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Fixing Employment Discrimination Law

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I. INTRODUCTION: THE BROKEN PROOF STRUCTURES OF EMPLOYMENT DISCRIMINATION LAW

A. The Wreck

The employment discrimination law[1] of the United States is broken. The proof structures or analytical frameworks[2] that define how discrimination cases are litigated and how they are analyzed at all dispositive stages are in a state of extreme disrepair. Consequently, employment discrimination law is "running" poorly, and it is up to Congress to fix it. Congress must pass legislation to clarify the proof structures. Such a fix is badly needed to restore an acceptable level of clarity, predictability, and functionality in employment discrimination litigation.

There are two proof structures under the disparate treatment theory of discrimination:[3] 1) *McDonnell Douglas* or pretext; and 2) mixed motives. Among several problems with these proof structures, the most significant is that no one knows which one applies in any given case. Furthermore, it is a mystery whether uniform disparate treatment proof structures are applicable to Title VII and the Age Discrimination in Employment Act (ADEA). While there is uncertainty regarding

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[1] When using the term "employment discrimination law," I am referring primarily to the following statutes and the case law developed under those laws: Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352 , 78 Stat 66 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-15); the Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§621-633a); and the Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12117). There are other employment discrimination laws in the U.S., such as the newly enacted Genetic Information Nondiscrimination Act, but most of the principles and structures of employment discrimination law have been developed under the three acts.

[2] "Proof structure" refers to what must be proven, in what order, and on whom the burden rests at each stage. The Supreme Court in the decision in which it announced the *McDonnell Douglas* or pretext proof structure described the thing it was creating: "The case before us raises significant questions as to the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973).

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

uniformity for disparate treatment, it is clear that there is one disparate impact[4] proof structure for Title VII and one for the ADEA, and each has multiple problems and uncertainties.

The proof structures are the engines of employment discrimination law, and their current condition means that the wreck that is employment discrimination law needs an overhaul. Given statues that simply say it is unlawful "to discriminate" in employment terms "because of" sex, race, etc.,[5] the courts have used the proof structures to develop the procedural, evidentiary, and substantive law of employment discrimination law. Over the course of the forty-three years or so that employment discrimination law has existed,[6] the Supreme Court has created the proof structures, and both the Supreme Court and Congress have clarified and modified them. Congress stepped in and modified or clarified the proof structures legislatively when it deemed the Court to be moving in the wrong direction in developing the proof structures, as it did in the Civil Rights Act of 1991.[7] At this stage, Congress needs to take its turn again. It may soon have an opportunity. Although the omnibus Civil Rights Act of 2008, which was introduced in

[4] Disparate impact is a theory of unintentional discrimination in which liability is based on use of a facially neutral practice or criterion that produces a statistically significant impact on a protected group, and the practice cannot be justified. *Teamsters*, 431 U.S. at 335 n.15. Disparate impact has been described as being based on either strict liability or negligence. *See* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 931-36 (1993).

[5] *See* 42 U.S.C. § 2000e-2 (a)(1) (Title VII); 29 U.S.C. § 623 (a)(1) (Age Discrimination in Employment Act); 42 U.S.C. § 12112(a) (Americans with Disabilities Act).

[6] Title VII is the oldest of our employment discrimination laws if we exclude the earlier Equal Pay Act, which amended the Fair Labor Standards Act. Title VII was enacted in 1964, but its effective date was July 2, 1965. *See* Pub. L. No. 88-352, § 716, 78 Stat. 241, 266 (1964) (stating that the effective date shall be one year after the date of enactment).

[7] Pub. L. No. 102-166, 105 Stat. 1071 (1991). The 1991 Act was enacted after President Bush's veto of the similar Civil Rights Act of 1990. 136 CONG. REC. S16,418-19 (daily ed. Oct. 22, 1990). A principal objective of the 1991 Act was to overturn several Supreme Court decisions. *See* H.R. Rep. No. 40, 102d Cong., 1st Sess., pt. 2, at 2-4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694-96.

Congress, would amend the employment discrimination laws in many important ways,[8] the bill as introduced would not repair the proof structures. There is no more important task for Congress in fixing employment discrimination law than repairing the proof structures.

Consider the following hypothetical discussion between a federal district judge and his law clerk. The employment discrimination case described is far from unusual, and the motion for summary judgment filed by the defendant is an everyday matter for courts adjudicating employment discrimination cases. If the law is close to as confused as I posit in this hypothetical (and it is), then the law is in urgent need of repair.

B. Ruling on a Motion for Summary Judgment: A Hypothetical Survey of the Wreck

"How do I rule on this motion, Clerk?" Judge Federal District bellows at his clerk.

"It's very complicated, Judge. I am not sure how you should rule," responds the clerk sheepishly.

Judge District is preparing to rule on the defendant's motion for summary judgment in an employment discrimination case in which John Q. Employee, a fifty-year-old white male, was not hired after applying to and being interviewed by defendant Employer. He filed a charge with the Equal Employment Opportunity Commission alleging discrimination based on race, sex, and age. In the job classification for which the plaintiff applied, the employer has a much higher percentage of Caucasians and men than African-Americans and women. After receiving his right to sue letter, Employee filed suit in federal district court. After discovery, defendant Employer filed a motion for summary judgment, seeking dismissal of the all of the plaintiff's employment

[8] H.R. 2159 110th Cong. (2008); S. 2554, 110th Cong. (2008). *See Democrats Introduce Wide-Ranging Bill to Bolster Employment Rights and Remedies*, Daily Lab. Rep. (BNA) No. 17, at A-3 (Jan. 28, 2008).

discrimination claims. As is the custom of Judge District, he and his clerk read all the briefs, and he discusses the case with his clerk.

"Well, Clerk, the briefs are clear and the law seems well defined. What do you see as the problem?"

"Judge, I think employment discrimination law is broken. Until the Supreme Court or Congress fixes it, I don't know how you should rule on this motion."

"That's preposterous, Clerk. Your days on law review have made you too contemplative. Employment discrimination law has been around for over forty years, and I have seen it develop. It has been a very orderly process in which the Supreme Court has explained the law in several landmark cases. Surely you are not suggesting that Congress and the Supreme Court would leave the law so confused that judges could not rule on motions for summary judgment."

"I don't think it is that simple, your Honor. With all due respect, I think that is precisely the state of confusion in which Congress and the Court have left us."

"Come now, we shall enjoy a nice discussion about employment discrimination law and determine how to rule on this motion. I shall explain employment discrimination law to you, and then you may write letters of apology to the Supreme Court and Congress. Let us begin with the claims for race, sex, and age discrimination under the disparate treatment theory. Disparate treatment is intentional discrimination, which the Supreme Court once labeled as the "most easily understood type of discrimination.[9] So, even you, Clerk, should be able to understand disparate treatment, although as the Court suggested, you may find disparate impact more difficult. Because the plaintiff asserts both the disparate treatment and disparate impact theories, let's resolve the easier one

[9] International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

first. As everyone knows, disparate treatment cases are analyzed, for purposes of summary judgment, under the famous *McDonnell Douglas*[10] or pretext analysis. It is a three-step analysis. First, the plaintiff establishes a prima facie case, which basically requires that the plaintiff to prove that he or she is in a protected class, there is a job available, and the plaintiff is basically qualified to perform the job, although the elements vary somewhat depending on what type of adverse employment action the employer took.[11] At stage two, the employer has the burden of production to articulate a legitimate, nondiscriminatory reason for its employment decision. As everyone knows, stages one and two are easy to satisfy, and virtually no cases are resolved at those stages.[12] So, this motion for summary judgment is likely to be resolved at stage three--the pretext stage. Now, Clerk, I'll grant you that the pretext stage is somewhat complex, and the Supreme Court has found it necessary to clarify its meaning in a couple of cases, but the Court did so.[13] At stage three the task is to determine, on a motion for summary judgment, whether there is sufficient evidence that the defendant's articulated legitimate, nondiscriminatory reason is a pretext for discrimination. That is, if we do not believe the reason given by the employer for taking the adverse employment action, then we may infer that the real reason is discriminatory, although we are not required to so infer.[14] Now, I know that is a

[10] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
[11] *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 & n. 6 (1976).
[12] *See, e.g.*, 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.").
[13] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).
[14] *See Reeves*, 530 U.S. at 146-47.

bit complicated, but the Court has been clear about this, and surely we can decide the disparate treatment claim under the analysis I have explained, Clerk."

"Judge, I am loathe to disagree with you, but I think there are a number of problems that make it much more complicated and less certain than you explained. First, it is not clear that the *McDonnell Douglas* analysis applies to plaintiff Employee's disparate treatment claims."

"Heresy!" exclaimed the indignant Judge District.

"No, Judge. As I am sure you know, the Supreme Court announced an alternative proof structure or analysis for disparate treatment claims in *Price Waterhouse v. Hopkins*.[15] That case set forth the mixed-motives analysis, under which there are two stages. First, the plaintiff must prove that the protected characteristic was a motivating or substantial factor (the case produced no majority opinion on the standard of causation), and then the defendant could still win the case and avoid liability by proving the same-decision defense—that it would have taken the same adverse action for nondiscriminatory reasons. Congress stepped in to modify and clarify the *Price Waterhouse* proof structure in the Civil Rights Act of 1991.[16] First, Congress selected "motivating factor" as the standard of causation.[17] Second, Congress changed the same-decision defense so that it does not operate as a complete affirmative defense, precluding liability, but instead limits the remedies that are available if the defendant "demonstrates"

[15] 490 U.S. 228 (1989).
[16] Pub. L. No. 102-166, § 107, 105 Stat. 1071 (1991), codified at scattered sections of 42 U.S.C. *See supra* note 7.
[17] 42 U.S.C. § 2000e-2(m).

(satisfies the burden of persuasion) that it would have made the same employment decision absent the discriminatory reason."[18]

"Yes, of course, Clerk. I know about *Price Waterhouse* and the 1991 Act," interjected Judge District. "But many more disparate treatment cases are analyzed under *McDonnell Douglas* or pretext because, as you should have learned in law school, the *Price Waterhouse* or mixed-motives analysis applies to only cases in which there is direct evidence of discrimination. There are far more cases involving circumstantial evidence of discrimination than those involving direct evidence."

