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A Pro-Employee Supreme Court?: The Retaliation Decisions.

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A PRO-EMPLOYEE SUPREME COURT?: THE RETALIATION DECISIONS†

MICHAEL J. ZIMMER*

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I. INTRODUCTION	

Since 2006, the United States Supreme Court under Chief Justice Roberts has decided four employee retaliation cases.¹ In all four, the employee won.² So,

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1. See *Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn.*, 129 S. Ct. 846 (2009); *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008); *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

2. This Article was written and submitted for publication before the Court decided *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 129 S. Ct. 846 (2009). In *Crawford*, the Court, in a unanimous opinion by Justice Souter, decided that the opposition clause of Title VII of the Civil Rights Act of 1964 § 704(a) protected an employee, Crawford, whose employer asked her to answer questions in an in-house investigation into whether a school district's employee relations director had engaged in sexual harassment. *Id.* at 849–50. Crawford told the questioner that the director had subjected her to repeated sexual harassment. *Id.* at

the question is whether the Supreme Court is pro-employee, at least in retaliation cases. My answer is yes, but not because the Court is “liberal” in the conventional political sense of Democratice with a capital “D,” nor in the sense of the classic canon of liberal statutory construction.³ Although conventional wisdom might be that a Republican-appointed Court⁴ would be pro-employer, when one understands the pragmatic approach a majority of these Justices take it comes as no surprise that the Court is pro-employee. My thesis is that these decisions are primarily a product of a pragmatic approach to judicial decision making.⁵ To examine that thesis, Part II discusses the Court’s three recent

849. Subsequently, the employer discharged her and other employees who responded similarly, although the employer claimed it discharged her for embezzlement. *Id.* at 849–50. Because the employee also won in *Crawford*, its holding does not alter an examination of the Justices’ approaches. Although this Article does not discuss the case in depth, *Crawford* reinforces the following analysis.

3. Judge Posner characterizes the Supreme Court, as opposed to lower federal courts, as a political body. See RICHARD A. POSNER, HOW JUDGES THINK 269–323 (2008) [hereinafter POSNER, HOW JUDGES THINK]; see also Richard A. Posner, *The Supreme Court, 2004 Term, Foreword: A Political Court*, 119 HARV. L. REV. 31, 53–54 (2005) [hereinafter Posner, *A Political Court*] (arguing that many of the Supreme Court’s landmark cases were ultimately political). Nevertheless, he does not characterize all decisions of the Court as political, only those where it decides constitutional issues: “No responsible student of the judicial system supposes that ‘politics’ . . . drives *most* decisions, except in the Supreme Court, which indeed is largely a political court when it is deciding constitutional cases.” POSNER, HOW JUDGES THINK, *supra*, at 8. When he describes the decisions as “political,” he means in the sense of making choices among policy objectives and the means to achieve those objectives, not in the sense of party politics. *Id.* at 8–10.

4. Republican Presidents appointed seven of the current Justices. See Biographies of Current Members of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited June 2, 2009).

5. In general, Judge Posner characterizes judicial thinking as either being legalist (i.e., formalist) or pragmatic. See POSNER, HOW JUDGES THINK, *supra* note 3, at 39–41. The fundamental difference is that legalists or formalists look backward to rules of law and attempt to apply them syllogistically to a given fact situation. See *id.* Pragmatists look forward to the consequences of the decision to the parties involved and also to the development of the law more broadly. See *id.* Posner’s definition of pragmatism is as follows: “In law, pragmatism refers to basing a judicial decision on the effects the decision is likely to have, rather than on the language of a statute or of a case, or more generally on a preexisting rule. So it is the opposite of legalism . . .” *Id.* at 40. Judicial pragmatism, as endorsed by Judge Posner, is not “anything goes” decisionmaking:

The pragmatic judge is a *constrained* pragmatist. He is boxed in, as other judges are, by norms that require of judges impartiality, awareness of the importance of the law’s being predictable enough to guide the behavior of those subject to it (including judges!), and a due regard for the integrity of the written word in contracts and statutes. The box is not so small that it precludes his being a political judge, at least in a nonpartisan sense. But he need not be one unless “political” is given the broadest of its possible meanings . . . in which the “political” is anything that has the slightest whiff of concern for policy. A pragmatic judge assesses the consequences of judicial decisions for their bearing on sound public policy as he conceives it. But it need not be policy chosen by him on political grounds as normally understood.

Id. at 13. For Posner, “[l]egalism drives most judicial decisions, though generally they are the less important ones for the development of legal doctrine or the impact on society.” *Id.* at 8. Thus, pragmatism comes to the fore for some judges when legalism runs out, leaving the judge with a law-making function. This backward versus forward orientation of the way judges think is developed

decisions. Next, Part III analyzes the positions of the Justices who authored these opinions to see if a pragmatic approach governed how they addressed the issue of employee retaliation, which resulted in the plaintiffs winning. Part IV attempts to place these Justices on a spectrum from pragmatist to formalist. Finally, Part V concludes that, interestingly, while the Justices writing opinions in these specific cases can generally be classified as pragmatic, they also employed a somewhat formalist approach; the opinions predominantly relied upon precedent and perhaps employed a new canon of statutory interpretation.

II. THREE RETALIATION DECISIONS

A. Burlington Northern & Santa Fe Railway Co. v. White

In its first term, the Roberts Court decided *Burlington Northern & Santa Fe Railway Co. v. White*.⁶ The case raised the question of what types of retaliatory actions by an employer are covered by § 704(a) of Title VII of the Civil Rights Act of 1964 (Title VII).⁷ After Sheila White complained that her supervisor had sexually harassed her, Burlington officials removed her from her job driving a forklift truck and assigned her to do standard track laborer tasks.⁸ When she filed a charge with the Equal Employment Opportunity Commission (EEOC), her employer suspended her without pay, allegedly for insubordination.⁹ A subsequent in-house investigation concluded that she had not been insubordinate, so Burlington reinstated her and gave her backpay for the thirty-seven days she had been suspended.¹⁰ Nevertheless, she pursued her claims and won a jury

more fully in Todd J. Zywicki & Anthony B. Sanders, *Posner, Hayek, and the Economic Analysis of Law*, 93 IOWA L. REV. 559, 586 (2008).

6. 548 U.S. 53 (2006). See Ernest F. Lidge III, *What Types of Employer Actions Are Cognizable Under Title VII?: The Ramifications of Burlington Northern & Santa Fe Railroad Co. v. White*, 59 RUTGERS L. REV. 497 (2007), for a discussion of the ramifications of *Burlington* on employer actions under Title VII of the Civil Rights Act of 1964.

7. *Burlington*, 548 U.S. at 56–57 (citing Title VII of the Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (2000)). Section 704(a) reads as follows:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

8. *Burlington*, 548 U.S. at 58.

9. *Id.*

10. *Id.* at 58–59.

verdict.¹¹ Rejecting an earlier panel decision, the Sixth Circuit, sitting en banc, found for White and affirmed the verdict.¹²

Justice Breyer, in an opinion joined by seven other members of the Court, affirmed the lower court judgment.¹³ The Court first held that the antiretaliation provision extends to employer actions that reach beyond the employer's place of business.¹⁴ The Court justified its holding by noting that the "antiretaliation provision seeks to secure [the] primary objective [of ending workplace discrimination] by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."¹⁵ The Act cannot achieve this purpose if "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace."¹⁶ Thus, for example, a plaintiff could bring a § 704(a) action to challenge an employer who retaliated by "blackballing" the plaintiff to another employer.

The second part of the holding involved the severity of the impact on the employee necessary to support a retaliation action.¹⁷ Not all retaliatory actions of an employer, whether at the employer's workplace or beyond, violate § 704(a).¹⁸ The Court determined that Title VII's antiretaliation provision is limited to employer actions that are serious enough to be materially adverse to a reasonable employee or applicant.¹⁹ To prevent trivial complaints from being the focus of litigation, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."²⁰ By using the term "reasonable employee," the Court intended that § 704(a)'s "standard for judging harm must be objective."²¹ But the opinion then went on to soften that standard by adding that the materiality of the challenged action is judged "from the perspective of a reasonable person *in the*

11. *Id.* at 59.

12. *Id.* (citing *White v. Burlington N. & Sante Fe Ry. Co.*, 364 F.3d 789, 791 (6th Cir. 2004) (en banc) (affirming the district court's denial of Burlington Northern's motion for judgment as a matter of law and remanding for a hearing on damages); *White v. Burlington N. & Sante Fe Ry. Co.*, 310 F.3d 443, 445–46 (6th Cir. 2002) (panel) (reversing the district court and setting aside the jury's verdict)).

13. *Id.* at 56. Justice Alito concurred in the judgment but disagreed with the Court's interpretation of the statute. *Id.* at 73–80 (Alito, J., concurring).

14. *Id.* at 67.

15. *Id.* at 63.

16. *Id.* at 62. Limiting protection against retaliation to acts affecting an employee's "terms, conditions, or status of employment," *id.* at 61, would arguably create a safe harbor for an employer's retaliatory actions beyond the workplace.

17. *Id.* at 67.

18. *See id.*

19. *Id.* at 68.

20. *Id.* (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)) (internal quotation marks omitted).

21. *Id.*

plaintiff's position."²² The Court further stated that the "significance of any given act of retaliation will often depend upon the particular circumstances. Context matters."²³ Thus, "petty slights, minor annoyances, and simple lack of good manners" that the employee might subjectively perceive as materially adverse would not be materially adverse to a reasonable person, but the context in which these actions occur might color how a reasonable person would view the circumstances.²⁴

This test is odd because it requires a plaintiff alleging discrimination and who claims to have suffered retaliation for complaining to prove that a reasonable worker would have been dissuaded from complaining in the face of the potentially severe reaction by the employer. This does not exactly require the plaintiff to prove she is unreasonable for having complained, but it comes close. This test insulates retaliatory acts from attack if a court considers them too minor or insignificant to justify the use of court resources.²⁵ Thus, an employer might be able to escape liability for a clearly retaliatory act if that act was, for example, the imposition of an unjustified evaluation in response to an employee's complaint of discrimination where that evaluation did not have sufficient immediate employment consequences to dissuade a reasonable person from complaining of discrimination in the first instance.²⁶ A court might consider a truly retaliatory act a minor annoyance, no more serious than an exacerbated harrumph of a supervisor in response to an employee's complaint of discrimination.

B. CBOCS West, Inc. v. Humphries

In its second term, the Roberts Court heard two retaliation decisions that also resulted as wins for the employee plaintiff. In *CBOCS West, Inc. v. Humphries*,²⁷ the plaintiff, a black employee, claimed his employer dismissed him because he complained to company managers about discrimination against another black employee.²⁸ Section 1981, a surviving part of post-Civil War civil rights

22. *Id.* at 71 (emphasis added).

23. *Id.* at 69.

24. *Id.* at 68–69.

25. *See id.* ("[I]t is important to separate significant from trivial harms.").

26. The *Burlington* Court provided the following example of when a reasonable person might choose not to report discrimination: "A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination." *Id.* at 69.

27. 128 S. Ct. 1951 (2008).

28. *Id.* at 1954. The plaintiff initially claimed the dismissal was discriminatory because of his race as well as because of retaliation. *Id.* Originally, he brought claims under Title VII as well as § 1981 of the Civil Rights Act of 1991. *Id.* However, based on various procedural grounds, the district court dismissed his Title VII claims and granted summary judgment in favor of CBOCS West, Inc. on the § 1981 claims. *Id.* While upholding much of the district court's ruling, the Seventh

legislation, provides that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.”²⁹ In a 7–2 decision, Justice Breyer, writing for the Court, found that “the provision encompasses a complaint of retaliation against a person who has complained about a violation of another person’s contract-related ‘right’” in the context of an employment contract.³⁰ In reaching the conclusion that § 1981 protects against retaliation for workers who challenge race discrimination, the Court did not address the scope of that protection.³¹ However, because the Court found the plaintiff had a sufficient § 1981 claim based on his complaint that the employer had discriminated against another of its employees,³² presumably the statute protects employees from retaliation for having complained about race discrimination against another person.³³ *CBOCS West* was another victory for an employee bringing a retaliation claim.

C. Gomez-Perez v. Potter

*Gomez-Perez v. Potter*³⁴ was the second retaliation decision in the 2007 Term of Court. Myrna Gomez-Perez was a federal postal worker who claimed her employer retaliated against her after she complained of age discrimination.³⁵ In 1974, Congress extended the protection of the Age Discrimination in Employment Act of 1967³⁶ (ADEA) to include federal workers.³⁷ Rather than simply amending the existing statutory provisions to include employees of the federal government by amending the definitions of “employee” or “employer,”

Circuit Court of Appeals remanded the § 1981 retaliation claim. *Id.* The § 1981 retaliation claim was the only issue which advanced to the Supreme Court. *Id.*

29. Civil Rights Act of 1991 § 101, 42 U.S.C. § 1981 (2000) (corresponds to the Act of May 31, 1870, ch. 114, § 16, 16 Stat. 140, 144).

30. *CBOCS West*, 128 S. Ct. at 1954. Justice Thomas, joined by Justice Scalia, dissented. *Id.* at 1961 (Thomas, J., joined by Scalia, J., dissenting).

31. *See id.* at 1956–61 (limiting discussion of § 1981’s scope to the affect of post-contract-formation conduct).

32. *Id.* at 1961.

33. *See* Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 (2006), for a statute similar to § 1981 granting a cause of action for discrimination, and *see Jackson v. Birmingham Board of Education*, 544 U.S. 167, 174–77 (2005), for a case holding that Title IX protects a male basketball coach from retaliation for complaining that the girls’ basketball team did not receive equal access or treatment.

34. 128 S. Ct. 1931 (2008).

35. *Id.* at 1935.

36. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621 to 634 (2006)). On January 29, 2009, President Obama signed an amendment to ADEA that increases the amount of time in which an employee can make a claim. *See Lilly Ledbetter Fair Pay Act of 2009*, Pub. L. No. 111-2, § 4, 123 Stat. 5, 6 (to be codified at 29 U.S.C. § 626(d)).

37. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(A), 88 Stat. 55, 58 (codified as amended at 29 U.S.C. § 203(d) (2006)) (amending the ADEA to include a public agency as “any person acting . . . in the interest of an employer”).

Congress followed the pattern it had earlier established in amending Title VII.³⁸ Congress enacted a provision that did not focus on any specific employment practices but instead created a general ban on age discrimination in federal employment.³⁹ Specifically, “All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age.”⁴⁰ The question presented in *Gomez-Perez* was “whether the statutory phrase ‘discrimination based on age’ include[d] retaliation based on the filing of an age discrimination complaint.”⁴¹ The Court, in a 6–3 decision written by Justice Alito, found that it did.⁴² This was the third victory in a row for employees in retaliation cases.

D. Summary

Putting these three Roberts Court retaliation decisions together provides a potentially robust jurisprudence protecting employees from retaliatory actions by employers. Workers need not prove that the retaliatory actions occurred on the employer’s workplace, but protection extends to employer actions occurring outside the workplace.⁴³ Further, the retaliation need not be limited to ultimate employment decisions, such as discharge, as long as the plaintiff can establish that the employer’s conduct was materially adverse in the sense that it would likely dissuade a reasonable person from opposing the discrimination in the first place.⁴⁴ Additionally, the reasonable person is someone who views the situation from the perspective of a person in the plaintiff’s position.⁴⁵ The implicated discrimination includes all the Title VII categories—race, color, religion, sex, and national origin⁴⁶—as well as age discrimination pursuant to the ADEA⁴⁷ and

38. When Congress added § 717 to Title VII, it had both a substantive and a procedural aspect. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 717, 86 Stat. 103, 111–12 (codified as amended at Title VII of the Civil Rights Act of 1964 § 11, 42 U.S.C. § 2000e (2000)). Section 717(a) provides a general ban on discrimination in federal employment, while § 717(b) imposes special procedures that apply in those federal employment claims. *Id.* Section 633a of the ADEA does not include those special procedures. Instead, it simply requires the claimant to file with the EEOC, as is required in the private sector. See 29 U.S.C. § 633a(b).

39. See 29 U.S.C. § 633a(a).

40. *Id.*

41. *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1936 (2008).

42. *Id.* at 1935. Chief Justice Roberts, joined in part by Justices Scalia and Thomas dissented. *Id.* at 1943 (Roberts, C.J., joined in part by Scalia, J. and Thomas, J., dissenting). Justice Scalia joined Justice Thomas’s separate dissent. *Id.* at 1951 (Thomas, J., joined by Scalia, J., dissenting).

43. *Burlington N. & Sante Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006).

44. *Id.* at 69–70.

45. *Id.*

46. See *id.* at 56 (explaining that Title VII of the Civil Rights Act of 1964 § 11, 42 U.S.C. § 2000e-2(a) (2000) forbids an employer from discriminating against an employee because that employee opposed discrimination based on race, color, religion, sex, or national origin).

47. See *Gomez-Perez*, 128 S. Ct. at 1936 (holding that the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633a(a) (2006), prohibits retaliation against an employee who files a complaint for age discrimination).

race discrimination in contracting pursuant to § 1981.⁴⁸ The employees protected from retaliation include private sector employees, employees of state and local government and, at least as to age discrimination, federal sector employees.⁴⁹

III. ANALYSIS OF THE AUTHORIZING JUSTICES' APPROACHES

A. Justice Breyer

Justice Breyer authored the decisions in *Burlington*⁵⁰ and *CBOCS West*.⁵¹ A former administrative law teacher, Justice Breyer advocates a method of statutory interpretation aimed at determining the purpose of the legislation, which is fundamentally a pragmatic approach.⁵² If the preliminary examination of the statute's language, structure, and history does not easily determine the answer to the question of interpretation, then he thinks there is a divide in judicial approach.⁵³ While Justice Scalia is an example of a judge who looks primarily to the text, the structure of the text, and canons of interpretation,⁵⁴ others, including Justice Breyer, "look primarily to the statute's purposes for enlightenment. They avoid the use of interpretive canons . . . [and t]hey speak in terms of congressional 'intent' . . . [as] the intent of the group . . ."⁵⁵ To

48. See *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1958 (2008) ("[T]hat § 1981 encompasses retaliation claims is indeed well embedded in the law.").

49. See *Gomez-Perez*, 128 S. Ct. at 1936 (discussing types of employees who have standing to file complaints for retaliation). See also Transcript of Oral Argument at 8–11, *Gomez-Perez*, 128 S. Ct. 1931 (No. 06-1321), for a discussion of whether § 717(a) of Title VII protects employees against retaliation.

50. See *Burlington N. & Sante Fe Ry. Co. v. White*, 548 U.S. 53, 56 (2006).

51. See *CBOCS West*, 128 S. Ct. at 1954.

52. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 85 (2005). He explains his approach to statutory interpretation by stating a general proposition:

Most judges start in the same way. They look first to the statute's language, its structure, and its history in an effort to determine the statute's purpose. They then use that purpose (along with the language, structure, and history) to determine the proper interpretation.

Id. at 86. While calling himself a "constrained" pragmatist, Judge Posner characterizes Justice Breyer as a "quasi-pragmatist." See POSNER, *HOW JUDGES THINK*, *supra* note 3, at 253–54. Judge Posner says at one point that Justice Breyer is "regarded as the most pragmatic member of the current Supreme Court." *Id.* at 320. Nevertheless, Judge Posner is very critical of the approach Justice Breyer articulates in his book. *Id.* at 104.

53. BREYER, *supra* note 52, at 86.

54. See *id.* at 86–87 & n.2 (citing Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 26–27 (Amy Gutmann ed., 1997)). Judge Posner characterizes Justice Scalia as a legalist or formalist but says "there are no consistent legalists." See POSNER, *HOW JUDGES THINK*, *supra* note 3, at 48.

55. BREYER, *supra* note 52, at 87. Judge Posner criticizes Justice Breyer's focus on legislative purpose as tending to "override legislative compromises," thereby giving supporters of the legislation "more than they were able to achieve in the legislative process." POSNER, *HOW JUDGES THINK*, *supra* note 3, at 336.

illustrate this, Justice Breyer creates a hypothetical “reasonable member of Congress.”⁵⁶ An important difference between the two approaches concerns the use of legislative history. While textualists disfavor the use of legislative history because they consider it inherently unreliable, those who follow Justice Breyer’s approach think that legislative history can help determine the legislative purpose by constructing what a hypothetical reasonable member of Congress would determine as the law’s purpose.⁵⁷ Justice Breyer eschews judges adopting their own social or political views of a law’s purpose but finds that his legislative purpose approach properly limits the role of judges: “[A]n interpretation of a statute that tends to implement the legislator’s will helps to implement the public’s will and is therefore consistent with the Constitution’s democratic purpose.”⁵⁸

Given what he claims to be his general approach to statutory interpretation,⁵⁹ Justice Breyer offered few surprises in *Burlington*. The question presented was whether the prohibition on retaliation in § 704(a) was limited to retaliatory actions taken by the employer affecting the terms and conditions of employment or whether retaliation protection reached beyond the employer’s workplace.⁶⁰ Justice Breyer began his analysis with the text.⁶¹ He pinpointed the textual similarities and the differences between the substantive prohibition of discrimination⁶² in § 703(a) and in the proscription of retaliation in § 704(a).⁶³ Because both statutes use the term “discriminate,” the employer asserted that the Court should read the antiretaliation provision *in pari materia* with the antidiscrimination provision.⁶⁴ Thus, the argument was that the words of limitation in § 703(a) should be read into § 704(a) to limit § 704(a)’s scope to employment related matters, such as hiring or firing.⁶⁵ Justice Breyer did not

56. BREYER, *supra* note 52, at 88.

57. *Id.* at 87–88.

58. *Id.* at 99. He concedes, however, that if the approach of Justice Scalia were adopted and applied consistently throughout the legislative process and the judicial interpretation of the product of that process, then textualism might be appropriate. *Id.* However, “in the world as it is, we shall do better to use whatever tools best identify congressional purpose in the circumstances.” *Id.* In contrast, Justice Scalia thinks that an even narrower textualist approach is necessary in order to limit the risk that judges will substitute their ideas of what is good for those of Congress. *See* Scalia, *supra* note 54, at 19–28.

59. *See* BREYER, *supra* note 52, at 98.

60. *See Burlington N. & Sante Fe Ry. Co. v. White*, 548 U.S. 53, 56–57 (2006).

61. *See id.* at 59–60.

62. *See* Title VII of the Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2000).

63. *Burlington*, 548 U.S. at 61–62.

64. *Id.* at 61. The term *in pari materia* means upon the same matter or subject. BLACK’S LAW DICTIONARY 807 (8th ed. 2004); *see generally* 3A SUTHERLAND ON STATUTORY CONSTRUCTION, NORMAN J. SINGER, STATUTES & STATUTORY CONSTRUCTION § 73.11, at 837 (6th ed. 2003) [hereinafter SUTHERLAND] (noting that courts should construe *in pari materia* statutes together to “produce a harmonious statutory scheme”). A more appropriate canon might be *noscitur a sociis*: “[T]he meaning of an unclear word or phrase should be determined by the words immediately surrounding it.” BLACK’S LAW DICTIONARY 1087 (8th ed. 2004).

65. *See Burlington*, 548 U.S. at 73–75 (Alito, J., concurring).

reject the *in pari material* canon of construction but instead distinguished it as not applying in this case. While both sections include the term “discriminate,” the context of that use differs significantly:

The . . . words in the substantive provision—‘hire,’ ‘discharge,’ ‘compensation, terms, conditions, or privileges of employment,’ ‘employment opportunities,’ and ‘status as an employee’—explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace. No such limiting words appear in the antiretaliation provision.⁶⁶

Justice Breyer looked to the legislative purposes of each section in determining that § 704(a) is not limited to employer actions involving the workplace.⁶⁷ Because the purpose of § 703(a)’s ban on discrimination is to ensure that the workplace is free of discrimination, that section focuses on the workplace to protect workers from discrimination because of their racial, ethnic, or gender-based *status*.⁶⁸ In contrast, § 704(a)’s purpose is to prevent employer conduct that interferes with full enforcement of the substantive provisions.⁶⁹ Thus, § 704(a) seeks to “prevent harm to individuals based on what they do, *i.e.*, their *conduct*.”⁷⁰ If employers could successfully retaliate against workers “by taking actions not directly related” to the workplace, they could frustrate the purpose of § 704(a).⁷¹

Finding that the Court could only serve Congressional purpose by extending the protection of § 704(a) to employer actions outside of the workplace, Justice Breyer then addressed the severity of harm a plaintiff need suffer in order to challenge that harm as retaliation.⁷² It is here that Justice Breyer showed his pragmatism.⁷³ Rather than construing § 704(a) to ban all retaliation, he created a test—not based on the terms of the statute—to define the severity of the employer’s action that insulates some retaliatory behavior by employers.⁷⁴ If a

66. *Id.* at 62.

67. *Id.* at 63. By looking at the consequences a particular approach will have on the overall functioning of this legislation, Justice Breyer may be edging toward a liberal position on statutory interpretation.

68. *Id.* (emphasis added).

69. *Id.*

70. *Id.* (second emphasis added). In *Gomez-Perez*, the Court examined the notion that under the ADEA, discrimination deals with status while retaliation focuses on conduct. *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1937 (2008).

71. *Burlington*, 548 U.S. at 63.

72. *Id.* at 67–70.

73. A liberal approach would go further by finding that failing to reach all retaliatory actions, even those beyond employment actions, would frustrate § 703(a)’s ban on discrimination. That is because allowing some retaliatory actions to go unchecked would insulate some discrimination from attack. Leaving some retaliation beyond the reach of the law gives employers an incentive to use those retaliatory actions to shelter some discrimination.

74. *Burlington*, 548 U.S. at 68–69.

court determines that the employer's retaliatory actions would not deter a reasonable employee from protesting discrimination, then the employer is not liable even though it did in fact retaliate.⁷⁵ To be prohibited, a plaintiff must show that the employer's action was significant enough to deter a reasonable employee from protesting the employer's discrimination even though the plaintiff complained of it. Justice Breyer noted that lower courts had taken four different approaches⁷⁶ and indicated that § 704(a) "protects an individual not from all retaliation, but from retaliation that produces an injury or harm."⁷⁷ As if choosing from a menu that he assumed included all the possible choices, Justice Breyer picked the formulation that the Seventh and District of Columbia Circuits had adopted: "In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."⁷⁸

In picking a middle ground from among decisions by lower courts, Justice Breyer failed to look at the Court's own earlier precedent as to Congress's purpose in enacting Title VII. For example, in *McDonnell Douglas Corp. v. Green*,⁷⁹ the Court found that "Title VII tolerates no racial discrimination, subtle

75. *Id.* at 69–70. On one hand, insulating some retaliatory action from liability allows an employer who wants to retaliate to do so without incurring liability by taking small, irritating actions designed to punish the employee for having complained of discrimination but not rising to the level of causing a materially adverse effect. On the other hand, it may be unreasonable to expect a court to provide remedy for every employee who claims he is a victim of retaliation despite the employer's action being of no real consequence.

76. *Id.* at 60–61. Justice Breyer explained,

Some Circuits have insisted upon a close relationship between the retaliatory action and employment. The Sixth Circuit majority in this case, for example, said that a plaintiff must show an "adverse employment action," which it defined as a "materially adverse change in the terms and conditions" of employment. The Sixth Circuit has thus joined those Courts of Appeals that apply the same standard for retaliation that they apply to a substantive discrimination offense, holding that the challenged action must "result in an adverse effect on the 'terms, conditions, or benefits' of employment." The Fifth and the Eighth Circuits have adopted a more restrictive approach. They employ an "ultimate employment decisio[n]" standard, which limits actionable retaliatory conduct to acts "such as hiring, granting leave, discharging, promoting, and compensating."

Other Circuits have not so limited the scope of the provision. The Seventh and the District of Columbia Circuits have said that the plaintiff must show that the "employer's challenged action would have been material to a reasonable employee," which in contexts like the present one means that it would likely have "dissuaded a reasonable worker from making or supporting a charge of discrimination." And the Ninth Circuit, following EEOC guidance, has said that the plaintiff must simply establish "adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."

