

REVITALIZING STATE EMPLOYMENT DISCRIMINATION LAW

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INTRODUCTION

Over the past few decades, federal discrimination law has become captive to an increasingly complex web of analytical frameworks.¹ The courts have been unable to articulate a consistent causation or intent standard for federal law or to provide a uniform account of the type of injury the plaintiff is required to suffer.² Part of this failure is demonstrated in the ever-increasing rift between how courts construct the discrimination inquiry for federal age discrimination claims and claims based on other traits, such as sex and race.³

Unfortunately, the courts are unnecessarily taking state employment discrimination claims into this federal morass. When considering state claims, courts often construe state statutes to adhere to federal standards without any principled basis for doing so.

This Article makes three central contributions. First, it describes how complex frameworks mold the federal discrimination inquiry. Second, it provides a historical narrative regarding the development of state employment discrimination law. This narrative demonstrates that much of the

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¹ See, e.g., William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. REV. 81, 82-83 (2009); Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857, 858-59 (2010); Deborah C. Malamud, *The Last Minuet: Disparate Treatment after Hicks*, 93 MICH. L. REV. 2229, 2229 (1995); Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 314 (2010); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 912 (2005); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse Is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1891 (2004).

² See, e.g., *Cooper v. United Parcel Serv., Inc.*, 368 F. App'x. 469, 473-74 (5th Cir. 2010) (per curiam) (indicating that a plaintiff must establish an adverse employment action to prevail); *Lee v. Dep't of Veterans Affairs*, 247 F. App'x 472, 477 (5th Cir. 2007) (per curiam) (indicating that plaintiff must be subjected to an ultimate employment action to proceed on discrimination claim); Zimmer, *supra* note 1, at 1890-91, 1893 (discussing whether single-motive and mixed-motive claims require separate analysis). At times, the courts have narrowly construed the federal statutes, only to have Congress respond by amending key statutory language. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93-95 (2003) (discussing history of judicial and congressional development of mixed motive).

³ See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176-77 (2009) (holding that ADEA requires plaintiff to establish but-for causation and noting that Title VII does not); *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (discussing how ADEA disparate impact claims differ from Title VII claims).

precedent used to justify importing federal standards to state claims should not apply to many of the cases in which it is used. It also shows that there are fundamental differences between state and federal statutes that militate in favor of interpreting them differently. Finally, the Article demonstrates how state law could become a model for further reform of federal antidiscrimination statutes.

Interpreting state statutes in tandem with federal law creates state regimes that are unmoored from their statutory language and ignores key differences between federal and state protections. More importantly, the ongoing dialogue regarding causation and harm is largely driven by underlying assumptions about whether discrimination is still happening, about how it manifests itself, and about how and whether society should address such concerns.⁴ The proof structures the courts have designed to think about these issues in the federal context frame the discrimination inquiry narrowly and are procedurally confusing. Ignoring that states may have different preferences raises serious concerns about the proper role of federalism in employment discrimination law.

Importantly, if courts would look at the way state statutes are constructed, they could discover a more elegant, unified way of considering discrimination claims, a way not marred by the recent disarray of federal law. Many states chose to prohibit discrimination along a myriad of protected traits within one statutory regime. Further, many state employment discrimination statutes address not only employment, but also other areas such as fair housing.⁵

The Article is organized in the following manner. Part I discusses the increasingly fractured nature of federal employment discrimination law. Part II provides an overview of the structure and text of state employment discrimination regimes, highlighting prominent differences between state and federal law. Part III describes how state law has been drawn into the federal frameworks. Part IV discusses ways to avoid this problematic interpretation, while Part V describes how state law could create an alternative to the federal structure, one that may convince courts that the federal frameworks are unnecessary.

I. THE FRACTURED DEVELOPMENT OF FEDERAL EMPLOYMENT DISCRIMINATION LAW

Federal employment discrimination law is centered on three statutes: Title VII of the Civil Rights Act (“Title VII”), the Age Discrimination in Employment Act (“ADEA”), and the Americans with Disabilities Act

⁴ See generally *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (expressing belief that in twenty-five years, racial preferences will not be necessary).

⁵ See *infra* note 115.

(“ADA”).⁶ Over time, numerous fractures have developed within federal employment discrimination law.⁷ Two of these fractures are relevant to this discussion. First, over the past forty years, the courts have struggled with developing a consistent framework for analyzing claims.⁸ Second, the courts have inconsistently defined the level of harm needed to bring a federal claim.⁹ This Part first addresses the development of Title VII, the ADEA, and the ADA, then continues by discussing the central fractures in federal employment discrimination law.

A. *Title VII, the ADEA, and the ADA*

In 1964, Congress enacted Title VII, which prohibits discrimination on the basis of race, color, religion, national origin, and sex.¹⁰ During the debate regarding Title VII, Congress considered adding age as one of the protected classes.¹¹ Rather than add age to Title VII, Congress instead directed Secretary of Labor Willard Wirtz to report back to Congress on the causes and effects of age discrimination in the workplace and to propose remedial legislation.¹²

Wirtz’s report to Congress recognized that age discrimination existed and proposed that Congress prohibit it.¹³ However, the Wirtz Report also made two observations about age discrimination that are important. First, Wirtz concluded that unlike discrimination based on race or other protected traits, age discrimination was typically not a result of animus or intolerance.¹⁴ Rather, the most problematic type of discrimination facing older workers was unsupported assumptions about the effect of age on ability.¹⁵ Second, Wirtz also noted that many legitimate factors used to make employment decisions correlate with age.¹⁶ These factors include declining health among older workers; lack of skills or educational credentials re-

⁶ 42 U.S.C. § 2000e-2(a) (2006) (Title VII’s primary operative provisions); 29 U.S.C. § 623(a) (2006) (same for ADEA); 42 U.S.C. § 12112(a)-(b) (same for ADA). Race discrimination claims can also be pursued under 42 U.S.C. § 1981; however, this statute is not a major driver of the federal frameworks and will not be discussed further.

⁷ See *Smith*, 544 U.S. at 240; see also *infra* Part I.B.

⁸ See *infra* Part I.B.

⁹ See *infra* text accompanying note 216.

¹⁰ Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-57 (codified at 42 U.S.C. §§ 2000e-2 to -17).

¹¹ See *Smith v. City of Jackson*, 351 F.3d 183, 203 n.8 (5th Cir. 2003) (Stewart, J., concurring in part and dissenting in part) (explaining history of ADEA), *aff’d*, 544 U.S. 228 (2005).

¹² See *Smith*, 544 U.S. at 232.

¹³ See *Smith*, 351 F.3d at 194.

¹⁴ See *id.* at 193.

¹⁵ *Id.*

¹⁶ *Smith*, 544 U.S. at 259 (O’Connor, J., concurring).

quired for jobs; and an outdated skill set caused by rapid technological advances.¹⁷

When Congress enacted the ADEA, it used primary operative provisions that were similar to those in Title VII.¹⁸ While the main provisions of Title VII and the ADEA are similar, two distinctions warrant mention. First, the ADEA contains the so-called “RFOA provision,” which specifically allows employers to take actions as long as the actions are based on a “reasonable factor other than age.”¹⁹ Second, the remedies provisions of the ADEA are drawn from the Fair Labor Standards Act (“FLSA”), making the ADEA an interesting hybrid of Title VII and the FLSA.²⁰

In 1990, Congress enacted the ADA.²¹ The ADA prohibits “discriminat[ion] against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”²² It then further defines discrimination in a separate subsection, containing seven separate definitional sections.²³

B. *Fractures Develop in Key Areas of Federal Law*

In 1971, the Supreme Court interpreted Title VII to allow plaintiffs to assert discrimination based on disparate impact,²⁴ reasoning that Title VII prohibited not only intentional conduct, but policies and practices that created “built-in headwinds” to the hiring of black employees.²⁵ The Court, in *Griggs v. Duke Power Co.*,²⁶ recognized disparate impact discrimination and developed a rudimentary framework for analyzing those claims.²⁷

Over the next two decades, the courts struggled with the appropriate framework for analyzing disparate impact cases, largely focusing on how the plaintiff would be allowed to establish a causal link between a facially

¹⁷ *See id.*

¹⁸ The ADEA makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age” or “to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age.” 29 U.S.C. § 623(a) (2006); *see also* 42 U.S.C. § 2000e-2(a) (2006) (Title VII’s primary operative provisions).

¹⁹ *See Smith*, 544 U.S. at 239 (plurality opinion) (discussing the RFOA provision).

²⁰ *See Lorillard v. Pons*, 434 U.S. 575, 578 (1978).

²¹ *See* 42 U.S.C. § 12112(a).

²² *Id.*

²³ *Id.* § 12112(b).

²⁴ *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429-32 (1971).

²⁵ *Id.* at 432 (internal quotation marks omitted).

²⁶ 401 U.S. 424 (1971).

²⁷ *Id.* at 431.

neutral policy and a protected trait and how a defendant would be able to defend against such claims.²⁸ In the late 1980s, the Court modified the test to be applied to disparate impact claims in two cases, *Watson v. Fort Worth Bank & Trust*²⁹ and *Wards Cove Packing Co. v. Atonio*.³⁰ In *Watson*, the Court (in a portion of Justice Sandra Day O'Connor's opinion joined by a plurality)³¹ indicated that to prove a disparate impact "[t]he plaintiff must . . . identify[] the specific employment practice that is challenged" and must establish statistical evidence of a kind and degree sufficient to show that the protected class caused the disparity.³² The burden of production then shifts to the defendant to show "that its employment practices are based on legitimate business reasons."³³ Once the defendant meets this burden, the plaintiff can prevail by showing that other tests could have been used that would not create the same disparity.³⁴ A year later, in *Wards Cove*, a five-Justice majority largely reaffirmed the *Watson* plurality's interpretation of the requirements for proving disparate impact.³⁵

Unhappy with the court-created structure, Congress amended Title VII in 1991.³⁶ The 1991 amendment allows a plaintiff to prevail on a disparate impact claim if the plaintiff establishes that a specific practice causes a disparate impact based on a trait protected by Title VII.³⁷ The employer has an affirmative defense to liability, if it can establish that a "practice is job related for the position in question and consistent with business necessity."³⁸ However, even if the defendant establishes this affirmative defense, the plaintiff may prevail by proving that the employer could have adopted alternate practices that would not result in a disparate impact.³⁹

When Congress amended Title VII, it did not make similar changes in the ADEA or the ADA.⁴⁰ In 2005, the Supreme Court held that disparate impact claims were cognizable under the ADEA.⁴¹ However, it chose to create a different analytical structure for these cases. The Court's fracturing

²⁸ See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); see also *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988) (plurality opinion).

²⁹ 487 U.S. 977 (1988).

³⁰ 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074.

³¹ Justice Sandra Day O'Connor wrote the majority opinion and was joined by Chief Justice William Rehnquist, Justice Byron White, and Justice Antonin Scalia regarding the portion being discussed. *Watson*, 487 U.S. at 982.

³² *Id.* at 994 (plurality opinion).

³³ *Id.* at 998.

³⁴ *Id.*

³⁵ *Wards Cove*, 490 U.S. at 656-57.

³⁶ See 42 U.S.C. § 2000e-2(k) (2006).

³⁷ See *id.* § 2000e-2(k)(1)(B).

³⁸ See *id.* § 2000e-2(k)(1)(A)(i).

³⁹ See *id.* § 2000e-2(k)(1)(A)(ii).

⁴⁰ *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005).

⁴¹ *Id.*

of Title VII and the ADEA centered on three rationales. First, the Court indicated that Congress had not amended the ADEA to include the Title VII disparate impact structure, second, that the RFOA provision in the ADEA required a different analysis, and third, that the Wirtz Report demonstrated that ADEA claims should not work in the same way Title VII claims did.⁴²

In the post-*Smith* ADEA disparate impact analysis, the first step is the same as the analysis for Title VII claims prior to the 1991 amendments; however, in the second step an employer must establish that the challenged practice was based on a reasonable factor other than age.⁴³ The employee may not prevail on an ADEA disparate impact claim by establishing the existence of alternative practices.⁴⁴ The Court has not determined how disparate impact claims would proceed under the ADA.⁴⁵

The courts developed a separate way of thinking about disparate treatment claims. The early Title VII cases involving disparate treatment were often based on employer decisions that were explicitly race- or gender-based.⁴⁶ These claims of facially discriminatory policies later became grouped into a type of individual disparate treatment case referred to as a direct evidence case.⁴⁷ The courts tended to use simple formulations in

⁴² *Id.* at 240-41.

⁴³ *See id.* at 242; *see also* Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 100-02 (2008) (clarifying that employer's burden at second step is one of both production and persuasion).

⁴⁴ *Smith*, 544 U.S. at 243.

⁴⁵ Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 75 (2011).

⁴⁶ *See, e.g.*, Vogler v. McCarty, Inc., 294 F. Supp. 368, 374-75 (E.D. La. 1968) (alleging that employer engaged in discrimination by only hiring union members when the union itself engaged in discriminatory membership practices), *aff'd sub nom.* Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969); Weeks v. S. Bell Tel. & Tel. Co., 277 F. Supp. 117, 117 (S.D. Ga. 1967) (alleging that an employer had a policy of making gender a qualification for a switchman position), *aff'd in part, rev'd in part*, 408 F.2d 228 (5th Cir. 1969); Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781, 781 (E.D. La. 1967) (alleging discrimination based on company policy that required women to resign upon marriage).

⁴⁷ *See, e.g.*, Stone v. Autoliv ASP, Inc., 210 F.3d 1132, 1137 (10th Cir. 2000) (indicating that a company policy of discrimination constitutes direct evidence). Outside of the context of facially discriminatory policies, courts have had a difficult time defining direct evidence, and definitions regarding what constitutes direct evidence vary. While the definitions of these terms appears to vary slightly by circuit, direct evidence of discrimination can be described as “evidence, that, if believed, proves the existence of a fact in issue without inference or presumption . . . [and] is composed of only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of some impermissible factor.” *Rojas v. Florida*, 285 F.3d 1339, 1342 n.2 (11th Cir. 2002) (per curiam) (quoting *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir. 1999)). One court has described direct evidence as that which “essentially requires an admission by the employer,” and explained that “such evidence ‘is rare.’” *Argyropoulos v. City of Alton*, 539 F.3d 724, 733 (7th Cir. 2008) (quoting *Benders v. Bellows & Bellows*, 515 F.3d 757, 764 (7th Cir. 2008)). “A statement that can plausibly be interpreted two different ways—one discriminatory and the other benign—does not directly reflect illegal animus, and, thus, does not constitute direct evidence.” *Vaughn v. Epworth Villa*, 537 F.3d 1147, 1154-55 (10th Cir. 2008) (quoting *Hall v. U.S. Dep't of Labor*, 476 F.3d 847, 855 (10th Cir. 2007)).

evaluating direct evidence cases, essentially requiring a plaintiff to establish that a decision was taken because of a protected trait.⁴⁸

However, as these explicit policies and decisions became less common, the courts began to develop an alternate analytical structure for analyzing claims. In *McDonnell Douglas Corp. v. Green*,⁴⁹ the Supreme Court created a three-part, burden-shifting test for analyzing individual disparate treatment claims.⁵⁰ Under *McDonnell Douglas*, a court first evaluates the prima facie case, which requires proof that

(i) [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [plaintiff's] qualifications.⁵¹

The burden then “shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”⁵² If the defendant meets this requirement, the plaintiff can still prevail by demonstrating that the defendant’s reason for the rejection was a pretext for discrimination.⁵³

The underlying concern in the *McDonnell Douglas* line of cases is whether the plaintiff has enough evidence to establish that an employer made a decision based on a protected trait.⁵⁴ *McDonnell Douglas* did not frame this causal question as one in which both legitimate and discriminatory factors might be at work.⁵⁵ In the 1989 case of *Price Waterhouse v. Hopkins*,⁵⁶ the Supreme Court interpreted Title VII as allowing so called

⁴⁸ See, e.g., *Mach v. Will Cnty. Sheriff*, 580 F.3d 495, 499 (7th Cir. 2009); *Paz v. Wauconda Healthcare & Rehab. Ctr., LLC*, 464 F.3d 659, 666 (7th Cir. 2006) (noting that under the direct method of proving discrimination, the court should not use a burden-shifting framework).

⁴⁹ 411 U.S. 792 (1973).

⁵⁰ *Id.* at 802-03. Some circuits will allow a plaintiff to make a case of discrimination without resorting to *McDonnell Douglas*, if the plaintiff has “either direct or circumstantial evidence that supports an inference of intentional discrimination.” *Coffman v. Indianapolis Fire Dep’t*, 578 F.3d 559, 563 (7th Cir. 2009).