"Judge, that was once the state of the law, but do you remember the Supreme Court's decision in 2003 in *Desert Palace, Inc. v. Costa*?[19]

"Yes, I read it, but it does not say very much, and it did not change anything I just explained to you."

"Well, your Honor, I certainly agree that the opinion says little, but the opinion and its negative pregnant footnote[20] lead some to believe that the case necessarily changed the way disparate treatment cases are analyzed."

"Yes, I have heard that some academics have read the case as abrogating *McDonnell Douglas*,[21] but the Court did not say that. It is very presumptuous of those ivory tower law professors to suggest that the Court *sub silento* overruled a well-

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[18] 42 U.S.C. §2000e-5(g)(2)(B).
[19] 539 U.S. 90 (2003).
[20] *Id.* at 94 n.1
[21] *See, e.g.,* Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 95-99 (2004); Jeffrey A. Van Detta, *"Le Roi Est Mort; Vie le Roi!" An Essay on the Quiet Demise of* McDonnell-Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a "Mixed Motives" Case*, 52 DRAKE L. REV. 71, 72 (2003); William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549 (2005); William R. Corbett, McDonnell Douglas, *1973-2003: May You Rest in Peace*? 6 U. PA. J. LAB. & EMP. L. 199 (2003) [hereinafter, Corbett, McDonnell Douglas].

established analysis that it had carefully developed over a period of more than thirty years."

"Your Honor, the problem for us is that the Court clearly did say in *Desert Palace* that there is no requirement in the Civil Rights Act of 1991 that a plaintiff produce direct evidence in order to be entitled to a "motivating factor" jury instruction.[22] With the dividing line erased between cases that are to be analyzed under the pretext analysis and those to be analyzed under mixed-motives, how do we know which one to use?"

"That is an interesting point, Clerk. How have the courts of appeals resolved that issue?"

"In short, not well, and the Supreme Court has denied certiorari in cases raising the issue.[23] Some courts have said that *Desert Palace* did not change anything. Others, unsure about how to decide which analysis to apply, have applied both.[24] One court held that *McDonnell Douglas* continues to apply to single-motive cases while a motivating factor analysis applies to mixed-motives cases."[25]

"But, Clerk, how can we preserve distinctions between the analyses of single- and mixed-motives cases if *Desert Palace* erased the dividing line? How does a court know which type it is dealing with?"

"Judge, the Sixth Circuit in *White v. Baxter Healthcare Corp.* seemed to rely on the complaint and how the plaintiff pled his claims. The court said that the plaintiff

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[22] *Desert Palace*, 539 U.S. at 101.
[23] *See, e.g.*, Read v. B.T. Alex Brown, 2003 WL 21754966 (5th Cir. July 30, 2003), *cert. denied*, 124 S. Ct. 1415 (2004).
[24] *See, e.g.*, Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005) (plaintiff may survive summary judgment by prevailing under either of the two proof structures). For an opinion summarizing the positions of the various circuits, see White v. Baxter Healthcare Corp., ___ F. 3d ___, 103 Fair Emp. Prac. Cas. (BNA) 1121, 2008 WL 2607893 (6th Cir. 2008).
[25] *See* White v. Baxter Healthcare Corp., ___ F.3d __ (6th Cir. 2008).

brought one claim pursuant to one section of Title VII and one pursuant to another section."[26]

"Depending on the pleading to separate them does not seem fair or reasonable. The Federal Rules of Civil Procedure establish a notice pleading system in which specificity is not required."

"Indeed, your Honor. Reliance on how a claim is pled to decide which proof structure applies seems ill-advised and contrary to the Federal Rules and Supreme Court precedent.[27] The Court rejected a requirement that pleadings must be strictly tied to the proof structures in *Swierkiewicz v. Sorenma N.A*."[28]

"Are there any other and better resolutions of this mess, Clerk?"

"Well, Judge, the most creative and ambitious resolution is that of the Fifth Circuit in *Rachid v. Jack in the Box, Inc.*[29] In an age discrimination case, the Fifth Circuit reasoned that *Desert Palace* did effect a significant change. The court announced a `modified *McDonnell Douglas'* analysis in which the first two parts of the pretext analysis remain unchanged, and only the third part is modified. At part three, a plaintiff may prevail by proving either pretext or motivating factor.[30] If the plaintiff proves motivating factor, then the same-decision defense is available to the defendant."

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[26] *Id.* at ___-___. The court said the single-motive claim was brought pursuant to 42 U.S.C. §2000e-2(a)(1) and the mixed-motives claim pursuant to 42 U.S.C. § 2000e-2(m). The district court, in discussing the claim analyzed under pretext and the claim analyzed under mixed motives referred to the type of evidence presented in support of each (circumstantial and direct, respectively), although the court also discussed the Desert Palace abrogation of that line. *See* White v. Baxter Healthcare Corp., No. 05-71201, 2007 WL 1119881 (E.D. Mich. Apr. 16, 2007).

[27] *See, e.g.*, Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 317 n.3 (4th Cir. 2005 ("Whether [plaintiff] pled a mixed-motive claim is irrelevant . . . because ` a case need not be characterized or labeled at the outset. . . . [T]he complaint itself need not contain more than the allegation that the adverse employment action was taken because of a protected characteristic.'") (quoting Costa v. Desert Palace, 299 F.3d 838, 856 n.7 (9th Cir. 2002)).

[28] 534 U.S. 506 (2002).

[29] 376 F.2d 305 (5th Cir. 2004).

[30] *Id*. at 312.

"That's more like it, Clerk. The Fifth Circuit has made things more manageable with that approach. How have other courts reacted?"

"No other circuit has adopted the `modified *McDonnell Douglas*' approach,[31] and even some panels within the Fifth Circuit have seemed unsure that *Rachid* is the framework that is generally applicable to all disparate treatment cases.[32] Though the combined analysis does make our job easier, I do not understand the continuing relevance of the pretext prong. If motivating factor is enough, plaintiffs opposing motions for summary judgment should always insist on having their cases analyzed under motivating factor rather than pretext."

"Another good point, Clerk. I like *McDonnell Douglas*, and I am very comfortable analyzing summary judgments under it. It is like a comfortable, old blanket. Let's say that pretext analysis continues to apply to motions for summary judgment, but does not apply thereafter. That should work, right?"

"Judge, that is what the Ninth Circuit said in its en banc decision in *Desert Palace.*[33] However, could we apply one standard to analyzing a motion for summary judgment and then apply a different standard in the jury instructions? Isn't summary judgment supposed to determine, under the same standard applicable to a motion for judgment as a matter of law, whether there is any need for a jury resolution? It seems to me that we need to apply the same analysis to summary judgment that we will later apply to determining whether the jury gets to decide the case, and if so under what instructions."

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[31] *See White*, ___ F.3d at ____.
[32] *See* Greene v. DaimlerChrysler Servs. N.A.,128 Fed. Appx. 353, 356 n.7 (5th Cir. 2005) (stating that court need not consider effect of *Desert Palace* and *Rachid* on case).
[33] Costa v. Desert Palace, 299 F.3d 838, 854 (9th Cir.2002), *aff'd*, 539 U.S. 90 (2003).

"That is a good point, Clerk. But I am going to analyze this case at the summary judgment stage under *McDonnell Douglas*. The appellate courts can take the pretext analysis from me when they pry it from my cold, dead fingers."

"Okay, Judge. And the jury instructions will be what? Pretext-based? What if the defendant asks for the same-decision defense jury instruction?"

"We'll cross that bridge when we get to it. It will not be an issue if I grant the motion for summary judgment. I want you to analyze the disparate treatment claim under *McDonnell Douglas,* and then for good measure, analyze it under mixed motives, too, to see if the result is any different. Wait a minute; that will be a problem if it comes out differently. Do that combined, modified analysis the Fifth Circuit made up in *Rachid*. That should cover all bases. "

"Okay, Judge. How about the disparate treatment claim based on age?"

"Same thing. Why should it be different from race and sex?"

"Some courts have said that whatever the Supreme Court did in *Desert Palace*, it had no effect on the Age Discrimination in Employment Act.[34] Thus, the mixed-motives analysis applicable to the age claim could be the *Price Waterhouse* version rather than the Civil Rights Act of 1991 version.[35]

"But you said the Fifth Circuit *Rachid* case was an age discrimination case. The Fifth Circuit did not seem bothered by the distinction that you just made: that the Civil Rights Act of 1991 did not amend the ADEA."

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[34] *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 526 F.3d 356 (8th Cir. 2008) (explaining that *Desert Palace*, which interpreted language in the Civil Rights Act of 1991, does not affect the application of *Price Waterhouse* to ADEA cases).

[35] *Id.*

"Right, Judge. The Fifth Circuit dispatched with that issue expeditiously, reasoning that the ADEA and Title VII statutory prohibitions are similar.[36] But some other courts have rejected the Fifth Circuit's harmonization or unification of the analyses, finding inadequate support for it in the statutes.[37] I think the Fifth Circuit did it as a matter of convenience."

"Clerk, my head is beginning to hurt. I am all for convenience, and I think it may be in the interest of the courts and the public to simplify this law, so apply the modified *McDonnell Douglas* analysis to the race, sex, and age disparate treatment claims. I see no reason why the analysis for age discrimination claims should be different from race and sex."

"As you wish, Judge, but the Supreme Court consistently has said that there are differences between age discrimination on the one hand, and race and sex discrimination on the other. For example, most recently the Court reiterated this in *Meacham v. Knolls Atomic Power Laboratory*.[38] Still, on the specific issue of the proof structure applicable to intentional discrimination cases, I agree with you."

"Good! Then apply the modified *McDonnell Douglas* analysis and prepare proposed reasons for judgment."

"Okay, Judge. Now about the reverse discrimination issue, how do you want to handle that?"

"Apply the modified *McDonnell Douglas* analysis. Is there anything else?"

"Yes, Judge. As you know we have a white male asserting race and sex discrimination claims. Do you want me to make adjustments to the analysis because the

[36] *Rachid*, 376 F.3d at 311.
[37] *See Gross*, 526 F.3d at 360-61.
[38] 128 S. Ct. 2395 (2008).

claim is reverse discrimination, meaning a case with a plaintiff who is a member of a group that historically has not been a primary target of discrimination?"[39]

"My word, Clerk, what adjustments would you make, and why would you make them?"

