HIDING THE STATUTE IN PLAIN VIEW: *UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER V. NASSAR*

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The Supreme Court decided in *University of Texas Southwestern Medical Center v. Nassar*[1] that the "motivating factor" level of proof to establish liability set forth in § 703(m)[2] and the "same-decision defense" to full remedies of § 706(g)(2)(B) of Title VII of the Civil Rights Act of 1964[3] do not apply to claims of retaliation brought pursuant to § 704(a).[4] Instead, Title VII retaliation must be the "but-for" cause of the adverse action that a plaintiff challenges. The obvious impact of *Nassar* is that it makes it more difficult for plaintiffs to prove retaliation. In some ways, *Nassar* is a surprise because the Court had consistently held for plaintiffs in a number of retaliation cases.[5] In other ways, it was not a surprise that the Court would move its retaliation jurisprudence more in line with its recent pro-employer, anti-civil rights interpretation of statutes typified by its decision in *Gross v. FBL Financial Services*.[6] As will be demonstrated, the Court reached its conclusion by hiding the terms and the structure of Title VII in plain sight while replacing the actual terms of the statute with terms of its own creation. Further, the majority of the Court was captivated by a hypothetical presented by counsel for the employer—a fact pattern that does not appear to have happened in any reported case—with that captivation indicative of the majority's perspective favoring employers over employees in its recent antidiscrimination decisions.

Dr. Naiel Nassar is a physician of Middle Eastern descent who is an expert in infectious diseases and a specialist in HIV/AIDS treatment. From 1995 to 1998 and again from 2001 to 2006, he was on the faculty of the University of Texas Southwestern Medical Center, as well as a member of the medical staff of the hospital. He served as Associate Medical Director of the hospital's Ame-

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[1] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

[2] 42 U.S.C. § 2000e-2(m) (2012).

[3] *Id.* § 2000e-5(g)(2)(B).

[4] *Id.* § 2000e-3(a).

[5] *See* Michael J. Zimmer, *A Pro-Employee Supreme Court?: The Retaliation Decisions*, 60 S.C. L. REV. 917, 917 (2009). *See also* Richard Moberly, *The Supreme Court's Anti-Retaliation Principle*, 61 CASE W. RES. L. REV. 375, 378 (2010) (the Court's pro-plaintiff retaliation decisions on statutory claims are based on a law enforcement model).

[6] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009) (all ADEA age discrimination claims must be proved to the "but-for" level of proof).

lia Court Clinic, working under the supervision of its Medical Director, Dr. Phillip Keiser.[7]

In 2004, the medical school hired Dr. Beth Levine to supervise the Clinic and Dr. Nassar. From the start, Dr. Levine treated Dr. Nassar differently from the rest of the medical staff in unfavorable ways. On a number of occasions, Dr. Nassar met with Dr. Gregory Fitz, the medical school's Chair of Internal Medicine and Levine's supervisor, to complain about Levine's unwarranted and unusual scrutiny. Trying to escape her racist statements and discriminatory treatment while still working for the clinic, Dr. Nassar tried to arrange becoming an employee of the hospital instead of just being on its medical staff. Having been told by the hospital that he would be hired if he resigned from the medical school faculty, Dr. Nassar sent a resignation letter to Dr. Fitz in which he cited the discrimination by Dr. Levine as the reason he was leaving. Dr. Nassar then negotiated his employment contract with the hospital. After receiving Dr. Nassar's resignation, Dr. Fitz moved to block Dr. Nassar's appointment at the hospital because he thought that Dr. Levine had been publically humiliated and needed to be publically exonerated.[8]

Dr. Nassar filed charges with the EEOC and brought suit against the medical school, claiming that he suffered from discrimination (because of his national origin) and retaliation by Dr. Fitz, who stopped his appointment by the hospital. At the liability stage of the trial, the district court instructed the jury that Dr. Nassar had the burden to prove that his protected characteristics and protected activities were motivating factors for the medical school's conduct, even though other factors might also have motivated it. The jury returned a verdict for Dr. Nassar, finding that his resignation from the medical school faculty was the result of a racially-motivated constructive discharge and that the medical school blocked the hospital from hiring him in retaliation for his complaints of discrimination.[9]

At the remedy stage, the court instructed the jury on the affirmative same-decision defense: If the medical school could prove that it would have stopped the hospital from hiring Dr. Nassar even absent a retaliatory motive, then the medical school would not be liable for damages or backpay. Attempting to make such a showing, the medical school argued to the jury that Dr. Fitz made his decision to block the hospital from hiring Dr. Nassar in April 2006, well before Dr. Nassar sent his resignation letter. The medical school offered, as an affirmative defense, a 1979 agreement between the school and the hospital where the hospital would only hire doctors who were on the medical school faculty. The jury rejected the medical school's affirmative defense and found that it had failed to prove that it would have blocked Dr. Nassar's hiring at the hospital even if it had not considered Dr. Nassar's national origin and race. Dr. Nassar was, therefore, entitled to full remedies for the discrimination and retaliation he had suffered.[10]

The medical school appealed and the Fifth Circuit reversed the finding of discrimination, deciding that the discrimination Dr. Nassar suffered did not

[7] Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448, 450 (5th Cir. 2012).
[8] *Id.* at 450–51.
[9] *Id.* at 452.
[10] *Id.* at 451–54.

constitute constructive discharge.[11] But the court upheld the finding that the medical school had unlawfully retaliated against him "to punish [him] for his complaints about [Dr.] Levine."[12] While four judges dissented, the Fifth Circuit decided not to rehear the case en banc.[13] The medical school petitioned the Supreme Court for certiorari, which was granted. The Court vacated the lower court's judgment.[14]

I. THE STRAIGHTFORWARD INTERPRETATION OF TITLE VII

Imagine looking at the text of Title VII for the first time.[15] That is what the plain textual meaning approach of statutory interpretation suggests to make sure that it is the text of the statute that is being interpreted. The Supreme Court has recently used the plain meaning approach in several antidiscrimination cases.[16]

Sections 703 and 704 set out the substantive provisions of Title VII. Section 703 is entitled "Discrimination Because of Race, Color, Religion, Sex, or National Origin" and § 704's title is "Other Unlawful Employment Practices."[17] Putting the two together suggests that, since § 704 prohibits unlawful employment practices, so too should the discrimination addressed in § 703 be characterized as unlawful employment practices. A standard principle of statutory interpretation requires that identical phrases appearing in the same statute, Title VII in this case, ordinarily mean the same thing each time they are used.[18] Because the substantive provisions of Title VII focus on "unlawful employment practices" committed by employers, employment agencies, labor organizations and training programs, the underlying organizing principle of the statute is to focus on the behavior of potential defendants and not on the nature of the claims of plaintiffs.[19] In other words, Title VII creates causes of action against

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[11] *Id.* at 452, 456.