Id. (alterations in original) (citations omitted).

77. *Id.* at 67.

78. *Id.* at 68 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)) (internal quotation marks omitted).

79. 411 U.S. 792 (1973).

or otherwise.”⁸⁰ Evoking *McDonnell Douglas* would be to look to an era when the Court adopted a pro-employee posture in interpreting Title VII.⁸¹ The *Burlington* Court’s failure to protect all employment-related actions simply because a court might find the consequences of the retaliatory action on the employee to be trivial⁸² partially undermines a broad purpose of Title VII. From the perspective of a broad approach to statutory purpose, Title VII’s language dealing with “terms, conditions, or privileges of employment”⁸³ merely limits the scope of application of Title VII to employment and not to other types of relationships, such as a customer and client relationship and situations covered by the other Titles of the 1964 Act.⁸⁴ If a broad purpose is appropriate, then courts should not use this test as a barrier to actions claiming an employer has discriminated.

While the materiality test the Court adopted may “separate significant from trivial harms,”⁸⁵ the pragmatic approach of Justice Breyer avoids the deeper question of interpretation of whether plaintiffs should be able to challenge all retaliatory actions involving employment. The effect of treating the language about terms and conditions of employment simply as a boundary between employment and other relationships would appear to give employees the discretion to challenge all retaliatory actions, be they slight or not, on the job or off.⁸⁶ Take, for example, an employer that assigned women who complained of

80. *Id.* at 801.

81. *See, e.g.*, Rachel K. Alexander, *Taking the Detour Around Defending Protected Activity: How Burlington Northern & Sante Fe Railway Co. v. White Unnecessarily Complicates Litigation of Retaliation Claims*, 27 REV. LITIG. 333, 335, 337–41 (2008) (discussing the heightened burdens imposed on employees under Title VII since the 1970s).

82. *See Burlington*, 548 U.S. at 68.

83. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2000).

84. *See* Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1151 (1998). The other Titles that make up the Civil Rights Act of 1964 all focus on discrimination, but each addresses different situations in which discrimination arises. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 241–68 (1964) (Title I (Voting Rights), Title II (Injunctive Relief Against Discrimination in Places of Public Accommodation), Title III (Desegregation of Public Facilities), Title IV (Desegregation of Public Education), Title V (Commission on Civil Rights), Title VI (Nondiscrimination in Federally Assisted Programs), Title VII (Equal Employment Opportunity), Title VIII (Registration and Voting Statistics), Title IX (Intervention and Procedure After Removal in Civil Rights Cases), and Title X (Establishment of Community Relations Service)). Thus, the Act establishes boundaries to distinguish the scope of application of each of the Titles.

85. *Burlington*, 548 U.S. at 68. The issue of how adverse an action must be also arises in basic discrimination claims as well as retaliation actions. Since *Burlington*, there is a movement to adopt a related materiality test to determine whether a plaintiff’s complaint of discrimination is trivial. *See* *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006).

86. The *Burlington* materiality test is not well-suited to deal with the fear that floodgates of litigation have opened. It is likely that the test has had little effect on the number of lawsuits actually filed. *See, e.g.*, Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 907 (2008) (noting that while scholars initially construed *Burlington* as pro-plaintiff, the subsequent lawsuits filed show a potentially opposite trend). The test is so case-specific that no one knows *ex ante* what will be found material until the

discrimination to Dilbert cubicles painted pink while assigning men who complained of discrimination to blue cubicles. Some would argue the color of cubicles is trivial since it does not immediately impinge on anyone's job in the sense of loss of income or a promotion. Others would argue that the color scheme created a discriminatory atmosphere that incorporated sex stereotypes into the workplace, which would be a disincentive to any reasonable person who might complain of discrimination. In such a situation, a court's finding that the plaintiff's complaint raised an issue that was too trivial seems problematic because some discrimination would be sheltered from challenge because of the threat of being stigmatized for protesting it. Not only the original, broad interpretation but also a literal interpretation of Title VII would reach such obviously retaliatory action taken in response to a complaint of discrimination. The pragmatic approach of Justice Breyer and the Court in *Burlington* tolerates some retaliation.⁸⁷ A more fully developed, but nevertheless pragmatic, approach might find the costs of intrusion into an employer's workplace to redress retaliation outweighed by a social policy that values eliminating as much discrimination as possible.

In *CBOCS West*, Justice Breyer's opinion relied primarily on precedent⁸⁸ and found insufficient the arguments the employer advanced against applying that precedent.⁸⁹ Justice Breyer first looked to *Sullivan v. Little Hunting Park, Inc.*,⁹⁰ which held that § 1982, the companion provision to § 1981 which protects

court finds that a particular action is or is not. So, if these claims will mostly result in lawsuits, there seems little reason to put the parties and the court through all the effort and expense to get the case to summary judgment only to have the court tell the plaintiff his complaint is too trivial to justify it being resolved on the merits. It may not take that much more judicial resources to simply decide whether the complained of actions were discriminatory.

87. See *Burlington*, 548 U.S. at 68. See also Brake & Grossman, *supra* note 86, at 907–11, for a description of how courts have misapplied *Burlington*, particularly some of the nullification courts. But see Lidge, *supra* note 6, at 521–25, for analysis showing that *Burlington* can be interpreted to be more protective than some of the lower court authority that the Court referred to favorably.

88. *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1955–58 (2008). While downplaying the necessity of following precedent, Judge Posner does think precedent is significant: "Although precedents can be distinguished and even overruled, they have some authority, which means that there is a cost to circumventing or eliminating a precedent." POSNER, HOW JUDGES THINK, *supra* note 3, at 39. For contrast, see Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 319–27 (2005), for a good description of how the Supreme Court views statutory precedent as a strong form of stare decisis. See also Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 656–71 (1992), for an argument that the canons of statutory interpretation can be meaningful. For a discussion of logical indeterminacy arising from judicial discretion in choosing among several precedents in the context of English law, see generally Julius Stone, *Fallacies of the Logical Form in English Law: A Study of Stare Decisis in Legal Flux*, in 2 *The Philosophy of Legal Reasoning: Precedents, Statutes, and Analysis of Legal Concepts* 300, 300–40 (Scott Brewer ed., 1998).

89. *CBOCS West*, 128 S. Ct. at 1958–61.

90. 396 U.S. 229 (1969).

rights related to ownership of property, also protects against retaliation.⁹¹ In that case, Sullivan, a white man, had rented a house to Freeman, a black man.⁹² The house was in an area that gave owners and lessees the right to own shares in a corporation that operated a playground open only to shareholders.⁹³ Because of Freeman's race, the corporation applied its explicit policy limiting ownership to whites and refused to accept Freeman's application.⁹⁴ The corporation then retaliated against Sullivan by expelling him from the corporation, thereby depriving him of the use of the playground.⁹⁵ In *Sullivan*, the Court upheld both plaintiffs' claims. Freeman, who had left the area, could maintain his § 1981 action for damages because the corporation's refusal to approve the transfer of shares in the corporation denied his right to lease property because of his race.⁹⁶ And Sullivan, the lessor, had his own § 1982 claim for injunctive relief to recover his shares in the corporation so he could continue to use the playground.⁹⁷

In his dissent in *CBOCS West*, Justice Thomas stated that *Sullivan* was only a third-party standing decision and not one involving direct protection against retaliation.⁹⁸ Justice Breyer, on the other hand, did not elaborate on *Sullivan* but instead quoted the more recent decision of the Rehnquist Court in *Jackson v. Birmingham Board of Education*,⁹⁹ which made clear that *Sullivan* interpreted § 1982 to encompass retaliation claims.¹⁰⁰ Justice Breyer then cited precedent from the Burger Court era in which the Court interpreted § 1981 consistently with § 1982.¹⁰¹ Justice Breyer concluded that, given the "sister statutes'

91. *Id.* at 237.

92. *See id.* at 234–35.

93. *Id.* at 234.

94. *Id.* at 235.

95. *Id.* (citing *Barrows v. Jackson*, 346 U.S. 249, 259 (1952)).

96. *Id.* at 237.

97. *Id.*

98. *See CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1965 (2008) (Thomas, J., dissenting) ("Having reexamined *Sullivan*, I remain convinced that it was a third-party standing case."). Justice Thomas's view is mistaken because the Court in *Sullivan* upheld the damages claim of Freeman, the black plaintiff, as well as Sullivan's claim for injunctive relief, *see Sullivan*, 396 U.S. at 235, in which Sullivan presumably sought reinstatement as a shareholder in the corporation because he still lived in the area and, presumably, valued access to the playground and park facilities that were available only to shareholders, *see id.* at 234–35. However, the *Sullivan* Court did indicate that Sullivan had "standing" to bring the action and did not use the term "retaliate." *See id.* at 237. But there is no indication that he was claiming standing to represent the interests of Freeman, a party to the action who was asserting his own claims. The language apparently means that Sullivan's claim for retaliation is within the scope of the protections provided by the statute and thus he could bring his own action.

99. 544 U.S. 167 (2005).

100. *CBOCS West*, 128 S. Ct. at 1955 (citing *Jackson*, 346 U.S. at 176).

101. *Id.* at 1955 (citing *Runyon v. McCrary*, 427 U.S. 160, 173 (1976)).

common language, origin, and purposes,”¹⁰² the antiretaliation precedent from § 1981 applied to § 1982.¹⁰³

Justice Breyer next turned to evaluate the consequences of the Rehnquist Court’s near nullification of § 1981 in *Patterson v. McLean Credit Union*¹⁰⁴ and the response to that decision by Congress in the Civil Rights Act of 1991.¹⁰⁵ While not dealing directly with retaliation claims, the *Patterson* Court read the statute narrowly so as not to apply to “conduct by the employer *after the contract relation has been established*.”¹⁰⁶ Recognizing that retaliation typically takes place after contract formation, Justice Breyer indicated that *Patterson*, “for a brief time, seems in practice to have foreclosed retaliation claims.”¹⁰⁷ The response by Congress was to supersede *Patterson* by adding new subsection (b), which defined the term “make and enforce contracts” to include “performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”¹⁰⁸ The legislative history of the 1991 Act also made it clear that Congress intended § 1981 to encompass retaliation claims.¹⁰⁹ Justice Breyer explained the effect of the Congressional override of *Patterson*: “[G]iven *Sullivan* and the new statutory language nullifying *Patterson*, there was no need for Congress to include explicit language about retaliation. After all, the 1991 amendments themselves make clear that Congress intended to supersede the result in *Patterson* and embrace pre-*Patterson* law. And pre-*Patterson* law included *Sullivan*.”¹¹⁰

102. *Id.* at 1956.

103. *Id.* at 1958. Race discrimination in contracting and in property transactions seems quite similar because both types played a significant part in the racially discriminatory superstructure of the Jim Crow era.

104. 491 U.S. 164 (1989).

105. See Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C., 16 U.S.C., 29 U.S.C., and 42 U.S.C.).

106. *CBOCS West*, 128 S. Ct. at 1956 (quoting *Patterson*, 491 U.S. at 177).

107. *Id.* Justice Breyer cites lower court authority to this effect. *Id.* at 1957.

108. Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071–72 (codified as amended at 42 U.S.C. § 1981(b) (2000)).

109. *E.g.*, H.R. Rep. No. 102-40(I), at 92–93 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 630 (noting that Congress intended to include retaliation claims in the protections provided by subsection (b)).

110. *CBOCS West*, 128 S. Ct. at 1959. See generally Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511 (2009). Professor Widiss’s article examines the way courts apply statutory provisions after Congress enacts amendments to overturn or override court decisions interpreting the original statutes. *Id.* at 512. While she finds that courts do not continue to apply the overturned precedent to cases on all fours, they sometimes still apply the underlying rationales of the superseded decisions in other fact situations brought under the amended, as well as related, statutes. *Id.* She proposes a rule of construction or interpretive canon that creates a rebuttable presumption that the override supersedes the judicial interpretation and the rationale for that interpretation of the preexisting statutory language. *Id.* That leaves the statute ready for a “fresh” interpretation, free of the earlier decision and its rationale. *Id.*

Based on this rather straightforward analysis of the text and precedent, Justice Breyer concluded that the “view that § 1981 encompasses retaliation claims is indeed well embedded in the law” so that “considerations of *stare decisis* strongly support our adherence to that view.”¹¹¹ The employer’s arguments did not overcome the “considerations of *stare decisis*.”¹¹² In responding to the main thrust of the employer’s textual argument, that because the term “retaliation” does not appear in § 1981 the statute does not prohibit retaliation, Justice Breyer adopted the approach that Justice O’Connor had used in *Jackson*. Just as Justice O’Connor found that the Congress that enacted Title IX “was thoroughly familiar”¹¹³ with the interpretation the Court had made several years earlier in *Sullivan*, Justice Breyer found that Congress had to be aware of *Sullivan* when it amended § 1981 in the Civil Rights Act of 1991, overturning *Patterson*.¹¹⁴ This approach suggests the emergence of a canon of statutory construction that presumes Congress intended to use the Court’s determination of the meaning of a term, at least if the congressional action is reasonably contemporaneous with the earlier Court decision.¹¹⁵

In sum, Justice Breyer did not discuss his theories of judicial decision making or statutory interpretation in either *Burlington* or in *CBOCS West*. Nevertheless, he used interpretative techniques such as reliance on the text of the statute, consideration of statutory structure, and examination of legislative history, which are consistent with his theoretical approach. He distinguished, rather than disavowed, the *in pari materia* canon of statutory interpretation. Relying on a view of legislative purpose, he rejected a textual argument that the limitations to employment found in § 703(a) be read into § 704(a). His approach

111. *CBOCS West*, 128 S. Ct. at 1958.

