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Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself

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Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself

William R. Corbett*

Abstract: Has too much tort law been incorporated into the case law under the federal employment discrimination statutes? The debate on this issue has been reinvigorated by the Supreme Court’s decision in Staub v. Proctor Hospital, 131 S. Ct. 1186 (2011). In Staub the Court referred to the Uniformed Services Employment and Reemployment Rights Act, a federal employment discrimination statute, as a “federal tort.” The Court then adopted the tort doctrine of proximate cause as the standard for evaluating subordinate bias (or “cat’s paw”) liability. Staub was not the first case in which the Court has suggested that a federal employment discrimination law is a federal statutory tort, but it was the most express and direct statement. Moreover, the Court’s adoption of proximate cause, one of the most complicated, confusing, and criticized concepts in tort law, to analyze a prevalent issue in employment discrimination law is striking and provocative. Staub reinvigorates the debate about whether the Court and courts have imported too much tort law into employment discrimination law—the debate about the “tortification” of employment discrimination law.

Most discussions of tortification of discrimination law trace the origin to the Supreme Court’s discussion of torts causation standards in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). However, it actually began much earlier. The ubiquitous pretext analysis, developed by the Court to analyze individual disparate treatment cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), is a thinly veiled version of the tort doctrine res ipsa loquitur. Although there have been numerous critiques of the McDonnell Douglas analysis that have called for its abrogation, none have exposed it as the much-maligned tort doctrine. Evaluating McDonnell Douglas as res ipsa helps explain its weaknesses and shortcomings. After almost forty years of the pretext analysis, it is time to expel it from discrimination law. Abrogating the McDonnell Douglas analysis should be a

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significant first step in reconsidering the tortification of employment discrimination law.

As one wit said: “If the thing speaks for itself, why doesn't it talk in English?”¹

[A]n act of employment discrimination is much more than an ordinary font of tort law. The anti-employment discrimination laws are suffused with a public aura for reasons that are well known. Throughout this Nation's history, persons have far too often been judged not by their individual merit, but by the fortuity of their race, the color of their skin, the sex or year of their birth, the nation of their origin, or the religion of their conscientious choosing. Congress has responded to these pernicious misconceptions and ignoble hatreds with humanitarian laws formulated to wipe out the iniquity of discrimination in employment, not merely to recompense the individuals so harmed but principally to deter future violations.

The anti-employment discrimination laws Congress enacted consequently resonate with a forceful public policy vilifying discrimination A plaintiff in an employment-discrimination case accordingly acts not only to vindicate his or her personal interests in being made whole, but also as a “private attorney general” to enforce the paramount public interest in eradicating invidious discrimination.²

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¹ *Stemme v. Siedhoff*, 427 S.W.2d 461, 465 (Mo. 1968).

² *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1234 (3d Cir. 1994), *vacated by* 514 U.S. 1034 (1995).

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INTRODUCTION

What if I told you that the most important analytical framework in employment discrimination law is nothing more than a thinly veiled pretext for one of the most enigmatic, vexing, and controversial doctrines of tort law? If I told you that the most basic and prevalent analysis in antidiscrimination law really is one of the most distrusted and marginalized analyses in tort law, would you be troubled? What if I told you that the ubiquitous *McDonnell Douglas* pretext analysis³ actually is just a slightly retrofitted version of res ipsa loquitur? Would you think that the very foundational analysis of employment discrimination law had been based on

³ The three-stage analysis, proof structure, or proof framework for analyzing individual disparate treatment (intentional) employment discrimination claims was announced by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The analysis also is commonly referred to as the pretext analysis. Since 1973, the *McDonnell Douglas* analysis has become pervasive in employment discrimination law and beyond. A Westlaw search indicates that from Jan. 1, 2011 to June 1, 2012, the case was cited in 3280 opinions in the federal courts and 202 opinions in state courts (search terms: “McDonnell Douglas” w/10 Green with date restriction). It is used for Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA). Although the Supreme Court has not definitively held that the *McDonnell Douglas* analysis applies to the ADEA and the ADA, it has recognized, without disapproval, that the courts of appeals apply it in those contexts. *See, e.g.*, *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311(1996) (reserving the issue in context of the ADEA, but evaluating the case pursuant to the framework); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49 n.3 (2003) (recognizing that the courts of appeals have used the analysis to evaluate summary judgment motions in disparate treatment claims and applying it under the ADA). The *McDonnell Douglas* framework also is commonly adopted by courts to analyze claims under state employment discrimination laws. *See, e.g.*, *Zaniboni v. Massachusetts Trial Court*, 961 N.E.2d 155, 158 (Mass. App. 2012) (stating that the analysis applies to claims under Massachusetts employment discrimination law). Beyond employment discrimination law, the pretext analysis has been adopted to analyze other types of federal and state employment claims. *See, e.g.*, *Sabourin v. University of Utah*, 676 F.3d 950 (10th Cir. 2012) (applying analysis to retaliation claim under the Family and Medical Leave Act); *Eagen v. Commission on Human Rights & Opportunities*, 42 A.3d 478, 487 & n.5 (Conn. App. 2012) (recognizing adoption of pretext analysis for various types of state employment law claims).

the best tort law had to offer or its dregs? Would this revelation help explain why current employment discrimination analysis is so badly confused and discredited?⁴ If I told you those things, would you consider that perhaps employment discrimination law should be *detortified*, at least to some extent, by returning *res ipsa loquitur* to tort law, and thus permitting employment discrimination to speak for itself without the artificial contortions of an ill-fitting analysis? Would you think that employment discrimination law should abandon its most fundamental analysis--the *McDonnell Douglas* pretext analysis? That monumental step would immeasurably improve employment discrimination law. It also might provide an impetus to consider the larger issue of whether transplanted tort law has become too predominant in employment discrimination law and has eroded to some extent the original public policy and civil rights foundations of that body of law.

Almost half a century ago, Congress began enacting federal statutes intended to implement an important public policy regarding basic civil rights--nondiscrimination in employment. Given the history of discrimination in this nation, it would be difficult to imagine a more important public policy.⁵ Congress largely left to the courts the mission of fleshing out the

⁴ Attorney Carter G. Phillips, in oral argument before the Supreme Court, expressed the complexity of the employment discrimination proof structures this way: "I will say in 25 years of advocacy before this Court I have not seen one area of the law that seems to me as difficult to sort out as this particular one is." Transcript of Oral Argument at 29, *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) (No. 08-441), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-441.pdf (statement by Carter G. Phillips, arguing for respondent); see also Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 307-08 (2004) (stating that "the statutes do not define `discrimination,'" that "Title VII law has never been easy," and that "[a]fter more than a decade of litigation under the revised [1991] Act, . . . Title VII law has never been more complex and confusing"); Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 71 (2011) [hereinafter Sperino, *Rethinking*] (positing that the rigid proof structures that control employment discrimination law have "led to doctrinal, procedural, and theoretical confusion within employment discrimination law and . . . mired the field in endless questions about frameworks rather than in addressing the field's core issues").

⁵ See, e.g., H.R. REP. NO. 1370, 87th Cong., 2d Sess. (Feb. 21, 1962) in UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2156 (1968) ("Clear enunciation and implementation of a national policy on equal employment opportunity are obviously long overdue at this point in the history of the United States."); Cheryl Krause Zelman, Note, *The After-Acquired Evidence Defense to Employment of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 189

lean statutory language with doctrine and principles regarding proof of violations.⁶ With such a mission courts could create legal principles and doctrine out of whole cloth or they could turn to existing bodies of law to borrow principles and doctrines,⁷ making adjustments to adapt the transplanted law to its new objectives. As seemed likely, the courts both borrowed and created.⁸ For borrowing and adapting, to what substantive body of law would the courts turn in developing the law of employment discrimination? There were several possibilities, including contract, constitutional, agency, property, and tort. The courts through the years have imported doctrine

(1993) (“Congress enacted the Civil Rights Act of 1964 in an attempt to assuage a national crisis Recognizing that discrimination injured the country as a whole, Congress passed Title VII to achieve broad social goals.”). There may be no more eloquent statement of the objectives of Title VII than that proclaimed by the Third Circuit in *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1234 (3d Cir. 1994), *vacated by* 514 U.S. 1034 (1995), *supra* text accompanying note __ (2).

⁶ For an interesting discussion of Congress’s delegation to the courts and the EEOC of the interpretive role for Title VII, see Margaret H. Lemos, *The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363 (2010). Professor Lemos discusses the political battle over whether the principal interpretive role would be delegated to the courts or the Equal Employment Opportunity Commission (EEOC). She notes that ultimately Congress weakened the enforcement authority of the new EEOC and therefore delegated a larger interpretive role to the courts. *Id.* at 385-86. Professor Suzanna Sherry posits that when Congress does not supply factual underpinnings for legislation in either the statutes or the legislative history, the Supreme Court supplies the foundational assumptions that inform the implementing doctrines. See Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 161[hereinafter, Sherry, *Foundational Facts*].

⁷ However, resort to common law sources is not necessarily an apt choice. See Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, __ U. ILL. L. REV. __ (34)(2012) [hereinafter Sperino, *Discrimination Statutes*] (“[I]t is unclear why judges would look to the common law to define terms in a statutory regime that is not generally drawn from the common law and that does not mimic the common law.”); cf. Robert Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235, 1242 (1988) (“Since the national policy against discrimination in employment is not based on the common law, a strong argument can be made that causal analysis should not be as critical an element in employment discrimination law as it is in the law of negligence.”). The propriety and balance of importing common law doctrines to develop law under the employment discrimination statutes is a topic that merits separate treatment. For now, it is important to note that courts should recognize some tension, and in some cases, incongruence of purpose between some common law principles and employment discrimination law. Indeed, some common law principles will be antithetical to employment discrimination law. For example, Professor Richard Epstein recognizes that the employment discrimination laws are diametrically opposed to the common-law based principle of employment at will. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 3 (1992). Commentators have made the case against a common law “baseline” for employment discrimination law. See, e.g., Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 70 (1990) (discussing the “inherent[] inconsist[ency]” of survival of “common-law economic and political premises in light of a statutory scheme” that significantly impinges on employment at will).

⁸ Regarding the courts’ creation of new law, consider for example, the development of the disparate impact theory of employment discrimination. See *infra* Part II.C.1.

and principles from various bodies of law,⁹ but tort law is the repository to which the courts have turned most often.¹⁰

Although many of the concepts, constructs, principles, and doctrines of tort law have proven useful in the context of the public policy statutes, it is important to keep in mind the different objectives and balance of goals of tort law and public policy statutes such as the employment discrimination laws.¹¹ Some torts concepts and principles might work well if modified, while still others might not be sufficiently adaptable. Thus, courts should have been careful about both adopting too much tort law that is not adaptable and adopting tort law without making needed modifications.¹² Almost fifty years after the enactment of the first antidiscrimination law, we find that we have a body of case law that has imported a large volume of torts principles and doctrine, including cause in fact, proximate cause, and *res ipsa loquitur*.

⁹ See, e.g., Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 171 (2007) (noting “the ‘background’ rules of contract, tort, and property [that] have emerged to play a vital role in the application of the statutes and doctrines that govern employment discrimination . . . cases”). For example, the Supreme Court has used agency law principles in determining when employers should be liable for sexual harassment. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Burlington Northern Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). In developing a proof structure for cases involving direct evidence of discrimination, the Court turned to the mixed-motives framework developed in the context of a public employee’s asserting a violation of first amendment rights. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (adopting the framework developed in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)). As will be discussed below, however, one of the most divisive issues in the splintered *Price Waterhouse* decision was the standard of causation, and that issue prompted debate about various tort standards of causation that could be incorporated in the *Mt. Healthy* analysis. See *infra* Part I.D.

¹⁰ See, e.g., Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 519-20 (2002) (stating that “the courts have frequently looked to common-law tort doctrines to create the common law of Title VII”).

¹¹ See, e.g., *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Adapting agency law principles to employer liability for sexual harassment, the Court noted that “such common-law principles may not be transferable in all their particulars to Title VII.” *Id.* at 72. See also David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for the Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 93 (1995) (contending that “[s]exual harassment is not merely a common-law tort, such as assault, battery, defamation, or intentional infliction of emotional distress; it is also a statutory wrong for which Congress has provided free government investigations, federal jurisdiction, and attorneys’ fees as well as legal damages”).

¹² Professor Sperino distinguishes between importation of “pure common law” and common law doctrine that is adjusted to the particular employment discrimination law. See Sperino, *Discrimination Statutes*, *supra* note ____, at ____ (45 & 51).

More important than the volume is the centrality of imported tort law in the corpus of employment discrimination law. For example, much of the core of individual disparate treatment law, the most important theory of employment discrimination law,¹³ is founded on torts standards of causation and the *res ipsa loquitur* doctrine. Indeed, the Supreme Court recently baldly declared in *Staub v. Proctor Hospital*¹⁴ that an employment discrimination statute is a federal tort. The *Staub* Court then proceeded to adopt one of the most complicated and criticized principles of tort law as the standard to resolve the commonly occurring employment discrimination issue presented in the case.

Over the years some scholars have questioned whether the “tortification” of employment discrimination law is an appropriate evolution for a body of civil rights and public policy law.¹⁵ At this point in the development of employment discrimination law, it is appropriate to ask if this body of law has become too dominated by imported tort law and, more importantly, imported tort law that has been insufficiently adapted to achieve the public policy purposes of statutes. While the Court’s recent proclamation in *Staub* about an employment discrimination statute being a federal statutory tort and its consequent incorporation of more tort doctrine has captured the attention and concern of employment discrimination scholars,¹⁶ it is just the latest occurrence in the ongoing and escalating tortification. It follows just two years after the Court in *Gross v. FBL Financial Services*,¹⁷ to the surprise of many, rejected application of the mixed-motives proof framework under the Age Discrimination in Employment Act and concomitantly

¹³ See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (declaring that “[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII”)

¹⁴ 131 S. Ct. 1186 (2011).

¹⁵ See, e.g., Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B. U. L. REV. ____ (2012)[hereinafter Sullivan, *Tortifying*]; Sperino, *Discrimination Statutes*, *supra* note ____; Zemelman, *supra* note ____.

¹⁶ See Sperino, *supra* note ____; Sullivan, *supra* note ____.

¹⁷ 557 U.S. 167 (2009).

entrenched but-for causation, the most basic, rigorous and plaintiff-hostile torts cause-in-fact standard, as the interpretation of the statutory language “because of . . . age.”¹⁸

Amidst concerns about the tortification of employment discrimination law, one of employment discrimination law’s oldest and most firmly established doctrines has never been impugned for its “tortiness.” While the *McDonnell Douglas* pretext framework has been the subject of extensive criticism,¹⁹ its tort lineage has flown beneath the radar of scholarly criticism. The *McDonnell Douglas* or pretext proof structure is a thinly veiled version of *res ipsa loquitur*,²⁰ and it is a tort doctrine that perhaps never should have been imported into employment discrimination law. Regardless of the propriety of the importation of *res ipsa loquitur* into employment discrimination law in 1973, the *McDonnell Douglas* framework has not been adequately modified from its *res ipsa* origins to serve the differently balanced objectives of the public policy statutes. Moreover, *res ipsa McDonnell Douglas*, which is based on the persuasiveness of assumptions supporting an inference, has not been substantially or adequately revised over its forty-year life to reflect changes in the occurrence of discrimination in the

¹⁸ *Id.* at 180. *Gross* is discussed *infra* Part I.D.

¹⁹ Criticism of *McDonnell Douglas* is almost as ubiquitous and unabating over the years as use of the framework itself is in the case law. See, e.g., George Rutherglen, *Reconsidering Burdens of Proof: Ideology, Evidence and Intent in Individual Claims of Employment Discrimination*, 1 VA. J. SOC. POL’Y & L. 43 (1993); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2259 (1995); Judith Olans Brown, Stephen N. Subrin & Phyllis Tropper Baumann, *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1527 n.182 (1997); Henry L. Chambers, Jr., *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1 (1996); Kenneth R. Davis *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703 (1995); Stephen W. Smith, *Title VII’s National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371 (1997).

²⁰ See, e.g., *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728, 732 (4th Cir. 1996) (describing the *McDonnell Douglas* analysis as “a cousin of *res ipsa loquitur*”); Robert Brookins, *Hicks, Lies, and Ideology: The Wages of Sin is Now Exculpation*, 28 CREIGHTON L. REV. 939, 982 n.258 (1995) (stating that “[t]he pretextual channel resembles the *res ipsa loquitur* model in the law of torts”); Ruth Gana Okediji, *Status Rules as Discrimination in a Post-Hicks Environment*, 26 FLA. ST. U. L. REV. 49, 85 (1998) (observing that “the *Hicks* majority’s explanation of the *McDonnell Douglas-Burdine* procedural framework strongly echoes the *res ipsa loquitur* procedural framework”); Sherry, *Foundational Facts*, *supra* note __, at 164 (stating that “*McDonnell Douglas* essentially applies the doctrine of *res ipsa loquitur* to employment discrimination: merely failing to hire (or firing) speaks for itself as evidence of discriminatory intent”); William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549, 1564 (2005).

workplace, and perhaps more importantly, changes in societal views about the occurrence of employment discrimination. Thus, the *res ipsa loquitur* of employment discrimination law has become not just unhelpful, but an impediment to proving discrimination in many disparate treatment claims and an obstacle to improving and updating the analytical tools of employment discrimination law.