[12] *Id.* at 454.

[13] Nassar v. Univ. of Tex. Sw. Med. Ctr., 688 F.3d 211 (5th Cir. 2012).

[14] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013).

[15] We may all be prone to look past the terms of a statute, like Title VII, that has been on the books for a long time and subject to much litigation. There may be some tendency to read the judicial gloss as the statute. Antidiscrimination decisions tend to discuss whether the plaintiff has proved discrimination and focus less on the structure and text of the statute that turn on the conduct of the defendant.

[16] In interpreting Title VII and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–33a, the Court has emphasized the importance of focusing on the statutory text. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (interpreting § 703(m) of Title VII); Gross v. FBL Fin. Servs. Inc., 557 U.S. 167 (2009) (interpreting § 623 of the ADEA). In Vance v. Ball State Univ., 133 S. Ct. 2434, 2439 (2013), decided the same day as *Nassar*, the Court said it was applying a plain meaning approach to determining who was a "supervisor" for purposes of an employer's vicarious liability for harassment. Justice Antonin Scalia and Bryan Garner call this the "Ordinary-Meaning Canon": "Words are to be understood in their ordinary, everyday meanings . . . ." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69 (2012).

[17] 42 U.S.C. §§ 2000e-2, 2000e-3 (2012).

[18] *See* Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007).

[19] The term "unlawful employment practice" is not defined in the definitions in 42 U.S.C. § 2000e (2012), but instead its definition is determined by all the substantive provisions of § 703 and § 704.

perpetrators of discrimination, so the law is structured around those violations and those violators, even though its goal is to protect victims of discrimination.[20] Eight different subsections of § 703 and § 704 set forth all of the unlawful employment practices prohibited by Title VII. The most commonly referred to provision, § 703(a), sets forth a long list of unlawful employment practices committed by employers:

> It shall be an unlawful employment practice for an employer —
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment 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 race, color, religion, sex, or national origin.[21]

Section 703(b) then describes unlawful employment practices of employment agencies,[22] § 703(c) sets forth unlawful employment practices of unions,[23] and § 703(d) does the same for training programs.[24]

The Civil Rights Act of 1991 amended § 703 to add two additional employment practices that an employee may challenge can be challenged as discrimination. Section 703(k) makes the use of an employment practice that

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[20] The purpose of Title VII is to end discrimination because of race, color, religion, sex, or national origin and so it is easy to see issues from the perspective of potential victims of discrimination. The structure of the statute, however, focuses on the potential liability of perpetrators of discrimination.

[21] 42 U.S.C. § 2000e-2(a).

[22] Section 703(b) provides:

> It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Id. § 2000e-2(b).

[23] Section 703(c) provides:

> It shall be an unlawful employment practice for a labor organization—
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> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
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> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
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> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Id. § 2000e-2(c).

[24] Section 703(d) provides:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Id. § 2000e-2(d).

causes unjustified disparate impact an unlawful employment practice[25] and § 703(l) makes it an unlawful employment practice to change employment test scores "on the basis of race, color, religion, sex, or national origin."[26] Unlike the substantive provisions originally enacted in § 703, these two new subsections do not delineate who the potential violators are. Presumably, they would be unlawful employment practices if utilized to discriminate because of race, color, religion, sex, or national origin by employers, employment agencies, labor organizations, or training programs.

Section 704, which is part of the Act as originally adopted, adds two more unlawful employment practices.[27] The unlawful employment practice at issue in *Nassar* is retaliation prohibited by § 704(a):

> 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.[28]

The legislative history of § 704 is sparse and gives no indication of why the two employment practices made unlawful by it—retaliation and publishing discriminatory job notices—were put in a section separate from those made unlawful by § 703.[29] Originally, the subsections of § 703 delineated what type

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[25] *Id.* § 2000e-2(k).

[26] *Id.* § 2000e-(l).

[27] Section 704(b) makes it an unlawful employment practice for a broad group of potential defendants to publish discriminatory job notices. Section 704(b) provides:

> It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

Id. § 2000e-3(b).

[28] *Id.* §2000e-3(a) (emphasis added). Nassar's claim of retaliation was based on the opposition clause.

[29] Congress regularly puts antiretaliation provisions in separate sections from the substantive sections of labor and employment law. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 215 (2012); Family and Medical Leave Act, 29 U.S.C. § 2615 (2012). As for the legislative history, see *Interpretative Memorandum on Title VII*, *reprinted in* U.S. EEQUAL EMP'T OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 3039, 3040 (1968), which states only that § 705(a) "prohibits discrimination by an employer or labor organization against persons for opposing discriminatory practices, and for bringing charges before the commission or otherwise participating in proceedings under the title." *See also* Edward C. Walterscheid, *A Question of Retaliation: Opposition*

of organization could violate the Act while the two subsections of § 704 applied to all potential defendants—employers, employment agencies, labor organizations and training programs. Without more, it is speculative to conclude that it is this distinction between subsections that are focused on single classifications of potential defendants and those that target all four classifications that caused Congress to enact the two separate sections creating substantive violations. The Congress that enacted the Civil Rights Act of 1991 (that added to § 703 the disparate impact and test score provisions that are not linked to any particular class of potential defendants) would not likely have intended to differentiate between § 703 and § 704 on that ground.[30] It is the present text that is the basis for interpreting the statute.

