BABBLING ABOUT EMPLOYMENT DISCRIMINATION LAW: DOES THE MASTER BUILDER UNDERSTAND THE BLUEPRINT FOR THE GREAT TOWER?

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> "I will say in 25 years of advocacy before this Court I have not seen one area of the law that seems to me as difficult to sort out as this particular one is."[1]

> [3] They said to each other, "Come, let's make bricks and bake them thoroughly." They used brick instead of stone, and tar for mortar. [4] Then they said, "Come, let us build ourselves a city, with a tower that reaches to the heavens, so that we may make a name for ourselves and not be scattered over the face of the whole earth."
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> [5] But the Lord came down to see the city and the tower that the men were building. [6] The Lord said, "If as one people speaking the same language they have begun to do this, then nothing they plan to do will be impossible for them. [7] Come, let us go down and confuse their language so they will not understand each other."

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1. Transcript of Oral Argument at 29, Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343 (2009) (No. 08-441), available at *http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-441.pdf* (statement by Carter G. Phillips, arguing for respondent); *see* Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 307-09 (2004) (stating that neither the 1964 Civil Rights Act nor the 1991 Civil Rights Act defines "discrimination," that "Understanding Title VII law has never been easy," and that "[a]fter more than a decade of litigation under the revised [1991] Act, . . . Title VII law has never been more complex and confusing").

> [8] So the Lord scattered them from there over all the earth, and they stopped building the city. [9] That is why it was called Babel—because there the Lord confused the language of the whole world. From there the Lord scattered them over the face of the whole earth.[2]

INTRODUCTION

A. Building a Great Tower

About forty-five years ago, Congress drew up the blueprint and laid the foundation of federal employment discrimination law with the enactment of Title VII of the Civil Rights Act of 1964.[3] Since that time the Supreme Court has taken the lead in developing the law by constructing legal theories, proof structures and analytical frameworks to effectuate the prohibition in Title VII (and other employment discrimination statutes) against refusing to hire, fire, or otherwise discriminate in employment decisions "because of . . . [the protected characteristic]."[4] These theories and proof structures inform employers, lawyers, and judges about how courts at various stages of litigation will analyze employment decisions to determine if they were made "because of" a protected characteristic. Congress has revised that blueprint occasionally, sometimes adding new structures,[5] and sometimes demolishing work that the Supreme Court had directed.[6]

2. *Genesis* 11:3-9 (New Int'l Version). There are numerous versions of the great tower story, including several in Judaeo-Christian sources, the Qur'an and Islamic traditions, and Sumerian lore. The tower story is included in the Sumerian epic of Enmerkar and the lord of Aratta. THORKILD JACOBSEN, THE HARPS THAT ONCE . . .: SUMERIAN POETRY IN TRANSLATION 275-319 (1987).

3. *See* Pub. L. No. 88-352, 78 Stat. 66 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-15 (2006)). Title VII was enacted in 1964, but its effective date was July 2, 1965. *See* Pub. L. No. 88-352, § 716a, 78 Stat. 241, 266 (1964) (stating that the effective date shall be one year after the date of enactment).

4. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (Title VII); 29 U.S.C. § 623(a)(1) (Age Discrimination in Employment Act); 42 U.S.C. § 12112(a) (Americans with Disabilities Act).

5. Congress passed several subsequent laws covering additional characteristics, which include the Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-633(a)); the Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12117); and the Genetic Information Nondiscrimination Act, Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified as amended in scattered sections of 26, 29 and 42 U.S.C.).

6. For example, Congress reacted to overturn U.S. Supreme Court decisions in the following statutes: the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)); the Civil Rights Act of 1991, Pub. L. No. 102-

We can think of employment discrimination law as a construction project—the building of a great tower—with Congress as Architect, the Supreme Court as Master Builder, and the lower courts as subordinate builders. From the beginning, it was an astoundingly ambitious, and perhaps audacious, project. Congress envisioned a tower of law that would elevate people, reaching toward the heavens by attempting to eradicate invidious employment discrimination.

With the blueprint drawn and the foundation laid by the Architect, the Master Builder began constructing the theories and frameworks atop the foundation in one of its first employment discrimination decisions, *Griggs v. Duke Power Co.*[7] The building project has continued apace since *Griggs*. The Court has created two major theories of discrimination—disparate treatment[8] and disparate impact[9]—each with its own proof structures.[10] In *Griggs* the Court built a proof structure for disparate impact. In *McDonnell Douglas Corp. v. Green*[11] and *Price Waterhouse v. Hopkins*[12] it built two for individual disparate treatment: pretext and mixed motives, respectively. The Court also developed an analysis for systemic disparate treatment cases that is less rigid than the individual disparate treatment frameworks.[13] Along the way, the Master Builder has remodeled some of its construction, as it did with the disparate impact proof structure in *Wards Cove Packing Co. v. Atonio*.[14] The Architect occasionally has

166, 105 Stat. 1071 (codified at scattered sections of 42 U.S.C.); the ADA Amendments Act of 2008, Pub. L. No. 110-325 § 2, 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12101); and the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (Jan. 29, 2009).

7. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

8. Disparate treatment is a form of intentional discrimination. *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (noting that disparate treatment was "the most obvious evil" providing impetus for the enactment of Title VII).

9. Disparate impact is a theory of unintentional discrimination in which liability is based on use of a facially neutral practice or criterion that produces a statistically significant disparate impact on a protected group, where such practice cannot be justified by business necessity. *See, e.g., id.* (explaining that disparate impact liability under Title VII does not require proof of a discriminatory motive).

10. "Proof structure" refers to what must be proven, in what order, and on whom the burden rests at each stage. In announcing the *McDonnell Douglas* or "pretext" proof structure, the Supreme Court responded to an ongoing concern: "The case before us raises significant questions as to the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793-94 (1973).

11. *Id.*

12. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

13. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. at 336 (1977) (holding that the systemic disparate treatment proof structure requires the plaintiff to present evidence establishing that intentional discrimination is the employer's standard operating procedure).

14. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (placing the burden of persuasion on the plaintiff to disprove business necessity and defining business necessity as

stepped back in and done some renovation when it did not like the Master Builder's construction,[15] but it has left most of the details of construction to the Master Builder. Courts, lawyers, and others have spoken essentially a single language of employment discrimination law as they have applied most of the same theories, frameworks, and principles to all of the laws.[16] The minor variations in the law applicable to the different employment discrimination statutes might be likened to different dialects.[17] The common language has facilitated the building project.[18] With a common language, the subordinate builders built a tower that was largely symmetrical regardless of which part came into view—Title VII, the Age Discrimination in Employment Act (ADEA), or the Americans With

requiring only that the practice significantly serve a legitimate goal of the employer).

15. *See supra* note 6 (discussing Congressional action in several federal anti-discrimination statutes designed to overturn Supreme Court decisions).

16. *See, e.g.*, Jamie Darin Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L. J. 511, 542 (2008) ("when statutes share the same or similar language . . . courts generally interpret that language consistently. An interpretation of one of the statutes' language is usually treated as binding on the other statutes' identical language."); s*ee also* Martin J. Katz, Gross *Disunity*, 114 PENN ST. L. REV. 857 (2010), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1515765* (discussing the Supreme Court's abandonment in *Gross* of its prior efforts to adopt a unified approach to disparate treatment law); Rhonda M. Reaves, *One of These Things Is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases*, 38 U. RICH. L. REV. 839, 846 (2004) (warning that "[a]nti-discrimination principles are often mechanically applied without sufficient exploration of difference"); David J. Willbrand, Comment, *Better Late Than Never? The Function of After-Acquired Evidence in Employment Discrimination Litigation*, 64 U. CIN. L. REV. 617, 692 (1996) ("This occurrence should not be surprising, for courts, in a sort of jurisprudential cross-pollination, have traditionally borrowed and applied employment discrimination principles across statutory bounds.").

17. Some variations are required by the blueprints drawn by Congress, and others have been fashioned by the Court. For example, statutory differences include the following: 1) The bona fide occupational qualification (BFOQ) applies to sex, religion, and national origin under Title VII, and age under the ADEA, but not to race and color. 42 U.S.C. § 2000e-2(e) (Title VII BFOQ) and 29 U.S.C. § 623(f)(1) (ADEA BFOQ); 2) In the Civil Rights Act of 1991, Congress added a statutory disparate impact analysis, 42 U.S.C. §2000e-2(k), and a statutory mixed-motives analysis to Title VII, 42 U.S.C. §§ 2000e-2(m) & 2000e-5(g)(2)(B), but not to the ADEA; 3) The ADEA's defense of "reasonable factors other than age," has no counterpart in Title VII. 29 U.S.C. § 623(f)(1); and 4) The duty to make a reasonable accommodation applies to only religion under Title VII, 42 U.S.C. § 2000e-2(j), and disability under the Americans with Disabilities Act, 42 U.S.C. §12112(b)(5)(A).

18. For example, the courts have developed facility with the pretext and mixed-motives structures because they have applied them across the employment discrimination statutes. Indeed, they have even applied them to other types of employment claims. *See, e.g.*, Richardson v. Monitronics Int'l, Inc., 434 F.3d 327, 332-33 (5th Cir. 2005) (applying *Desert Palace* mixed-motives analysis to FMLA retaliation claim). Moreover, there is a large and rich body of case law on which courts can rely when applying these analyses, made larger by such cross-pollination.

Disabilities Act (ADA).[19] Despite minor variations, symmetry seemed to be a salient characteristic of the blueprint. In 1991, the Architect expressed displeasure with some of the recent work on the tower. By enacting the Civil Rights Act of 1991 (or "the 1991 Act"),[20] Congress effectively demolished some of the structure and also modified the original blueprint. It is the Architect's 1991 plan—and its subsequent interpretation by the Master Builder—that has brought us to our current state of confusion.

In 2003, the Court began its work of interpreting the 1991 modifications of the blueprint by adding a strange-looking structure to the building—*Desert Palace, Inc. v. Costa*.[21] Although this new structure deviated substantially from the work that preceded it, the Court said the new blueprint required it. This new and different structure lacked sharp, definitional lines. It was hard for the subordinate builders—the lower courts—to understand *Desert Palace* and to know how to build on it. In 2009, the Supreme Court added another structure, *Gross v. FBL Fin. Servs., Inc.*,[22] this time to the ADEA side of the tower, based on its interpretation of the 1991 drawings and a surprising new interpretation of the original blueprint.

When viewed alongside *Desert Palace*, *Gross* reveals several things about the current and future work on the tower. First, the Master Builder believes that the plans handed down by the Architect in 1991 require structures different from what the subordinate builders had constructed before.[23] More surprisingly, the 1991 plan has prompted the Master Builder to reinterpret the original blueprint and demolish existing

19. This Article focuses on the law under Title VII and the ADEA. Many of the principles developed under Title VII, including the proof structures, also have been applied to the ADA. *See, e.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (applying the *McDonnell Douglas* pretext analysis to an ADA case). The Seventh Circuit recently held that under the reasoning of *Gross*, the mixed-motives proof structure does not apply to ADA claims. Serwatka v. Rockwell Automation, Inc., 591 F.3d 957 (7th Cir. 2010). This is a curious result in light of the enactment of the ADA Amendments Act of 2008, which overturned two prior Supreme Court decisions in order to broaden coverage under the ADA: not long after Congress passed legislation to overturn Supreme Court decisions that narrowly interpreted coverage under the ADA, the Seventh Circuit applies *Gross* to the ADA to deny plaintiffs use of the mixed-motives framework in asserting their ADA claims.

20. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). The 1991 Act was enacted after President Bush's veto of the similar Civil Rights Act of 1990. *See* 136 CONG. REC. S16, 418-19 (daily ed. Oct. 22, 1990) (recording President Bush's veto of the 1990 act). A principal objective of the 1991 Act was to overturn several Supreme Court decisions. *See* H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 2, at 2-4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694-96 (noting the 1991 Act's intent to overrule several Supreme Court cases, including Wards Cove v. Atonio, 490 U.S. 642 (1988)).

21. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

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

23. In both *Desert Palace* and *Gross*, the Court interpreted the Civil Rights Act of 1991 as changing the case law under Title VII and the ADEA, respectively.

structures, telling the builders that they misunderstood the original blueprint.[24] Second, the Master Builder now reads the blueprint, by interpreting the new 1991 drawings and reinterpreting the original blueprint, as requiring a shift to asymmetrical building—the use of different structures, depending upon the part of the tower. Now the Supreme Court is requiring courts and lawyers to speak slightly different languages depending on which part of the tower they are working—Title VII or the ADEA. This change in plans would be confounding enough on its own, but the subordinate builders are further confused by the Master Builder's refusal to give detailed instructions about its new interpretation of the blueprint. The Court in *Desert Palace* made general statements about the construction to be completed, but declined to give detailed instructions. The Court was more concrete in its pronouncement in *Gross*, declaring the mixed–motives proof structure inapplicable to age discrimination claims, but still not clear enough.[25] Third, not only is the Court requiring different structures for the ADEA and Title VII, but *Gross* is also the latest in a series of cases instructing that the ADEA portion of the tower is to be far less prominent than its Title VII counterpart.[26]

At this point, as the subordinate builders try to build on *Desert Palace* and *Gross*, their language has been differentiated, and they are confounded about what and how to build on the recent structures.[27]

24. In *Gross* the Court looked to the language of the ADEA and said that the meaning of "because of . . . age" has been misinterpreted by the lower courts. Gross, 129 S. Ct. at 2345; *see infra* Part I.B (discussing the impacts of *Gross* and arguing for greater symmetry in the disparate treatment proof structures of Title VII and the ADEA).

25. For example, does the pretext analysis apply to ADEA claims? *See infra* note 27. Moreover, does the holding of *Gross* extend to claims under the Americans with Disabilities Act, requiring plaintiffs to prove but-for causation? *See supra* note 19.

26. *See infra* Part II.E (discussing the adverse impacts of this asymmetrical approach on the pension benefit system).

27. Consider, for example, the lower courts' uncertainty about whether the *McDonnell Douglas* pretext analysis still applies to ADEA cases after *Gross*. *See* Moore v. Dirt Motorsports, Inc., 2009 WL 2997077 (W.D. Okla. Sept. 15, 2009) (surveying the decisions to date on the issue and concluding that, after *Gross*, a majority of courts that have considered the issue have continued to apply the pretext analysis to ADEA cases at the summary judgment stage); *compare* Geiger v. Tower Automotive, 579 F.3d 614, 623 (2009) (noting that the Supreme Court in *Gross* expressly declined to address the applicability of the pretext analysis to the ADEA and continuing to recognize its applicability in the Sixth Circuit), *and* Smith v. Allentown, 2009 WL 4912120 (3d Cir. Dec. 22, 2009) (holding that *Gross* is not in conflict with continued application of the *McDonnell Douglas* proof structure in ADEA cases) *with* Holowecki v. Federal Express Corp., 644 F. Supp. 2d 338, 352 (S.D.N.Y. 2009) (recognizing that the Supreme Court left open whether *Gross* implicitly eliminated the pretext analysis from ADEA cases and not resolving the issue). Another issue for which *Gross* may have implications is the applicability of the mixed-motives analysis to claims under the Americans with Disabilities Act (ADA). The Seventh Circuit, relying on *Gross*, held that the mixed-motives analysis does not apply under the ADA. *See* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961 (7th Cir. 2010)

Furthermore, it is not clear that the asymmetry resulting from the perceived new blueprint will yield a sound structure. The Master Builder's interpretation of the new blueprint will produce a scaled-down version on the ADEA portion of the tower. While the subordinate builders obviously will do their best to build on the structures created by the Master Builder, it is fair to ask whether this is the tower intended by the Architect. Most of the uncertainty and confusion stem from the blueprint modifications of 1991. Maybe the Architect intended only minor changes in the building rather than a significant reinterpretation of the blueprint. It is highly questionable whether the Master Builder is correctly interpreting the 1991 plan and the original blueprint as modified.