112. *Id.* The employer in *CBOCS West* made four arguments. First, it argued that because the statute did not include the term “retaliation,” the retaliation was not within the scope of the statute’s protection. *Id.* The Court rejected this argument based on *Sullivan* and *Jackson*. *Id.* at 1958–59. Second, the employer argued that because the amendments to § 1981 in the Civil Rights Act of 1991 did not include the term “retaliation,” the statute did not proscribe retaliation. *Id.* at 1959. The Court rejected this argument because Congress had no need to include it, given the Court’s holding in *Sullivan*. *Id.* Third, the employer argued that providing for protection against retaliation in § 1981 created statutory overlap because of the express antiretaliation provision of Title VII. *Id.* The Court found that this argument proved too much, since Congress intended that the two statutes in general did provide some overlapping protection against race discrimination. *Id.* at 1960. Finally, the employer argued that, based on *Burlington*, a Title VII case, § 1981 protects only actions taken because of the status of a person based on race and not those taken based on the person’s conduct. *Id.* The Court rejected this argument because it found the antiretaliation provision of Title VII to have a broader reach, including actions outside of employment, while the statute’s discrimination provisions were specifically limited to various employment-related decisions and practices. *Id.* Any distinction between status and conduct did not mean that § 1981 did not proscribe retaliation.

113. *Id.* at 1959 (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005)).

114. *Id.*

115. Thus, this may be a new area for the application of a “clear statement” rule. Unless Congress separately defines a term in a way that makes clear it is not adopting a definition of that term decided upon by the Court, a reviewing court will read the term in the new statute as having adopted the Court’s definition.

was not a liberal one, at least when compared with the interpretations of Title VII in its early years, because the materiality test adopted in *Burlington* allows some clearly retaliatory actions by an employer to sneak under the radar if a court finds that the employer's conduct would not deter a reasonable employee from complaining of discrimination. His approach was pragmatic because the test he adopted in *Burlington* for the severity of retaliatory action necessary to make it actionable is not textual, but it instead looks to the legislative purpose and to the different functions the antidiscrimination and the antiretaliation provisions serve. Perhaps the most interesting aspect of his approach in *Burlington* is his ratification of Justice O'Connor's analysis that binds Congress to the meaning of a statutory term as determined by the Court in a reasonably contemporaneous construction of the term in another statute.¹¹⁶

B. Justice Alito

Justice Alito wrote an opinion in *Burlington*,¹¹⁷ concurring in the judgment but declining to join the opinion of the Court.¹¹⁸ He did not expand the scope of retaliation protection to employer actions that reach beyond the workplace.¹¹⁹ Alito began by focusing on the text of § 704(a), which makes it unlawful for an employer "to *discriminate* . . . because [an employee] has opposed any practice made . . . unlawful . . . or because he has made a charge."¹²⁰ Based on his reading of the text, Alito saw two possible interpretations of the term "discriminate."¹²¹ The plaintiff had argued that the term "discriminate" in the statute means "to treat differently," an interpretation that would require an employer to treat employees who make discrimination complaints the same as employees who never complained.¹²² In other words, the plaintiff had proposed an equal treatment test to determine the viability of a retaliation claim. Justice Alito rejected the plaintiff's argument that the retaliation provision reaches any and every action taken by the employer as a result of a worker's complaint of discrimination.¹²³

116. To the extent that this approach is actually a rule or canon of statutory construction, it would reflect, at least as Judge Posner frames it, a more formalist approach. *See supra* notes 52–55 and accompanying text. This seems to be out of line with the approach Justice Breyer takes towards the canons. *See* BREYER, *supra* note 52, at 86–87.

117. *Burlington N. & Sante Fe Ry. Co. v. White*, 548 U.S. 53, 73 (2006) (Alito, J., concurring).

118. *Burlington*, 548 U.S. at 73 (Alito, J., concurring).

119. *Id.* at 76–77.

120. *Id.* at 74 (quoting Title VII of the Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (2000)).

121. *Id.*

122. *See id.*

123. *See id.* at 74–75.

Given the jurisprudence limiting the type of actions that plaintiffs can challenge as discriminatory,¹²⁴ the plaintiff's proposed meaning would leave plaintiffs less protected from discrimination than they would be from retaliation for having complained of that discrimination.¹²⁵ This would be so because only adverse employment actions can be challenged as discriminatory while, presumably, any action taken as retaliation, no matter how trivial, would be subject to challenge as retaliation.¹²⁶ Justice Alito described what the plaintiff's equal treatment test would mean:

[A] retaliation claim must go to the jury if the employee creates a genuine issue on such questions as whether the employee was given any more or less work than others, was subjected to any more or less supervision, or was treated in a somewhat less friendly manner because of his protected activity.¹²⁷

A liberal approach would have looked at the difference Justice Alito articulated but would have gone the other way, concluding that the reach of the antidiscrimination provision should include all discriminatory employment actions. In contrast, Justice Alito took a narrow approach, assuming that Congress did not intend to burden courts with claims of discrimination based on such "relatively trivial differences in treatment."¹²⁸

Because he limited himself to a text-based argument, Justice Alito determined that the only plausible alternative was to link the term "discriminate" in § 704(a) to its use in § 703(a) so that only discrimination "with respect to . . . compensation, terms, conditions, or privileges of employment" would be within the scope of employer actions that a plaintiff could challenge in a retaliation claim, just as plaintiffs could challenge only actions within those terms as discrimination under § 703(a).¹²⁹ Acknowledging that this was not "the

124. *See White, supra* note 84, at 1135.

125. *Burlington*, 548 U.S. at 74 (Alito, J., concurring).

126. *Id.* at 75.

127. *Id.* That position assumes, of course, that the lower court's narrowing construction of § 703(a) is correct. A better interpretation of the language of § 703(a) is that it only creates a boundary between actions arising out of employment and not out of some other relationship between the parties. *See White, supra* note 84. If § 703(a) could be interpreted according to its plain meaning, then so could § 704(a).

128. *Burlington*, 548 U.S. at 75 (Alito, J., concurring).

129. *Id.* (alteration in original) (quoting Title VII of the Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a)(1) (2000)) (internal quotation marks omitted).

most straightforward reading of the bare language of § 704(a),”¹³⁰ Justice Alito nevertheless thought his approach better than the one adopted by the majority.¹³¹

In contrast to Justice Breyer’s more purpose-directed approach in *Burlington*, Justice Alito claimed to tie his opinion more closely to the text by keying his approach to the definition of the term “discriminate,”¹³² even though he rejected the most straightforward textual argument.¹³³ But he left the text behind by reading the other terms of § 703(a) into § 704(a), where they do not appear.¹³⁴ With that move, he rejected the more straightforward textual argument that any violation of equal treatment by the employer is retaliation encompassed by the statute.¹³⁵

Based on his concurrence in *Burlington*, it is hard to characterize Justice Alito’s style of decision making other than to say that he proceeds cautiously, possibly pragmatically. He stated, but rejected, one text-based interpretation,¹³⁶ which suggests he is not a formalist. His next move was to read some of the text from one statutory provision into another, thus presenting a narrower interpretation of that statute than the one adopted by the majority.¹³⁷ To reject a plain meaning argument because of the concern that adopting such an argument would extend the application of the statute too broadly obviously is taking into

130. *Id.* A straightforward textual argument would not read the text from § 703(a)’s antidiscrimination provision into the antiretaliation provisions of § 704(a). A textualist would interpret the absence of more specific language in § 704(a) to mean that those terms do not limit retaliation claims in § 703(a).

131. *Id.* at 76–79. Justice Alito wrote that the majority’s test, which reaches retaliatory conduct beyond the workplace, “is misplaced” for several reasons. *Id.* at 76. First, most retaliatory conduct likely occurs “on the job.” *Id.* That may be so, but Justice Alito’s interpretation would create an incentive for employers to retaliate outside the workplace. Second, his interpretation would reach some off-the-job retaliatory conduct because the conduct would involve a term or condition of employment. *Id.* at 76–77. Third, the majority approach “has no grounding in the statutory language.” *Id.* at 77. Fourth, the majority test “leads logically to perverse results” because it would require taking into account the nature or type of the discrimination that led to the filing of the retaliation charge. *Id.* at 77–78. Thus, a discharged employee would have less protection from retaliation because few retaliatory actions by the employer would be so severe that it would dissuade the employee from filing a discrimination charge challenging the ultimate action of discharge. *Id.* at 78. Fifth, the majority’s conception of “a reasonable worker” is unclear because, by taking into account the individualized situation of the plaintiff, the test seems to implicate a subjective standard. *Id.* at 78–79. Finally, the causation standard—whether a retaliatory act “well might have dissuaded” an employee from filing discrimination charges—is “loose and unfamiliar.” *Id.* at 79.

132. *See id.* at 75, 77.

133. *See id.* at 74–75.

134. *See id.* at 75.

135. *See id.* at 75–77. His approach fails to address the structural differences between § 703(a) and § 704(a) that formed the basis of the employer’s argument in *Gomez-Perez*. Namely, the general ban on age discrimination did not protect federal sector employees from retaliation because there was no express ban on retaliation. *See Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1939–41 (2008).

136. *See supra* notes 127–28 and accompanying text.

137. *See supra* notes 128–31 and accompanying text.

account the future consequences of the decision being made. This can be seen as reflecting pragmatic thinking.

Writing for the Court in *Gomez-Perez*, Justice Alito followed the approach used by Justice Breyer in *CBOCS West*. He started with *Sullivan* as precedent, as did Justice Breyer, but then he quickly moved to discuss the more directly relevant authority of *Jackson*, the Title IX retaliation case.¹³⁸ Congress drafted the statutory structure of Title IX, which prohibits discrimination based on gender in federally funded education programs, including athletic programs, using a general proscription of discrimination.¹³⁹ This structure is quite similar to the protection against age discrimination provided to federal employees by § 633a(a) of the ADEA,¹⁴⁰ as well as § 717 of Title VII,¹⁴¹ which also applies to federal employees.

In *Jackson*, the Court had held a male sports coach at a high school to be protected against retaliation by his employer after the coach protested discrimination against the girls' basketball program at his school.¹⁴² Title IX provides that "[n]o person . . . shall, on the basis of sex . . . be subjected to discrimination under any education program."¹⁴³ Thus, as with § 633a(a) of the ADEA, Title IX sets forth a general ban on discrimination, which made reliance on Title IX precedent particularly useful in analyzing § 633a(a). The *Gomez-Perez* Court found that "[t]he statutory language at issue here ('discrimination based on age') is not materially different from the language at issue in *Jackson* ('discrimination' 'on the basis of sex') and is the functional equivalent of the language at issue in *Sullivan*."¹⁴⁴

Taking an approach that looked to legislative purpose, Justice Alito quoted at length from Justice O'Connor's opinion in *Jackson*, explaining that when a statute adopts a general ban on discrimination, retaliation is among the kinds of activities proscribed.¹⁴⁵ Just as an employer subjects a victim of discrimination to unequal treatment, an employer has intentionally subjected a victim of retaliation

138. *Gomez-Perez*, 128 S. Ct. at 1936–37 (citing *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171, 173–74, 177, 184–85 (2005)).

139. See Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. § 1681 (2006)).

140. See *Gomez-Perez*, 128 S. Ct. at 1936–37 (citing the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633a(a) (2006)).

141. See *id.* at 1940 (citing Title VII of the Equal Employment Opportunity Act of 1972 § 717, 42 U.S.C. § 2000e-16(a) (2000 & Supp. V 2005)).

142. *Jackson*, 544 U.S. at 171.

143. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2006).

144. *Gomez-Perez*, 128 S. Ct. at 1937.

145. *Id.* at 1936–37 (quoting *Jackson*, 544 U.S. at 173–74) (“Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination. . . . Retaliation is, by definition, an intentional act. It is a form of ‘discrimination’ because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination ‘on the basis of sex’ because it is an intentional response to the nature of the complaint: an allegation of sex discrimination.” (alteration in original) (internal quotation marks omitted)).

to unequal treatment in the sense that the employer would not have taken the action it did but for the victim having complained of discrimination.¹⁴⁶ Based on the similarity between discrimination and retaliation, Justice Alito concluded, “Following the reasoning of *Sullivan* and *Jackson*, we interpret the ADEA federal-sector provision’s prohibition of ‘discrimination based on age’ as likewise proscribing retaliation.”¹⁴⁷ Justice Alito rejected the lower court’s attempt to distinguish the two statutory provisions by distinguishing *Jackson*.¹⁴⁸

Justice Alito rejected the government’s textual argument that the ADEA does not prohibit retaliation because, while Congress expressly included it in the provisions applying to private sector employment, Congress did not expressly include it as to federal sector employment.¹⁴⁹ The two statutory schemes differ fundamentally. The federal ban is a general proscription while the private sector proscription sets out a specific list of forbidden employer practices.¹⁵⁰ That difference in structure flowed from the fact that the federal sector ban on age discrimination channeled the similar ban on federal sector discrimination that Congress had earlier added to Title VII, again after Congress had adopted the more narrowly focused proscriptions for private employers.¹⁵¹

146. *Id.*

147. *Id.* at 1937.

148. *Id.* at 1938. The lower court distinguished *Jackson* in three ways, but the Supreme Court rejected all three. First, the lower court assumed that because the courts had implied a private cause of action under Title IX but Congress had expressly created a private cause of action under the ADEA, the *Jackson* Court had greater leeway to use an expansive interpretation of Title IX. *See id.* The Court rejected this analysis as perverse, because it would mean that a provision creating a private cause of action would justify a court in limiting the scope of protection more narrowly than in a court created, implied cause of action. *See id.* Second, the lower court opined that retaliation claims play a more important role in Title IX than in the ADEA. *See id.* The Court rejected this distinction, reasoning that this fails to understand that the Court based its decision in *Jackson* on the interpretation of the text, not on policy grounds. *See id.* at 1939 (quoting *Jackson*, 544 U.S. at 173, 178). Finally, the lower court stated that Congress adopted Title IX in response to *Sullivan*, but there was no similar context concerning the ADEA federal sector protections. *Id.* The Court concluded that there was “no reason to think that Congress forgot about *Sullivan* during the two years that passed between the enactment of Title IX in 1972 and the enactment of § 633a in 1974.” *Id.* This final argument asserted by the Court again reflects what may be an emerging canon of interpretation under which courts hold Congress to the Court’s contemporaneous construction of a statutory term unless Congress expressly defines that term.