Adding up all of the different unlawful employment practices that employers, employment agencies, unions, or training programs could commit that violate Title VII totals twenty-four.[31] Four subsections focus on the class of the potential defendants and four do not. Section 703(k) is not linked to any particular type of actor but prohibits a "respondent" from using an unjustified employment practice because of its disparate impact.[32] Section 703(l) is also not linked to any particular actor but it prohibits a "respondent" from changing test scores.[33] Section 704(a) prohibits retaliation but applies to all the potential classifications of defendants covered by Title VII as does § 704(b) as to publishing discriminatory notices or advertisements.[34]

Two of § 703's subsections establish ways to prove that an employment practice is unlawful, both of which were added by the Civil Rights Act of 1991. Section 703(k) establishes how to prove disparate impact discrimination, a the-

Conduct as Protected Expression Under Title VII of the Civil Rights Act of 1964, 29 B.C. L. REV. 391, 393 (1988) (stating that there is an "almost total absence of any legislative history" on § 704(a) and that committee reports "simply repeat certain language of Section 704(a) without any explanation of its meaning") (citation omitted).

[30] For an inside-the-Administration view of the actual legislative background of the Civil Rights Act of 1991, see Roger Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459 (1994) (this "legislative history" is an insider's view describing the process rather than the traditional notion of legislative history based on the proceedings in Congress). A more traditional and comprehensive legislative history is published in a seven volume set. *See* 1–7 BERNARD D. REAMS JR. & FAYE COUTURE, THE CIVIL RIGHTS ACT OF 1991: A LEGISLATIVE HISTORY OF PUBLIC LAW 102-166 (1994).

[31] Here is how the total gets to be twenty-four. Employer unlawful employment practices involve 1. hiring, 2. discharging, 3. compensating, 4. terms, 5. privileges of employment, 6. limiting, 7. segregating, 8. classifying to deprive any individual of employment opportunities, and 9. adversely affecting status. Employment agency unlawful practices include 10. failing or refusing to refer, 11. otherwise discriminating, or 12. classifying or referring on basis of race, color, religion, sex, or national origin. Labor organization unlawful practices involve 13. failing or refusing to refer, 14. otherwise to discriminate, 15. classifying to deprive any individual of employment opportunities, and 16. causing an employer to discriminate. Training program unlawful employment practices include 17. failing or refusing to refer, 18. otherwise to discriminate, 19. classifying or referring on basis of race, color, religion, sex, or national origin. Section 703(k), added by the Civil Rights Act of 1991, prohibits 20. unjustified disparate impact. Section 703(l) involves 21. changing test scores. Section 704(a) involves 22. opposing, 23. making a charge, and 24. Section 704(b) involves publishing discriminatory notices.

[32] 42 U.S.C. § 2000e-2(k) (2012).

[33] *Id.* § 2000e-1(*l*).

[34] *Id.* § 2000e-3.

ory that does not include any state of mind element of the defendant to establish that an employment practice is unlawful.[35] For claims of intentional discrimination, § 703(m) sets forth the level of proof necessary to connect the alleged adverse action to the defendant's intent to discriminate: "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[36]

Shaped around the common prohibition of unlawful employment practices, all of these substantive violations—whether limited to certain kinds of actors, such as employers or unions, or more broadly applied—are part of one whole. Some employment practices that discriminate because of race, color, religion, sex, or national origin are made unlawful when committed by a specific type of actor—employer, employment agency, union or training program—and others, in both § 703 and § 704, are unlawful if committed by any actor that can engage in an unlawful employment practice. Certainly, after the enactment of the Civil Rights Act of 1991, the distinction between employment practices made unlawful by § 703 or by § 704 is a distinction without any real difference.

Given that § 703(m) applies to prove any "unlawful employment practice" and since § 704(a) characterizes retaliation as an "unlawful employment practice," the answer to the issue in *Nassar*—whether the "motivating factor" standard of proof of § 703(m) applies in § 704(a) retaliation claims—is simple. The answer is yes. During oral argument, Justice Ginsburg made this very straightforward interpretation of the relationship between § 703(m) and its application to § 704(a) in this colloquy with counsel for the medical school:

> JUSTICE GINSBURG: If we look at this [703](m) section, it says, "except as otherwise provided in this subchapter." I take it that would include retaliation as well, in the subchapter.
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> MR. JOSEFFER: Yes.
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> JUSTICE GINSBURG: "An unlawful employment practice is established." And then, when we go over to the retaliation provision, it says, "It shall be an unlawful employment practice."
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> So why doesn't that suggest that the — "an employment practice" under the retaliation provision is the same as "an employment practice" under this —[37]

At this point, counsel for the medical school interrupted, but did not provide an answer. Instead, he reiterated the basic claim that the substantive provisions of § 703 focus on the five prohibited characteristics—race, color,

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[35] Of course, nothing prevents a claim of disparate impact discrimination from being the basis for a finding of intentional discrimination if there is evidence that would support drawing the inference that "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." *Id.* § 2000e-2(m).

[36] *Id.*

[37] Transcript of Oral Argument at 13, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) (No. 12-484), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-484_c9dh.pdf.

religion, sex, and national origin—while § 704 does not.[38] While § 704(a) does not include the terms "race, color, religion, sex and national origin," it obviously refers to these characteristics because employment actions based on these characteristics are those that are "made an unlawful employment practice" by Title VII. Thus, § 704(a) is closely linked to the rest of Title VII's substantive provisions.