⁵¹ *McDonnell Douglas*, 411 U.S. at 802.

⁵² *Id.*

⁵³ *Id.* at 804. In *McDonnell Douglas* itself, the Court noted that the facts required to establish a prima facie case will necessarily vary, depending on the case. *Id.* at 802 n.13. In subsequent cases, the Court further considered how the *McDonnell Douglas* test would operate. See *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993); *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

⁵⁴ See Tristin K. Green, *Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CALIF. L. REV. 983, 1006-007 (1999).

⁵⁵ By using the term causation, this Author does not mean to imply causation as that term is often understood in the common law tort context. Rather, its use means that there is some link between the adverse action and a protected trait. As discussed in other work, it is difficult to force discrimination claims into a traditional tort model. See Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. (forthcoming 2013) (manuscript at 2, 15-16), available at <http://ssrn.com/abstract=2013453> (last revised Sept. 17, 2012).

⁵⁶ 490 U.S. 228 (1989).

“mixed-motive” claims.⁵⁷ The Court held that a plaintiff must establish that a protected trait played a motivating part in the employment decision.⁵⁸ The employer has the ability to avoid liability by proving an affirmative defense—that it would have made the same decision, even if it had not allowed the protected trait to play a role.⁵⁹

In 1991, Congress also amended Title VII to change the structure enunciated in *Price Waterhouse*.⁶⁰ Congress indicated that a plaintiff could prevail on a discrimination claim under Title VII by establishing that a protected trait played a motivating factor in an employment decision.⁶¹ Congress also created an affirmative defense, which, if proven, would be a partial defense to damages.⁶² However, the statutory language did not explain how this new “motivating factor” language fit with the existing frameworks for evaluating discrimination cases.

Over the next two decades, the Supreme Court decided two more cases that further fractured analysis in mixed-motive cases. While the Justices in *Price Waterhouse* agreed on many of the central contours of mixed-motive claims, they disagreed about whether the plaintiff would need to have direct evidence to proceed on a mixed-motive case.⁶³ After *McDonnell Douglas*, courts had started to develop a dichotomy between the analytical structures used for direct evidence cases and those used for cases with what the courts termed circumstantial evidence.⁶⁴ In *Desert Palace v. Costa*,⁶⁵ the Court held that the direct/circumstantial dichotomy would not be imported into the mixed-motive context under Title VII.⁶⁶ While the direct/circumstantial evidence dichotomy no longer exists for mixed-motive cases, some circuits have continued to use the dichotomy in single-motive cases.⁶⁷

The second case the Supreme Court resolved in the mixed-motive context involved the ADEA. When Congress added the “motivating factor” language to Title VII, it did not make similar changes to the ADEA or ADA.⁶⁸ The question arose whether mixed-motive claims were actionable

⁵⁷ *Id.* at 241-43 (plurality opinion).

⁵⁸ *Id.* at 244-45. For a description of how the same decision language was imported from constitutional claims, see Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 298-299 (2010).

⁵⁹ *Price Waterhouse*, 490 U.S. at 244-45 (plurality opinion).

⁶⁰ 42 U.S.C. § 2000e-2(m) (2006).

⁶¹ *Id.*

⁶² *Id.* As with the disparate impact framework, when Congress added the “motivating factor” language to Title VII, it did not make similar changes to the ADEA. Struve, *supra* note 58, at 288-90.

⁶³ *Price Waterhouse*, 490 U.S. at 271 (O’Connor, J., concurring) (noting that to get benefit of mixed-motive framework, plaintiff would be required to present direct evidence of discrimination).

⁶⁴ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 584 (2007) (Stevens, J., dissenting); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95 (2003).

⁶⁵ 539 U.S. 90 (2003).

⁶⁶ *Id.* at 101-02.

⁶⁷ *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 717-18 (6th Cir. 2006) (discussing confusion).

⁶⁸ Struve, *supra* note 58, at 290.

under the ADEA. In *Gross v. FBL Financial Services*,⁶⁹ the Supreme Court held that plaintiffs proceeding under the ADEA must prove that age was the “but for” cause of the alleged employment action.⁷⁰ The *Gross* decision fractured the discrimination inquiry even more, requiring the plaintiff to prove a stronger causal link in age cases than in cases under Title VII.

During this same time period, the courts were developing a fractured line of cases regarding the amount of harm a plaintiff would need to allege to state a cognizable claim. Through the development of *McDonnell Douglas*, the courts had inserted the words “adverse employment action” into the third prong of the prima facie case.⁷¹ While this wording was originally a substitute for specific enunciation of the kind of decision (e.g., termination or failure to promote), courts began to interpret the term “adverse employment action” as having greater significance.⁷² Some courts now hold that in order to make a viable claim under the employment discrimination statutes, a plaintiff must be able to establish that an action meets a certain threshold level of seriousness.⁷³ For example, in some circuits a discriminatory evaluation or lateral transfer will not be deemed serious enough to warrant federal protection.⁷⁴ There is currently a circuit split regarding what the threshold should be.⁷⁵

This threshold of harm disagreement is further exacerbated by the fact that the courts developed a separate language for talking about harm in the harassment context. In determining when harassment is sufficient to state a claim, the Supreme Court has held that “it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment.’”⁷⁶ Both the harassment and the disparate treatment standards are at odds with the standard the Supreme Court has enunciated in the Title VII retaliation context—that the challenged conduct is such that a reasonable person would be dissuaded from making a complaint.⁷⁷

⁶⁹ 557 U.S. 167 (2009).

⁷⁰ *Id.* at 176.

⁷¹ *See, e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002).

⁷² *See, e.g.*, *Watson v. Magee Women’s Hosp.*, 472 F. Supp. 325, 329-30 (W.D. Pa. 1979) (translating *McDonnell Douglas* test from failure to hire context by using concept of adverse employment action).

⁷³ *See, e.g.*, *Cooper v. United Parcel Serv., Inc.*, 368 F. App’x 469, 474 (5th Cir. 2010) (per curiam).

⁷⁴ *See id.* at 474.

⁷⁵ *See, e.g.*, *Lee v. Dep’t of Veterans Affairs*, 247 F. App’x 472, 477 (5th Cir. 2007) (per curiam) (holding that plaintiff must establish an ultimate employment action).

⁷⁶ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (alteration in original) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)); *see also* *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23 (1993).

⁷⁷ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006).

C. Causation, Harm, and Frameworks

The vast array of frameworks that the courts use to define how plaintiffs must establish claims have complicated federal law. While many of these frameworks grow out of the statutory language of the federal statutes, they also derive from those statutes' unique histories, as well as the choices the Supreme Court has made regarding how to piece together the purpose of the statutes and their legislative and textual history.⁷⁸ Underlying these frameworks are certain assumptions about discrimination itself. This Part explores the idea that the frameworks represent a set of choices about how to view discrimination and highlights the problems caused by their complexity.

As described in the prior Parts, the courts and Congress have developed one framework for dealing with disparate impact claims under Title VII and another for ADEA claims.⁷⁹ They have separated disparate impact claims and disparate treatment, and have also given disparate treatment claims a complex architecture.⁸⁰ In many circuits, this structure first requires courts to determine whether a discrimination claim is based on a single motive or mixed motives.⁸¹ If there is a single-motive case, the court must then determine whether the direct evidence framework is required or whether to use the *McDonnell Douglas* test.⁸² If the case is a mixed-motive one, the court can use the motivating factor structure for Title VII cases, but not for ADEA cases.⁸³

This complex architecture represents a narrow way of viewing discrimination claims that is, in many ways, largely unconnected to the changing face of discrimination. By dividing discrimination claims into disparate treatment claims and disparate impact claims, the courts have ignored that discrimination may result from a combination of unconscious bias and traditionally conceived intentional bias,⁸⁴ or perhaps through unconscious bias alone.⁸⁵ Neither disparate-impact nor disparate-treatment claims recognize

⁷⁸ See Ann C. McGinley, *!Viva la Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 446 n.194, 479 (2000) (discussing dynamic statutory interpretation). The author recognizes that it also is possible to read the frameworks as political choices that are framed through the lens of statutory interpretation. *Id.* at 446 n.194.

⁷⁹ See *supra* Part I.B.

⁸⁰ See *supra* notes 45-53 and accompanying text.

⁸¹ See *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 717-18 (6th Cir. 2006).

⁸² *Id.*

⁸³ Struve, *supra* note 58, at 290.

⁸⁴ The author is not expressing any opinion on whether unconscious bias is intentional or not. Rather, this sentence is meant to contrast unconscious discrimination with more traditional ways of conceiving intentional discrimination as conscious.

⁸⁵ See Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 745 (2005); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-25 (1987).

the possibility of negligent discrimination.⁸⁶ Additionally, structural discrimination is not fully captured within any of the frameworks.⁸⁷

Further, courts have failed to fully explore whether the substantive equality model underlying disparate impact applies in other contexts⁸⁸ or whether the current disparate impact tests fairly capture all conduct that might limit or tend to limit a plaintiff's opportunities.⁸⁹ Plaintiffs unable to offer proof of specific practices that create gross statistical disparities under the disparate impact framework are largely left with models based on formal equality.⁹⁰ None of the proof structures appropriately capture intersectional discrimination.⁹¹

In the individual disparate treatment context, the courts largely seem to assume discrimination as a fairly constant bad motive that resides in an individual.⁹² The proof structures appear tied to a concept of discrimination that seeks to ferret out a single decision maker (or small group of decision makers) who acted with a certain kind of animus toward an individual plaintiff.⁹³ This narrow concept of intent ignores the possibility of disparate influences and structural discrimination.

It also creates causal requirements between a protected trait and an employment decision that may be impossible to prove in many real-world scenarios. Take for example the *McDonnell Douglas* test. The question in the *McDonnell Douglas* case itself was framed as whether the company was discriminating against the plaintiff because of his illegal protest activities or whether the company was using these activities as an excuse to cover up its racially motivated decision not to re-hire him.⁹⁴ The *McDonnell Douglas* test, therefore, focuses on a single decision made at a particular point of time. It tries to link the specific decision to the protected trait to establish a causal narrative. In other situations with multiple players and multiple deci-

⁸⁶ See generally David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993) (discussing negligent discrimination).

⁸⁷ See Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 138 (2003).

⁸⁸ See, e.g., *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1314 (11th Cir. 1999) (rejecting claim that employer's refusal to grant modified work to pregnant women created a disparate impact because plaintiff failed to present evidence of gross statistical disparity).

⁸⁹ Compare 42 U.S.C. § 2000e-2(a) (2006), with *id.* § 2000e-2(k) (showing how the current disparate impact tests help define Title VII's primary operative provision).

⁹⁰ *Spivey*, 196 F.3d at 1314.

⁹¹ See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140, 152 (arguing that discrimination theory does not fully address discrimination that happens against black women).

⁹² See Martin, *supra* note 1, at 374.

⁹³ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

⁹⁴ *Id.* at 801.

sions or actions being taken over time, *McDonnell Douglas* has proven problematic.⁹⁵

Likewise, federal statutes are interpreted as enshrining certain assumptions about harm. The harassment inquiry contains the idea that harassment does not affect the terms or conditions of an employee's work environment unless it is fairly severe or pervasive.⁹⁶ However, that is a factual assumption made by judges that does not reflect the actual statutory language of the federal statutes, which only require that the terms or conditions of the plaintiff's employment were affected or that the conduct did or tended to deprive the plaintiff of employment opportunities.⁹⁷ Many circuits have modified *McDonnell Douglas* to only provide relief to plaintiffs who can prove they suffered an adverse employment action.⁹⁸

Notice that underlying these federal constructs are choices about how discrimination operates. The structures developed in the 1970s were grounded in the idea that discrimination against people within certain protected classes regularly occurred.⁹⁹ However, the standards developed in these cases were inexact and were tied to the particular cases before the Court.¹⁰⁰ Beginning in the 1980s, the courts began to impose tighter causal standards for disparate impact claims, indicating these tighter standards were necessary to prevent employers from being held liable for numerical anomalies in workforce statistics.¹⁰¹ In the 2000s, the Supreme Court interpreted the ADEA to have a different causal standard than Title VII, reasoning that age discrimination and discrimination prohibited under Title VII were different in important ways.¹⁰²

Not only do the federal frameworks provide a narrow frame through which to view the discrimination inquiry, they are also procedurally confusing. "It remains unclear whether the types of discrimination are separate 'claims' under the statutes or whether they are simply ways of clarifying the statutes' primary operative language."¹⁰³ For example, "it is not completely clear whether the term 'mixed motive' describes a type of discrimination, a

⁹⁵ See, e.g., Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1285-86 (2008) (discussing problems with using *McDonnell Douglas* in mixed-motive situations).

⁹⁶ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

⁹⁷ See, e.g., 42 U.S.C. § 2000e-2(a) (2006) (Title VII's operative provisions).

⁹⁸ See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002).

⁹⁹ *McDonnell Douglas*, 411 U.S. at 800; *Griggs v. Duke Power Co.*, 401 U.S. 424, 427-28 (1971).

¹⁰⁰ See, e.g., *Griggs*, 401 U.S. at 430, 434 n.10.

¹⁰¹ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074.

¹⁰² *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174-75 (2009).

¹⁰³ Sperino, *supra* note 45, at 112; see also Kaitlin Picco, Comment, *The Mixed-Motive Mess: Defining and Applying a Mixed-Motive Framework*, 26 A.B.A. J. LAB. & EMP. L. 461, 475 (2011) (discussing confusion among courts).

rubric for evaluating a discrimination claim, or perhaps both.”¹⁰⁴ The answer to whether mixed motive is a claim or a way of analyzing a claim is important because it determines whether plaintiffs proceeding under single-motive cases can use the broader “motivating factor” language provided in the 1991 amendments at both the summary judgment stage and in jury instructions.¹⁰⁵ This question also raises profound issues regarding whether *McDonnell Douglas* survives as a stand-alone analytical structure and whether the direct/circumstantial evidence dichotomy is still appropriate in single-motive cases. Questions about what the frameworks are procedurally, will become more important as courts strengthen the pleading requirements in federal court.

As this Part demonstrates, federal employment discrimination is increasingly complex. These complexities have practical effects on litigants. The frameworks “create[] an uncertainty that makes it difficult for parties to determine potential liability both *ex post* and *ex ante*.”¹⁰⁶ The parties are forced to prove their cases through technical frameworks that, in some cases, do not provide a complete framework for evaluating discrimination claims.¹⁰⁷ And, as Professor Martin Katz noted: “[S]uch a state of affairs breeds cynicism about the law in this area, as it suggests that outcomes depend more on technicalities than on the merits of a particular case.”¹⁰⁸ This is the muddled landscape into which state discrimination law is being drawn.

II. THE STATE LAW LANDSCAPE

All fifty states also have enacted statutes that prohibit discrimination in the workplace.¹⁰⁹ However, none of the state statutes mimics the federal

¹⁰⁴ Sperino, *supra* note 45, at 113; *see also* Picco, *supra* note 103, at 475.

¹⁰⁵ 42 U.S.C. § 2000e-2(m) (1994).

¹⁰⁶ Sperino, *supra* note 45, at 114.

¹⁰⁷ Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 644 (2008).

¹⁰⁸ *Id.*

¹⁰⁹ *See* ALA. CODE §§ 25-1-21 to -28 (LexisNexis, LEXIS through 2012 Sess.); ALASKA STAT. § 18.80.220 (LEXIS through 2011 Sess.); ARIZ. REV. STAT. §§ 41-1463 to -1465 (LexisNexis, LEXIS through 2012 legislation); ARK. CODE ANN. § 16-123-107(a)(1) (LEXIS through 2012 Fiscal Sess. & updates); CAL. GOV'T CODE §§ 12920-12926 (Deering, LEXIS through 2012 Sess. Ch. 288); COLO. REV. STAT. § 24-34-402 (LEXIS through 2012 Sess.); CONN. GEN. STAT. § 46a-60 (LEXIS through 2011 legislation); DEL. CODE ANN. tit. 19, § 711 (LEXIS through 2012 Ch. 404); FLA. STAT. ANN. § 760.10 (LexisNexis, LEXIS through 2012 Sess.); GA. CODE ANN. §§ 45-19-29 to -35 (LEXIS through 2012 Sess.); HAW. REV. STAT. ANN. §§ 378-2 to -3 (LexisNexis, LEXIS through 2012 Sess., Acts 1-200); IDAHO CODE ANN. §§ 67-5909 to -5910 (LEXIS through 2012 Sess.); 775 ILL. COMP. STAT. ANN. 5/2-102 to -105 (LexisNexis, LEXIS through 2012 Legis. Sess., Pub. Acts. 97-848); IND. CODE ANN. §§ 22-9-1-3, 22-9-2-2, 22-9-5-19 (LexisNexis, LEXIS through 2012 Sess., P.L. 161); IOWA CODE § 216.6 (LEXIS through 2011 legislation); KAN. STAT. ANN. § 44-1009 (LEXIS through 2011 Supp.); KY. REV. STAT. ANN. §§ 344.040-.050 (LexisNexis, LEXIS through 2012 Sess.); LA. REV. STAT. ANN. §§ 23:312,

statutes in all important respects. These differences suggest courts should be more cautious in deciding whether state laws should adopt the frameworks applied in federal discrimination claims.

