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Babbling About Employment Discrimination Law: Does the Builder Understand the Blueprint for the Great Tower?

William R. Corbett
Louisiana State University Law Center, bill.corbett@law.lsu.edu

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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."
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."
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]

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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); s*ee also* Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 307-08 (2004) (stating that the statutes do not define "discrimination," that "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").

[2] *Genesis* 11:3-9. There are numerous versions of the great tower story, including several in Judaea-Christian sources, the Quran and Islamic traditions, and Sumerian lore.

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 and proof structures or analytical frameworks to effectuate the prohibition in Title VII (and the other statutes) against refusing to hire, firing, or otherwise discriminating in employment "because of . . . [the protected characteristic]."[4] The theories and proof structures inform employers, lawyers,

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

and judges how courts at various stages of litigation will analyze employment decisions to determine if they were made "because of" the protected characteristic. Congress from time to time has revised the blueprint, sometimes adding new structures,[5] and sometimes tearing down work that the Supreme Court directed.[6]

So, think of employment discrimination law as a construction project—the building of a great tower. Congress is the Architect, the Supreme Court is the Master Builder, and the lower courts are the subordinate builders. From the beginning, it was an astoundingly ambitious project—one that many would describe as audacious. 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 building the theories and frameworks on the foundation in one of its first employment discrimination decisions, *Griggs v. Duke Power Co*.[7] The project of building has continued apace since *Griggs*. The Court has built two major theories of discrimination, disparate treatment[8] and disparate impact,[9] with proof structures[10] under

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[5] Congress has passed new laws covering additional characteristics: the Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§621-633a); 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 (to be codified as amended in scattered sections of 26, 29 and 42 U.S.C.).

[6] For example, Congress reacted to overturn Supreme Court decisions in the following statutes: the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)); the Civil Rights Act of 1991, Pub. L. No. 102-166, 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] 401 U.S. 424 (1971).

[8] Disparate treatment is intentional discrimination. *See, e.g*., International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[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 impact on a protected group, and the practice cannot be justified. *See, e.g*., *id.*

[10] "Proof structure" refers to what must be proven, in what order, and on whom the burden rests at each stage. The Supreme Court in the decision in which it announced the *McDonnell Douglas* or pretext proof

each. In *Griggs* the Court built a proof structure for disparate impact. In *McDonnell Douglas* v. *Green*[11] and *Price Waterhouse v. Hopkins*[12] it built two for disparate treatment: pretext and mixed motives, respectively. 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*.[13] The Architect occasionally has stepped back in and done some renovation when it did not like the Master Builder's construction,[14] 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.[15] The minor variations in the law applicable to the different employment discrimination statutes might be likened to different dialects.[16] The common language has facilitated the building project.[17] With a common language, the builders built a tower

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structure described the thing it was creating: "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 (1973).

[11] 411 U.S. 792 (1973).

[12] 490 U.S. 228 (1989).

[13] 490 U.S. 642 (1989).

[14] *See supra* note 6.

[15] *See, e.g.,* David J. Willbrand, Comment, *Better Late Than Never? The Function of After-Acquired Evidence in Employment Discrimination Litigation*, 64 U. CIN. L. REV. 617, 693 (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."); *see also* 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 mechanistically applied without sufficient exploration of difference").

[16] Some variations are required by the blueprints drawn by Congress, and others have been fashioned by the Court as it has built. For example, statutory differences include the following: 1) the bona fide occupational qualification 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) Congress in the Civil Rights Act of 1991 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).

[17] 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 applied them to

that was largely symmetrical regardless of which part of it one viewed--Title VII, the Age Discrimination in Employment Act (ADEA), or the Americans With Disabilities Act (ADA).[18] 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 issuing modifications to the original blueprint; with the Civil Rights Act of 1991 (or "the 1991 Act"),[19] Congress demolished some of the structure and issued modifications of the original blueprint. It is the Architect's 1991 plan and its subsequent interpretation by the Master Builder that has brought us to the 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*.[20] It was a structure that deviated substantially from the work that had gone before it, but the Court said it was required by the new blueprint. The new structure, in addition to being different from what had gone before it, did not have sharp lines. It was hard for the subordinate builders (lower courts) to understand *Desert Palace* and to know how to build on it. In 2009 the Supreme Court added another structure, 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--*Gross v. FBL Financial Servs., Inc*.[21]

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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, which is larger because of the cross-pollination.

[18] 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).

[19] 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. 136 Cong. Rec. S16,418-19 (daily ed. Oct. 22, 1990). 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.

[20] 539 U.S. 90 (2003).

[21] 129 S. Ct. 2343 (2009).

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.[22] More surprisingly, the 1991 plan has prompted the Master Builder to reinterpret the original blueprint and demolish exiting structures, telling the builders that they misunderstood the original blueprint.[23] 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—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 the part of the tower on which they are working—Title VII or the ADEA. This change in plans would be confounding enough, 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 done, but declined to give detailed instructions. The Court was more concrete in its pronouncement in *Gross*, but still not clear enough. Third, not only is the Court requiring different structures for the ADEA and Title VII, *Gross* is the latest in a series of cases instructing that the ADEA portion of the tower is to be much less prominent than the Title VII part.