Later in the argument, a majority of the court declined to use a plain meaning approach. Justice Sotomayor answered Justice Ginsburg's earlier question, stating that Title VII "[c]alls [discrimination and retaliation] identical things, an unlawful employment practice."[39] Then, in answer to Justice Scalia's call to look at the text of the statute rather than the intent of different Congresses, the Assistant Solicitor General elucidated the plain meaning interpretation:

> I am actually happy to turn to the text. I think it's important to look at the language of Subsection [703](m). . . . And, if you follow that language, it starts off very plainly saying as, "Except as otherwise provided in Subchapter (m), unlawful employment practice is established." This is a means of proving an unlawful employment practice. And we know, when you look at [704] (a) . . . that retaliation is an unlawful employment practice. Congress used that phrase "unlawful employment practice" in Subsection (m). It's an unadorned phrase. It didn't limit it. It didn't say "under this section." It didn't say "under Section [704](a)." It said "an unlawful employment practice." And if you continue on, "when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor." And we know, under this Court's cases under *Gomez-Perez*, under *CBOCS*, under *Jackson* and *Sullivan*, that race is a motivating factor in an employment decision that is based on retaliation when you've complained about race discrimination. And so the language of [703](m), the plain language, clearly encompasses the retaliation claims in Title VII.[40]

Justice Kennedy responded, claiming the plain text meaning would read some words out of § 704(a): "Well, but under — under that analysis, you don't

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[38] Well, the — under Title VII, there are basically three different ways to establish an unlawful employment practice. One is the general provision for discrimination because of membership in a class. One is because of retaliation. And this is another one.

So this defines, basically, a third way of establishing whether an employment practice is unlawful. And what it says is that any employment practice that is motivated by one of the five listed factors is an unlawful employment practice. So this is why it all keeps coming back to do those five factors, those five motivations, do they or do they not include retaliation?

Id. at 13–14.

[39] *Id.* at 22. Later in the argument, counsel for the plaintiff, made the same point:

> [§2000e]-2(m), on its text, applies to e-3(a). Congress could have very well put an e-2(m) under this section. It could have very well put an e-2(m), an individual's race, color, religion, sex, national origin, but what it did was it said a complaining party must demonstrate — and then it lists those things. And then it says, "for any employment practice."
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> E-3(a) specifically defines retaliation as an unlawful employment practice. So the text of e-2(m), which, again, was a new provision altogether — Congress did not go in and amend e-2(a) through e-2(d), as it easily could have done, but it created a new provision.

Id. at 29.

[40] *Id.* at 51–52. The four opinions referred to are: Gomez-Perez v. Potter, 553 U.S. 474 (2008); CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005); and Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).

need the final clause . . . 'because he has opposed.' Race is enough."[41] To this, the Assistant Solicitor General replied that the conduct § 704(a) prohibits is opposition as described in the clause Justice Kennedy referred to:

> I think that [clause] defines what the protected activity is. I don't think it is any different than in *Jackson* or *Gomez-Perez*. In those cases, it was a general discrimination provision, but, once retaliation claims are recognized, there — there still actually needs to be protected activity. There has to be opposition. There has to be participation of some sort. And so I don't think it's any different in that respect.[42]

Finally, in her dissent, Justice Ginsburg made the plain meaning interpretation clearly and forcefully based on the Civil Rights Act of 1991:

> There is scant reason to think that, despite Congress' aim to "restore and strengthen . . . laws that ban discrimination in employment," House Report Part II, at 2, Congress meant to exclude retaliation claims from the newly enacted "motivating factor" provision. Section [703](m) provides that an "unlawful employment practice is established" when the plaintiff shows that a protected characteristic was a factor driving "any employment practice." Title VII, in § [704](a), explicitly denominates retaliation, like status-based discrimination, an "unlawful employment practice." Because "any employment practice" necessarily encompasses practices prohibited under § [704](a), § [703](m), by its plain terms, covers retaliation.[43]

Despite being presented with the argument that a plain meaning approach would rather easily answer the question presented, a majority of the Court looked elsewhere. If it had applied the plain meaning canon, the lower court's decision would be affirmed and the "a motivating factor" standard applied in all Title VII retaliation cases.[44]

II. The Supreme Court Misses the Obvious

Instead of a straightforward interpretation of the text that was consistent with the structure of Title VII, the Court sliced and diced the terms of the statute to reach a result that is at odds with the plain meaning of both the terms and the structure of the statute.[45] Writing for the Court in this five to four decision, Justice Kennedy began by dividing all of the employment practices made unlawful by Title VII into two separate types of violation—"status-based discrimination" and "retaliation"[46]—neither of which are terms included in Title VII.[47] For Justice Kennedy, status-based discrimination is discrimination that violates § 703(a)(1): "prohibitions against employer discrimination on the basis of race, color, religion, sex, or national origin in hiring, firing, salary

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[41] Transcript of Oral Argument, *supra* note 37, at 52–53.

[42] *Id.* at 53.

[43] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2539 (2013) (Ginsburg, J., dissenting).

[44] It would presumably be of some legal authority to support reaching similar results in other antidiscrimination statutes that provide a basis for challenging retaliation.

[45] Ironically, the Court claims that its interpretation honors Congress' "structural choices" when that is precisely what it does not do. *Nassar*, 133 S. Ct at 2529.

[46] *Id.* at 2522.

[47] The legislative history of the Civil Rights Act of 1991 does not appear to address whether or not new § 703(m) applies to § 704(a) retaliation claims, it is replete with statements including retaliation with other forms of discrimination. *See generally* Reams & Couture, *supra* note 30.

structure, promotion and the like."[48] Section 703(m)'s "motivating factor" test applies to claims based on five different characteristics—race, color, religion, sex, or national origin—that are prohibited bases for establishing liability. Justice Kennedy further asserted that "[t]he second type of conduct is employer retaliation on account of an employee's having opposed, complained of, or sought remedies for, unlawful workplace discrimination," and, based on § 704(a): "[t]he two remaining categories of wrongful employer conduct—the employee's opposition to employment discrimination, and the employee's submission of or support for a complaint that alleges employment discrimination—are not wrongs based on personal traits but rather types of protected employee conduct."[49] While this is true, the statute makes no distinction between personal traits and protected employee conduct. Furthermore, like §§ 703(a) to (d), § 704(a) does explicitly make it an unlawful practice "to discriminate against any individual," language that channels the language of § 703.[50]

Having created out of whole cloth the distinction between status claims of discrimination and retaliation claims in the opening paragraphs of the opinion, Justice Kennedy then set forth a statement of the case. When he returned to analyze the law, Justice Kennedy appeared to treat the distinction he created in the first part of the opinion as well established. He linked the "motivating factor" level of proof to what he characterized as § 703(a)(1)'s "status claims" while refusing to apply that standard to claims where the employment practice that is made unlawful pursuant to § 704(a) is retaliation. Evoking tort law, which he claims is the default rule to establish "[t]he requisite relation between prohibited conduct and compensable injury,"[51] Justice Kennedy describes the issue as one of causation in fact, "proof that the defendant's conduct did in fact cause the plaintiff's injury."[52] If that truly were the question, Dr. Nassar would win because the medical school did rescind the offer to him. But instead, Justice Kennedy conflated physical cause-in-fact—"was it the defendant that injured the plaintiff?"—while the real issue was linking the defendant's dis-

[48] *Nassar*, 133 S. Ct. at 2522. Justice Kennedy's dichotomy is underinclusive. Citing only § 703(a)(1) and § 704(a) inexplicably leaves out the rest of the substantive provisions of Title VII including §§ 703(a)(2), (b), (c), (d), (k) and (*l*) and § 704(b).