"Some courts have modified the *McDonnell Douglas* analysis in reverse discrimination cases by requiring more proof to establish a prima facie case.[40] Usually, courts that do this say that they require evidence of `background circumstances,' which suggest that this is an unusual employer that discriminates against a historically favored group."[41]

"Now, Clerk, why would we modify the analysis for reverse discrimination cases? Doing so seems discriminatory to me, which is quite ironic given that we are trying to enforce antidiscrimination laws."

"Judge, some courts have refused to modify the analysis at least in large part for that reason.[42] It is important to remember, however, that employment discrimination law makes a number of distinctions, and thus it obviously does discriminate.[43] The important

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[39] 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 (2004) [hereinafter Sullivan, *Circling*].

[40] *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 39; Timothy K. Giordano, Comment, *Different Treatment for Non-Minority Plaintiffs Under Title VII: A Call for Modification of the Background Circumstances Test to Ensure That Separate is Equal*, 49 EMORY L.J. 993 (2000); Donald T. Kramer, *What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes—Private Employment Cases*, 150 A.L.R. Fed. 1 (1998); Ryan M. Peck, *Title VII Is Color Blind: The Law of Reverse Discrimination*, 75 J. KAN. BAR ASS'N 20 (June 2006).

[41] *See, e.g*., Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985); *see also* Sullivan, *Circling*, *supra* note 39, at 1065-71 (discussing background circumstances).

[42] *See, e.g*., Sullivan, Circling, *supra* note 39, at 1080-84.

[43] For example, the bona fide occupational defense applies to sex, religion, and national origin, but not race and color. 42 U.S.C. § 2000e-2 (e). Furthermore, the Supreme Court has recognized that under certain circumstances, employers can develop and maintain affirmative action plans. *See, e.g*., Johnson v. Transportation Agency of Santa Clara County, 480 U.S. 616 (1987); United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979); DeCorte v. Jordan, 497 F.3d 433 (5th Cir. 2007).

question is whether there is a solid rationale for distinguishing between the proof structure applied to traditional discrimination cases and that applied to reverse discrimination cases. The best reason seems to be based on the presumptions underlying the *McDonnell Douglas* prima facie case. As we discussed earlier, all the prima facie case essentially requires is that a plaintiff prove that she is in a protected class, is basically qualified for the job in question, and a job exists for which plaintiff was not chosen. Although this is easily satisfied in most cases, the Court has explained that the prima facie case rules out the two most common reasons for a person not getting a job: no job exists or the person is not qualified.[44] With the most common nondiscriminatory reasons ruled out, the Court believed that discrimination occurs often enough to make it reasonable to infer discrimination, subject to rebuttal.[45] However, that same inference may not be as reasonable for reverse discrimination because historically such discrimination has not been common. So, as you can see, when you think about the underlying rationale for the proof structure, modifying the prima facie case for reverse discrimination cases by requiring proof of additional background circumstances makes sense. However, the modification has been very controversial. One court expressed its consternation by saying that cases which apply the background circumstances requirement in reverse discrimination cases are inconsistent with antidiscrimination statutes."[46]

"I understand, Clerk. I don't want to jump into that controversy, so don't modify the prima facie case with a 'background circumstances' requirement even if it makes sense to do so. Besides, with more minority-owned businesses and the current emphasis

[44] International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.77 (1977).
[45] *Id.*
[46] *See* Lind v. City of Battle Creek, 681 N.W.2d 334 (Mich. 2004).

on diversity in the workplace, I suppose reverse discrimination may be more common than it used to be. Are we done with the disparate treatment claims?"

"I think so, Judge, but if the age discrimination claim is a reverse discrimination claim, as it seems it may be, then we do not need to apply any analysis to it. It can be dismissed as a matter of law. Younger people cannot claim that they were discriminated against in favor of older people on the basis of age."

"Now, wait a minute. Why not? The Age Discrimination in Employment Act (ADEA) says `age,' which could go either way—older or younger. Furthermore, I know the Supreme Court has approved reverse discrimination claims under Title VII,[47]

"Yes, Judge, that is all true, but the Supreme Court held that the ADEA does not provide for reverse discrimination claims in *General Dynamics Land Systems, Inc. v. Cline*.[48]

"That does not make sense to me. The statute says "because of . . . age,"[49] and does not say anything about younger or older. I recently read about a British case in which a younger plaintiff sued for age discrimination and won."[50]

"Shall I write that, notwithstanding what the Court said in *General Dynamics Land Systems*, the ADEA should be interpreted to permit reverse age discrimination claims and cite the British case?"

"No, Clerk, I don't think so. Some justices on the Supreme Court don't like to see any foreign law cited.[51] If the age claim is a reverse discrimination claim, grant the summary judgment for the defendant, citing *General Dynamics Land Systems*. Okay,

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[47] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).
[48] 540 U.S. 581 (2004).
[49] 29 U.S.C. § 623(a)(1).
[50] Wilkinson v. Springwell Eng'g Ltd., ET/2507420/07.
[51] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 622 (2005) (Scalia, J., dissenting).

surely that takes care of the disparate treatment claims. Let's move on to disparate impact. This should be much easier than disparate treatment because Congress codified the disparate impact proof structure in the Civil Rights Act of 1991.[52] You know the three-part analysis: 1) prima facie case consisting of a) employment practice that b) causes c) a statistically significant disparity; 2) employer's defense of business necessity and job relatedness; and 3) alternative employment practice."[53]

"Judge, I know that is how courts see it, although the structure established by Congress in the Civil Right Act of 1991 is not that clear. For example, the statute does not say that alternative employment practice (AEP) is the third stage of a three-part analysis.[54] Moreover, it is almost impossible to separate AEP from business necessity and job relatedness (BN/JR). How can a practice be a necessity if there is an alternative practice available that is nearly as effective and less discriminatory? Courts generally have not been able to separate BN/JR and AEP into two stages."[55]

"Okay, well, treat BN/JR and AEP as two separate stages anyway. Any more problems?"

"Working backwards, my biggest problem at stage two is that Congress did not attempt to define BN/JR, and courts have struggled to define it.[56] As some have explained it, before the Civil Rights Act of 1991, the Supreme Court seemed to apply a sliding scale approach to BN/JR, being more deferential or less deferential to the employer depending on the type of job and what was at stake in second guessing the

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[52] *See* 42 U.S.C. § 2000e-2(k)(1)(A).
[53] *Id.*
[54] 42 U.S.C. § 2000e-2(k)(1)(A)(ii).
[55] *See, e.g.*, Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993).
[56] *See, e.g.,* Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts Are Unjustified*, 95 CAL. L. REV. 669, 670 (2007) ("The conflict over the appropriate scope of the business justification defense is longstanding.").

employer's determination of business necessity. Also, what did Congress have in mind by making the defense two parts—business necessity and job related? Are we really supposed to analyze both? Can a practice be a business necessity without being job related? Isn't job related redundant?"

"Clerk, I understand, but the statutory language is crystal clear. Even if you think job related is redundant, analyze both. As far as the appropriate standard for BN/JR survey the case law and pick one. Any other problems?"

"Yes, regarding the prima facie case, there are problems with all three parts. First, what constitutes an employment practice is not clear. For example, the Supreme Court in the case first holding that disparate impact is actionable under the ADEA, *Smith v. City of Jackson*, held that the employer's pay raise formula was not an employment practice.[57] One could attribute that to its being an age case, but what constitutes an employment practice also has been vexing in Title VII cases. For example, in *EEOC v. Joe's Stone Crab*,[58] the Eleventh Circuit said it found no employment practice in the employer's hiring procedures, although the dissent had no difficulty finding practices."

"So you will have to apply an amorphous standard to what constitutes an employment practice. Just add that to the amorphous standard for the defense of BN/JR. What are the problems with the rest of the PFC?"

"The Supreme Court announced a specific causation standard in *Wards Cove Packing v. Atonio*.[59] Although Congress overturned most of *Wards Cove* in the Civil Rights Act of 1991, it appears to have codified the specific causation requirement.[60]

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[57] 544 U.S. 228, 241 (2005).
[58] 220 F.3d 1263 (11th Cir. 2000)
[59] 490 U.S. 642 (1989).
[60] 42 U.S.C. § 2000e-2(k)(1)(A)(i) & (B)(ii).

Here's the problem in this case: the plaintiff claims disparate impact in refusal to hire based on race, sex, and age. Let's put the age disparate impact claim to one side because it must be analyzed according to a different disparate impact proof structure. As for the race and sex claims, there is a problem because the employer has many more men and whites in the job classification for which Plaintiff was denied employment and many more men and whites in its workforce as a whole."

"Ah, checkmate, Clerk. The Supreme Court explained in *Connecticut v. Teal* that the bottom line cannot be used to defeat a claim of discrimination.[61] That is, if a practice or criterion is excluding a group disproportionately, it is no answer that the group is proportionately represented in the employer's workforce."

"True, Judge, but how do you reconcile that principle with *Livingston v. Roadway Express, Inc.*[62] In that case, the employer had a maximum height requirement for drivers. The tall male applicant who was denied a job sued, asserting disparate impact. The court rejected his claim, noting that the employer's workforce had 189 male drivers and two female drivers. The court tried to distinguish *Connecticut v. Teal*, but the ground of distinction made no difference. Then the court buttressed its conclusion that the claim failed by noting that the case was a reverse discrimination case and saying the background circumstances requirement applicable to disparate treatment reverse discrimination cases also applies to disparate impact cases."

"I admit that *Livingston* poses some enigmas. How do you resolve them, Clerk?"