With the tortification of employment discrimination law having reached a new level of audacity in *Staub v. Proctor Hospital*, it is an opportune time to consider both a narrow and a broad proposition linking *McDonnell Douglas* and *Staub*. Many of the criticisms that have been addressed to the Court's incorporation of proximate cause into employment discrimination law apply with at least equal force to the Court's decision in 1973 installing *res ipsa loquitur* as the basic analytical framework for intentional discrimination. Second and more broadly, many of the problems and criticisms associated with *Staub* and the *McDonnell Douglas* analysis are symptomatic of the more overarching issue--the indiscriminate tortification of employment discrimination law. Almost forty years after it was announced, the *res ipsa loquitur* of employment discrimination law is preventing employment discrimination from speaking for itself, and the newly adopted proximate cause standard of *Staub* has unleashed new uncertainties and concerns in discrimination law. Unmasking *McDonnell Douglas* as almost unexpurgated tort law that has been foisted upon employment discrimination law should help unseat the reigning foundational analysis. Notwithstanding its pervasiveness and popularity with the courts, the *res ipsa loquitur* of employment discrimination law has not yet achieved statutory enshrinement,²¹ although future codification is by no means farfetched.²² If the tort origins and

²¹ See, e.g., Sperino, *Rethinking Discrimination Law*, *supra* note ___, at 104 (stating that "*McDonnell Douglas* is not codified in any statutory language").

foundations of the pretext analysis could be used to undermine it while it is common-law based, such a monumental development might advance a dialogue about the larger topic of importing tort law into employment discrimination law.²³ While employment discrimination law still retains some of its civil rights and public policy aura, it is time to reclaim some of that ground by acknowledging that tort principles and constructs should not so readily be imported into employment discrimination law.

Part I of this Article discusses the changing perception of the employment discrimination laws—how and why the laws have come to be viewed as federal torts. Part I also considers some of the incorporations of tort law into employment discrimination law that have constituted the “tortification” of the law. Part II critically examines the *McDonnell Douglas* or pretext analysis as an adoption of *res ipsa loquitur* and contrasts that adoption of tort law with more innovative employment discrimination principles, standards, and proof frameworks created by the Supreme Court and Congress. Part III proposes the abrogation of the *McDonnell Douglas res ipsa* analysis’s dominance of employment discrimination law. This part demonstrates how poorly *res ipsa loquitur* accommodates analysis of employment discrimination claims. Casting off the vexing *McDonnell Douglas* analysis, which is itself a mere pretext for *res ipsa loquitur*, would be a good first step in reversing the almost haphazard tortification of employment

²² Consider, for example, the Protecting Older Workers Against Discrimination Act, the legislation introduced in 2009 and again in 2012 to overturn *Gross v. FBL Fin. Servs, Inc.*, 557 U.S. 167 (2009). See S. 1756, 111th Cong., 1st Sess. (2009); H.R. 3721, 111th Cong., 1st Sess. (2009); S. 2189, 112th Cong., 2d Sess. (2012). The bills would have codified the *McDonnell Douglas* evidentiary framework by providing that plaintiffs asserting employment discrimination claims under Title VII, the ADEA, the ADA and the Rehabilitation Act of 1973 “may demonstrate an unlawful practice through any available method of proof, including the analytical framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).” *Id.* at § 2(b)(3)(C).

²³ Commentators referring to the tortification of employment discrimination law almost invariably are using the term in a pejorative sense. Compare RED HOT CHILI PEPPER, CALIFORNICATION (Warner Bros. Record 1999). The adoption and adaptation of tort law in employment discrimination law has not always been bad, and future incorporations need not be bad.

discrimination law. It would be one giant leap toward letting employment discrimination speak for itself.

I. The Tortification of Employment Discrimination Law

A. *Staub--Tortification of Employment Discrimination Law Reaches its Zenith*

When Title VII of the Civil Rights Act of 1964 was enacted, it is doubtful that Congress or the Supreme Court would have characterized the federal employment discrimination law as a statutory tort. It was, instead, primarily a public policy and civil rights statute aimed at eradicating, in the employment setting, the most socially caustic and destructive forms of discrimination that had blighted the nation throughout its history.²⁴ Since early in the employment discrimination law era, however, the courts, and to a lesser extent Congress, have vigorously infused discrimination law with the principles of tort law.²⁵ During its 2010-11 term, the Supreme Court moved farther down the road of reconceptualizing the federal employment discrimination laws as federal torts rather than broad public policy statements regarding civil rights. In *Staub v. Proctor Hospital*,²⁶ the Court, adopting a standard for subordinate bias or “cat’s paw” liability,²⁷ stated that “when Congress creates a federal tort it adopts the background of general tort law.”²⁸ Although the Court was analyzing the Uniformed Services Employment

²⁴ See *supra* note ___ (5); see also H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963), reprinted in U.S.C.C.A.N. 2391, 2401 (stating Title VII’s purpose to eliminate discrimination); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) (stating that “the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace”).

²⁵ It is interesting to note that this importation of law is not a one-way street. Professor Martha Chamallas writes of the “degree to which the concepts and values of civil rights law have migrated or can be expected to migrate into tort law.” Martha Chamallas, *Discrimination and Outrage: The Immigration From Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2118 (2007) [hereinafter, Chamallas, *Discrimination*].

²⁶ 131 S. Ct. 1186 (2011).

²⁷ The Court explained the issue as follows: “[plaintiff] sought to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision.” *Id.* at 1190. The Court also explained the origin of the term “cat’s paw.” *Id.* n.1.

²⁸ *Id.* at 1191.

and Reemployment Rights Act (USERRA),²⁹ the Court clearly was suggesting that Title VII and the other employment discrimination laws are federal torts as well.³⁰

The bare statement in *Staub* was jarring enough, but it was not the first time that the Court has made such a statement about employment discrimination laws.³¹ Indeed, Justice O'Connor, in sorting through torts standards of causation to choose one for the mixed-motives analysis in her concurring opinion in *Price Waterhouse v. Hopkins*, referred to Title VII as creating a “statutory employment `tort.’”³² Beyond the Court’s labeling in *Staub* of an employment discrimination statute as a federal tort, what was more telling was the Court’s adoption of the tort concept of proximate cause, one of the most maligned principles of tort law, as the test for deciding when to attribute the discriminatory motive of a subordinate to a superior.³³

²⁹ Pub. L. No. 103-353, 108 Stat. 3149, 38 U.S.C. §§ 4301-4334.

³⁰ The principle that the Court was discussing in *Staub*, subordinate bias liability or cat’s paw liability, is a general discrimination issue that arises under all of the employment discrimination laws. The USERRA case simply served as a vehicle to resolve the issue for all of employment discrimination law. The Court had granted certiorari to resolve the issue several years earlier in a Title VII case that settled before the Court’s decision. See *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006), *cert. dismissed*, 549 U.S. 1334 (2007). Moreover, among the three cases the Court cited in support of the federal tort proposition was a Title VII case--*Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764 (1998). The Court had not actually called Title VII a federal tort in *Ellerth*; the Court said, “Title VII borrows from tort law the avoidable consequences doctrine.” *Id.*

³¹ See Sullivan, *Tortifying*, *supra* note __, at __ (2) (“Although Title VII has often been described as creating a statutory tort, the panoply of tort doctrines has been applied to this statutory scheme only sporadically, and then often in forms influenced by specific statutory language of the law.”).

³² 490 U.S. 228, 264 (1989) (O’Connor, J., concurring). As Professor Bernstein chronicles, Justice O’Connor was the primary proponent of the thesis that employment discrimination law is statutory tort law. Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 510 (1997) (stating that “her colleagues on the Court have never effectively refuted Justice O’Connor’s cogent position that employment discrimination is a tort in all but name”).

³³ Many have decried the complexity, uncertainty, and other negative qualities of proximate cause. Indeed, the dissatisfaction with proximate cause has been so great that the Restatement (Third) of Torts replaces “proximate cause” with “scope of liability,” explaining that proximate cause is a poor term to describe the idea embodied in the term. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM Ch. 6. Scope Of Liability (Proximate Cause) Special Note on Proximate Cause (2010). Dean Mark Grady, in the course of offering a defense of proximate cause for its greater-than-appreciated predictability and cohesiveness, recognized that many believe that proximate cause is basically incoherent, that its cases cannot be predicted, and even that they illustrate some fundamental disorder of the common law. See Mark F. Grady, *Proximate Cause Decoded*, 50 UCLA L. REV. 293, 294 (2002); see also Sullivan, *Tortifying*, *supra* note __, at __ (22) (stating that “[c]omplaints about the nebulosity of the concept are numerous and longstanding, and there have been determined efforts to eradicate it

Why the Court incorporated proximate cause into the subordinate bias liability analysis is perplexing. Regarding the result in the case, as Professor Charles Sullivan has noted, the invocation of proximate cause seems gratuitous in *Staub*.³⁴ More broadly, proximate cause seems an unusual concept to invoke in employment discrimination law—ill-suited to the job.³⁵ Where the adoption of proximate cause will lead in employment discrimination law is difficult to foresee.³⁶

Although the Court’s treatment of employment discrimination law in *Staub* has been provocative,³⁷ it was just the latest step in the ongoing transformation of the employment discrimination statutes into federal statutory torts. However, *Staub* represents a significant step because the Court both unequivocally declared an employment discrimination statute to be a tort and adopted one of the most vexatious of all tort doctrines to address a common employment discrimination issue.

B. In the Beginning

The tortification of employment discrimination law was not imminent when the Supreme Court began interpreting Title VII and developing the law. In its first significant encounter with

from legal discourse”); Sperino, *Discrimination Statutes*, *supra* note ___, at ___(4) (quoting a leading torts treatise regarding the disagreement and confusion about proximate cause).

³⁴ Sullivan, *Tortifying*, *supra* note ___, at ___ (20-21).

³⁵ Sullivan notes three reasons: 1) Proximate cause is “a notoriously amorphous concept even in those areas in which it applies”; 2) proximate cause in torts applies to negligence not intentional torts, and disparate treatment denotes intentional discrimination; and 3) tort law has used proximate cause primarily for physical injuries, not economic injuries. *See id.* at ___(21). Even a commentator who is generally favorable about *Staub*, recognizes the uncertainty the Court left in its wake. *See* Benjamin Pepper, Note & Comment, *Staub v. Proctor Hospital: A Tenuous Step in the Right Direction*, 16 LEWIS & CLARK L. REV. 363 (2012).

³⁶ Professor Sullivan posits that the Court may have been preparing to hold that unconscious discrimination is not actionable because such discrimination does not cause the harm. Sullivan, *supra* note ___, at ___ (21). Professor Sperino predicts that “importing proximate cause into employment discrimination law will further limit the reach of federal discrimination law, in line with already conservative interpretations of factual causation.” Sperino, *Discrimination Statutes*, *supra* note ___, at ___(3).

³⁷ *See, e.g.*, Sullivan, *Tortifying*, *supra* note ___, at ___; Sperino, *Discrimination Statutes*, *supra* note ___, at ___.

Title VII,³⁸ the Supreme Court in 1971 in *Griggs v. Duke Power Co.*³⁹ adopted disparate impact, an innovative theory of discrimination advocated by the Equal Employment Opportunity Commission.⁴⁰ Under the theory, facially nondiscriminatory employment practices and criteria that have a statistically significant disparate impact on members of a protected class constitute illegal discrimination, regardless of intent, if they cannot be justified by their relationship and necessity to the job in question.⁴¹ Although it has been argued that the EEOC created the disparate impact theory,⁴² Professor Carle, in an insightful article, has traced the origins of the theory to activists within the National Urban League who developed “experimentalist regulatory strategies” in the early 1900s.⁴³ No one disputes, however, that the agency charged with enforcement of Title VII played a major role in the development of and advocacy for disparate impact,⁴⁴ a legal theory that was not borrowed from tort law or any other obvious common law source. In adopting the disparate impact theory, the Court spoke in eloquent language about the purpose of Title VII to “proscribe[] not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”⁴⁵ Further, the Court proclaimed: “What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the

³⁸ The Court decided one Title VII case before *Griggs*: *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). The per curiam opinion reversed a summary judgment on the issue of whether women not having preschool age children was a bona fide occupational qualification for a job.

³⁹ 401 U.S. 424 (1971).

⁴⁰ See generally Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251 (2011).

⁴¹ See, e.g., *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The definition and framework for disparate impact were codified in the Civil Rights Act of 1991. See 42 U.S.C. §2000e-2(k).

⁴² See, e.g., HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972*, at 249-50 (1990); Michael Evan Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 491-500 (1985).

⁴³ See Carle, *supra* note ____, at 270-74.

⁴⁴ See, e.g., Lemos, *supra* note ____, at 398-99 (discussing the Court’s reliance on the EEOC’s guidelines on Employee Selection Procedures).

⁴⁵ *Griggs*, 401 U.S. at 431.

barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”⁴⁶

Disparate impact was innovative and expansive law, and it has been controversial, with some arguing that the Court reached beyond Congressional intent in enacting Title VII.⁴⁷ However, arguments regarding disparate impact’s questionable lineage and its alleged inconsistency with Congressional intent were rendered moot by Congress’s codification of a version of disparate impact in the Civil Rights Act of 1991.⁴⁸ Although the battle about disparate impact’s past is merely academic, the threat to its future viability is real, with both commentators and a Supreme Court Justice positing that the disparate impact theory may violate the Equal Protection Clause.⁴⁹

After *Griggs* was decided in 1971, one might have forecast that the Court would develop the law of Title VII by being creative and fashioning a body of employment discrimination principles and doctrines that was not simply or largely imported from the common law.⁵⁰ However, the impulse was short-lived and both the Supreme Court and Congress soon began to tortify employment discrimination law. The Court’s second significant encounter with Title VII was in 1973 in *McDonnell Douglas Corp. v. Green*. Although none of the critics of the

⁴⁶ *Id.*

⁴⁷ See, e.g., EPSTEIN, *supra* note ____, at 254-55 (citing sources); Lemos, *supra* note ____, at 399 n.155 (stating that “[f]ans and opponents of *Griggs* tend to agree that the decision is difficult to square with the available indications of congressional intent”).

⁴⁸ Pub. L. No. 102-166, § 107, 105 Stat. 1071 (1991), codified at 42 U.S.C. § 2000e-2(k).

⁴⁹ Ricci v. DeStefano, 129 S. Ct. 2658, 2681-82 (2009) (Scalia, J., concurring); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 585-87 (2003); see also Eang L. Ngov, *When “The Evil Day” Comes, Will Title VII’s Disparate Impact Provision Be Narrowly Tailored to Survive an Equal Protection Clause Challenge?*, 60 AM. U. L. REV. 535, 588 (2011) (concluding that disparate impact’s means of achieving its goals are not sufficient to satisfy the narrow-tailoring requirement).

⁵⁰ For further discussion of employment discrimination law crafted by the Court rather than imported from common law and tort law, see *infra* notes ____-____ and accompanying text.

tortification of employment discrimination law identify the case as a significant step in the process, it was, and that view of the case will be discussed later.⁵¹

The tortification of employment antidiscrimination law can be viewed in two ways. First and more generally is the changing perception of the laws. Second and more specifically is the incorporation of specific tort concepts, doctrines, and principles into antidiscrimination law with no, few, or inadequate modifications.

C. The Changing Perception of the Employment Discrimination Laws

The first statements by justices on the Supreme Court analogizing Title VII to torts and expressly adopting torts standards are in the various opinions of the Court in 1989 in *Price Waterhouse v. Hopkins*.⁵² Before considering the incorporation of specific tort doctrines into employment discrimination law, it is instructive to consider changing views of the employment discrimination laws that have made resort to tort law seem apt and natural. One view of the statutes is that they are manifestations of public policy regarding civil rights, which attempt to eradicate and deter the societal wrong of employment discrimination.⁵³ While compensation of individual victims' personal injuries is an appropriate goal of public policy/civil rights laws, it is not the principal objective.⁵⁴ Another view of the employment discrimination laws is that they are essentially federal statutory torts, the primary purpose of which is to compensate individuals

⁵¹ See *infra* Part II.B.

⁵² 490 U.S. 228 (1989).

⁵³ See the statement of the Third Circuit in *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1234 (3d Cir. 1994), vacated by 514 U.S. 1034 (1995), *supra* note ____(2).

⁵⁴ The Court discussed the dual goals of deterrence/eradication of discrimination and compensation in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The Court identified the "primary objective" of Title VII as "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 417 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 429-430 (1972)). The Court then went on to recognize that "[i]t is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.* at 418. See also *Zemelman*, *supra* note ____, at 191 ("The primary emphasis on deterrence, rather than compensation, is reflected in the language and judicial interpretation of Title VII's backpay provision.").

for the personal injuries they suffer as a result of discrimination.⁵⁵ In the half century since the passage of Title VII, the perception of the employment discrimination laws among courts, commentators, employers and the general public has moved from the first view toward the second.

A strong critic of the tortification of employment discrimination law, Cheryl Zemelman, expressed her assessment in 1993 that there had been “a two-decade evolution of Title VII from a public policy-enforcing statute, designed to promote employer responsibility, to a compensatory, tort-like statute, aimed at making victims whole [such that] the privatization of Title VII has become so complete that once unthinkable characterizations of the statute now seem commonplace.”⁵⁶ How did perception of the employment discrimination laws, a group of public policy and civil rights statutes, so evolve? This Section considers three things that either indicate a shift in perception or provided impetus for such a shift or both: 1) the enactment of section 1981a as part of the Civil Rights Act of 1991; 2) the shift in the predominant type of claims from those based on refusal to hire to claims based on termination; and 3) the Supreme Court’s and other courts’ increasing restrictions on use of the class action device in employment discrimination litigation, which has been somewhat analogous to the restrictions placed on use of the class action for mass torts.