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

[22] 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.

[23] 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. *See infra* Part I.B.

build on the recent structures. 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 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 that the Architect intended. 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

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 it accurately and expeditiously, although some measure of complexity[24] and uncertainty[25] is necessary

[24] 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 also are 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.

[25] 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 raises the costs

and may even be beneficial. A high degree of symmetry among the various laws and covered characteristics also may be desirable, as this may improve simplicity and certainty, although complete uniformity is not appropriate because discrimination based on the various protected characteristics is not a monolithic phenomenon,[26] and the goals of and rationales for the laws differ somewhat.[27] 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.

With a national demographic of a large and increasing percentage of older people[28] and a large percentage of the workforce composed of older workers,[29] the ADEA has become an increasingly significant law. One measure of its increasing

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and decreases the efficiency of the law. *See, e.g.*, Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 652 (2008). 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.

[26] *See, e.g.*, Hazen Paper Co. v. Biggins, 507 U.S. 604, 610-11 1993); *see also* Reaves, *supra* note 15 (explaining why it is inappropriate to import all Title VII race discrimination law into the ADEA).

[27] S*ee, .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).

[28] *See generally* CONGRESSIONAL RESEARCH SERVICE, THE CHANGING DEMOGRAPHIC PROFILE OF THE UNITED STATES (Updated June 7, 2006), available at http://fpc.state.gov/documents/organization/68820.pdf.

[29] *See generally* Bureau of Labor Statistics, Older Workers: Are There More Older People in the Workplace, http://www.bls.gov/spotlight/2008/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).

significance is the increase in volume of claims filed and ensuing litigation.[30] Several recent Supreme Court decisions have interpreted the ADEA as being a less prominent part of the tower. It is not clear that this is consistent with Congress's plan.

I have argued that the uncertainty and complexity introduced into employment discrimination law by the Master Builder in *Desert Palace, Inc. v. Costa*[31] six years ago should have been vexing enough to the Architect to prompt Congress to work on the blueprint.[32] The Court's recent decision in *Gross v. FBL Financial Servs., Inc.*[33] 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. *Gross* should make it abundantly clear that Congress must draft a clear blueprint addressing the issues rather than simply tearing down particular Supreme Court decisions. If the Builder is reading the plans incorrectly, it is incumbent on the Architect to issue new plans which detail how the work is to proceed. Even if the Master Builder is correctly interpreting the blueprint, it is not giving clear and detailed instructions to its builders, and the Architect should provide clarity. In doing so, the Architect should learn

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[30] 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 agency. *See* http://eeoc.gov/stats/charges.html. For 2008, the EEOC reported a 28% increase in age charges filed over the number filed in 2007, which was the largest increase among all types of charges. *See* http://www.eeoc.gov/stats/adea.html; *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. S*ee* Reaves, *supra* note 15, at 843 & n.7 ("[O]lder workers are the fastest growing group of discrimination plaintiffs.").

[31] 539 U.S. 90 (2003).

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

[33] 129 S. Ct. 2343 (2009).

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.

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.*[34] 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, gave up 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

[34] 376 F.3d 305 (5th Cir. 2004).

In *Desert Palace*,[35] the plaintiff sued her employer claiming that she 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.[36] The direct evidence requirement was based on Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*,[37] 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.[38] In a very short opinion, the Supreme Court unanimously affirmed, relying upon the Civil Rights Act of 1991 as abrogating the direct evidence requirement emanating from *Price Waterhouse*.[39] 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

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[35] 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 Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 102-03 (2004); 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); Michael J. Zimmer, *The New Discrimination Law*: Price Waterhouse *is Dead, Whither* McDonnell Douglas?, 53 EMORY L.J. 1887, 1892-1909 (2004); William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549 (2005) [hereinafter Corbett, *Allegory*]; William R. Corbett, McDonnell Douglas, *1973-2003: May You Rest in Peace*? 6 U. PA. J. LAB. & EMP. L. 199 (2003).

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

[37] 490 U.S. 228 (1989).

[38] *Costa*, 299 F.3d at 854.

[39] 539 U.S. 90 (2003).

motivating factor for any employment practice.'"[40] About the continuing viability of the pretext analysis, the Court indirectly said 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."[41]

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

The plaintiff had worked for the defendant employer for thirty-two years. In 2003, when 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 job of position-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

[40] *Id.* at 101 (quoting 42 U.S.C. § 2000e-2(m)).
[41] *Id.* at 94 n.1. Although the Court said nothing about pretext, 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.

> 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."[42]

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,[43] Congress did not similarly amend the ADEA. 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 "motivating factor" to be the applicable causation standard. 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.

[42] *Gross*, 526 F.3d 356, 359 (8th Cir. 2008).
[43] 42 U.S.C. §§ 2000e-2(m) & 2000e-5(g)(2)(B).

