

OHIO STATE LAW JOURNAL | FURTHERMORE
VOLUME 76

Let's Pretend that Federal Courts Aren't Hostile to Discrimination Claims

MARCIA L. McCORMICK*

TABLE OF CONTENTS

I. INTRODUCTION	22
II. THE LARGE CONSENSUS THAT DISCRIMINATION LAWS ARE ENFORCED TOO NARROWLY	23
III. THE TROUBLE WITH COURTS	25
IV. CONCLUSION.....	30

I. INTRODUCTION

Professor Sandra Sperino's article, *Let's Pretend Discrimination Is a Tort*,¹ makes a valuable contribution to the debate about the proper interpretation of Title VII and other employment discrimination laws in light of Supreme Court trends. Professor Sperino ably describes the way that the Supreme Court has used tort concepts increasingly in recent cases,² even having gone so far as to have called employment discrimination statutes federal torts.³ This development has created significant concern among scholars,⁴ including Professor Sperino herself.⁵

Rather than simply reiterate those concerns, however, in her article Professor Sperino adopts a novel approach: she takes the Court at its word, spinning out how embracing tort concepts and tort methodology would transform discrimination law.⁶ In sum, she explores how using tort concepts could "clarify the roles of intent and causation in discrimination analysis,

* Professor of Law and Director, William C. Wefel Center for Employment Law.

¹ Sandra F. Sperino, *Let's Pretend Discrimination Is a Tort*, 75 OHIO ST. L.J. 1107 (2014).

² *Id.* at 1107.

³ *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1191 (2011).

⁴ *See, e.g.*, Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1459 (2012); Cheryl Krause Zelman, Note, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 193-97 (1993).

⁵ *See generally* Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1; Sandra F. Sperino, *Statutory Proximate Cause*, 88 NOTRE DAME L. REV. 1199 (2013); Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051 (2014).

⁶ *See generally* Sperino, *supra* note 1.

[should] alter the way courts conceive intent, [should] lower the harm threshold for some sexual harassment cases,”⁷ and would transform current approaches to statutory interpretation, allowing the law greater “flexibility to respond to changing circumstances.”⁸ This response essay applauds Professor Sperino’s work in this area, her suggestion of a silver lining in a problematic trend, and the roadmap she lays out for a more positive trajectory. At the same time, I worry that she is unlikely to succeed because the actors she relies upon to effect the changes she projects are unwilling to do so.

II. THE LARGE CONSENSUS THAT DISCRIMINATION LAWS ARE ENFORCED TOO NARROWLY

The path Professor Sperino lays out for the lower courts on what it would really mean for discrimination to be a tort is appealing to scholars concerned about the way that the federal courts have appeared to have been consistently narrowing the reach of employment discrimination statutes. Extensive research has shown that employment discrimination plaintiffs fare significantly worse in federal court at every possible stage of litigation than plaintiffs in other kinds of cases. For example, few employment discrimination cases go to trial.⁹ When they do go to trial, few cases are resolved in favor of employees once the appeals process is exhausted.¹⁰

And it is not only scholars who are concerned about the way the Supreme Court in particular has narrowed the law. Congress has acted several times to amend the discrimination statutes to “fix” them after the Court issued decisions that narrowed their scope. The Pregnancy Discrimination Act amended Title VII to effectively overrule the Supreme Court’s decision in *General Electric Co. v. Gilbert* that discrimination on the basis of pregnancy was not

⁷ *Id.* at 1107.

⁸ *Id.* at 1109.

⁹ See Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 120 (1999) (suggesting that only ten percent of employment discrimination cases go to trial); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 440–41, 444 (2004) (stating that nearly seventy percent of employment discrimination cases settle and plaintiffs win only just over four percent of pretrial adjudications).