First, a small, yet significant, number of states adopted discrimination protections prior to their federal enactment. For example, Pennsylvania, Massachusetts, and New York had employment statutes governing race, and age before their federal counterparts.¹¹⁰ Other states adopted at least one protection prior to federal action.¹¹¹ More than half of the states prohibited

:323, :332, :342, :352, :368 (LEXIS through 2012 Sess.); ME. REV. STAT. ANN. tit. 5, §§ 4572-4573 (LEXIS through 2011 Sess. Ch. 702); MD. CODE ANN., STATE GOV'T §§ 20-602 to -607 (LexisNexis, LEXIS through 2012 Gen. Assemb.); MASS. ANN. LAWS ch. 151B, § 4 (LexisNexis, LEXIS through 2012 Legis. Sess. Act 239); MICH. COMP. LAWS SERV. §§ 37.2102, .2202-.2206 (LexisNexis, LEXIS through 2012 P.A. 86, 88-177, 179-200, 202-236, 240, 249); MINN. STAT. § 363A.08 (LEXIS through 2012 Sess. Ch. 299); MISS. CODE ANN. §§ 25-9-103, 25-9-149 (LEXIS through 2012 Sess.); MO. REV. STAT. §§ 213.010, .055 (LEXIS through 2012 Sess.); MONT. CODE ANN. §§ 49-2-101, 49-2-303 (LEXIS through 2011 Sess.); NEB. REV. STAT. ANN. §§ 48-1101 to -1115 (LexisNexis, LEXIS through 2012 Sess.); NEV. REV. STAT. ANN. §§ 613.330-.390 (LexisNexis, LEXIS through 2011 Sess.); N.H. REV. STAT. ANN. §§ 354-A:1 to :7 (LexisNexis, LEXIS through 2012 Sess. Ch. 290); N.J. STAT. ANN. §§ 10:5-4, -12 (LEXIS through 2012 Ch. 44); N.M. STAT. ANN. §§ 28-1-7, 28-1-9 (LexisNexis, LEXIS through 2012 Sess.); N.Y. EXEC. LAW §§ 291, 296 (Consol., LEXIS through 2012 Ch. 1-447); N.C. GEN. STAT. §§ 143-422.1 to .3 (LEXIS through 2011 Sess.); N.D. CENT. CODE §§ 14-02.4-03 to 14-02.4-09 (LEXIS through 2011 Legis. Sess.); OHIO REV. CODE ANN. § 4112.02 (LexisNexis, LEXIS through 2012 legislation); OKLA. STAT. ANN. tit. 25, §§ 1302-1308 (LEXIS through 2012 Sess.); OR. REV. STAT. §§ 659A.006, .009, .030 (LEXIS through 2011 Legis. Sess.); 43 PA. CONS. STAT. § 955 (LEXIS through 2012 Sess., Act 143); R.I. GEN. LAWS §§ 28-5-1 to -7 (LEXIS through 2011 Sess.); S.C. CODE ANN. §§ 1-13-10 to -80 (LEXIS through 2011 Sess.); S.D. CODIFIED LAWS § 20-13-10 (LEXIS through 2012 Sess.); TENN. CODE ANN. §§ 4-21-401 to -408 (LEXIS through 2011 Sess.); TEX. LAB. CODE ANN. §§ 21.051-.055 (LEXIS through 2011 1st Called Sess.); UTAH CODE ANN. §§ 34A-5-101 to -106 (LexisNexis, LEXIS through 2012 4th Spec. Sess.); VT. STAT. ANN. tit. 21, § 495 (LEXIS through 2011 Sess.); VA. CODE ANN. § 2.2-3903 (LEXIS through 2012 Sess.); WASH. REV. CODE ANN. §§ 49.60.040, 49.60.180 (LexisNexis, LEXIS through 2012 Sess.); W. VA. CODE ANN. §§ 5-11-3, -9 (LexisNexis, LEXIS through 2012 Sess.); WIS. STAT. §§ 111.321-.322 (LEXIS through 2011 Act 113); WYO. STAT. ANN. §§ 27-9-101 to -105 (LEXIS through 2012 Budget Sess.).

¹¹⁰ See Act of May 23, 1946, ch. 368, 1946 Mass. Acts 372 (codified at MASS. ANN. LAWS ch. 151B, § 4 (LexisNexis, LEXIS through 2012 Legis. Sess. Act 239)); Act of Aug. 1, 1950, ch. 697, 1950 Mass. Acts 590 (codified at MASS. ANN. LAWS ch. 151B, § 4); Law Against Discrimination, ch. 414, 1961 N.Y. Laws 1447 (codified at N.Y. EXEC. LAW § 290-291 (Consol. LEXIS through 2012 Ch. 1-447)); Act of Apr. 14, 1958, ch. 738, 1958 N.Y. Laws 1591 (codified at N.Y. EXEC. LAW § 296); Pennsylvania Fair Employment Practice Act, No. 222, 1955 Pa. Laws 744 (codified at 43 PA. CONS. STAT. § 955 (LEXIS through 2012 Sess., Act 143)). This Article does not discuss preemption because the federal discrimination statutes often do not preempt state legislation. For a discussion of preemption and workplace law, see generally Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 *FORDHAM L. REV.* 469 (1993).

¹¹¹ See, e.g., Act of March 9, 1953, ch. 18, 1953 Alaska Sess. Laws 64 (codified at ALASKA STAT. § 18.80.220 (LEXIS through 2011 Sess.)); Act of July 9, 1960, ch. 337, 52 Del. Laws 795 (1959) (codified at DEL. CODE ANN. tit. 19, § 711 (LEXIS through 2012 Ch. 404)); Act of Apr. 13, 1961, ch. 248, 1961 Kan. Sess. Laws 542 (codified at KAN. STAT. ANN. § 44-1009 (LEXIS through 2011 Supp.)); Act of June 8, 1959, no. 123, 1959 Mo. Laws i (codified at MO. REV. STAT. § 213.055 (LEXIS through 2012 Sess.)); Law Against Discrimination, ch. 169, 1945 N.J. Laws 589, 594-95 (codified at N.J. STAT ANN.

disability discrimination in private employment prior to the ADA's enactment in 1990.¹¹² There are several states that adopted age discrimination

§ 10:5-12 (LEXIS through 2012 Ch. 44)); Act of Apr. 1, 1949, ch. 2181, 1949 R.I. Acts & Resolves 157 (codified at R.I. GEN. LAWS §§ 28-5-2 to -7 (LEXIS through 2011 Sess.)); Act of June 29, 1963, no. 196, 1963 Vt. Acts & Resolves 209 (codified at VT. STAT. ANN. tit. 21, § 495 (LEXIS through 2011 Sess.)); Law Against Discrimination in Employment, ch. 183, 1949 Wash. Sess. Laws 506 (codified at WASH. REV. CODE ANN. §§ 49.60.040 (LexisNexis, LEXIS through 2012 Sess.)).

¹¹² See Act of Apr. 18, 1985, ch. 167, § 3, 1985 Ariz. Sess. Laws 405, 407 (codified at ARIZ. REV. STAT. § 41-1463 (LexisNexis, LEXIS through 2012 legislation)) (adopting disability protections in 1985); Act of Sept. 19, 1980, ch. 992, § 12920, 1980 Cal. Stat. 3142 (codified at CAL. GOV'T CODE § 12920 (Deering, LEXIS through 2012 Sess. Ch. 288)) (in 1980); Act of June 22, 1979, ch. 239, § 24-34-402, 1979 Colo. Sess. Laws 922, 929-30 (codified at COLO. REV. STAT. § 24-34-402 (LEXIS through 2012 Sess.)) (in 1979); Act effective July 1, 1977, ch. 77-341, § 13.261, 1977 Fla. Laws 1461, 1465 (codified at FLA. STAT. ANN. § 760.10 (LexisNexis, LEXIS through 2012 Sess.)) (in 1977); Fair Employment Practices Act of 1978, no. 807, 1978 Ga. Laws 859 (codified at GA. CODE ANN. § 45-19-29 (LEXIS through 2012 Sess.)) (in 1978); Act of June 2, 1981, Act 94, § 378-2, 1981 Haw. Sess. Laws 184, 185 (codified at HAW. REV. STAT. ANN. § 378-2 (LexisNexis, LEXIS through 2012 Sess., Acts 1-200)) (in 1981); Act of Mar. 29, 1988, ch. 225, 1988 Idaho Sess. Laws 433 (codified at IDAHO CODE ANN. § 67-5909 (LEXIS through 2012 Sess.)) (in 1988); Act of Dec. 6, 1979, Pub. Act 81-1267, § 1-102, 1980 Ill. Laws 247 (codified at 775 ILL. COMP. STAT. ANN. 5/2-102 (LexisNexis, LEXIS through 2012 Legis. Sess., Pub. Acts 97-848)) (in 1980); Act of Feb. 22, 1974, ch. 209, 1974 Kan. Sess. Laws 759 (codified at KAN. STAT. ANN. § 44-1009 (LEXIS through 2011 Supp.)) (in 1974); Act effective Oct. 1, 1975, ch. 358, 1975 Me. Laws 986 (codified at ME. REV. STAT. ANN. tit. 5, § 4572 (LEXIS through 2011 Sess. Ch. 702)) (in 1975); Act of May 31, 1974, ch. 601, 1974 Md. Laws 2029 (codified at MD. CODE ANN., STATE GOV'T § 20-606 (LexisNexis, LEXIS through 2012 Gen. Assemb.)) (in 1974); Act of May 24, 1973, ch. 729, § 3, 1973 Minn. Laws 2161 (codified at MINN. STAT. § 363A.08 (LEXIS through 2012 Sess. Ch. 299)) (in 1973); Act of May 15, 1984, ch. 488, § 333, 1984 Miss. Laws 628 (codified at MISS. CODE ANN. § 25-9-149 (LEXIS through 2012 Sess.)) (in 1984); Act of June 13, 1978, § 296.020, 1978 Mo. Laws 560 (codified at MO. REV. STAT. § 213.055 (LEXIS through 2012 Sess.)) (in 1978); Act of Mar. 25, 1974, ch. 283, § 2, 1974 Mont. Laws 696, 698 (codified at MONT. CODE ANN. § 49-2-303 (LEXIS through 2011 Sess.)) (in 1974); Act of May 10, 1973, LB 266, § 1, 1973 Neb. Laws 752 (codified at NEB. REV. STAT. ANN. § 48-1101 (LexisNexis, LEXIS through 2012 Sess.)) (in 1973); Act of Apr. 24, 1971, ch. 508, § 1, 1971 Nev. Stat. 1056 (codified at NEV. REV. STAT. ANN. § 613.330 (LexisNexis, LEXIS through 2011 Sess.)) (in 1971); Act of Mar. 26, 1973, ch. 155, § 2, 1973 N.M. Laws 533, 534-35 (codified at N.M. STAT. ANN. § 28-1-7 (LexisNexis, LEXIS through 2012 Sess.)) (in 1973); Equal Employment Practices Act, ch. 726 § 1, 1977 N.C. Sess. Laws 933 (codified at N.C. GEN. STAT. § 143-422.2 (LEXIS through 2011 Sess.)) (in 1977); Human Rights Act, ch. 173, 1983 N.D. Laws 466 (codified at N.D. CENT. CODE § 14-02.4-03 (LEXIS through 2011 Legis. Sess.)) (in 1983); Act of Apr. 23, 1976, § 4112.02, 1975-76 Ohio Laws 424, 432 (codified at OHIO REV. CODE ANN. § 4112.02 (LexisNexis, LEXIS through 2012 legislation)) (in 1976); Act of June 22, 1981, ch. 231, § 2, 1981 Okla. Sess. Laws 551, 552 (codified at OKLA. STAT. ANN. tit. 25, § 1302 (LEXIS through 2012 Sess.)) (in 1981); Act of June 21, 1983, ch. 225, § 2, 1983 Or. Laws 249, 250 (codified at OR. REV. STAT. § 659A.006 (LEXIS through 2011 Legis. Sess.)) (in 1983); Act of May 11, 1973, ch. 132, § 28-5-7, 1973 R.I. Pub. Laws 545, 547 (codified at R.I. GEN. LAWS § 28-5-7 (LEXIS through 2011 Sess.)) (in 1973); Act of Mar. 11, 1986, ch. 170, § 7, 1986 S.D. Sess. Laws 388, 389 (codified at S.D. CODIFIED LAWS § 20-13-10 (LEXIS through 2012 Sess.)) (in 1986); Act of Feb. 23, 1979, ch. 136, § 3, 1979 Utah Laws 756, 760 (codified at UTAH CODE ANN. § 34A-5-106 (LexisNexis, LEXIS through 2012 4th Spec. Sess.)) (in 1979); Act of May 1, 1981, no. 65, § 1, 1981 Vt. Acts & Resolves 242 (codified at VT. STAT. ANN. tit. 21, § 495 (LEXIS through 2011 Sess.)) (in 1981); Act of Mar. 21, 1985, ch. 421, § 51.01-41, 1985 Va. Acts 539, 552 (codified at VA. CODE ANN. § 2.2-3900 (LEXIS through 2012 Sess.)) (in 1985);

prohibitions prior to the ADEA's enactment in 1967 and even prior to the Wirtz Report.¹¹³

Second, when the states enacted employment discrimination statutes, almost all of them chose omnibus legislation that includes all of the protected traits under the same statutory regime.¹¹⁴ What makes mass importation

Act of Mar. 8, 1979, ch. 127, § 2, 1979 Wash. Sess. Laws 481, 482 (codified at WASH. REV. CODE ANN. § 49.60.180 (LexisNexis, LEXIS through 2012 Sess.)) (in 1979); Act of Apr. 7, 1981, ch. 128, § 5-11-2, 1981 W. Va. Acts 541, 542 (codified at W. VA. CODE ANN. § 5-11-9 (LexisNexis, LEXIS through 2012 Sess.)) (in 1981); Act of May 6, 1982, ch. 334, 1981 Wis. Sess. Laws 1378 (codified at WIS. STAT. §§ 111.321 (LEXIS through 2011 Act 113)) (in 1981); Act of Feb. 8, 1985, ch. 5, § 1, 1985 Wyo. Sess. Laws 4 (codified at WYO. STAT. ANN. §§ 27-9-105 (LEXIS through 2012 Budget Sess.)) (in 1985); *see also* Drummonds, *supra* note 110, at 490 n.113 (discussing disability protections adopted by the states).

¹¹³ *See* Fair Employment Practices Act, Pub. Act No. 145, § 3, 1959 Conn. Pub. Acts 418, 418-19 (codified at CONN. GEN. STAT. § 46a-60 (LEXIS through 2011 legislation)); Act of August 1, 1950, ch. 697, §§ 6-8, 1950 Mass. Acts 590, 591 (codified at MASS. ANN. LAWS ch. 151B, § 4 (LexisNexis, LEXIS through 2012 Legis. Sess. Act 239)); Act of May 7, 1962, ch. 37, §§ 2-3, 7, 1962 N.J. Laws 158, 159, 162-63 (codified N.J. STAT. ANN. §§ 10:5-4, -12 (LEXIS through 2012 Ch. 44)); Act of April 17, 1961, ch. 609, 1961 N.Y. Laws 1867 (codified at N.Y. EXEC. LAW § 296 (Consol., LEXIS through 2012 Ch. 1-447)); Pennsylvania Fair Employment Practices Act, No. 222, §§ 1-5, 1955 Pa. Laws 744, 744-46 (codified at 43 PA. CONS. STAT. § 955 (LEXIS through 2012 Sess., Act 143)). Some states continue to be the early adopters, offering protections against sexual orientation discrimination which do not yet exist at the federal level. *See* Anita Bernstein, *Civil Rights Violations = Broken Windows: De Minimis Curet Lex*, 62 FLA. L. REV. 895, 918 & n.135 (2010).