B. Interpreting the Blueprint

1. The Shift Toward Complexity, Uncertainty, and Asymmetry

What characteristics did Congress intend for the great tower of employment discrimination law? Perhaps it should be simple to the extent that such a project can be simple, with sharp, well-defined lines so that employees and employers can understand their rights and obligations, and lawyers and judges can apply them accurately and expeditiously. Some measure of complexity[28] and uncertainty,[29] however, is necessary and

("Although the *Gross* decision construed the ADEA, the importance that the court attached to the express incorporation of the mixed-motive framework into Title VII suggests that when another anti-discrimination statute lacks comparable language, a mixed-motive claim will not be viable under that statute."). Yet another post—*Gross* issue is whether the mixed-motives analysis applies to non-ADEA retaliation claims. The Fifth Circuit held that the mixed-motives analysis remains applicable to Title VII retaliation claims because *Gross* involved an ADEA claim, and extending its rationale to Title VII retaliation claims "would be contrary to *Gross's* admonition against intermingling interpretations of the two statutory schemes." Smith v. Xerox Corp., No. 08-11115, __ F.3d __, 2010 WL 1052837, at *6 (5th Cir. Mar. 24, 2010).

28. Simplicity can be a good characteristic of laws, but in some cases simplicity may be achieved at the expense of fairness, effectiveness, or other characteristics that are also desirable. *Compare* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995) (favoring simple legal rules if rules cannot be avoided) *with* Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150, 161 (1995):

> Complexity often is discussed as an evil to be minimized, as in commentary on the income tax. Of course, less complexity is to be preferred if the same substantive rules can be applied. But much complexity—the type examined in this article—arises because of the benefits from rules that are more precisely tailored to particular behavior. To talk of minimizing complexity in this context is misguided: the simplest rules might permit all acts, require equal reductions of all pollutants regardless of their toxicity, or require the same speed limit on all roads.

possibly even beneficial. A high degree of symmetry among the various laws and covered characteristics may also be desirable, as this could improve simplicity and certainty. Complete uniformity, however, is not appropriate because discrimination based on the various protected characteristics is not a monolithic phenomenon,[30] and the goals of and rationales for the laws differ.[31] If simplicity, certainty, and symmetry are characteristics generally intended by Congress, recent Supreme Court interpretations of the laws reveal a structure that is becoming more complex, less certain on some crucial questions, and less symmetrical across the laws. The Court says this is the structure as drawn by Congress in the original blueprint and the 1991 modification.

Ultimately, I contend that the destruction of symmetry in the disparate treatment proof structures applicable to Title VII and the ADEA is the most harmful result of *Gross*. Complete symmetry cannot be achieved because of differences in statutory language, and even where it can be achieved based on statutory language, differences in the types of discrimination may support some asymmetry in the law. Yet, I think symmetry in employment discrimination law is a characteristic to be desired when the statutes permit it and there is not a distinction in the types of discrimination that justifies asymmetry. I am not alone in believing that

Kaplow, 11 J.L. ECON. & ORG. at 161.

29. Certainty would be considered by most to be a positive characteristic of law, so that parties can know the law and manage their conduct accordingly. Moreover, certainty facilitates the assessment of claims by employers and employees, lawyers, and judges. Generally, it is believed that uncertainty both raises the costs and decreases the efficiency of the law. *E.g.*, Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 652 (2008) [hereinafter Katz, *Unifying*]. There are circumstances, however, in which uncertainty may achieve socially beneficial results. For example, uncertainty may cause actors to avoid brinksmanship regarding violating the law and instead become proactive in developing strategies to avoid liability. *Cf.* Frank Dobbin, *Do the Social Sciences Shape Corporate Anti-Discrimination Practice? The United States and France*, 23 COMP. LAB. L. & POL'Y J. 829, 833 (2002):

> [E]mployers were uncertain of what the law meant and of where it was going. To inoculate themselves against employment discrimination suits, which could prove costly and embarrassing, they engaged experts who followed social-scientific understandings of discrimination and who institutionalized equal opportunity practices in anticipation of where the courts would go.

Dobbin, 23 COMP. LAB. L. & POL'Y J. at 833.

30. *See, e.g.*, Hazen Paper Co. v. Biggins, 507 U.S. 604, 610-11 (1993) (explaining that age discrimination typically involves negative stereotyping of older workers rather than animus against them); *see also* Reaves, *supra* note 16 (explaining why it is inappropriate to import all Title VII race discrimination law into the ADEA).

31. *See, e.g.*, Christine Jolls, *Hands-Tying and the Age Discrimination in Employment Act*, 74 TEX. L. REV. 1813, 1813 (1996) (discussing different justification for the ADEA); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 37 (2000) (positing that employment discrimination law has sought to achieve a more far-reaching societal transformation regarding race than sex).

symmetry is a valuable characteristic of employment discrimination law. The Supreme Court in decisions before *Gross* generally supported symmetry between Title VII and the ADEA, and specifically in disparate treatment analysis.[32] Congress, too, seems to insist on a high degree of symmetry, as indicated in the bills that have been introduced to overturn *Gross*—The Protecting Older Workers Against Discrimination Act[33]—but why?

One reason for valuing symmetry is that it enhances simplicity and understanding. The law is simpler if employers and employees, litigants, lawyers, and jurors can apply common principles under the different discrimination laws. Professor Katz has argued that "fragmentation" of disparate treatment law results in doctrinal confusion that is expensive and inefficient.[34] The difficulty of analyzing cases should be of even greater concern with the availability of jury trials in most disparate treatment cases.[35]

A second reason to favor symmetry among employment discrimination laws is that the laws should be perceived by the public to be sensible and fair. The public at large, and even lawyers and judges, are more likely to perceive symmetrical employment discrimination laws to be fair and worthy of support. They are more likely to be cynical about asymmetrical laws and to question their fairness. This sense of fairness about symmetrical discrimination laws runs deeper than the canon of statutory construction that courts should interpret statutes with similar language similarly. Discrimination laws that discriminate are vexatious; it is the very fact that Title VII and the ADEA are statutes that ban discrimination that troubles people when they see distinctions being drawn between or among the protected characteristics. Many people

32. *See, e.g.*, Katz, Gross *Disunity*, *supra* note 16, at 857 ("The Supreme Court has done a turn-about on the value of uniformity in employment discrimination law."); *see* Prenkert, *supra* note 16, at 542-43 (discussing the "consistency presumption"); *see also* Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 622-23 (1996) [hereinafter Zimmer, *The Emerging Uniform Structure*] (positing the 1991 Act and two subsequent Supreme Court decisions began the development of a uniform structure for disparate treatment discrimination to eliminate much of the previous complexity and confusion).

33. S. 1756, 111th Cong. (2009); H.R. 3721, 111th Cong. (2009).

34. *See* Katz, *Unifying*, *supra* note 29, at 643-44 (proposing a single framework to overcome both doctrinal confusion and existing inferior frameworks); *see also* Katz, Gross *Disunity*, *supra* note 16, at 857 *passim* (critiquing the Supreme Court's rejection of uniform requirements of proof in disparate treatment cases).

35. Jury trials were not generally available in disparate treatment cases, other than age cases, until passage of the Civil Rights Act of 1991. In 1996, Professor Zimmer noted the importance of what then appeared to be an emerging uniform proof structure for disparate treatment cases: "The clarity and simplicity of this emerging uniform structure has become more important as we enter an era in which the right to trial by jury exists in all such cases." Zimmer, *The Emerging Uniform Structure*, *supra* note 32, at 625.

underestimate the complexity of employment discrimination law. What they do understand about it is the formal equality rationale underpinning employment discrimination law—that distinctions should not be made among people who are similarly situated. When the law is not symmetrical, people wonder why anti-discrimination law discriminates. Borrowing from George Orwell, people wonder why all people covered by employment discrimination laws are equal, but some are more equal than others.[36] In the context of *Gross*, the dissatisfaction takes the form of a question: "Why are people claiming discrimination based on race, color, sex, religion, or national origin granted more protection than people claiming age discrimination?"

2. The Incredible Shrinking Age Discrimination Act

With a national demographic of a large and increasing percentage of older people[37] and a large percentage of the workforce composed of older workers,[38] the ADEA has become an increasingly significant law. One measure of its growing significance is the increase in the volume of claims filed and ensuing litigation.[39] Several recent Supreme Court decisions have

36. *See* GEORGE ORWELL, ANIMAL FARM 88 (Alfred A. Knopf, 1993) (1946) (containing the memorable and oft-quoted line: "All animals are equal, but some are more equal than others"). Consider, for example, the Sixth Circuit's holding, subsequently reversed by the Supreme Court, that younger people are protected from age discrimination in favor of older people:

> [W]e do not share the commonly held belief that this situation is one of so-called "reverse discrimination." Insofar as we are able to determine, the expression "reverse discrimination" has no ascertainable meaning in the law. An action is either discriminatory or it is not discriminatory, and some discriminatory actions are prohibited by the law. . . . [T]he protected class should be protected; to hold otherwise is discrimination, plain and simple.

Cline v. Gen. Dynamics Land Sys., Inc., 296 F.3d 466, 471 (6th Cir. 2003*), rev'd*, 540 U.S. 581 (2004). Reverse discrimination is an area in which courts sometimes rail against asymmetry. *See, e.g.*, Lind v. Battle Creek, 681 N.W.2d 334 (Mich. 2004) (rejecting distinctions in the analysis of reverse race discrimination claims).

37. *See generally* LAURA B. SHRESTHA, THE CHANGING DEMOGRAPHIC PROFILE OF THE UNITED STATES (Cong. Research Serv., CRS Report for Congress Order Code RL32701, updated May 5, 2006), *available at http://www.fas.org/sgp/crs/misc/RL32701.pdf* (highlighting some of the demographic changes that have occurred since 1950 and illustrating how these and future trends will reshape the U.S. in the decades to come).

38. *See generally* Bureau of Labor Statistics, Older Workers: Are There More Older People in the Workplace, *http://www.bls.gov/spotlight/2008/older workers/* (presenting various charts and graphs showing the growing number of older workers); Dennison Keller, Note, *Older, Wiser and More Dispensable: ADEA Options Available Under* Smith v. City of Jackson*: Desperate Times Call for Disparate Impact*, 33 NORTHERN KY. L. REV. 259, 279 (2006).

39. A good measure of the volume of disputes is the data generated by the Equal Employment Opportunity Commission (EEOC) on discrimination charges filed with the

interpreted the ADEA as being a less prominent part of the tower. It is not clear that this is consistent with Congress's plan.

3. The Need for Clarification by the Architect

I have argued that the uncertainty and complexity introduced into employment discrimination law by the Master Builder in *Desert Palace, Inc. v. Costa*[40] six years ago should have been vexing enough to the Architect to prompt Congress to work on the blueprint.[41] The Court's recent decision in *Gross v. FBL Financial Servs., Inc.*[42] has made the need for intervention far more urgent. *Gross* interpreted the ADEA in light of the 1991 Act as requiring a high degree of asymmetry between the ADEA and Title VII. *Gross* also was the latest of several Supreme Court decisions interpreting the ADEA in a way that substantially reduces the protections of the ADEA below those of Title VII.[43] *Gross* should make it abundantly clear to Congress that it must draft a clear blueprint addressing the issues rather than simply tearing down particular Supreme Court decisions.[44] Although there are issues on which Congress may achieve an appropriate result by merely overturning a particular Supreme Court decision,[45] the issues in *Desert Palace* and *Gross* involved the fundamental building blocks that Congress and the Court have developed over the decades, requiring a more comprehensive repair. If the Builder is reading the plans incorrectly, it is incumbent on the Architect to issue new plans which detail

agency. *See http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm* (indicating the number of individual charges filed each year between 1997 and 2009). For 2008, the EEOC reported a 28% increase in age discrimination charges filed over the number filed in 2007, which was the largest increase among all types of charges. *See http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm* (showing the number of charges filed and resolved under the ADEA between 1997 and 2009); *EEOC Charges Reached Record High, Commission Confirms in Fiscal 2008 Report*, Daily Lab. Rep. (BNA) No. 46, at A-12 (Mar. 12, 2009). The agency's 12-year chart shows a general upward trend and a significant increase from 1997. *See* Reaves, *supra* note 16, at 843 & n.7 ("[O]lder workers are the fastest growing group of discrimination plaintiffs.").

40. 539 U.S. 90 (2003).

41. William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. REV. 81 (2009) [hereinafter Corbett, *Fixing*].

42. 129 S. Ct. 2343 (2009).

43. For discussion of the other cases, see *infra* Part II.

44. The bills introduced in Congress to overturn *Gross*, the Protecting Older Workers Against Discrimination Act, *supra* note 33, adopt the approach of tearing down a particular decision. For discussion of the bills, see *infra* Part III.D. A more comprehensive approach is needed.

45. For example, the Lilly Ledbetter Fair Pay Act of 2009 overturned the Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), limiting the time period for filing a charge based on discriminatory pay practices. Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified in scattered sections of 29 and 42 U.S.C.).

how the work is to proceed. Even if the Master Builder is interpreting the blueprint correctly, it is not giving clear and detailed instructions to its builders, and the Architect should provide clarity. In doing so, the Architect should learn from the experience in 1991 and issue a detailed plan for the work that does not leave as many matters for the Master Builder to interpret, as it did in the 1991 Act.[46]

Part I of this article examines the Court's decisions in *Desert Palace, Inc. v. Costa* and *Gross v. FBL Financial Services, Inc.* The section compares and contrasts those decisions—the two Supreme Court cases interpreting the blueprint regarding disparate treatment after the 1991 Act. The section explains how, taken together, *Desert Palace* and *Gross* have made employment discrimination law more complex, less certain, and less symmetrical. The Fifth Circuit's decision in *Rachid v. Jack in the Box, Inc.*[47] is discussed as an interpretation that the Supreme Court could have adopted in *Gross* to maintain uniformity of proof structures between Title VII and the ADEA. Part II discusses *Gross* as the latest of several Court decisions constricting the ADEA. Part III proposes that Congress, as Architect, should step in and clarify the blueprint in a way that at least addresses the issue of the appropriate proof structures under Title VII and the ADEA. If Congress wants more simplicity, certainty, and symmetry, it will need to make several changes.

It is not clear from the various renditions of the old story whether the Tower of Babel collapsed or the people, confounded by their different languages, simply gave up on the project and dispersed to pursue other endeavors. Regardless, the great tower of employment discrimination law should have a better fate. I think that fate rests in the hands of the Architect.