¹⁰ See Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL’Y J. 547, 551–54 (2003) (finding that cases decided in favor of plaintiffs are six times more likely to be reversed than those found in favor of defendants); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 283–84, 309 (1997) (arguing that meritorious cases are lost or reversed on appeal); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560–61 (2001) (asserting that employers prevail in ninety-eight percent of federal court employment discrimination cases resolved at the pretrial stage).

discrimination on the basis of sex.¹¹ The Civil Rights Act of 1991 was enacted in part because “the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio* . . . has weakened the scope and effectiveness of Federal civil rights protections.”¹² It also added a provision that gave Title VII and the ADA limited extraterritorial reach after the Court had held in *EEOC v. Arabian American Oil Co.* that Title VII only applied in the United States.¹³ It further rejected a limited view of mixed-motives liability adopted in *Price Waterhouse v. Hopkins*.¹⁴ And it added a provision to supersede the Supreme Court’s decision in *Lorance v. AT&T Technologies*¹⁵ that a neutral-appearing seniority policy established with discriminatory effect had to be challenged immediately.¹⁶ The ADA Amendments Act of 2008 was made necessary in Congress’s view because the Supreme Court had “narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating the protection for many individuals whom Congress intended to protect.”¹⁷ Additionally, “as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities.”¹⁸ Most recently, Congress enacted the Lilly Ledbetter Fair Pay Act of 2009, because:

[t]he Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.* . . . significantly impair[ed] statutory protections against discrimination in

¹¹ Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e-2(k) (2012)); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 138–41 (1976); see also Diana Kasdan, Note, *Reclaiming Title VII and the PDA: Prohibiting Workplace Discrimination Against Breastfeeding Women*, 76 N.Y.U. L. REV. 309, 321–23 (2001) (describing the legislation and the legislative history behind the PDA).

¹² Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(2), 105 Stat. 1971, 1971 (codified as amended in scattered sections of 42 U.S.C.).

¹³ *Id.* § 109; *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 246–47 (1991).

¹⁴ Civil Rights Act of 1991 § 107 (providing for liability but no damages relief if protected status was a motivating factor in an employment decision but the same decision would have been made without considering protected status); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (plurality opinion) (providing for a defense to liability in a mixed motives case if the employer could prove it would have made the same decision without considering protected status); *id.* at 260–61 (White, J., concurring) (arguing that objective evidence should not be required); *id.* at 261 (O’Connor, J., concurring) (asserting that causation analysis should be made compatible with the *McDonnell Douglas* burden shifting framework).

¹⁵ *Lorance v. AT&T Tech.*, 490 U.S. 900, 911–12 (1989).

¹⁶ Civil Rights Act of 1991 § 112 (“For purposes of this section, an unlawful employment practice occurs . . . when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.”).

¹⁷ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4), 122 Stat. 3553, 3553 (codified as amended in scattered sections of 42 U.S.C.); see also *id.* §§ 2(a)(5), (b) (describing the purpose of the Act).

¹⁸ *Id.* § 2(a)(6).

compensation that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decision undermine[d] those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress The limitation imposed by the Court on the filing of discriminatory compensation claims ignore[d] the reality of wage discrimination and [was] at odds with the robust application of the civil rights laws that Congress intended.¹⁹

Individual Supreme Court Justices have also bemoaned the way the Court has narrowed the scope of employment discrimination protections. There have been a number of high profile dissents in discrimination cases making these points,²⁰ but most notable are recent calls by Justice Ginsburg for Congress to step in. In her dissent to the Court's decision in the *Ledbetter* case, Justice Ginsburg stated that "the ball [was] in Congress' court . . . to correct this Court's parsimonious reading of Title VII."²¹ Justice Ginsburg has made similar statements in additional cases. In *Texas Southwestern Medical Center v. Nasser*, and *Vance v. Ball State University*, Justice Ginsburg concluded that the two decisions warped congressional intent so badly that they should "prompt yet another Civil Rights Restoration Act."²²

III. THE TROUBLE WITH COURTS

The prior section touches on a pattern. Congress creates a discrimination statute, over time the federal courts interpret it narrowly, Congress steps in to counteract the narrowing, the courts interpret the amendments narrowly, and Congress is called to step in again. One of the most appealing parts of Professor Sperino's suggestion is that it disrupts this pattern. First, it doesn't rely on Congress to act at a time when Congress seems incapable of acting²³ and when

¹⁹ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2(1)–(2), 123 Stat. 5, 5 (codified as amended in scattered sections of 42 U.S.C.).