The enactment of section 1981a⁵⁷ as part of the Civil Rights Act of 1991⁵⁸ was a good and needed change in employment discrimination law. Nonetheless, that change probably has contributed to the view of the employment discrimination laws shifting toward statutory torts.

⁵⁵ See John C. P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 985 (2010) (stating that “legislatures have the authority to fashion statutory torts--relational wrongs that give rise to private rights of action. . . [t]his is what statutes like Title VII are all about”).

⁵⁶ Zemelman, *supra* note ____, at 188 & 196.

⁵⁷ 42 U.S.C. §1981a.

⁵⁸ Pub. L. No. 102-166, 105 Stat. 1071 (1991).

Section 1981a made capped compensatory and punitive damages and jury trials available for disparate treatment claims under Title VII and the Americans with Disabilities Act. The enactment of section 1981a brought more consistency and uniformity to the remedies available for various types of discrimination, although the caps preserved some of the inequality and inconsistency. Before the enactment of section 1981a, plaintiffs with race claims had been able to seek damages and have jury trials under Section 1981⁵⁹ and age discrimination plaintiffs had been able to have jury trials and recover liquidated damages under the ADEA.⁶⁰ Outside of race and age claims, the principal monetary remedy available to other employment discrimination plaintiffs was backpay. Under Title VII before the 1991 Act, sexual harassment plaintiffs, if they did not lose their jobs, often would not have recovered money, other than attorney's fees.⁶¹ The 1991 Act changed that with the addition of capped compensatory and punitive damages⁶² and thereby partially rectified a disparity among the types of discrimination claims. Thus, there were very good reasons for Congress to enact section 1981a, adding damages and jury trials for discrimination claims that previously did not have those features. The addition of the damages

⁵⁹ See generally, H.R. REP. NO. 40(I), 102d Cong., 1st Sess. 15, 64-65 (1991), reprinted in 1991 U.S.C.C.A.N. 553, 602-03, 612 (report of the House Committee on Education and Labor) (stating that in providing for damages the Act "authorizes damage awards in Title VII cases in the same circumstances as such awards are now permitted under 42 U.S.C. section 1981 for intentional race discrimination"); see also Michael C. Harper, *Eliminating the Need for Caps on Title VII Damage Awards: The Shield of Koldstad v. American Dental Association*, 14 N.Y.U.J.L. PUB. POL'Y 477, 481-82 (2011) (stating that "Congress acted to at least mitigate the disparity created by this set of legal developments by enacting a new section, 1981a"); Sandra Sperino, *The New Calculus of Punitive Damages for Employment Discrimination Cases*, 62 OKLA. L. REV. 701, 709 (2010) ("42 U.S.C. § 1981 provides a federal remedy for race discrimination but does not contain the damages caps found in Title VII").

⁶⁰ 29 U.S.C. § 626(b).

⁶¹ See, e.g., H.R. REP. NO. 40(I), 102d Cong., 1st Sess. 64-69 (1991), reprinted in 1991 U.S.C.C.A.N. 553, 602-07; Harper, *supra* note __, at 481 (stating that Congress saw a need to provide additional remedies "in light of the disparity between the legal damages the Court made available for race discrimination in private employment through its interpretation of section 1981 and the limited equitable relief available for sex and other proscribed forms of employment discrimination available under section 706(g) of Title VII").

⁶² See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 § 2 (1991) (stating the congressional finding that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace"); Chamallas, *Discrimination*, *supra* note ____, at 2142 (noting that "[t]he most important change came with respect to remedies: for the first time, Title VII plaintiffs were permitted to obtain jury trials and to recover compensatory and punitive damages, in addition to monetary awards for backpay").

also strengthened the compensatory objective of the employment discrimination laws and that change, to some, made them seem more tort-like.⁶³ Indeed, the Supreme Court suggested as much in a decision regarding the taxability of an award of backpay under Title VII. In *United States v. Burke*, the Court stated that “one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff.”⁶⁴ The Court responded to the argument that the Civil Rights Act of 1991 changed the remedial provisions and thus made Title VII claims “inherently tort-like in nature,” by explaining that although “Congress’ decision to permit jury trials and compensatory and punitive damages under the amended Act signals a marked change in its conception of the injury redressable by Title VII,” that change could not be attributed to the statute before the amendment.⁶⁵

Thus, the 1991 Civil Rights Act’s amendment to add damages has been viewed as bolstering the compensation objective of the employment discrimination laws and making them more tort-like. Although this view of the change in Title VII (and the ADA) wrought by the Civil Rights Act is facile,⁶⁶ it nonetheless seems to have influenced thinking that the employment discrimination laws became more tort-like with the enactment of the Civil Rights Act of 1991.

A second development that has contributed to the view that the employment discrimination laws have become more tort-like is the shift over the years in the type of adverse employment actions challenged in a majority of discrimination claims⁶⁷ and the interaction of that change with the predominant employment law principle in the United States--employment at

⁶³ See Zemelman, *supra* note ___, at 196-97 (positing that “because the Civil Rights Act of 1991 now directly authorizes compensatory and punitive damages for Title VII plaintiffs, numerous lawyers, members of Congress, and executive officers believe that Title VII has become a tort statute”).

⁶⁴ 504 U.S. 229, 235 (1992) (ruling on taxability superseded by statute).

⁶⁵ *Id.* at 241 n.12.

⁶⁶ It fails to take into account or give proper weight to the following: 1) the dual objectives of the discrimination statutes; 2) the relationship between the two objectives: the availability of compensation enhances deterrence; and 3) the objective of Congress to address disparities in the remedies among the various types of discrimination.

⁶⁷ Zemelman, *supra* note ___, at 194.

will. In the first years after enactment of Title VII, most claims were based on refusal to hire, but over the years the majority of claims have become discharge claims.⁶⁸ That shift should come as no surprise because over the years employment opportunities became more open to those to whom they had been denied in the past. However, the shift from claims based on refusal to hire to claims based on terminations brought the employment discrimination laws increasingly into tension with employment at will, the basic governing principle for employment termination in 49 of 50 states.⁶⁹ Employment at will provides that, absent contractual, statutory or other restrictions, an employer can fire an employee for any reason (often stated as “good reason, bad, reason, or no reason at all”).⁷⁰ Employment at will is a longstanding, deeply entrenched, and fundamental principle of employment law in the United States.⁷¹ When employees are terminated, many believe their termination is wrongful or unjustified, they experience it as a personal injury, and many want to sue their former employer for “wrongful termination” or “wrongful discharge.” Yet, in a nation dominated by employment at will, few plaintiffs can assert viable claims for wrongful discharge. While most states recognize a tort denominated as wrongful discharge in violation of public policy, the tort is ill-defined, and it is notoriously hard

⁶⁸ See, e.g., See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991) (noting that “hiring charges outnumbered termination charges by 50 percent in 1966, but by 1985, the ratio had reversed by more than 6 to 1”); Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMP. LEGAL STUD. 175, 177-80 (2010).

⁶⁹ Forty-nine states are characterized as employment-at-will states. The Montana Wrongful Discharge from Employment Act of 1987 removes that state from the list, although weakly. Mont. Code Ann. 39-2-901 to-914 (2002).

⁷⁰ See, e.g., *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 520 (1884) (“All may dismiss their employe(e)s at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.”), overruled on other grounds, *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915); see also Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1655 (1996) (stating the “employer’s presumptive right to fire employees at will--for good reason, for bad reason, or for no reason at all”).

⁷¹ See, e.g., Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 66 (2000) (“To understand the American system, therefore, it is necessary to understand the doctrine of employment at will, its fundamental assumptions, and its ambivalence. More importantly, it is necessary to recognize where that fundamental assumption has shaped our labor law.”).

for plaintiffs to recover under the tort theory.⁷² However, plaintiffs who can allege terminations because of race, sex, age, etc. under the employment discrimination laws often have viable claims. Thus, employers, employees, and courts understand that the most significant source of legal protection against unjust termination in the United States is the employment discrimination laws. Thus, increasingly the discrimination laws have come to be perceived as statutory wrongful discharge torts.⁷³ Moreover, this may have led to a divisive view of the employment discrimination laws--that the laws bestow job protection on “protected classes.”⁷⁴

A third matter regarding the changing perception of the employment discrimination laws is that the courts increasingly have made the class action device difficult to use in employment discrimination.⁷⁵ This change is roughly analogous to the restrictions that the courts have placed on the class action device for mass torts,⁷⁶ and evinces the perspective that employment discrimination is, or has become, just another font of tort law. As Professor Selmi explained in 2003:

⁷² See, e.g., J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 IOWA L. REV. 347, 392-402 (1995).

⁷³ Cf. Timothy J. Coley, *Contracts, Custom, and the Common Law: Towards a Renewed Prominence for Contract Law in American Wrongful Discharge Jurisprudence*, 24 BYU J. PUB. L. 193, 208-09 (2010) (stating that Title VIVI can be used as “a representative wrongful discharge statute” because “it provides the basis for the most commonly-litigated claims related to employment”).

⁷⁴ See Estlund, *supra* note ___, at 1679 (explaining that “superimposition of the antidiscrimination laws on top of an at-will background . . . may also contribute to . . . divisive tensions between the members of “protected groups,” such as women and minorities, and other employees[;] [w]hile the latter normally have no recourse at all against an unfair employment action, including discharge, the former may have a potential remedy if they plausibly claim discrimination”); Cynthia L. Estlund, *The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law*, 1 U. PA. J. LAB. & EMP. L. 49, 81 (1998) (positing that “[i]t may appear to some white co-workers that minorities are getting something they are not-that the employer, when dealing with minority employees (and women), is considering and reviewing adverse decisions more carefully, while they themselves remain subject to the unalloyed and merciless at-will regime”).

⁷⁵ Zemeleman, *supra*, note ___, at 194.

⁷⁶ See, e.g., Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059 (2012) (explaining why the class action device is disfavored for mass torts); Douglas G. Smith, *The Intersection of Constitutional Law and Civil Procedure: Review of Wholesale Justice—Constitutional Democracy and the Problem of the Class Action Lawsuit (Part II)*, NW. U. L. REV. COLLOQUY 330, 339 (2010).

. . . [T]oday the lawsuits have largely become just another variation of a tort claim where monetary relief is the principal, and often the only, goal of the litigation. Along with this shift in emphasis has come a dramatic change in our perspective on the persistence of discrimination. There is no longer any concerted effort to eliminate discrimination; instead, efforts are directed at providing monetary compensation for past discrimination without particular concern for preventing future discrimination, or even remedying past discrimination, through injunctive relief. For firms, discrimination, claims are now like accidents--a cost of doing business, which necessarily implies that a certain level of discrimination will persist. One reason for the change in the nature of the litigation is that employment discrimination class actions have evolved into a purely private realm with little to no government oversight--indeed, . . . , with hardly any oversight at all.⁷⁷

The increasing restrictions on use of the class action are a significant limitation in employment discrimination law. If employment discrimination is not an individual, isolated, and sporadic phenomenon,⁷⁸ then we would expect claims and litigation to involve systemic claims; moreover such approaches would be needed to address effectively the type and scope of employment discrimination that routinely occurs. Indeed, two theories of discrimination, systemic disparate treatment and disparate impact, address systemic discrimination.⁷⁹ The EEOC believes that a focus on systemic claims is worth the agency's focus and commitment of resources.⁸⁰ Systemic claims of discrimination often are pursued using the class action device.

⁷⁷ Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1251-52 (2003).

⁷⁸ See, e.g., Tristin Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 128 (2003) (stating that "discrimination today rarely operates in isolated states of mind; rather, it is often influenced, enabled, and even encouraged by the structures, practices, and opportunities of the organizations within which groups and individuals work").

⁷⁹ *Id.* at 119-126 (discussing systemic disparate treatment); *id.* at 136-44 (discussing disparate impact). See generally Michael J. Zimmer, *Wal-Mart v. Dukes: Taking the Protection Out of Protected Class*, 16 LEWIS & CLARK L. REV. 409 (2012) [hereinafter Zimmer, *Wal-Mart*].

⁸⁰ The EEOC launched its systemic initiative in 2006. See Leslie E. Silverman et al., *Systemic Task Force Report*, EEOC (Mar. 2006), available at http://www.eeoc.gov/eeoc/task_reports/systemic.cfm. The EEOC reaffirmed its commitment to the systemic initiative in its 2012-16 Strategic Plan. See United States Equal Employment Opportunity Commission, *Strategic Plan for Fiscal Years 2012 – 2016*, available at http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm#_edn23.

Yet, over the years the Court and courts increasingly have restricted the availability of class actions in employment discrimination.⁸¹

The Supreme Court's decision in 2011 in *Wal Mart Stores, Inc. v. Dukes*,⁸² in which the Court disallowed certification of a sex discrimination class of perhaps over a million and a half sales associates, is the latest, and perhaps most significant, manifestation of the limitation of class actions in employment discrimination law. In *Dukes*, female sales associates at Wal-Mart stores throughout the nation sought class certification for their claims that Wal-Mart engaged in intentional discrimination in denying women promotions and in suppressing pay of women compared to men. In a five-four decision, the Supreme Court held that a class action could not be certified under Federal Rules of Civil Procedure Rule 23. The majority gave several procedural reasons, and one was because class actions are not available under Rule 23(b)(2) when claims for monetary relief are more than incidental to claims for injunctive or declaratory relief.⁸³ The dissent actually agreed that certification was not appropriate under Rule 23(b)(2), but opined that the certification might have been possible under 23(b)(3), if not for the majority's finding that the requirements of 23(a) were not satisfied.⁸⁴

Dukes has both its defenders⁸⁵ and its detractors.⁸⁶ However, whether *Dukes* was a good or reasonable decision is not the point here. It is the latest evidence of the Court restricting the

⁸¹ See Linda L. Holdeman, *Civil Rights in Employment: The New Generation*, 67 DENV. U. L. REV. 1, 56 (1990) (stating that "[t]he present Court operates from a highly atomistic, individualistic view of society. Hence, it can support the claims of a plaintiff such as Ann Hopkins in *Price Waterhouse* but is strongly disinclined to permit the problems of racism and sexism to be addressed systemically by either legislation or lower courts. Discrimination issues are restricted to one-on-one showdowns, deciding who is right and who is wrong.").

⁸² 131 S. Ct. 2541 (2011).

⁸³ *Id.* at 2560.

⁸⁴ *Id.* at 2561 (Ginsburg, J., concurring).

⁸⁵ See, e.g., Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1, 28 [hereinafter Sherry, *Hogs*] ("Bringing a class action in order to rewrite the substantive law of employment discrimination to include implicit bias and structural discrimination was thus overreaching at its worst.").

availability of the class action device in employment discrimination cases. How much *Dukes* actually restricts the class action remains to be seen.⁸⁷

The Supreme Court’s limitations on the use of class actions in employment discrimination are somewhat analogous to some of the restrictions on use of class actions for mass torts. Some of the concerns regarding use of the class action in the two contexts are the same.⁸⁸ Additionally, some judges and commentators are concerned that the employment discrimination class action has become too much like the tort class action—largely private litigation with little oversight in which the principal objective is compensation of the plaintiffs with much less attention to deterrence.⁸⁹

Thus, over the half century since the enactment of Title VII, several changes have provoked or accommodated a changing view of the employment discrimination laws—a view that they have become more tort-like—more about individual personal injury and compensation than about the public policy of deterring and eradicating discrimination. This shift results in courts, lawyers, litigants, and perhaps the public viewing the employment discrimination laws as statutory torts.

D. Importation of Tort Doctrines and Principles

As the general perception of the employment discrimination statutes has shifted toward torts, the courts have tortified employment discrimination law in another way. Specific tort

⁸⁶ See, e.g., Zimmer, Wal-Mart, *supra* note ____; Melissa Hart, *Civil Rights and Systemic Wrongs*, 32 BERKELEY J. EMP. & LAB. L. 455 (2011).

⁸⁷ See Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 477, 479 (2011) (stating that “[i]t is not yet clear what impact the Court’s *Wal Mart* decision will have but it is likely to make certification of a nationwide class far more difficult”). Notwithstanding *Dukes*, there may be devices that preserve and reinvigorate the availability of the class action in employment discrimination, such as certification of a class “with respect to particular issues” under Rule 23(c)(4). See *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012); Hart, *supra* note ___, at 475 (discussing class certification under Rule 23(c)(4)).

⁸⁸ See Campos, *supra* note ____ (discussing concerns with litigant autonomy).

⁸⁹ See, e.g., Selmi, *supra* note ____ and accompanying text.

principles and doctrines have been imported into discrimination law with varying degrees of modification. The most prevalent, overarching, and practically significant incorporation of tort law into antidiscrimination law is the adoption of tort standards of causation as the means for understanding, proving and analyzing the statutory prohibitions on discrimination.

The incorporation of tort cause in fact was discussed in the various opinions in the badly splintered Supreme Court decision in *Price Waterhouse v. Hopkins*.⁹⁰ The focal point of the debate was what causation standard was invoked by Title VII's statutory language "because of . . . race, color, religion, sex, or national origin."⁹¹ The plurality rejected the idea that "because of" means but for causation.⁹² The Court borrowed a procedural framework from constitutional law, requiring the plaintiff to prove as the prima facie case that the relevant protected characteristic was a motivating factor in the adverse employment decision, and the burden of persuasion then shifting to the defendant to prove that it would have taken the same action in the absence of a discriminatory motive (the same-decision defense).⁹³ The analysis had been developed in *Mt. Healthy City Bd. of Ed. v. Doyle*,⁹⁴ a case in which a terminated public school teacher asserted a First Amendment free speech claim.⁹⁵ The plurality opinion in *Price Waterhouse* selected "motivating factor" as the standard of causation in the plaintiff's prima facie case,⁹⁶ whereas the Court in *Mt. Healthy* expressed the standard as "'substantial factor' or to put it in other words, . . .