I. THE MASTER BUILDER REINTERPRETS THE BLUEPRINT

A. The First Interpretation of the 1991 Blueprint Modifications: Desert Palace, Inc. v. Costa

In *Desert Palace*,[48] the plaintiff sued her employer claiming that she

46. Professor Katz criticizes the Protecting Older Workers Against Discrimination Act as leaving too much to the courts' interpretation. Katz, *Gross Disunity*, *supra* note 16, at 889; *see also* 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 (2010) (urging more informed and comprehensive reform of the causation standard in federal employment discrimination and employment laws).

47. 376 F.3d 305 (5th Cir. 2004).

48. I cover *Desert Palace* briefly and *Gross* more fully because *Desert Palace* has been discussed and critiqued extensively. *See, e.g.*, Henry L. Chambers, Jr., *The Effect of*

was treated differently than male employees and eventually was terminated—in a case of disparate discipline—because of her sex. The plaintiff won a jury verdict in the trial court. On appeal, the defendant employer argued that the district court erroneously gave a mixed-motives jury instruction. The defendant argued that the jury instruction was unsupported because the plaintiff did not present direct evidence of discrimination. The Ninth Circuit, in an *en banc* decision, rejected the prerequisite of direct evidence to invoke the mixed-motives analysis.[49] The direct evidence requirement was based on Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*,[50] and the court, looking to the Civil Rights Act of 1991 did not find any such requirement in the codified version of the mixed-motives analysis. The Ninth Circuit went on to explain the continuing viability of the *McDonnell Douglas* pretext framework as a tool to analyze claims on motions for summary judgment but declared it to be irrelevant to jury instructions.[51] In a very short opinion, the Supreme Court affirmed unanimously, relying on the Civil Rights Act of 1991 as abrogating the direct evidence requirement emanating from *Price Waterhouse*.[52] The Court held that, "[i]n order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"[53] About the continuing viability of the pretext analysis, the Court said indirectly that it would not resolve that issue: "This case does not require us to decide when, if ever, § 107 applies outside of the mixed-motive context."[54]

With *Desert Palace*, the Court interpreted the new blueprint as eradicating the line, derived from *Price Waterhouse* (O'Connor, J.,

Eliminating Distinctions Among Title VII Disparate Treatment Cases, 57 SMU L. REV. 83, 102-03 (2004) (critiquing *Desert Palace*); William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549 (2005) [hereinafter Corbett, *Allegory*] (same); William R. Corbett, McDonnell Douglas, *1973-2003: May You Rest in Peace?* 6 U. PA. J. LAB. & EMP. L. 199 (2003) (same); Jeffrey A. Van Detta, *"Le Roi Est Mort; Vie le Roi!" An Essay on the Quiet Demise of* McDonnell-Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a "Mixed Motives" Case*, 52 DRAKE L. REV. 71, 72 (2003) (same); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither* McDonnell Douglas?, 53 EMORY L.J. 1887, 1892-1909 (2004) [hereinafter Zimmer, *The New Discrimination Law*] (same)..

49. Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).

50. Desert Palace, Inc. v. Costa, 490 U.S. 228 (1989).

51. *Costa*, 299 F.3d at 854.

52. 539 U.S. 90 (2003).

53. *Id.* at 101 (quoting 42 U.S.C. § 2000e-2(m)).

54. *Id.* at 94 n.1. Although the Court said nothing about pretext expressly, it said it would not resolve the range of cases covered by mixed motives. The point is that there may be no cases left to which the pretext framework applies.

concurring), that determined whether cases were analyzed under the pretext or mixed-motives proof structure. The Court declined to say, however, whether the *McDonnell Douglas* proof structure remained viable, and, if so, what was the new dividing line.

B. More Than Desert Palace II: Gross v. FBL Financial Services, Inc.

In *Gross*, the plaintiff had worked for the defendant employer for thirty-two years. In 2003, when the plaintiff was 54 years old, he was working as claims administration director until he was reassigned to the position of claims project coordinator. Although he retained the same compensation, many of his former position's job responsibilities were shifted to a newly created position of Claims Administration Manager. A woman in her early forties, whom plaintiff previously had supervised, was given the new position. The plaintiff considered his job reassignment to be a demotion, and he sued for age discrimination.

The case was tried in federal district court. At the close of trial, the court gave jury instructions to which the defendant objected:

> Gross had the burden to prove that (1) FBL demoted Gross to Claims Project Coordinator on January 1, 2003, and (2) that Gross's age was "a motivating factor" in FBL's decision to demote Gross. Final Jury Instruction No. 11. The instruction continued that the jury's verdict must be for FBL, however, "if it has been proved by a preponderance of the evidence that defendant would have demoted plaintiff regardless of his age."[55]

The jury returned a verdict in favor of the plaintiff and awarded $46,945.

On appeal to the Eighth Circuit, the employer challenged the jury instructions, arguing that the trial court erred in giving a mixed-motives jury instruction based on *Price Waterhouse v. Hopkins* because it was undisputed that direct evidence of age discrimination was not presented. The court of appeals held that the trial court erred in giving the mixed-motives jury instructions because, under *Price Waterhouse*, direct evidence is required for such a jury instruction. The plaintiff conceded that he did not present direct evidence. The court rejected the argument that the jury instruction was correct because the Civil Rights Act of 1991 and the Supreme Court's decision in *Desert Palace* superseded *Price Waterhouse*. The court explained that, although the Civil Rights Act of 1991 amended Title VII to provide a statutory version of the mixed-motives analysis,[56]

55. Gross v. FBL Fin. Servs., Inc., 526 F.3d 356, 360 (8th Cir. 2008).
56. 42 U.S.C. §§ 2000e-2(m) & 2000e-5(g)(2)(B).

Congress did not amend the ADEA similarly. The court explained that the Supreme Court, in *Desert Palace*, interpreted the language of section 2000e-2(m)—added to Title VII by the Civil Rights Act of 1991—as making *Price Waterhouse* inapplicable to Title VII cases because the section does not refer to a prerequisite of direct evidence for applying the "motivating factor" standard regarding causation. Thus, the Eighth Circuit held that *Price Waterhouse* remains controlling for ADEA cases. Therefore, in the absence of direct evidence, the trial court incorrectly gave a jury instruction that shifted the burden of persuasion to the defendant.

The Supreme Court granted certiorari on the following question: Must a plaintiff present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case?[57] The Court majority, in a 5-4 decision, acknowledged the foregoing question as the one on which certiorari was granted, but then stated that it first must decide whether the burden of persuasion ever shifts to the defendant in an ADEA case.[58] The majority rejected the plaintiff's reliance on decisions interpreting Title VII as controlling. The Court explained that it never had held that the mixed-motives analysis of *Price Waterhouse* applies to the ADEA.[59] When it enacted the Civil Rights Act of 1991, Congress amended Title VII to add the mixed-motives analysis, but it did not amend the ADEA similarly.[60] Thus, with the 1991 Act, Congress created a "materially different" burden of persuasion in Title VII than exists in the ADEA: "motivating factor" in Title VII and "because of" in the ADEA.[61] The Court therefore concluded that its interpretation of the ADEA is not controlled by decisions interpreting Title VII—specifically *Price Waterhouse* and *Desert Palace*. Although it was not unexpected for the Court to hold that the Civil Rights Act of 1991 rendered *Desert Palace* inapplicable to ADEA claims (as this was the focal issue in the many briefs), it was surprising that it held *Price Waterhouse* inapposite.[62] Lower courts uniformly had assumed the applicability of the *Price Waterhouse* mixed-motives analysis to ADEA claims,[63] and there was nothing in the

57. Petition for Writ of Certiorari, Gross v. FBL Fin. Servs., Inc., 2008 WL 4462099 (U.S. 2008) (No. 08-411).

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

59. *Id.* at 2349.

60. *Id.*

61. *Id.* at 2348-49 ("Unlike Title VII the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor.").

62. *See* Katz, Gross *Disunity*, *supra* note 16, at 866 (noting that the courts below and the parties had assumed that the *Price Waterhouse* mixed-motives proof structure applied to ADEA claims).

63. *See, e.g.*, Katz, Gross *Disunity*, *supra* note 16, at 874 ("[M]ost of [the lower] courts still applied *Price Waterhouse* in non-1991 Act cases."); *see also* Harper, *supra* note 46, at 100 (describing how lower courts preserved the *Price Waterhouse* framework in ADEA cases); Prenkert, *supra* note 16, at 547 (same).

1991 Act that seemed to upset that state of the law. The Court rationalized the inapplicability of *Price Waterhouse* on the basis of the following: 1) in the 1991 Act Congress amended Title VII, adding a statutory mixed-motives analysis, but it did not amend the ADEA similarly; and 2) the Court itself never had extended the *Price Waterhouse* analysis to the ADEA, notwithstanding the unanimity of lower courts in so applying it.

Having dispatched with the authority of *Price Waterhouse* and *Desert Palace*, the Court majority shifted to interpreting the text of the ADEA. The Court read the "because of . . . age" language to mean that age is the but-for cause of the employer's action.[64] The Court explained this interpretation of "because of" based on dictionary definitions, its opinion in *Hazen Paper Co. v. Biggins*,[65] a couple of non-employment-discrimination Court decisions interpreting the similar language "by reason of" and "based on," and a torts treatise explaining but-for causation.[66] From these sources, the Court gleaned that the "ordinary" meaning of the statutory language "because of" is but-for causation.[67]

After concluding that the standard of causation is but-for, the Court turned to the burden of persuasion. The Court stated that the default rule is that plaintiffs bear the burden of persuasion, and the text of the ADEA indicates no exception to that default rule.[68] Locking in a uniform analysis for intentional age discrimination cases, the Court stated that the burden of persuasion is the same in mixed-motives cases as in other disparate treatment cases: the plaintiff must prove that age is the but-for cause of the employer's decision.[69]

Having decided the case, the Court added comments about its strict textual approach and its distaste for the *Price Waterhouse* analysis. After repeating that it does not consider *Price Waterhouse* controlling, the majority stated that "it is far from clear that the Court would have the same approach were it to consider the question today in the same instance."[70] The Court proceeded to criticize the *Price Waterhouse* framework as difficult to apply and stated that, even if the analysis were doctrinally sound, "the problems associated with its application have eliminated any perceivable benefit to extending its framework to the ADEA."[71] The Court concluded by stating its holding clearly: "a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse

64. *Gross*, 129 S. Ct. at 2351.
65. 507 U.S. 604 (1993).
66. *Gross*, 129 S. Ct. at 2350.
67. *Id*.
68. *Id.* at 2351.
69. *Id.*
70. *Id.* at 2351-52.
71. *Id.* at 2352.

employment action."[72]

There were two dissents. The dissent authored by Justice Stevens had two major points of contention with the majority—one procedural and one substantive. First, Justice Stevens criticized the majority for not following "prudential Court practices"[73] by answering a question on which certiorari was not granted and which was raised in the respondent's brief.[74] Second, he disagreed with the majority's interpretation of "because of . . . age" as meaning but-for causation.

On substantive grounds, Justice Stevens considered *Price Waterhouse* as controlling on the issue of interpretation of the "because of language" as meaning "motivating factor" or "substantial factor" rather than but-for causation.[75] Although *Price Waterhouse* interpreted the "because of" language under Title VII, the language under the two statutes before the 1991 Act was identical. The Court long had applied interpretations of Title VII to the ADEA. Justice Stevens disagreed with the majority that *Hazen Paper Co.* and *Sanderson Plumbing Products v. Reeves*[76] support a but-for causation standard for the ADEA. Rather, Justice Stevens read those cases as support for ADEA standards generally conforming to Title VII standards. Whereas the majority interpreted Congress's failure to amend the ADEA to include a mixed-motives analysis when it enacted the Civil Rights Act of 1991 as rejecting mixed-motives under the ADEA, the dissent interpreted this as a ratification of the continuing applicability of the *Price Waterhouse* analysis to the ADEA.[77]

Justice Stevens' dissent drew support from the Court's 2005 decision in *Smith v. City of Jackson*.[78] In *Smith*, the Court held that because Congress did not codify a disparate impact proof structure in the ADEA, in the Civil Rights Act of 1991, as it did in Title VII, the existing *Wards Cove [Packing Co. v. Atonio]*[79] version continued to apply to the ADEA. Finally, Justice Stevens countered the majority's point that the *Price Waterhouse* proof structure is too complicated and thus more trouble than it

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

73. *Id.* at 2353 (Stevens, J., dissenting).

74. *Id.*

75. The dissent said that "motivating factor" and "substantial factor" are interchangeable standards. *Id.* at 2354 n.3. This is not so clear. Justice O'Connor, concurring in *Price Waterhouse*, stressed that a higher standard of causation than "motivating factor" should be required in order to shift the burden of persuasion to the employer, and she advocated "substantial factor." Price Waterhouse v. Hopkins, 490 U.S. 228, 278 (O'Connor, J., concurring).

76. 530 U.S. 133 (2000).

77. *Gross*, 129 S. Ct. at 2356. The dissent noted, however, that there was some evidence in committee reports that Congress intended for the new mixed-motives analysis to apply to the ADEA as well. *Id.* at n.6.

78. 544 U.S. 228 (2005).

79. 490 U.S. 642 (1989).

is worth by pointing out that Congress codified a modified version of it in Title VII.[80] Moreover, Justice Stevens argued that the majority's solicitude for the inscrutability of the mixed-motives analysis for trial courts and juries was belied by the fact that the majority introduced more complexity into cases in which both Title VII and ADEA claims are raised and must be analyzed differently.[81]

Turning to the question on which certiorari was granted, Justice Stevens stated that he would extend the holding of *Desert Palace*, a Title VII case, to hold that direct evidence is not required for a mixed-motives jury instruction.[82] Justice Stevens first explained that neither the four-justice plurality in *Price Waterhouse* nor Justice White's concurrence in that decision required direct evidence for a mixed-motives analysis. Thus, he argued that courts that have treated Justice O'Connor's concurrence as controlling have been wrong.[83] Regardless, Justice Stevens found any questions raised by *Price Waterhouse* to have been answered by *Desert Palace*. Although the Civil Rights Act of 1991 did not amend the ADEA regarding the mixed-motives analysis, Justice Stevens' dissent relied on *Desert Palace* for a proposition it stated about Title VII that is equally true about the ADEA: neither statute by its terms imposes a direct evidence requirement.[84]

A dissent authored by Justice Breyer focused on why a standard of causation lower than but-for is appropriate for discrimination cases. The Breyer dissent described the difficulty of discerning the motives for employers' decisions. Justice Breyer posited that but-for causation is not as difficult in tort law, which deals with objective facts, as it is in employment discrimination, where the but-for standard is applied to subjective mental states.[85] Because the employer is in a better position than the employee to know its motives, Justice Breyer could discern nothing "unfair or impractical" in requiring a plaintiff to prove that age played a role and then the employer can try to prevail on the affirmative defense by proving that it would have made the same decision.[86]

80. *Gross*, 129 S. Ct. at 2356-57 (Stevens, J., dissenting).

81. *Id.* at 2357.

82. *Id.*

83. *Id.*; *see also* Recent Cases, *Employment Law "Discrimination" Ninth Circuit Finds for Employee in a Mixed-Motive Case Without "Direct Evidence" of Discrimination* Costa v. Desert Palace, Inc., *299 F.3d 838 (9th Cir. 2002) (en banc), cert. granted, 123 S. Ct. 816 (2003)*, 116 HARV. L. REV. 1897 (2003) (arguing that Justice O'Connor's statements about direct evidence should be viewed as dictum because her vote did not substantially affect the outcome of the case); *see also* Harper, *supra* note 46, at 91 (arguing that lower courts should have ignored the concurring opinion by Justice O'Connor).