"*Livingston* exemplifies a couple of the most significant unresolved issues about disparate impact. First, is disparate impact really about individual rights rather than

[61] 457 U.S. 440 (1982).
[62] 802 F.2d 1250 (10th Cir. 1986).

group rights? In *Connecticut v. Teal*,[63] the Court insisted that employment discrimination law protects individual rights, not group rights.[64] The dissent in *Teal* disagreed, saying the Court was confusing the goal of Title VII with the legal theories for accomplishing that goal; while disparate treatment is about proving discrimination against individuals, disparate impact is about proving discrimination with reference to a group.[65] If disparate impact is about protecting individuals against discrimination only as members of a group, then *Livingston* makes sense, as the employer hired many men and certainly did not discriminate against men. On the other hand, if disparate impact protects individuals as individuals, then the plaintiff should have recovered. Second, in what group must the disparate impact be manifested? The actual workforce of the employer or some hypothetical group mirroring the general public that could have applied for the job?[66] In *Livingston*, for example, there was no underrepresentation of men in the employer's workforce, although everyone knows that a height limitation would disproportionately screen out men in a hypothetical applicant pool. In *Livingston*, looking at the PFC from the top (from the employment practice downward) it looks like a fairly strong disparate impact case. However, looking at it from the bottom (from the workforce upward) it looks like a nonexistent disparate impact case. There is yet another issue in *Livingston*. Should disparate impact theory even apply to reverse discrimination cases?[67] Although the court stated that it would impose the additional background circumstances requirement for disparate impact in reverse discrimination cases, the court could have

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[63] 457 U.S. 440 (1982).
[64] *Id.* at 451.
[65] *Id*. at 458-59 (Powell, J, dissenting).
[66] *See* Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523, 564-570 (1991).
[67] See generally Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505 (2004) [hereinafter Sullivan, *The World*].

considered whether disparate impact even was intended to protect members of groups against whom there is no history of discrimination. This is a very controversial issue which also may raise constitutional concerns. So far, the scant case law on the issue recognizes the applicability of disparate impact to reverse discrimination cases, [68] but the issue has not been thoroughly discussed in a difficult case. Because there are more Caucasians and men in the job classification for which the plaintiff applied, we may have such a case."

"Clerk, what constitutional issues are implicated if I rule that disparate impact does not apply to reverse discrimination cases?"

"The argument is that a judicial decision limiting disparate impact to traditional discrimination cases is a racial classification that is subject to strict scrutiny analysis under the equal protection clause, and therefore probably constitutionally infirm.[69] However, there are arguments in the academic literature to the contrary."[70]

"Clerk, we will not risk that constitutional fight. We will apply disparate impact to the reverse discrimination claims in the case before us without discussing the issue, much as the court did in *Livingston*. However, do not add the background circumstances requirement."

"Okay, your Honor. You are aware, of course, that the disparate impact analysis under the ADEA is different from that under Title VII. At a minimum, the statutory language requires that the defense of "reasonable factors other than age" replace business

[68] *Livingston*, 802 F.2d at 1252; Craig v. Alabama State Univ., 804 F.2d 682, 685 (11th Cir. 1986).
[69] *See* Sullivan, *The World*, *supra* note 67.
[70] *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three,* 117 HARV. L. REV. 493 (2003).

necessity and job relatedness as the applicable affirmative defense.[71] In *Meacham v. Knolls Atomic Power Laboratory* the Supreme Court recently explained this difference and the fact that there is no stage three rebuttal in the analysis analogous to "alternative employment practices."[72] Indeed, until the Supreme Court's 2005 decision in *Smith v. City of Jackson,* it was not resolved that disparate impact theory was available under the ADEA.[73] The Supreme Court's explanation of the ADEA disparate impact analysis in *Smith* seems to make it very unlikely that plaintiffs will prevail.[74] The Court, however, did clarify in *Meacham* that RFOA is an affirmative defense for which the burden of persuasion is on the defendant."

"So, Clerk, I question why the Supreme Court and Congress have disfavored age discrimination by making it harder for plaintiffs to recover, but I accept your explanation of the differences."

"You realize the analysis I do under both disparate treatment and disparate impact will be fraught with uncertainty, Judge?"

"Yes, Clerk, I now understand that, but I find it baffling that Congress and the Supreme Court have not heretofore seen fit to provide certainty regarding the basic tools we must use at the key stages in litigation of employment discrimination cases."[75]

"Well, your Honor, Congress stepped up to the plate and did significant revamping and clarification of both disparate impact and disparate treatment in the Civil

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[71] 42 U.S.C § 623(f)(1).
[72] 128 S. Ct. 2395 (2008).
[73] 544 U.S. 228 (2005).
[74] *See, e.g.*, Jessica Sturgeon, Note, Smith v. City of Jackson: *Setting an Unreasonable Standard*, 56 DUKE L.J. 1377 (2007).
[75] *See* Michael Abbott, *A Swing and a Miss: The U.S. Supreme Court's Attempt to Resolve the Confusion Over the Proper Evidentiary Burden for Employment Discrimination Litigation in* Costa v. Desert Palace, 30 J. CORP. L. 573, 591 (2005) ("Overall, with lower courts already making their own differing interpretations of *Costa*'s effects, it appears that the only thing clear in the area of employment discrimination law is the existence of confusion.").

Rights Act of 1991. Perhaps it will do so again. But I should begin work on your opinion because that hope does not help us now."

II. How Did the Wreck Occur?

The odyssey of the proof structures is well chronicled, so I will render it here in succinct form.

A. Disparate Treatment: Pretext and Mixed Motives from McDonnell Douglas *and* Price Waterhouse *to the Civil Rights Act of 1991 to* Desert Palace

The two proof structures were created by the Supreme Court, the pretext structure in *McDonnell Douglas v. Green*[76] in 1973, and the mixed-motives structure in *Price Waterhouse v. Hopkins*[77] in 1989. Although both were created by the Court, mixed-motives later would be modified and codified by Congress.

The Court held the pretext analysis applicable in a reverse discrimination case without much discussion of how it applies in *McDonald v. Santa Fe Trail Transportation Co*.[78] The *McDonnell Douglas* pretext analysis was further developed in a series of Supreme Court decisions: *Texas Department of Community Affairs v. Burdine*,[79] *St. Mary's Honor Center v. Hicks*,[80] and *Reeves v. Sanderson Plumbing Products, Inc.*[81] The Supreme Court never has held that the pretext analysis is applicable to analyze ADEA cases (although it assumed it in *Consolidated Coin Caterers*),[82] and lower courts

[76] 411 U.S. 792 (1973).
[77] 490 U.S. 228 (1989).
[78] 427 U.S. 273 (1976).
[79] 450 U.S. 248 (1981).
[80] 509 U.S. 502 (1993).
[81] 530 U.S. 133 (2000).
[82] O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (1996) ("In assessing claims of age discrimination brought under the ADEA, the Fourth Circuit, like others, has applied some variant of the basic evidentiary framework set forth in McDonnell Douglas. We have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it.").

routinely have applied it. The Court seems to have approved the applicability of the pretext analysis to disabilities claims under the ADA in *Raytheon Co. v. Hernandez*.[83]

The court announced the alternative proof structure, mixed motives, in *Price Waterhouse*. The plurality opinion and Justice O'Connor's concurrence applied different standards to the plaintiff's prima facie case, "motivating factor" applied by the plurality, and "substantial factor" by the concurrence. After *Price Waterhouse*, most courts applied substantial factor. Courts also grappled with the issue of under which proof structure any particular case should be analyzed. Most circuits seized upon the dividing line cited by the O'Connor concurrence: cases in which there was direct evidence were analyzed under mixed-motives, and circumstantial evidence cases were analyzed under pretext.[84]

Congress made some changes in at least one disparate treatment proof structure in the Civil Rights Act of 1991. Given the splintered Court decision in *Price Waterhouse*, Congress clarified and fixed the mixed-motives proof structure. Congress codified "motivating factor" as the causation standard in the plaintiff's prima face case rather than "substantial factor."[85] Congress also changed the analysis of *Price Waterhouse* by providing that the same-decision defense is not a complete defense, avoiding liability. Instead liability is still imposed even if the employer satisfies its burden on the same-decision defense; instead, it limits the remedies that are available.[86] Did Congress intend in the Civil Rights Act of 1991 to make any changes in the pretext analysis? Congress did not say. Did the new statutory version of mixed motives apply to the Age

[83] 540 U.S. 44 (2003).
[84] *Price Waterhouse*, 490 U.S. at 270-71 (O'Connor, J., concurring).
[85] 42 U.S.C. § 2000e-2(m).
[86] 42 U.S.C. §2000e-5(g)(2)(B). The limitation is significant, leaving the plaintiff with no money.

Discrimination in Employment Act, which was not amended by the Civil Rights Act of 1991? Congress did not say, but it placed the new statutory analysis in Title VII. Many courts said that the *Price Waterhouse* version of mixed motives continued to apply to ADEA disparate treatment claims.

As long as courts maintained a dividing line between cases to be analyzed under pretext and those to be analyzed under mixed motives, it was reasonable for courts to continue using the two proof structures and the rich body of case law developed under them. However, the Supreme Court obliterated this order when it held *in Desert Palace, Inc. v. Costa* that direct evidence is not required for a plaintiff to be entitled to a motivating factor jury instruction.[87] With that, the Court erased the line separating the cases analyzed under pretext and those analyzed under mixed motives. The Court based its holding on the fact that the language added by the Civil Rights Act of 1991 did not say anything about "motivating factor" being limited to direct evidence cases. Did elimination of the dividing line mean that *all* disparate treatment cases were to be analyzed under mixed motives? The Court declined to say.[88] The lower courts were left with no guidance on deciding what to do with the two disparate treatment proof structures.