¹¹⁴ *See* ALASKA STAT. § 18.80.220 (LEXIS through 2011 Sess.); ARIZ. REV. STAT. §§ 41-1463 to -1465 (LexisNexis, LEXIS through 2012 legislation); CAL. GOV'T CODE §§ 12920-12926 (Deering, LEXIS through 2012 Sess. Ch. 288); COLO. REV. STAT. § 24-34-402 (LEXIS through 2012 Sess.); CONN. GEN. STAT. § 46a-60 (LEXIS through 2011 legislation); FLA. STAT. ANN. § 760.10 (LexisNexis, LEXIS through 2012 Sess.); GA. CODE ANN. §§ 45-19-29 to -35 (LEXIS through 2012 Sess.); HAW. REV. STAT. ANN. §§ 378-2 to -3 (LexisNexis, LEXIS through 2012 Sess., Acts 1-200); IDAHO CODE ANN. §§ 67-5909 to -5910 (LEXIS through 2012 Sess.); 775 ILL. COMP. STAT. ANN. 5/2-102 to -105 (LexisNexis, LEXIS through 2012 Legis. Sess., Pub. Acts 97-848); IOWA CODE § 216.6 (LEXIS through 2011 legislation); KY. REV. STAT. ANN. §§ 344.040-.050 (LexisNexis, LEXIS through 2012 Sess.); ME. REV. STAT. ANN. tit. 5, §§ 4572-4573 (LEXIS through 2011 Sess. Ch. 702); MD. CODE ANN., STATE GOV'T §§ 20-601 to -609 (LexisNexis, LEXIS through 2012 Gen. Assemb.); MASS. ANN. LAWS ch. 151B, § 4 (LexisNexis, LEXIS through 2012 Legis. Sess. Act 239); MINN. STAT. § 363A.08 (LEXIS through 2012 Sess. Ch. 299); MISS. CODE ANN. §§ 25-9-103, 25-9-149 (LEXIS through 2012 Sess.) (prohibiting discrimination for state service jobs); MO. REV. STAT. §§ 213.010, .055 (LEXIS through 2012 Sess.); MONT. CODE ANN. §§ 49-2-101, 49-2-303 (LEXIS through 2011 Sess.); NEV. REV. STAT. ANN. §§ 613.330-.390 (LexisNexis, LEXIS through 2011 Sess.); N.H. REV. STAT. ANN. §§ 354-A:1 to :7 (LexisNexis, LEXIS through 2012 Sess. Ch. 290); N.J. STAT. ANN. §§ 10:5-4, -12 (LEXIS through 2012 Ch. 44); N.M. STAT. ANN. §§ 28-1-7, 28-1-9 (LexisNexis, LEXIS through 2012 Sess.) (including prohibited traits within one statute, but referencing ADEA provisions for age discrimination); N.Y. EXEC. LAW §§ 291, 296 (Consol., LEXIS through 2012 Ch. 1-447); N.C. GEN. STAT. §§ 143-422.1 to .3 (LEXIS through 2011 Sess.); N.D. CENT. CODE §§ 14-02.4-03 to 14-02.4-09 (LEXIS through 2011 Legis. Sess.); OHIO REV. CODE ANN. § 4112.02 (LexisNexis, LEXIS through 2012 Legislation); OKLA. STAT. ANN. tit. 25, §§ 1302-1308 (LEXIS through 2012 Sess.); OR. REV. STAT. §§ 659A.006, .009, .030 (LEXIS through 2011 Legis. Sess.); 43 PA. CONS. STAT. § 955 (LEXIS through 2012 Sess., Act 143); R.I. GEN. LAWS §§ 28-5-1 to -7 (LEXIS through 2011 Sess.); S.C. CODE ANN. §§ 1-13-10 to -80 (LEXIS through 2011 Sess.); S.D. CODIFIED LAWS § 20-13-10 (LEXIS through 2012 Sess.); TEX. LAB.

of federal employment discrimination law into state regimes even more problematic is that many state statutes prohibit not only employment discrimination, but discrimination in other areas, such as public accommodations, voting, and making contracts.¹¹⁵

Finally, there is not a single state statute that contains the same statutory language as the federal statutes, even when confining such consideration to substantive, rather than procedural or administrative, provisions.¹¹⁶ There are key textual features to federal discrimination law that have contributed to its fracturing, which are simply not shared by most state laws.¹¹⁷

CODE ANN. §§ 21.051-.055 (LEXIS through 2011 1st Called Sess.); UTAH CODE ANN. §§ 34A-5-101 to -106 (LexisNexis, LEXIS through 2012 4th Spec. Sess.); VT. STAT. ANN. tit. 21, § 495 (LEXIS through 2011 Sess.); WASH. REV. CODE ANN. §§ 49.60.040, 49.60.180 (LexisNexis, LEXIS through 2012 Sess.); W. VA. CODE ANN. §§ 5-11-3, -9 (LexisNexis, LEXIS through 2012 Sess.); WIS. STAT. §§ 111.321-.322 (LEXIS through 2011 Act 113); WYO. STAT. ANN. §§ 27-9-101 to -105 (LEXIS through 2012 Budget Sess.). While Louisiana's discrimination prohibitions are contained within one statutory regime, separate provisions govern age and disability discrimination. LA. REV. STAT. ANN. §§ 23:312, :323, :332, :342, :352, :368 (LEXIS through 2012 Sess.). Alabama law prohibits discrimination solely based on age. ALA. CODE §§ 25-1-21 to -29 (LexisNexis, LEXIS through 2012 Sess.). A handful of the state statutes do not include all of the traits protected under the federal statutes or separate the regimes differently than federal law. ARK. CODE ANN. § 16-123-107(a)(1) (LEXIS through 2012 Fiscal Sess. & updates) (prohibiting race, religion, national origin, gender, and disability discrimination, but not including age); DEL. CODE ANN. tit. 19, § 711 (LEXIS through 2012 Ch. 404) (prohibiting discrimination on the basis of race, marital status, genetic information, color, age, religion, sex, or national origin, including disability under §§ 723-24); IND. CODE ANN. §§ 22-9-1-3, 22-9-2-2, 22-9-5-19 (LexisNexis, LEXIS through 2012 Sess., P.L. 161) (prohibiting discrimination based on race, religion, color, sex, disability, national origin or ancestry; § 22-9-2-2 addresses age discrimination as against public policy); KAN. STAT. ANN. § 44-1009 (LEXIS through 2011 Supp.) (prohibiting discrimination on the basis of race, religion, color, sex, disability, national origin or ancestry, but addressing age in § 44-1113); MICH. COMP. LAWS SERV. §§ 37.2102, .2202-.2206 (LexisNexis, LEXIS through 2012 P.A. 86, 88-177, 179-200, 202-236, 240, 249) (including age, sex, race, and other traits, but addressing disability in §§ 37.1101 to 37.1214); NEB. REV. STAT. ANN. §§ 48-1101 to -1115 (LexisNexis, LEXIS through 2012 Sess.) (separately addressing age in §§ 48-1001 to 1010); TENN. CODE ANN. §§ 4-21-401 to -408 (LEXIS through 2011 Sess.) (prohibiting discrimination on the basis of race, creed, color, religion, sex, age or national origin, addressing disability through §§ 8-50-103 to 8-50-118); VA. CODE ANN. § 2.2-3903 (LEXIS through 2012 Sess.) (addressing disability in § 51.5-41).

¹¹⁵ See, e.g., ARK. CODE ANN. §16-123-107 (LEXIS through 2012 Fiscal Sess. & updates); CAL. GOV'T CODE §§ 12920-12926 (Deering, LEXIS through 2012 Sess. Ch. 288); IDAHO CODE ANN. §§ 67-5909 to 67-5910 (LEXIS through 2012 Sess.); IND. CODE ANN. §§ 22-9-1-3, 22-9-2-2, 22-9-5-19 (LexisNexis, LEXIS through 2012 Sess., P.L. 161); MASS. ANN. LAWS ch. 151B, § 4 (LexisNexis, LEXIS through 2012 Legis. Sess. Act 239); N.H. REV. STAT. ANN. §§ 354-A:1 to :7 (LexisNexis, LEXIS through 2012 Sess. Ch. 290); N.J. STAT. ANN. §§ 10:5-4, -12 (LEXIS through 2012 Ch. 44); N.M. STAT. ANN. §§ 28-1-7, 28-1-9 (LexisNexis, LEXIS through 2012 Sess.); N.Y. EXEC. LAW §§ 291, 296 (Consol., LEXIS through 2012 Ch. 1-447); OHIO REV. CODE ANN. § 4112.02 (LexisNexis, LEXIS through 2012 legislation).

¹¹⁶ See *infra* notes 118-128 and accompanying text.

¹¹⁷ See *infra* notes 118-128 and accompanying text.

One key aspect of both the ADEA and Title VII is that their primary substantive language is contained within a two-part provision. For example, Title VII provides as follows:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.¹¹⁸

The ADEA has similar original language.¹¹⁹ The courts have often viewed the first of these provisions as relating to disparate treatment claims, while interpreting the second provision as originally governing disparate impact claims.¹²⁰

However, many state statutes do not mimic the two-part structure of the federal statutes.¹²¹ Some states have defined discrimination through

¹¹⁸ 42 U.S.C. § 2000e-2(a) (2006).

¹¹⁹ 29 U.S.C. § 623 (2006).

¹²⁰ See *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 251-52 (6th Cir. 1988) (noting that this distinction has been generally applied, but not definitely decided).

¹²¹ See, e.g., ALASKA STAT. § 18.80.220 (LEXIS through 2011 Sess.); ARK. CODE ANN. § 16-123-107(a)(1) (LEXIS through 2012 Fiscal Sess. & updates); CAL. GOV'T CODE §§ 12920-12926 (Deering, LEXIS through 2012 Sess. Ch. 288); COLO. REV. STAT. § 24-34-402 (LEXIS through 2012 Sess.); CONN. GEN. STAT. § 46a-60 (LEXIS through 2011 legislation); HAW. REV. STAT. ANN. §§ 378-2 to -3 (LexisNexis, LEXIS through 2012 Sess., Acts 1-200); IDAHO CODE ANN. §§ 67-5909 to 67-5910 (LEXIS through 2012 Sess.); 775 ILL. COMP. STAT. ANN. 5/2-102 to -105 (LexisNexis, LEXIS through 2012 Legis. Sess., Pub. Acts 97-848); IND. CODE ANN. §§ 22-9-1-3 (LexisNexis, LEXIS through 2012 Sess., P.L. 161); IOWA CODE § 216.6 (LEXIS through 2011 legislation); KAN. STAT. ANN. § 44-1009 (LEXIS through 2011 Supp.); ME. REV. STAT. ANN. tit. 5, §§ 4572-4573 (LEXIS through 2011 Sess. Ch. 702); MINN. STAT. § 363A.08 (LEXIS through 2012 Sess. Ch. 299); MONT. CODE ANN. §§ 49-2-101, 49-2-303 (LEXIS through 2011 Sess.); N.H. REV. STAT. ANN. §§ 354-A:1 to :7 (LexisNexis, LEXIS through 2012 Sess. Ch. 290); N.J. STAT. ANN. §§ 10:5-4, -12 (LEXIS through 2012 Ch. 44); N.M. STAT. ANN. §§ 28-1-7, 28-1-9 (LexisNexis, LEXIS through 2012 Sess.); N.Y. EXEC. LAW §§ 291, 296 (Consol., LEXIS through 2012 Ch. 1-447); N.C. GEN. STAT. §§ 143-422.1 to .3 (LEXIS through 2011 Sess.); N.D. CENT. CODE §§ 14-02.4-03 to 14-02.4-09 (LEXIS through 2011 Legis. Sess.); OHIO REV. CODE ANN. § 4112.02 (LexisNexis, LEXIS through 2012 legislation); 43 PA. CONS. STAT. § 955 (LEXIS through 2012 Sess., Act 143); R.I. GEN. LAWS §§ 28-5-1 to -7 (LEXIS through 2011 Sess.); S.D. CODIFIED LAWS § 20-13-10 (LEXIS through 2012 Sess.); UTAH CODE ANN. §§ 34A-5-101 to -106 (LexisNexis, LEXIS through 2012 4th Spec. Sess.); VT. STAT. ANN. tit. 21, § 495 (LEXIS through 2011 Sess.); WASH. REV. CODE ANN. §§ 49.60.040, 49.60.180 (LexisNexis, LEXIS through 2012 Sess.); W. VA. CODE ANN. §§ 5-11-3, -9 (LexisNexis, LEXIS through 2012 Sess.); WIS. STAT. §§ 111.321-.322

words that differ significantly from those used in federal statutes.¹²² Also, many states have defined the type of harm that a plaintiff must suffer in words that are different than the federal standard.¹²³

As discussed earlier, in 1991 Congress amended Title VII to clarify that a plaintiff could prevail if her protected trait played a motivating factor in a decision.¹²⁴ It also added a separate disparate impact provision.¹²⁵ As discussed throughout this Article, these amendments have played key roles in fracturing federal employment discrimination law.¹²⁶ While a few states define unlawful employment practices to include practices made unlawful

(LEXIS through 2011 Act 113); WYO. STAT. ANN. §§ 27-9-101 to -105 (LEXIS through 2012 Budget Sess.).

¹²² *E.g.*, ALASKA STAT. §18.80.220 (LEXIS through 2011 Sess.) (providing that discrimination against a person is prohibited “when the reasonable demands of the position do not require distinction on the basis of” a protected trait); ARK. CODE ANN. § 16-123-107(a)(1) (LEXIS through 2012 Fiscal Sess. & updates) (indicating that a person has a right to be free from discrimination, including “[t]he right to obtain and hold employment without discrimination”); CAL. GOV’T CODE § 12920 (Deering, LEXIS through 2012 Sess. Ch. 288) (indicating that the statute is designed to provide the “opportunity of all persons to seek, obtain, and hold employment without discrimination”); CONN. GEN. STAT. § 46a-60 (LEXIS through 2011 legislation) (containing numerous operative provisions with more detailed explanations regarding what is prohibited); IND. CODE ANN. §§ 22-9-1-3, 22-9-2-2, 22-9-5-19 (LexisNexis, LEXIS through 2012 Sess., P.L. 161); KAN. STAT. ANN. § 44-1009 (LEXIS through 2011 Supp.) (prohibiting employers from “follow[ing] any employment procedure or practice which, in fact, results in discrimination, segregation or separation without a valid business necessity”); S.D. CODIFIED LAWS § 20-13-10 (LEXIS through 2012 Sess.) (making it illegal “to accord adverse or unequal treatment”).

¹²³ *See, e.g.*, ARK. CODE ANN. § 16-123-107(a)(1) (LEXIS through 2012 Fiscal Sess. & updates) (indicating that a person has a right to be free from discrimination, including “[t]he right to obtain and hold employment without discrimination”); CAL. GOV’T CODE § 12920 (Deering, LEXIS through 2012 Sess. Ch. 288) (indicating that the statute is designed to provide the “opportunity of all persons to seek, obtain, and hold employment without discrimination”); COLO. REV. STAT. § 24-34-402 (LEXIS through 2012 Sess.) (defining the prohibited actions as refusal to hire, discharge, promotion or demotion, harassment, or discriminating in matters of compensation because of a protected trait); CONN. GEN. STAT. § 46a-60(a)(7) (LEXIS through 2011 Legislation) (including refusal to grant a reasonable leave of absence for pregnancy in protections and including detailed provision for pregnancy discrimination); IND. CODE ANN. § 22-9-1-3(1)(2) (LexisNexis, LEXIS through 2012 Sess., P.L. 161) (defining prohibited discrimination as the “exclu[sion] [of a] person[] from equal opportunities”); IOWA CODE ANN. § 216.6 (LEXIS through 2011 legislation) (defining prohibited conduct to include “otherwise discriminat[ing] in employment”); ME. REV. STAT. ANN. tit. 5, § 4572 (LEXIS through 2011 Sess. Ch. 702) (indicating that discrimination is prohibited in “any other matter directly or indirectly related to employment”); MINN. STAT. § 363A.08 (LEXIS through 2012 Sess. Ch. 299) (providing that it is unlawful to discriminate “with respect to hiring, apprenticeship, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment”); R.I. GEN. LAWS §§ 28-5-1 to -7 (LEXIS through 2011 Sess.) (prohibiting discrimination regarding “any other matter directly or indirectly related to employment”); S.D. CODIFIED LAWS § 20-13-10 (LEXIS through 2012 Sess.) (making it illegal “to accord adverse or unequal treatment”).