⁹⁰ 490 U.S. 228 (1989).

⁹¹ 42 U.S.C. § 2000e-2(a)(1).

⁹² *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989). Twenty years later, a majority of the Court would repudiate the conclusion that "because of" does not mean but for in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

⁹³ *Price Waterhouse*, 490 U.S. at 244-45.

⁹⁴ 429 U.S. 274 (1977).

⁹⁵ *Price Waterhouse*, 490 U.S. at 249. The Court also noted that it had approved such an analysis for a claim under the National Labor Relations Act in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). In *Transportation Management*, the Court approved the reliance of the National Labor Relations Board on *Mt. Healthy* in developing its analysis in *NLRB v. Wright Line*, 662 F.2d 899 (11th Cir. 1981).

⁹⁶ *Price Waterhouse*, 490 U.S. at 244.

. a `motivating factor.’”⁹⁷ Justice O’Connor’s influential concurring opinion,⁹⁸ argued that “because of” did mean “but for,” and she was not willing to shift the burden of persuasion to the defendant employer on the same-decision defense until the plaintiff satisfied a more demanding standard of causation at the prima facie case stage.⁹⁹ Thus, Justice O’Connor’s concurrence selected “substantial factor,” treating it as a higher standard and not subscribing to the interchangeability of “motivating factor” and substantial factor” in *Mt. Healthy*. Referring to the “statutory employment `tort’ created by Title VII,”¹⁰⁰ Justice O’Connor turned to torts case law to find a suitable basis for shifting the burden of persuasion and relied on *Summers v. Tice*,¹⁰¹ in which the California Supreme Court aided a plaintiff shot by one of two hunters who could not prove which breach caused the harm by shifting the burden to the defendants to prove they did not cause the harm.¹⁰² She also cited another torts case applying a shifting burden—*Kingston v. Chicago & N.W.R. Co.*,¹⁰³ a case of concurrent sufficient causes, in which one cause of the fire damage was the railroad company’s negligence and the other was an innocent or unknown cause.¹⁰⁴

The dissent in *Price Waterhouse* argued that the plurality was incorrect: that “because of” “by any normal understanding” and as used “in everyday speech” does mean “but for.”¹⁰⁵ But for is the minimum standard used in common law approaches, the dissent noted, citing tort

⁹⁷ *Mt. Healthy*, 429 U.S. at 287.

⁹⁸ The O’Connor concurrence was relied upon by appellate courts to glean a majority rationale for creation of the mixed-motives framework. For an argument that the courts relied on the wrong *Price Waterhouse* concurrence, see *Recent Cases, Employment Law--Discrimination—Ninth Circuit Finds for Employee in a Mixed-Motive Case Without “Direct Evidence” of Discrimination—Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002) (*en banc*) cert. granted, 123 S. Ct. 816 (2003), 116 HARV. L. REV. 1897 (2003).

⁹⁹ *Price Waterhouse*, 490 U.S. at 265 (O’Connor, J., concurring).

¹⁰⁰ *Id.* at 264. O’Connor’s concurring opinion followed the “statutory tort” label by noting the two primary functions of Title VII: the deterrence goal related to public policy and the compensation or make-whole goal.

¹⁰¹ 33 Cal.2d 80, 199 P.2d 1 (1948).

¹⁰² *Price Waterhouse*, 490 U.S. at 263 (O’Connor, J., concurring).

¹⁰³ 191 Wis. 610, 211 N.W. 913 (1927).

¹⁰⁴ *Price Waterhouse*, 490 U.S. at 263-64 (O’Connor, J., concurring).

¹⁰⁵ *Price Waterhouse*, 490 U.S. at 281 (Kennedy, J., dissenting).

law.¹⁰⁶ The dissent then explained that the plurality actually did, contrary to its protestations, adopt a but-for causation test in two steps.¹⁰⁷

Although the opinions in *Price Waterhouse* discussed tort causation standards, what the Court created was a two-part analysis with a shifting burden of persuasion that had no analogue in tort law. Congress's subsequent modification of the mixed-motives analysis in the Civil Rights Act of 1991 preserved this employment discrimination analysis that was distinct from tort causation standards.¹⁰⁸ Congress also selected the ostensibly lower standard of causation—"motivating factor"—rather than "substantial factor" for the plaintiff's prima facie case that triggers the shift in the burden of persuasion. Thus, although the mixed-motives analysis incorporates tort causation standards, the analysis is drawn from other sources of law, and Congress made adjustments in the statutory version to accommodate the objectives of Title VII.

The adoption of tort standards of cause in fact in Title VII analysis was the most significant tortification of employment discrimination law because all analyses of intentional (disparate treatment) discrimination focus on causation. The *Price Waterhouse* mixed-motives analysis was developed with the Court disagreeing about the standard of causation to be applied. Regarding the other principal analysis for individual disparate treatment claims, *McDonnell Douglas*/pretext, the Supreme Court has not engaged in a protracted debate or discussion about what tort cause-in-fact standard it incorporates as it did with mixed-motives. The Court has

¹⁰⁶ *Id.* at 282 (citing W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS 265 (5th ed. 1984)).

¹⁰⁷ *Id.* at 285 (Kennedy, J., dissenting).

¹⁰⁸ See Sperino, *Discrimination Statutes*, *supra* note __, at __ (17) ("This two-tiered factual cause standard does not mimic traditional tort cause standards, especially given that if the employer prevails on the second step, the employer wins only a partial defense to damages.").

suggested, however, in *McDonald v. Santa Fe Trail Transportation Co.*, that the pretext analysis incorporates but-for causation.¹⁰⁹

The formula developed by the Court for the statutory language “because of” provides that discriminatory motive must be the cause in fact of the adverse job action. This incorporation of tort law cause-in-fact standards into the core of intentional discrimination analysis has been criticized by many scholars. One commentator posits that the formula is not apt because the analogy to tort causation is flawed. Motives do not cause discriminatory acts; thus, “trying to interpret human actions as if they were problems in causation is fundamentally flawed.”¹¹⁰ Similarly, other commentators have argued that the causation formula fails to depict how the phenomenon of discrimination actually occurs, as it often results from unconscious or subtle bias.¹¹¹

My critique of the tortification of employment discrimination law does not end, however, with the propriety of adoption of tort principles. It is one thing to criticize the Court for the importation of tort cause-in-fact standards into employment discrimination law--the most important and far-reaching tortification of discrimination law. Nonetheless, the cause-in-fact standards are well-established, deeply imbedded, and, in fairness, not far removed from the statutory language. So, I do not expect the Supreme Court to adopt a new approach to importation of tort law and consequently abandon the cause-in-fact standards. However, another

¹⁰⁹ 427 U.S. 273, 282 n.10 (1976).

¹¹⁰ See Paul J. Gudel, *Beyond Causation: The Interpretation of an Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 20 (1991); see also Belton, *supra* note __, at 1242 (“Tort law has its genesis in the common law. Since the national policy against discrimination in employment is not based on the common law, a strong argument can be made that causal analysis should not be as critical an element in employment discrimination law as it is in the law of negligence.”).

¹¹¹ See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1168-77 (1995); Green, *supra* note __, at 131 (arguing that “focus on causation leaves in place the dominant conception of discrimination as stemming from individuals rather than from the larger organizational context within which they work”).

facet of tortification is the modification of tort concepts either at the time of adoption or over time to better achieve the objectives of employment discrimination law. Even if one lauds or accepts the Court's adoption of cause-in-fact standards, the Court's trajectory in developing and adjusting cause-in-fact law in employment discrimination has been far less impressive.

The most basic tort cause-in-fact standard, and the most onerous for torts plaintiffs to satisfy, is but-for causation. As discussed, the various *Price Waterhouse* opinions debated whether Title VII's "because of" language requires a but-for causation standard, with the plurality asserting that it did not. What emerged from *Price Waterhouse* was a proof framework that actually did, when one considers the two parts of the mixed-motives analysis, as the dissent argued, maintain but-for causation. However, the shifting burden of persuasion was an innovative adjustment, which enabled the plaintiff to move forward and even win the case by proving a lower standard of causation at the prima facie case stage, subject to rebuttal by the defendant's same-decision defense. As Justice O'Connor noted, there were a few types of torts cases in which such a variation on but-for causation was used. Thus, one could have been optimistic at the time of *Price Waterhouse* and Congress's adjustment of the *Price Waterhouse* mixed-motives analysis that the Court and Congress would appreciate the differences between tort law and employment discrimination law and adjust the tort causation standards appropriately over time as employment discrimination cases arose that demonstrated the need.

The evolution of tort cause-in-fact standards reached its nadir in 2009. The promise of *Price Waterhouse*, the Civil Rights Act of 1991, and innovative circuit court opinions, such as *Rachid v. Jack in the Box, Inc.*,¹¹² that Congress and the Courts would adjust tort cause in fact to accommodate the objectives of employment discrimination law foundered on *Gross v. FBL*

¹¹² 376 F.3d 305 (5th Cir. 2004). *Rachid* is discussed *infra* Part I.C.3.

*Financial Servs., Inc.*¹¹³ In a surprising opinion, the Court addressed an issue on which it had not granted certiorari, holding that the mixed-motives analysis, with its shifting burdens, does not apply to the Age Discrimination in Employment Act. The majority opinion in the five-four decision insists that the statutory language “because of” does mean but-for causation,¹¹⁴ and expresses distaste for the burden-shifting mixed-motives framework.¹¹⁵ The *Gross* decision, thus, retreats from the innovative mixed-motives variation on but-for causation and arguably entrenches the but-for standard in all employment discrimination statutes that use only the “because of” language,¹¹⁶ thus all statutes except Title VII, to which the Civil Rights Act of 1991 added “motivating factor.”¹¹⁷

The dissenting opinions in *Gross* disagreed with the majority’s equation of but for with “because of” and its departure from both *Price Waterhouse* and perceived Congressional intent in the Civil Rights Act of 1991.¹¹⁸ One dissenting opinion focused on the differences between tort law and employment discrimination law that justify application of different principles.

Justice Breyer’s dissent expressed that view as follows:

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

¹¹³ 557 U.S. 167 (2009).

¹¹⁴ *Id.* at 176-77.

¹¹⁵ *Id.* at 179 (stating “[w]hatever the deficiencies of *Price Waterhouse* in retrospect, it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply. For example, in cases tried to a jury, courts have found it particularly difficult to craft an instruction to explain its burden-shifting framework.”).

¹¹⁶ Because the Court was interpreting “because of” statutory language, the decision might render the mixed-motives framework inapplicable to all discrimination statutes except Title VII, which also has the statutory “motivating factor” language. See *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010) (*Gross* holding renders mixed motives inapplicable to Americans with Disabilities Act). But see *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010) (not extending holding of *Gross* to antiretaliation provision in Title VII).

¹¹⁷ 42 U.S.C. § 2000e-2(m).

¹¹⁸ *Gross*, 557 U.S. at 180 (Stevens, J., dissenting).

determine a “but-for” relation when we consider, not physical forces, but the mind-related characterizations that constitute motive.¹¹⁹

Although there were negative reactions from influential people and organizations and calls for Congressional action¹²⁰ with proposed legislation to overrule the decision introduced in Congress (the Protecting Older Workers Against Discrimination Act¹²¹), *Gross* remains the law.

In my view of the tortification of employment discrimination law, *Gross* is perhaps the most disappointing and alarming decision of the Supreme Court. Having adopted torts cause-in-fact standards and having shown that it is able to adjust the torts principles to better serve employment discrimination law, the Court limited the adjustments and innovations and reverted to the most basic causation standard that also is the most onerous for plaintiffs to satisfy. This is not a propitious trajectory for the management of transplanted tort doctrine.

Cheryl Zemelman cites the application of the unclean hands doctrine to the after-acquired evidence principle as an incorporation of tort law into antidiscrimination law.¹²² The issue posed by after-acquired evidence is what effect it has on an employment discrimination claim when a

¹¹⁹ *Id.* at 190 (Breyer, J., dissenting).

¹²⁰ Not surprisingly, the AARP did not like the decision. See David G. Savage, *Supreme Court makes age-bias suits harder to win*, L.A. TIMES, June 19, 2009, at 1, available at http://bulletin.aarp.org/yourworld/law/articles/supreme_court_makes_agebias_suits_harder_to_win.html (discussing how the Supreme Court’s conservative decision will make it harder for older workers to bring successful age-discrimination claims because it eliminated the long-standing two-step approach and replaced it with the requirement that plaintiffs “bear the full burden of proving that age was the deciding factor in the dismissal or demotion”). AARP attorney Thomas W. Osborne was critical of the decision, characterizing it as one of several Court decisions suggesting that age discrimination is different from other types and not as serious. See Susan J. McGolrick, *Justices 5-4 Adopt But-For Causation, Reject Burden Shifting for ADEA Claims*, Daily Lab. Rep. (BNA) No. 116, at AA-1 (June 19, 2009) (noting that Osborne was “absolutely” surprised by “how far the court went” in the *Gross* decision). Senate Judiciary Committee Chairman Senator Patrick Leahy stated as follows: “By disregarding congressional intent and the time-honored understanding of the statute, a five member majority of the Court has today stripped our most senior American employees of important protections.” *Id.* at AA-3. Senator Leahy further likened the *Gross* decision to the Court’s “wrong-headed” ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which Congress overturned in the Lilly Ledbetter Fair Pay Act of 2009. *Id.* For other criticism, see Kevin P. McGowan, *EEOC Provides Guidance on Waivers, Hears Testimony on Age Bias Developments*, Daily Lab. Rep. (BNA) No. 134, at A-14 (July 16, 2009) (noting that outside witnesses criticized the Supreme Court holding in *Gross* at a July 15 EEOC meeting); Editorial, *Age Discrimination*, N.Y. TIMES, July 7, 2009, at A22 (calling for Congress to reverse *Gross* as it did *Ledbetter*).

¹²¹ See *supra* note ____.

¹²² See Zemelman, *supra* note ____, at 202-06.

plaintiff proves a discriminatory motive for an adverse employment action, but the employer offers evidence that after the discriminatory action was taken it discovered evidence of wrongdoing by the employee that would have justified the decision even absent the discriminatory motive. The issue is intertwined with cause in fact because the after-acquired evidence could not cause the adverse employment action if it was not known at the time of decision. Zemeleman criticized an approach to after-acquired evidence followed by some courts whereby a plaintiff's recovery was barred if an employer could produce after-acquired evidence and prove that it would have taken the adverse employment action for that reason absent the discriminatory reason.¹²³ This unclean-hands-infused treatment was ameliorated by the Supreme Court's later decision in *McKennon v. Nashville Banner Publishing Co.*,¹²⁴ in which the Court held that after-acquired evidence does not bar recovery, but such evidence may, under some circumstances, be introduced to cut off the monetary remedies from the date of discovery of such evidence. Nonetheless, the Court did not go as far as it might have in favor of employment discrimination law. It could have held that after-acquired evidence was inadmissible and irrelevant to the plaintiff's recovery.¹²⁵

A further incorporation of tort law into employment discrimination law, although less express, is the Supreme Court's recognition of hostile environment sexual harassment as a covered type of employment discrimination in *Meritor Savings Bank v. Vinson*.¹²⁶ The

¹²³ See, e.g., *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988).

¹²⁴ 513 U.S. 352 (1995).

¹²⁵ See, e.g., William R. Corbett, *The "Fall" of Summers, the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks*, 30 GA. L. REV. 305, 375-82 (1996).

¹²⁶ 477 U.S. 57 (1986).

harassment theory, particularly hostile environment,¹²⁷ is very tortlike,¹²⁸ focusing on the dignitary harm that results from the discrimination.¹²⁹ The Supreme Court, in developing the employer's affirmative defense to liability for supervisor sexual harassment in *Burlington Industries, Inc. v. Ellerth*, invoked the tort doctrine of avoidable consequences.¹³⁰

The foregoing are some of the most salient examples of tort law being imported into employment discrimination law. Although there are other examples,¹³¹ the Court's recent incorporation of proximate cause theory to determine subordinate bias liability is the latest example, and it ushers into employment discrimination law a tort principle that has been more troublesome in torts than cause in fact.

II. *McDonnell Douglas* Framework: A Pretext for *Res Ipsa Loquitur*

A few commentators and some courts have remarked that the analysis developed in *McDonnell Douglas Corp. v. Green* is an incorporation of the tort doctrine of *res ipsa loquitur* into antidiscrimination law.¹³² This Part explores the relationship between the *McDonnell Douglas* pretext analysis and *res ipsa*. It also contends that the most significant analysis in employment discrimination law should not have been, and should not be, modeled on a tort analysis used for unusual cases in which the breach in a negligence claim is a mystery. It begins by examining the tort doctrine of *res ipsa loquitur*.

¹²⁷ Although the Court stated that the terms “quid pro quo” and “hostile environment” are of “limited utility,” it acknowledged that they remain relevant in distinguishing types of conduct. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 743 (1998). The terms still are used frequently by the courts.