B. Disparate Impact: From Griggs *to* Wards Cove *to the Civil Rights Act of 1991*

The history of disparate impact starts with the Supreme Court's recognition of the theory in 1971 in *Griggs v. Duke Power Co.*[89] Between *Griggs* and the codification of disparate impact in the Civil Rights Act of 1991, several major Supreme Court cases

[87] 539 U.S. 90, 101 (2003).
[88] In fact the Court said it would not say: "This case does not require us to decide when, if ever, §107 applies outside of the mixed-motives context." *Desert Palace*, 539 U.S. at 94 n.1.
[89] 401 U.S. 424 (1971).

developed the proof structure. In1982 in *Connecticut v. Teal*,[90] the Court announced that if an employment practice causes a disparate impact, an employer cannot defend and win the case by fixing the disparate impact at the bottom line—by adjusting its numbers so that the group adversely affected by the practice is adequately represented in the work force or job classification. In 1988 in *Watson v. Fort Worth Bank & Trust*[91] the Court held that disparate impact analysis applies to subjective employment practices. Then, in *Ward's Cove Packing Co. v. Atonio*[92] in 1989, the Court radically changed the disparate impact analysis, making business necessity easier to satisfy and placing the burden of persuasion on the plaintiff. Congress took aim at *Wards Cove* in the Civil Rights Act of 1991 and created a statutory version of the disparate impact proof structure that modified most of the *Ward's Cove* version of the analysis, except the requirement of specific causation between the employment practice and the statistical disparity.[93] Unfortunately, the statutory version developed by Congress presumed that the terms it used, such as "business necessity" and "job related" were adequately defined by pre-*Ward Cove* case law. They were not. The Court held in *Smith v. City of Jackson*[94] in 2005 that the disparate impact analysis, although not the one created by the Civil Rights Act of 1991, is applicable under the ADEA. The Court continued to clarify the differences between the ADEA and Title analyses in 2008 in *Meacham v. Knolls Atomic Power Laboratory.*[95]

III. LEGISLATIVELY FIXING THE PROOF STRUCTURES

A. Legislate Like It's 1991

[90] 457 U.S. 440 (1982).
[91] 487 U.S. 977 (1988).
[92] 490 U.S. 642 (1989).
[93] 42 U.S.C. § 2000e-2(k).
[94] 544 U.S. 228 (2005).
[95] 128 S. Ct. 2395 (2008).

The proof structures, even the ones retrofitted in the Civil Rights Act of 1991, are fraught with problems, enigmas, and conundrums.[96] These frameworks are used by attorneys and judges to analyze all employment discrimination cases, and they are used by courts to rule on dispositive motions and to instruct juries. Thus, employment discrimination law is badly broken and in desperate need of repair.

Congress must answer the call and repair the law by repairing the proof structures.[97] Why Congress rather than the Supreme Court? First, obviously Congress is better able to repair all the problems in one piece of legislation, whereas the Court would have to find cases presenting the issues and grant certiorari in a number of cases to fix them all. The problems are numerous enough and fundamental enough that they should be repaired in one fell swoop. While one may argue that problems can be resolved by the courts by permitting time for experimentation, this repair work is long overdue. Second, not only is the Court unable to deal with all of the problems in a short period of time, it has not demonstrated a willingness to fix the problems it could have over long periods of time. How hard would it have been to clarify the effect of *Desert Palace* on the disparate treatment proof structures, given a number of petitions for certiorari in cases raising the issues? Finally, Congress demonstrated in the 1991 Act that it can identify specific problems (often created by specific Supreme Court decisions) and fix them in a single piece of legislation. One may respond that the political wrangling surrounding the failed

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[96] *See supra* Part I.B.

[97] In a recent article, Professor Martin Katz provided a way that the lower courts could fix the disparate treatment "quagmire." *See* Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643 (2008) [hereinafter Katz, *Unifying*]. Professor Katz stated, however, that a legislative solution was preferable. *Id*. at 659. I argue that legislative action is necessary to repair the broken proof structures of both disparate treatment and disparate impact. This is a big project that requires Congress to survey the big picture of employment discrimination law and choose how to fix it. Furthermore, when considering disparate treatment alone, Congress needs to make some decisions about the appropriate repair. I am not sure that the existing statutory proof structure should be applied to all cases without some changes being made, which is what Professor Katz proposes courts should do.

Civil Rights Act of 1990 and the successful 1991 Act demonstrate a weakness of Congress that led to some of the current problems.[98] While that is true, the 1991 Act is still impressive for its recognition of fundamental problems with the proof structures revealed by the existing case law and its attempt to address them by drawing on the available case law. Thus, it is time for Congress to fix employment discrimination law as it did in the Civil Rights Act of 1991. As in 1991, the fix will not resolve all issues well, but Congress has the superior competence to fix numerous problems identified by and developed in the case law.

Before suggesting the specific changes that I think Congress should make, I offer a few observations regarding the limited scope of what this Article proposes. First, this is more about mechanics than theory, and a repair rather than building something new. Much academic scholarship focuses on theory to explain the failures and deficiencies of current employment discrimination law,[99] and some goes on to use theory to recommend reconceptualizations of the law.[100] While those endeavors are important and worthwhile, rather than building something new, I will limit the changes to fixing problems with current parts. A related point is that the repairs I recommend, like the approach Congress

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[98] *See supra* note 7, regarding the veto of the 1990 Act and passage and signing of the 1991 Act. Several of the problems with the proof structures can be traced to the Civil Rights Act of 1991. For example, the Supreme Court in *Desert Palace* eradicated the line dividing cases analyzed under pretext and those analyzed under mixed motives based on its interpretation of the 1991 Act—to be precise, what the Civil Rights Act did not say (that direct evidence is required for a case to come under mixed motives). The debate over whether changes wrought in the disparate treatment and impact proof structures by the 1991 Act apply to the ADEA stem from the fact that the Act was silent on that issue. The uncertainty of the courts over the proper standard for business necessity and job relatedness goes to the tortured and ineffective draftsmanship in the 1991 Act after political wrangling on that issue.

[99] *See, e.g.*, Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as Rights-Claiming System*, 86 N.C.L. REV. 859 (2008).

[100] *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 (1995); Oppenheimer, *supra* note 4.

took in 1991, will use available parts and not anything that has to be custom ordered. The changes that I recommend do not effect a reconceptualization or reinvention of employment discrimination law; instead, they are directed at the more modest goal, for example, of selecting from among the causation standards that have been used by the courts the best one in view of the state of the law and society.

The repair job that I recommend is limited in scope and ambition for at least two reasons. First, I want to recommend something that has a good chance of becoming law; it should be politically feasible. Employment discrimination law is almost like a "third rail" in politics, as the failed 1990 Act and the successful 1991 Act demonstrate. The 1990-1991 efforts show that it is hard enough to muster the political will to fix identifiable problems in Supreme Court decisions, but it can be done. In the 1991 Act, Congress identified the Supreme Court cases it was addressing, and in each case, Congress drew from existing case law, often from opinions in the cases it was targeting to codify a repair.[101] This is a good approach with a chance of political success. Identifying problems in court opinions, particularly Supreme Court opinions, shows that they are real problems that probably raise their heads frequently in litigation of cases. Furthermore, identifying problems in cases demonstrates that the courts have tried their hand at fixing it, and now it is Congress' turn. In addition to political viability, there are several other reasons that I favor this approach. Courts often have considered a range of answers, so the case law often includes most viable solutions. But not always. Why not do something truly revolutionary, such as rejecting all generally prevailing standards of causation that have been used in employment discrimination law—sole cause, but for,

[101] For example, the "motivating factor" standard in mixed motives was taken from the plurality opinion in *Price Waterhouse* and selected over the "substantial factor" standard in Justice O'Connor's concurrence, which had gained favor in the courts of appeals.

substantial factor, motivating factor—and instead adopt increased chance/lost chance methodology from tort law to have courts and juries determine the percentage chance that discrimination caused an adverse employment action? Besides the unlikelihood of legislative success, there is another reason. Courts and lawyers in general do not like changes; they are comfortable with that with which they are familiar. For example, I thought that *Desert Palace* implicitly made it clear that the *McDonnell Douglas* pretext analysis could not be maintained as it had before that decision, but I also predicted that courts and lawyers would cling tenaciously to the analysis that had become common and comfortable in its thirty-plus years of existence.[102] Whatever legislation Congress enacts will be interpreted by the courts, and the courts will do a better job interpreting and applying legislation based on concepts developed in the existing case law. For example, the proof structure for disparate impact in the 1991 Act[103] is not clearly the three-part analysis that Congress probably intended and that courts have interpreted it as codifying. However, because Congress used terms and concepts developed in the case law, courts have resorted to the prior case law in interpreting the legislation. Courts are comfortable with what they know and what has a body of case law development. Thus, Congress should work with the parts the courts have provided where possible so that courts will know how to drive it when Congress sends it back. We might prefer to see Congress give us a Rolls Royce, but we should be satisfied with a smooth-running version of the Chevy or Ford we took in to the shop. We won't be as worried about what happens to it when we take it out and drive it around every day.

And now, we begin the repair job.

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[102] Corbett, McDonnell Douglas, *supra* note 21.
[103] See 29 U.S.C. § 2000e-2((k)(A) & (B).

B. Fixing Disparate Treatment

Because most employment discrimination cases are individual disparate treatment cases and the mystery of what proof structure applies was raised by a Supreme Court opinion, this is the most important and most needed repair. As a starting point, Congress codified the mixed-motives proof structure with a "motivating factor" standard and a same-decision limitation on remedies in the Civil Rights Act of 1991.[104] The Supreme Court in *Desert Palace* read this amendment as not limiting the "motivating factor" standard to cases involving direct evidence. As argued in this article and elsewhere, once the dividing line between cases analyzed under mixed motives and those analyzed under pretext was erased, someone needs to say whether both proof structures continue to exist, and if they do, what is the new dividing line. In the aftermath of *Desert Palace*, Congress could do any of the following: 1) Preserve the two proof structures and either overturn *Desert Palace* by reinstalling the prior direct evidence-circumstantial evidence dividing line or creating a new one; 2) Merge the two analyses into one new one along the lines of what the Fifth Circuit did in *Rachid v. Jack in the Box*[105]; or 3) Abrogate the pretext analysis by expressly making a single statutory proof structure applicable to all individual disparate treatment cases, and consider any modifications of the current mixed-motives statutory structure that seem advisable in light of the abrogation of the pretext analysis and adoption of a single standard.