149. *Id.* at 1939–41.

150. *Id.* at 1940.

151. *See id.* at 1940–41. In the oral argument, there was sharp colloquy about whether the Title VII ban on discrimination in the federal sector included within it a ban on retaliation. *See* Transcript of Oral Argument at 8, 10–11, *Gomez-Perez*, 128 S. Ct. 1931 (No. 06-1321). It is clear that in amending the ADEA to make it applicable to federal employees, Congress used the same model it had used when it extended Title VII to federal employees. *See Gomez-Perez*, 128 S. Ct. at 1939–40 (citing *Lehman v. Nakshian*, 453 U.S. 156, 167 n.15 (1981)). However, there is nothing in the legislative history of § 717(a) indicating why Congress took the approach it did with respect to Title VII in the first instance. *See* H.R. REP. NO. 92-238, at 22–26 (1971), *reprinted in* SUBCOMM. ON LABOR, S. COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 82–86 (1972). Presumably, the reason Congress used a separate, general proscription of all discrimination in § 717(a) is because the exercise of those

The government also argued that Congress did not intend for the federal sector age discrimination ban to include a prohibition on retaliation because Congress expected that the Civil Service Commission would revise its regulations to ban retaliation based on age, just as the Commission had banned discrimination (including retaliation) in regulations enacted after Congress extended Title VII to the federal sector.¹⁵² Justice Alito rejected this argument as inherently contradictory, calling it speculative because there was no evidence in the text, structure, or legislative history that Congress had in fact relied on the Civil Service Commission to fill the gap.¹⁵³ On one hand, if Congress did not intend § 633a(a) to include retaliation within its proscriptions, there would be no reason for Congress to expect the Civil Service Commission to ban it by regulation.¹⁵⁴ On the other hand, if Congress had specifically declined to ban retaliation, then the Civil Service Commission would be acting *ultra vires* if it did undertake to ban retaliation.¹⁵⁵ Because precedent supported including retaliation within the proscription of age discrimination in the ADEA provision that applied to federal sector employment, and because the arguments for distinguishing that authority were quite weak, Justice Alito concluded that § 633a(a) protects an employee from retaliation when an employee of the federal government has complained of age discrimination.¹⁵⁶

Looking only at the retaliation opinions of Justice Alito in *Burlington* and *Gomez-Perez*, his approach to statutory construction appears to be cautious but with at least an overtone of pragmatism. Like Justice Breyer in *Burlington*,¹⁵⁷ he was unwilling to proscribe all employer actions that amounted to retaliation. But he also took one further, narrowing step by exempting from the proscription all retaliatory actions outside of employment.¹⁵⁸ A more committed pragmatist

claims by federal employees was subject to the specialized procedural requirement added in § 717(b). *See supra* note 38. Congress followed the structure it had used in Title VII when it extended the ADEA to federal employees, *see Gomez-Perez*, 128 S. Ct. at 1940 (citing *Lehman*, 453 U.S. at 167 n.15), even though it did not attach special procedural requirements to federal employee claims of discrimination, *see Age Discrimination in Employment Act of 1967*, 29 U.S.C. § 633a (2006).

152. *Gomez-Perez*, 128 S. Ct. at 1941–42.

153. *Id.* at 1942.

154. *Id.*

155. *See id.* At a general level, the civil service system is designed to select qualified employees and then to provide job security to covered employees. In the civil service system, neither discrimination nor retaliation for having challenged discrimination justify an employer taking an adverse action against an employee. *See H.R. REP. NO. 92-238*, at 22–23 (1971), *reprinted in* SUBCOMM. ON LABOR, S. COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 82–83 (1972). Thus, in some sense, civil service law proscribed discrimination and retaliation without need for any legislation by Congress. But Congress nevertheless extended Title VII protections to all federal workers, even those covered by civil service, because it found that the civil service system had failed to be an adequate system to protect federal employees from discrimination. *See id.* at 23–24.

156. *Gomez-Perez*, 128 S. Ct. at 1943.

157. *See supra* notes 73–75 and accompanying text.

158. *See supra* note 119 and accompanying text.

would have understood that a consequence of limiting retaliation protection to the employer's workplace would give employers the opportunity to retaliate in a calculated way by making sure the retaliatory actions occurred beyond the workplace.¹⁵⁹ In *Gomez-Perez*, Justice Alito channeled Justice Breyer's approach in his two retaliation opinions by looking to precedent and to Justice O'Connor's approach in *Jackson* of relying on the purpose of Congress in creating different approaches to private and public sector employees. It might even be argued that he moved slightly to a more pro-employee position in *Gomez-Perez* from where he started in his *Burlington* concurrence. A more fully committed pragmatist, however, might have bolstered the decision to include retaliation within a general proscription of discrimination by exploring the consequences of failing to do so. Basically, the proscription of discrimination would be much diminished, if not completely undermined, if the provision did not also proscribe retaliation. Without a ban on retaliation, opportunistic employers would be able, as a practical matter, to insulate themselves from discrimination claims by making it clear to employees that any complaint of discrimination would be met with the most dire consequences at the workplace and beyond. Few employees would risk their jobs by complaining of discrimination. Thus, based on *Burlington* and *Gomez-Perez*, it is possible to characterize Justice Alito as a mild pragmatist. In *Burlington*, he rejected a plain meaning argument because of a pragmatic concern that relying on the text would expand the scope of Title VII protection against retaliation too far,¹⁶⁰ and in *Gomez-Perez*, he followed the generally pragmatic approach of Justice Breyer in *Burlington*.¹⁶¹

While Justice Alito's approach in these two cases seems at some level to be pragmatic, that judgment must be viewed in light of his opinion in an important Title VII decision dealing not with retaliation but with time limits for filing discrimination claims—the 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*¹⁶² In *Ledbetter*, the Court, in an opinion by Justice Alito, held that each pay-setting decision is a “discrete act” so that the 180-day filing period for discrimination claims begins when the act occurs,¹⁶³ even if the employee is unaware that the act, along with the discrete acts of setting the salaries of other workers, constituted salary discrimination.¹⁶⁴ *Ledbetter* apparently knew that her supervising manager had given her low job evaluations, which she thought

159. A pragmatist might nevertheless balance the outcome this way because opportunistic employers might have greater difficulty finding ways to retaliate beyond the workplace, and a broader rule might be seen as having the consequence of intruding too far into employer autonomy.

160. See *supra* notes 119–28 and accompanying text.

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

162. 550 U.S. 618 (2007). *Ledbetter* proved to be such a controversial decision that one of President Barack Obama's first acts as President of the United States was to sign a law that superseded the opinion. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, §§ 2, 4, 123 Stat. 5, 5–6 (amending Age Discrimination in Employment Act of 1967 § 7(d), 29 U.S.C. § 626(d) (2006)).

163. *Ledbetter*, 550 U.S. at 628.

164. *Id.* at 642.

happened because she was a woman.¹⁶⁵ By the time Ledbetter retired from Goodyear, she was making substantially less money than any of her similarly situated male colleagues.¹⁶⁶

Justice Alito, as he subsequently did in his opinion in *Gomez-Perez*,¹⁶⁷ looked to precedent in writing the *Ledbetter* opinion.¹⁶⁸ This time, instead of finding one stream of authority—such as the *Sullivan* decision later followed in *Jackson*—he found two. In the first stream of cases, the Court had dismissed the plaintiffs’ complaints of discrimination because the plaintiffs had not timely challenged the discriminatory conduct. However, Justice Alito also noted a second stream of authority—including Congressional action and at least one subsequent Supreme Court case—that suggested a more liberal approach to the time-barring challenges to alleged employment discrimination.

In *Ledbetter*, Justice Alito looked to *United Air Lines, Inc. v. Evans*,¹⁶⁹ which had insulated from legal challenge the present effects of an earlier policy requiring female flight attendants to be unmarried.¹⁷⁰ In *Evans*, the employer discharged the plaintiff because she was married, but she did not challenge her dismissal.¹⁷¹ Once the employer ended the discriminatory policy because of litigation brought by other flight attendants, the plaintiff applied and her employer rehired her.¹⁷² The airline treated her as a new employee without giving her seniority credit for her prior service.¹⁷³ Substantively, this case was very important since the Burger Court used it to reject the “present effects of past discrimination” theory of discrimination.¹⁷⁴ Procedurally, the abrogation of that substantive theory left the plaintiff without a remedy: the plaintiff had not timely challenged her discharge when she got married, and without the present effects theory of discrimination, there was nothing discriminatory about treating her as a new employee without seniority when her employer rehired her.¹⁷⁵

Justice Alito also discussed *Delaware State College v. Ricks*,¹⁷⁶ where a plaintiff was time-barred from bringing his Title VII complaint because he had pursued internal remedies, waiting to file until his terminal year as a professor

165. *Id.* at 621–22.

166. *Id.* at 622.

167. *See supra* notes 138–44 and accompanying text.

168. *Ledbetter*, 550 U.S. at 624–32.

169. 431 U.S. 553 (1977).

170. *Id.* at 558.

171. *Id.* at 554–55.

172. *Id.* at 555.

173. *Id.*

174. *See* Case Comment, *Past Discrimination and Present Violations of Title VII: Farris v. Board of Education*, 92 HARV. L. REV. 757, 757 (1979) (citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977)).

175. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 625 (2007) (quoting *Evans*, 431 U.S. at 558).

176. 449 U.S. 250 (1980), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 112, 105 Stat. 1071, 1078–79.

had expired.¹⁷⁷ The discrete act of discrimination occurred when the plaintiff's employer initially notified him that it would not renew his contract beyond that terminal year.¹⁷⁸

Finally, Justice Alito discussed *Lorance v. AT&T Technologies, Inc.*,¹⁷⁹ where women workers filed discrimination claims when their employer laid them off because they had less seniority than they would have had if, years earlier, the employer had not modified the seniority system to advantage male workers.¹⁸⁰ Their claim was time-barred because the plaintiffs did not file it when the employer modified the seniority system.¹⁸¹

However, Justice Alito also considered a second strain of reasoning found in precedent. Congress, in the Civil Rights Act of 1991, had rejected *Lorance* by amending Title VII to allow challenges to seniority systems “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.”¹⁸² This applies “whether or not that discriminatory purpose is apparent on the face of the seniority provision.”¹⁸³ Further, in

177. *Ledbetter*, 550 U.S. at 626 (citing *Ricks*, 449 U.S. at 252–54, 258).

178. *Id.* (citing *Ricks*, 449 U.S. at 252–53).

179. 490 U.S. 900 (1989).

180. *Ledbetter*, 550 U.S. at 627 (citing *Lorance*, 490 U.S. at 902–03).

181. *Id.* (citing *Lorance*, 490 U.S. at 911).

182. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 112, 105 Stat. 1071, 1078–79 (codified at 42 U.S.C. § 2000e-5(e)(2) (2000)). Unlike Justice Breyer's approach to congressional override in *CBOCS West* where Congress overrode the prior decision and the law reverted to its earlier status, *see supra* note 110 and accompanying text, Justice Alito continued to rely on the rationale the Court relied upon in *Lorance* even though Congress had rejected the outcome, *see* 42 U.S.C. § 2000e-5(e)(2). In a footnote, he described why the override did not undermine the rationale of *Lorance*:

After *Lorance*, Congress amended Title VII to cover the specific situation involved in that case. The dissent attaches great significance to this amendment, suggesting that it shows that *Lorance* was wrongly reasoned as an initial matter. However, the very legislative history cited by the dissent explains that this amendment and the other 1991 Title VII amendments “*expand[ed]* the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.” For present purposes, what is most important about the amendment in question is that it applied only to the adoption of a discriminatory seniority system, not to other types of employment discrimination. *Evans* and *Ricks*, upon which *Lorance* relied, and which employed identical reasoning, were left in place, and these decisions are more than sufficient to support our holding today.

Ledbetter, 550 U.S. at 627 n.2 (alteration in original) (citations omitted). *See* Widiss, *supra* note 110, at 512, for further discussion of the way courts look at decisions that the legislature overrides.

183. 42 U.S.C. § 2000e-5(e)(2). To be critical of Congress, when it addressed *Lorance*, it should have addressed more broadly the problems of injustice associated with Title VII's short filing period and the restrictive interpretation not only in *Lorance* but in *Ricks* and *Evans* as well. Nevertheless, a liberal approach to statutory interpretation would find a broader purpose to this amendment, requiring the Court to at least rethink more generally its approach to the short filing period problems. Of course, the need to assemble supermajority support for amendments to controversial legislation may require compromises that result in a law that is less than ideal.

Bazemore v. Friday,¹⁸⁴ the Court had found timely a pay discrimination claim filed years after two racially segregated branches of the employer merged together without removing the pay differentials that had been part of the earlier, segregated system.¹⁸⁵

Justice Alito appears to have adopted the reasoning from the former stream of cases, and in so doing pursued an extremely formalistic path in *Ledbetter*. Disregarding the consequences of barring Ledbetter's claim, he found that discrete acts by the plaintiff's supervisor caused the significant difference in salaries between the plaintiff and her male coworkers even though the plaintiff did not discover that fact until years later.¹⁸⁶ Because those discrete acts occurred long before, plaintiff's claim could not reach them.¹⁸⁷

Ledbetter is a stunningly perverse decision.¹⁸⁸ It denied the plaintiff's claim as time-barred even though she did not know of the higher salaries of her coworkers during the period when she could have filed a timely claim.¹⁸⁹ Ledbetter knew that her supervisors had given her what she thought were discriminatory evaluations, but she did not know at that time the salaries of her coworkers who did similar work.¹⁹⁰ Simply being told what your salary is to be triggers the start of the 180-day time limit, even when the employee has no further information about potential discrimination. The Court blamed Ledbetter for not filing a discrimination claim with the first paycheck after her evaluations and every paycheck thereafter: "Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her."¹⁹¹

While the Court appears to leave open the possibility that a discovery rule could mitigate the harshness of its decision in *Ledbetter*,¹⁹² it is hard to believe

184. 478 U.S. 385 (1986) (per curiam).