²⁰ See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561–62 (2011) (Ginsburg, J., dissenting); *Ricci v. DeStefano*, 557 U.S. 557, 608–09 (2009) (Ginsburg, J., dissenting); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009) (Stevens, J., dissenting); *AT&T Corp. v. Hulteen*, 556 U.S. 701, 720 (2009) (Ginsburg, J., dissenting).

²¹ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 660–61 (2007) (Ginsburg, J., dissenting).

²² *Univ. of Tex. Sw. Med. Ctr. v. Nasser*, 133 S. Ct. 2517, 2547 (2013) (Ginsburg, J., dissenting); see also *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2466 (2013) (Ginsburg, J., dissenting) ("The ball is once again in Congress' court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today.")

²³ Paul Kane, *Little Time Left for Congress's To-Do List*, WASH. POST, Dec. 2, 2013, at A2 (calling 2013 a record-low year for congressional action); David Welna, *As Congress Breaks, Inaction Remains Most Notable Action*, NPR (Aug. 2, 2014, 8:29 AM), <http://www.npr.org/blogs/itsallpolitics/2014/08/02/337181198/as-congress-breaks-inaction-remains-most-notable-action>, archived at <http://perma.cc/L63L-A88E>.

congressional action does not seem to have the desired effect.²⁴ Second, it relies on the actors most likely to be able to make a change: the lower courts, which hear vastly more cases than the Supreme Court with its discretionary docket. And third, it advocates for change that the Supreme Court has clearly opened the door to.

An additional virtue of this approach is that it does not get bogged down in why the law has developed in the way it has. Starting there is a common practice for reformers. In past efforts at reform, many scholars have focused on why employment discrimination cases are different from other kinds of cases as a way to suggest how Congress could change the law or courts should change their practices. Some have posited that plaintiffs are unsuccessful because of changes in employer behavior, labeling current forms of discrimination “subtle” rather than “overt.”²⁵ Others have mapped doctrinal drift between the goals of the statutes when they were initially enacted and their current applications.²⁶ Still others have linked the drift and plaintiffs’ disproportional losses to the liberal use of summary judgment and the change in rules to pleading standards under *Twombly* and *Iqbal*.²⁷ Each of these approaches has merit, but none has yet led to a solution. Focusing first and foremost on a path forward is refreshing at the very least.

²⁴ See, e.g., *Hulteen*, 556 U.S. at 717 (Ginsburg, J., dissenting) (criticizing the majority for subverting an amendment to Title VII); *Nassar*, 133 S.Ct. at 2541 (Ginsburg, J., dissenting) (“It is strange logic indeed to conclude that when Congress homed in on retaliation and codified the proscription, as it did in Title VII, Congress meant protection against that unlawful employment practice to have *less* force than the protection available when the statute does not mention retaliation.”).

²⁵ E.g., Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 749–51 (2005); Damon Ritenhouse, *Where Title VII Stops: Exploring Subtle Race Discrimination in the Workplace*, 7 DEPAUL J. FOR SOC. JUST. 87, 87–88 (2013); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 469–89 (2001). But see generally Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL’Y J. 1 (2005); Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather than Intent*, 34 COLUM. HUM. RTS. L. REV. 657 (2003) (asserting that plenty of overt workplace discrimination persists).