1. Congress Should Not Change the Result of *Desert Palace*

Option 1 should not be followed. Although the holding of *Desert Palace*, that the Civil Rights Act of 1991 does not require direct evidence to invoke the mixed-motives

[104] *See* 29 U.S.C. § 2000e-2 (m) & § 2000e-5(g)(2)(B).
[105] 376 F.3d 305 (5th Cir. 2004); *see supra* notes ___-___ and accompanying text.

proof structure, is not the only possible interpretation of the 1991 amendment, *Desert Palace* on balance did a good thing. It does not appear that Congress had any notion of abrogating the *McDonnell Douglas* pretext analysis or erasing the well-known dividing line between pretext cases and mixed-motives cases with the 1991 amendments. Instead, the codification of mixed motives was directed at fixing the proof structure articulated by the Supreme Court in *Price Waterhouse*. However, I do not think that Congress should follow option 1 above, overturning *Desert Palace* or preserving the pretext analysis. Regardless of whether one likes the *McDonnell Douglas* pretext or mixed-motives proof structure better, the two proof structures were divided by a chimerical line that no one really understood or applied effectively. As the Ninth Circuit explained in its en banc opinion in *Desert Palace*,[106] there were several approaches applied by the various circuits to defining the direct-circumstantial dividing line. The suggestion of a new dividing line, such as single motive and mixed-motives cases, is not any more helpful because all cases present themselves as potential mixed-motives cases when the employer introduces evidence of its legitimate, nondiscriminatory reason. Thus, *Desert Palace* actually did a good thing by erasing an ineffective and artificial dividing line even if it misinterpreted what Congress intended to do in the 1991 Act.

2. Congress Should Not Codify a Proof Structure That Merges Pretext and Mixed Motives

How about option 2—codifying the *Rachid* solution of merging proof structures? Congress should consider this as an option, but ultimately, I recommend rejecting it. The first thing that favors it is that it would preserve an analysis that the courts love and to which they desperately are clinging. This is no small reason to preserve it. Courts have a

[106] 299 F.3d 838 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).

rich body of case law and experience with it. Second, one can observe that if plaintiffs have the option of going the pretext route at stage three rather than motivating factor, they may avoid the introduction of the same-decision defense and the limitation of remedies if that defense is successful.[107] However, that poses the additional problem of what a plaintiff must do to preclude the same-decision defense in a given case and how the court makes that decision; the issue of the dividing line reemerges.[108]

The merged analysis and the preservation of the pretext analysis share several negatives. First, the pretext analysis is more difficult for plaintiffs to satisfy than the motivating factor standard of the mixed-motives proof structure. Although there is a debate about what level of causation the pretext analysis entails,[109] it should suffice to say that it has been the understanding since *Price Waterhouse* that the mixed-motives proof structure was intended to give plaintiffs an advantage over plaintiffs proceeding under pretext, at least at the prima facie case stage, and plaintiffs have sought the mixed-

[107] Corbett, McDonnell Douglas, *supra* note 21, at 216-19.

[108] Professor Martin Katz has argued that no choice is required. *See Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 167-68 (2007) [hereinafter Katz, *Reclaiming*]. He argues that the pretext analysis is no longer mandatory, but plaintiffs can use it as a way to prove motivating factor. No doubt he is correct that plaintiffs can introduce evidence of pretext to prove discrimination. However, retaining the proof structure, which has shifting burdens of production and case law regarding the meaning of each stage, is a mistake. Professor Katz argues for retention of a nonmandatory *McDonnell Douglas*. I think a nonmandatory *McDonnell Douglas* is a way of saying the pretext evidence is relevant to the motivating factor standard of causation (certainly true), and we can keep the proof structure without requiring plaintiffs to use it (problematic and destined to preserve confusion). My response to Professor Katz is that plaintiffs do not need the pretext proof structure preserved in order to render evidence of pretext relevant to discrimination under a motivating factor (or other causation) standard.

[109] Although the pretext analysis has been understood as incorporating a but-for standard of causation, Professor Katz has argues that the pretext analysis actually incorporates a motivating factor standard of causation. *See* Katz, *Reclaiming*, *supra* note 108, at 136-38. He does concede, however, that a "strong version" of the pretext analysis proves but-for causation. *Id.* at 139.

motives analysis, believing it to be favorable.[110] If you tell a plaintiff that she can prevail by proving either motivating factor or pretext, you may as well dispense with pretext.[111]

Second, the *McDonnell Douglas* analysis, notwithstanding its long service, has significant problems. The prima facie case is the biggest problem. It was established and has remained low and easy to satisfy[112] and consequently is not predictive of whether a plaintiff has a case on which she is likely to prevail at trial or even survive summary judgment.[113] All one has to prove essentially is that there is a job and the plaintiff is basically qualified for it. The Supreme Court considered raising the requirements for the prima facie case and perhaps attempted to do so in *Texas Department of Community Affairs v. Burdine*,[114] but failed to do so. The easily satisfied prima facie case seems to be the reason that many courts have imposed an additional background circumstances requirement in reverse discrimination cases; the light prima facie case does not support an inference of prohibited discrimination against a plaintiff who is not a member of a group against which there has been a history of discrimination.[115]

A federal court of appeals recently expressed the futility and frustration of the *McDonnell Douglas* prima facie case:

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[110] In Desert Palace v. Costa, for example, the issue that got the case to the Supreme Court was the plaintiff's argument that she was entitled to a mixed-motives jury instruction, notwithstanding the lack of direct evidence.

[111] Professor Katz agues that this is wrong because, when pretext is properly understood and used, a plaintiff is not required to choose pretext or mixed motives. *See* Katz, *Reclaiming, supra* note 108, at 166. Professor Katz and I actually do not disagree on this because he says that those who argue that a mandatory *McDonnell Douglas* is dead are correct. *Id.* at 167. My point is that leaving *McDonnell Douglas* as a viable proof structure makes it more meaningful and influential procedurally than it should be.

[112] *See* St. Mary's Honor Ctr. v. Hicks, 505 U.S. 502, 515 (1993); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2245-50 (1995).

[113] *See, e.g.,* Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?* 12 LAB. LAW. 371, 377-78 (1997).

[114] 450 U.S. 248 (1981).

[115] *See, e.g.*, Sullivan, *Circling*, *supra* note 39, at 1061-65.

> Much ink has been spilled regarding the proper contours of the prima-facie-case aspect of *McDonnell Douglas*. But as we read the Supreme Court precedents . . . the prima facie case is a largely unnecessary sideshow. It has not benefited employees or employers; nor has it simplified or expedited court proceedings. In fact it has done exactly the opposite, spawning enormous confusion and wasting litigant and judicial resources.[116]

A rejoinder to the futility of the prima facie case is that it forces an employer, which generally may fire employees at will, to offer a legitimate, nondiscriminatory reason for an adverse employment action, thus giving the plaintiff a "target."[117] The short answer to this is that, regardless of employment at will, almost every employer that is sued for discrimination offers a legitimate, nondiscriminatory reason, and this would be true without stages one and two of the pretext proof structure.

While part two of the pretext analysis, legitimate, nondiscriminatory reason, has not been very problematic, the long-running debate about part three demonstrates another problem with the analysis. The pretext-only/pretext plus debate was waged in law review articles and Supreme Court decisions.,[118] The Supreme Court eventually in *Reeves v. Sanderson Plumbing Products, Inc*. left us with no categorical answer: that is, the Court said that evidence of pretext ordinarily would be enough to survive summary judgment and judgment as a matter of law, but not necessarily always.[119] One may think that we

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[116] Brady v. Office of the Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008).
[117] *See* Katz, *Reclaiming*, *supra* note 108, at 183.
[118] *See generally* Catherine J. Lanctot, *The Defendant Lies and Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule In Employment Discrimination Cases*, 43 HASTING L.J. 57 (1991); Deborah A. Calloway, St. Mary's Honor Center v. Hicks: *Questioning the Basic Assumption*, 26 CONN. L. REV. 997 (1994).
[119] 530 U.S. 133 (2000).

can live with the *Reeves* interpretation of the third stage, but problems remain with the meaning and effect of pretext.

In the end, Congress should reject a merged proof structure or the preservation of pretext as a proof structure because 1) the two proof structures have a history of operating as two different analyses and cannot be blended effectively; and 2) there are enough problems with the pretext analysis that it should not be retained.

3. Congress Should Adopt One Statutory Proof Structure Applicable to All Disparate Treatment Cases

The issue all along has been what must a plaintiff do to prove that employment discrimination occurred because of race, sex, etc. The Supreme Court and lower courts have addressed this issue in terms of standards of causation. Congress installed a statutory standard in the 1991 Act: "motivating factor." The second stage of the analysis provides that employers may avail themselves of the same-decision defense, which if the defendant is successful, will limit remedies, eliminating all monetary remedies to the plaintiff. If Congress were to follow my recommendations and eliminate the pretext proof structure and choose to establish one statutory proof structure for all disparate treatment cases, the current statutory mixed-motives structure seems to be a good starting point. Because it is itself a modification of the *Price Waterhouse* mixed-motives analysis, courts have experience applying it. But before recommending that Congress simply amend the statute to say 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. Thus, Congress should consider modifications to the current statutory proof structure.

a. Congress Should Consider the Standard of Causation in the Plaintiff's Prima Facie Case

When Congress passed the 1991 Act it chose "motivating factor" as the standard of causation from the *Price Waterhouse* plurality opinion rather than "substantial factor" from Justice O'Connor's *Price Waterhouse* concurrence. Does the express abrogation of pretext and adoption of a unified proof structure call for the adoption of a different and more demanding standard of causation, such as substantial factor? That is a policy question for Congress, but I think the best answer is for Congress to stay with "motivating factor" for at least two reasons. First, Congress should not amend the employment discrimination statutes to make it harder for plaintiffs to recover. The data indicates that employment discrimination cases are harder for plaintiffs to win than most other civil litigation.[120] Second, the second stage of the statutory mixed-motives proof structure, the same-decision defense, incorporates a but-for causation standard (with the burden on the defendant) for the purpose of limiting liability.[121] Thus, the current analysis has a lenient causation standard at the first stage and a more stringent standard at the second stage. These causation standards should be maintained.

b. Congress Should Change the Effect of the Same-Decision Defense

Under *Price Waterhouse*, the same-decision defense at stage two was a complete defense to liability. In the 1991 Act, Congress changed that and made it more favorable

[120] *See, e.g.*, Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001).
[121] Katz, *Unifying*, *supra* note 97, at 658.