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?[44] 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.[45] 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.[46] When it enacted the Civil Rights Act of 1991, Congress amended Title VII to add the mixed-motives analysis, but it did not similarly amend the ADEA.[47] 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.[48] The Court thus 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. Lower courts uniformly had assumed the applicability of the *Price Waterhouse* mixed-motives analysis to ADEA claims,[49] and there was nothing in the 1991 Act that seemed to upset that state of the law. The Court rationalized the inapplicability of *Price Waterhouse* on the basis of the

[44] Petition for Certiorari, Gross v. FBL Fin. Servs., Inc., 2008 WL 4462099 (No. 08-441).
[45] *Gross*, 129 S. Ct. at 2346.
[46] *Id.* at 2349.
[47] *Id*.
[48] *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.").
[49] *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, 548 (2008).

following: 1) in the 1991 Act Congress amended Title VII, adding a statutory mixed motives analysis, but it did not similarly amend the ADEA; 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.[50] The Court explained this interpretation of "because of" based on dictionary definitions, *Hazen Paper Co. v. Biggins*,[51] 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.[52] From these sources, the Court gleaned that the "ordinary" meaning of the statutory language "because of" is but-for causation. Having concluded 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.[53] Locking in a uniform analysis for intentional discrimination age 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.[54]

Having decided the case, the Court added comments about its strict textual approach and its distaste for the *Price Waterhouse* analysis. After reminding that it does not consider *Price Waterhouse* controlling, the majority stated that "it is far from clear

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[50] *Gross,* 129 S. Ct. at 2351.
[51] 507 U.S. 604 (1993).
[52] *Gross*, 129 S. Ct. at 2350.
[53] *Id*. at 2351.
[54] *Id*.

that the Court would have the same approach were it to consider the question today in the same instance."[55] 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."[56] The Court concluded by clearly stating its holding: "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 employment action."[57]

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, the dissent criticized the majority for not following "prudential Court practices"[58] by answering a question on which certiorari was not granted and which was raised in the respondent's brief.[59] Second, the dissent disagreed with the majority's interpretation of "because of . . . age" as meaning but-for causation.

On substantive grounds, the dissent 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.[60] 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

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[55] *Id* at 2351-52.
[56] *Id*. at 2352.
[57] *Id.*
[58] *Id*. at 2353 (Stevens, J., dissenting).
[59] *Id*.
[60] 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."

interpretations of Title VII to the ADEA. The dissent disagreed with the majority that *Hazen Paper Co.* and *Sanderson Plumbing Products v. Reeves*[61] support a but-for causation standard for the ADEA. Rather, the dissent read those cases as support for ADEA standards generally conforming to Title VII standards. Whereas the majority interpreted Congress's not amending 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.[62] The dissent drew support from the Court's 2005 decision in *Smith v. City of Jackson*.[63] In *Smith* the Court held that because Congress did not, in the Civil Rights Act of 1991, codify a disparate impact proof structure in the ADEA as it did in Title VII, the existing *Wards Cove [Packing Co. v. Atonio]*[64] version continued to apply to the ADEA. Finally, the dissent countered the majority's point that the *Price Waterhouse* proof structure is too complicated and thus more trouble than it is worth by pointing out that Congress codified a modified version of it in Title VII.[65] Moreover, the dissent argued that the majority's concern 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.[66]

Turning to the question on which certiorari was granted, the dissent stated that it would extend the holding of *Desert Palace*, a Title VII case, to hold that direct evidence

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[61] 530 U.S. 133 (2000).
[62] *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. *See id.* n.6.
[63] 544 U.S. 228 (2005).
[64] 490 U.S. 642 (1989).
[65] *Gross*, 129 S. Ct. at 2356-57.
[66] *Id.* at 2357.

is not required for a mixed-motives jury instruction.[67] The dissent 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, the dissent argued that courts that have treated Justice O'Connor's concurrence as controlling have been wrong.[68] Regardless, the dissent 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, the 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.[69]

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. The dissent 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.[70] Because the employer is in a better position than the employee to know its motives, the dissent 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.[71]

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[67] *Id*.
[68] *Id.* 2357; *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).
[69] *Gross*, 129 S. Ct. at 2358.
[70] *Id*. at 2358-59 (Breyer, J., dissenting).
[71] *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.[72] 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*[73] 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.[74] 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.[75] 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.

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[72] 539 U.S. 90 (2003).
[73] 411 U.S. 792 (1973).
[74] "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 .
[75] *See* Prenkert, *supra* note 49, at 512; Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of* McDonnell Douglas, 44 HOUS. L. REV. 349, 372-74 (2007); Corbett, *Fixing supra* note 32.