185. *Ledbetter*, 550 U.S. at 633 (citing *Bazemore*, 478 U.S. at 386–87, 390–91, 395–96).

186. *See id.* at 621–22.

187. *Id.* at 628.

188. Cf. Deborah L. Brake, *What Counts as "Discrimination" in Ledbetter and the Implications for Sex Equality Law*, 59 S.C. L. REV. 657, 672 ("The Court's recent *Ledbetter* decision is much more than a narrow, procedural ruling interpreting Title VII's filing deadlines. It is the product of a Court that has taken an increasingly narrow view of the proper role of law in remedying gender inequality.").

189. *See Ledbetter*, 550 U.S. at 645 (Ginsburg, J., dissenting).

190. *Id.* Only a small proportion of all employees know their coworkers' salaries since there is little transparency about salaries. *See, e.g.,* Leonard Bierman & Rafael Gely, "Love, Sex and Politics? Sure. Salary? No Way": *Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 168, 171 (2004) (stating that one-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with coworkers; only one in ten employers has adopted a pay openness policy).

191. *Ledbetter*, 550 U.S. at 628. This sentence may demand too much from an employee. Although Ledbetter knew her salary, she did not, at the time her pay was set, know that it was discriminatory because she did not know the salaries of her coworkers.

192. *Id.* at 642 n.10. A discovery rule would in essence only begin the filing period once the employee knew facts sufficient to make clear at least the possibility that she was the victim of discrimination. *See generally* Brake & Grossman, *supra* note 86, at 874–78 (explaining the

that Congress could have meant courts to interpret the short filing period, which Congress intended to serve the purpose of quickly resolving discrimination claims,¹⁹³ to cut off claims before the potential claimant knew facts sufficient to support a claim of discrimination. While it is, of course, theoretically possible that Congress could have intended such a result (even though it is bizarre), a pragmatic judge would reach that conclusion only with the strongest proof. No such proof is present as to the Title VII filing periods.

A pragmatic approach would not only consider the consequences to the particular plaintiff but would also evaluate the consequences more broadly. It is with this broader perspective that the true perversity of *Ledbetter* becomes clear, even from the viewpoint of someone who favors employers over employees. Because the filing period begins to run when the discrete act of setting a salary occurs,¹⁹⁴ each employee whose salary the employer alters has a legally-created incentive—if the employee is to safeguard claims of wage discrimination—to file a wage discrimination claim even in the absence of full information as to whether the salary determination was discriminatory. Further, every time the employer modifies the salary for a second employee who might be a potential comparator for the first employee,¹⁹⁵ the first employee has an incentive to file a wage discrimination claim because the modification may be a discrete act establishing when discrimination first occurs and when the filing period starts to run. Since few employees are aware of the salaries of potential comparators or when the employer sets the salaries for these employees,¹⁹⁶ all employees have, as a result of *Ledbetter*, a strong incentive to file a wage discrimination claim every time they receive their wages.¹⁹⁷

Looking only at the bizarre consequences of *Ledbetter*, Justice Alito's approach to judicial decision making must be considered extremely formalistic; indeed, his position resulted in undermining Title VII wage discrimination claims. But after the 2007 Term, that may no longer be a complete view. Putting *Ledbetter* together with his opinions in the two retaliation cases moves him from the position of an extreme formalist toward somewhat of a pragmatist.

discovery rule and describing lower courts' approaches in applying the discovery rule to Title VII claims).

193. See *Ledbetter*, 550 U.S. at 629–30 (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980)).

194. *Id.* at 628.

195. See generally Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 193–97 (2009) (discussing the increasing use of “comparator” proof to show disparate treatment). A comparator is “someone whose treatment by the employer may be an adequate basis for inferring discrimination against the plaintiff.” *Id.* at 193.

196. See *Ledbetter*, 550 U.S. at 645 (Ginsburg, J., dissenting).

197. See Brake & Grossman, *supra* note 86, at 866–87, for an interesting discussion of the interaction of *Ledbetter* and *Burlington*. Obviously, if employees did undertake to protect their potential discrimination claims by filing claims every pay period, employers would likely respond with the kinds of retaliation that occurs all too frequently. Thus, there would be a tremendous increase in the number of retaliation charges filed that would correlate with the increase in filings of discrimination charges.

C. Justice Thomas

Justice Thomas also wrote two opinions in the three retaliation decisions discussed above, dissenting in both *CBOCS West*¹⁹⁸ and *Gomez-Perez*.¹⁹⁹ In *CBOCS West*, Justice Thomas, joined by Justice Scalia, opened with a plain meaning argument that § 1981 does not cover retaliation because it does not include the term “retaliation.”²⁰⁰ That argument is problematic because § 1981 also does not include in its text the term “discriminate.”²⁰¹ Thus, Justice Thomas quickly moved beyond the plain meaning argument by conceding that, despite the absence of the language in the statute, a ban on discrimination because of race “is the clear import of its terms.”²⁰² But for him, “[r]etaliation is not discrimination based on race.”²⁰³ This is consistent with his view that § 1981 is limited to a very narrow, equal treatment test of discrimination, one that would not affirmatively guarantee any rights.²⁰⁴ In his view, retaliation violates § 1981 only if the defendant violated equal treatment by, for example, having different retaliation policies for blacks and whites.²⁰⁵ For example, an employer would violate § 1981 if it retaliated only against blacks who complained of discrimination but not whites. However, a policy of retaliating against everyone who complains of discrimination would not violate § 1981. From his point of view, it would be wrong to find that retaliation violated § 1981 because doing so would involve a positive right against race discrimination.²⁰⁶ The underpinning of Justice Thomas’s whole approach is that, for him, retaliation is fundamentally different from discrimination and the discrimination § 1981 proscribes is quite limited.²⁰⁷ Thus, he continues to assert that the somewhat broader approach of

198. *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1961–70 (2008) (Thomas, J., dissenting).

199. *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1951 (2008) (Thomas, J., dissenting).

200. *See CBOCS West*, 128 S. Ct. at 1961.

201. *See* Civil Rights Act of 1991, 42 U.S.C. § 1981(b) (2000).

202. *CBOCS West*, 128 S. Ct. at 1962 (Thomas, J., dissenting).

203. *Id.* at 1963. Justice Thomas’s approach evokes earlier approaches limiting the conceptual scope of discrimination. For example, the Court found that pregnancy discrimination was not sex discrimination. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 135 (1976). Congress overturned that narrow definition of discrimination by enacting the Pregnancy Discrimination Act of 1978. *See* Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2000 & Supp. V 2005)). Early on, the courts did not find that sexual harassment was sex discrimination, and even comparatively recently some lower courts had found that same-sex harassment could not be sex discrimination. *See, e.g., Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 77, 82 (1998) (noting that both lower courts held a male worker had no cause of action for being harassed by his male coworker; the Supreme Court reversed, holding “same-sex sexual harassment is actionable under Title VII”).

204. This is also consistent with Justice Thomas’s narrow view of the scope of the Equal Protection Clause of the Fourteenth Amendment. *See Grutter v. Bollinger*, 539 U.S. 306, 349–78 (2003) (Thomas, J., dissenting).

205. *See CBOCS West*, 128 S. Ct. at 1963 n.2 (Thomas, J., dissenting).

206. *Id.*

207. *See id.* at 1965.

Justice O'Connor in *Jackson* (on which Justice Alito relied in *CBOCS West*)²⁰⁸ is erroneous.²⁰⁹ The *Jackson* Court found that intentional retaliatory action taken against an employee for challenging discrimination was itself a form of discrimination because the action is different treatment than the employee would have received absent the discrimination claim.²¹⁰

In *Gomez-Perez*, Justice Thomas, again joined by Justice Scalia, dissented, reasserting his view stated in *Jackson* that a proscription of discrimination never encompasses retaliation.²¹¹ For him, if Congress wants to ban retaliation it must do so expressly.²¹²

Characterizing Justice Thomas as a formalist or pragmatist is not difficult. In *CBOCS West*, he appears forced by the absence of the term “discriminate” to give up his textualist argument that § 1981 does not proscribe retaliation because it does not include the term “retaliation.”²¹³ He does hold strongly to his formalist position that the hollow equal treatment notion of what constitutes discrimination limits the scope of § 1981,²¹⁴ but he made no attempt here to articulate why his narrow approach has favorable consequences.

D. Chief Justice Roberts

Chief Justice Roberts, who joined the majority opinions in *Burlington*²¹⁵ and *CBOCS West*,²¹⁶ dissented in *Gomez-Perez*,²¹⁷ joined by Justice Scalia and joined in part by Justice Thomas.²¹⁸ In Part I of the dissent, the Chief Justice accepted *Sullivan* and *Jackson* but distinguished them.²¹⁹ Based on this precedent, he agreed that “broad antidiscrimination provisions may also encompass an antiretaliation component.”²²⁰ However, he argued that “it cannot be . . . that *any* time Congress proscribes ‘discrimination based on X,’ it means to proscribe

208. See *supra* notes 145–51 and accompanying text.

209. See *CBOCS West*, 128 S. Ct. at 1964 (Thomas, J., dissenting).

210. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005).

211. See *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1951 (2008) (Thomas, J., dissenting).

212. See *id.* This is a good example of textualism that operates to substantially restrict the scope of application of a statutory provision because a court will read the statute as not applicable to any situation it does not expressly cover.

213. See *supra* notes 200–03 and accompanying text.

214. See *supra* notes 204–07 and accompanying text.

215. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 55 (2006).

216. *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1954 (2008).

217. *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1943 (2008) (Roberts, C.J., dissenting).

218. *Id.* Justice Thomas did not join in Part I of the dissent because the Chief Justice took a position inconsistent with Justice Thomas’s position that the Court wrongly decided *Jackson* and *CBOCS West*. See *id.* at 1951 (Thomas, J., dissenting).

219. *Id.* at 1943–45 (Roberts, C.J., dissenting).

220. *Id.* at 1944.

retaliation as well.”²²¹ *CBOCS West* is, for him, one of those situations where retaliation is included, although it is not in *Gomez-Perez*.²²²

Chief Justice Roberts then referred to *Burlington* for the proposition that a claim of retaliation is conceptually different from a claim of discrimination because discrimination deals with the *status* of an employee—a worker treated differently because she is over age forty—while retaliation deals with *conduct*—a worker who complains of age discrimination.²²³ He traced various arguments to show that Congress did not intend to include retaliation within the proscription of the ban on age discrimination for federal sector employees.²²⁴

More important to the Chief Justice than the subtle statutory distinctions he assembled to support his conclusion was a claim based on legislative purpose. In other words, he looked to “*why* . . . Congress [would] allow retaliation suits against private-sector and state employers, but not against the Federal Government.”²²⁵ For him, Congress was familiar with the civil service protections available to federal employees that were not available to employees in the private sector.²²⁶ He traced the history of the proscription of discrimination on the basis of race, color, religion, sex, and national origin which protected workers from, among other things, reprisal, and which came into being before an executive order extended Title VII to federal sector employees.²²⁷ The Civil Service Commission regulations created a scheme by which federal employees could vindicate their rights, including the right not to be the victim of retaliation.²²⁸ Though revised, those regulations continued in effect after the

221. *Id.*

222. *Id.*

223. *Id.* at 1945. Justice Breyer in *Burlington* uses the distinction between status and conduct to show how, on one hand, the specific employment situations further specified in § 703(a) define the scope of that section’s proscription of discrimination because of status while, on the other hand, § 704(a)’s proscription of retaliation involves the employer’s response to the conduct of the employee of complaining of discrimination. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61–64 (2006). The Chief Justice in *Gomez-Perez* turns that distinction around to say that the ADEA’s proscription of discrimination, because of the status of being over age forty for federal sector employees, does not address the protection of the employee for the conduct of having complained of discrimination. *Gomez-Perez*, 128 S. Ct. at 1943–44 (Roberts, C.J., dissenting).

224. *Gomez-Perez*, 128 S. Ct. at 1945–50 (Roberts, C.J., dissenting). His first point is that the ADEA’s provisions dealing with the private sector specify retaliation, but the federal sector provision does not. *Id.* at 1945–46. Rather than differentiating the general nature of the federal sector provisions from the laundry list of specific applications in the private sector provisions, he finds in this a congressional intent not to prohibit retaliation as to federal employees. *Id.* To bolster that, the Chief Justice pointed to *Lehman v. Nakshian*, 453 U.S. 156 (1981). The *Lehman* Court differentiated the private sector provisions of the ADEA, which courts have construed to provide for trial by jury, from the federal sector provision, which the Court found did not include by implication a right to trial by jury. *Id.* at 162–63.

225. *Gomez-Perez*, 128 S. Ct. at 1948 (Roberts, C.J., dissenting).

226. *Id.*

227. *Id.* at 1948–49.

228. *Id.* at 1948.

executive order extended Title VII to federal employees.²²⁹ When Congress extended the ADEA to federal employees, the Civil Service Commission revised its regulations to extend protections against age discrimination, including retaliation for having complained of age discrimination.²³⁰ Thus, for Chief Justice Roberts, the comprehensive nature of the Commission's protection against retaliation explains why Congress did not intend to include retaliation within the proscriptions of age discrimination when it enacted § 633a(a).

The position of the Chief Justice is quite problematic. As Justice Alito noted, there is no support in the ADEA, its structure, or the legislative history of its amendment adding § 633a(a) that Congress intended not to include retaliation in § 633a(a) because the Civil Service Commission might subsequently ban retaliation by regulation.²³¹ Further, the legislative history of § 717 of Title VII, the provision Congress channeled when it enacted § 633a(a), suggests that Congress intended to make these antidiscrimination provisions applicable to federal employees because the civil service system had been inadequate to redress discrimination, thereby justifying added measures.²³²

By joining the pro-employee decisions in *Burlington* and *CBOCS West*, Chief Justice Roberts can probably be seen as adopting a pragmatic approach similar to that of Justice Breyer's. Chief Justice Roberts's position in his dissent in *Gomez-Perez* may indicate that he does not approach all statutory interpretation from a strictly pragmatic perspective, just as Justice Alito's opinion in *Ledbetter* suggests that Justice Alito sometimes approaches statutory interpretation with a more formalist inclination.²³³ However, Chief Justice Roberts's rationale for the dissent follows a pragmatic approach because he looks to the consequences of his position; he assumes that the Civil Service Commission will step forward with regulations banning retaliation.²³⁴ Perhaps he is not acting out of pragmatism but instead is responding to the contemporary debate about the scope of powers of the Executive. While a full discussion of this question is beyond the scope of this Article, Chief Justice Roberts's approach involves a healthy dose of deference to the Executive. This deference

229. *Id.* at 1948–49.