¹²⁸ Professor Chamallas has described the migration of law regarding sexual harassment as moving from employment discrimination to tort. See Chamallas, *Discrimination*, *supra* note __, at 2180-87 (discussing how the law of sexual harassment has influenced development of the tort of intentional infliction of emotional distress).

¹²⁹ See, e.g., Bernstein, *supra* note __, at 451 (discussing the “tort-like wrong of sexual harassment”).

¹³⁰ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (stating that “Title VII borrows from tort law the avoidable consequences doctrine”).

¹³¹ See, e.g., Frank *supra* note __, at 520 (stating that “[t]hese tort principles include the doctrine of avoidable consequences . . . , respondeat superior liability, the discovery rule, shifting burdens of proof, the fellow servant rule, principles of causation, the eggshell skull rule, and others”).

¹³² See *supra* note ____ (19).

A. Res Ipsa Loquitur: *Latin for “The Thing Speaks for Itself”*

The tort “doctrine”¹³³ of res ipsa loquitur seems to be an exotic mantra imbued with mystical powers. In fact, it is not so mysterious. It is well explained as a rule regarding the use of circumstantial evidence in a negligence case. The *Restatement Third of Torts* describes res ipsa in this way: “[R]es ipsa loquitur is circumstantial evidence of a quite distinctive form. The doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of the causes of the type or category of accidents involved.”¹³⁴ Differently stated, res ipsa permits the fact finder to infer or presume a breach by the defendant(s) when the plaintiff has difficulty producing evidence of a specific act or acts by the defendant(s) that constitute a breach of the standard of care.

The incantation and invocation of res ipsa is seductive. From many years of grading the Torts exams of first-year law students, I know that they are eager to find res ipsa in every exam, if not every fact pattern on an exam. Perhaps it is the allure of the Latin.¹³⁵ Plaintiffs also seem to be eager to include res ipsa in their pleadings and requested jury instructions. For plaintiffs and their attorneys, however, the attraction to rely on res ipsa is likely more than the Latin. Res ipsa enables a plaintiff who successfully invokes it to take a case to the fact finder without proving the precise breach committed by the defendant.¹³⁶ Rather, the jury is instructed that it

¹³³ Res ipsa has been variously characterized “as a rule, principle, doctrine, maxim, and [by] one particularly frustrated scholar, a myth.” G. Gregg Webb, Note, *The Law of Falling Objects: Byrne v. Boadle and the Birth of Res Ipsa Loquitur*, 59 STAN. L. REV. 1065, 1065 (2007).

¹³⁴ RESTATEMENT OF THE LAW OF TORTS RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 17 (2010).

¹³⁵ See, e.g., Clifford A. Hull, Steven R. Perkins & Tracy Barr, *Understanding Latin Legalese*, available at <http://www.dummies.com/how-to/content/understanding-latin-legalese.html> (stating that “[m]ost lawyers love to throw around Latin phrases. The reason for this is that ancient Rome’s legal system has had a strong influence on the legal systems of most western countries.”).

¹³⁶ See, e.g., Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. L. U. L. REV. 111, 144 (2011) (explaining that res ipsa loquitur is “a powerful force that militates against holding a plaintiff’s lack of access to

may find some undefined breach by the defendant based on the circumstantial evidence. Plaintiffs likely enjoy a second less obvious advantage under *res ipsa*. The cause in fact inquiry becomes muddled, and defendants often have no clear target in arguing absence of cause in fact.¹³⁷ The but-for causation test inquires whether the damage would have occurred if the breach had not occurred. If the breach is presumed but not clearly defined, it is more difficult to answer the counterfactual inquiry posed by cause-in-fact analysis. Thus, if the fact finder is willing to infer an ill-defined breach, it may be willing to presume cause in fact as well.

For a doctrine shrouded in mystery, there is nothing mysterious about the source that gave it impetus,¹³⁸ although that case was not its origin.¹³⁹ The phrase is traced to the pronouncement of Chief Baron Jonathan Frederick Pollock in the 1863 British case *Byrne v. Boadle*.¹⁴⁰ The case involved a barrel falling out of a shop on a London street, hitting a passerby, and permanently injuring him. The attorney for the business argued that the plaintiff had not proven a breach by the defendant or its employees. Chief Baron Pollock launched the doctrine of *res ipsa loquitur* on its dubious career when he responded, “There are certain cases of which it may be said *res ipsa loquitur*, and this is one of them.”¹⁴¹ However, the doctrine would be more fully developed in two subsequent cases.¹⁴² The dissent of Chief Justice Erle in *Scott v. London and St. Katherine Docks Co.*¹⁴³ suggested the addition of the predicate facts that the injury-

crucial evidence against him where the totality of the circumstances indicates that there is not a sound reason to do so”).

¹³⁷ See, e.g., Erik S. Knutsen, *Ambiguous Cause-in-Fact and Structured Causation: A Multi-Jurisdictional Approach*, 38 TEX. INT’L L.J. 249, 277-78 (2003) (exploring the relationship between *res ipsa* and ambiguous cause-in-fact cases).

¹³⁸ See Webb, *supra* note ___, at 1067 (“Rarely has the first use of a well-known legal phrase been so clearly traceable to an individual case.”); RESTATEMENT (SECOND) OF TORTS §328D Cmt. a (attributing the origin to Baron Pollock in *Byrne v. Boadle*).

¹³⁹ See Webb, *supra* note ___, at 1077 (tracing the term to a 1614 British case)

¹⁴⁰ (1863) 159 Eng. Rep. 299 (Exch.).

¹⁴¹ *Id.* at 300.

¹⁴² See Webb, *supra* note ___, at 1107-08.

¹⁴³ 3 H.&C. 596 (Exch Chamber 1865).

causing thing is shown to be under the control of the defendant or its servants and such accidents ordinarily do not happen if those in control of the thing use proper care.¹⁴⁴ Next in *Briggs v. Oliver*, the phrase *res ipsa loquitur* was combined with the predicate facts from Erle's dissent.¹⁴⁵ One commentator's chronology of the development of the doctrine traces it back to an earlier principle in English law of presumptive negligence when passengers of common carriers were injured and suffered from a deficit of evidence to establish a breach by the common carrier.¹⁴⁶ The adaptation of this principle of presumptive negligence in the broader range of cases to which *res ipsa* was applied was a positive development for plaintiffs, who were aided by the doctrine.¹⁴⁷

In American tort law, the *Restatement (Second) of Torts* set forth the "principle" of *res ipsa loquitur*, stating that negligence may be inferred as the cause of a plaintiff's damage when the following predicate facts are established: the event is of a kind that ordinarily does not happen in the absence of negligence; other causes, such as conduct of the plaintiff and third parties, is sufficiently eliminated; and the negligence is within the scope of the defendant's duty.¹⁴⁸ Other courts and authorities have included another element: that evidence of the cause of the injury is more accessible to the defendant than the plaintiff.¹⁴⁹ It has been argued that the accessibility-to-evidence element is used when courts want to expand *res ipsa*.¹⁵⁰ Although the *Second Restatement's* prerequisites differ from those stated by Chief Justice Erle, the comment to section 328D recaptured the last element, stating that a plaintiff may eliminate other

¹⁴⁴ See Webb, *supra* note ____, at 1107-08.

¹⁴⁵ *Id.* at 1108.

¹⁴⁶ *Id.* at 1084-88.

¹⁴⁷ *Id.* at 1107 (stating that "[r]es ipsa loquitur, as it was applied in *Byrne* and its progeny, blurred the edges of negligence in favor of injured plaintiffs, not defendant businesses")

¹⁴⁸ RESTATEMENT (SECOND), *supra* note ____, § 328D.

¹⁴⁹ See Okediji, *supra* note ____, at 83-84 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §9, at 244 (5th ed. 1984)).

¹⁵⁰ *Id.* (citing Prosser).

responsible causes by showing that the cause for the event was within the defendant's responsibility or that the defendant was responsible for all reasonably probable causes.¹⁵¹

Thus, a central feature of res ipsa law since its inception has been the requirement that a plaintiff seeking to invoke it must first establish certain prerequisite facts, which justify its applicability and its bestowing of advantages on the plaintiff. The prerequisite facts provide some assurance that the defendant most likely did breach the standard of reasonable care in some undefined or ill-defined way notwithstanding the plaintiff's inability to prove the particular breach. The *Restatement (Third)* explains the reticence about this doctrine: “[R]es ipsa loquitur does produce an element of discomfort, inasmuch as the defendant can be found negligent without any evidence as to the nature or circumstances of the defendant's actual conduct. This discomfort leads to some circumspection in the application of res ipsa loquitur.”¹⁵²

Notwithstanding the uneasiness with application of res ipsa, the *Restatement (Third)* pares down the requirements for application of res ipsa to a more basic requirement: “the accident causing the plaintiff's harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member.”¹⁵³

The role of the prerequisite facts for invoking res ipsa is justification for finding a breach and perhaps holding a defendant liable despite the plaintiff's inability to prove a specific breach. Notwithstanding the vital role of the prerequisites, this is one of the features of res ipsa that has generated the most disagreement among the courts and authorities. The early English case law and the *Restatement (Second)* articulated the requirement of three prerequisites. The

¹⁵¹ RESTATEMENT (SECOND), *supra* note ____, § 328D cmt. G.

¹⁵² RESTATEMENT (THIRD) § 17, *supra* note ____, Cmt. a

¹⁵³ *Id.*

Restatement (Third) adopted a pared-down test for the applicability of *res ipsa*¹⁵⁴ and rejected two different versions accepted by some courts. Each of the versions rejected by the latest Restatement consists of two steps.¹⁵⁵ The first applies *res ipsa* if the accident is of a type that usually occurs because of negligence and the instrumentality causing the harm was under the exclusive control of the defendant.¹⁵⁶ The other two-step formulation requires that the type of accident usually happens because of negligence, and such negligence is usually that of the defendant rather than some other party.¹⁵⁷

Thus, one of the most unsettled and vexing features of *res ipsa loquitur* is the disagreement and uncertainty regarding the predicate facts which determine whether *res ipsa loquitur* applies to a given case. This is no small problem because, as explained, it is the predicate facts that justify giving a plaintiff the advantages of *res ipsa*. If there is confusion, disagreement, or loss of confidence in these foundational facts, then *res ipsa* is likely to be seen as creating an unjustified inference or presumption that eases the usual burden and requirements imposed on plaintiffs in typical litigation. The disagreement and confusion over the prerequisites or foundational facts and a resulting loss of confidence in the presumption raised by the analysis are characteristics that the *McDonnell Douglas* pretext framework shares with *res ipsa*, as will be developed later.¹⁵⁸

Another troublesome feature of *res ipsa* that also is suffered by *McDonnell Douglas* is, if it is applicable to a claim, then what procedural effect does it have. Some jurisdictions interpret *res ipsa* as creating a permissible inference of breach, while others have held that it has the more

¹⁵⁴ See *supra* text accompanying note ____.

¹⁵⁵ RESTATEMENT (THIRD) § 17, *supra* note ____, Cmt. B.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See *infra* Part II.B.2(a)(i).

significant procedural effect of creating a rebuttable presumption of breach. A majority of courts have espoused the view that it gives rise to a permissible inference of breach, although even in those jurisdictions, in an exceptional case the evidence may be such that no reasonable fact finder could find that the defendant did not breach.¹⁵⁹ A minority of jurisdictions, by case law or statute, accord the greater effect of rebuttable presumption.¹⁶⁰ Still other jurisdictions seem to use “permissible inference” and “rebuttable presumption” interchangeably, not carefully limning the difference in procedural effect.¹⁶¹ The New York Court of Appeals acknowledged the tendency of courts to use the terms interchangeably and explained that courts in that state “have grown more sensitive to the differences between inferences and presumptions, recognizing that terminology can carry varying procedural implications.”¹⁶²

A third vexing aspect of *res ipsa* that it shares with *McDonnell Douglas* is the uncertainty regarding the types of cases to which it is applicable. Because *res ipsa* is considered a rule or principle regarding circumstantial evidence, which gives the plaintiff a positive procedural effect after establishing the predicate facts, some authorities and courts reject the applicability of *res ipsa* in cases in which direct evidence of breach is presented or available.¹⁶³ However, this distinction is based on the much-maligned and ill-defined distinction between circumstantial and direct evidence.¹⁶⁴

¹⁵⁹ RESTATEMENT (THIRD) §17, *supra* note ____, cmt. j; *Ryan v. Fast Lane, Inc.*, 360 S.W.3d 787 (Ky. App. 2012).

¹⁶⁰ *See, e.g.*, TENN. CODE ANN. 29-6-115 (c); *Kendrick v. Pippin*, 252 P.3d 1052 (Colo. 2011).

¹⁶¹ *See, e.g.*, *Morejon v. Rais Const. Co.*, 7 N.Y.3d 203, 851 N.E.2d 1143 (N.Y. 2006).

¹⁶² *Id.* at 210, 851 N.E.2d at 1147; *see also* Alan W. Stewart, Note, *Are We Allowing the Thing to Speak for Itself? Linnear v. CenterPoint Energy and Res Ipsa Loquitur in Louisiana*, 71 LA. L. REV. 1091, 1099 (2011) (explaining that the uncertainty regarding presumption or inference was “most likely due to a careless interchanging of the two words by judges”).

¹⁶³ *See, e.g.*, *Linnear v. Centerpoint Energy Entex/Reliant Energy*, 966 So. 2d 36 (La. 2007); *B & K Rentals and Sales Co. v. Universal Leaf Tobacco Co.*, 596 A.2d 640, 647 (1991); *Stahlecker v. Ford Motor Co.*, 667 N.W.2d 244, 252 (Neb. 2003).

¹⁶⁴ This is true both as a principle of evidence generally, and as applied to employment discrimination law specifically. Regarding the general principle, consider the following observations:

The foregoing three problems, uncertainties, or controversies regarding *res ipsa loquitur* lead ineluctably to an overarching characteristic of *res ipsa loquitur* that it shares with its sibling *McDonnell Douglas*: given its nebulous nature, reticence of courts to ease the usual litigation burdens of plaintiffs without justification, and the skepticism about the inference or presumption to be drawn based on surrogate questions (substitutes for whether the defendant committed a breach of the standard of care), the doctrine is more trouble than it is worth. Consequently, authorities sometimes attempt to limit the applicability and influence of *res ipsa*, but it has a dogged tenacity and perseverance, as indicated by its pervasive acceptance and its survival in the *Third Restatement*. Its unwillingness to succumb, notwithstanding its many failings, is another thing it shares with *McDonnell Douglas*.

A case that demonstrates some of the problems with *res ipsa* is *Linnear v. Centerpoint Energy Entex/Reliant Energy*.¹⁶⁵ In several decisions before *Linnear*, the Louisiana Supreme Court had defined and refined *res ipsa*.¹⁶⁶ The principles announced in *Linnear* marked a significant limitation on use of *res ipsa*. The plaintiffs, wife and husband, sued for injury of the wife, who fell on her property and injured her leg. They sued a company that recently had

The problem with the direct-circumstantial distinction is not simply that common beliefs about the significance of the distinction are false. A more fundamental problem is that the distinction, while perhaps appealing on the level of intuition, makes no logical sense. There simply is no category of evidence that brings us into direct contact with crucial facts because no such contact is possible. All facts are a function of interpretation, and this unavoidability of interpretation makes all facts a matter of inference and all evidence, whether called “direct” or “circumstantial,” nothing more or less than a contribution to that inferential process.

Richard K. Greenstein, *Determining Facts: The Myth of Direct Evidence*, 45 HOUS. L. REV. 1801, 1804 (2009). See also Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1658 n.220 (2011) (citing 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 24, at 945 n.5 (Peter Tillers ed., 1983)) [hereinafter, Sullivan, *Plausibly Pleading*]. Regarding the distinction in the employment discrimination context, the Court in *Desert Palace, Inc. v. Costa* made the unimportance of distinguishing between direct and circumstantial evidence a linchpin of its decision. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-100 (2003).

¹⁶⁵ 966 So. 2d 36 (La. 2007).

¹⁶⁶ Stewart, *supra* note ___, at 1095 (stating that since its recognition in a case in 1899, “Louisiana courts have continuously developed the doctrine, but . . ., they experienced significant confusion about the requirements for the doctrine’s applicability and its effects”).

replaced a gas line on their property. She sued for negligence in filling the trench and sodding the area after replacing the gas line. The company produced the testimony of two employees who worked on the project, who described in detail how the filling and resodding was done. For their part, the plaintiffs introduced the testimony of the wife regarding the fall and photographs of the area where the woman fell. The trial court rejected the plaintiff's request for a res ipsa jury instruction, and the jury returned a verdict for the defendant. The appellate court reversed, holding that the trial court committed reversible error by not giving a res ipsa instruction, and conducting a de novo review, held that the defendant was negligent. The supreme court reversed, explaining that it had long held that res ipsa should be applied sparingly¹⁶⁷ and imposing two significant limitations on the applicability of res ipsa. First, the court held that it "only applies where direct evidence of defendant's negligence is not available to assist the plaintiff to present a prima facie case of negligence."¹⁶⁸ The court explained that in the case before it direct evidence was not only available, but presented and considered.¹⁶⁹ Second, the court stated the three predicate criteria,¹⁷⁰ and held that a judge may give a res ipsa instruction only if the judge concludes that reasonable minds could differ on all three of those facts.¹⁷¹ Considering these two holdings, a commentator concluded that the Louisiana court had narrowed the applicability of res ipsa.¹⁷² Moreover, given that all a plaintiff obtains procedurally from a res ipsa instruction in Louisiana is a permissible inference of breach, that commentator

¹⁶⁷ *Linnear*, 966 So. 2d at 44.