84. *Gross*, 129 S. Ct. at 2358.

85. *Id.* at 2358-59 (Breyer, J., dissenting).

86. *Id.* at 2359.

C. Desert Palace and Gross: The Master Builder Reinterprets the Blueprint and Confounds the Builders

In 2003 the Supreme Court changed employment discrimination law as we knew it. In *Desert Palace, Inc. v. Costa*, the Court held that direct evidence of discrimination is not a prerequisite for a court to give a motivating-factor jury instruction in Title VII cases.[87] The holding itself changed the established case law about how to evaluate disparate treatment cases under Title VII. The Court resolved the effect that the Civil Rights Act of 1991 has on existing employment discrimination doctrine developed in *Price Waterhouse* and its progeny. Beyond the holding, the decision implicated a number of other significant issues that it did not answer. Did the pretext analysis developed for Title VII disparate treatment cases in *McDonnell Douglas v. Green*[88] remain viable? If the pretext analysis survives *Desert Palace*, what determines whether a case is evaluated under the pretext analysis or the mixed-motives analysis? If the pretext analysis survives, at what stages of litigation does it apply? The Court, in a footnote, essentially stated that it was not resolving these other questions.[89] The Court thus decided the narrowest issue presented in *Desert Palace* and, in the aftermath, left litigation of disparate treatment cases under Title VII in a state of disarray.[90] In addition to the questions *Desert Palace* left unresolved about Title VII, courts and commentators were left to discern what, if any, effect *Desert Palace* had on the ADEA.

Six years after the Supreme Court decided *Desert Palace*, it ventured back into the chaotic area of the proof structures used to analyze intentional discrimination cases. When the Court granted certiorari in *Gross v. FBL Financial Services, Inc.*,[91] it appeared to be *Desert Palace* Part II. As the Court decided the case, however, it turned out to be much more. Thus, the Court seemed poised to answer a narrow question: Whether the *Price Waterhouse* direct evidence/circumstantial evidence line that divides cases

87. 539 U.S. 90 (2003).

88. 411 U.S. 792 (1973).

89. "This case does not require us to decide when, if ever, § 107 applies outside of the mixed-motive context." *Desert Palace*, 539 U.S. at 94 n.1.

90. *See* Corbett, *Fixing supra* note 41 (arguing that employment discrimination law in the U.S. is "broken" and the state of disrepair is so bad that lawyers and judges do not know how to analyze any given case); Prenkert, *supra* note 16, at 512 (arguing that disparate treatment law is in disarray and calling for Congress to "end the fragmentation of disparate treatment law and clean up the mixed-motives mess"); Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of* McDonnell Douglas, 44 HOUS. L. REV. 349, 373 (2007) ("Currently, the federal law is in a state of flux regarding the intersection of the 1991 amendments to Title VII, the *Desert Palace* decision, and the *McDonnell Douglas* test.").

91. Gross v. FBL Fin. Serv., Inc., 526 F.3d 356 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 680 (2008).

between pretext and mixed-motives analyses still applies to ADEA claims, even though it no longer applies to Title VII claims. Different treatment of the two employment discrimination laws was feasible because the Civil Rights Act of 1991, which formed the basis for the Court's analysis in *Desert Palace*, did not amend the ADEA as it did Title VII. *Gross* thus appeared to be the sequel to *Desert Palace*, answering the same question for the ADEA that *Desert Palace* answered for Title VII. Surprisingly, though, the Court rendered a decision that answered a much broader question. The Court held that the mixed-motives analysis or proof structure does not even apply to ADEA cases; instead, the burden of persuasion is on the plaintiff to prove but-for causation, and the burden never shifts to the defendant.[92]

The comparisons and contrasts between *Desert Palace* and *Gross* are numerous and striking. The same issue was before the Court, but under Title VII in *Desert Palace* and under the ADEA in *Gross*. The Court in *Desert Palace* showed remarkable restraint in answering a narrow question and not answering additional questions that were implicated, the answers to which were needed to avoid rampant confusion in Title VII disparate treatment litigation. In contrast, in *Gross*, the Court went out of its way to answer a broad question, which probably will produce a high degree of certainty in litigation of ADEA disparate treatment claims. The Civil Rights Act of 1991 played an important role in each case, but it played a very different role in each. In *Desert Palace*, the Court announced a major change in the law by interpreting the Civil Rights Act of 1991 as requiring the change. By contrast, the Court in *Gross* announced what most courts and commentators perceive as a major change in the law by using the Civil Rights Act to free it of the potential precedential effect of *Desert Palace* and, even more surprisingly, *Price Waterhouse*. *Desert Palace* could have moved the state of the law to a single proof structure applicable to Title VII disparate treatment claims, but the Court did not rule broadly enough to make that result clear, and few courts have interpreted *Desert Palace* that way.[93] Because the Court ruled broadly in *Gross*, there now is a single causation standard for the ADEA, though the Court did not resolve the issue of what, if any, proof structures apply under the ADEA. Generally, *Desert Palace* moved the law in a positive direction for employees/plaintiffs under Title VII, while *Gross* moved it in a positive

92. Gross v. FBL Fin. Serv., Inc., 129 S. Ct. 2343, 2352 (2009).

93. One circuit court so held. *See* Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004) (holding that a "modified McDonnell Douglas approach," which merges pretext and mixed-motives into a single analysis, applies to disparate treatment claims). For discussion of *Rachid*, see *infra* Part I.D. (discussing how the Fifth Circuit reached its holding in *Rachid* and why its holding differed from the Supreme Court's in *Gross*). Although *Rachid* was an age discrimination case, it unified the pretext and mixed-motives proof structures for the ADEA and Title VII.

direction for employers/defendants under the ADEA. Before *Desert Palace*, the pretext analysis created by *McDonnell Douglas* and the mixed-motives analysis created by *Price Waterhouse* were the twin pillars of disparate treatment litigation. *Desert Palace* made *Price Waterhouse* irrelevant to Title VII cases, but left uncertainty about *McDonnell Douglas*. *Gross* finished off *Price Waterhouse*, declaring it irrelevant to the ADEA and thus dead law, but it again left us uncertain about *McDonnell Douglas*.[94]

Considered together, *Desert Palace* and *Gross* redefine the proof structures or analyses applicable to disparate treatment claims under Title VII and the ADEA. Because they address the proof structures applicable to the two oldest employment discrimination laws that generate the overwhelming number of charges and lawsuits, the two cases have significantly reshaped employment discrimination law, even if they have left some of the contours ill-defined. What does the new blueprint look like? After *Desert Palace* there may be a single, uniform analysis under Title VII, but that is uncertain. After *Gross* there is a single, uniform analysis under the ADEA, but it may not use any proof structure applicable to Title VII. Title VII and the ADEA may share a proof structure, if both still recognize the *McDonnell Douglas* pretext analysis, but they may not. Regardless of how that matter is resolved, we know after *Desert Palace* and *Gross* that the mixed-motives analysis is not uniform across Title VII and the ADEA because the ADEA recognizes no mixed-motives proof structure. Moreover, under the rationale of *Gross*, perhaps the mixed-motives proof structure does not apply to claims under the Americans with Disabilities Act.[95] Thus, predictions of potential uniformity in analysis of disparate treatment claims among the employment discrimination statutes,[96]

94. *See* cases cited *supra* note 27 (surveying the lower courts' decisions regarding whether the *McDonnell Douglas* pretext analysis should still be applied in ADEA cases after the Supreme Court's holding in *Gross)*.

95. *See* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957 (7th Cir. 2010) (finding, based on *Gross*, that the Americans with Disabilities Act does not authorize a mixed-motives discrimination claim).

96. *See, e.g.*, Katz, *Unifying*, *supra* note 29 (discussing the problems associated with the fragmentation of disparate treatment law and proposing the use of a single framework); Robert A. Kearney, *The High Price of* Price Waterhouse*: Dealing with Direct Evidence of Discrimination*, 5 U. PA. J. LAB. & EMP. L. 303, 310-12 (2003) (noting the difficulty that arises when a plaintiff faces two different causation standards for one claim and proposing a simplified standard for evaluating the sufficiency of oral evidence); Benjamin C. Mizer, Note, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 MICH. L. REV. 234 (2001) (recognizing that in many disparate treatment claims, plaintiffs' already complicated claims become more difficult to establish due to the existence of both the pretext and mixed-motives analyses and proposing a set of jury instructions); Michael J. Zimmer, *Chaos or Coherence: Individual Disparate Treatment Discrimination and the ADEA*, 51 MERCER L. REV. 693, 693 (2000) (suggesting that "this chaos . . . may be a prelude to a new coherence"); Zimmer, *The Emerging Uniform Structure*, *supra* note 32, at

for better or worse, have been frustrated.

D. The Interpretation the Master Builder Rejected: Rachid v. Jack in the Box

About a year after the rendering of the *Desert Palace* decision and five years before *Gross*, the Fifth Circuit confronted blueprint interpretation issues in *Rachid v. Jack in the Box*.[97] It is instructive to consider the Fifth Circuit's decision in *Rachid* because it attempted to interpret what the Court said (and didn't say) in *Desert Palace*, which is no easy feat in its own right, and to anticipate what the Court would say in *Gross*. *Rachid* involved an age discrimination claim. The district court had granted defendant's motion for summary judgment. Plaintiff argued that the trial court had erroneously evaluated his case under the *McDonnell Douglas* pretext analysis, and that it should have used the mixed-motives analysis of *Price Waterhouse* and *Desert Palace* instead. The defendant argued that the trial court correctly declined to apply the mixed-motives analysis because the plaintiff did not introduce direct evidence. The Fifth Circuit began its analysis with *Desert Palace*, saying that it had not yet addressed whether the decision changed the *Price Waterhouse* and *McDonnell Douglas* analyses.[98] The Fifth Circuit rendered two significant holdings: 1) that whatever changes *Desert Palace* wrought in the two proof structures under Title VII, the same result should apply under the ADEA; and 2) that *Desert Palace* did alter the two proof structures, and the Fifth Circuit fashioned a new single analysis merging the two. The Supreme Court later repudiated the first holding in *Gross*.

The *Rachid* court's first holding was broad. The court might have more narrowly held that a mixed-motives analysis applied to the ADEA, but that it was the *Price Waterhouse* version because the Civil Rights Act of 1991 did not codify a new mixed-motives analysis in the ADEA as it did in Title VII.[99] Instead, the court reasoned that because the core "because of . . ." sections in Title VII and the ADEA were virtually identical, the statutes should be interpreted similarly.[100] Just as *Desert Palace* pointed out that Title VII provided for no heightened standard of direct evidence to invoke mixed motives, the Fifth Circuit pointed out that the ADEA

564 (discerning the possible emergence of a uniform proof structure based on the Civil Rights Act of 1991 and two subsequent Supreme Court decisions).

97. 376 F.3d 305 (5th Cir. 2004).

98. *Id.* at 310.

99. *See* Katz, Gross *Disunity*, *supra* note 16, at 865 (describing the approach adopted by the Fifth Circuit in *Rachid* as "total unification" of disparate treatment law and distinguishing it from "partial unification").

100. *Rachid*, 376 F.3d at 310-11

specified no such requirement.[101] Thus, the court held that direct evidence was not required for a mixed-motives analysis.

Next, the Court held that *Desert Palace* required a modification of the two proof structures, and the court achieved that by merging the two proof structures into what it termed "the modified *McDonnell Douglas* approach" in which the first two parts of the pretext analysis remain unchanged, and only the third part is modified.[102] In part three, a plaintiff may prevail by proving either pretext or motivating factor.[103] If the plaintiff proves motivating factor, then the same-decision defense is available to the defendant.[104]

It is instructive to compare and contrast *Rachid* and *Gross*. The Fifth Circuit in *Rachid* was interpreting and attempting to build on *Desert Palace*. Both the Supreme Court in *Gross* and the Fifth Circuit in *Rachid* said that they were interpreting the statutory text of the ADEA, and yet they reached opposite results. Furthermore, the Fifth Circuit in *Rachid* found it necessary to distinguish its decision from its holding in *Smith v. City of Jackson*,[105] and the Supreme Court in *Gross* also distinguished its decision from *Smith*, which overruled the Fifth Circuit's decision.[106] The Fifth Circuit obviously did not read the blueprint the way the Supreme Court did. Who did a better job of interpreting the blueprint: the Master Builder or the subordinate builder? I think the Fifth Circuit came closer to building what Congress intended, based on the characteristics that the tower needs.[107] Regardless, the Fifth Circuit at least came closer to building what Congress should draw in its next modification of the blueprint.

E. Who, If Anyone, Is Reading the Blueprint Correctly?

Does the Master Builder know what the employment discrimination blueprint, as amended in 1991, requires? *Desert Palace* and *Gross* provoke at least a modicum of doubt.

101. *Id.*
102. *Id.* at 312.
103. *Id.*
104. *Id*.
105. 351 F.3d 183 (5th Cir. 2003), *rev'd*, 544 U.S. 228 (2005).
106. Smith v. City of Jackson, 544 U.S. 228 (2005). For a discussion of *Smith v. City of Jackson*, see *infra* Part II.C. (discussing the Court's holding that the disparate impact theory applicable to Title VII claims is also applicable to ADEA claims, but in a narrower version, thus making it more difficult for plaintiffs to prevail).
107. This view seems supported by the Protecting Older Workers Against Discrimination Act introduced in Congress. For discussion of the Act, see *infra* Part III.D. (noting that the proposed legislation was an immediate response to the Court's holding in *Gross*, and that the bill states Congress's disapproval of the Supreme Court's decision to interpret Title VII and ADEA cases differently, a decision that was inconsistent with established precedent).

It is difficult to criticize what the Supreme Court actually said in *Desert Palace.* It was, after all, a unanimous decision. However, the Court has been appropriately criticized for what it did not say. With respect to what the Court actually did say, was the Court correct in interpreting the 1991 Act as abrogating the *Price Waterhouse* line between pretext and mixed-motives cases? This was not an unreasonable interpretation, but it was also not a necessary one. It seems just as likely, and perhaps more likely, that Congress merely specified only what it wanted to change about *Price Waterhouse* and other targeted Supreme Court cases. That is, by saying nothing about the direct evidence/circumstantial evidence dividing line in the 1991 Act, Congress did not intend to effect any change.[108] Even so, the direct/circumstantial dividing line was chimerical, yielding a variety of approaches for distinguishing direct evidence from circumstantial evidence,[109] and it is likely that no one sheds a tear for the Court's abolition of a bad standard. However, the Court has been faulted for saying too little.[110] Lower courts did not know after *Desert Palace* whether there were two proof structures for analyzing disparate treatment cases or one, and if there were two, how to distinguish which structure applied to which cases.[111]

At this point, enters a subordinate builder in *Rachid* to build on *Desert Palace*. The Court first guessed that *Desert Palace* would also govern the ADEA. One may fault the Fifth Circuit for this prediction and its reasoning. After all, other courts had reached the contrary result because *Desert Palace* based its holding on the 1991 Act's amendment of Title VII (the Act did not similarly amend the ADEA).[112] However, the Fifth Circuit believed that a fundamental principle of the original blueprint, carried forward in the 1991 revision, was symmetry, and it used that principle to resolve the issue. In *Rachid*, the Fifth Circuit looked at the odd structure of *Desert Palace* and chose to build upon it something that was simple, clear, and symmetrical. It created a single proof structure

108. *See* Chambers, *supra* note 48, at 92-93 (noting that Congress most likely felt that the distinction between pretext and mixed-motives cases was a good one because it gave no indication that the 1991 Act was intended to change how pretext cases were handled).