¹²⁴ 42 U.S.C. § 2000e-2(m) (2006).

¹²⁵ *See id.* § 2000e-2(k).

¹²⁶ *See supra* text accompanying notes 36-42, 105-108.

by Title VII (as amended),¹²⁷ none of the other statutes fully incorporate the 1991 amendments.¹²⁸

To the extent that the development of the federal frameworks depends on references to statutory language and its historical development over time, reading the state statutes in accordance with these federal frameworks is highly suspect. Nonetheless, the next Part describes how courts have done so.

¹²⁷ N.H. REV. STAT. ANN. § 354-A:2(XV) (LexisNexis, LEXIS through 2012 Sess. Ch. 290) (indicating that an “[u]nlawful discriminatory practice’ includes . . . [p]ractices prohibited by the federal Civil Rights Act of 1964, as amended”); TENN. CODE ANN. § 4-21-101 (LEXIS through 2011 Sess.) (indicating that its purpose is to effectuate Title VII within the state of Tennessee).

¹²⁸ See, e.g., ALASKA STAT. § 18.80.220 (LEXIS through 2011 Sess.); ARIZ. REV. STAT. § 41-1463 (LexisNexis, LEXIS through 2012 legislation); ARK. CODE ANN. § 16-123-107(a)(1) (LEXIS through 2012 Fiscal Sess. & updates); CAL. GOV’T CODE §§ 12920-12926 (Deering, LEXIS through 2012 Sess. Ch. 288); COLO. REV. STAT. § 24-34-402 (LEXIS through 2012 Sess.); CONN. GEN. STAT. § 46a-60 (LEXIS through 2011 legislation); DEL. CODE ANN. tit. 19, § 711 (LEXIS through 2012 Ch. 404); FLA. STAT. ANN. § 760.10 (LexisNexis, LEXIS through 2012 Sess.); GA. CODE ANN. § 45-19-29 (LEXIS through 2012 Sess.); HAW. REV. STAT. ANN. § 378-2 (LexisNexis, LEXIS through 2012 Sess., Acts 1-200); IDAHO CODE ANN. § 67-5909 (LEXIS through 2012 Sess.); 775 ILL. COMP. STAT. ANN. 5/2-102 (LexisNexis, LEXIS through 2012 Legis. Sess., Pub. Acts 97-848); IND. CODE ANN. §§ 22-9-1-3, 22-9-2-2, 22-9-5-19 (LexisNexis, LEXIS through 2012 Sess., P.L. 161); IOWA CODE § 216.6 (LEXIS through 2011 legislation); KAN. STAT. ANN. § 44-1009 (LEXIS through 2011 Supp.); KY. REV. STAT. ANN. §§ 344.040-.050 (LexisNexis, LEXIS through 2012 Sess.); LA. REV. STAT. ANN. §§ 23:312, :332, :342, :368 (LEXIS through 2012 Sess.); ME. REV. STAT. ANN. tit. 5, §§ 4572-4573 (LEXIS through 2011 Sess. Ch. 702); MD. CODE ANN., STATE GOV’T §§ 20-601, -602 (LexisNexis, LEXIS through 2012 Gen. Assemb.); MASS. ANN. LAWS ch. 151B, § 4 (LexisNexis, LEXIS through 2012 Legis. Sess. Act 239); MINN. STAT. § 363A.08 (LEXIS through 2012 Sess. Ch. 299); MO. REV. STAT. §§ 213.010, .055 (LEXIS through 2012 Sess.); MONT. CODE ANN. §§ 49-2-101, 49-2-303 (LEXIS through 2011 Sess.); NEB. REV. STAT. ANN. §§ 48-1101 to -1115 (LexisNexis LEXIS through 2012 Sess.); NEV. REV. STAT. ANN. §§ 613.330-.390 (LexisNexis, LEXIS through 2011 Sess.); N.J. STAT. ANN. §§ 10:5-4, -12 (LEXIS through 2012 Ch. 44); N.M. STAT. ANN. §§ 28-1-7, 28-1-9 (LexisNexis, LEXIS through 2012 Sess.); N.Y. EXEC. LAW §§ 291, 296 (Consol., LEXIS through 2012 Ch. 1-447); N.C. GEN. STAT. §§ 143-422.1 to .3 (LEXIS through 2011 Sess.); N.D. CENT. CODE §§ 14-02.4-03 to 14-02.4-09 (LEXIS through 2011 Legis. Sess.); OHIO REV. CODE ANN. § 4112.02 (LexisNexis, LEXIS through 2012 legislation); OKLA. STAT. ANN. tit. 25, §§ 1302-1308 (LEXIS through 2012 Sess.); OR. REV. STAT. §§ 659A.006, .009, .030 (LEXIS through 2011 Legis. Sess.); 43 PA. CONS. STAT. ANN. § 955 (LEXIS through 2012 Sess., Act 143); R.I. GEN. LAWS §§ 28-5-1 to -7 (LEXIS through 2011 Sess.); S.C. CODE ANN. §§ 1-13-10 to -80 (LEXIS through 2011 Sess.); S.D. CODIFIED LAWS § 20-13-10 (LEXIS through 2012 Sess.); TEX. LAB. CODE ANN. §§ 21.051-.055 (LEXIS through 2011 1st Called Sess.); UTAH CODE ANN. §§ 34A-5-101 to -106 (LexisNexis, LEXIS through 2012 4th Spec. Sess.); VT. STAT. ANN. tit. 21, § 495 (LEXIS through 2011 Sess.); WASH. REV. CODE ANN. §§ 49.60.040, 49.60.180 (LexisNexis, LEXIS through 2012 Sess.); W. VA. CODE ANN. §§ 5-11-3, -9 (LexisNexis, LEXIS through 2012 Sess.); WIS. STAT. §§ 111.321-.322 (LEXIS through 2011 Act 113); WYO. STAT. ANN. §§ 27-9-101 to -105 (LEXIS through 2012 Budget Sess.).

III. FRAMEWORKS ARE IMPORTED INTO STATE LAW

Courts have often used federal law to interpret state employment discrimination statutes.¹²⁹ Using federal law as persuasive authority is not problematic in itself, as long as that borrowing is done with due regard to the specific goals, history, and text of the underlying state statute. On too many occasions, however, courts have treated interpretations of federal discrimination law as if they should be presumptively applied to state law claims. Courts have plunged state laws into the federal framework morass, without adequately considering whether states have made different legislative choices.

This Part first traces how problematic deference to federal law developed over time. It then discusses how deference is especially problematic in the context of frameworks, as the dynamics at play make the frameworks even more complicated in the state context.

A. *The History of Federal Law Predominance*

The federal frameworks often are imported into state law with little explicit consideration of the state statutory regime, as courts tend to borrow deference language that has been developed over time in regards to other statutory provisions.¹³⁰ In many instances, a prior court has looked to federal law to decide a narrow question of state discrimination law.¹³¹ When the court looks to federal law, it uses broad language regarding the similarity between federal and state law and the reasons why state law should follow federal law.¹³² Later courts begin relying on the earlier rationale, failing to recognize that the rationale of the first case may not apply when the court is

¹²⁹ See, e.g., *Anderson v. Family Dollar Stores of Ark., Inc.*, 579 F.3d 858, 862 (8th Cir. 2009) (applying federal standards to Arkansas law); *Greenfield v. City of Miami Beach*, 844 F. Supp. 1519, 1524 (S.D. Fla. 1992) (applying federal standards to Florida state law); *Lambert v. Mazer Disc. Home Ctrs., Inc.*, 33 So. 3d 18, 23 (Ala. Civ. App. 2009) (applying federal standards to age case under Alabama state law); *Smith v. Anchorage Sch. Dist.*, 240 P.3d 834, 840 (Alaska 2010) (applying federal standards to Alaska state law); *Higdon v. Evergreen Int'l Airlines, Inc.*, 673 P.2d 907, 909 n.3 (Ariz. 1983) (applying federal standards to Arizona law); *Chavez v. City of L.A.*, 224 P.3d 41, 50 (Cal. 2010) (applying federal standards to California law); *St. Croix v. Univ. of Colo. Health Scis. Ctr.*, 166 P.3d 230, 236 (Colo. App. 2007) (applying federal standards to Colorado law); *Ware v. State*, 983 A.2d 853, 864 (Conn. App. Ct. 2009) (applying federal standards to Connecticut law).

¹³⁰ See, e.g., *Greenfield*, 844 F. Supp. at 1524 & n.1; *Chavez*, 224 P.3d at 50; *St. Croix*, 166 P.3d at 236; *Ware*, 983 A.2d at 864.

¹³¹ See, e.g., *Anderson*, 579 F.3d at 862; *Lambert*, 33 So. 3d at 23; *Smith*, 240 P.3d at 840; *Chavez*, 224 P.3d at 50.

¹³² See, e.g., *Anderson*, 579 F.3d at 862; *Lambert*, 33 So. 3d at 23; *Higdon*, 673 P.2d at 909 n.3; *St. Croix*, 166 P.3d at 236.

considering a different statutory provision than the one considered in the earlier case.¹³³

Consider, as an example, the interpretation of the Pennsylvania Human Relations Act (“PHRA”).¹³⁴ The PHRA is an omnibus statute that prohibits discrimination on the basis of a variety of protected traits, including age, sex, and handicap or disability.¹³⁵ One of the earliest cases to use federal law to interpret the PHRA was a case involving whether the defendant could establish the defense of a bona fide occupational qualification (“BFOQ”).¹³⁶ Both Title VII and the PHRA used this term of art within their statutory language.¹³⁷ In construing the PHRA provision to be in line with the federal provision, a Pennsylvania state court indicated: “This is the only reasonable, workable method, through hand-in-hand working of the state and federal government, that will carry us to a practical interpretation of this important exception.”¹³⁸

Later cases deferred to federal interpretations, even when the corollaries between state and federal law were not as strong. For example, a federal district court was asked to determine whether plaintiffs proceeding on an age discrimination case under the PHRA must prove but-for causation or whether the plaintiff could proceed on a mixed-motive claim.¹³⁹ The district court simply looked at the main operative provision of the PHRA, noted its similarity to the ADEA and declared that but-for causation was required.¹⁴⁰ It cited prior case law, indicating “that [a]s a general, though not sacrosanct rule . . . the PHRA is interpreted in accordance with the parallel federal antidiscrimination law.”¹⁴¹

However, the district court ignored the complexity of the issue before it, failing to recognize that other courts had interpreted the same language in the PHRA to allow a mixed-motive claim based on other protected traits, interpreting the PHRA to be in tandem with Title VII.¹⁴² The district court failed to recognize that the Supreme Court had created a rift between Title

¹³³ Compare *City of Phila. v. Pa. Human Relations Comm’n*, 300 A.2d 97, 100-01 (Pa. Commw. Ct. 1973) (carefully interpreting the relationship between state and federal statutory language), with *Malarkey v. Reading Hosp. & Med. Ctr.*, No. 09-3278, 2010 WL 4703537, at *9 (E.D. Pa. Nov. 19, 2010) (relying on federal interpretation as a general principle).

¹³⁴ 43 PA. CONS. STAT. § 955 (LEXIS through 2012 Sess., Act 143).

¹³⁵ *Id.*

¹³⁶ *City of Phila.*, 300 A.2d at 101.

¹³⁷ 43 U.S.C. § 2000e-2(e) (2006); 43 PA. CONS. STAT. § 955 (LEXIS through 2012 Sess., Act 143).

¹³⁸ *City of Phila.*, 300 A.2d at 101.

¹³⁹ *Malarkey v. Reading Hosp. & Med. Ctr.*, No. 09-3278, 2010 WL 4703537, at *9 (E.D. Pa. Nov. 19, 2010).

¹⁴⁰ *See id.*

¹⁴¹ *Id.* (alterations in original) (quoting *Warshaw v. Concentra Health Servs.*, 719 F. Supp. 2d 484, 503 (E.D. Pa. 2010)).

¹⁴² *See Young v. St. James Mgmt., LLC*, 749 F. Supp. 2d 281, 288 (E.D. Pa. 2010).

VII and the ADEA that was driven, in part, by those statutes' histories and texts, which differ from the text and history of the PHRA.

In some instances, early courts included some restrictions regarding the circumstances where federal law should follow state law.¹⁴³ However, in subsequent cases, courts tended to only cite broad expressions of deference, excluding the words of limitation. For example, one court explained that when interpreting the North Dakota Human Rights Act, courts should "look to federal interpretations of Title VII for guidance 'when it is helpful and sensible to do so.'"¹⁴⁴ However, in a later case, the references to helpful and sensible disappear, as the later court simply notes that "federal interpretations of Title VII [provide] guidance in interpreting the North Dakota Human Rights Act."¹⁴⁵

In other cases, the deference issues become more complex. Take for example the Tennessee Human Rights Act ("THRA").¹⁴⁶ The THRA prohibits discrimination based on age and based on traits such as sex, race, and religion.¹⁴⁷ Thus, the THRA prohibits discrimination based on protected traits that on the federal level are found in the ADEA and Title VII.¹⁴⁸ The THRA was not amended to mimic the 1991 amendments to Title VII.¹⁴⁹

The THRA explicitly indicates that its purpose is to "[p]rovide for execution within Tennessee of the policies embodied in the federal Civil Rights Acts of 1964, 1968 and 1972, the Pregnancy Amendment of 1978, and the Age Discrimination in Employment Act of 1967."¹⁵⁰ When interpreting the THRA, Tennessee courts have looked to interpretations of federal employment discrimination statutes.¹⁵¹ Thus, the Tennessee legislature has created an interesting quandary. It has chosen to prohibit discrimination through one unified statutory regime. Yet, it has indicated that the THRA should be interpreted according to both the ADEA and Title VII, which are increasingly being interpreted to be at odds with one another.

Another similar example can be found under an Alabama law, which only prohibits discrimination based on age.¹⁵² The Alabama law has a provision which reads as follows: "Any employment practice authorized by the federal Age Discrimination in Employment Act shall also be authorized by

¹⁴³ See *Schweigert v. Provident Life Ins. Co.*, 503 N.W.2d 225, 227 (N.D. 1993).

¹⁴⁴ *Opp v. Source One Mgmt., Inc.*, 591 N.W.2d 101, 105 (N.D. 1999) (quoting *Schweigert*, 503 N.W.2d at 227).

¹⁴⁵ *Brown v. Flying J, Inc.*, No. 1:08-cv-059, 2009 WL 2516202, at *13 (D.N.D. Aug. 14, 2009) (citing *Opp*, 591 N.W.2d at 105).

¹⁴⁶ See generally TENN. CODE ANN. §§ 4-21-401 to -408 (LEXIS through 2011 Sess.).

¹⁴⁷ *Id.* § 4-21-401.

¹⁴⁸ See 29 U.S.C. § 623(a) (2006); 42 U.S.C. § 2000e-2(a) (2006).

¹⁴⁹ Compare 42 U.S.C. 2000e-2(k), with TENN. CODE ANN. §§ 4-21-401 to -408 (LEXIS through 2011 Sess.).

¹⁵⁰ TENN. CODE ANN. § 4-21-101 (citation omitted).

¹⁵¹ *E.g.*, *Bruce v. W. Auto Supply Co.*, 669 S.W.2d 95, 97 (Tenn. Ct. App. 1984).

¹⁵² ALA. CODE §§ 25-1-21 to -22 (LexisNexis, LEXIS through 2012 Sess.).

this article and the remedies, defenses, and statutes of limitations, under this article shall be the same as those authorized by the federal [ADEA].¹⁵³ The ADEA explicitly provides that it is legal to take an action based on a RFOA, which has been interpreted by the Supreme Court to be an employer affirmative defense in age discrimination cases.¹⁵⁴ Likewise, the ADEA permits age discrimination when age constitutes a BFOQ.¹⁵⁵ Alabama law does not contain either the BFOQ or RFOA language,¹⁵⁶ so it is hard to understand how the state law can be read to have the same defenses as the ADEA.

In the early years of the federal discrimination statutes, rote borrowing from federal statutory interpretation may not have been as problematic as it is today. Many of the provisions that drew the courts' early attention were provisions that were the same in both federal and state law.¹⁵⁷ However, even if there were reasons early in the history of employment discrimination law to read state law to be in sync with federal law, those reasons are becoming less compelling with the passage of time.