[49] *Id.* at 2522, 2525.

[50] 42 U.S.C. §§ 2000e-2(a–d), 2000e-3(a) (2012).

[51] *Nassar*, 133 S. Ct. at 2522. This is a relatively new and quite contested proposition. *See* Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1431–34 (2012); Sandra F. Sperino, The Tort Label (Jan. 15, 2013) (on file with the Univ. of Cincinnati College of Law), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200990. *Nassar* is an example of a decision where tort law is used rather casually, without really demonstrating the complexity that modern tort law entails. For example, causation is not an element of a prima facie case of intentional torts such as assault, battery, false imprisonment or the intentional infliction of emotional distress. Cause in fact is an element of the tort of negligence but disparate treatment is intentional discrimination, not discrimination based on negligence. If the Court wanted to seriously engage the similarities between tort law and employment discrimination law, then it would undertake a thorough explication of both bodies of law so it could recognize distinctions and deal with them as well as the similarities that might appear to exist at a more general level of abstraction.

[52] *Nassar*, 133 S. Ct. at 2524. That "defendant's conduct did in fact cause the plaintiff's injury" is, of course, established beyond peradventure. Plaintiff would be entitled to summary judgment if the only question was whether the defendant, as opposed to some other actor, rescinded plaintiff's job offer.

criminatory state of mind to the adverse action of retaliating against the plaintiff.[53] Justice Kennedy used his distinction between status discrimination and retaliation to overcome the unambiguous text of § 703(m), which clearly applies to proof of any unlawful employment practices where the defendant's motivation is at issue.

> It must be acknowledged that because Title VII defines "unlawful employment practice" to include retaliation, the question presented by this case would be different if [§ 703](m) extended its coverage to all unlawful employment practices. As actually written, however, the text of the motivating factor provision, while it begins by referring to "unlawful employment practices," then proceeds to address only five of the seven prohibited discriminatory actions—actions based on the employee's status, *i.e.*, race, color, religion, sex, and national origin.[54]

This sleight of hand reads "unlawful employment practices" out of § 703(m), even though that term is the core organizing language that pulls together the twenty-four different types of unlawful employment practices that constitute Title VII violations. While it might be convenient shorthand to characterize all twenty-four unlawful employment practices to be "actions based on the employee's status," this characterization is entirely inappropriate if rephrasing the actual statutory language in that way drops important language from the statute and undermines the basic structure of the act that turns on employment practices that thereby are made unlawful.[55]

By disassociating § 704(a) retaliation from some of the types of discrimination prohibited by § 703, the Court appears to be implying that Title VII retaliation is not bounded by the "five . . . prohibited discriminatory actions—actions based on the employee's status, *i.e.*, race, color, religion, sex, and

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[53] Justice Breyer, in his dissent in Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 190–91 (2009) (Breyer, J., dissenting), articulated the difference between physical cause—did the defendant do it?—from determining the motivations for the action that defendant unquestionably vis-à-vis the plaintiff:

> It is one thing to require a typical tort plaintiff to show "but-for" causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of "but-for" causation comparatively easy to understand and relatively easy to apply. But it is an entirely different matter to determine a "but-for" relation when we consider, not physical forces, but the mind-related characterizations that constitute motive. Sometimes we speak of *determining* or *discovering* motives, but more often we *ascribe* motives, after an event, to an individual in light of the individual's thoughts and other circumstances present at the time of decision. In a case where we characterize an employer's actions as having been taken out of multiple motives, say, both because the employee was old and because he wore loud clothing, to apply "but-for" causation is to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.

All that a plaintiff can know for certain in such a context is that the forbidden motive did play a role in the employer's decision. And the fact that a jury has found that age did play a role in the decision justifies the use of the word "because," *i.e*., the employer dismissed the employee because of his age (and other things).

[54] *Nassar*, 133 S. Ct. at 2528. The "Presumption of Consistent Usage" canon provides that a "word or phrase is presumed to breathe the same meaning throughout a text . . . ." *See* SCALIA & GARNER, *supra* note 16, at 170.

[55] SCALIA & GARNER, *supra* note 16, at 174.

national origin."[56] It is as if the Court fears that, without a toughened proof standard, a worker could challenge her employer's retaliation for being a Republican or a vegetarian.[57] That is simply not the case. Title VII retaliation is linked to proof that the defendant's retaliation against the plaintiff resulted from opposition to discrimination prohibited by Title VII.

A common scenario in discrimination and retaliation cases is one where an employee believes that she was not promoted because of her sex, and challenges the failure to promote as sex discrimination. Thereafter, the employer takes some adverse employment action against her, and the employee understands these actions to be retaliatory in response to her sex discrimination claim. Even if she is unable to prove that the failure to promote was discrimination, the employee can still win her retaliation claim if the factfinder believes that, in fact, the employer did retaliate against her for opposing the initial decision as discrimination. Thus, claims of retaliation are bounded by the thrust of Title VII and are a form of discrimination because of race, color, religion, sex and national origin.