109. Costa v. Desert Palace, Inc., 299 F.3d 838, 851-53 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).

110. *See, e.g.*, sources cited *supra* note 48 (evaluating and often criticizing *Desert Palace*).

111. For an opinion summarizing the positions of the various circuits, see *White v. Baxter Healthcare Corp.*, 533 F.3d 381 (6th Cir. 2008) (describing the holdings of various circuit courts with respect to the appropriate proof structures for disparate treatment claims after *Desert Palace*), *cert. denied*, 129 S. Ct. 2380 (2009). *See also* Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 210 n.81 (2009) (collecting court decisions and articles).

112. *See, e.g.*, Lawhead v. Ceridian Corp., 463 F. Supp.2d 856 (N.D. Ill. 2006) (surveying the interpretation of the law in different courts).

applicable to disparate treatment claims under both Title VII and the ADEA. Moving on, the Fifth Circuit then tried to interpret what the Court's *Desert Palace* decision meant about the two proof structures. The court built a single merged proof structure consisting of pretext and mixed motives. Although it is a curious-looking structure and one that I think is illogical,[113] it was based on the preexisting structures and demonstrated symmetry and clarity, if not simplicity.

The Master Builder returned in *Gross* to tear down part of the *Rachid* construction, holding that the mixed-motives proof structure does not apply to the ADEA. The decision merits criticism on several grounds. First, the Court obviously is correct that the 1991 Act did not amend the ADEA to create a codified version of mixed motives as it did Title VII. Thus, the Court concluded that mixed motives does not apply under the ADEA. On the contrary, the dissent argued that what follows from the 1991 Act is that the *Price Waterhouse* version of mixed motives still applies to the ADEA.[114] The majority's answer was that *Price Waterhouse* was a case involving a Title VII claim, and that the Supreme Court had never held the case's mixed-motives analysis to be applicable to the ADEA, even though the courts of appeals had so held. The Court then said it must go back to the language of the ADEA, and it interpreted the "because of . . . age" language as requiring but-for causation. There are several problems with this reasoning. First, the Court makes it a point that, after the 1991 Act, the burden of persuasion in Title VII and that in the ADEA are different. While that is true, the burden of persuasion was "because of" for both at the time *Price Waterhouse* was decided, as the

113. I have argued that the Court should not have created a merged analysis. It did well to interpret *Desert Palace* as creating a single disparate treatment analysis, but that analysis should have been the Title VII statutory mixed-motives analysis. It should have read *Desert Palace* as abolishing the *McDonnell Douglas* pretext analysis. *See* Corbett, *Fixing*, *supra* note 41, at 104-06 (arguing that Congress should not create a proof structure that merges pretext and mixed motives, but instead should adopt a modified mixed-motives analysis for all disparate treatment claims); Corbett, *Allegory*, *supra* note 48, at 1575-77 (noting that, with the Supreme Court's decision in *Desert Palace*, the *McDonnell Douglas* approach should be abandoned). Of course plaintiffs could still present evidence that the employer's reason was pretextual, but the structure by which the court would analyze the case would be mixed motives. Professor Katz has argued that there should be a "nonmandatory *McDonnell Douglas*," meaning that plaintiffs would have the option of using the pretext analysis to prove causation, but would not be required to use it. Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 143 (2007). I contend that, although plaintiffs certainly can introduce relevant pretext evidence, the pretext proof structure should be abandoned as its causation standard is inconsistent with motivating factor, and retention of the proof structure will perpetuate confusion.

114. The argument rejected by the majority and embraced by the dissenters was what Professor Katz terms "partial unification." *See* Katz, Gross *Disunity*, *supra* note 16, at 865 (defining the "partial unification" position as the view that "pre-1991 Title VII definition (*Price Waterhouse*) applies in non-Title VII statutes").

Stevens dissent in *Gross* and the *Rachid* court pointed out.[115] Second, the Court rejects Justice Stevens' point in his dissent that the Court's approach in *Smith v. City of Jackson* should lead the Court in *Gross* to revert to the *Price Waterhouse* analysis for ADEA claims.[116] In *Smith* the Court concluded that because Congress did not amend the ADEA with a statutory version of disparate impact, the *Wards Cove* version would continue to apply to the ADEA.[117] The majority attempts to counter this argument by saying essentially that *Price Waterhouse* cannot be applied to the ADEA because the 1991 Act did not amend the ADEA to provide for a burden-shifting proof structure.[118] That argument does not effectively rebut the *Smith*-based argument. Finally, the majority rejected principles of symmetry and simplicity by adopting a different analytical framework for the ADEA, saying this is what is required by the Architect's blueprint. It was not required, and it was a poor choice, as the dissenting justices explained.[119]

II. A BLUEPRINT REQUIRING A LESS PROMINENT ADEA

Divergence between Title VII law and ADEA law is not limited to the holding in *Gross* regarding proof structures. For many years, the Court has said that there are differences between the phenomenon of employment discrimination based on race or sex and discrimination based on age, and the Court has suggested or held (depending on the case) that the law under Title VII and the law under the ADEA should differ in ways reflective of those differences. *Gross* is the latest of those decisions. This approach to interpreting the ADEA was introduced in *Hazen Paper Co. v. Biggins*[120] and further developed in *General Dynamics Land Systems, Inc. v. Cline*,[121] *Smith v. City of Jackson*,[122] *Meacham v. Knolls Atomic Power Laboratory*,[123] and *Kentucky Retirement System v. EEOC*.[124] The divergence should raise a concern beyond the increasing asymmetry in employment discrimination law. The divergence invariably has produced

115. Gross v. FBL Fin. Serv., Inc., 129 S. Ct. 2343, 2354 (2009) (Stevens, J., dissenting); Rachid v. Jack in the Box, 376 F.3d 305, 310-11 (5th Cir. 2004).

116. *Gross*, 129 S. Ct. at 2354 (Stevens, J., dissenting).

117. *Id.* at 2356 (Stevens, J., dissenting).

118. *Id.* at 2352 n.5.

119. *See* Katz, Gross *Disunity*, *supra* note 16, at 868 n.49 (noting that "[t]he relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII apply `with equal force in the context of age discrimination . . . .'") (quoting *Gross*, 129 S. Ct. at 2355 (Stevens, J., dissenting)).

120. 507 U.S. 604 (1993).

121. 540 U.S. 581 (2004).

122. 544 U.S. 228 (2005).

123. 128 S. Ct. 2395 (2008).

124. 128 S. Ct. 2361 (2008).

less protection against age discrimination than is available for the characteristics covered by Title VII.[125] Is that structure, with a relatively less protective age discrimination law, consistent with the Congressional blueprint?[126] With a large and growing percentage of the workforce in the United States in the protected class under the ADEA, and in the higher ranges of that protected class, this is an important question to consider. *Gross* is the most significant case reducing ADEA protection by making it more difficult for plaintiffs to recover in the most common type of case—individual disparate treatment. It has provoked negative reactions from influential people and organizations and calls for Congressional action.[127] The negative reactions may expand if the rationale of *Gross* is extended to make the mixed-motives analysis inapplicable to claims under the Americans with Disabilities Act, as one court recently held.[128]

125. Professor Michael Selmi posits that the courts are reluctant to provide broad protection under the ADEA because the statute covers such a broad class, and courts are skeptical about the prevalence of discrimination against people in the lower age range of that class. *See* Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 564-65 (2001) (making the aforementioned arguments).

126. The answer is "no," according to the proposed Protecting Older Workers Against Discrimination Act. *See infra* Part III.D (noting that the intention of Congress was to treat the two types of claims the same way).

127. Not surprisingly, the AARP did not like the decision. *See* David G. Savage, *Supreme Court makes age-bias suits harder to win*, L.A. TIMES, June 19, 2009, at 1, *available at http://bulletin.aarp.org/yourworld/law/articles/supreme_court_makes_agebias_suits_harder_to_win.html* (discussing how the Supreme Court's conservative decision will make it harder for older workers to bring successful age-discrimination claims because it eliminated the long-standing two-step approach and replaced it with the requirement that plaintiffs "bear the full burden of proving that age was the deciding factor in the dismissal or demotion"). AARP attorney Thomas W. Osborne was critical of the decision, characterizing it as one of several Court decisions suggesting that age discrimination is different from other types and not as serious. *See* Susan J. McGolrick, *Justices 5-4 Adopt But-For Causation, Reject Burden Shifting for ADEA Claims*, Daily LAB. REP. (BNA) No. 116, at AA-1 (June 19, 2009) (noting that Osborne was "absolutely" surprised by "how far the court went" in the *Gross* decision). Senate Judiciary Committee Chairman Senator Patrick Leahy stated as follows: "By disregarding congressional intent and the time-honored understanding of the statute, a five member majority of the Court has today stripped our most senior American employees of important protections." *Id.* at AA-3. Senator Leahy further likened the *Gross* decision to the Court's "wrong-headed" ruling in *Ledbetter v. Goodyear Tire & Rubber Co*, 550 U.S. 618 (2007), which Congress overturned in the Lilly Ledbetter Fair Pay Act of 2009. *Id.* For other criticism, see Kevin P. McGowan, *EEOC Provides Guidance on Waivers, Hears Testimony on Age Bias Developments*, DAILY LAB. REP. (BNA) No. 134, at A-14 (July 16, 2009) (noting that outside witnesses criticized the Supreme Court holding in *Gross* at a July 15 EEOC meeting); Editorial, *Age Discrimination*, N.Y. TIMES, July 7, 2009, at A22 (calling for Congress to reverse *Gross* as it did *Ledbetter*). For a discussion of the Protecting Older Workers Against Discrimination Act, see *infra* Part III.D.

128. *See* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010) (holding that "a plaintiff complaining of discriminatory discharge under the ADA must

A. Laying the Foundation for Divergent Law Under Title VII and the ADEA

One of the most obvious differences between age discrimination and discrimination based on the characteristics covered by Title VII is that Congress passed separate laws.[129] The Court began exploring the implications of this fact in *Hazen Paper Co. v. Biggins*.[130] The plaintiff was fired a short time before his pension vested, and he sued, alleging age discrimination.[131] He won a jury verdict. The Court introduced the possibility that the disparate impact theory of discrimination, which was developed under Title VII, may not apply to the ADEA.[132] After explaining the two theories of discrimination, the Court stated that disparate treatment addresses "the essence of what Congress sought to prohibit in the ADEA."[133] The Court explained why age discrimination law might differ from Title VII law: the phenomenon of age discrimination in the workplace usually involves negative stereotyping about older workers being less productive rather than animus- or hatred-based discrimination.[134] The main adverse employment action that Congress sought to address in the ADEA was that older workers were being fired based on "inaccurate and stigmatizing stereotypes."[135] The Court was concerned that the jury may have based its finding of age discrimination on a finding that the employer fired plaintiff because of his pension status, and it remanded for reconsideration of whether the termination was based on age.

Hazen Paper Co. did not ultimately pronounce that ADEA law differed from Title VII law, but it set the stage for such a finding. In the aftermath of *Hazen Paper Co.*, many lower courts seized upon the Court's statement that disparate treatment is primarily what Congress sought to

show that his or her employer would not have fired him but for his actual or perceived disability; proof of mixed motives will not suffice").

129. For useful discussions of the history of the ADEA, see Molly Horan, *The Supreme Court Retires Disparate Impact:* Kentucky Retirement Systems v. EEOC *Validates the Disparate Treatment Theory Under the Age Discrimination in Employment Act*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY, 115, 119-21 (2009) (providing an historical background of age discrimination legislation); D. Aaron Lacy, *You Are Not Quite as Old as You Think: Making the Case for Reverse Age Discrimination Under the ADEA*, 26 BERKELEY J. EMPL. & LAB. L. 363, 366-70 (2005) (reviewing the statutory history of the ADEA in relation to the Civil Rights movements of the 1960's); Jessica Sturgeon, Note, Smith v. City of Jackson*: Setting an Unreasonable Standard*, 56 DUKE L.J. 1377, 1378-80 (2007) (discussing the "[o]rigins of the Age Discrimination in Employment Act").

130. 507 U.S. 604 (1993).

131. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 606 (1993). He also asserted a claim under ERISA. *Id.*

132. *Id.* at 608. This is an idea the Court later rejected in *Smith v. City of Jackson*. *See infra* Part II.C. (holding that the disparate impact theory applies to ADEA claims).

133. *Hazen Paper Co.*, at 610

134. *Id.* at 610-11 (quoting EEOC v. Wyoming, 460 U.S. 226 (1983)).

135. *Id.* at 610.

address in the ADEA as the basis for holding that disparate impact is not applicable to the ADEA.[136]

B. Different Law on Reverse Discrimination

The Court encountered the issue of whether the ADEA covers reverse discrimination[137] in *General Dynamics Land Systems, Inc. v. Cline*.[138] The case involved the elimination of health care benefits for future retirees except those who were 50 or older on a certain date. The plaintiffs were employees between ages 40 and 50. The majority, in a 6-3 decision, held that Congress did not intend for the ADEA to cover reverse discrimination claims. Recognizing that reverse discrimination claims are covered by Title VII, the majority began with the fact that age was covered in a separate and subsequently enacted law. Reviewing legislative history of the ADEA, the Court concluded that all references, except one, indicate that the ADEA was intended to protect older workers from discrimination against them and in favor of younger workers.[139] The majority then argued that age as used in the ADEA's "because of . . . age" prohibition is properly understood as meaning "old age." The Court explained that while "race" and "sex" as used in Title VII are best interpreted as referring to all races and both sexes, age as used in the ADEA is best interpreted narrowly,

136. *See, e.g.*, Coleman v. Quaker Oats Co., 232 F.3d 1271 (9th Cir. 2000) ("The lack of case law on this issue in the courts of appeal stems in large part from the fact that several of our sister circuits do not recognize a disparate impact cause of action under ADEA after *Hazen Paper Co. v. Biggins*."); *see also* Debra Burke, *ADEA Disparate Impact Discrimination: A Pyrrhic Victory?*, 9 U.C. DAVIS BUS. L.J. 47, 54-56 (2008) (surveying the case law).

137. Reverse discrimination is used to denote a claim of a plaintiff who is a member of a group that historically has not been a primary target of discrimination. *See, e.g.*, Donald T. Kramer, *What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes—Private Employment Cases*, 150 A.L.R. Fed. 1 (1998) (discussing cases addressing this issue); Ryan M. Peck, *Title VII Is Color Blind: The Law of Reverse Discrimination*, 75 J. KAN. BAR ASS'N 20 (June 2006) (noting that Title VII protects against all types of discrimination, including reverse discrimination); Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM & MARY L. REV. 1031, 1034 (2004) (arguing for similar treatment of reverse and traditional discrimination cases under new methods of proof, to avoid possible constitutional infirmities of different treatment); Timothy K. Giordano, Comment, *Different Treatment for Non-Minority Plaintiffs Under Title VII: A Call for Modification of the Background Circumstances Test to Ensure That Separate is Equal*, 49 EMORY L.J. 993, 996 (2000) (noting that courts remain divided on the question of how the principles of Title VII should apply to nonminority plaintiffs, and arguing that there are good reasons "for adopting a different prima facie case in reverse discrimination claims").