For decades the courts largely assumed that the ADEA and Title VII worked in tandem. If an analytical framework was used in the Title VII context, the courts applied that same framework to the ADEA.¹⁵⁸ As discussed earlier, beginning in 2005, the Supreme Court began to differentiate the ADEA from Title VII, interpreting the ADEA as not providing for a mixed-motive claim and requiring application of a different analysis for disparate impact claims.¹⁵⁹ Both of these changes make it more difficult for a plaintiff to prevail on ADEA claims than on Title VII claims.

Not only has the ADEA diverged from Title VII, but over time, the language of the federal discrimination statutes has diverged further from the state statutes. The 1991 amendments to Title VII, which have played a critical role in interpretation of federal statutes, were not adopted by most of the states.¹⁶⁰ Using deference standards that were developed in relation to other provisions of state employment discrimination law is problematic.

¹⁵³ *Id.* § 25-1-29.

¹⁵⁴ *See* *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (discussing the RFOA provision); *see also id.* at 239 (plurality opinion) (noting that the RFOA provision acts as a “preclu[sion]” to liability).

¹⁵⁵ 29 U.S.C. § 623(f)(1) (2006).

¹⁵⁶ ALA. CODE §§ 25-1-21 to -22 (LexisNexis, LEXIS through 2012 Sess.).

¹⁵⁷ *See, e.g., City of Phila. v. Pa. Human Relations Comm’n*, 300 A.2d 97, 101 (Pa. Commw. Ct. 1973).

¹⁵⁸ *E.g., O’Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 311 (1996) (assuming without deciding that *McDonnell Douglas* could be used in ADEA cases).

¹⁵⁹ *See* *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009); *Smith*, 544 U.S. at 240.

¹⁶⁰ *See supra* note 128.

B. *The Structure and Language of State Employment Discrimination Law*

Courts often ignore important differences between the state and federal regimes, trying to shoehorn state law into the federal pattern.¹⁶¹ Unfortunately, interpretation of federal law is laden with analytical splits, and interpreting state law in kind unnecessarily draws state law into those same splits.

This Part describes how two fractures of federal law have been imported into state law despite the structure and language of the state employment discrimination statutes suggesting another outcome. It also describes central features of state law that distinguish it from federal law in ways that are important to the federal frameworks.

As discussed in more detail in Part I.B., the courts, over the last decade, have interpreted Title VII as requiring different proof structures and allowing for different types of claims than the ADEA.¹⁶² For example, mixed-motive claims are allowed under Title VII, while the Supreme Court has interpreted the ADEA as requiring but-for causation.¹⁶³ The courts use one structure for analyzing Title VII disparate impact claims and a different structure for thinking about an ADEA claim.¹⁶⁴ The Supreme Court has signaled that it may reconsider whether the *McDonnell Douglas* test, which is overwhelmingly used in Title VII single-motive cases, should be used in ADEA cases.¹⁶⁵ Thus, in the federal context, there is a growing dichotomy between how claims are analyzed under the ADEA and under Title VII.

State law has been drawn into these rifts. Consider for example, the federal courts' interpretation of the New York State Human Rights Law ("NYSHRL"). Like most state laws, the NYSHRL is one unified statutory regime that prohibits discrimination based on age, as well as other protected traits, such as race and sex.¹⁶⁶ However, the Second Circuit has assumed, without deciding, that the Supreme Court's interpretation of the causal standard for ADEA claims would apply to claims brought under the NYSHRL, thus, incorporating a but-for standard for such claims.¹⁶⁷ This is

¹⁶¹ See *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 105 n.6 (2d Cir. 2010).

¹⁶² See *Gross*, 557 U.S. at 174; *Smith*, 544 U.S. at 240.

¹⁶³ *Gross*, 557 U.S. at 174, 176.

¹⁶⁴ See *Smith*, 544 U.S. at 240.

¹⁶⁵ Compare *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (applying the *McDonnell Douglas* test to a case under the ADEA), with *Gross*, 557 U.S. at 175 n.2 (noting that the *McDonnell Douglas* test does not necessarily apply to ADEA cases).

¹⁶⁶ N.Y. EXEC. LAW § 296 (Consol., LEXIS through 2012 Ch. 1-447) ("It shall be an unlawful discriminatory practice . . . [f]or an employer or licensing agency, *because of* an individual's age, race, creed, color, national origin, [or] sexual orientation . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment." (emphasis added) (citation omitted)).

¹⁶⁷ *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 105 n.6 (2d Cir. 2010). However, in a later case, a district court judge in the same circuit expressed doubt about whether state law should mimic the

strange because the federal courts have used the “motivating factor” language to describe the causal link the plaintiff is required to establish in cases involving other protected classes.¹⁶⁸

Similar analysis occurs in disparate impact cases. Like most states, Tennessee has a unified discrimination statute that prohibits discrimination on the basis of age and other traits, such as race and sex.¹⁶⁹ Federal courts have applied the ADEA’s disparate impact analysis to age claims brought under the THRA.¹⁷⁰ Federal courts have applied Title VII’s disparate impact analysis to race discrimination claims brought under the THRA.¹⁷¹ Even though the THRA has one set of operative provisions governing race and age claims, the courts have applied the fractured Title VII and ADEA jurisprudence to the state law claims.

Several features of federal employment law contribute to the rift between ADEA and Title VII claims. In creating different analytical frameworks for Title VII and the ADEA, the courts have relied on the fact that the ADEA and Title VII are two separate statutes and that Congress did not include the 1991 amendments regarding mixed-motive and disparate impact in the ADEA.¹⁷² In separating the ADEA from Title VII, the courts have also relied on the Wirtz Report, suggesting that the report indicates that age discrimination is functionally different than discrimination based on other protected traits.¹⁷³ The question of whether mixed-motive claims should exist under the ADEA is a part of a discussion regarding whether age discrimination is and should be fundamentally different than other discrimination based on other protected classes.

However, many state laws do not share these features with federal law. First, most states have a combined statute that prohibits discrimination against a variety of protected traits under one unified regime.¹⁷⁴ This organizational difference is important because it means that the theoretical and textual differences used to fracture analysis under the ADEA and Title VII should not automatically carry over into the state context. Importantly, the lack of that distinction provides less reason to believe that state legislators

federal standard. *Saenger v. Montefiore Med. Ctr.*, 706 F. Supp. 2d 494, 506 (S.D.N.Y. 2010). To avoid the potential conflict, the district court evaluated the case under the lower motivating factor standard, reasoning that the plaintiff’s claim did not even meet this lower burden. *Id.*

¹⁶⁸ See *Joseph v. Marco Polo Network, Inc.*, No. 09 Civ. 1597(DLC), 2010 WL 4513298, at *6 (S.D.N.Y. Nov. 10, 2010).

¹⁶⁹ TENN. CODE ANN. § 4-21-401 (LEXIS through 2011 Sess.).

¹⁷⁰ *Aldridge v. City of Memphis*, 404 F. App’x 29, 40 n.11 (6th Cir. 2010) (noting that court was applying ADEA analysis to THRA claim), *cert. denied*, 131 S. Ct. 2932 (2011).

¹⁷¹ See *Isabel v. City of Memphis*, No. 01-2533 ML/BRE, 2003 WL 23849732, at *1 (W.D. Tenn. Feb. 21, 2003).

¹⁷² See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009); *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005).

¹⁷³ See *Smith*, 544 U.S. at 240-41.

¹⁷⁴ See *supra* note 114.

viewed age discrimination as fundamentally different from the discrimination that occurs based on other protected traits. Second, state legislatures did not amend the state statutes to include the mixed motive and disparate impact provisions contained within Congress's 1991 amendments to Title VII.¹⁷⁵

This same problem plays itself out in other contexts. For example, in 1991, Congress amended Title VII, adding language indicating that a plaintiff could prevail under the statute if she is able to establish that the protected trait played a motivating factor in an employment decision.¹⁷⁶ Based on this provision, some courts have characterized Title VII as being divided into two kinds of individual disparate treatment claims, single-motive and mixed-motive, each having a different analytical structure.¹⁷⁷ Most state discrimination statutes do not contain Title VII's "motivating factor" language. Yet, courts interpreting state law have applied separate tests for mixed-motive and single-motive claims.¹⁷⁸

In doing so, many courts have failed to understand that they are ducking key questions about causation and intent. For example, for state statutes that do not contain "motivating factor" language, courts should be considering whether the operative language of the state statutes require a showing of but-for causation, whether the language is broad enough to include "motivating factor" causation, whether the words actually point to another causal standard, or whether intent requirements serve as a proxy for causation.¹⁷⁹ This issue also relates to whether the state law claims should have different analytical frameworks for considering mixed and single-motive claims.

The courts' assumptions about state law have numerous spillover effects. The Supreme Court's decision to require but-for causation in the ADEA context creates confusion regarding whether the term "because of" in other contexts also means but-for causation.¹⁸⁰ One of the areas where this ambiguity appears is in deciding whether but-for causation is required in retaliation cases or whether plaintiffs can prevail by establishing that the

¹⁷⁵ See *supra* note 128.

¹⁷⁶ 42 U.S.C. § 2000e-2(m) (2006).

¹⁷⁷ See *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 716-19 (6th Cir. 2006) (Moore, J., concurring) (discussing confusion among circuit courts on how mixed-motive claims should be treated).

¹⁷⁸ See, e.g., *id.* at 706, 712-13 (majority opinion); *Sheikh-Hassan v. United Airlines, Inc.*, No. 98-15114, 1999 WL 137336, at *2-3 (9th Cir. Feb. 10, 1999) (applying the *McDonnell Douglas* test to a single-motive claim); *Tatro v. Cascades Boxboard Grp. Conn., LLC*, No. CV 09 4009597, 2010 WL 2196531, at *7 (Conn. Super. Ct. Apr. 22, 2010) (recognizing that the *McDonnell Douglas* test does not necessarily apply to mixed-motive claims).

¹⁷⁹ *Cf.*, e.g., *West v. Bechtel Corp.*, 117 Cal. Rptr. 2d 647, 656-57 (Cal. Ct. App. 2002) (holding that motivating factor standard applies to age discrimination cases under California statute).

¹⁸⁰ See, e.g., *Saridakis v. S. Broward Hosp. Dist.*, 468 F. App'x 926, 931 (11th Cir. 2012) (per curiam) (noting circuit split that has developed regarding whether but-for causation is required for Title VII retaliation claims).

plaintiff's participation in protected activity was a motivating factor in the decision.¹⁸¹

For example, the Pennsylvania antidiscrimination statute, the PHRA, contains a retaliation provision, indicating that it is unlawful "to discriminate in any manner against" a person "because" he or she opposed an unlawful employment practice.¹⁸² Using *Gross*, a federal district court has reasoned that plaintiffs proceeding on a retaliation claim under the PHRA must establish but-for causation.¹⁸³ However, federal courts also interpret the "because of" language in the PHRA's primary operative provisions as allowing the plaintiff to prove her case by showing that a protected trait was a motivating factor in the decision.¹⁸⁴ Thus, the same words used in the same statutory regime are interpreted to have different meanings.

As shown throughout this Part, there are many features of the structure, text, and history of state employment discrimination law that do not parallel federal law. Most state statutes do not share the same two-part structure as the original operative provisions of Title VII. Additionally, most state statutes handle all protected classes within the same statutory regime. The state statutes do not include the 1991 amendments to Title VII in their totality. To the extent these factors have led to the fracturing of federal law, it is doubtful that state law should be interpreted as containing the same analytical rifts.

C. *Reliance on Common Law Decision Making*

In some instances, the courts read state law to work similarly to federal law in instances where the federal law is not being driven by statutory interpretation, but rather by common-law decision making by the courts. This Part explores whether parallel construction in such instances is warranted.

The most prominent example of reliance on common-law decision making is when state law is read to contain the *Faragher/Ellerth* defense.¹⁸⁵ Title VII provides that employers are prohibited from taking certain acts based on a protected trait.¹⁸⁶ Although the term "employer" is further defined within the statutory text,¹⁸⁷ it was unclear what type of liability this

¹⁸¹ *See id.*

¹⁸² 43 PA. CONS. STAT. § 955(d) (LEXIS through 2012 Sess., Act 143).

¹⁸³ *Warshaw v. Concentra Health Servs.*, 719 F. Supp. 2d 484, 503-04 (E.D. Pa. 2010).

¹⁸⁴ *Anthony v. Duff & Phelps Corp.*, No. 09-3918, 2010 WL 3222188, at *8-9 (E.D. Pa. Aug. 12, 2010) (applying a mixed-motive analysis in national origin discrimination case under PHRA), *aff'd*, 432 F. App'x 140 (3d Cir. 2011).

¹⁸⁵ *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Merritt v. Albemarle Corp.*, 496 F.3d 880, 883 (8th Cir. 2007).

¹⁸⁶ 42 U.S.C. § 2000e-2(a) (2006).

¹⁸⁷ *Id.* § 2000e(b).

provision placed on employers for the acts of their employees.¹⁸⁸ This question became more important after the Court recognized harassment as a cognizable violation under Title VII.

In two opinions handed down on the same day, the Supreme Court developed a complex framework for thinking about employer liability for harassment.¹⁸⁹ The Supreme Court held that employers would be liable for sexual harassment committed by supervisors if the supervisor also took a tangible employment action against the employee.¹⁹⁰ However, in cases of supervisor harassment where no tangible action is taken, the Court provided the defendant with a way to escape liability by establishing an affirmative defense to liability.¹⁹¹ The affirmative defense requires the employer to establish “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”¹⁹²

The words “tangible employment action” do not appear in Title VII; nor does the two-part affirmative defense created by the Supreme Court.¹⁹³ *Faragher* and *Ellerth* do not represent pure statutory interpretation of Title VII.¹⁹⁴ Rather, in these cases, the Supreme Court has created, using common law-type reasoning, a federal law of agency for Title VII that is not dependent on the statutory language.

In cases where the federal courts are gap filling federal statutes using common law reasoning, there is greater reason to be skeptical about importing these concepts into state law. Nonetheless, courts interpreting state employment discrimination statutes have applied the agency analysis created in *Faragher* and *Ellerth*.¹⁹⁵ What is especially strange about parallel construction in this context is that while the Supreme Court considered using traditional agency principles to resolve the Title VII issue, it ultimately rejected those principles, creating its own agency analysis that combined elements of traditional reasoning with the Court’s view regarding how those

¹⁸⁸ See *id.*; *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (declining to adopt a definitive rule regarding employer liability for their employees’ sexual harassment).

¹⁸⁹ See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

¹⁹⁰ *Ellerth*, 524 U.S. at 762.

¹⁹¹ *Id.* at 765; *Faragher*, 524 U.S. at 807.

¹⁹² *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

¹⁹³ Compare 42 U.S.C. § 2000e (2006), with *Ellerth*, 524 U.S. at 765, and *Faragher*, 524 U.S. at 807.

¹⁹⁴ See *Ellerth*, 524 U.S. at 754-55; *Faragher*, 524 U.S. at 791.

¹⁹⁵ See *Merritt v. Albemarle Corp.*, 496 F.3d 880, 883 (8th Cir. 2007); *May v. Schering Corp.*, No. 09-170-B-W, 2010 WL 377012, at *7-8 (D. Me. Jan. 26, 2010). But see *Murillo v. Rite Stuff Foods, Inc.*, 77 Cal. Rptr. 2d 12, 17 (Ct. App. 1998) (holding that employer is strictly liable for discrimination by supervisor in cases brought under California law).

principles should interact with the underlying goals of Title VII.¹⁹⁶ In the agency context, it is logical to think that state employment discrimination law should work in tandem with state agency principles, rather than making agency law radically different in the employment discrimination context.

This same problem is also present with regard to the *McDonnell Douglas* framework. The *McDonnell Douglas* framework was created with little reference to the actual language of Title VII or its legislative history.¹⁹⁷ Indeed, when courts have discussed what the framework is, they have described it as a “procedural device,”¹⁹⁸ as “merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination,”¹⁹⁹ and as simply a means of “arranging the presentation of evidence.”²⁰⁰ Despite the fact that *McDonnell Douglas* may not even represent an exercise of statutory interpretation, it still is broadly imported into state law.²⁰¹ However, importing such a standard into state law should require more explicit consideration because the federal courts have imposed an analytical structure onto statutes that is not directly drawn from the federal statutes.