²⁶ E.g., Brian S. Clarke, *A Better Route Through the Swamp: Causal Coherence in Disparate Treatment Doctrine*, 65 RUTGERS L. REV. 723, 727 (2013); Erik J. Girvan & Grace Deason, *Social Science in Law: A Psychological Case for Abandoning the “Discriminatory Motive” Under Title VII*, 60 CLEV. ST. L. REV. 1057, 1060 (2013); Lynda L. Arakawa & Michele Park Sonen, Note, *Caught in the Backdraft: The Implications of Ricci v. DeStefano on Voluntary Compliance and Title VII*, 32 U. HAW. L. REV. 463, 464 (2010); Allison Cimpl-Wiemer, Comment, *Ledbetter v. Goodyear: Letting the Air Out of the Continuing Violations Doctrine?*, 92 MARQ. L. REV. 355, 357 (2008).

²⁷ E.g., Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 96–97 (2010); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1013–15; J. Scott Pritchard, Comment, *The Hidden Costs of Pleading Plausibility: Examining the Impact of Twombly and Iqbal on Employment Discrimination Complaints and the EEOC’s Litigation and Mediation Efforts*, 83 TEMP. L. REV. 757, 774–79 (2011).

The drawback to this particular way forward without looking at causes is that it does not fully account for the way that lower courts are likely to act. One explanation that few were willing to posit for the narrowing of discrimination law was judicial animus towards those kinds of claims or other incentives to be rid of them. But recent scholarship by a former federal court judge suggests that animus and other incentives lie behind at least some of the way that discrimination law develops – or fails to develop.

Nancy Gertner, a Senior Lecturer on Law at Harvard²⁸ and former United States District Court Judge, has offered important new insights on why it is that employment discrimination cases fare worse than other kinds of cases in three recent articles. Her most recent article, *The Judicial Repeal of the Johnson/Kennedy Administration's Signature Achievement*, offers the most developed explanation. She identifies five potential causes of the phenomenon:

- 1) judges may believe that discrimination doesn't exist anymore;
- 2) more discrimination cases may be frivolous;
- 3) good cases may be taken to state courts because state law is less employer friendly;
- 4) the Supreme Court may have narrowed the law in a way that protects employers; and
- 5) the pressures on judges may create and perpetuate biases against these cases.²⁹

Based on her own experiences and others' studies of judicial decisions, Gertner concludes that ideology, particularly as communicated by the Supreme Court in its decisions, plays some role. She concludes, though, that the greatest causes of the narrowing come from the pressure on judges to manage their caseloads and the ways that effects of those pressures magnify those ideological factors. This article builds on two of Judge Gertner's prior articles, *Losers' Rules*,³⁰ and, *"Only Procedural": Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*.³¹ The core contention in these three works revolves around how case management practices are driving a wholesale abandonment of the antidiscrimination project.

²⁸Judge Nancy Gertner (Ret.), HARV. L. SCH., <http://www.law.harvard.edu/faculty/directory/10303/Gertner> (last visited Jan. 6, 2015), archived at <http://perma.cc/B3ZQ-UW5M>.

²⁹Nancy Gertner, *The Judicial Repeal of the Johnson/Kennedy Administration's Signature Achievement* 2–4 (Mar. 9, 2014) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406671, archived at <http://perma.cc/R2R7-74PE>.

³⁰See generally Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109 (2012), http://yalelawjournal.org/pdf/1111_aau9fyvc.pdf, archived at <http://perma.cc/MC8X-MCEE>.

³¹See generally Elizabeth M. Schneider & Nancy Gertner, *"Only Procedural": Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*, 57 N.Y.L. SCH. L. REV. 767 (2012–2013).

Judge Gertner describes two main drivers: asymmetrical processes in issuing written decisions and overreliance on heuristics that are linked with losing plaintiffs. First, judges are encouraged to resolve cases without trials and to write decisions only when absolutely necessary. Because a grant of dismissal or judgment disposes of at least part of a case, those decisions must be written and must explain the decision's rationale. So decisions are written only when plaintiffs lose.³² That means, the only decisions available to be read by judges and litigants are decisions explaining what is wrong with plaintiffs' cases, which creates and reinforces judges' implicit biases about the merit of employment discrimination cases. As Judge Gertner notes, "[i]f case after case recites the facts that do not amount to discrimination, decisionmakers have a hard time imagining the facts that comprise discrimination."³³