While claiming to rely on *Gross* for its "persuasive force,"[58] the Court's adventure in statutory creationism undermines the *Gross* approach in three ways.[59] First, the *Gross* Court emphasized the use of plain meaning as the basis for statutory interpretation, quoting *Engine Manufacturers Association* v. *South Coast Air Quality Management District*[60] for the proposition that, "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."[61] Effectively reading "unlawful employment practice" as if it were absent from Title VII—while in actuality it is the core structural provision that ties the entire statute together—is simply not consistent with the approach the *Gross* Court said should be used in interpreting antidiscrimination statutes. Second, the Court in *Gross* found that Title VII was not relevant to interpreting the Age Discrimination in Employment Act because they were different statutes.[62] If Title VII is not relevant to interpreting the ADEA, then it should follow that the ADEA is not relevant to, nor of "persuasive force" in interpreting Title VII.[63] Third, the Court in *Nassar* used *Gross* to claim that,

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[56] *Nassar*, 133 S. Ct. at 2528.

[57] This misunderstanding can be seen in the question of Justice Kennedy during oral argument where he suggests that the plain text meaning of the text would read some words out of § 704(a): "Well, but under — under that analysis, you don't need the final clause, . . 'because he has opposed.' Race is enough." Transcript of Oral Argument, *supra* note 37, at 52–53.

[58] *Nassar*, 133 S. Ct. at 2527.

[59] From the viewpoint of the outcomes of the two cases, both favor employers because both make it harder for plaintiffs to prove age discrimination in *Gross* and retaliation in *Nassar*.

[60] Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004).

[61] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 (2009) (citation omitted).

[62] *Id.* at 173 ("Because Title VII is materially different with respect to the relevant burden of persuasion, however, [Title VII] decisions do not control our construction of the ADEA."). While in the past, the Court tried to harmonize the different antidiscrimination statutes to maximize the protection provided the victims of discrimination, *Gross* is a watershed. It requires that the different statutes be read independently of each other.

[63] *Gross* made a significant shift away from longstanding interpretative practice of reading to the extent possible antidiscrimination statutes harmoniously so that these laws would be

because the retaliation provision is in § 704(a), a separate *section* from § 703 with its "a motivating factor" standard, nothing in § 703 is relevant to the interpretation of a claim made pursuant to § 704(a).[64] This slicing and dicing of the statute is directly at odds with the principle of statutory interpretation requiring that the interpretation starts with the whole statute and finishes with it to determine that all terms are used consistently.[65] Justice Kennedy's approach is so at odds with the plain meaning canon that Justice Scalia, who has devoted considerable energy to reinvigorate the plain meaning approach,[66] and Justice Thomas, who wrote two previous antidiscrimination decisions, *Desert Palace, Inc. v. Costa*[67] and *Gross* (that emphasized the priority of the plain meaning canon), should have, as a matter of principle, joined the dissenters to change the outcome in *Nassar*. Their joining the opinion of Justice Kennedy makes one wonder about the depth of their commitment to the plain meaning approach to interpreting statutory text or, alternatively, to question what about the *Nassar* case compelled them to overlook principles they stated so strongly in earlier cases.

To reach the desired result, the Court had to deal with the longstanding proposition, supported by many decisions, that a statute prohibiting discrimination included a prohibition on retaliation as one form of discrimination—even where the statute does not refer to retaliation in so many words.[68] Justice Kennedy claimed to distinguish those decisions by again splitting in two the provisions of Title VII. He claimed that those cases dealt with substantive bars to discrimination, while *Nassar* "establishes the causation standard for proving a violation defined elsewhere in Title VII."[69] Why this distinction would make a difference is not clear since the question in *Nassar* does deal with the unlawful employment practice of retaliation, which is certainly substantive.[70] More sig-

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broadly protective. To achieve a similar narrowing of antidiscrimination law that it undertook in *Gross*, the Court in *Nassar* had to abandon the technique it said applied in *Gross.*

[64] The plain meaning canon of statutory construction involves interpreting the meaning of specific terms of a statute but it is necessary to do that in the context of the entire statute. Slicing apart the statute to give different meanings to the same term is exactly at odds with longstanding approaches to statutory interpretation. Scalia describes this as the "Whole-Text Canon": "The text must be construed as a whole." SCALIA & GARNER, *supra* note 16, at 167.

[65] *Nassar* is not the first time this technique of statutory misinterpretation has been used. *See* Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 577 (2001). One wonders how much thinner the Court will slice a statute in order to achieve its desired substantive outcome. Will the next case divide a statutory section into its subsections to reach a decision that is consistent with the Court's policy predilections?

[66] *See* SCALIA & GARNER, *supra* note 16; ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997).

[67] Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

[68] *See* CBOCS W., Inc. v. Humphries, 553 U.S. 442, 443 (2008); Gomez-Perez v. Potter, 553 U.S. 474, 476, 480–81 (2008); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173–74 (2005); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237–38 (1969).

[69] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2530 (2013).

[70] In oral argument, Chief Justice Roberts suggested that there was a hierarchical difference between the core anti-discrimination provisions in § 703 and a less significant violation by retaliating that is an unlawful employment practice in § 704(a).

> It seems to me that the protection against discrimination — race, color, religion, sex — that sets forth the basic principle of — of fair and equal treatment. The anti-retaliation provision is more functional. The way you protect against that discrimination is you make sure people don't retali-

nificantly, Justice Kennedy, having earlier read the term "unlawful employment practice" out of Title VII, then brought it out of hiding in order to support the Court's distinction between broad statutes that incorporate retaliation within the meaning of "discrimination" and Title VII's "detailed statutory scheme."[71] Of all the disingenuous aspects of *Nassar*, this is perhaps the worst. Undermining the significance and usefulness of being protected from retaliation makes the

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> ate when they complain about it. Now, that seems, to me, to be an order of — of hierarchy removed from the basic principle. So, perhaps, you would have a different standard of causation when you deal with that.

Transcript of Oral Argument, *supra* note 37, at 48–49.

This is very much at odds with precedent. As the Court recognized in its prior retaliation cases such as *Sullivan, Jackson*, *CBOCS West*, and *Gómez-Pérez*, protection against retaliation is fundamentally important to make the substantive prohibitions enforceable.

During oral argument, Justice Alito tried to justify making proof of retaliation more difficult than for other types of discrimination because it is too difficult for an employer to keep the fact that an employee filed a discrimination claim out of its mind when acting adversely to the employee for nondiscriminatory reasons.