It is important that courts considering state law claims think about whether court-created doctrines in the federal context should transfer to the state context, especially when the doctrines are not derived directly from the language of the federal statutes. In *Faragher/Ellerth*, the Court was deciding the circumstances under which an employer would be liable for

¹⁹⁶ See Sandra F. Sperino, *The “Disappearing” Dilemma: Why Agency Principles Should Now Take Center Stage in Retaliation Cases*, 57 U. KAN. L. REV. 157, 167 n.54 (2008).

¹⁹⁷ See Sandra F. Sperino, *Flying Without a Statutory Basis: Why McDonnell Douglas Is Not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743, 746 (2006).

¹⁹⁸ *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 521 (1993) (emphasis omitted). This Article will not address whether federal courts are properly using vertical choice of law when they apply *McDonnell Douglas* to state law claims. This issue is addressed in Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith*, 44 HOUS. L. REV. 349, 352 (2007).

¹⁹⁹ *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

²⁰⁰ *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988); see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002) (holding *McDonnell Douglas* “is an evidentiary standard, not a pleading requirement”).

²⁰¹ See, e.g., *Acree v. Tyson Bearing Co.*, 128 F. App’x 419, 429-30 (6th Cir. 2005) (“Although the Kentucky Supreme Court has not squarely addressed whether the *McDonnell Douglas* burden-shifting analysis applies to age discrimination cases under the [Kentucky Civil Rights Act], the parties do not dispute the issue and we will therefore assume that it does.”); *Higgins v. Johnson Cnty. Med. Labs. Inc.*, No. 95-2295-JWL, 1996 WL 707102, at *3 n.5 (D. Kan. Nov. 15, 1996) (assuming that *McDonnell Douglas* standard would apply to Kansas antidiscrimination statute); *Bd. of Educ. v. Cady*, 860 N.E.2d 526, 535 (Ill. App. Ct. 2006) (allowing plaintiffs to indirectly prove discrimination using the *McDonnell Douglas* standard); see also *Farrugia v. N. Shore Univ. Hosp.*, 820 N.Y.S.2d 718, 726 (N.Y. Sup. Ct. 2006) (requiring only a de minimis showing to establish a prima facie case and shift the burden of proof).

discrimination.²⁰² The *McDonnell Douglas* inquiry is concerned with how a plaintiff can establish a discrimination claim.²⁰³ Both of these issues go to the heart of discrimination law, a place where state choice should be respected.

D. *Causation and Harm Questions Represent Choices*

This Part discusses federalism concerns, examining the proper balance between state and federal law in the discrimination context.²⁰⁴ One of this Article's primary concerns is to ensure that state preferences regarding causation and harm, which are reflected in state statutes, are respected. To make this argument, it is necessary to understand that recent interpretations of federal law are largely grounded in assumptions and choices that the federal courts have made with respect to those laws.

The Supreme Court has engaged in an analysis of federal employment discrimination law that makes explicit choices about how those statutes operate. Regarding the ADEA, the Supreme Court has given prominence to certain portions of the Wirtz Report to reason that the ADEA requires a plaintiff to establish but-for causation and that it provides the employer with an easier way to rebut a showing of disparate impact.²⁰⁵ As discussed throughout the Article, these decisions are strongly grounded in how the federal courts have interpreted the particular history and text of the ADEA and its relationship to Title VII.²⁰⁶

Underlying all of the Supreme Court's recent interpretations of the ADEA is a concern that if age discrimination is not handled differently than other discrimination claims, then employees will be able to establish discrimination in cases where liability otherwise should not lie.²⁰⁷ If one believes that age discrimination is rare and that age often correlates with non-discriminatory reasons for acting, it is reasonable to impose a but-for causation standard. It also is sensible to make it easier for defendants to rebut disparate impact claims. Lower standards for plaintiffs might improperly entangle employers in cases where no liability should lie.²⁰⁸

However, with regard to age discrimination, most states have arguably made a different choice. Underlying race and sex discrimination claims is

²⁰² *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 785-86 (1998).

²⁰³ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

²⁰⁴ Cf. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 914 (1994).

²⁰⁵ See *Smith v. City of Jackson*, 544 U.S. 228, 240-41 (2005); cf. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174, 176 (2009).

²⁰⁶ See *Gross*, 557 U.S. at 174; *Smith*, 544 U.S. at 240-41.

²⁰⁷ See *Smith*, 544 U.S. at 240-41.

²⁰⁸ See *id.*

the idea that, in most cases, these traits will not be relevant and will not often correlate with nondiscriminatory reasons for acting.²⁰⁹ The overwhelming majority of states have chosen to include age protections within the same regime as sex and race protections.²¹⁰ The states have not used the “reasonable factor other than age” distinction that appears in the ADEA.²¹¹ This statutory organization explicitly rejects the dichotomy contained in federal law between age and other claims.

The federal courts also have engaged in choices about appropriate causation, intent, and harm standards even within Title VII. The prima facie case of *McDonnell Douglas* was supposed to create a fairly minimal burden for plaintiffs, after which a rebuttable presumption of discrimination would arise.²¹² It would be reasonable to create a framework that works this way based on a belief that discrimination frequently occurred. Likewise, creating a mixed-motive framework is reasonable if one believes that discrimination nonetheless still happens when both legitimate and discriminatory reasons are at play.

These choices also come into play regarding harm. In the harassment context, the Supreme Court has indicated that the plaintiff is not harmed in a way that is remediable, unless the harassment is severe or pervasive.²¹³ The words “severe or pervasive” do not appear in Title VII; rather, these words are a choice that the Court has imposed upon the statutory language.²¹⁴ The Supreme Court has indicated its belief that the terms and conditions of a plaintiff’s work are not affected until harm reaches a certain level.²¹⁵ This same assumption underlies court reasoning that lateral transfers or bad evaluations are not harmful enough to be cognizable under the federal statutes.²¹⁶

Importantly, the federal courts have also made choices about the fractured way in which they perceive discrimination. The federal courts divide harm explicitly into certain frameworks and require plaintiffs to meet the structures of those frameworks when proving a discrimination case.²¹⁷

Many state laws do not embody these same choices and did not adopt the original two-part structure of Title VII’s original provisions. Many states have not included “motivating factor” language in their statutes or

²⁰⁹ See 42 U.S.C. § 2000e-2(e)(1) (2006) (providing BFOQ defense that allows sex to be taken into account only in a narrow set of circumstances).

²¹⁰ See *supra* note 114 and accompanying text.

²¹¹ See *Unlawful Discrimination*, in 50 STATE STATUTORY SURVEYS: EMPLOYMENT; PRIVATE EMPLOYMENT (2011), available at 0060 SURVEYS 25 (Westlaw).

²¹² *Buytendorp v. Extendicare Health Servs., Inc.*, 498 F.3d 826, 834 (8th Cir. 2007).

²¹³ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

²¹⁴ See, e.g., 42 U.S.C. § 2000e-2(a) (Title VII’s operative provisions).

²¹⁵ *Meritor Sav. Bank*, 477 U.S. at 67.

²¹⁶ See, e.g., *Cooper v. United Parcel Serv., Inc.*, 368 F. App’x 469, 474 (5th Cir. 2010) (per curiam).

²¹⁷ *Sperino*, *supra* note 45, at 72, 74-81.

separately codified a disparate impact provision and instead describe the type of harm the plaintiff needs to suffer in different terms than those used by the federal statute.²¹⁸

Using this approach, it is likely that some state regimes will be interpreted to be more pro-employee, adopting broad causal standards for all discrimination claims and rejecting some of the limits of the federal proof structures. Other statutes will be interpreted in a pro-defendant direction, perhaps rejecting application of the motivating factor or disparate impact standard to any claims. This Article proposes that state law provides a viable alternative to the federal regime, one that is less entangled in the substantive and procedural mess of frameworks. Allowing the pro-employee states to take a less framework-driven approach to discrimination law would be a welcome development for federal discrimination law.

IV. CONSIDERING HOW TO UNTANGLE INAPPROPRIATE DEFERENCE

The prior Parts demonstrate that construing state statutes in tandem with federal law draws them into an increasingly complicated web of frameworks that are substantively and procedurally confusing. This Article argues that state law should not be governed by these complex frameworks. Answering the normative question, however, does not provide a roadmap for how courts could diminish deference. This Part details how courts and legislatures would do this.

A. *Rejecting the Uniformity Hypothesis*

Some might argue that uniformity is a value that supports interpreting federal and state discrimination law in tandem.²¹⁹ Without debating the value of uniformity, this Part demonstrates that it does not result from the current approach to parallel construction because of two different dynamics. First, state interpretation is often read to follow federal law, but then is left behind after a congressional amendment to the federal statute. Second, federal law is mired in circuit splits, which then also affect state law.

In many instances, state law is interpreted to follow federal law in one way, but a later congressional amendment changes the federal regime. The

²¹⁸ See, e.g., ARK. CODE ANN. § 16-123-107(a)(1) (LEXIS through 2012 Fiscal Sess. & updates) (indicating that a person has a right to be free from discrimination, including the right to obtain and hold employment without discrimination). Despite the difference in language between the Arkansas statute and federal law, courts have imported the adverse employment action standard into cases brought under Arkansas state law. *Davis v. KARK-TV, Inc.*, 421 F.3d 699, 703-04, 706 (8th Cir. 2005) (indicating that lateral transfer claim was not cognizable).

²¹⁹ See Alex B. Long, *Viva State Employment Law! State Law Retaliation Claims in a Post-Crawford/Burlington Northern World*, 77 TENN. L. REV. 253, 255-56 (2010).

question then remains whether the state statute continues to follow the old interpretation of the federal statute or the interpretation required under the amended federal statute, if the state legislature fails to amend the state statute to follow the federal one.

This problem can occur in many different ways, but an example best illustrates the problem. After *Price Waterhouse*, courts were uncertain whether direct evidence was required to establish a mixed-motive claim under Title VII.²²⁰ In 1991, Congress amended Title VII to explicitly provide for claims where the plaintiff could prove a protected trait was a motivating factor in the decision, and in *Desert Palace*, the Supreme Court interpreted the 1991 amendments to Title VII as not requiring direct evidence for mixed-motive claims.²²¹

Courts interpreted state law in the interim between the Supreme Court interpretation of the federal statutes and congressional action.²²² For example, Alaska has a statute, the language of which does not correspond to the federal discrimination statutes.²²³ The operative Alaska provision provides that an employer cannot discriminate “because of” a protected trait “when the reasonable demands of the position do not require [the] distinction.”²²⁴ Federal law does not contain the “reasonable demands of the position” language.²²⁵ Despite the differences in statutory language, Alaska courts have often looked to Title VII for guidance.²²⁶ After *Price Waterhouse*, but prior

²²⁰ *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95 (2003).

²²¹ *Id.* at 92.

²²² This happens in other contexts as well. Consider first the example regarding the definition of disability. Prior to 2008, the ADA defined a person as actually disabled if he or she had an impairment that significantly limited a major life activity. 42 U.S.C. § 12102(2) (2006). In *Sutton v. United Air Lines, Inc.*, the Supreme Court held that whether a person had a disability under the federal statute must be determined with respect to mitigating measures. 527 U.S. 471, 475 (1999). State and federal courts began to interpret state statutes in line with the *Sutton* decision. Such interpretations were accepted even for statutory regimes where the state definition of disability differed from the federal definition. *See, e.g.*, *Davis v. Computer Maint. Serv., Inc.*, No. 01A01-9809-CV0459, 1999 WL 767597, at *6, *8, *9 (Tenn. Ct. App. Sept. 29, 1999) (requiring mitigating measures to be considered under the Tennessee Handicap Act, which does not contain a definition of “handicap”). In 2008, Congress amended the ADA to indicate that mitigating measures should not be taken into account when considering whether an individual has a disability. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3556 (to be codified at 42 U.S.C. § 12102(2)). Many states did not amend their state statutes, and the question remains whether these states now are stuck with the prior, restricted definition of disability. *See* Sandra F. Sperino, *Diminishing Deference: Learning Lessons from Recent Congressional Rejection of the Supreme Court’s Interpretation of Discrimination Statutes*, 33 RUTGERS L. REC. 40, 44-45 (2009), available at http://lawrecord.com/files/33_Rutgers_L_Rec_40.pdf.

²²³ *See* ALASKA STAT. § 18.80.220 (LEXIS through 2011 Sess.).

²²⁴ *Id.* §18.80.220(a)(1).

²²⁵ 42 U.S.C. § 2000e-2(a) (2006).

²²⁶ *See, e.g.*, *Smith v. Anchorage Sch. Dist.*, 240 P.3d 834, 839 (Alaska 2010).

to *Desert Palace*, the Alaska courts indicated that mixed-motive claims could only proceed under Alaska law upon a showing of direct evidence.²²⁷

After the 1991 amendments to Title VII, the Supreme Court interpreted Title VII as not requiring direct evidence for mixed-motive claims, reasoning that the amendment language did not distinguish between direct and circumstantial evidence.²²⁸ Alaska did not amend its statute. When later litigants argued that *Desert Palace* governed state law claims, the Alaska Supreme Court refused to overrule earlier interpretations of the statute, essentially reasoning that *Desert Palace* relied on Title VII's amended language, which was not present in the Alaska statute.²²⁹

While this latter argument appears sound, it is grounded on an inappropriate assumption that the initial decision to follow federal law was correct. Alaska's statutory language does not explicitly distinguish between direct and circumstantial evidence. Given its former reliance on federal law, the Alaska state statutory regime is interpreted as having a strange distinction that has been rejected at the federal level. Even less helpful, the Alaska Supreme Court left open the possibility that it might later change its interpretation.²³⁰ Litigants are then left having to wade through numerous analytical frameworks to avoid abandoning potential claims, and courts are forced to sort through these various conflicting positions.

Also consider a state law that was interpreted to have a disparate impact analysis that was similar to the one enunciated by the Supreme Court in *Wards Cove*.²³¹ In 1991, Congress amended Title VII to codify a disparate impact analysis that was different than that articulated in *Wards Cove*.²³² Importantly, the analytical framework to be applied in Title VII disparate impact cases was not laid out in Title VII prior to the 1991 amendments.²³³ In a state where the state law was interpreted to follow *Wards Cove*, but where the legislature did not amend the underlying state statute, it would be disingenuous to interpret the state statute in two ways: following first the *Wards Cove* structure and then ipse dixit following the structure proposed in the 1991 amendments. Yet rote deference either invites this kind of reasoning or an outcome that leaves state law out of sync with federal law. Over time, the chance that state statutes will become moored to prior interpretations of federal law have increased as federal law becomes more com-

²²⁷ *Era Aviation, Inc. v. Lindfors*, 17 P.3d 40, 44 (Alaska 2000); see also *Crommie v. Pub. Utils. Comm'n*, 840 F. Supp. 719, 722 (N.D. Cal. 1994) (requiring direct evidence to proceed under motivating factor test under California state law), *aff'd in part sub nom. Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470 (9th Cir. 1995).

²²⁸ *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101-02 (2003).

²²⁹ *Smith*, 240 P.3d at 840.

²³⁰ *Id.* at 841.

²³¹ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-67 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074.

²³² Compare *Wards Cove*, 490 U.S. at 656-57, with 42 U.S.C. § 2000e-2(k) (2006).

²³³ Civil Rights Act of 1991, §§ 2-3, 105 Stat. at 1071.

plex, the Supreme Court is called upon to resolve more and more circuit splits, and Congress responds to the Supreme Court's cases.²³⁴

Federal law circuit splits also invite disarray when federal law is imported into state law. This situation clearly calls for courts to independently consider how the circuit split should apply to the particular state law regime. Nonetheless, courts often simply reason that the state law follows the federal law and that therefore the state law is read in tandem with the reading of the federal statute accepted in the particular circuit.

Consider the following example. Prior to 2005, a circuit split existed regarding whether disparate impact claims were cognizable under the ADEA.²³⁵ Alabama has a state statute prohibiting employment discrimination based on age.²³⁶ The statute was enacted in 1997, and its primary operative language is very similar to the main statutory language of the ADEA.²³⁷ In determining whether disparate impact claims existed under the Alabama state statute, a federal district court simply reasoned as follows: "Insomuch as the Alabama Age Discrimination in Employment Act ("AADEA") tracks the ADEA in its interpretation, this court follows the law of the Eleventh Circuit and holds that disparate impact claims may not be brought under the AADEA."²³⁸

Given the existing circuit split, the fact that Alabama law generally mimics the ADEA does not provide the court with any basis for deciding whether the Alabama statute provides for disparate impact claims. Nonetheless, the court used this general deference to justify syncing state law with the federal circuit's interpretation of federal law. Given the fact that circuit splits are often later resolved, this dynamic places state law in an untenable position, with the state law remaining tethered to the circuit's interpretation of the law.