138. 540 U.S. 581 (2004).

139. *Id*. at 590.

referring only to older age.[140] The Court also referred to the "social history" of age discrimination, which, considered in conjunction with the statutory reference, leads to an interpretation of the phrase meaning discrimination against older people.[141]

A dissenting opinion authored by Justice Thomas argued, first, that the plain language of the ADEA did not explicitly consider discrimination against older people, but just "because of . . . age."[142] The dissent also relied for additional support on the EEOC's interpretation of the ADEA.[143] The dissent also pointed out that Title VII has been conclusively interpreted as covering reverse discrimination although there was no indication in the legislative history that discrimination against whites was a problem sought to be addressed by the law.[144] Comparing the majority's interpretation of the ADEA with the established interpretation of Title VII, Justice Thomas said, that "[i]n light of the Court's opinion today, it appears that this Court has been treading down the wrong path with respect to Title VII since at least 1976."[145]

General Dynamics Land Systems interprets the ADEA as providing narrower protection than Title VII, and it renders the two laws asymmetrical. The result was not obvious, as indicated by a well-reasoned dissent.[146] However, the majority rejected the dissent's argument that "age" should be interpreted as the Court has interpreted "race" and "sex" in Title VII.[147] The majority said that in common usage, one must add a modifier to "race" or "sex" to narrow the meaning, but in common usage "age" without a modifier means simply old age.[148] Conversely, the majority opinion looks to identical language in Title VII and the ADEA and distinguishes them, thus building asymmetrically. Similarly, in the later *Gross* case, the dissent would argue that the majority looks at identical language in Title VII and the ADEA and yet develops divergent law.[149]

What may have troubled the majority about recognizing reverse discrimination under the ADEA is the fact that employers must allocate resources for both employment and retirement benefits on some basis, and

140. *Id.* at 597-98.
141. *Id.* at 596.
142. *Id.* at 603 (Thomas, J., dissenting).
143. *Id.* at 605-06.
144. *Id.* at 608-09.
145. *Id.* at 611 (citing McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976)).
146. For example, the British Employment Tribunal interprets the United Kingdom's age discrimination law as prohibiting reverse discrimination. *See* Wilkinson v. Springwell Eng'g Ltd., (2008) ET/2507420/07 (E.T.) (awarding a plaintiff damages in an age-discrimination case in the UK).
147. General Dynamics Land Sys., 540 U.S. at 597-98.
148. *Id.*
149. *See supra* Part I.B. (discussing the *Gross* decision).

years of service and/or age is often the basis selected for making allocation decisions, particularly when employers must bargain with unions. This same concern is illustrated in all of the cases discussed below in this section. To permit claims when employers make such distinctions based in part on age either would subject employers to substantial liability under the ADEA or would deprive them of what the Court appears to believe is a relevant and reasonable basis for making such decisions.

C. Symmetry and Asymmetry in Disparate Impact and a Pyrrhic Expansion of the ADEA

The Court decided in *Smith v. City of Jackson*[150] that the disparate impact theory of discrimination is applicable to ADEA claims. The police department in Jackson, Mississippi had given raises constituting a higher percentage to officers with five or fewer years of seniority.[151] The department claimed that the reason for the disparity was to raise the salaries of junior officers so that they were competitive in the marketplace.[152] However, because most of the officers who had less than five years of experience were under 40, the plaintiff sued, alleging that the compensation plan had a disparate impact on officers in the protected class.[153] Seizing upon dicta in *Hazen Paper Co.* that found disparate treatment as the principal discrimination targeted by the ADEA, many lower courts had previously held that the disparate impact theory was not available under the ADEA.[154] The Supreme Court unanimously rejected that proposition, relying upon the principle that when Congress uses the same language in similar statues, the Court will presume that Congress intended them to have the same meaning.[155]

So, *Smith* appears to be an exception to both of my arguments about recent Supreme Court interpretations of the ADEA vis-à-vis Title VII: that the Court is not building symmetrically and that it is interpreting the ADEA more narrowly. To an extent that is true; however, the Court went on to describe a disparate impact structure that is different from that in Title VII, and one under which it is far more difficult for plaintiffs to recover. In finding as much, the Court said that two statutory differences between the ADEA and Title VII require this narrower version of disparate impact.[156]

150. 544 U.S. 228 (2005). For detailed analyses of *Smith*, see Burke, *supra* note 136; Sturgeon, *supra* note 129.

151. *Smith*, 544 U.S. at 230-31.

152. *Id.* at 230.

153. *Id.*

154. *See* sources cited *supra* note 136 (discussing the influence of the *Hazen Paper Co.* decision on many lower court holdings).

155. *Smith*, 544 U.S. at 233-34.

156. *Id.* at 240.

First, the Court explained that the ADEA's "reasonable factors other than age" (RFOA) provision,[157] which has no analogue in Title VII, narrows ADEA coverage.[158] Second, the Court pointed out that the Civil Rights Act of 1991 modified the disparate impact proof structure articulated in *Wards Cove Packing Co. v. Atonio*[159] by inserting a codified version in Title VII, but the Act did not similarly amend the ADEA.[160] Thus, the Court concluded that the version of disparate impact applicable to the ADEA is the old *Wards Cove* version.[161] The meaning of this statement was unclear, and this ambiguity caused the Court to clarify its meaning in *Meacham*.[162] *Smith* then applied the new ADEA disparate impact analysis to the specific facts and held that the plaintiffs had not alleged any specific employment practice which could cause a disparate impact.[163] It is not at all clear what is exactly required to constitute a specific employment practice and why the Court thought that the plaintiffs had failed to identify one.[164] However, the Court provided an alternative reason why plaintiffs lost, explaining that the reason for the difference in raises, bringing salaries in line with competition to retain police officers, satisfied the "reasonable factors other than age" (RFOA) provision.[165] Thus, although the Court recognized disparate impact under the ADEA, it created an analysis that would make it very difficult for plaintiffs to recover, and as applied in *Smith* it resulted in a loss for plaintiffs.[166]

157. 29 U.S.C. § 623(f)(1).

158. *Smith*, 544 U.S. at 233, 240.

159. 490 U.S. 642 (1989) (most of the principles established in *Wards Cove* were abrogated by the Civil Rights Act of 1991).

160. *Smith*, 544 U.S. at 240.

161. This is the petard upon which the dissent would hoist the majority in *Gross*. *See supra* text accompanying notes 78-79 (discussing how Justice Stevens in his *Gross* dissent relied upon the rationale of Smith v. City of Jackson).

162. Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395, 2404 (2008) ("To begin with, when the Court of Appeals further inferred from the *City of Jackson* reference to *Wards Cove* that the *Wards Cove* burden of persuasion (on the employee, for the business necessity enquiry) also applied to the RFOA defense . . . .").

163. *Smith*, 544 U.S. at 241.

164. Sturgeon, *supra* note 129, at 1397. This requirement may seem unexceptional because the Civil Rights Act of 1991 amended Title VII, installing a statutory version of disparate impact that retained the *Wards Cove* requirement that the plaintiff identify (in most cases) a "particular employment practice." 42 U.S.C. § 2000e-2(k)(1)(B)(i). However, the Court in *Smith* and *Meacham* seems to create a more limited definition of "specific employment practice," thus saddling age discrimination plaintiffs with a more onerous burden. Courts have understood this as plaintiffs asserting disparate impact in age discrimination cases after *Smith* have lost on either the particular employment practice or RFOA. *See* R. Henry Pfutzenreuter IV, *The Curious Case of Disparate Impact Under the ADEA: Reversing the Theory's Development into Obsolescence*, 94 MINN. L. REV. 467, 492 (2009) (exploring the appropriate standards for a RFOA defense).

165. *Smith*, 544 U.S. at 241-42.

166. *See* Sturgeon, *supra* note 129, at 1397-1401 (exploring the impact of *Smith v. City*

Smith is an oxymoronic opinion: it expands the ADEA but only superficially, and it creates a fictitious symmetry between the ADEA and Title VII.[167] The Court grounded its holding on the principle that when the same language is used in Title VII and the ADEA, it should be interpreted as having the same meaning.[168] The Court then goes on to recognize differences in language between the ADEA and Title VII, and it bases the modified version of disparate impact on those particular differences.[169] As in *Gross*, the fact that Congress in the Civil Rights Act of 1991 amended Title VII and did not similarly amend the ADEA was crucial to a different interpretation of the ADEA. In the final analysis, although one may criticize some aspects of *Smith*, such as the cryptic discussion of a requirement that plaintiffs prove a specific employment practice, the decision seems well reasoned. It attempts to preserve symmetry between the two employment discrimination statutes to the extent the statutory language permits. In contrast, *Gross* eschews symmetry more than the differences in statutory language require.

D. More Symmetry and Asymmetry in Disparate Impact and More Restrictive Expansion of the ADEA

In *Meacham v. Knolls Atomic Power Laboratory*, the Court decided that the RFOA provision in the ADEA is an affirmative defense on which the defendant bears the burden of persuasion.[170] The Court's consideration of the issue can be traced to the confusing reference in *Smith v. City of Jackson* to the ADEA disparate impact theory being the *Wards Cove* version. The Second Circuit understandably construed the *Wards Cove* reference to mean the burden-of-persuasion scheme of *Wards Cove* applied, in which the Court had placed the burden of persuasion on business necessity and job relatedness on the plaintiff.[171] The Supreme Court explained that the Second Circuit had misinterpreted its reference to *Wards Cove*.[172] Looking to the section in the ADEA that contains RFOA, the Court pointed out that its neighbor in that section is a bona fide

of Jackson on heightening pleading standards for employees).

167. *See* Joseph A. Seiner, *Understanding the Unrest of France's Younger Workers: The Price of American Ambivalence*, 38 ARIZ. ST. L.J. 1053, 1094-98 (discussing *Smith* as a case that "erode[s]" age discrimination protection).

168. *Smith*, 544 U.S. at 233-34.

169. *Id.* at 240.

170. 128 S. Ct. 2395, 2400 (2008).

171. *Meacham*, 461 F.3d 134, 140-41 & 144 (2d Cir. 2006), *rev'd*, 128 S. Ct. 2395 (2008).

172. The explanation clarified nothing. The Court said the reference was in the context of a narrower disparate impact theory under the ADEA and to the requirement that a plaintiff identify a specific employment practice. *Id.* at 2405.

occupational qualification, which is an affirmative defense to disparate treatment claims.[173] After declaring RFOA to be an affirmative defense, which would seem to be a favorable result for those seeking ADEA protection, the Court seemed to apologize for the interpretation:

> That said, there is no denying that putting employers to the work of persuading fact-finders that their choices are reasonable makes it harder and costlier to defend than if employers merely bore the burden of production; nor do we doubt that this will sometimes affect the way employers do business with their employees. But at the end of the day, *amici's* concerns have to be directed at Congress, which set the balance where it is, by both creating the RFOA exemption and writing it in the orthodox format of an affirmative defense. We have to read it the way Congress wrote it.[174]

The Court also tried to assuage concerns over these potentially harsh results by explaining that "[i]dentifying a specific practice is not a trivial burden [on plaintiffs]."[175]

Meacham is much like *Smith* in its oxymoronic approach to the ADEA. It relieves a plaintiff of the burden of disproving RFOA. As the Court notes, however, this was not new law, as it previously had referred to RFOA as an affirmative defense.[176] The Court's reaffirmation of that proposition in *Meacham* became necessary only because of its ambiguous reference in *Smith* to *Wards Cove*. The salient feature of this case, however, is the Court's effort to assure amici that plaintiffs will have a very hard time winning disparate impact claims under the ADEA. The Court suggested that not only would plaintiffs have difficulty identifying a specific employment practice, but that employers should easily prevail on the RFOA defense unless the nonage factor is "obscure for some reason."[177] In such a case, the employer would have a harder time satisfying the burden of persuasion on the affirmative defense.[178]

E. Narrowing the ADEA and More Asymmetry—The Troublesome Issue of Pension Benefits

The Court considered whether a retirement plan that made distinctions based on age violated the ADEA in *Kentucky Retirement*

173. *Id.* at 2400 (discussing 29 U.S.C. § 623(f)(1)).
174. *Id.* at 2406.
175. *Id.*
176. *Id.* at 2400 (citing cases).
177. *Id.* at 2406.
178. *Id.*

Systems, Inc. v. EEOC.[179] The state's retirement system provided two routes by which one could reach normal retirement and receive full retirement benefits: 1) 20 years of service regardless of the employee's age; or 2) 5 years of service for those aged 55 or older. The plan had a special provision for state employees in jobs classified as hazardous. If such an employee became disabled and had not reached the age or years of service necessary for normal retirement, the system added the minimum number of imputed years necessary to bring the employee to normal retirement. The number of imputed years that could be added was capped by the number of years the employee had worked. The plaintiff in the case became eligible for normal retirement at age 55, continued to work, and became disabled and retired at age 61. Because the plaintiff had attained normal retirement at age 55, no imputed years were added for him. The plaintiff filed a charge with the EEOC. The EEOC sued, arguing that the plan facially discriminated on the basis of age because it failed to impute years to the plaintiff because he had attained age 55. The district court held that the plan did not violate the ADEA and granted summary judgment. The Sixth Circuit reversed, and the Supreme Court granted certiorari. It seemed obvious that the plan did, on its face, discriminate based on age. Nonetheless, the Supreme Court reached a contrary result, in a 5-4 decision, with the underlying rationale for the result seeming clear from the beginning of the opinion. The Court stated that it granted certiorari "[i]n light of the potentially serious impact of the Circuit's decision upon pension benefits provided under plans in effect in many States . . . ."[180] The majority held that the plan did not violate the ADEA, relying primarily on *Hazen Paper Co*. The majority quoted that case for the proposition that for a disparate treatment claim under the ADEA a plaintiff must prove that age "actually motivated" the decision.[181] The Court specified six circumstances that persuaded it that the differential treatment was not actually motivated by age: 1) age and pension status are analytically distinct concepts; 2) this was not an individual employment decision, but a set of complex rules, and the ADEA in several provisions expressly treats pension benefits "more flexibly and leniently";[182] 3) there was a nonage rationale for the different treatment; 4) although the plan worked to the disadvantage of the older worker in this case, it could work to the advantage of older workers over younger workers in some fact situations; 5) the retirement system was not based on the kind of stereotypical assumptions against which the ADEA was aimed; and 6) it is hard to think of another way to achieve the plan's

179. 128 S. Ct. 2361 (2008). For a more detailed discussion of the case, see Horan, *supra* note 129.

180. *Kentucky Retirement Sys.*, 128 S. Ct. at 2366.

181. *Id.* (quoting *Hazen Paper Co.*, 507 U.S. at 610).