to plaintiffs by making same decision a limitation on remedies rather than a complete defense. However, the limitation on remedies is substantial, leaving the plaintiff without any money if the defendant prevails on same decision. When the mixed-motive proof structure was applicable to only a subset of disparate treatment cases, that significant limitation was perhaps not so troublesome, and after all, Congress had modified it from a complete defense. As the next step in the evolution of proof structures, as Congress makes mixed motives the only proof structure applicable in disparate treatment cases, Congress needs to alter the same-decision defense. What should be the effect when a plaintiff proves that a protected characteristic was a motivating factor and the defendant proves that the characteristic was not a but-for cause? Congress could reduce the remedy limitation, making it possible for a plaintiff to recover a monetary remedy. I recommend one of two possibilities: 1) the same-decision defense cuts off compensatory and punitive damages and injunctive relief of reinstatement (instatement, promotion, etc.) and front pay, but not backpay; or 2) the same-decision defense cuts off punitive damages and injunctive relief such as reinstatement, but not backpay and compensatory damages. I favor the second of these options because the remedy for disparate treatment should provide make-whole relief for wages lost and compensation for emotional distress injuries. This is the result that seems most consistent with the 1991 Act's enhancing of the remedies available under Title VII and the ADA by providing for damages (subject to a cap). Yet another possibility for modifying the same-decision defense may stem from legislation that already has been introduced in Congress. The proposed Civil Rights Act of 2008[122] would remove the damage caps created by the 1991 Act.[123] If that were to

[122] H.R. 2159 110th Cong. (2008); S. 2554, 110th Cong. (2008). *See Democrats Introduce Wide-Ranging Bill to Bolster Employment Rights and Remedies*, Daily Lab. Rep. (BNA) No. 17, at A-3 (Jan. 28, 2008).

become the law generally, Congress could modify the same-decision defense to provide that when the defendant satisfies it, the cap on compensatory and punitive damages would become applicable.[124]

c. Congress Should Adopt the Modified Mixed-Motives Structure for All Cases (and Not Modify it for Reverse Discrimination Cases)

The issue of whether and how to modify the proof structure in disparate treatment reverse discrimination cases is important and contentious. As discussed above, courts and others on both sides of this issue can become exorcised.[125] Indeed, this is an issue on which employment discrimination law can look very unfair to the general public. Fortunately, by adopting a single proof structure based on the current mixed-motives analysis, this problem can be obviated. Courts have adopted the background circumstances requirement in large part because of the very easily satisfied prima face case of the *McDonnell Douglas* pretext analysis. The motivating factor standard (or substantial factor, if Congress so chooses) seems an adequate standard for all discrimination cases, traditional or reverse, with no need for background circumstances. Although background circumstances could perhaps be required under a motivating factor standard, there is no case law on this issue. Moreover, it is the specificity of the elements of the pretext structure that suggests the need for and accommodates the addition of background circumstances as an additional element. It is the nonspecificity of a

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[123] The caps are based on number of employees of the employer, and they apply to disability claims and Title VII claims seeking jury trials and damages under Section 1981a. 42 U.S.C. § 1981a. Race discrimination cases brought pursuant to Section 1981 are not subject to the caps.

[124] Because the caps of Section 1981a are not applicable to race discrimination claims seeking damages under Section 1981, this approach would require deciding whether to make race claims in which the defendant prevailed on the same-decision defense subject to the caps.

[125] *See supra* notes __-__ and accompanying text.

"motivating factor" standard that invites introduction of all relevant evidence but accommodates no additional elements.[126]

d. Congress Should Provide that the New Codified Proof Structure Applies to Disparate Treatment Claims Under All the Federal Employment Discrimination Laws

The idea that a *Price Waterhouse* version of the mixed-motives analysis applies to age discrimination claims under the ADEA is based on the fact that Congress in the 1991 Act did not amend the ADEA.[127] While the point is debatable, Congress should put it to rest by expressly providing that the one new proof structure applies to disparate treatment claims under Title VII, Section 1981, the ADEA, and the ADA. There is no reason why intentional discrimination cases should be analyzed differently under these statutes. Although the disparate impact analysis is a bit different under Title VII and the ADEA,[128] that is because the ADEA expressly provides for a different defense: "reasonable factors other than age" rather than business necessity/job relatedness. There is no reason in statutory language or policy that supports adopting a different proof structure for intentional discrimination cases. The Fifth Circuit addressed this issue in *Rachid v. Jack in the Box*[129] when it applied its modified *McDonnell Douglas* analysis to an age case, reasoning that any changes wrought by *Desert Palace v. Costa* were intended by the Court to apply equally to the

[126] For example, the Third Circuit recently held that a plaintiff in a mixed-motives case must prove that he has the basic qualifications for the job. *See* Makky v. Chertoff, No. 07-3271, ___ F.3d ___, 2008 WL 3091785 (3d Cir. Aug. 7, 2008). While recognizing the relevance of that evidence to the claim, the court stated that it did not need to decide whether a mixed-motives plaintiff must prove each of the elements of a *McDonnell Douglas* prima facie case.
[127] *See, e.g.,* Katz, *Unifying, supra* note 97, at 666-80.
[128] *See* Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395 (2008).
[129] 376 F.3d 305 (5th Cir. 2004).

ADEA. The similarity in language and purpose among the discrimination statutes should provide Congress adequate reason to make one proof structure applicable to all. If more reason is needed, simplicity and economy should be considered desirable bonuses. Employment discrimination law is complicated enough.

C. Fixing Disparate Impact

The Supreme Court has described disparate treatment as the most easily understood type of discrimination. This suggests that disparate impact is not as easily understood. Nor is it as easily fixed. Controversial from its origins, it has remained so, even after codification by the Civil Rights Act of 1991. It has been suggested recently that development of disparate impact may have been a mistake that stunted the development of a more robust disparate treatment theory.[130] While it is interesting to ponder whether disparate impact should have been recognized and query how effective it is today, my task is repairing the proof structure, not abrogating the theory. First, even if we concluded that disparate impact either has too many problems or is not sufficiently effective in practice to justify repairs, one can only imagine the political firestorm that would be generated by a proposal to legislatively abolish disparate impact. Although firestorms are sometimes needed, the damage wrought by this one would be too great. Generally, it would be seen as retrenchment in U.S. employment discrimination law, and that is too large a price to pay. Moreover, it is worth noting that many other nations and international organizations recognize the disparate impact theory of discrimination, and

[130] *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006)

"[t]he international marketplace of legal ideas provides a means of testing the value of a concept."[131]

One more matter before moving to repairing the three parts of the disparate impact proof structure: Should Congress provide that disparate impact is not applicable in cases of reverse discrimination? It is tempting to recommend this because the theory was explained by the Court in *Griggs v. Duke Power Co.* as knocking down artificial barriers intended to keep out those against whom discrimination has been practiced historically.[132] On balance, however, Congress should resist the temptation to limit disparate impact's applicability to traditional discrimination cases. First, disparate impact is controversial enough as it is, raising concerns about affirmative action and quotas. One of the most divisive things that can be done is to flaunt that employment discrimination law is not always status blind or "color blind." Although that clearly is true, it is an unpopular idea.[133] Thus, limiting disparate impact likely would harm the "moral authority" of employment discrimination law in the view of the public. Second (and a related point), because it is so divisive, the restriction of disparate impact to traditional discrimination claims is not politically feasible. Congress should not do it because it is too controversial to pass, and even raising it could jeopardize other needed repairs discussed herein. Third, there is the concern, at least, that such a restriction would be

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[131] Rosemary C. Hunter & Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept*, 19 BERKELEY J. EMP. & LAB. J. 108, 111 (1998). Although the disparate impact theory of discrimination is "an American innovation," it has spread and been incorporated in the law of many other individual nations, directives of the European Union, and conventions of the International Labour Organization. *See id.*

[132] 401 U.S. 424, 429-30 (1971). *See., e.g.*, Sullivan, *The World*, *supra* note 67, at 1506 ("[T]here was at least something odd about using disparate impact to remove barriers to the employment of, say, whites.")

[133] *See* Sullivan, *The World*, *supra* note 67, at 1506 (describing "resistance to an unbalanced application of the theory [as] reflect[ing] the increasingly reflexive colorblindness in our law and society, manifested by the present aversion to affirmative action").

unconstitutional.[134] At a minimum, the limiting of disparate impact to traditional discrimination cases would be constitutionally challenged. Whether it withstood the challenge, the public debate on this controversial and misunderstood issue would impugn employment discrimination law.

1. Harmonizing Title VII and ADEA Differences

An initial matter to note here is to specify differences that may exist in the Title VII and the ADEA versions of disparate impact, whether statutory or case law developed differences. There may be a difference in the prima facie cases of the Title VII version and the ADEA version, and there is a statutory distinction in the defenses.

If the prima facie cases are different, it is a difference developed in the case law. When the Supreme Court recognized the applicability of disparate impact to age discrimination in *Smith v. City of Jackson*, the Court stated that, because the Civil Rights Act of 1991 did not amend the ADEA, it is the pre-1991 *Wards Cove* version of disparate impact that applies under the ADEA.[135] What that meant was not at all clear. The Court revisited that statement in its decision in *Meacham v. Knolls Atomic Power Lab*., in which the Court explained the Smith statement as relating to "a plaintiff-employee's burden of identifying which particular practice allegedly cause an observed disparate impact."[136] Curiously, although the Civil Rights Act of 1991 amended Title VII to overturn some parts of *Wards Cove*,[137] the Act seems to preserve the requirement that a

[134] *Id. passim*.
[135] 544 U.S.228, 240 (2005).
[136] 128 S. Ct. 2395, 2404 & 2405-06.
[137] I say "parts" rather than holdings because the parts of *Wards Cove* regarding the defense of business necessity and job relatedness overturned by the 1991 Act appear to be dicta.

plaintiff identify a specific practice.[138] Thus, the meaning of the reference to the *Wards Cove* version of disparate impact in *Smith v. City of Jackson* was not effectively clarified in *Meacham*. The Court also explained in *Meacham* that the statement about *Wards Cove* may have referred to the fact that disparate impact under the ADEA is narrower than under Title VII.[139] As the Court points out in *Smith*, however, ADEA disparate impact theory is rendered narrower by the Court's interpretation of the reasonable-factors-other-than age defense as being less onerous for defendants to satisfy than the business necessity/job relatedness defense of Title VII.[140] Ultimately, I see no reason for Congress to differentiate between the prima facie case for disparate impact under the ADEA and Title VII. If Congress agrees with the Supreme Court's statements in *Smith* and *Meacham* that disparate impact is meant to be narrower under the ADEA than under Title VII, that result can be maintained by leaving in place the Court's statements regarding the comparative stringency of the defenses.