¹⁶⁸ *Id.* at 42.

¹⁶⁹ *Id.* One troubling aspect of this holding is that it does not specify which party or parties must have access to direct evidence. The court characterized the evidence as "competing direct evidence," *id.*, but that does not seem correct. Only the defendant had evidence that might be described as direct.

¹⁷⁰ Although the Louisiana courts have varied in their statements, the court in *Linnear* listed them as follows: "1) injury is of type that ordinarily does not occur without negligence; 2) evidence sufficiently eliminates other more probable causes; and 3) alleged negligence is within scope of defendant's duty to plaintiff." *Id.* at 44.

¹⁷¹ *Id.* (holding that "[i]n order to give the instruction, he must satisfy himself that reasonable minds could differ as to the presence of each of the three requirements").

¹⁷² Stewart, *supra* note ___, at 1106-09.

concluded that plaintiffs would be better off without res ipsa, as obvious breaches would speak for themselves without Latin.¹⁷³

B. McDonnell Douglas Pretext Analysis: Preventing Discrimination from Speaking for Itself

The *McDonnell Douglas* pretext analysis is a barely modified version of res ipsa loquitur. The three-stage framework with shifting burdens of production is well-worn and well-known. The first stage of the framework is for the plaintiff to satisfy the burden of production (produce sufficient evidence) of four predicate criteria: 1) plaintiff is protected by the applicable employment discrimination statute; 2) she applied for a job for which she was qualified; 3) she was not hired; and 4) the position remained open and the employer continued to seek applicants with qualifications like those of plaintiff.¹⁷⁴ The Supreme Court also explained in the *McDonnell Douglas* opinion itself¹⁷⁵ and then later in *McDonald v. Santa Fe Trail Transportation Co.*¹⁷⁶ that the elements of the prima facie case may vary depending upon the facts; that qualification will be addressed more fully later.¹⁷⁷ If the plaintiff satisfies the burden of production on the prima facie case, and plaintiffs usually do because so little is required,¹⁷⁸ the plaintiff enjoys a rebuttable presumption of discrimination, and the burden of production shifts to the defendant employer to produce sufficient evidence of a “legitimate, nondiscriminatory reason” for the adverse employment action.¹⁷⁹ If the employer satisfies its burden of production

¹⁷³ *Id.* at 1110.

¹⁷⁴ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹⁷⁵ *Id.* at 802 n.13.

¹⁷⁶ 427 U.S. 273, 279 n.6 (1976).

¹⁷⁷ See *infra* notes ___-___ and accompanying text.

¹⁷⁸ See, e.g., Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 927 (2005) (observing that “the first step of *McDonnell Douglas*, the prima facie case, has always required little proof) (hereinafter Sullivan, *Disparate Impact*).

¹⁷⁹ *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

at stage two, and they almost always do,¹⁸⁰ the burden or production shifts back to the plaintiff to prove that the defendant's reason is pretextual.¹⁸¹ If the plaintiff proves pretext, then the fact finder may, but is not required, to find that the employer discriminated.¹⁸²

Although some have recognized the pretext analysis as a barely modified version of *res ipsa loquitur*,¹⁸³ the Supreme Court has never identified it as such. So let us unveil *McDonnell Douglas* a mere pretext for *res ipsa*. First, both are treatments, rules, or doctrines regarding use of circumstantial evidence, ascribing procedural consequences to the production of circumstantial evidence regarding certain issues. As noted above, *res ipsa loquitur* often has been called a rule or doctrine regarding circumstantial evidence.¹⁸⁴ The Supreme Court made clear early on that the *McDonnell Douglas* pretext framework was designed to analyze cases involving circumstantial evidence of employment discrimination.¹⁸⁵ Second, in order for *res ipsa* to apply to a case, certain prerequisites or predicate facts must be established.¹⁸⁶ This is true, too, of the pretext analysis. The Supreme Court explained the reason the predicate facts in the analysis justify a presumption of discrimination in *Furnco v. Constr. Corp. v. Waters*:

A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that

¹⁸⁰ Denny Chin & Jodi Golinsky, *Moving Beyond McDonnell Douglas, A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 665 (1998); see also Sullivan, *Disparate Impact*, *supra* note ___, at 928 (explaining that “[t]he requirements the defendant must meet are thus minimal: first, the nondiscriminatory reason must be put into evidence and not just argued and second, the nondiscriminatory reason must not be too vague, as some courts have rejected nondiscriminatory reasons for vagueness”).

¹⁸¹ *Burdine*, 450 U.S. at 256.

¹⁸² *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

¹⁸³ See sources cited *supra* note ___.

¹⁸⁴ See sources cited *supra* note ___.

¹⁸⁵ The Court explained the rationale for according the circumstantial evidence procedural significance in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). The Court also has expressly stated that the pretext analysis manipulates circumstantial evidence. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 584 (2007); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 536 (1993).

¹⁸⁶ See *supra* notes ___-___ and accompanying text.

more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.¹⁸⁷

Despite the similarities between *res ipsa* and the *McDonnell Douglas* analysis regarding the predicate facts, there is one respect in which the analyses differ. In the tort doctrine the plaintiff bears the burden of establishing all of the prerequisites for the applicability of *res ipsa*, whereas in the pretext analysis, the burden of production shifts between the plaintiff and the defendant. Thus, unlike in *res ipsa*, the burden of production on predicates for applicability is divided in the pretext analysis because it is necessary for the defendant to produce a reason before the plaintiff can attack that reason as pretextual.

A third similarity between *res ipsa* and pretext is the variability of the predicates that must be established for application. The different elements that have been required for *res ipsa* are detailed above.¹⁸⁸ The Supreme Court explained that the elements of the *McDonnell Douglas* prima facie case vary depending on the facts.¹⁸⁹ In most cases, the variation in elements occurs because the adverse employment action differs from the refusal to rehire at issue in *McDonnell Douglas Corp. v. Green*. As Professor Sullivan has observed, “the famous four prongs of the prima facie case were tailored to the relatively unusual facts before the Court, namely an employer's refusal to rehire a qualified black former employee when the job in question remained vacant.”¹⁹⁰ For example, the elements are varied where the complained of

¹⁸⁷ 438 U.S. 567, 577 (1978).

¹⁸⁸ See *supra* Part II.A.

¹⁸⁹ See *supra* note __ and accompanying text.

¹⁹⁰ Sullivan, *Disparate Impact*, *supra* note ____, at 926.

adverse employment action is a reduction in force.¹⁹¹ Moreover, some courts vary the basic *McDonnell Douglas* prima facie case when the claim is one of so-called “reverse discrimination,” in which the plaintiff is not a member of a historically discriminated against class, such as a Caucasian or a man.¹⁹² Some courts have varied the prima facie case in reverse discrimination cases, imposing an additional requirement on a plaintiff to produce evidence of “background circumstances” suggesting that the employer is an unusual employer that would be likely to discriminate against a member of a class that historically has not suffered substantial employment discrimination.¹⁹³

A fourth similarity, and one that is particularly important to this topic, is the procedural effect accorded the circumstantial evidence under *res ipsa* and *McDonnell Douglas*.¹⁹⁴ As discussed above, some jurisdictions at various times have accorded *res ipsa* the effect of a rebuttable presumption that a breach occurred, but most give it the effect of a permissible inference.¹⁹⁵ The procedural effect of a plaintiff’s satisfying her burdens of production in the pretext analysis has been the subject of several Supreme Court decisions, culminating with *Reeves v. Sanderson Plumbing Co.*¹⁹⁶ It is now well established that if a plaintiff satisfies the

¹⁹¹ See, e.g., Developments in the Law, *Shifting Burdens of Proof in Employment Discrimination Litigation*, 109 HARV. L. REV. 1579, 1587-88 (1996).

¹⁹² See, e.g., Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1035-36 (2004) [hereinafter, Sullivan, *Circling*].

¹⁹³ See, e.g., *Duffy v. Wolle*, 123 F.3d 1026, 1036 (8th Cir. 1997); *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981); see also Sullivan, *Circling*, *supra* note ___, at 1065-71; Timothy K. Giordano, Comment, *Different Treatment for Non-Minority Plaintiffs Under Title VII: A Call for Modification of the Background Circumstances Test to Ensure That Separate is Equal*, 49 EMORY L.J. 993, 1001-11 (2000); Donald T. Kramer, *What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes—Private Employment Cases*, 150 A.L.R. Fed. 1 (1998).

¹⁹⁴ See Okediji, *supra* note ___, at 85 (stating that “[t]he procedural effect of *res ipsa loquitur* has been as troublesome in the practice of tort law as the Title VII *McDonnell Douglas-Burdine* framework has been in the practice of employment discrimination law”).

¹⁹⁵ See *supra* Part II.A.

¹⁹⁶ 530 U.S. 133 (2000).

burdens of production on the prima facie case and pretext, the fact finder may, but is not required, to infer that the defendant employer illegally discriminated.¹⁹⁷

A final similarity between res ipsa and the pretext analysis is the uncertainty regarding the type of cases to which they apply. For res ipsa, a couple of questions arise: 1) Does it apply to cases in which a plaintiff attempts to prove a specific breach, and pleads res ipsa and seeks a res ipsa jury instruction in the alternative?; 2) Does it apply to cases in which direct evidence is introduced, and if it is not applicable in such cases, does such inapplicability depend on which party introduced the direct evidence? Of course, a very difficult and pivotal issue imbedded in those questions is how does a court distinguish between direct and circumstantial evidence. As for the pretext analysis, Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*¹⁹⁸ was the origin of the dividing line that the *McDonnell Douglas* analysis applied to cases involving circumstantial evidence, but not to cases involving direct evidence, to which the mixed-motives analysis, originally developed in *Price Waterhouse* applied.¹⁹⁹ However, after Congress modified and codified the mixed-motives analysis in the Civil Rights Act of 1991, the Supreme Court decided in *Desert Palace, Inc. v. Costa*, based on the language of the statutory change, that the mixed-motives analysis is not restricted to cases in which direct evidence of discrimination is produced.²⁰⁰ Now, there is great uncertainty and confusion about the types of cases to which the *McDonnell Douglas* analysis applies.²⁰¹

¹⁹⁷ *Id.* (permissible inference at summary judgment and judgment as a matter of law); see also *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (permissible inference at verdict/judgment).

¹⁹⁸ 490 U.S. 228 (1989).

¹⁹⁹ See *supra* Part I.D.

²⁰⁰ 539 U.S. 90, 101 (2003).

²⁰¹ See, e.g., Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 102-03 (2004); Kenneth R. Davis, *Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 861 (2004); Kaitlin Picco, *The Mixed-Motive Mess: Defining and Applying a Mixed-Motive Framework*, 26 ABA J. LAB. & EMP. L. 461, 464-65 (2011); Sullivan, *Plausibly Pleading*, *supra* note ____, at 1650-51.

In sum, the similarities between *res ipsa loquitur* and the *McDonnell Douglas* pretext analysis and the problems they share are striking. The most significant difference between the *McDonnell Douglas* proof structure and *res ipsa* is the shifting burdens of production under *McDonnell Douglas*, and the fact that the plaintiff does enjoy a rebuttable presumption of discrimination after establishing a *prima facie* case. This is an insignificant distinction, however, because almost every defendant employer rebuts that presumption by producing evidence of a legitimate, nondiscriminatory reason.²⁰² Moreover, the shifting burden is merely a burden of production, unlike the mixed-motives analysis in which the burden of persuasion shifts.²⁰³ Although *res ipsa* does not impose shifting burdens of production, in reality defendants do produce evidence to attempt to rebut both the prerequisites for application of *res ipsa* and the ultimate issue of a breach by the defendant. Ultimately, then, both *res ipsa* and *McDonnell Douglas* give plaintiffs the advantage of a permissive inference—permitting, but not compelling, the fact finder to infer breach or employment discrimination, respectively.

Given the foregoing similarities between *res ipsa* and the *McDonnell Douglas* analysis, it is a sound conclusion that the pretext analysis is essentially *res ipsa* with slight and insignificant modifications. *McDonnell Douglas* looks like *res ipsa*, performs like it, and shares its problems. One may ask why the Supreme Court did not declare its importation of tort law in its *McDonnell Douglas* opinion. As discussed earlier, the Court has baldly declared in several employment discrimination cases, including *Staub* most recently, that it was borrowing from tort law. A few

²⁰² See, e.g., *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 254 (1981); *Miles v. MNC Corp.*, 750 F.2d 867, 870 (11th Cir. 1985); George Rutherglen, *Abolition in a Different Voice*, 78 VA. L. REV. 1463, 1474 (1992) (“The fact that the plaintiff has made out a *prima facie* case in *McDonnell Douglas* usually is of no consequence because the plaintiff’s burden of making out that case, and the defendant’s rebuttal burden of showing a ‘legitimate nondiscriminatory’ reason, are so easily satisfied. Almost all individual cases under *McDonnell Douglas* come down to a determination whether the plaintiff has proved that the ‘legitimate, nondiscriminatory reason’ offered by the defendant is really a pretext for discrimination.”).

²⁰³ See *supra* Part I.D.

possible answers occur. First, perhaps the Court did not realize that it was importing *res ipsa* into employment discrimination law. Second, maybe the Court realized that it was importing *res ipsa*, but it did not think it important to say that it was doing so. Third, *McDonnell Douglas* was the third Title VII case decided by the Supreme Court, and the notion that Title VII was merely a statutory tort or that tort law could be adopted to do the work of a civil rights and public policy statute might have been surprising or controversial in 1973. Regardless of why the Court did not identify the pretext analysis as largely unexpurgated tort law, the exposure of it as such prompts three questions: 1) What other options did the court have?; 2) Was it appropriate to import *res ipsa* as the most fundamental analysis in employment discrimination law?; and 3) Regardless of the propriety at the time of adoption, is it appropriate to retain it today? The questions and answers are related and are treated together in the next Section.

C. The Appropriateness of Res Ipsa Loquitur for Employment Discrimination Law

1. In the Beginning

Should the Supreme Court have adopted, and only slightly adapted, *res ipsa loquitur* as the basic analysis for the most common type of employment discrimination claim—individual disparate treatment? The answer depends in part on what alternatives existed. Could the Court, rather than importing *res ipsa*, have created new law? Of course it could have. In fact, much of the *McDonnell Douglas* opinion is hard to understand if one does not see it as the Court's effort to explain why the innovative employment discrimination law theory it approved in *Griggs v. Duke Power Co.*²⁰⁴ --disparate impact--did not apply to the type of claim presented in *McDonnell Douglas*. The Court explained that the court of appeals had committed error in rejecting the

²⁰⁴ 401 U.S. 424 (1971).

employer's given reason for not rehiring Green.²⁰⁵ The Court further explained that the lower court had relied on *Griggs* for the position that exclusionary employment practices that cannot be justified by their relation to job performance violate Title VII.²⁰⁶ The Court then declared that Green appeared "in different clothing," and the expansive principles embodied in the disparate impact theory of *Griggs* did not apply to his claim.²⁰⁷ Instead, if Green could not disprove as pretextual the employer's reason for not rehiring him, his engaging in an unlawful stall-in, he would lose. This approach was necessary, the Court explained, to accommodate the "societal as well as personal interests on both sides of this equation[:] [t]he broad, overriding interest, shared by employer, employee, and consumer, i[n] efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions."²⁰⁸

Thus, without invoking the term, the Court adopted a barely modified version of *res ipsa loquitur*. The Court later would make the *res ipsa* roots clear when, in *Furnco Constr. Corp. v. Waters*, it explained the justification for the pretext analysis: if the most common reasons for an adverse employment action are eliminated through the three stages of the pretext analysis, then discrimination more likely than not is the reason for the action.²⁰⁹

So, the Court adopted *res ipsa* in *McDonnell Douglas* rather than creating new law as it had in *Griggs*. According to the Court's rationale in *McDonnell Douglas*, this *res ipsa* analysis accommodated the competing interests and the shared interest of employers, employees, and consumers. Furthermore, as the Court explained more fully in *Furnco*, the rationale supporting *res ipsa* in tort law also fit the context of intentional discrimination analysis: if certain predicate

²⁰⁵ *McDonnell Douglas Corp.*, 411 U.S. at 805-06.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 806.

²⁰⁸ *Id.* at 801.

²⁰⁹ 438 U.S. 567, 577 (1978). *See supra* note ____ (187).

facts could be established, then discrimination was a more-probable-than-not explanation of the adverse employment action at issue, just as breach is a likely cause of the damages in a negligence case if the *res ipsa* foundational facts can be established. Moreover, as Justice O'Connor would explain in her concurring opinion in *Price Waterhouse* seventeen years after the *McDonnell Douglas* framework was unveiled: “[T]he entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by.”²¹⁰ Thus, as with *res ipsa*, the pretext framework was a tool bestowed on plaintiffs to help them marshal circumstantial evidence to present a case of intentional discrimination. In sum, the *McDonnell Douglas* analysis is essentially *res ipsa*, with the formal addition of shifting burdens of production, and the rationale for and purpose of *res ipsa* match the rationale for and purpose of the pretext framework.