> It's one thing to say — and it's a good thing to say to employers, when you are making employment decisions, you take race out of your mind, take gender out of your mind, take national origin out of your mind. It's not something you can even think about.
>
> But, when you are talking about retaliation, when you are talking about an employer who has been, perhaps publicly, charged with discrimination and the employer knows that the charge is not a good charge, it's pretty — it's very, very difficult to say to that employer and very difficult for the employer to say, I'm going to take this completely out of my mind, I'm not even going to think about the fact that I am — have been wrongfully charged with discrimination.
>
> Isn't that a real difference?

Id. at 50.

[71] This statute enumerates specific unlawful employment practices. See §§2000e2(a)(1), (b), (c)(1), (d) (status-based discrimination by employers, employment agencies, labor organizations, and training programs, respectively); § 2000e-2(*l*) (status-based discrimination in employment-related testing); § 2000e-3(a) (retaliation for opposing, or making or supporting a complaint about, unlawful employment actions); § 2000e-(3)(b) (advertising a preference for applicants of a particular race, color, religion, sex, or national origin).

Nassar, 133 S. Ct. at 2530. During oral argument, Justice Scalia made the argument that the same-decision defense to liability under the "a motivating factor" standard supports the Court's conclusion.

> What I'm concerned about is the text of this statute, which simply destroys your argument that there's no difference between retaliation and race discrimination. Section 2000e-5(g)(2)(A) limits remedies where a defendant acted — and this is a quote from the statute – "for any reason other than discrimination on account of race, color, religion, sex, or national origin, or in violation of Section 2000e-3(a) of this title." It — it separates out 2000e-3(a), retaliation, from the other aspects of race, color, religion, sex, or national origin discrimination.

Transcript of Oral Argument, *supra* note 37, at 37–38.

This becomes arguable but only after the Court distinguishes away both the significance of the many decisions that found retaliation to be discrimination and the text of § 704(a) that prohibits Title VII discrimination by opposing or challenging it.

There is considerable literature studying whether oral argument questioning predicts the outcomes in Supreme Court cases. *See, e.g.*, Timothy R. Johnson et al., *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?*, 29 WASH. U. J.L. & POL'Y 241, 256 (2009) ("[T]he attention Justices give to one side or the other at oral arguments significantly affects the outcome of a case."). For a critique of the Court's use of information not in the record of the cases decided, see Arthur Selwyn Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975).

antidiscrimination statutes much less available to workers in an at-will world where challenging the employer is extremely risky.[72]

III. WHY DID THE COURT DECIDE THE WAY IT DID?

So, why did the Court reject its recent interpretative approach to statutes and reach well beyond the terms of Title VII to justify its decision? It is difficult to understand the Court's failure to use the plain meaning method of statutory interpretation when its use would lead to a simple answer to the question presented—notwithstanding the Court's protestations that its decision was consistent with the plain meaning approach. Further, to reach its desired conclusion, the Court had to undermine the approach it had recently taken in *Gross* by ignoring some terms from Title VII, rather than reading the statute as a whole.

The Court's answer is that all of this slicing and dicing of Title VII was justified because of the "central importance to the fair and responsible allocation of resources in the judicial and litigation systems."[73] What the Court deems to be a fair and responsible allocation of resources is a reduction in the number and likelihood of success of retaliation actions because "claims of retaliation are being made with ever-increasing frequency."[74] Justice Kennedy asserts that using the "motivating factor" standard for proving retaliation would open the flood gates of litigation to retaliation claims. Basing a decision to cut back the scope of social legislation through misinterpretation of its terms is, by itself, not an adequate justification unless the Court knows what the real rate of retaliation is. If the amount of retaliatory conduct increases or the awareness of it by its victims improves, the number of claims filed should increase. After all, there is no indication that Congress did not, when it enacted Title VII, intend to prohibit all retaliation that constitutes an unlawful employment practice. Without some empirical support for reconfiguring the legislation by the number of claims filed, the Court is simply making an aesthetic or policy judgment, not an interpretation based on the statute. That judgment is for Congress, not the Court.[75]

Justice Kennedy also claimed that "lessening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer[s], administrative agencies, and courts to combat workplace harassment."[76] Certainly some small percentage of all retaliation claims, like any other kind of legal claim, may well prove to be frivolous.

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[72] For the development of the increasing insecurity of American workers, see Michael J. Zimmer, *Inequality, Individualized Risk, and Insecurity*, 2013 WIS. L. REV. 1 (2013).

[73] *Nassar*, 133 S. Ct. at 2531.

[74] *Id.* The number of these claims filed with the Equal Employment Opportunity Commission (EEOC) has nearly doubled in the past fifteen years—from just over 16,000 in 1997 to more than 31,000 in 2012. *Charge Statistics: FY 1997 Through FY 2013*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Apr. 21, 2014). Counsel for the employer made this argument in oral argument. Zimmer, *supra* note 72, at 29 n.133.

[75] *See* Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court is No Longer a Court*, 14 U. PA. J. CONST. L. 161, 162–63 (2011) (noting that the Supreme Court is no longer acting as a court by deciding issues not litigated).

[76] *Nassar*, 133 S. Ct. at 2531–32.

However, interpreting the statute where Congress intended to encourage more legitimate claims would likely only increase the number, but not necessarily the percentage, of claims that would ultimately be found to be frivolous. In the absence of any evidence about the actual rate of frivolous cases, the Court here relied on a hypothetical situation posed by the medical school's counsel in oral argument:

> Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation.[77]

During oral argument, Justice Kennedy appeared to focus on this hypothetical:

> I thought the thrust of Justice Alito's question was that retaliation claims are — are now quite common, and they can almost be used as a defensive — as a defense when you know you are about to be [fired]. And, if that's true, shouldn't we be very careful about the causation standard?[78]

There followed for four pages of the transcript a colloquy about the hypothetical that involved the Chief Justice and Justices Scalia and Alito.[79] What is especially interesting about this hypothetical is that it appears to be precisely that: a hypothetical. The Court's opinion does not cite to any cases that involved facts like the hypothetical, nor did the employer's counsel in oral argument. None of the briefs filed in the case cite to any cases either.[80] That is not a surprise since the hypothetical is based on a dubious assumption that employees who would engage in this scheming have some rather sophisticated knowledge of employment discrimination law.