230. *Id.* at 1949.

231. *Id.* at 1942 & n.6.

232. The main rationale for adding § 717 to Title VII was that the preexisting system, administered by the Civil Service Commission, had failed to redress discrimination in federal sector employment. See H.R. REP. NO. 92-238, at 23–24 (1971), reprinted in SUBCOMM. ON LABOR, S. COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 83–84 (1972). The amendment extending the ADEA to federal sector employees was only a small part of a much larger project of extending the minimum wage provisions of the Fair Labor Standards Act to public sector employees. See H.R. REP. NO. 93-913, at 2–3 (1974), as reprinted in 1974 U.S.C.C.A.N. 2811, 2811–12. There is little legislative history beyond an indication that federal employees deserved the same protection against age discrimination that other employees had. See H.R. REP. NO. 93-913, at 40–41, as reprinted in 1974 U.S.C.C.A.N. 2811, 2849–50.

233. See *supra* notes 186–87 and accompanying text.

234. See *Gomez-Perez*, 128 S. Ct. at 1942 (Roberts, C.J., dissenting).

can be characterized as political²³⁵ in the sense that such a position appears more sympathetic to a “unitary executive” theory of separation of powers.²³⁶ If this is true, then one way of synthesizing Chief Justice Roberts’s approach in the two 2007 Term retaliation decisions is that he chose to defer to the Executive’s position in both cases—finding for the employee in *CBOCS West* but for the federal government employer in *Gomez-Perez*.

IV. THE JUSTICES ON A SPECTRUM FROM PRAGMATIC TO FORMALIST

A classic “liberal” approach to statutory interpretation, used in the sense of traditional American jurisprudence and not politics,²³⁷ first asks whether or not the statute is social legislation.²³⁸ If the statute is social legislation, then courts should construe it broadly so that its remedial objectives will likely be fully realized.²³⁹ Antidiscrimination laws are very good examples of social

235. See *supra* note 3.

236. One thrust of the unitary executive theory is that the President will not be able to fulfill the constitutional function as the sole executive without complete control over all aspects of the federal government, including control of all of its employees. For a description of the concrete aspects of governance involved in the scope of this theory and how it has developed from President Ronald Reagan to President George W. Bush, see Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523, 523–59 (2008). For a seminal article on the “unitary executive” theory, see generally Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155 (1992) (arguing that the President retains supervisory control over all executive officers). The George W. Bush administration relied heavily on broad assertions of the unitary executive theory. Ironically, Justice Alito may have initiated the contemporary debate over the “unitary executive” theory, at least in those terms, when he served in the Office of Legal Counsel of the Reagan Justice Department in the mid-1980s. See Jess Bravin, *Judge Alito’s View of the Presidency: Expansive Powers*, WALL ST. J., Jan. 5, 2006, at A1.

237. “Liberal” here means in the policy sense, not the sense of party politics. See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 161–91, 229 (1995).

238. See SUTHERLAND, *supra* note 64, § 73:1, at 741–43. Social legislation, often called “general welfare” legislation, is legislation that seeks to promote the common good, *see id.* at 741, generally by protecting and assisting the weaker members of society.

239. *Id.* at 741–42. Presumably, underlying this approach is the assumption that if a court gets the interpretation wrong it is better to have the error work in favor of those needing protection. With statutes that courts do not find to be social legislation, the consequences of an error in interpretation are worse if a court wrongly extends the reach of the law too far. To say it another, more statistically-oriented way, the question is whether there is a social policy that would cause the decider to choose between a “false inculcation” or a “false exculpation” error. See Neil B. Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. REV. 385, 409–11 (1985).

Justice Scalia views the canon that “remedial statutes are to be liberally construed” as a “canard.” See Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 581–86 (1990). He rejects the canon because the goal of interpretation with “respect to any statute, should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right.” *Id.* at 582. For him, this interpretive tool might interfere with achieving that goal. *Id.* But he fails to recognize what to do when reaching that goal is subject to doubt. More humble jurists might not be as confident that they can achieve the goal of a “precisely right” interpretation of the statute and so they do worry about the consequences of getting it wrong.

legislation.²⁴⁰ If broadly construing social legislation is a good litmus test of a liberal approach to judicial decision making, none of the Justices who wrote opinions in any of the retaliation cases discussed above can be considered to have adopted a liberal approach. To say this another way, this traditional method of interpretation is not part of the current approach of any of the Justices to statutory interpretation. Indeed, the last time the Court said it was using the approach of broadly construing social legislation was in 1980 in an opinion by Justice Stewart in *Whirlpool Corp. v. Marshall*.²⁴¹ In that case, upholding a regulation promulgated by the Secretary of Labor, the Court said “safety legislation is to be liberally construed to effectuate the congressional purpose.”²⁴²

Construing the three statutes involved in the three retaliation cases liberally, a jurist would ask if proscribing retaliation would best achieve the objectives of these statutes.²⁴³ Justice Alito’s reliance in *Gomez-Perez* on the rationale Justice O’Connor used in *Jackson*²⁴⁴ only partly addresses the underlying issue of whether a proscription of retaliation is necessary to actually proscribe discrimination. If an employer faces no liability for retaliation, that creates a strong incentive for the employer to either promulgate a policy or follow a practice of discharging every employee who complains. That approach essentially shelters the employer from liability for all underlying discrimination claims, short of a claim that the employer discharged the employee because of discrimination.²⁴⁵ The employer could further insulate itself even from claims of discriminatory discharge by claiming that retaliation was a legitimate, nondiscriminatory reason for the discharge.²⁴⁶ Finally, the employer could have a policy or practice of “blackballing” all employees or former employees who complain that their dismissal was discriminatory. This is in line with, but is an

Judge Learned Hand suggested that he “should like to have every court begin, ‘I beseech ye in the bowels of Christ, think that we may be mistaken.’” *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 230 (Irving Dilliard ed., 1960). Hand was quoting Oliver Cromwell, who was making the same suggestion to the Church of Scotland. *See id.* at xxiv–xxv.

240. *See* *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418–19 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800–01 (1973).

241. 445 U.S. 1 (1980). Later, the Supreme Court, in a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) case, did not say that courts should construe remedial statutes broadly, *see* *United States v. Bestfoods*, 524 U.S. 51, 55–73 (1998), even though the lower courts in the same case had examined that concept in reference to CERCLA, *see* *United States v. Cordova Chem. Co. of Mich.*, 113 F.3d 572, 578 (6th Cir. 1997); *CPC Int’l, Inc. v. Aerojet-Gen. Corp.*, 777 F. Supp. 549, 571 (W.D. Mich. 1991).

242. *Marshall*, 445 U.S. at 13 (citing *United States v. Bacto-Unidisk*, 394 U.S. 784, 798 (1969); *Lilly v. Grand Trunk W. R.R. Co.*, 317 U.S. 481, 486 (1943)).

243. A more pointed question would be to ask if Congress intended only to appear to be proscribing discrimination while not actually banning discrimination by enabling employers to take retaliatory actions to prevent employees from advancing claims of discrimination.

244. *See supra* notes 138–51 and accompanying text.

245. Essentially, this is how Justice Thomas interprets § 1981, because in his view it does not expressly proscribe retaliation. *See supra* notes 200–10.

246. *See* *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993) (stating that an illegal reason for discharge can be legitimately nondiscriminatory).

even more extreme form of, the prophylactic rule that some lower courts have implemented that only allows claims of discrimination to proceed to trial that involve such “ultimate employment” decisions as discharge.²⁴⁷ Justices Alito and O’Connor perhaps saw a glimmer of this very real prospect by their treatment of retaliation as a form of discrimination. But the classic liberal approach would attempt to construe these antidiscrimination statutes so that they would work to abrogate discrimination. Absent the strongest text to the contrary, liberal jurists would not construe an antidiscrimination statute to allow any discriminatory or retaliatory acts by the employer to escape scrutiny just because a court might find the acts not sufficiently important to merit scarce judicial attention. The fact that none of the Justices writing opinions in these retaliation cases took a liberal approach may support the inference that there is no liberal among them.²⁴⁸

Rather than asking whether these statutes were social legislation to be broadly construed, the Justices writing for the Court in all three of the retaliation decisions started by relying on precedent. Justice Breyer began his opinion in *Burlington* by citing to *Jackson*.²⁴⁹ He also explicitly based his opinion in *CBOCS West* on stare decisis.²⁵⁰ Justice Alito in *Gomez-Perez* and *Ledbetter* does not mention the doctrine of stare decisis but moves right to discussing the relevant precedent.²⁵¹ While none of the three decisions involved precedent directly on point, all three involved areas where the authority moved in one direction—finding the plaintiff protected against retaliation.

For Justice Breyer in *CBOCS West*, the strong precedent was *Sullivan*, which found that the proscriptions of § 1982, a companion statute to § 1981, included retaliation.²⁵² One problem in *Sullivan* was that the Court did not use the word “retaliation” to describe Sullivan’s claim but did use the word “standing” instead.²⁵³ Without using the term, however, it is clear that Sullivan’s claim was

247. See, e.g., Lisa M. Durham Taylor, *Parsing Supreme Court Dicta to Adjudicate Non-Workplace Harms*, 57 *DRAKE L. REV.* 75, 84 & n.36 (2008) (noting cases where federal courts of appeal have required ultimate employment actions before allowing retaliation claims).

248. Had Justice Breyer utilized his “reasonable member of Congress” test to determine legislative purpose, it is possible that his analysis might approach a liberal one. See BREYER, *supra* note 52, at 87–88. But he did not appear to rely on that concept in either *Burlington* or *CBOCS West*.

249. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006).

250. See *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1955 (2008).

251. See *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1936 (2008); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, §§ 2, 4, 123 Stat. 5, 5–6 (amending Age Discrimination in Employment Act of 1967 § 7(d), 29 U.S.C. § 626(d) (2006)).

252. *CBOCS West*, 128 S. Ct. at 1955.

253. See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969). The Court described Sullivan’s claim as follows:

We turn to Sullivan’s expulsion for the advocacy of Freeman’s cause. If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property. That is why we said in [*Barrows*] that the white owner is at times “the only effective adversary” of the unlawful

one for retaliation by the corporation against him directly and not in some capacity representing the interests of his lessee.²⁵⁴ Justice Breyer avoided the problem in *CBOCS West* by again citing precedent; this time, he used the decision of the Rehnquist Court in *Jackson*, which states that the *Sullivan* Court interpreted § 1982 “to cover retaliation against those who advocate the rights of groups protected by that prohibition.”²⁵⁵ The next step was to look to precedent that courts are to read §§ 1981 and 1982 together. Given “the sister statutes’ common language, origin, and purposes,” Justice Breyer cited *Runyon* for the proposition that courts should read the two sections alike.²⁵⁶ Because precedent from § 1982 applies to § 1981, the fact that § 1982 proscribed retaliation made it easy to conclude that § 1981 did so as well.

Relying on precedent—*stare decisis*—is at first glance formalistic, but it is common for pragmatists to rely on it as well. In *CBOCS West*, Justice Breyer simply filled out the interpretation that had come before; he took that authority one small step in the same direction that courts had followed since the late 1960s.²⁵⁷ As Judge Posner sees it, external and internal restraints constrain pragmatic judges.²⁵⁸ Precedent is one of the external restraints.²⁵⁹ Pragmatism differs from formalism only once the use of formalist tools, including text and precedent, still leave a question open.²⁶⁰

Justice Breyer may have judged both *Burlington* and *CBOCS West* as being sufficiently determined by precedent and not leaving an open question that would require greater pragmatic exploration of the consequences.²⁶¹ To say it another way, it would have taken a radically different approach to come to a different conclusion; indeed, the Court had seen the consequences of such radicalism when Congress enacted the Civil Rights Act of 1991 to overturn a series of radical Supreme Court decisions in a number of civil rights areas. Congress had quickly rebuffed the Rehnquist Court’s decision in *Patterson*.²⁶²

It is interesting to note that the way Justice Breyer in *CBOCS West* dealt with *Patterson* and Congress’s subsequent repudiation further reinforces the cautious nature of the approach taken to statutory interpretation in this area of the law. Rather than acknowledging that Congress had reacted very negatively to

restrictive covenant. Under the terms of our decision in *Barrows*, there can be no question but that Sullivan has standing to maintain this action.

Id. (quoting *Barrows v. Jackson*, 346 U.S. 249, 259 (1953)).

254. *See id.* at 234–37.

255. *CBOCS West*, 128 S. Ct. at 1955 (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005)) (internal quotation marks omitted).

256. *CBOCS West*, 128 S. Ct. at 1955–56 (citing *Runyon v. McCrary*, 427 U.S. 160, 173 (1976)).

257. *See id.* at 1954–61.

258. *See* POSNER, *HOW JUDGES THINK*, *supra* note 3, at 259–60.

259. *Id.* at 260.

260. *See id.* at 260–64.

261. *See supra* Part III.A.

262. *See supra* text accompanying notes 104–10.