Should the Court in *McDonnell Douglas* have adopted *res ipsa* as the analysis for individual disparate treatment claims? It is difficult to determine now whether the Court in 1973 made a good decision, but the balancing of interests and rejection of *Griggs* articulated in *McDonnell Douglas* and the post-hoc explanation of the analysis under the *res ipsa* rationale by the Court in *Furnco* and Justice O'Connor's concurring opinion in *Price Waterhouse* are well reasoned and persuasive. If the Court believed that employment discrimination was common enough that judges were willing to infer discrimination from a flimsy prima facie case and a showing of pretext, then *res ipsa* seemed to function well enough in helping plaintiffs present cases based on circumstantial evidence. However, over time the shortcomings of *res ipsa* to serve as the basic analysis increasingly began to show, and the utter failure now should be apparent.

²¹⁰ *Price Waterhouse*, 490 U.S. at 271.

2. Forty Years of Res Ipsa/Pretext

Even if one concludes that the Court’s 1973 adoption of res ipsa in employment discrimination law was a good, or at least reasonable, decision, the experience with it over forty years yields a dramatically different assessment of the decision to cling to it now. The chinks in the armor have been many, and cumulatively they render indefensible the maintenance of res ipsa in employment discrimination law. This Section addresses two specific developments and one overarching theme that render maintenance of the *McDonnell Douglas*/res ipsa regime untenable now.

a. Two Specific Developments

i. Enervation of the Prima Facie Case and Pretext

First, the Supreme Court in numerous decisions from 1973 to 2003 worked with the *McDonnell Douglas* framework, trying to explain its substantive and procedural meaning, striving to bolster its weak prima facie case, and attempting to retain sufficient flexibility in both the first (prima facie case) and third (pretext) stages to make the analysis workable across various types of factual scenarios. The lower courts in turn have worked with what the Supreme Court has given them, and the result has been confusing, and but for a high tolerance of the courts to work through uncertainties and vagaries,²¹¹ could be close to chaotic.²¹² The Court began early on working with the analysis, explaining that variations in the prima facie case would be necessary and explaining the substantive meaning and procedural effects of the second and third stages of the analysis. The fact that the Supreme Court and the lower courts have spent

²¹¹ Regarding vagaries, consider, for example, two somewhat surprising decisions of the Court: *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (holding that direct evidence is not required to invoke the “motivating factor” statutory standard inserted in Title VII by the Civil Rights Act of 1991); and *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) (holding that the mixed-motives analysis does not apply to age discrimination claims under the ADEA and the “because of . . .” statutory language in the ADEA means but-for causation).

²¹² In its decision in *Desert Palace*, the Ninth Circuit used the terms “a quagmire,” a “morass,” and “chaos” to describe the state of the law on disparate treatment proof structures. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851-53 (9th Cir. 2002), *aff’d*, 539 U.S. 90 (2003). The Ninth Circuit’s assessment predated the Supreme Court’s decisions in *Desert Palace* and *Gross v. FBL Fin. Servs., Inc.* See *infra* note ____ (next footnote).

so much time tinkering with the proof structure rather than addressing questions about discrimination, which are sufficiently numerous, complex, and important in their own right, is indicative of the failure of this *res ipsa* analysis.²¹³ Ultimately neither the efforts to adjust and fortify the *prima facie* case nor the explication of the pretext stage have proven efficacious in maintaining a generally applicable, useful, comprehensible, palatable, and flexible analysis.

The second development that has undermined *McDonnell Douglas* is the Court's recognition that the pretext/*res ipsa* analysis would not be adequate to evaluate all types of individual disparate treatment claims and its consequent creation of the alternative mixed-motives analysis, which was (when created by the Court) and is now (as codified) much better-suited than pretext/*res ipsa* to evaluating intentional discrimination. Soon after the Court created the mixed-motives analysis, Congress would codify a modified version of it. The creation of the second framework and the Supreme Court's later eradication of the dividing line between the types of cases governed by each would lead to virtual chaos.

Regarding the variability of the *prima facie* case, the Court in *McDonnell Douglas* itself reserved the possibility that the elements might change depending on the factual situation.²¹⁴ The Court reiterated that the elements of the *prima facie* case need to be varied depending upon the facts in the course of holding that the framework applied to a reverse discrimination case in *McDonald v. Santa Fe Trail Transportation Co.*²¹⁵ As courts applied the analysis to reverse

²¹³ See, e.g., Sperino, *Rethinking*, *supra* note __, at 81 (“[T]he use of the frameworks often creates questions that might not otherwise arise—because the questions are about the frameworks themselves, rather than about the substantive discrimination inquiry.”); *id.* at 106 (“After a framework is created, courts often funnel their discrimination inquiries through this typology, rather than through the statutory language. Like the prisoners in the allegory of the cave, courts (and litigants) begin to review discrimination based on a shadow of reality.”).

²¹⁴ *McDonnell Douglas*, 411 U.S. at 802 n. 13 (“The facts necessarily will vary in Title VII cases, and the specification above of the *prima facie* proof required from respondent is not necessarily applicable in every respect to differing factual situations.”).

²¹⁵ 427 U.S. 273 (1976).

discrimination cases in the future, the ill fit between res ipsa analysis and reverse discrimination cases would become obvious.²¹⁶

The Court was confronted with the issue of the ease with which virtually any minimally qualified plaintiff could satisfy the prima facie case and thus achieve a rebuttable presumption of discrimination in *Texas Dept. of Community Affairs v. Burdine*.²¹⁷ The Court responded by “slipping in” an additional statement about the prima facie case, which Professor Malamud labeled a “stealth requirement.”²¹⁸ After the justices exchanged drafts and memoranda about how light a burden plaintiffs bore under the prima facie case,²¹⁹ the Court’s final opinion included the following statement of the prima facie case: “The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected *under circumstances which give rise to an inference of unlawful discrimination.*”²²⁰ Although the stealth requirement has not often been repeated or seemed to make a difference in many cases since *Burdine*, it demonstrates that the Court recognized the weakness of the *McDonnell Douglas* prima facie case fewer than ten years after it announced the proof structure, and it already had wavered from the res ipsa-based rationale it articulated in *Furnco*. However, as discussed above, the *McDonnell Douglas* framework shares this feature--an uncertain and changing prima facie case--with res ipsa.²²¹

Although the Supreme Court has not addressed the issue again since its 1976 decision in *McDonald v. Santa Fe Trail Transportation Co.*, the inadequacy of the prima facie case has been

²¹⁶ See *infra* notes ___-___ and accompanying text.

²¹⁷ 450 U.S. 248 (1981).

²¹⁸ See Malamud, *supra* note ___, at 2246-54.

²¹⁹ *Id.*

²²⁰ *Burdine*, 450 U.S. at 253 (emphasis added).

²²¹ See *supra* Part II.B.

particularly evident and vexatious in reverse discrimination cases in the lower courts. The *McDonnell Douglas* analysis does not function reasonably in such cases without an adjustment, and that adjustment is one which flouts the equal treatment foundation of employment discrimination law. The *res ipsa* rationale, articulated by the Court in *Furnco*, for the permissive inference arising from a plaintiff's successful navigation of *McDonnell Douglas* is that employment discrimination occurs commonly enough that if the two most common reasons for adverse employment actions are eliminated by the *prima facie* case and the adverse action remains unexplained by the employer (because the plaintiff has proven the employer's proffered reason to be pretextual), then discrimination is more likely than not the explanation. In reverse discrimination cases, the foregoing formulation does not work because, by definition, reverse discrimination has not been historically commonly practiced.²²² Accordingly, some courts have required that a plaintiff in a reverse discrimination case prove something additional to establish a *prima facie* case—background circumstances showing that the employer at issue is one which would be likely to engage in this historically uncommon type of discrimination.²²³ However, other courts object to imposing the additional requirement in the *prima facie* case,²²⁴ some reasoning that to do so would violate an important theoretical foundation of employment discrimination law—equal treatment of similarly situated persons.²²⁵

Thus, the *prima facie* case stage of *McDonnell Douglas* has been revealed as too weak of a basis to support a rebuttable presumption of discrimination and as inadequately flexible to address various types of cases.

²²² See, e.g., Sperino, *Rethinking*, *supra* note ____, at 78-79 (noting that “some courts began doubting that the inferences created by *McDonnell Douglas* made sense in reverse discrimination cases, where the plaintiff was not a member of a historically discriminated against group”).

²²³ See *supra* note ____.

²²⁴ See, e.g., Sullivan, *Circling*, *supra* note ____, at 1080-84.

²²⁵ See, e.g., *Clements v. Barden Miss. Gaming, L.L.C.*, 373 F. Supp. 2d 653, 667-68 (N.D. Miss. 2004); *Lind v. City of Battle Creek*, 681 N.W.2d 334 (Mich. 2004).

In addition to the facts constituting the prima facie case, the other predicate fact upon which *Furnco* based the inference of discrimination was the plaintiff's production of sufficient evidence that the employer's proffered legitimate, nondiscriminatory reason was pretextual. Over the years, the Court has wavered in its conviction about the inference to be drawn from that predicate fact, as the debate spanned decades and two Supreme Court decisions. In this instance again, the Supreme Court has spent its resources, as well as those of the lower courts and litigants, interpreting the meaning of the framework rather than addressing questions about the ultimate issue of employment discrimination.²²⁶ Termed pretext-plus versus pretext-only,²²⁷ the issue was what procedural effect does it have when a plaintiff, at stage three, introduces sufficient evidence of pretext. The Court addressed the effect of proving pretext vis-à-vis two burdens that the plaintiff bears: production and persuasion. First, the Court addressed the effect of proving pretext on the burden of persuasion in 1993 in *St. Mary's Honor Center v. Hicks*, wherein the Court held that proving pretext permits, but does not require, the fact finder to infer discrimination (permissive inference).²²⁸ Although many civil rights advocates and commentators were chagrined by the holding in *St. Mary's Honor Center*,²²⁹ it was a result consistent with the procedural effect generally accorded to res ipsa in tort law, although some courts and jurisdictions accord res ipsa a stronger effect.²³⁰ Realistically, not much more could be expected from an analysis in which the Court already had shown a significant lack of confidence.

²²⁶ See *supra* note ____ (current footnote 213).

²²⁷ See, e.g., Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991).

²²⁸ *St. Mary' Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

²²⁹ See, e.g., Deborah A. Calloway, *St. Mary's Honor Ctr. v. Hicks: Questioning the Basic Assumption*, 26 CONN. L. REV. 997 (1995).

²³⁰ See *supra* Part II.A.

The Court considered the procedural effect of pretext in the context of the burden of production in 2000 in *Reeves v. Sanderson Plumbing Products, Inc.*²³¹ Considering whether sufficient evidence of pretext would enable a plaintiff to survive a challenge to sufficiency of the evidence (summary judgment or judgment as a matter of law), the Court stated as follows: “[A] plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury’s finding of liability.”²³² So, once again, the answer was that a plaintiff’s successful navigation of the pretext analysis yields a permissive inference of discrimination at yet another procedural juncture, although the Court in *Reeves* suggested that the permissive inference is stronger at summary judgment and judgment as a matter of law than it is in *St. Mary’s Honor Center* at verdict/judgment. Justice Ginsburg, in her concurring opinion in *Reeves*, found this suggestion somewhat unsatisfactory: “I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for judgment as a matter of law. I anticipate that such circumstances will be uncommon.”²³³

Thus, the Supreme Court and lower courts have struggled with the procedural effect and substantive meaning of two stages of the three-part *McDonnell Douglas* analysis. As discussed above, these struggles are analogous to the uncertainties and discomforts courts have

²³¹ 530 U.S. 133 (2000).

²³² *Id.* at 148.

²³³ *Id.* at 155 (Ginsburg, J., concurring).

experienced with the prerequisite or predicate facts in *res ipsa*.²³⁴ Ultimately what these struggles have demonstrated is that *res ipsa* was ill-suited to employment discrimination law, and the fit has become progressively worse since 1973. The Court and courts have spent substantial time and resources attempting to mitigate the problems with the framework, but they have failed.

ii. Creation of an Alternative Framework

In *Price Waterhouse v. Hopkins* the Court acknowledged that *res ipsa/McDonnell Douglas* was inadequate to address all types of individual disparate treatment cases.²³⁵ In that case the Court created what has come to be known as the mixed-motives analysis²³⁶ to analyze cases in which more than one motive causes the employer to take an adverse employment action. Congress would later modify and codify the mixed-motives analysis in the Civil Rights Act of 1991, thus embedding the “motivating factor”²³⁷ and same-decision defense²³⁸ stages of the analysis in Title VII. Faced with the question of which analysis to apply in any given case, the lower courts crafted a dividing line based on Justice O’Connor’s *Price Waterhouse* concurrence whereby *McDonnell Douglas* applied to claims proven by circumstantial evidence and mixed motives applied to claims supported by direct evidence.²³⁹

In 2003 in *Desert Palace, Inc. v. Costa*, the Supreme Court, saying it was interpreting the mixed-motives language in Title VII added by the Civil Rights Act of 1991, held that direct evidence is not necessary to obtain a statutory “motivating factor” jury instruction, and thus erased the line of demarcation between cases analyzed under *McDonnell Douglas* and those analyzed under the statutory mixed-motives framework. Since the decision in *Desert Palace*,

²³⁴ See *supra* Parts II.A & II.B.

²³⁵ 490 U.S. 228 (1989).

²³⁶ See, e.g., *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

²³⁷ 42 U.S.C. §2000e-2(m).

²³⁸ 42 U.S.C. §2000e-5(g)(B).

²³⁹ See *Costa v. Desert Palace, Inc.*, 299 F.3d 838,851-54 (9th Cir. 2002), *aff’d*, 539 U.S. 2148 (2003).

lower courts have had no guidance on how to decide which of the two analyses applies to any given case. As mentioned above, this debate is akin to the issue in tort law of whether *res ipsa* may be applied in cases in which direct evidence of breach/nonbreach is available.²⁴⁰

b. The Overarching Theme: A Tool for Plaintiffs Becomes a Straitjacket for Litigants and a Distraction from Consideration of Substantive Discrimination Issues

As the Supreme Court and lower courts have tinkered with the *res ipsa* analysis of employment discrimination law and created an alternative analysis to evaluate some undefined subset of individual disparate treatment claims, it has become increasingly clear that the *McDonnell Douglas* analysis has lost the positive aspects of *res ipsa loquitur*, while the negative characteristics of *res ipsa* have been replicated and exacerbated. The three-stage structure has become a shibboleth that courts dare not fail to recite, but all the while, they have little to no faith that if a plaintiff satisfies the prima facie case and pretext, then employment discrimination is a likely explanation for the adverse employment action.

The elements of the prima facie case and pretext, the stages of the pretext analysis on which the plaintiff bears the burden of production, are the analogues of the predicate facts for application of *res ipsa*. The issues addressed by plaintiffs at these two stages of the *McDonnell Douglas* analysis are not about whether discrimination occurred, but issues which may lead to an inference of discrimination.²⁴¹ The prima facie case, with its varying elements, is particularly weak, and courts progressively have come to suspect that it indicates little about the ultimate

²⁴⁰ See *supra* Parts II.A & II.B.

²⁴¹ The Supreme Court expressed the idea this way: “In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.” *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 n.8 (1981); see also Sperino, *Rethinking*, *supra* note __, at 94 (explaining that “[e]mbedded within the *McDonnell Douglas* inquiry are several sets of facts that masquerade as legal standards”).

issue of discrimination.²⁴² Thus over its forty years, the *res ipsa loquitur* of employment discrimination law has become an exemplar of a phenomenon described by Professor Suzanna Sherry in which old and established legal doctrines seemingly change abruptly (analogized to earthquakes) when in reality what has occurred is that the foundational facts embedded within them and on which the doctrines are based have changed over time (movement of the tectonic plates).²⁴³ Sherry points to *St. Mary's Honor Center v. Hicks*²⁴⁴ as an apparent earthquake which is evidence that the Supreme Court had changed its belief about the foundational facts of the *McDonnell Douglas* analysis.²⁴⁵ She posits that the Court might reasonably believe that with the passage of time since the enactment of the discrimination laws, it has become less likely that employers intentionally discriminate on prohibited bases.²⁴⁶

If the courts have little confidence that the predicate facts give rise to an inference of discrimination, then the *res ipsa* of employment discrimination law is no longer performing its function, and we would be better off simply addressing the issue of discrimination.²⁴⁷ Still, one could argue that the framework may serve a useful purpose because some courts will continue to believe the inference reasonable in some cases; that is, *McDonnell Douglas* will continue to serve as a useful tool for some plaintiffs to marshal their circumstantial evidence. However, the framework presents at least two other problems. First, it suffers not just from reduced usefulness as a tool, but it has become a hindrance, as courts recite it and require plaintiffs (and defendants)

²⁴² See, e.g., Sperino, *Discrimination Statutes*, *supra* note __ at (15); Sherry, *Foundational Facts*, *supra* note __, at 164 (explaining that plaintiffs are not required initially to prove discriminatory intent, but instead intent is presumed from the four elements of the prima facie case because courts believe they give rise to an inference).

²⁴³ See Sherry, *Foundational Facts*, *supra* note __, at 146 (observing that “[t]he prima facie case does not require the plaintiff to establish but for causation, but only to prove certain facts that the courts have determined are sufficient to suggest discrimination might be at work”).

²⁴⁴ 509 U.S. 502 (1993).

²⁴⁵ See Sherry, *Foundational Facts*, *supra* note __, at 165-66.

²⁴⁶ *Id.* at 164; see also Calloway, *supra* note __, *passim*; Okediji, *supra* note __, at 52.