While the hypothetical might reflect real incidents that have happened (in unreported decisions) or incidents that conceivably could happen in the future,

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[77] *Id.* at 2532. Counsel raised this hypothetical in his oral argument. *See* Transcript of Oral Argument, *supra* note 37, at 22–23. Justice Alito did the same. *See id.* at 30–31. Justice Scalia opines that the employee would win the retaliation case if this hypothetical was a real case. *See id.* at 32.

[78] *Id.* at 45.

[79] *Id.* at 45–48. Counsel for the medical school, Daryl L. Joseffer, of King & Spalding, is an experienced Supreme Court litigator. *Nassar* is his twelfth oral argument before the Court and he has filed more than one-hundred matters with the Court. Before joining King & Spalding as the head of its national litigation practice, Joseffer had been Principal Deputy Solicitor General, Assistant to the Solicitor General and counsel in the White House Office of Management & Budget. *Daryl L. Joseffer*, KING & SPALDING, http://www.kslaw.com /people/Daryl-Joseffer (last visited Apr. 21, 2014). There is a well-developed literature about the significance of "repeat players," lawyers who appear before the Court on numerous occasions, as an influence on the decisions of the Court. *See, e.g.*, Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187 (1995).

[80] Searching Westlaw to find any such cases is not easy. With the help of Reference Librarian Joe Mitzenmacher, I used the following search which turned up twenty-four cases, none of which appear to involve an employee using a claim of discrimination and retaliation as a strategic defense to an expected adverse employment action: adv: employee +8 knew know! suspect! § fire! terminat! "poor performance" (low! less! reduc! /4 pay salary) transfer! /p charge! (bring brought file! /4 suit complaint action) sue! /s discriminat! /p retaliat!.

the importance of the hypothetical's attractiveness to a majority of the Court in *Nassar* is that it demonstrates their basic inclination to see employment and employment discrimination from the perspective of the employer, not the employee, and not from an interpretation of the text and the structure of the statute. The majority of the Court appeared to base its interpretation of the statute on nothing more than the ability of the employer's counsel to tell a story that appealed to their preconceptions.[81] The image of the worker gaming the employer through the calculated misuse of the law brings to mind the powerful stereotype that Ronald Reagan evoked of "welfare queens," driving around in "welfare Cadillacs."[82] The stereotype proved to be powerful politically, yet it was not based on fact. Evoking the stereotype of conniving employees appeared powerful enough to capture the support of a majority of the Court by diverting their thinking away from the straightforward plain meaning analysis of the statute, replacing it with the convoluted slicing and dicing of the statute to reach a decision that was consistent with their policy predilections.[83]

IV. CONCLUSION

In her dissent, Justice Ginsburg concluded that "the Court appears driven by a zeal to reduce the number of retaliation claims filed against employers . . . Congress had no such goal in mind when it added [§ 703](m) to Title VII."[84] Much like her dissent in the Lilly Ledbetter case,[85] Justice Ginsburg used her dissent in *Nassar* to call for Congress to step in and again amend Title VII to overturn a Supreme Court decision that makes challenges to discrimination more difficult[86]: "[t]oday's misguided judgment, along with the judgment in *Vance v. Ball State Univ.*, should prompt yet another Civil Rights Restoration Act."[87] Given the present composition of the Supreme Court, patching the holes that it makes in antidiscrimination law may not suffice. Fraught with

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[81] Daniel Kahneman describes two ways that drive how our minds work: System 1 is "fast" and intuitive responses to stimuli, and System 2 is "slow" and analytical but requires great effort on the part of the observer. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 13 (2011). The hypothetical used so effectively in *Nassar* appears to be the product of System 1's fast thinking because it triggers stereotypes followed by System 2 slow thinking to rationalize the initial intuition. For an essay relating the book to law and legal practice, see Charles W. Murdock & Barry Sullivan, *What Kahneman Means for Lawyers: Some Reflections on Thinking, Fast and Slow*, 44 LOY. U. CHI. L. J. 1377 (2013).

[82] *See* Paul Krugman, *Republicans and Race*, N.Y. TIMES (Nov. 19, 2007), http://www.nytimes.com/2007/11/19/opinion/19krugman.html ("Reagan repeatedly told the bogus story of the Cadillac-driving welfare queen—a gross exaggeration of a minor case of welfare fraud. He never mentioned the woman's race, but he didn't have to.").

[83] That may explain the failure of Justices Scalia and Thomas to challenge the convoluted interpretation put forth by Justice Kennedy despite their repeated claims to follow the plain meaning approach to statutory interpretation.

[84] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2547 (2013) (Ginsburg, J., dissenting).

[85] Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618, 660 (2007) (Ginsburg, J., dissenting).

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

[87] *Nassar*, 133 S. Ct. at 2547 (Ginsburg, J., dissenting) (citations omitted) (*Vance* is the decision that restricts who is a "supervisor" in sex harassment cases that make it more diffi-

difficulty as it would be, it may be time for a broader revision of Title VII to cabin the instincts of a majority of the Court to slice and dice the law into insignificance.[88]

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cult for the victims of harassment to impose liability on their employers under the doctrine of *respondeat superior*).

[88] *See* William R. Corbett, *Calling On Congress: Take a Page from Parliament's Playbook and Fix Employment Discrimination Law*, 66 VAND. L. REV EN BANC 135, 142–43 (2013), http://www.vanderbiltlawreview.org/content/articles/2013/10/Corbett_Calling-on-Congress.pdf (calling for Congress to consider enacting a comprehensive new antidiscrimination statute as the United Kingdom Parliament recently had done when it replaced a series of different antidiscrimination statutes with the Equality Act of 2010). The text is available at *Equality Act 2010*, LEGISLATION.GOV.UK, http://www.legislation.gov.uk/ukpga/2010/15/contents (last visited Apr. 21, 2014).