Six years after *Desert Palace* was decided, the Court 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,*[76] it appeared to be *Desert Palace* Part II. As decided by the Court, 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 which divides cases between pretext and mixed-motives analyses still applies to ADEA claims, even though it no longer applies to Title VII. Different treatment of the two employment discrimination laws was feasible because the Civil Rights Act of 1991, on which the Court focused its 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, 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.[77]

The comparisons and contrasts between *Desert Palace* and *Gross* are numerous and striking. The same issue was before the Court, 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

[76] 526 F.3d 356 (8th Cir.), *cert. granted*, 129 S. Ct. 680 (2008).
[77] *Gross*, 129 S. Ct. at 2352.

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. In contrast, in *Gross* the Court announced what most courts and commentators likely 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.[78] Because *Gross* ruled broadly, for the ADEA there now is a single analysis based on a single causation standard, but 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 plaintiffs under Title VII, while *Gross* moved it in a positive direction for 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 left us uncertain about *McDonnell Douglas*.

Considered together, *Desert Palace* and *Gross* redefine the proof structures or analyses applicable to disparate treatment claims under Title VII and the ADEA.

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[78] One circuit court so held. *See* Rachid v. Jack in the Box, Inc., 376 F.3d 305 (5th Cir. 2004). For discussion of *Rachid*, see *infra* Part I.D.

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 a not a uniform across Title VII and the ADEA because the ADEA recognizes no mixed-motives proof structure. Thus, predictions of potential uniformity in analysis of disparate treatment claims among the employment discrimination statutes,[79] 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 *Desert Palace* decision was rendered and five years before *Gross*, the Fifth Circuit confronted blueprint interpretation issues in *Rachid v. Jack in the Box.*[80] 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 mean 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

[79] *See, e.g.*, Michael J. Zimmer, *Chaos or Coherence: Individual Disparate Treatment Discrimination and the ADEA*, 51 MERCER L. REV. 693 (2000); Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563 (1996); Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643 (2008); Robert A. Kearney, *The High Price of* Price Waterhouse: *Dealing with Direct Evidence of Discrimination*, 5 U. PA. J. LAB. & EMP. L. 303, 310, 312 (2003); Benjamin C. Mizer, Note, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 MICH. L. REV. 234 (2001).

[80] 376 F.3d 305 (5th Cir. 2004).

for summary judgment. Plaintiff argued that the trial court had erroneously evaluated his case under the *McDonnell Douglas* pretext analysis, but that it should have used the mixed-motives analysis of *Price Waterhouse* and *Desert Palace*. 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 changes the *Price Waterhouse* and *McDonnell Douglas* analyses.[81] The Fifth Circuit rendered two significant holdings: 1) Whatever changes *Desert Palace* wrought in the two proof structures under Title VII, the same result should apply under the ADEA; and 2) *Desert Palace* did alter the two proof structures, and the Fifth Circuit fashioned a new single analysis merging the two. The first holding would be repudiated by the Supreme Court 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 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. 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. 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 specified no such requirement. 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

[81] *Id.* at 310.

termed "the modified *McDonnell Douglas* analysis" in which the first two parts of the pretext analysis remain unchanged, and only the third part is modified. At part three, a plaintiff may prevail by proving either pretext or motivating factor.[82] If the plaintiff proves motivating factor, then the same-decision defense is available to the defendant.

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 in *Smith v. City of Jackson*,[83] and the Supreme Court in *Gross* distinguished its decision in *Smith*, which overruled the Fifth Circuit's decision.[84] The Fifth Circuit obviously did not read the blueprint as the Supreme Court does. 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. At least, the Fifth Circuit 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.

There is not much to criticize about what the Supreme Court said in *Desert Palace.* It was, after all, a unanimous decision. However, the Court has been

[82] *Id*. at 312.
[83] 351 F.3d 183 (5th Cir. 2003), *rev'd*, 544 U.S. 228 (2005).
[84] 544 U.S. 228 (2005). For discussion of *Smith v. City of Jackson*, see *infra* Part II.C.

appropriately criticized for what it did not say. Regarding what the Court said, was the Court correct in interpreting the 1991 Act as abrogating the *Price Waterhouse* line between pretext and mixed-motives cases? It is not an unreasonable interpretation, but also not a necessary interpretation. It seems just as likely, and perhaps more likely, that Congress in the Act 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.[85] Even so, the direct/circumstantial dividing line was chimerical, yielding a variety of approaches to distinguishing direct evidence from circumstantial evidence,[86] and it is likely that no one sheds a tear for the Court's abolishing a bad standard. However, the Court has been faulted for saying too little.[87] Lower courts did not know after *Desert Palace* whether there were two proof structures for analyzing disparate treatment cases or one, and if two, how to distinguish which applied to which cases.[88]

Enter the subordinate builder in *Rachid* to build on *Desert Palace*. The court first guessed that *Desert Palace* also would 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 (and it did not similarly amend the ADEA).[89] However, the Fifth Circuit believed that a fundamental principle of the original blueprint, carried forward in the

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[85] *See* Chambers, *supra* note 35, at 92-93.
[86] Costa v. Desert Palace, Inc., 299 F.3d 838, 851-53 (9th Cir. 2002), *aff'd,* 539 U.S. 90 (2003).
[87] *See, e.g.*, sources cited *supra* note 35.
[88] For an opinion summarizing the positions of the various circuits, see *White v. Baxter Healthcare Corp.*, 533 F.3d 381 (6th Cir. 2008), *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).
[89] *See, e.g.*, Lawhead v. Ceridian Corp., 463 F.Supp.2d 856 (N.D. Ill. 2006) (surveying the law).