²⁴⁷ See Sperino, *Rethinking*, *supra* note __, at 71 & 81.

to try to fit their evidence into it no matter how their evidence may differ from the framework's prescribed elements. Thus, what the Supreme Court designed as a tool to help plaintiffs with circumstantial evidence has become a straightjacket into which they must force their cases.²⁴⁸ Second, as often mentioned in this article, the courts (as well as commentators, litigants, employers, and others) view the proof structures as the thing itself, rather than the shadow on the wall of the cave, and an inordinate number of decisions and other resources are devoted to explicating, developing, and unraveling the proof structures. Viewing employment discrimination law in such a distorted way inevitably stunts productive and innovative development of the law.²⁴⁹

Among the many problems already noted about the *McDonnell Douglas* framework, it does not work well for discrimination cases that deviate substantially from the most common factual scenarios of discrimination.²⁵⁰ Reverse discrimination cases, as discussed above, do not fit well within *McDonnell Douglas*/re ipsa because they do not involve historically common types of discrimination.²⁵¹ Consider for example, *Burlington v. News Corp.*, a case in which a Caucasian news anchor was fired after his use of the word “nigger” in a meeting discussing whether the word should be uttered in a news report caused substantial racial unrest in the

²⁴⁸ See, e.g., *id.* at 71 (stating that “the key question in modern discrimination cases is often whether the plaintiff can cram his or her facts into a recognized structure and not whether the facts establish discrimination”); Okediji, *supra* note ___, at 52 (stating that *St. Mary's Honor Center* version of pretext analysis “artificially constrains factfinding”).

²⁴⁹ See Sperino, *Rethinking*, *supra* note ___, at 86 (asserting that “[s]ince the late 1980s . . . courts have largely failed to consider new ways of thinking about discrimination and have instead chosen to rely on the existing typology”); cf. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1,47 (2006) (explaining that advocates of a structuralist approach to employment discrimination law could contend that the alternative may “remit workplace inequities to the increasingly outmoded tools of an employment discrimination law designed in the 1960s and based on a very different model of discrimination, of the workplace, and of regulation than that which prevails today”).

²⁵⁰ See, e.g., Sperino, *Discrimination Statutes*, *supra* note ___ at ___(15) (observing that “[i]n practice, *McDonnell Douglas* causes courts to focus on narrow visions of how discrimination happens and therefore makes it unlikely that a plaintiff trying to prevail on a strange scenario will survive the test”).

²⁵¹ See *supra* Part II.B.

workplace.²⁵² The Caucasian plaintiff contended that he was disciplined for a nonderogatory use of the word, while many black employees who also used the word were not disciplined. The court recognized the threshold question of which analysis it should apply--the *McDonnell Douglas* pretext analysis or mixed-motives. The court said it was using both analyses, but it posed the key question ostensibly under the pretext stage: “[C]an an employer be held liable under Title VII for enforcing or condoning the social norm that it is acceptable for African Americans to say ‘nigger’ but not whites?”²⁵³ Thus, the court identified the core discrimination issue in the case and one that merited careful consideration, but an issue that actually had little to do with the *McDonnell Douglas* analysis, although the court dutifully crammed it into the pretext stage. Examining that issue, the court concluded that African Americans indeed might tolerate use of the word by other African Americans and be insulted when the word is used by white people.²⁵⁴ Nevertheless, the court found that even if such a social norm exists, it is the type of discriminatory social norm that Title VII was enacted to counter.²⁵⁵

In another recent reverse discrimination case, *Smith v. Lockheed-Martin Corp.*, the ultimate issue focused on comparative treatment of African American and white employees.²⁵⁶ White employees, who were involved in transmission of an email message containing a racially offensive joke, were fired, while black employees who engaged in arguably similar conduct were not fired. The court forced the evidence into the *McDonnell Douglas* analysis, but twice expressly disclaimed any real operative importance of the analysis:

[E]stablishing the elements of the *McDonnell Douglas* framework is not, and never was intended to be, the sine qua non for a plaintiff to survive a summary

²⁵² 759 F. Supp. 2d 580 (E.D. Pa. 2010).

²⁵³ *Id.* at 596.

²⁵⁴ *Id.* at 597.

²⁵⁵ *Id.*

²⁵⁶ 644 F.3d 1321 (11th Cir. 2011).

judgment motion in an employment discrimination case. Accordingly, the plaintiff's failure to produce a comparator does not necessarily doom the plaintiff's case.²⁵⁷

[A] court merely uses the pretext inquiry to guide its determination of the ultimate issue at summary judgment—i.e., whether the evidence yields a reasonable inference of the employer's discrimination.²⁵⁸

The Eleventh Circuit in *Smith* went on to find that the plaintiff presented sufficient circumstantial evidence of racial discrimination to avoid summary judgment.²⁵⁹ However, the court's blasphemous declarations regarding *McDonnell Douglas* would cause another court to reassert fealty to the *res ipsa* analysis. A federal district court, faced with citation of the *Smith* apostasy, declared as follows: "To the extent that *Smith* suggests the burden-shifting paradigm of *McDonnell Douglas* can be ignored in a case based on circumstantial evidence, freeing the plaintiff from any obligation to establish a prima facie case, it is in tension with a long line of Eleventh Circuit precedent."²⁶⁰ Although some courts diverge from the *McDonnell Douglas* straightjacket, most do not, and even among those that do, almost all feel constrained to at least pay lip service to it.

The restrictive effect on the litigation, shoving all evidence into the three stages of the pretext analysis, and the focus of courts on the framework rather than the real issues of discrimination thus are intertwined. When courts liberate themselves somewhat from the *McDonnell Douglas* vice grip, as in *Burlington* and *Smith*, they are able to say, "the real issue in this case is this," and then grapple with the actual issues of employment discrimination.

²⁵⁷ *Id.* at 1328.

²⁵⁸ *Id.* at 1346 n.86.

²⁵⁹ *Id.* at 1346-47.

²⁶⁰ *Bell v. Crowne Management, LLC*, ___ F. Supp. 2d ___ 2012 WL 27806, at *7 (S.D. Ala. 2012).

3. *The Tenacity of Res Ipsa/McDonnell Douglas*

In light of the weaknesses of the framework and forty years of tinkering with it, one would think that the Supreme Court long ago would have expelled *res ipsa* from employment discrimination law. Congress presented a golden opportunity when, in the Civil Rights Act of 1991, it codified a version of the mixed-motives analysis. Indeed, the Court in *Desert Palace, Inc. v. Costa* could have sent *res ipsa* back to tort law rather than leaving lower courts with the conundrum of which framework applies in a given case, but it did not. Notwithstanding an outpouring of scholarship arguing that *Desert Palace* should have signaled the end of *McDonnell Douglas*,²⁶¹ it flourishes. When the Fifth Circuit took on the task of addressing the question left by *Desert Palace* in *Rachid v. Jack in the Box, Inc.*, it merged the pretext and mixed-motives analyses into what it termed the “modified *McDonnell Douglas* analysis,” which retained the three stages of the pretext analysis,²⁶² although they seemed perfunctory when the court grafted the “motivating factor” standard of mixed motives onto the third stage as an alternative to pretext. When bills (the Protecting Older Workers Against Discrimination Act) were introduced in Congress to overturn the Supreme Court’s decision in *Gross v. FBL Financial Servs, Inc.*, the bills expressly stated that the *McDonnell Douglas* analysis was to be preserved as a way to prove discrimination under all the employment discrimination laws.²⁶³ Thus, notwithstanding its monumental shortcomings, the *McDonnell Douglas* proof structure maintains a tenacious and powerful grip on employment discrimination law—almost like the siren call of *res ipsa loquitur* beckoning first-year law students to the perilous shoals of peripheral issues and irrelevant discussion.

²⁶¹ See *supra* note ____.

²⁶² 376 F. 3d 305 (5th Cir. 2004).

²⁶³ See *supra* note ____.

III. Throwing Res Ipsa Out of the Employment Discrimination Warehouse

What lessons can be learned from a consideration of *McDonnell Douglas* as imported tort law? First, seeing the proof structure as res ipsa helps explain why it increasingly has served employment discrimination law poorly. Perhaps this view of the hoary pretext analysis will provide some added impetus for finally dispatching with it and moving to a more appropriate and more flexible standard. Second and more generally, perhaps this perspective will encourage Congress and the courts to develop a more deliberative and discriminating approach for incorporating tort law into employment discrimination law. Adopting such a new approach is important because tort law still has much to offer the younger and relatively underdeveloped body of employment discrimination law.

Like the infamous barrel that fell from the warehouse and spawned res ipsa loquitur, *McDonnell Douglas* needs to be cast out of employment discrimination law. Regarding the need to jettison the res ipsa of employment discrimination law, there have been many calls to expel the *McDonnell Douglas* analysis,²⁶⁴ but few of them have invoked its ill-matched tort underpinnings as a reason. Judge Wood of the Seventh Circuit, in a recent concurring opinion called for the abrogation of the *McDonnell Douglas* analysis because, although it was designed to clarify and simplify a plaintiff's presentation of her case, "both of those goals have gone by the wayside."²⁶⁵ Judge Wood then declared that "[c]ourts manage tort litigation every day without the ins and outs of these methods of proof, and I see no reason why employment discrimination litigation . . . could not be handled in the same straightforward way."²⁶⁶

²⁶⁴ See *supra* note ____.

²⁶⁵ *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring).

²⁶⁶ *Id.* at 863.

Ironically, many employment discrimination law principles, including the *McDonnell Douglas* analysis, have been borrowed from tort law.

The *McDonnell Douglas* proof structure's declining performance over four decades already has been chronicled. If the Supreme Court had expressly recognized the analysis as at least a derivative of *res ipsa* when it adopted it in 1973, there were reasons based on *res ipsa*'s use and track record in tort law to question whether it was appropriate for employment discrimination law. For one, although *res ipsa* was a doctrine to be used by plaintiffs to assist them in presenting circumstantial evidence of a breach, it was a tool of last resort for plaintiffs who could not otherwise prove a breach. The Court in *McDonnell Douglas* seemed to understand that it was establishing the fundamental analytical tool for individual disparate treatment claims--the most common employment discrimination claims. The pretext analysis would not be a backup tool like *res ipsa* was.

Two other distinctions between the use of *res ipsa* in tort law and the pretext analysis in employment discrimination also should have raised concerns. First, the Court was adopting, without significant modification, an analysis for intentional discrimination cases used in torts for negligence cases. A number of torts doctrines distinguish between negligence and intentional torts and impose greater burdens on alleged intentional tortfeasors than negligent tortfeasors.²⁶⁷ Perhaps the Court considered that the three stages and shifting burdens of production of the *McDonnell Douglas* analysis were an adequate modification of *res ipsa*. However, considering the distinction between negligence and intent, the Court might have shifted not just the burden of production, but also the burden of persuasion. Or the Court might have resolved the pretext plus

²⁶⁷ Consider, for example, with negligence, proximate cause cuts off liability of defendants for unforeseeable harm, whereas the principle of extended liability holds that defendants who commit intentional torts are liable for the full extent of harm they cause, no matter how unforeseeable. *See, e.g., Davis v. White*, 18 B.R. 246 (1982).

vs. pretext only debate in ways more favorable to plaintiffs than it did in *St. Mary's Honor Center v. Hicks* and *Reeves v. Sanderson Plumbing Products, Inc.*²⁶⁸ Second, whereas res ipsa usually addresses physical acts and physical injuries, the *McDonnell Douglas* analysis is used to evaluate a mental state.

Beyond the distinctions between torts and employment discrimination, as discussed above, res ipsa did not have a sterling record of performance in torts. There were a number of problems and uncertainties with res ipsa in tort law,²⁶⁹ and those difficulties merited consideration before it was adopted as the basic analysis for a landmark civil rights and public policy statute.

Regardless of whether the Court should have adopted res ipsa for employment discrimination law and whether it could have been modified adequately to accommodate employment discrimination law, the time has come to push the *McDonnell Douglas* barrel out of the warehouse. A superior alternative is readily available. In the Civil Rights Act of 1991, Congress codified a version of the mixed-motives analysis in Title VII. The plaintiff establishes a prima facie case by demonstrating that discrimination was a motivating factor in the employer's decision.²⁷⁰ At that point the employer is liable, but if the employer can demonstrate (satisfy the burden of persuasion) that it would have made the same decision for nondiscriminatory reasons, the defendant employer can limit remedies.²⁷¹ Commentators have advocated the replacement of the *McDonnell Douglas* analysis with some version of the mixed-

²⁶⁸ See *supra* Part II.C.2(a)(i).

²⁶⁹ See *supra* Part II.A.

²⁷⁰ 42 U.S.C. §2000e-5(m).

²⁷¹ *Id.* §2000e-5(g)(2)(B).

motives analysis, at least similar to the one added to Title VII by the Civil Rights Act of 1991.²⁷² That framework resolves or ameliorates many of the problems raised by the pretext analysis. First, the motivating factor standard does not artificially cabin the types of evidence that must be presented by the parties. Second, it does not base an inference or presumption of discrimination on presentation of evidence to satisfy predicate issues that are surrogates for the real issue of discrimination. Third, the motivating factor standard does not establish an inference or presumption based on historical patterns of discrimination that may have changed, or that courts and jurors may think have changed, over time. In the foregoing ways and others, the mixed-motives analysis is less rigid and more generally appropriate than the pretext analysis. Another reason to adopt it as the replacement is that Congress approved it by making it statutory for Title VII.

Even if *McDonnell Douglas* were rejected, another step would be necessary to make the statutory mixed-motives analysis applicable to individual disparate treatment claims under all the employment discrimination laws. The Supreme Court in *Gross v. FBL Financial Services* defined the statutory language “because of” as meaning but for causation and rejected the mixed-motives analysis for age discrimination claims under the Age Discrimination in Employment Act.²⁷³ Because of *Gross*, to effectuate unification of all disparate treatment law under mixed

²⁷² See, e.g., Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 643-44 (2008); Jamie Darin Prekert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas’s Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L. J. 511, 516 (2008); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1891 (2004); William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. REV. 81, 106-10 (2000) [hereinafter Corbett, *Fixing*].

²⁷³ 557 U.S. 167 (2009). Because the Court was interpreting “because of” statutory language, the decision might render the mixed-motives framework inapplicable to all discrimination statutes except Title VII, which also has the statutory “motivating factor” language. See *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010) (*Gross* holding renders mixed motives inapplicable to Americans with Disabilities Act). But see *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010) (not extending holding of *Gross* to antiretaliation provision in Title VII).

motives, either the Court would need to overrule the case, or Congress would have to make the mixed-motives analysis available under all the employment discrimination statutes.²⁷⁴

Another issue that Congress should consider if the statutory mixed-motives analysis were to become the sole individual disparate treatment analysis is the effect of the same-decision defense.²⁷⁵ Under the current Title VII defense, if a defendant satisfies the burden of persuasion on same decision, it will limit remedies, eliminating all monetary remedies that would go to the plaintiff. Before recommending that Congress simply amend the statutes to say that the current statutory mixed-motives analysis applies to all intentional discrimination cases, it is worth asking whether changes should be made in light of the fact that the pretext proof structure will be gone. In the 1991 Act, Congress clearly indicated the way in which it wished to modify the *Price Waterhouse* mixed-motives analysis. However, if Congress also had thought it were abolishing the pretext analysis and replacing it with a unified analysis, it might have done things differently, such as giving a different effect to the same-decision defense. Thus, Congress should consider modifications to the current statutory mixed-motives proof structure.

Congress is the better body to abrogate *McDonnell Douglas* than the Supreme Court.²⁷⁶ Although the Court should have dispensed with the pretext analysis in *Desert Palace* or thereafter, when it eradicated the line of demarcation between cases to be analyzed under pretext and mixed motives, the Court did not do so, and nine years after *Desert Palace*, it still has not done so. Rather than removing ill-fitting tort principles from employment discrimination law, *Staub* demonstrates that the Court is inclined to forge ahead with importation of tort law.

²⁷⁴ The proposed Protecting Older Workers Against Discrimination Act would do this, but it also would preserve the *McDonnell Douglas* analysis. See *supra* note ____.

²⁷⁵ I have addressed this issue elsewhere. See Corbett, *Fixing*, *supra* note ___, at 107-08. Nonetheless, it bears repeating when proposing replacement of *McDonnell Douglas* with a version of the statutory mixed-motives analysis.

²⁷⁶ See, e.g., Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857, 889 (2010).

Generally, the Court simply has not expressly overruled employment discrimination precedents.²⁷⁷ Furthermore, as discussed, if the pretext analysis were thrown out of the warehouse, there are issues that Congress needs to consider in refining the replacement mixed-motives framework.

Getting rid of the *McDonnell Douglas* analysis should improve substantially employment discrimination law. That important step also might prompt consideration of the general issue of tortification of employment discrimination law. But that is an issue for another day.

CONCLUSION

The Supreme Court's latest foray into tortification of employment discrimination law in *Staub v. Proctor Hospital* is alarming. However, one can only guess how the concept of proximate cause will develop in discrimination law. The *McDonnell Douglas*/pretext framework, which is a thinly veiled version of *res ipsa loquitur*, has a forty-year track record. Whether *res ipsa* should have been imported with only minor modifications in 1973 is debatable. Regardless, during its tenure, it has suffered from declining performance, mangling cases and impeding the innovative development of employment discrimination law. The time has come to reject this pretext for *res ipsa loquitur* and let employment discrimination speak for itself.

²⁷⁷ See, e.g., Lemos, *supra* note ___, at 427 (observing that “[i]f judged by the rate of outright reversals, the Court's decisions in the Title VII arena have been exceptionally stable: not once in the history of Title VII has the Court overruled a prior opinion”).