Second, courts have developed decisionmaking heuristics for employment discrimination cases which are employed in only one direction: to avoid false positives—wrongful accusations of discrimination. Those heuristics become precedent and then supplant the law themselves.³⁴ One particularly vivid illustration of such a heuristic is the “stray remarks” doctrine, which trivializes sexist and racist speech.³⁵ This doctrine arose as a way to distinguish direct evidence of discriminatory motive from circumstantial evidence, with a particularly narrow view of direct evidence. Only if no inference at all was required to link the plaintiff's protected class with the decision—e.g., I am not hiring you because you are black or female—would the evidence be direct. Anything else would be a “stray” remark.³⁶ This heuristic has been employed in such a way that now, explicitly gendered or race-linked speech is not considered evidence of discrimination or constitutive of harassment *at all* by judges at the summary judgment stage. Conversely when juries hear that this kind of language was used, they have ruled for plaintiffs and awarded large damages. These awards suggest that those juries interpret this language not only as evidence of discrimination or as constituting harassment, but also as an indication that the discrimination or harassment is severe.³⁷ Based on development of heuristics like this one and in other ways, judges say that they

³² Gertner, *supra* note 29, at 4, 12; *see also* Gertner, *supra* note 31, at 110.

³³ Gertner, *supra* note 29, at 13.

³⁴ Judge Gertner is not alone in making this observation. Both Professor Sperino and I, for example, have made similar claims. *See, e.g.,* Marcia L. McCormick, *The Allure and Danger of Practicing Law as Taxonomy*, 58 ARK. L. REV. 159, 160–61 (2005) (arguing that the test developed in *McDonnell Douglas* had replaced the prohibition on discrimination in Title VII); Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 69 (2011) (arguing that frameworks used for analysis reduce the courts' work to rote sorting that squeezes out arguably cognizable claims).

³⁵ Gertner, *supra* note 29, at 3–4, 8–10.

³⁶ Gertner, *supra* note 30, at 119–20.

³⁷ Gertner, *supra* note 29, at 8.

feel compelled by Supreme Court decisions and their own prior precedents to rule in ever narrower ways.³⁸

Judge Gertner is not the only person with federal judicial experience writing about how the system is broken for employment discrimination cases. She is joined by Judge Mark W. Bennett, who has agreed that these structural pressures are having an effect,³⁹ and by Judge David F. Hamilton, who also agrees and offers the Seventh Circuit's standard as an antidote.⁴⁰ The work of all three should signal that we ought to be concerned about the way employment discrimination cases are treated by the judiciary, and that leaving expansion of discrimination law up to judges might pose a problem.

I am also skeptical that the Supreme Court will take its own lead to expand discrimination law to align it further with tort law or by using tort methodology, either for its own purposes or to nudge the lower courts along. There are circumstances where the Court has had to make clear that the lower courts were interpreting the employment discrimination laws too narrowly. In *Reeves v. Sanderson Plumbing Products*, a unanimous Court had to reverse the Fifth Circuit and make clear that plaintiffs did not have to provide additional specific evidence of discriminatory motive if they could prove the reason given by the employer was not worthy of belief.⁴¹ Similarly, in *Desert Palace, Inc. v. Costa*, the Court had to explain that there was no special type of evidence required for a plaintiff or defendant to use the mixed-motives analytical structure.⁴² These situations, though, have been relatively rare.

Much more common are actions by the Supreme Court to limit the reach of discrimination law and to nudge lower courts in that direction. Some of these actions are not obvious. A number of scholars have demonstrated in different contexts how the Supreme Court has engaged in analytical sleights of hand to resist broad interpretations of discrimination law.

For example, Sachin Pandya has shown how the Court has effectively overruled prior precedent without acknowledging it is doing so through stealth erosion.⁴³ An example he gives is the way that the Court in *Ricci v. DeStefano* likely overruled two cases holding that affirmative action was not discrimination under Title VII by contravening four necessary implications of

³⁸ *Id.* at 11–12; Gertner, *supra* note 30, at 109.