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 on it something that was simple, clear, and symmetrical. It created a single proof structure 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,[90] 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 mixed motives 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. The majority's answer was that *Price Waterhouse* was a case involving a Title VII claim, and the Supreme Court never had held the case's mixed-motives analysis to be applicable to the ADEA, although the courts of appeals had. 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

[90] 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 32, at 104-06; Corbett, *Allegory, supra* note 35, at 1575-77.

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 Stevens dissent in *Gross* and the *Rachid* court pointed out. Second, the Court rejects the point of Justice Stevens 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. 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.[91] 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.[92] 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.

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 because of 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

[91] *See Gross*, 129 S. Ct. at 2356 (Stevens, J., dissenting).
[92] *Id.* at 2351 n.1.

interpreting the ADEA was introduced in *Hazen Paper Co. v. Biggins*[93] and further developed in *General Dynamics Land Systems, Inc. v. Cline*,[94] *Smith v. City of Jackson*,[95] *Meacham v. Knolls Atomic Power Laboratory*,[96] and *Kentucky Retirement System v. EEOC*.[97] The divergence should raise a concern beyond the increasing asymmetry in employment discrimination law. The divergence invariably has produced less protection against age discrimination than is available for the characteristics covered by Title VII.[98] Is that structure, with a relatively less protective age discrimination law, consistent with the Congressional blueprint? 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—disparate treatment. It has provoked negative reactions from influential people and organizations and calls for Congressional action.[99]

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[93] 507 U.S. 604 (1993).
[94] 540 U.S. 581 (2004).
[95] 544 U.S. 228 (2005).
[96] 128 S. Ct. 2395 (2008).
[97] 128 S. Ct. 2361 (2008).
[98] 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).
[99] Not surprisingly, the AARP did not like the decision. *See* http://bulletin.aarp.org/yourworld/law/articles/supreme_court_makes_agebias_suits_harder_to_win.html. 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). 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*. 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); Editorial, *Age Discrimination*, N.Y. TIMES (July 6, 2009) (calling for Congress to reverse *Gross* as it did *Ledbetter*).

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.[100] The Court began exploring the implications of this fact in *Hazen Paper Co*. The plaintiff was fired a short time before his pension vested, and he sued, alleging age discrimination.[101] He won a jury verdict. The Court planted the idea that the disparate impact theory of discrimination, which was developed under Title VII, may not apply to the ADEA.[102] 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."[103] 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.[104] 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."[105] 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.

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[100] For useful discussions of the history of the ADEA, see 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); 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); Jessica Sturgeon, Note, Smith v. City of Jackson: *Setting an Unreasonable Standard*, 56 DUKE L.J. 1377, 1378-80 (2007).
[101] He also asserted a claim under ERISA.
[102] This is an idea the Court later rejected in *Smith v. City of Jackson*, see *infra* Part II.C.
[103] *Hazen Paper Co*., 507 U.S. at 610.
[104] *Id*. at 610-11 (quoting EEOC v. Wyoming, 460 U.S. 226 (1983)).
[105] *Id.* at 610.

Hazen Paper Co. did not ultimately pronounce ADEA law that differed from Title VII law, but it set the stage for such law. 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 address in the ADEA as the basis for holding that disparate impact is not applicable to the ADEA.[106]

B. Different Law on Reverse Discrimination

The Court encountered the issue of whether the ADEA covers reverse discrimination[107] in *General Dynamics Land Systems*.[108] 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 age discrimination act 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.[109]

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[106] *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).

[107] 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*., 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, 1035-36 (2004); 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 (2000); 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); Ryan M. Peck, *Title VII Is Color Blind: The Law of Reverse Discrimination*, 75 J. KAN. BAR ASS'N 20 (June 2006).

[108] 540 U.S. 581 (2004).

[109] *General Dynamics Land Sys*., 540 U.S. at 590.