Patterson's significantly different approach to the statute as well as to the Court's other civil rights decisions in the 1988 term, Justice Breyer's treatment of *Patterson* seems to assume that the decision was simply a small deviation in the interpretation of § 1981 that Congress corrected without much overall impact.²⁶³ Perhaps Justice Breyer took this approach for collegial reasons, thinking that quoting *Jackson* was a sufficient rebuke to his more conservative colleagues.²⁶⁴

Only Justices Scalia and Thomas dissented in *CBOCS West*,²⁶⁵ with the two newest members of the Court, Chief Justice Roberts and Justice Alito, joining the majority. This may be some indication that the latter two justices are not as rigidly formalistic as their more senior colleagues. An alternative explanation is that they are more conservative²⁶⁶ (in the political sense) and as a result are more likely to defer to Executive decisions that they see fall within the purview of the Executive's power. For example, the Solicitor General argued in *CBOCS West* that Congress included retaliation within the conduct proscribed by § 1981, and both Chief Justice Roberts and Justice Alito agreed with that approach.²⁶⁷ But, while Chief Justice Roberts was consistent in siding with the divergent positions of the Executive in the two cases, Justice Alito limited his agreement to *CBOCS West* and rejected the federal government's position in *Gomez-Perez*, where the Deputy Solicitor argued the government's case.²⁶⁸

263. See *supra* text accompanying notes 109–12.

264. See *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1955 (2008) (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005)).

265. See *id.* at 1961 (Scalia & Thomas, JJ., dissenting).

266. Judge Posner characterizes Justice Alito as “conservative,” but he uses the term in the sense of politics. See POSNER, *HOW JUDGES THINK*, *supra* note 3, at 277–78.

267. See *CBOCS West*, 128 S. Ct. at 1954.

268. See *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1935 (2008). To explore in more detail the level of agreement between the Executive and Chief Justice Roberts and Justice Alito, the author examined every case in the Roberts Court era in which the Solicitor General filed briefs. Specifically, the examination considered the Solicitor General's requested outcome, whether the outcome the Court granted paralleled the Solicitor General's request, and whether Chief Justice Roberts and Justice Alito agreed with the Solicitor General's position. The data is on file with the author.

In the Roberts Court era, the Solicitor General has filed briefs in 66 cases. In 35 of these cases, the Supreme Court accepted the position advanced by the Solicitor General. Where the Court accepted the position of the Solicitor General, Chief Justice Roberts and Justice Alito each failed to agree with that position in only 1 case each. For Justice Alito, it was *Greenlaw v. United States*, 128 S. Ct. 2559, 2571 (2008) (Alito, J., dissenting). Similarly, the Chief Justice joined Justice Scalia's dissenting opinion in *Zuni Public School District No. 89 v. Department of Education*, 550 U.S. 81, 108 (2007) (Scalia, J., dissenting). In the 31 cases in which the Court did not accept the Solicitor General's position, Chief Justice Roberts agreed with the Solicitor General 8 times, while Justice Alito agreed with him 11 times. In total, Justice Alito agreed with the Solicitor General in 45 of 66 cases while the Chief Justice agreed in 42. Thus, they are both somewhat more likely to defer to the Executive's position than is the Court overall.

In *Gomez-Perez*, Justice Alito, writing for the Court, mentioned *Sullivan* but primarily focused on *Jackson* as precedent.²⁶⁹ While not a case on all fours with *Gomez-Perez*, *Jackson* provided good authority since the structure of the two statutory prohibitions on discrimination—Title IX in *Jackson* and the federal-sector provision in the ADEA here—are so similar.²⁷⁰ Since the *Jackson* Court found a retaliation claim to be within the general ban on sex discrimination in Title IX,²⁷¹ it was an easy step to find that Congress included retaliation in the similarly broad ban on age discrimination in § 633a(a) of the ADEA, which applied to federal sector employees. By siding with the Executive in *CBOCS West* but not in *Gomez-Perez*, it may be that Justice Alito finds precedent more important than deference to the Executive.

An alternative approach, one that is formalistic but reaches a different result, is a plain meaning, text-based approach: because § 633a(a) does not expressly include the term “retaliation” in its text,²⁷² the section does not prohibit retaliation. That argument, however, depends on whether the term “discriminate” itself includes retaliation. Deciding whether discrimination includes retaliation depends on an argument based on statutory structure. Not only are the structures of Title IX and § 633a(a) similar in setting forth broad proscriptions of discrimination,²⁷³ but these provisions are also quite different in structure from those that apply to the private sector in the ADEA. Section 623(a) of the ADEA’s ban on private sector employment discrimination sets forth a detailed list of the different types of employment actions that violate the Act if done

269. See *Gomez-Perez*, 128 S. Ct. at 1936–41.

270. Both statutes involve a substantive ban on discrimination that is quite general. Compare Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2006) (prohibiting discrimination in educational programs or activities based on sex), with Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633a(a) (2006) (prohibiting discrimination against an employee because of age).

271. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005).

272. See 29 U.S.C. § 633a(a).

273. See *id.*

because of age.²⁷⁴ Section 623(d) explicitly prohibits retaliation, but it is one subsection of a laundry list of specific acts that this section prohibits.

The broader wording of both § 633a(a) and Title IX create the possibility that the term “discriminate” means something different in different contexts. When used in an open ended, general way, the term could include retaliation. But the term may not include retaliation when Congress narrows it by linking it to a list of specific aspects of employment. Finding that the term “discriminate” has different meanings in different contexts is a position that a pure textualist might find disturbing. To justify reaching beyond plain-meaning textualism, Justice Alito quotes at length the rationale Justice O’Connor provided in *Jackson*.²⁷⁵ This comes close to the purposive approach Justice Breyer advanced in his theoretical work and in his *Burlington* opinion.²⁷⁶ Thus, Justice Alito’s analysis here may reflect a more pragmatic approach to making decisions.

So, why did Justice Alito seem to change his approach so much from the prior year’s decision in *Ledbetter*? In *Ledbetter*, Justice Alito had two divergent streams of precedent to rely on.²⁷⁷ One applied the short filing periods strictly and the other more liberally. Those precedents started with the narrowing approach used in the Burger Court era to stop the liberal momentum from the Warren Court era.²⁷⁸ In other words, there was no liberal Warren Court precedent to set the law moving in a broader way in *Ledbetter* as there was in *Gomez-Perez*. The Burger Court decision in *Evans* was fundamentally important as a

274. *See id.* § 623(a). Section 623(a) provides:

(a) Employer Practices.

It shall be unlawful for an employer—

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age;
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age; or
- (3) to reduce the wage rate of any employee in order to comply with this chapter.

Section 623(b) prohibits age discrimination by employment agencies, and § 623(c) does the same for labor organizations. Section 623(d) then proscribes retaliation:

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation.

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

Finally, § 623(e) bans discriminatory job postings.

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

276. *See supra* Part III.A.

277. *See supra* text accompanying notes 167–84.

278. *See supra* text accompanying notes 167–94.

matter of substantive law because it abrogated the most liberal, far reaching definition of discrimination—the present effects of past discrimination test—that the lower courts had developed during the Warren Court era.²⁷⁹ At the time the Court decided *Evans*, the procedural consequences were secondary, but the abrogation of the present effects test of discrimination set in motion the narrowed jurisprudence that Justice Alito relied on in *Ledbetter*.²⁸⁰

Putting *Gomez-Perez* together with *Ledbetter* supports the conclusion that both decisions reflect formalist thinking. In *Gomez-Perez*, there was consistent precedent, though no Supreme Court decision on all fours, supporting the conclusion that the general proscription of age discrimination applicable to federal sector employees included retaliation.²⁸¹ Thus, both a formalist and a pragmatist would likely reach the same conclusion. In contrast, in *Ledbetter*, there was a conflict in precedent and the Court had to pick which of the two cases to follow.²⁸² Thus, *Ledbetter* presented an open case. From a pragmatic point of view, the way to resolve an open case is to look at the likely consequences of the decision. The bizarre and perverse consequences of picking the path the Court followed to bar *Ledbetter*'s claim would not be the approach a pragmatist would likely decide to take. Presumably, thinking formalistically, Justice Alito applied what he considered to be the closest precedent without regard to the consequences.

If Justice Alito was so formalistic in *Ledbetter*, what explains his opinion in *Gomez-Perez*? It may be possible that the best explanation for Justice Alito's pro-employee position in *Gomez-Perez* is that he reacted to all the criticism that his opinion in *Ledbetter* evoked and the attempts in Congress to overturn it.²⁸³ If this is true, he may have become more sensitive to the consequences of his approach to decision making. In other words, this may show that he has been educated to move toward a more pragmatic way of judicial decision making.

Unlike his position in *CBOCS West*, Chief Justice Roberts dissented from the majority in *Gomez-Perez*.²⁸⁴ One explanation for his dissent may be that he is deferring to the position of the Executive, just as he did in *CBOCS West*.²⁸⁵

279. See *supra* notes 169–75 and accompanying text.

280. As to the larger question of whether there are any liberal justices on the present Court, it may be instructive that Justice Stevens was the author of *Evans*. See *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 554 (1977). While he is thought to sit on the left end of the ideological spectrum of the Justices on the Court today, that does not make him a liberal. But the fact that he joined the dissent of Justice Ginsburg in *Ledbetter*, see *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting), may be some indication that, in fact, he has moved to the left and not just stayed put while the Court moved to the right.

281. See *supra* text accompanying notes 138–44.

282. See *supra* text accompanying notes 168–84.

283. See, e.g., Brake & Grossman, *supra* note 86, at 933 & nn.384–85 (describing the outpouring of criticism of *Ledbetter*).

284. *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1943–51 (2008).

285. It is interesting that *Gomez-Perez* and *CBOCS West* were argued one day apart, see *Gomez-Perez*, 128 S. Ct. at 1931 (argued on February 19, 2008); *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1951 (2008) (argued on February 20, 2008), and the government took conflicting

Looking for an alternative explanation seems reasonable since his stated reason is quite tenuous: Congress meant to exclude retaliation from the proscription of age discrimination in federal sector employment because it expected that the Civil Service Commission would, by regulation, ban retaliation once Congress extended the ban on age discrimination to the federal sector.²⁸⁶ Justice Alito rejected the argument because there was no support for it in the text, or even the Act's legislative history, and it was self-contradictory.²⁸⁷

Among the Justices writing opinions in these cases, Justice Thomas sits on the far right end of the spectrum; he generally takes a formalist approach. He appears willing and able to take and maintain a strong position on his narrow equal treatment view of what § 1981 applies to²⁸⁸ as well as to continue to resist the precedent established in *Jackson*, a case in which he issued a strong dissent. Justice Breyer sits the farthest on the left. But the left end of the spectrum is not liberal; instead it is pragmatic. The right end is formalist. Based only on his retaliation opinions, Justice Alito seems to be close to Justice Breyer. But he moves toward the formalist end of the spectrum if his opinion in *Ledbetter* is considered. The Chief Justice is similarly hard to place. On one hand, he fully joined the majority in *Burlington* and *CBOCS West*, but he dissented on weaker

positions in each. Where it was the defendant–employer in *Gomez-Perez*, it opposed finding the general prohibition of discrimination applicable to federal employees proscribed retaliation. See *Gomez-Perez*, 128 S. Ct. at 1935. But in *CBOCS West*, the government argued that § 1981 included retaliation within its scope of application. See *CBOCS West*, 128 S. Ct. at 1954. The Deputy Solicitor General argued *Gomez-Perez*, see Transcript of Oral Argument at 1, *Gomez-Perez*, 128 S. Ct. 1931 (No. 06-1321), while the Solicitor General presented the government's position in *CBOCS West*, see Transcript of Oral Argument at 1, *CBOCS West*, 128 S. Ct. 1951 (No. 06-1431).

286. *Gomez-Perez*, 128 S. Ct. at 1949.

287. *Id.* at 1942. One might ask why Justice Alito did not defer to the authority of the Executive in *Gomez-Perez*. This may sound silly, but perhaps he is more refined in his instinct to defer to the government, and he deferred to the Solicitor General's position in *CBOCS West* but did not feel the need to defer to the Deputy Solicitor General's argument in *Gomez-Perez*. This may flow from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which dealt with judicial deference to administrative agency determinations of their underlying statutes. See *id.* at 843–45. In a post-*Chevron* case dealing with an issue about the meaning of the Fair Labor Standards Act of 1938, *Christensen v. Harris County*, 529 U.S. 576 (2000), Justice Scalia took the position that the Court should defer when the government has taken a definitive legal position:

[T]he position that the county's action in this case was unlawful unless permitted by the terms of an agreement with the sheriff's department employees warrants *Chevron* deference if it represents the authoritative view of the Department of Labor. The fact that it appears in a single opinion letter signed by the Acting Administrator of the Wage and Hour Division might not alone persuade me that it occupies that status. But the Solicitor General of the United States, appearing as an *amicus* in this action, has filed a brief, cosigned by the Solicitor of Labor, which represents the position set forth in the opinion letter to be the position of the Secretary of Labor. That alone, even without existence of the opinion letter, would in my view entitle the position to *Chevron* deference.

Id. at 591 (Scalia, J., concurring in part and concurring in the judgment).

288. See *supra* notes 200, 204–07 and accompanying text.

grounds in *Gomez-Perez*. Assuming he based his actions on deference to the Executive, that makes him more politically motivated in his decision making.

V. CONCLUSION

The Justices who wrote opinions for the Roberts Court began with a rather formalist approach of relying on precedent but also relied on pragmatism as well to decide the two retaliation cases on its 2007 Term docket as well as *Burlington* in its 2005 Term. From an employee-oriented point of view, it may be critical, at least to Justice Alito, to find good authority from the Warren Court as a basis for an argument from precedent. None of the Justices took what might be called a traditionally liberal approach, but the cases were not of the type that might push a Justice to address whether to proceed as a full-blown pragmatist. An interesting wrinkle is the development of what might be called a new canon of statutory interpretation that unless Congress expressly defines a term, reviewing courts will deem Congress to have adopted the Court's interpretation of that term, at least if the Court decision is reasonably contemporaneous with Congress's action. In a sense, this development evokes a formalistic approach.

Having decided *Burlington* in 2006, *CBOCS West* and *Gomez-Perez* in 2008, and *Crawford* in 2009,²⁸⁹ the Court appears to consider the scope of employee protection against retaliation to be an important question. The Court has moved the law concerning retaliation forward, and as a result, a more robust jurisprudence may develop.²⁹⁰

289. *See supra* note 1.

290. One cautionary note: the Court in *Gomez-Perez* made clear that the parties had not challenged *Sullivan* or *Jackson*. *See Gomez-Perez*, 128 S. Ct. at 1937. This may suggest that the Court is willing to overrule that precedent should its viability come before the Court.