182. *Id.*

objective without cutting benefits to disabled workers, which the state said it would do if it lost the case.[183]

The dissenting opinion, authored by Justice Kennedy, agreed that the imputation provision of the plan sought to achieve a laudable purpose, but found that the majority's opinion bent the law in order to uphold it.[184] The dissent argued that the law required a finding of facial age discrimination, leaving any changes to Congress. The dissent faulted the majority for a misinterpretation of *Hazen Paper Co.*, explaining that when there is facial discrimination, there is no requirement that plaintiff prove that age actually motivated the decision: "[t]he rule [in *Hazen Paper Co.*] is that once the plaintiff establishes that a policy discriminates on its face, no additional proof of a less-than-benign motive for the challenged employment action is required."[185] The dissent cited *Trans World Airlines, Inc. v. Thurston*,[186] an ADEA case, and *Los Angeles Dept. of Water and Power v. Manhart*,[187] a Title VII case, as examples that facially discriminatory policies are illegal without proof of motive.[188] In the six policy arguments set forth by the majority, the dissent found it "difficult to find a clear rule of law."[189] The dissent argued that by adopting a position rejected by all the appellate courts that had considered the issue the majority "creates unevenness in administration, unpredictability in litigation, and uncertainty as to employee rights once thought well settled."[190]

The Court in *Kentucky Retirement System* again encountered the difficult issue of pension plans and the ADEA. It is not surprising that the majority relied on another pension case, *Hazen Paper Co.*, to try to explain why the facially discriminatory provision of the plan did not violate the ADEA. Although one may concede that the challenged provision had a beneficent objective, it did clearly discriminate based on age. The decision narrows coverage under the ADEA, permitting a facially discriminatory rule, apparently because of its laudable objective. This is precisely what the Court has rejected under Title VII in cases such as *Manhart*[191] and *UAW v. Johnson Controls, Inc.*,[192] both of which were cited by the dissent.

183. *Id.* at 2367-69.
184. *Id.* at 2372 (Kennedy, J., dissenting).
185. *Id.* at 2374-75.
186. 469 U.S. 111 (1985).
187. 435 U.S. 702 (1978).
188. *Kentucky Ret. Sys.*, 128 S. Ct. at 2375 (Kennedy, J., dissenting).
189. *Id.* at 2373.
190. *Id.* at 2372.
191. 435 U.S. 702 (1978).
192. 499 U.S. 187 (1991).

III. REVISING THE BLUEPRINT

The Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*[193] is a stark reminder of a message that should have been clear for quite a while: the Architect must draw up a revised blueprint. In 2009, I wrote that it was time for Congress to pass legislation to revise and clarify the proof structures used to analyze both disparate treatment and disparate impact cases.[194] I proposed new legislation because the application of proof structures under disparate treatment and disparate impact has been uncertain for years. Disparate treatment has been chaotic since the Court decided *Desert Palace* in 2003. Disparate impact was not adequately clear before the Civil Rights Act of 1991 amended Title VII, the 1991 Act did not adequately clarify it, and problems were accentuated by the recognition of a different disparate impact analysis under the ADEA in *Smith v. City of Jackson*. With the *Gross* decision, Title VII and ADEA law have diverged in a practically significant way because disparate treatment is the theory under which most litigation occurs.[195] Thus, the need for legislation has become even more urgent in the wake of *Gross*.

In my last proposal, I recommended that Congress should "legislate like it's 1991," meaning that Congress should consider issues and problems regarding the proof structures raised by particular Supreme Court decisions and fix them.[196] However, the Court's decision in *Gross*, following its decision in *Desert Palace*, leads me to recommend that Congress legislate somewhat differently than it did in 1991. The 1991 revision left the blueprint unclear. *Gross* is the third major decision (*Desert Palace* and *Smith v. City of Jackson* being the other two) in which the Court looked to what Congress did and did not do in the Civil Rights Act of 1991 and interpreted it in a way that has made employment law more complex, less certain, and less symmetrical. The Court may have interpreted what Congress intended in the 1991 Act correctly, but that is a dubious proposition. Even if the Court was correct, the Court's continued refusal to provide specific details that the subordinate builders need[197] demonstrates

193. 129 S. Ct. 2343 (2009).

194. *See* Corbett, *Fixing*, *supra* note 41 at 82 (arguing that discrimination law is broken, and it is up to Congress to fix in order to "restore an acceptable level of clarity, predictability, and functionality in employment discrimination litigation").

195. *See* Laura D. Francis, *Attorneys Say Ricci Will Impact Employers More Directly, While Gross Impacts Litigation*, Daily Lab. Rep. (BNA) No. 139, at C-1 (July 23, 2009) (offering evidence that *Gross* pertains primarily to the burden of proof in litigation).

196. Corbett, *Fixing*, *supra* note 41 at 99.

197. The most salient example is the Court's refusal to explain in *Desert Palace* whether the *McDonnell Douglas* pretext analysis is still viable, and if so, how to determine to which disparate treatment cases the pretext and mixed-motives analyses apply. Not only did the Court not answer the question in *Desert Palace*, but it has not granted certiorari to address

that the Architect needs to provide substantial detail in the revised blueprint, leaving little to the interpretation of the Master Builder. The Court's grudging interpretation of the ADEA in *Gross* and other cases reinforces the need for Congress to leave little to interpretation.

A. A Uniform Statutory Proof Structure for Disparate Treatment

First, Congress needs to draw a single proof structure applicable to all disparate treatment cases. In my previous proposal, I urged that Congress codify one proof structure for intentional discrimination claims under all employment discrimination laws and that it should be a variation on the statutory mixed-motives proof structure added to Title VII by the Civil Rights Act of 1991.[198] I reassert my recommendation that Congress revise the second part, the same-decision defense, so that if a defendant satisfies it, it would not bar all monetary recovery by the plaintiff.[199] Under my proposal, for Title VII and ADA claims, the employer's establishing the same-decision defense should preclude either 1) compensatory and punitive damages, injunctive relief of reinstatement (reinstatement, promotion, etc.), and front pay, but not backpay; or 2) only punitive damages and injunctive relief, but not compensatory damages and backpay. Turning to the ADEA, which has a different remedial scheme than Title VII and the ADA, the remedy-limiting effect of the same-decision defense necessarily would be different. Because the ADEA provides for liquidated damages in cases of willful violations, the obvious solution is that the same-decision defense should preclude liquidated damages. The important change is to make some monetary relief available to a plaintiff even if a defendant establishes the same-decision defense. This modification of the same-decision part is important because the same-decision defense in the 1991 Act, although it ameliorated the *Price Waterhouse* effect of precluding liability, still left plaintiffs with virtually no monetary recovery, other than attorney's fees and costs.[200] Before *Desert Palace*, when the mixed-motives analysis was

those issues in the six years since. The most recent denial of certiorari in a case raising the issues was in 2009. White v. Baxter Healthcare Corp., 533 F.3d 381 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 2380 (2009). Similarly, the Court held in *Gross* that the standard of causation under the ADEA is "but for," but it did not say whether the *McDonnell Douglas* pretext analysis should be used to evaluate disparate treatment age claims. Gross v. FBL Fin. Servs., 129 S. Ct. 2343, 2350-51 (2009).

198. 42 U.S.C. §§ 2000e-2(m) & 2000e-5(g)(2)(B) (2000).

199. *See* Corbett, *Fixing*, *supra* note 41, at 107-08 (explaining that "[a]s the next step in the evolution of proof structures, as Congress makes mixed motives the only proof structure applicable in disparate treatment cases, Congress should again alter the same-decision defense").

200. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (making attorney's fees and costs the only

thought to apply to only a small subset of disparate treatment cases (those involving direct evidence), the remedy-preclusion effect did not apply to many cases. If one proof structure is made to apply to all disparate treatment cases, the significant remedy limitation of same decision must be reformed; plaintiffs should not be barred from recovering money after they prove motivating factor. While I think that such an adjustment of the statutory same-decision defense would be an improvement over current law, *Gross* prompts me to urge Congress to carefully examine and debate the issue of cause in fact under the employment discrimination laws.[201]

In light of *Gross*, Congress should consider the question of what level of causation it wants in the statutes, and it should consider repealing the "because of . . ." language, or at least expressly stating that "because of" means "motivating factor" or whatever other causation standard Congress selects.[202] In *Gross*, the majority and dissent debated whether the statutory language requires but-for causation.[203] As the dissent points out, this is a debate that also took place twenty years earlier in *Price Waterhouse*.[204] What neither the majority nor the dissent in *Gross* points out is that the full mixed-motives analysis is still a but-for test; mixed-motives analysis simply bifurcates causation into two parts (motivating factor and same decision) and shifts the burden of persuasion to the defendant on the second part to disprove but-for causation. Justice Kennedy explained this in his dissenting opinion in *Price Waterhouse*.[205] Now that the standard of

possible monetary relief if the defendant proves the same-decision defense).

201. There are substantial arguments that cause-in-fact standards should not be used in evaluating employment discrimination. *See, e.g.*, Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed-Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17 (1991) (discussing the nuances of mixed-motives cases and criticizing the focus on causation). While I do not disagree with that position, I do not think that Congress is likely to abandon the inveterate concept of causation in employment discrimination law.

202. Congress should not leave open the interpretation that one can plead and prove a discrimination claim under either the "because of" provision or the new causation provision. Regarding this problem under current law, see *infra* note 208.

203. *Compare* Gross v. FBL Fin. Servs., 129 S. Ct. 2343, 2350-51 (2009) (age must be a but-for cause of employer's action) *with id.* at 2354-56 (Stevens, J., dissenting) (an adverse action is any discrimination based in whole or in part on age).

204. *Id.* at 2354 (Stevens, J., dissenting).

205. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 283 (1989) ("One of the principal reasons the plurality decision may sow confusion is that it claims Title VII liability is unrelated to but-for causation, yet it adopts a but-for standard once it has placed the burden of proof as to causation upon the employer. This approach conflates the question whether causation must be shown with the question of how it is to be shown. Because the plurality's theory of Title VII causation is ultimately consistent with a but-for standard, it might be said that my disagreement with the plurality's comments on but-for cause is simply academic."). *See also* Katz, *Unifying*, *supra* note 29, at 658 ("The 1991 Act framework imposes liability at the 'motivating factor' level, requiring 'but for' causation only for damages."); Zimmer, *The New Discrimination Law*, *supra* note 48, at 1930-31.

causation debate has been reopened in *Gross*, Congress should consider the issue anew. The dissent in *Gross* explained how difficult it is for a plaintiff to prove but-for causation on the question of whether the mental state of an employer's agents caused them to take employment actions; the dissent contrasted this with what the dissent considered the relatively easier task of torts plaintiffs proving but-for causation in the context of physical, objective facts.[206] The dissent also approved of the shifting burden at part two of the same-decision analysis because the defendant employer is likely to have better access to information regarding whether it would have taken the same employment action in the absence of discrimination.[207] Now that twenty years after *Price Waterhouse* launched the debate, the Court in *Gross* has come full circle and reengaged in the debate over the appropriate standard of causation in employment discrimination cases, Congress should not just patch over the issue, as it did in 1991.[208] Instead, it should debate the issue and decide the standard of causation and ultimately specify it in the statute so that the Court does not spend another twenty years trying to resolve it. The appropriate standard of causation is significant because it is translated into the proof structures used. For example, what standard of causation does the *McDonnell Douglas* pretext analysis incorporate? It usually is said to be but-for causation, but I contend that it actually is sole causation.[209] The mixed-motives analysis initially employs a motivating

206. *Gross*, 129 S. Ct. at 2358 (Stevens, J. dissenting).

207. *Id.* at 2359.

208. One may object to my characterization by pointing out that Congress selected a causation standard, "motivating factor," from among those favored by the various opinions in *Price Waterhouse*, and codified it in Title VII. *See* 42 U.S.C. § 2000e-2(m) (2006) ("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"). The problem, however, is that Congress simply added a new standard of causation without repealing the old "because of" language in the statute. *See* 42 U.S.C. § 2000e-2(a)(1) (2006) ("shall be unlawful . . . to discriminate . . . because of such individual's race, color, religion, sex, or national origin"). Although that approach could be interpreted in different ways, one interpretation is that there are two types of Title VII claims, and a plaintiff must plead under the appropriate provision. *See* White v. Baxter Healthcare Corp., 533 F.3d 381 (6th Cir. 2008) (specifying under which section each of plaintiff's claims was brought), *cert. denied*, 129 S. Ct. 2380 (2009); *see also* Francis, *supra* note 195 (discussing attorney Eric Dreiband's suggestion of a defense litigation strategy of pressing plaintiffs to choose under which section they are pursuing a claim). Professor Harper argues that Congress in the 1991 Act did not intend for the motivating factor provision to be a separate cause of action for discrimination, as it was construed in *White*, and Congress needs to clarify this in new legislation. *See* Harper, *supra* note 46, at 92-93 & 134-36.

209. *See* Corbett, *Allegory*, *supra* note 48, at 1568 (arguing that it may be more accurate to see the *McDonnell Douglas* pretext analysis as incorporating sole-factor causation); *cf.* Grubb v. Southwest Airlines, 296 F. App'x. 383, 389 (5th Cir. 2008) (characterizing the *McDonnell Douglas* test as the more restrictive sole motive test). *But see* Harper, *supra* note 46, at 76-77 (arguing that the *McDonnell Douglas* analysis rejects both sole and sufficient

factor standard of causation and then but-for causation when it shifts the burden to the employer on the same-decision defense. I doubt Congress will abandon some notion of but-for causation, having embraced it in the two-part mixed-motives analysis in the 1991 Act (essentially affirming the Court's cause-in-fact debate in *Price Waterhouse*). If the standard Congress chooses is but-for causation, the mixed-motives analysis incorporates that standard well. Given the Court's interpretation of "because of" as meaning "but for" in *Gross* and the potential for courts to interpret the statute as countenancing separate "because of" and "motivating factor" claims, Congress should repeal the "because of" language. Alternatively, if Congress keeps "because of" out of respect for history, it should render it ornamental only by expressly providing that "because of" means the selected causation standard.

In light of the discussion of causation standards in *Gross*, it would be a propitious time for Congress to broaden the causation debate beyond causation standards that heretofore have been used in employment discrimination law. The causation standards were borrowed from tort law. An innovation in tort law that would further ameliorate the difficulty and uncertainty of plaintiffs proving cause-in-fact regarding the employer's mental state is permitting fact finders to discount recoveries based on the percentage chance that discrimination occurred. This is a version of the lost-chance-of-survival analysis that has made modest gains since being introduced in medical malpractice wrongful death cases in tort law.[210] The flipside of lost chance is increased risk, which has enjoyed some limited acceptance in some toxic torts and fear-of-contracting-disease cases.[211] One model for using lost chance/increased risk in analysis of employment discrimination cases would be to incorporate such an approach into the current statutory mixed-motives analysis: after the two current steps, motivating factor and same decision, the fact finder could decide on a percentage basis to what extent the employer persuaded on its same-decision defense, if at all, and reduce the recovery by that percentage. I would apply the percentage reduction to all monetary relief—compensatory

causation standards).

210. The seminal article on this issue is Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences, 90 YALE L.J. 1353 (1981).* The first reported judicial decision to adopt the approach was *Herskovitz v. Group Health Cooperative of Puget Sound*, 664 P.2d 474 (Wash. 1983) (en banc).