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, referring only to older age.[110] 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.[111]

A dissenting opinion authored by Justice Thomas argued first that the plain language of the ADEA did not say discrimination against older people, but just "because of . . . age."[112] The dissent also relied for additional support on the EEOC's interpretation of the ADEA.[113] The dissent also pointed out that Title VII has been interpreted as covering reverse discrimination notwithstanding that there was no indication in the legislative history that discrimination against whites was a problem sought to be addressed by the law.[114] Comparing the majority's interpretation of the ADEA with the established interpretation of Title VII, the dissent said, "In 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."[115]

General Dynamics Land Systems interprets the ADEA as narrower than Title VII, and it renders the law asymmetrical. The result was not obvious, as indicated by a well-

[110] *Id.* at 597-98.
[111] *Id.* at 596.
[112] *Id.* at 603 (Thomas, J., dissenting).
[113] *Id.* at 605-06.
[114] *Id.* at 608-09.
[115] *Id.* at 611 (citing McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976)).

reasoned dissent.[116] The majority rejected the dissent's argument that "age" should be interpreted as the Court has interpreted "race" and "sex" in Title VII. 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 old age.[117] The majority opinion looks at almost 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 virtually identical language in Title VII and the ADEA and yet develops divergent law.[118]

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 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 can be seen in all of the other cases discussed 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 thinks 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* [119] 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

[116] 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., ET/2507420/07.
[117] *General Dynamics Land Sys*., 540 U.S. at 597-98.
[118] *See supra* Part I.B.
[119] 544 U.S. 228 (2005). For detailed analyses of *Smith*, see Burke, *supra* note 106; Sturgeon, *supra* note 100.

fewer years of seniority. The reason given by the department for the disparity was to raise the salaries of junior officers so that they were competitive in the marketplace. 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. Seizing upon dicta in *Hazen Paper Co*. that disparate treatment is the principal discrimination targeted by the ADEA, many lower courts had held that the disparate impact theory was not available under the ADEA.[120] The 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.[121]

So, the case 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 should be far more difficult for plaintiffs to recover. The Court said that two statutory differences between the ADEA and Title VII require this narrower version of disparate impact. First, the Court explained that the ADEA's "reasonable factors other than age" (RFOA) provision,[122] which has no analogue in Title VII, narrows ADEA coverage.[123] Second, the Court pointed out that the Civil Rights Act of 1991 modified the disparate impact proof structure articulated in

[120] *See* sources cited *supra* note 106.
[121] *Smith*, 125 S. Ct. at 233-34.
[122] 29 U.S.C. § 623(f)(1).
[123] *Smith*, 125 S. Ct. at 233 & 240.

Wards Cove Packing Co. v. Atonio[124] by inserting a codified version in Title VII, but the Act did not similarly amend the ADEA.[125] Thus, the Court concluded that the version of disparate impact applicable to the ADEA is the old *Wards Cove* version.[126] What this meant was left vague, and would cause the Court to issue a clarification in *Meacham*.[127] The Court applied the new ADEA disparate impact analysis to the facts and held that the plaintiffs had not alleged any specific employment practice which could cause a disparate impact.[128] It is not at all clear what is required to constitute a specific employment practice and why the Court thought that the plaintiffs had failed to identify one.[129] The Court provided an alternative reason why plaintiffs lost in *Smith*, 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.[130] Thus, although the Court recognized disparate impact under the ADEA, it created an analysis that would made it very difficult for plaintiffs to recover, and it resulted in a plaintiffs' loss as applied to the case.[131]

Smith is an oxymoronic opinion: it expands the ADEA but only superficially, and it creates symmetry between the ADEA and Title VII, but not really.[132] The Court grounds its holding on the principle that when the same language is used in Title VII and

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[124] 490 U.S. 642 (1989).
[125] *Smith*, 125 S. Ct. at 1544-45.
[126] This is the petard upon which the dissent would hoist the majority in *Gross*. *See supra* text accompanying notes 63-64.
[127] "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 . . . ." Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395, 2404 (2008).
[128] *Smith*, 129 S. Ct. at 241.
[129] *See* Sturgeon, *supra* note 100, at 1397.
[130] *Smith*, 129 S. Ct. at 241-42.
[131] *See* Sturgeon, *supra* note 100, at 1397-1401.
[132] *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 "erodes" age discrimination protection).

the ADEA, it should be interpreted as having the same meaning. Then the Court goes on to recognize differences in language between the ADEA and Title VII, and it bases the different version of disparate impact on those differences. 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*[133] the Court decided that the RFOA provision in the ADEA is an affirmative defense on which the defendant bears the burden of persuasion. 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 thought the *Wards Cove* reference meant 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.[134] The Supreme Court explained that the Second Circuit had

[133] 128 S. Ct. 2395 (2008).
[134] *Meacham*, 461 F.3d 134, 140-41 & 144 (2d Cir. 2006), *rev'd*, 128 S. Ct. 2395 (2008).

misinterpreted its reference to *Wards Cove*.[135] Looking to the section in the age act that contains RFOA, the Court pointed out that its neighbor in that section is bon fide occupational qualification, which is interpreted as an affirmative defense to disparate treatment claims.[136] 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.[137]

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]."[138]

Meacham is much like *Smith* in its oxymoronic approach to the ADEA. It relieves 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.[139] The

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[135] 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.
[136] *Meacham*, 128 S. Ct. at 2400 (discussing 29 U.S.C. § 623(f)(1)).
[137] *Id.* at 2406.
[138] *Id*.
[139] *Id.* at 2400 (citing cases).