The other difference between disparate impact under Title VII and the ADEA is the defense. Under Title VII, it is business necessity/job relatedness, and under the ADEA it is reasonable factors other than age (RFOA). This is established in the express language of the statutes. The Supreme Court pointed out this difference in *Smith v. City of Jackson*[141] and *Meacham v. Knolls Atomic Power Laboratory*[142] in explaining that plaintiffs will have more difficulty prevailing on disparate impact under the ADEA than under Title VII. If Congress wishes to change this result, it could amend the ADEA to

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[138] "An unlawful employment practice based on disparate impact is established under this title only if—(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact . . . ." 42 U.S.C. § 2000e-2(k)(1)(A)(i).
[139] *Meacham*, 128 S. Ct. at 2404.
[140] *Smith*, 544 U.S. at 1544-45.
[141] 544 U.S. 228 (2005)
[142] 128 S. Ct. 2395 (2008).

replace the RFOA defense with the same revamped business necessity defense that I describe below for Title VII. However, if Congress agrees that it should be more difficult to win disparate impact claims under the ADEA, it should leave the RFOA defense as is. My guess is that there would be political pressure to harmonize the proof structures, both because there are powerful lobbying interests that support legislation protecting older persons, and because the reason for the distinction is not obvious. Simplicity and "nondiscrimination" favor a uniform proof structure. Thus, I recommend that Congress repeal the RFOA defense and replace it with the new business necessity defense that I recommend for Title VII.

2. Fixing the Three Parts of the Prima Facie Case

The three parts of the prima facie case fit together as follows: 1) particular employment practice 2) causes 3) a disparate impact. The first and last elements are problematic, but it seems to me that the last one is the one Congress needs to repair. As to the first element, Congress could change the requirement that the plaintiff identify a "particular" employment practice, but I think there are few good legislative solutions. What constitutes a sufficiently specific practice has been challenging in Title VII cases as well as in ADEA cases. For example, in *EEOC v. Joe's Stone Crab*, a Title VII sex discrimination case, the majority and dissent disagreed about whether the employer's hiring procedure constituted a particular employment practice.[143] In *Smith v. City of Jackson*, the Supreme Court, while recognizing the applicability of disparate impact to age discrimination, held that the city's pay plan designed to give larger raises to less senior police officers was not a "specific test, requirement, or practice within the pay plan

[143] 220 F.3d 1263 (11th Cir. 2000).

that has an adverse impact on older workers."[144] This uncertainty and caution regarding what constitutes a specific employment practice may be traceable to the Court's grudging holding in *Watson v. Fort Worth Bank & Trust* that disparate impact applies to subjective practices as well as objective practices and criteria,[145] and the holding in *Wards Cove* that plaintiffs must link a particular practice with the impact it causes and may not attack a bundle of practices.[146]

I don't recommend that Congress do anything to modify the requirement of plaintiffs identifying a particular employment practice. Congress could eliminate the requirement of identifying a particular practice and even repeal the exception, thus permitting plaintiffs to target a bundle of practices. However, Congress was not so inclined in 1991, even when overturning most of *Wards Cove*, and I doubt it will be now.

The part of the prima facie case that needs clarification is the third part. In what group must disparate impact be established? The question raised by *Livingston v. Roadway Express*[147] needs to be answered. Is a plaintiff required to prove an impact manifested in the employer's workforce? Or is it sufficient for a plaintiff to prove that a practice would produce a disparate impact in a group that could apply for and hold the job at issue—a hypothetical labor pool from the general population?[148] The answer should be the latter under the reading of *Connecticut v. Teal* that I advocate, although *Teal* might be read more narrowly. I think Congress should add language to the proof structure to state that the practice must cause a disparate impact manifested in the actual

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[144] *Smith*, 544 U.S. at 241.
[145] 487 U.S. 977, 991 (1988).
[146] This was codified in the 1991 Act, with an exception if the plaintiff proves that the decision making process cannot be separated for analysis. *See* 42 U.S.C. §2000e-2(k)(1)(B)(i).
[147] 802 F.2d 1250 (10th Cir. 1986).
[148] *See* Perry, *supra* note 66, at 564-70.

workforce or in the actual or an alternative relevant labor pool. Congress could refer to *Livingston* and reject the holding of the case.

3. Fixing the Defense of Business Necessity/Job Relatedness

It is not obvious that a major repair is needed here as courts have worked fairly well with what they were given. However, Congress handled it so badly in the 1991 Act that the defense should be repaired. Rather than explaining the meaning of job relatedness and business necessity, Congress included a section in the Act that referred to an interpretive memorandum for all standards referring to *Wards Cove*.[149] That memorandum provides that "[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*." With this statutory language, some have even argued that the 1991 Act did not change the *Wards Cove* version of the affirmative defense.[150] Congress can and should provide more clarity than this.

The first problem with the business necessity/job relatedness defense is easily fixed. Job related should be dropped. Business necessity is the more rigorous standard, and usually it includes job relatedness. There may be some employment practices that satisfy business necessity, but not job relatedness. For example, a court may conclude that a nonfraternization or antinepotism policy is a business necessity, although such a policy may not be job related in a strict sense. Still, Congress should simplify this

[149] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, §105, 105 Stat. 1071, 1075 ("No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to *Wards Cove*--Business necessity/cumulation/alternative business practice.").
[150] *See* Michael Garvin, *Disparate Impact Claims Under the New Title VII*, 68 NOTRE DAME L. REV. 1153 (1993).

standard by deleting job relatedness. Most of the case law deals with the issue of business necessity, not job relatedness.

The second problem is the uncertainty of what business necessity means—how to define it. At one end of the spectrum is a rigorous (harder-to-satisfy) standard—a practice is a business necessity if it is or determines "minimum qualifications that are necessary for the successful performance of the job in question successfully."[151] At the other end is a less rigorous (more easily satisfied) standard such as the one articulated in *Wards Cove*—"serves, in a significant way, the legitimate employment goals of the employer."[152] As judges and commentators have explained, there was no settled definition for business necessity standard before *Wards Cove*.[153] A dissenting judge in *Lanning v.* v. *Southeastern Pa. Transportation Authority* described the standard as variable, depending on the nature of the job, with employers benefiting from the more deferential standard particularly in jobs involving safety issues.[154] Arguments can be made for any of the definitions of business necessity and for leaving the courts the flexibility to apply a sliding scale to different types of jobs. Although this problem is not a catastrophic failure, Congress should repair what it mishandled in 1991. I recommend that Congress adopt the stringent standard for business necessity. Although that standard may not seem to give adequate deference to the judgment of employers in some types of jobs, which the sliding scale can accommodate, the next recommendation that I make

[151] Lanning v. Southeastern Pa. Transp. Auth., 181 F.3d 478, 490 (3d Cir. 1999).
[152] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989).
[153] *See, e.g.*, Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C.L. REV. 1479, 1485 (1996); Perry, *supra* note 66, at 581-85.
[154] *Lanning*, 181 F.3d at 499-500 (Weiss, J., dissenting).

below, regarding alternative employment practices, should soften the blow and ameliorate that concern.

4. Fixing Alternative Employment Practice

It is difficult to conceptualize how a court meaningfully and sensibly can evaluate business necessity without taking into account the prospect of alternative practices. Particularly under a stringent standard of business necessity, how can one determine that a practice is necessary unless one considers possible alternative practices? For example, in *Fitzpatrick v. City of Atlanta*, after deciding that the clean-shaven policy was a business necessity for firefighters, the Eleventh Circuit gave short shrift to the plaintiff's argument that a shaving clinic, permitting shadow beards, was an alternative employment practice.[155] The court explained that alternative employment practice necessarily was intertwined with business necessity: "As we have explained above in addressing the City's business necessity defense, the firefighters have failed to create a genuine issue that shadow beards are safe."[156]

Curiously, the unusual drafting of the provision codifying disparate impact in the Civil Rights Act of 1991 does not even seem to create a three-part proof structure: it provides that a defendant is liable if a plaintiff establishes a prima facie case unless a defendant "demonstrate(s)" business necessity and job related *or* the plaintiff proves alternative employment practice.[157] It is confusing, but Congress should amend Title VII to provide that alternative employment practices is a factor to be taken into account in evaluating business necessity.

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[155] Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993).
[156] *Id.* at 1122.
[157] 42 U.S.C. § 2000e-2(k)(1)(A)(i)-(ii).

There is more that Congress might do with alternative employment practice, but I do not recommending doing more. For example, it is understood that the alternative practice should be less discriminatory and still accomplish the employer's objective. This raises two salient issues: 1) How much less discriminatory must the alternative practice be?; and 2) How effective must the alternative be in accomplishing the employer's objective (*i.e.*, Must it be equally effective)? Although these are important issues under alternative employment practice, I think they are difficult to address in legislation and should be left to courts to work out.

IV. CONCLUSION

The proof structures of disparate treatment (pretext and mixed motives) and disparate impact form the engine of employment discrimination law. They are used to draft pleadings, to conduct discovery, to move for summary judgment, to organize evidence for presentation at trial, to move for judgment as a matter of law, and to craft jury instructions. Although these analyses are primarily about evidence and procedure, they have become the focal point of discrimination law and have shaped how we think about the substance of discrimination "because of" protected characteristics. Over the life of employment discrimination law, the proof structures have evolved and been modified by the Supreme Court, the lower courts, and Congress. Congress last intervened to fix the proof structures when it passed the Civil Rights Act of 1991. Since that time, many issues have developed that have left the proof structures sputtering. It is now so bad that judges do not know how to analyze motions for summary judgment or properly instruct juries. It is time for Congress to step in again and fix employment discrimination law. No repair could be more important than a thorough checking and

servicing of the proof structures. With that repair, employment discrimination law will be good for many more miles. While considering a number of changes to employment discrimination law, Congress should focus on job #1—fixing the engine.