211. *See, e.g.*, John Makdisi, *Proportional Liability: A Comprehensive Rule to Apportion Tort Damages Based on Probability*, 67 N.C. L. REV. 1063 (1989) (arguing for a proportional liability rule in torts cases); Tori A. Weigand, *Loss of Chance in Medical Malpractice: The Need for Caution*, 87 MASS. L. REV. 3, 18 (2002) (urging caution in applying loss of chance in medical malpractice cases in Massachusetts).

and punitive damages and backpay.[212] One of the chief arguments in favor of lost chance in medical malpractice cases is that it avoids the all-or-nothing approach of other causation analyses.[213] Moreover, a lost chance/increased risk approach would ameliorate the misfit between employment discrimination law and causation standards measuring the causative role of mental states.[214] Essentially, a lost chance/increased risk model asks the fact finder to decide how likely it is that discrimination occurred, and it adjusts the damages awarded to that probability.[215] Although lost chance has been applied almost exclusively in medical malpractice cases, it has been applied in some employment discrimination cases.[216]

In the end, I think Congress will decide on a more well-established standard of causation, opting for the two-stage motivating factor and same-

212. There are other ways that lost chance could be implemented to analyze employment discrimination cases. *See* Paul M. Secunda, *A Public Interest Model for Applying Lost Chance Theory to Probabilistic Injuries in Employment Discrimination Cases*, 2005 WIS. L. REV. 747, 784-91 (2005) (advancing a "public interest approach for remedying probabilistic injuries in employment discrimination litigation").

213. *See* King, *supra* note 210, at 1354 (discussing loss of a chance of achieving a favorable outcome or avoiding a negative outcome as a compensable loss in tort law).

214. *See*, *e.g.*, Gudel, *supra* note 201 (discussing the role of causation in mixed-motives cases).

215. Professor Katz discusses tort law's comparative fault allocation scheme as a way of ameliorating all-or-nothing windfalls to either plaintiffs or defendants, but he recognizes that there is no precedent for a comparative fault regime in employment discrimination law. Katz, *Gross Disunity*, *supra* note 16, at 887-88. I think that comparative fault is not as well-suited to employment discrimination law as lost chance/increased risk because often the nondiscriminatory reasons are not fault based, such as when an employer takes an adverse employment action due in part to economic reasons. Still, a comparative fault regime that permits assignment of a percentage to the discriminatory reason could achieve the same result as lost chance/increased risk. Regardless of what it is called, a system that permits assignment of a percentage chance that discrimination caused an action would improve upon the all-or-nothing problem of current standards. Although one may argue that the current statutory mixed-motives analysis is not all or nothing because the same-decision defense does not avoid liability, it does preclude almost all monetary relief for the plaintiff.

216. *See* Secunda, *supra* note 212 (discussing the theory and its application in a few U.S. employment discrimination cases). In the United Kingdom, a version of lost chance is used in cases in which an employer that fails to follow termination procedures claims that even if it had followed the procedures, it would have reached the same result. This is known as the *Polkey* reduction after the case *Polkey v. A E Dayton Servs. Ltd.*, [1988] A.C. 344 H.L. The Employment Appeal Tribunal discussed the *Polkey* reduction in *Mason v. The Governing Body of Ward End Primary School*, Appeal No. UKEAT/0433/05/ZT (Apr. 12, 2006).

> It is common ground that if, applying *Polkey*, the Tribunal decided that there was a less than 50/50 chance of the employee being dismissed, the dismissal is unfair and an appropriate award would be made. If there was a 33% chance of dismissal, a compensatory award would be reduced by 33%.

*Id.*at ¶ 30. The *Polkey* doctrine was legislatively abrogated by the Employment Act of 2002. *Id.* It was restored by the 2007 Employment Bill.

decision defense with some remedy-reducing effect. It is important, however, for the remedy-limiting effect of the same-decision defense to be reduced. The current statutory version gives the defendant an exorbitant windfall for disproving but-for causation.

I reassert my argument that the same proof structure be made applicable to Title VII, the ADEA, and the ADA. This would abrogate the holding of *Gross*. The Court majority explained that it must require but-for causation, with no shifting burden, based on the "because of . . . age" language of the ADEA. The Court was clear that the mixed-motives analysis does not apply under the ADEA. How about the *McDonnell Douglas* pretext analysis? The Court did not say; in fact it said that it had never answered that question: "[T]he Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas Corp. v. Green* . . . utilized in Title VII cases is appropriate in the ADEA context."[217] After *Gross*, it seems that none of the established proof structures should apply to the ADEA, although courts are clinging to the hoary *McDonnell Douglas* analysis.[218] Unless Congress chooses to dispense with all proof structures, the same one should apply to disparate treatment claims under all the laws. The only reason to apply different proof frameworks is to make it relatively harder or easier for plaintiffs to recover under a given law.[219] The Court in *Gross* interpreted the blueprint as making it harder for age discrimination plaintiffs to recover than plaintiffs asserting claims under Title VII. I do not think that Congress intended to make it more difficult to recover under one employment discrimination law, and I do not think it will make such a choice in new legislation, particularly in the context of intentional discrimination.[220] Indeed, the Court in *Hazen Paper Co. v. Biggins* suggested that age discrimination might not encompass disparate impact, but it said that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA."[221] For intentional discrimination, a uniform proof structure should apply. This is simple,[222]

217. *Gross*, 129 S. Ct. at 2349 n.2.

218. *See* cases cited *supra* note 27 (cases continue to apply *McDonnell Douglas* pretext analysis).

219. *See* Katz, *Gross Disunity*, *supra* note 16 at 869 (pointing out that if Congress thought race and sex discrimination were more prevalent than age discrimination, it "might choose to make it easier to prove race or sex discrimination than age discrimination by adopting a less restrictive definition of "because of" in Title VII and a more restrictive definition in the ADEA").

220. For a discussion of the Protecting Older Workers Against Discrimination Act, see *infra* Part III.D.

221. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

222. The *Gross* dissent criticized the majority for labeling the *Price Waterhouse* mixed-motives analysis as complex and practically difficult, while creating a situation in which courts and juries in cases involving plaintiffs asserting both ADEA and Title VII claims will have to evaluate the claims under different frameworks. *Gross*, 129 S. Ct. at 2357 (Stevens,

symmetrical, and a good policy decision.

B. A Uniform Statutory Proof Structure for Disparate Impact

In my earlier proposal, I recommended that Congress modify the statutory disparate impact analysis in Title VII and make that analysis applicable to the ADEA as well.[223] Without rehashing too much detail, I recommended tweaking the prima facie case, eliminating job related from the business necessity/job-relatedness defense, and merging alternative employment practice into business necessity.[224] Congress could provide that this same analysis applies to the ADEA. If it does so, it should repeal the reasonable factors other than age (RFOA) defense in the ADEA because the Court in *Smith v. City of Jackson* and *Meacham v. Knolls Atomic Power Laboratory* indicated that RFOA is a harder defense to satisfy than business necessity.[225] I argue for this uniform proof structure less forcefully than I do for uniformity regarding disparate treatment. When the Court explained the distinctions between age discrimination and race (and perhaps sex) discrimination in *Hazen Paper Co.*, the Court suggested that these differences might manifest themselves in the nonapplicability of disparate impact to the ADEA. I think there is a risk that several types of employment decisions, such as reductions in force and pension and retirement plans, routinely impact workers who are forty or older more than younger employees, and such decisions may subject employers to liability under disparate impact. Still, the Supreme Court in *Smith v. City of Jackson* held that disparate impact applies to the ADEA. I think that Congress will affirm that result. To do otherwise would render the ADEA less protective than Title VII. However, the current ADEA disparate impact analysis established in *Smith* and *Meacham* should not be maintained. It is ambiguous (e.g., What constitutes an employment practice under *Smith*?[226]), and, as the Court suggested in *Meacham*,[227]it seems virtually impossible for a plaintiff to win. This sham theory of discrimination should not be maintained. Congress is likely to choose to maintain the current state of the law--that the disparate impact theory is applicable to the ADEA. If it does, I think the same analysis should apply,

J., dissenting).

223. *See* Corbett, *Fixing*, *supra* note 41, at 111-12 (describing how Congress might harmonize Title VII and ADEA differences).

224. *Id.* at 112-15.

225. Smith v, City of Jackson, 544 U.S. 228, 240-41 (2005); Meacham v. Knolls Atomic Power Co., 128 S. Ct. 2395, 2406 (2008).

226. *See supra* note 149 (describing plaintiff's unclear burden under ADEA).

227. *See supra* Part II.D (discussing how the *Meacham* court suggested that plaintiffs would have difficultly identifying a specific employment practice and that employers would usually easily prevail on the RFOA defense).

in the interest of simplicity and symmetry.

C. The Less Protective ADEA

The issue of fixing the proof structures is the most important issue for Congress to address. The proof structures are applied in litigation on a daily basis—from evaluating the strength of a case, to conducting discovery, to ruling on dispositive motions. By fixing the proof structures along the lines I have suggested, Congress would address the most significant issues and make employment discrimination law simpler, more certain, and more symmetrical. It also would overturn several of the Supreme Court decisions that have narrowed the ADEA: *Smith*, *Meacham*, and *Gross*. Of the remaining cases, *Hazen Paper Co.* does not need to be addressed because it laid the foundation for different law under Title VII and the ADEA and suggested that disparate impact might not apply to the ADEA, a suggestion later rejected in *Smith v. City of Jackson*. For the other two cases that narrowed the ADEA, it is not clear to me that Congress should legislate regarding *General Dynamics Land Systems* or *Kentucky Retirement Systems*.

Kentucky Retirement Systems dealt with pensions and retirement, two issues that have caused ongoing problems under the ADEA. While I find the case troubling because it holds that a facially discriminatory policy does not violate the ADEA, the result in the case is probably good. I doubt Congress would choose to abrogate the decision. Congress could codify the result in the case or create a statutory exemption for rules in pension plans, but with the Court's decision as controlling precedent for similar cases, it does not seem advisable for Congress to try to craft a general exception. If the case were likely to insulate other facially discriminatory policies, Congress may need to act, but there seems to be adequate limiting language in the majority's opinion. Unless *Kentucky Retirement Systems* is relied on by lower courts to further constrict ADEA coverage, I do not think Congress should address it.[228]

Congress should consider the reverse age discrimination issue of *General Dynamics Land Systems*, but I do not have a strong position on whether Congress should overturn the result. Reverse discrimination in the context of race is a controversial topic that elicits strong views.[229] Imagine the firestorm that would be ignited if the Supreme Court held that whites could not sue for race discrimination or men could not sue for sex

228. *But see* Horan, *supra* note 129 at 161-62 (arguing that, despite the limiting language in the case, lower courts will struggle with how it applies to cases in which age is one of several factors used to determine benefits in policies or practices).

229. Consider, for example the news coverage and heated debates surrounding the firefighter testing case, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

discrimination. Yet, there has been no strong reaction to the Court's decision that the ADEA does not cover discrimination against younger people within the ADEA's protected class.[230] Congress is unlikely to be lobbied much, if at all, to overturn the decision. The strongest criticism of the Court's decision has not been made on policy grounds, but on grounds of interpreting the plain meaning of statutory language and interpreting the ADEA consistently with Title VII.[231] If Congress declared reverse age discrimination actionable, I think there is a possibility that it would generate a substantial number of claims and lawsuits. As *General Dynamics Land Systems* indicates, employers, in allocating resources and addressing retirement issues, sometimes do offer benefits to older workers that they do not offer to younger workers. Furthermore, with an older workforce and people staying in jobs longer, older workers may have more clout than in the past. Although my first inclination is to argue for symmetry between Title VII and the ADEA, this is an issue for which there is currently little pressure for change. Accordingly, I think Congress should not abrogate *General Dynamics Land Systems* at this time.

Although the Court's narrowing of the ADEA from *Hazen Paper Co.* to *Gross* needs to be addressed by Congress, it is the more stringent ADEA proof structures created in *Smith, Meacham,* and *Gross* that are the heart of the problem.

D. The Protecting Older Workers Against Discrimination Act

Congress's immediate response to *Gross* was the Protecting Older Workers Against Discrimination Act.[232] The Act chastises the Court in *Gross* for undermining Congress's reliance on a long line of court cases interpreting Title VII and the ADEA consistently.[233] The Act further states that the Supreme Court in *Gross* "eroded this long-held understanding of consistent interpretation and circumvented well-established precedents."[234] The crux of the Act essentially makes the mixed-motives analysis of the 1991 Act applicable to the ADEA by inserting the language that amended

230. *See* Seiner, *supra* note 167, at 1093-94 (contrasting the apathy of U.S. young people to erosions of employment protection for them with the violent reactions of French young people).

231. *See General Dynamics Land Sys.*, 540 U.S. at 602 (Thomas, J., dissenting) (arguing that the plain language mandates that the younger workers should have been able to sue for discrimination against them in favor of older workers); *see also* Lacy, *supra* note 129, at 403 (arguing that Congress intended to allow discrimination claims under the ADEA by any person in the protected class).

232. S. 1756, 111th Cong., 1st Sess. (2009); H.R. 3721, 111th Cong., 1st Sess. (2009).

233. *Id.* at § 2(3).

234. *Id.*

Title VII[235] into the ADEA.[236] It further provides that direct evidence is not required to trigger the mixed-motives analysis[237] and that the *McDonnell Douglas* evidentiary framework as well as "every method for proving . . . such violation" is available to plaintiffs.[238]

While the Act would overturn *Gross* and accomplish some of the changes that I recommend, it does not go far enough in achieving symmetry,[239] and it makes the bad decision of preserving the *McDonnell Douglas* pretext analysis by ensconcing it in statutory language. In short, the Act takes yet another piecemeal approach to reforming employment discrimination law by overturning a Supreme Court decision with which Congress disagrees. Congress's failure to be the Architect with understanding and vision of the design for the Tower is indicated by the limited scope of the Act and its preservation of the pretext proof structure, which does not fit well with the mixed-motives framework.

It is incumbent on Congress to play the role of Architect by providing a plan for the courts rather than tearing down a part of the structure and leaving much of the asymmetry and incongruity in place.

CONCLUSION

The great tower of employment discrimination law is a project in need of a new blueprint. The Master Builder has been interpreting the Architect's 1991 drawing in ways that have confounded the subordinate builders. The result is that employment discrimination law has become more complex, less certain, and asymmetrical. It is hard to believe that this is the tower envisioned by the Architect. Unless Congress steps in to change and clarify the law, the builders are likely to continue babbling in different tongues as they try to build on structures such as *Desert Palace*, *Gross*, and *Smith*. That is no way to continue work on an already impressive tower that the Architect envisioned would reach the heavens.

235. 42 U.S.C. §§ 2000e-2(m) & 2000e-5(g)(2)(B).

236. S. 1756; H.R. 3721 § 3.

237. *Id.*

238. *Id.*

239. *See* Katz, *Gross Disunity*, *supra* note 16, at 889 (arguing that new legislation must make clear the applicability of the same causation standard to the disparate treatment theory under all statutes); *see also* Harper, *supra* note 46, at 144 ("Congress should meet the challenge to federal employment law posed by the Court's decision in *Gross*, not as it met the Court's *Price Waterhouse* decision two decades earlier, by enacting a reactive provision for only the statute addressed in the decision.").