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 the case 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, employers should easily prevail on the RFOA defense unless the nonage factor is "obscure for some reason."[140] In such a case, the employer would have a harder time satisfying the burden of persuasion on the affirmative defense.[141]

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 Systems, Inc. v. EEOC*.[142] 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 age; or 2) 5 years of service and age 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.

[140] *Id.* at 2406.
[141] *Id.*
[142] 128 S. Ct. 2361 (2008). For a more detailed discussion of the case, see Horan, *supra* note 100.

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, but the Supreme Court majority's contrary result, in a 5-4 decision, and the reason were 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."[143] 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 the plaintiff must prove that age "actually motivated" the decision.[144] 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";[145] 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

[143] *Kentucky Retirement Sys*., 128 S. Ct. at 2366.
[144] *Id.* (quoting *Hazen Paper Co*., 507 U.S. at 610).
[145] *Id*. at 2367.

to think of another way to achieve the plan's objective without cutting benefits to disabled workers, which the state said it would do if it lost the case.[146]

The dissenting opinion, authored by Justice Kennedy, agreed that the special imputed years provision of the plan sought to achieve a laudable purpose but found the majority's opinion to bend the law to permit it.[147] 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 when there is facial discrimination, there is no requirement that plaintiff prove that age actually motivated the decision: "The 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."[148] The dissent cited *Trans World Airlines, Inc. v. Thurston*,[149] an ADEA case, and *Los Angeles Dept. of Water and Power v. Manhart*,[150] a Title VII case, as examples that facially discriminatory policies are illegal without proof of motive.[151] In the six policy arguments set forth by the majority, the dissent found no "clear rule of law."[152] The dissent argued that by adopting a position rejected by all the appellate courts to have considered the issue the majority "creates unevenness in administration, unpredictability in litigation, and uncertainty as to employee rights once thought well settled."[153]

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

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[146] *Id.* at 2367-69.
[147] *Id*. at 2372 (Kennedy, J., dissenting).
[148] *Id*. at 2375.
[149] 469 U.S. 111 (1985).
[150] 435 U.S. 702 (1978).
[151] *Kentucky Retirement Sys*., 128 S. Ct. at 2375 (Kennedy, J. dissenting).
[152] *Id.* at 2373.
[153] *Id.* at 2372.

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 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*[154] and *UAW v. Johnson Controls, Inc*.,[155] both cited by the dissent.

III. REVISING THE BLUEPRINT

The Supreme Court's decision in *Gross v. FBL Financial Services, Inc*. is a stark reminder of a message that should have been clear for quite a while: the Architect must draw up a revised blueprint. A year ago, 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.[156] 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 when the Civil Rights Act of 1991 amended Title VII, the 1991 Act did not adequately clarify it, and problems were multiplied 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 has diverged in a practically significant way as disparate treatment is the theory under which

[154] 435 U.S. 702 (1978).
[155] 499 U.S. 187 (1991).
[156] *See* Corbett, *Fixing, supra* note 32.

most litigation occurs.[157] Thus, the need for legislation has become 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. 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[158] demonstrates 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

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[157] *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).

[158] 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 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.

First, Congress needs to draw up the proof structure for disparate treatment. 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.[159] I recommended revision of the second part, the same-decision defense, so that if a defendant satisfied it, it would not bar all monetary recovery by the plaintiff.[160] I recommended that the employer's establishing the same-decision defense should either preclude monetary relief except backpay or it should preclude punitive damages. The modification of the same-decision part was important because if one proof structure is going to apply to all disparate treatment cases, rather than to the small subset of cases to which mixed motives applied before *Desert Palace*, then 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.[161]

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 state that "because of" means "motivating factor" or

[159] It is at 42 U.S.C. §§ 2000e-2(m) & 2000e-5(g)(2)(B) (2000).
[160] *See* Corbett, *Fixing*, *supra* note 32, at 107-08.
[161] 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). 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.

whatever other causation standard Congress selects.[162] In *Gross*, the majority and dissent debated whether the statutory language requires but-for causation.[163] As the dissent points out, this is a debate that also took place twenty years earlier in *Price Waterhouse*.[164] 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. Justice Kennedy explained this in his dissenting opinion in *Price Waterhouse*.[165] Now that the standard of 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 whether the mental state of agents of an employer 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.[166] 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

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[162] 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 168.

[163] *Compare Gross*, 129 S. Ct. at 2350-2351 *with id* at 2354-56 (Stevens, J., dissenting).

[164] *Id.* at 2354 (Stevens, J., dissenting).

[165] *Price Waterhouse*, 490 U.S. at 283:

> 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, *supra* note 24, at 658 ("The 1991 Act framework imposes liability at the `motivating factor' level, requiring `but for' causation only for damages."); Zimmer, *supra* note 35, at 1930-31.