³⁹ Mark W. Bennet, *From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 697–701 (2012–2013).

⁴⁰ Judge David F. Hamilton, *On McDonnell Douglas and Convincing Mosaics: Toward More Flexible Methods of Proof in Employment Discrimination Cases*, Address to the Association of American Law Schools, Section on Employment Discrimination Law 2013 Annual Meeting, in 17 EMP. RTS. & EMP. POL'Y J. 195, 196–98 (2013).

⁴¹ *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 149 (2000).

⁴² *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92 (2003).

⁴³ Sachin S. Pandya, *Detecting the Stealth Erosion of Precedent: Affirmative Action After Ricci*, 31 BERKELEY J. EMP. & LAB. L. 285, 286–87 (2010).

the holdings in those cases.⁴⁴ Another example of this phenomenon might be present in the way that the Court used the rationale in *Gross v. FBL Financial Services* to stealthily erode the holding from *Price Waterhouse v. Hopkins* that “because of” did not require “but-for” causation, so that the Court could hold that in fact it did require “but-for” causation in *University of Texas Southwestern Medical Center v. Nassar*.⁴⁵

Deborah Widiss has documented a complementary type of sleight of hand—the way that the Court reinvigorates precedent that has been overridden by Congress.⁴⁶ She used *Gross* to show how the Court had used an amendment by Congress to one statute that overrode Supreme Court precedent as a reason to interpret other related statutes as embodying that precedent.⁴⁷ Professor Widiss also showed how *Ledbetter v. Goodyear Tire & Rubber Co.* revived *Lorance v. AT&T Technologies* despite the fact that the Civil Rights Act of 1991 had amended Title VII to nullify the effect of that decision.⁴⁸ In additional examples, she explained how the lower courts also give life to precedents overridden by Congress, creating splits and failing to give effect to Congress’s language.⁴⁹

IV. CONCLUSION

Based on this scholarly work, it is hard for me to see anything but a one-way ratchet in the judicial branch. The Supreme Court seems focused on using doctrines only if they limit the reach of discrimination law, and the lower courts magnify those inclinations because of judges’ own ideology about discrimination law and the way that ideology is reinforced through judicial practices. So while I agree wholeheartedly with Professor Sperino’s insights into what it would mean for discrimination law if courts were to embrace tort principles completely, I fear that her roadmap will not be followed.

That does not mean we should not try, however. No suggestions for reform seem significantly more likely to be successful. Some of the other suggestions

⁴⁴*Id.* at 299 (arguing that the two cases affected were *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), and *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979)); see also *Ricci v. DeStefano*, 557 U.S. 557 (2009).

⁴⁵See Michael J. Zimmer, *Hiding the Statute in Plain View: University of Texas Southwestern Medical Center v. Nassar*, 14 NEV. L.J. 705, 716–17 (2014) (arguing that the decision in *Nassar* undermined the approach in *Gross* by relying on it to interpret Title VII based on the ADEA, when in *Gross* the Court had said it could not rely on Title VII to interpret the ADEA).

⁴⁶See Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 513 (2009) [hereinafter Widiss, *Shadow Precedents*]; Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 860 (2012) [hereinafter Widiss, *The Hydra Problem*].

⁴⁷Widiss, *The Hydra Problem*, *supra* note 46, at 860–63.

⁴⁸Widiss, *Shadow Precedent*, *supra* note 46, at 542–46.

⁴⁹*Id.* at 546–56.

for reform are worth highlighting here. It is frequently argued that Congress should amend the discrimination laws to “fix” Supreme Court decisions that interpret them narrowly.⁵⁰ Judges face structural pressures that cause them to limit the substance of the law, and these pressures create a self-perpetuating spiral away from the goals of the employment discrimination statutes. To counter these pressures, Judge Gertner suggests that amendments by Congress could use broader language that cabins judicial discretion.⁵¹ Another suggestion along these lines, by Bill Corbett, urges Congress to stop making patchwork amendments and instead thoroughly overhaul our statutory approach to discrimination law.⁵²

An alternative recommendation could be for more or different judicial education. Scholars could monitor judicial decisions, like one study of decisions from the Northern District of Georgia, showing that summary judgment was granted for defendants on at least one issue in 95% of cases, in an effort to reveal to judges their own patterns.⁵³ Seeing those patterns might be a way to de-bias the judges’ anti-antidiscrimination-law attitudes.⁵⁴ Judge Gertner herself is currently undertaking a larger study like the Georgia one.⁵⁵

None of these recommendations is inconsistent with the approach recommended by Professor Sperino, and in fact may complement it. Her suggestions don’t rely solely on the courts, but also create opportunities for litigants. Advocates who incorporate her arguments may see success in the lower courts. Tort principles may actually have more traction than amendments to Title VII which may incorporate principles less linked to the common law. The fact that tort law is one of the law’s core subject matters means that judges are likely quite comfortable with its principles and its methodology. Moreover, there is a much larger body of law to draw on, law that is shaped by remarkable consensus through the *Restatement* and state law together. These factors suggest that exploiting the tortification of discrimination law might be more fruitful than other routes for reform.

The only other discrimination- and litigation-specific recommendation for reform that has been suggested is to consider an enforcement scheme that

⁵⁰ See *supra* notes 20–22 and accompanying text (describing Justice Ginsburg’s calls to Congress).

⁵¹ See Gertner, *supra* note 29, at 14.

⁵² William R. Corbett, *Calling on Congress: Take a Page from Parliament’s Playbook and Fix Employment Discrimination Law*, 66 VAND. L. REV. EN BANC 135, 136 (2013).

⁵³ See Gertner, *supra* note 29, at 14.

⁵⁴ Judges appear to overestimate their freedom from biases, and a first step to countering the effect of those biases is to have their existence demonstrated. See CHERYL STAATS ET AL., KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, THE OHIO ST. UNIV., STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2013, at 39–40, 53–54, 59–60 (2013), available

at http://www.issueab.org/resource/state_of_the_science_implicit_bias_review_2013, archived at <http://perma.cc/Q7D2-6XNY>.

⁵⁵ Gertner, *supra* note 29, at 6.

doesn't rely on the federal courts.⁵⁶ Judge Gertner suggested exploring whether giving an agency staffed with subject matter experts who possess the power to adjudicate discrimination claims might be a better option.⁵⁷ I made this suggestion a number of years ago, and have explored it in some depth.⁵⁸ In my view, such an agency could better enforce the antistatutory goals of Title VII, better balance employer and employee interests, provide greater access to justice for low and medium wage employees, and better adapt to changing norms of equality.

On the other hand, structuring an agency with such a large mandate and staffing it to run efficiently is a daunting task, as is expecting Congress to create something like this in the foreseeable future. Despite the appeal of an agency model as an ideal, because of its impracticality, pursuing that strategy seems unwise. As an alternative in conjunction with other compatible reform efforts, Professor Sperino's suggestion that the lower courts be pushed into accepting other tort principles and tort methodology seems promising. I hope they take her up on it in the ways that she suggests.

⁵⁶ See Samuel Estreicher & Zev J. Eigen, *The Forum for Adjudication of Employment Disputes*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 409, 417–18 (Cynthia L. Estlund & Michael L. Wachter eds., 2012) (advocating reforms that would allow greater use of private alternative dispute resolution methods in discrimination cases).

⁵⁷ See Gertner, *supra* note 29, at 14.

⁵⁸ Marcia L. McCormick, *Federal Regulation and the Problem of Adjudication*, 56 ST. LOUIS U. L.J. 39, 39 (2011); Marcia L. McCormick, *The Truth Is Out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 30 BERKELEY J. LABOR & EMP. L. 193, 195 (2009).