[166] *Gross*, 129 S. Ct. at 2358 (Stevens, J. dissenting).

access to information regarding whether it would have taken the same employment action in the absence of discrimination.[167] Now that the Court in *Gross* has come full circle and reengaged in the debate over the appropriate standard of causation in employment discrimination cases, twenty years after *Price Waterhouse* launched the debate, Congress should not just patch over this issue, as it did in 1991.[168] Instead, it actually 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 be but-for causation, but I contend that it actually is sole causation.[169] The mixed-motives analysis initially employs a motivating 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 is going to dispatch with 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" in *Gross* and the potential for courts to interpret the statute as countenancing separate

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[167] *Id.* at 2359.

[168] 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). The problem, however, is that Congress simply added a new standard of causation without repealing the old language—"because of" in 42 U.S.C. § 2000e-2(a)(1). 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 157 (discussing attorney Eric Dreiband's suggestion of a defense litigation strategy of pressing plaintiffs to choose under which section they are pursuing a claim).

[169] *See* Corbett, *Allegory, supra* note 35, at 1568. *Cf.* Grubb v. Southwest Airlines, 296 Fed. Appx. 383, 389 (5th Cir. 2008).

"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 decorative only by expressly providing that "because of" means the selected causation standard.

In light of *Gross*, Congress should broaden the causation debate beyond causation standards that already 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.[170] The flipside of lost chance is increased risk, which has been used in some toxic torts and fear-of-contracting-disease cases.[171] Incorporating such an approach into the current statutory mixed-motives analysis, for example, the plaintiff could prove that race was a motivating factor in an employment action, and the burden would shift to the employer to prove the same-decision defense. The fact finder could decide on a percentage basis to what extent the employer persuaded on its defense, if at all, and reduce the recovery by that percentage. I would apply the percentage reduction to all monetary relief—compensatory and punitive damages and

[170] 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 (1980). 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).

[171] *See, e.g.*, John Makdisi, *Proportional Liability: A Comprehensive Rule to Apportion Tort Damages Based on Probability,* 67 N.C. L. REV. 1063 (1989); Tori A. Weigand, *Loss of Chance in Medical Malpractice: The Need for Caution*, 87 MASS. L. REV. 3, 18 (2002).

backpay.[172] 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.[173] 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.[174] Essentially, 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. Although lost chance has been applied almost exclusively in medical malpractice cases, it has been applied in some employment discrimination cases.[175]

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-decision defense with some remedy-reducing effect. It is important, however, for the remedy-limiting effect of the same-decision defense to be reduced.

I reassert my argument that the same proof structure be made applicable to Title VII, the ADEA, and the ADA. This would change the holding of *Gross*. The Court

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[172] 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)

[173] *See* King, *supra* note 170, at 1356.

[174] *See, e.g.,* Gudel, *supra* note 161.

[175] *See* Secunda, *supra* note 161 (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] AC 344 HL. 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. ¶30. The *Polkey* doctrine was legislatively abrogated by the Employment Act of 2002. *Id*. It was restored by the 2007 Employment Bill.

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."[176] After *Gross,* it seems likely that none of the established proof structures apply to the ADEA. 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 the laws. 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 will make that choice, particularly in the context of intentional discrimination. Indeed, the Court in *Hazen Paper Co*. 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."[177] For intentional discrimination, a uniform proof structure should apply. This is simple,[178] symmetrical, and a good policy decision.

B. A Uniform Statutory Proof Structure for Disparate Impact

[176] *Gross*, 129 S. Ct. at 2349 n.2.
[177] Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).
[178] 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 court 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, J., dissenting).

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.[179] Without rehashing too much detail, I recommended tweaking the prima facie case, eliminating job related from the business necessity/job relatednesss defense, and merging alternative employment practice into business necessity.[180] 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. 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. Accordingly, Congress should decide whether disparate impact should apply to the ADEA. 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*?), and it seems virtually impossible for a plaintiff to win, as the Court suggested in *Meacham*.[181] This sham theory of discrimination should not be maintained. Congress is likely to choose to

[179] *See* Corbett, *Fixing, supra* note 32, at 111-12.
[180] *Id.* at 112-15.
[181] *See supra* Part II.D .

make disparate impact applicable to the ADEA. If it does, I think the same analysis should apply, 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. 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 an issue that has caused ongoing problems under the ADEA—pensions and retirement. 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.[182]

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.[183] Imagine the reaction that would be generated if the Supreme Court held that whites could not sue for race discrimination or men could not sue for sex discrimination. There has been no strong reaction, however, to the Court's decision that the ADEA does not cover discrimination against younger people within the ADEA's protected class.[184] 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.[185] 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

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[182] *But see* Horan, *supra* note 100, 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).
[183] Consider, for example the news coverage and heated debates surrounding the firefighter testing case, Ricci v. DeStefano, 129 S. Ct. 2658 (2009).
[184] *See* Seiner, *supra* note 132, 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).
[185] *See* General Dynamics Land Sys., 540 U.S. at 602 (Thomas, J., dissenting); *see also* Lacy, *supra* note 100, at 403.

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 on which there is not a clear problem and little pressure for a change now. Accordingly, I think Congress should not address *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.

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 planned to reach the heavens.