At times, circuit splits cause even more bizarre results as different judges within a circuit opine that state law has two contradictory meanings. For example, the federal courts have been unable to agree on a single standard for plaintiffs trying to establish reverse-discrimination claims. Some courts allow plaintiffs to proceed under the traditional *McDonnell Douglas* test and others require a reverse-discrimination plaintiff to prove more.²³⁹

²³⁴ For example, Congress has considered enacting the Protecting Older Workers Against Discrimination Act, which would incorporate the motivating factor standard into many federal employment discrimination statutes. H.R. 3721, 111th Cong. § 3 (2009); S. 1756, 111th Cong. § 3 (2009).

²³⁵ See *Smith v. City of Jackson*, 544 U.S. 228, 239-240 (2005) (plurality opinion) (discussing history of ADEA disparate impact claims).

²³⁶ ALA. CODE §§ 25-1-21 to -28 (LexisNexis, LEXIS through 2012 Sess.).

²³⁷ Compare *id.* § 25-1-22, with 29 U.S.C. § 623 (2006).

²³⁸ *Dooley v. AutoNation USA Corp.*, 218 F. Supp. 2d 1270, 1279 (N.D. Ala. 2002).

²³⁹ *Brierly v. Deer Park Union Free Sch. Dist.*, 359 F. Supp. 2d 275, 294 n.7 (E.D.N.Y. 2005) (citing cases applying various standards to reverse-discrimination cases and noting the absence of a Second Circuit determination of the issue).

In *Leadbetter v. Gilley*,²⁴⁰ the Sixth Circuit considered reverse-discrimination claims brought under both Title VII and the Tennessee discrimination statute.²⁴¹ In ruling on the claims, the Sixth Circuit applied its own reverse-discrimination test to both the federal and state claims, which required the plaintiff to establish additional background circumstances to demonstrate the defendant “was the unusual employer who discriminates against men.”²⁴² The Sixth Circuit applied this standard without any separate discussion about whether a different standard should be applied to the Tennessee state law claims and failed to discuss a Tennessee Court of Appeals decision that reached the opposite result.²⁴³

In another reverse-discrimination case brought under Tennessee law and federal law, the defendant did not argue that the Sixth Circuit’s higher standard for reverse discrimination should apply.²⁴⁴ The Sixth Circuit applied the same articulation of the *McDonnell Douglas* test as it would apply in a traditional discrimination case to both the federal claims and the state claims.²⁴⁵ Explaining its application of federal law to the Tennessee claims, the court noted: “[A]s they are coextensive, the Title VII analysis subsumes the claims under the counterpart Tennessee statute.”²⁴⁶ The court did not cite any Tennessee state court reverse-discrimination case to support this proposition.²⁴⁷ The underlying Tennessee law on reverse-discrimination claims does not change depending on the three-judge panel that is considering the claim, but this is the result that follows from the type of analysis often used in employment discrimination cases.

As this Part demonstrates, the current approach of reading state law in tandem with federal law does not lead to uniformity between state and federal law, but rather only leads to more complexity and confusion.

B. *Rejecting Other Rationales for Parallel Construction*

In considering whether state law should be read in tandem with its federal counterparts, it also is necessary to explore other reasons provided for parallel construction. This Part explores each of the commonly articulated reasons and describes how these rationales are either inapplicable or less compelling than they were originally.

²⁴⁰ 385 F.3d 683 (6th Cir. 2004).

²⁴¹ *Id.* at 688.

²⁴² *Id.* at 690, 693.

²⁴³ *Id.* at 690-91; *Wilson v. Rubin*, 104 S.W.3d 39, 52 (Tenn. Ct. App. 2002) (not requiring additional background circumstances in a reverse discrimination case).

²⁴⁴ *Willoughby v. Allstate Ins. Co.*, 104 F. App’x 528, 530 n.1 (6th Cir. 2004).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

Some courts have reasoned that following the federal lead is appropriate because state and federal statutes have common purposes and designs.²⁴⁸ While it may be true that federal and state discrimination statutes have the same broad purposes, it is not clear that such a statement helps courts to resolve many of the issues facing courts. For example, saying that a statute broadly prohibits race discrimination does not reveal anything about whether it should adopt one analytical framework over another.

Further, it is debatable whether the majority of the state statutes have the same design as the federal statutes, even confining that observation to the statutes as originally enacted. As discussed earlier, the federal discrimination provisions are divided into numerous statutory regimes, while most states have adopted a unified discrimination regime.²⁴⁹ Many of the state statutes never used the same language as the federal statutes to define discrimination.²⁵⁰

However, it is correct to say that in the past many of the state statutes were more aligned with federal law than they are now. As discussed earlier, most states did not amend their state statutes to reflect Congress's 1991 Title VII amendments regarding mixed-motive and disparate impact claims.²⁵¹ These amendments have created internal fractures within Title VII and have also caused the courts to distinguish the ADEA from Title VII.²⁵² In the first three decades after their enactment, courts interpreted the ADEA and Title VII as largely operating under the same analytical frameworks.²⁵³ The 1991 amendments are central to many of the arguments that the ADEA and Title VII should be interpreted differently.²⁵⁴ To the extent that this same history is not repeated in state law, it is inappropriate to draw state law into the chaos the courts have created in the amendments' wake.

In the early decades of the discrimination statutes, reading state and federal law in tandem may have been more compelling. In these years, it would be more plausible to argue that doing so created consistency for litigants and made litigation more efficient. State cases appended to federal claims would be litigated using similar analytical structures.²⁵⁵ However,

²⁴⁸ See *Melchi v. Burns Int'l Sec. Servs., Inc.*, 597 F. Supp. 575, 581 (E.D. Mich. 1984); *Hawkins v. State*, 900 P.2d 1236, 1240 (Ariz. Ct. App. 1995) (indicating that state law has common intent and purpose to Title VII).

²⁴⁹ See *supra* note 114 and accompanying text.

²⁵⁰ See *supra* notes 121-123 and accompanying text.

²⁵¹ See *supra* note 128.

²⁵² See discussion *supra* Part I.B.

²⁵³ See *supra* note 158 and accompanying text.

²⁵⁴ See *supra* notes 40-42 and accompanying text.

²⁵⁵ Cf. Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 918 (2012) (discussing how federal courts hearing both state and federal claims may resolve both claims using similar analysis).

the persuasiveness of these arguments has diminished over the last two decades.²⁵⁶

Another rationale used to justify deference is that the federal courts have more opportunity to consider employment discrimination issues than the state courts.²⁵⁷ While this statement may be correct, it does not then follow that importing principles and adopting frameworks from federal law is preferable. As discussed throughout this Article, the federal courts have repeatedly interpreted federal law narrowly in ways that drew a response from Congress.²⁵⁸ In many of these instances, it appears that Congress was not necessarily changing the meaning of words contained within the federal statutes, but rather clarifying or reiterating their original meaning.²⁵⁹ Additionally, the federal courts have created chaos in employment discrimination's analytical frameworks, creating numerous, sometimes contradictory, tests.²⁶⁰

A third rationale is that reading the state and federal regimes together is the only practical method for interpreting state law.²⁶¹ Tied to this concern is the idea that it is efficient for both litigants and courts for the statutes to be similar.²⁶²

However, this argument is not true in its broad form. Although the current deference may appear more efficient in individual cases, deference to state law has unnecessarily entangled state law in the framework chaos that plagues federal law. As discussed in more detail in Part V, in the long run such deference prevents state law from being a much-needed counterweight to federal statutory interpretation.²⁶³

C. *Courts Must Reconsider the Language Used to Describe Parallel Interpretation.*

Not only should courts reconsider their prior rationales for reading state and federal law in tandem, they must also consider the language they have used to describe the relationship between the state and federal regimes.

A court considering whether deference is warranted cannot simply rely on broad, generic statements in prior cases that the state law generally follows the federal law. As shown in Parts III.A. and IV.A., these types of

²⁵⁶ Alex B. Long, "If the Train Should Jump the Track . . .": *Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 473-74 (2006).

²⁵⁷ *Melchi v. Burns Int'l Sec. Servs., Inc.*, 597 F. Supp. 575, 581 (E.D. Mich. 1984).

²⁵⁸ *See supra* notes 36 and 60.

²⁵⁹ *See, e.g.*, 42 U.S.C. § 2000e-2(m) (2006).

²⁶⁰ *See discussion supra* Part I.B.

²⁶¹ *City of Phila. v. Pa. Human Relations Comm'n*, 300 A.2d 97, 101 (Pa. Commw. Ct. 1973).

²⁶² Long, *supra* note 256, at 476.

²⁶³ *See discussion infra* Part V.

statements are highly suspect.²⁶⁴ Often, the quotations and citations used by courts are short-hand versions of more nuanced discussions about appropriate deference.²⁶⁵ And, many times, the court is interpreting a provision that is different in substance, organization, or history than the provision considered by earlier courts.²⁶⁶

D. *Courts Must Reconsider Prior Cases*

Not only may a court be required to reconsider the language it uses, it also may be required to disentangle prior case law that relied on such erroneous language. Consider cases like those in which the courts have adopted different frameworks for considering age cases and other cases under unified state statutes.²⁶⁷ It is unlikely that the same words in the same statutory provision were meant to have different meanings and implications for proof structures. At times, courts may simply have to overrule earlier cases that were not carefully reasoned.

Courts will then need to independently consider whether the state statute should mimic federal law, not in some general sense, but rather in regard to the particular statutory provision at issue in the case. In doing this, courts must consider whether the state provision differs from the federal provision in a substantive way, whether the state provision derives from the federal provision, and whether the organizational structure of the state statute differs in important ways. It also must consider whether the federal law is being driven by its particular history, keeping in mind that this history often is not shared by the state regime.

Consider the differentiation between the ADEA and Title VII. Most of the state statutes prohibit age discrimination and discrimination based on other protected traits in the same statutory regime.²⁶⁸ Most of these statutory regimes do not use the terms “reasonable factor other than age,” which is the statutory language used to differentiate disparate impact claims based on age from disparate impact claims under Title VII.²⁶⁹ Thus, the growing proof structure dichotomy between the ADEA and Title VII should not be carried over into most state statutory regimes. Refusing to import the dichotomy not only simplifies state law, it prevents it from being drawn into future conflicts differentiating the ADEA and Title VII.

Further, the distinctions made between the ADEA and Title VII in part reflect the Supreme Court’s understanding that age discrimination is differ-

²⁶⁴ See discussion *supra* Parts III.A, IV.A.

²⁶⁵ See discussion *supra* Parts III.A, IV.A.

²⁶⁶ See discussion *supra* Parts III.A, IV.A.

²⁶⁷ See *supra* notes 134-142 and accompanying text.

²⁶⁸ See *supra* note 114.

²⁶⁹ See *supra* notes 19, 211, and accompanying text.

ent than discrimination based on other protected classes. On several occasions, the Court has indicated that taking certain nondiscriminatory factors into account should be expected to correlate with age and that this recognition was factored into the ADEA.²⁷⁰ However, it is difficult to claim that this same argument applies to all state age claims. Some of those statutes were enacted prior to the Wirtz Report and so cannot claim to be swayed by its reasoning.²⁷¹ Some states adopted age protections at the same time they adopted other protections and used the same words to describe both sets of protections,²⁷² thus making it unlikely that the state intended to treat the two protected classes differently. Given the fact that an overwhelming majority of states have unified employment discrimination regimes, it is difficult to argue that the legislatures intended the words of the statutes to convey that age discrimination is somehow different.²⁷³

Also consider the federal fracturing regarding causation. Many of the state statutes use the same language to describe the required causation for all discrimination inquiries.²⁷⁴ Additionally, many state legislatures have not amended the statutory language in response to the 1991 Title VII amendments.²⁷⁵ Thus, the disarray that exists regarding the *McDonnell Douglas* test and its interaction with the Title VII amendments may not exist in state regimes. Likewise, for most state statutes, there should be no dichotomy between single-motive and mixed-motive cases.

This is not to say that resolving framework questions under state law will be easy, either substantively or practically. For example, there are at least two ways to interpret the 1991 amendments to Title VII. By inserting the “motivating factor” language into Title VII, Congress could have been simply affirming the fact that Title VII’s original “because of” language meant motivating factor causation.²⁷⁶ In *Gross*, the Supreme Court interpreted “because of” as only meaning but-for causation.²⁷⁷ When interpreting state law, courts will need to consider the underlying meaning of the state

²⁷⁰ See *Smith v. City of Jackson*, 544 U.S. 228, 240-41 (2005).

²⁷¹ Eric Ledell Smith & Kenneth C. Wolensky, *A Novel Public Policy: Pennsylvania’s Fair Employment Practices Act of 1955*, 69 PA. HIST. 489, 517 (2002), available at http://dpubs.libraries.psu.edu/DPubS?service=Repository&version=1.0&verb=Disseminate&view=body&content-type=pdf_1&handle=psu.ph/1141330712# (discussing that 1955’s Pennsylvania Fair Employment Practices Act included age provisions).

²⁷² See *supra* note 114 and accompanying text.

²⁷³ See *supra* note 114 and accompanying text.

²⁷⁴ See *supra* notes 114, 166-168, and accompanying text.

²⁷⁵ See *supra* note 128 and accompanying text.

²⁷⁶ Nicholas J. Thielen, Note, *The New Definition of “Because of”*: *The Supreme Court Distinguishes Identical Causation Language in Title VII and the ADEA in Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), 90 NEB. L. REV. 1017, 1025-26 (2012) (discussing that even before the 1991 amendments, the “motivating factor” language was already the supreme law of the land).

²⁷⁷ *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (holding that the ADEA requires showing of but-for causation).

statute; however, there is no need for the state courts to become entangled in the varying proof structures that plague federal law.

On a practical level, it may be difficult for courts to untangle varying guidance about the appropriateness of relying on federal law. For example, a few states seem to be retreating from parallel constructions with federal law, but in a way that makes it difficult to determine when parallel construction is appropriate. In 2010, the Alaska Supreme Court held that “while we look to federal discrimination law jurisprudence generally,” Alaska’s employment discrimination law “is intended to be more broadly interpreted than federal law to further the goal of eradication of discrimination.”²⁷⁸ Using this statement of deference, the Alaska Supreme Court rejected application of the *Gross* case to state age discrimination claims, holding that mixed-motive claims could be pursued.²⁷⁹

However, in the same case the Alaska Supreme Court also reiterated its prior holding that plaintiffs proceeding on mixed-motive claims could only proceed under Alaska law upon a showing of direct evidence, even though the Alaska statute does not explicitly draw a distinction between direct and circumstantial evidence.²⁸⁰ The prior precedent had been based on earlier deference to the Supreme Court’s interpretation of Title VII.²⁸¹ In the part of its 2010 opinion related to mixed motive, the Supreme Court indicated: “We look to decisions under Title VII in interpreting Alaska’s anti-discrimination laws, and have . . . endorsed the federal approach to analyzing claims of disparate treatment.”²⁸² Thus, even within the same case, the state Supreme Court is sending mixed signals about parallel construction.

Advocating that greater care be taken before construing state discrimination law is not the same as abandoning deference to federal reasoning. In many instances, there are strong textual and historical ties regarding provisions of state and federal law where similar treatment would be appropriate. Unfortunately, in a growing number of areas, this general argument does not hold true, necessitating more careful analysis of when to differ to federal principles.

E. Answering the “When” Question

It might be argued that having courts separately construe state law will make it much harder for courts to deal with a large employment discrimination caseload. Further, judges may lack the motivation to engage in a

²⁷⁸ *Smith v. Anchorage Sch. Dist.*, 240 P.3d 834, 842 (Alaska 2010) (quoting *VECO, Inc. v. Rosebrock*, 970 P.2d 906, 912-13 (Alaska 1999)).

²⁷⁹ *Id.* at 842.

²⁸⁰ *Id.* at 840 (citing *Era Aviation, Inc. v. Lindfors*, 17 P.3d 40, 44 (Alaska 2000)).

²⁸¹ *Era Aviation*, 17 P.3d at 44.

²⁸² *Smith*, 240 P.3d at 839 n.6 (alteration in original) (quoting *Era Aviation*, 17 P.3d at 43).

searching analysis of state law, when doing so increases the work required to decide a case. However, there are many instances when courts can retain the efficiency existing under the current system and avoid the motivational issues simply by being mindful of when they need to construe state law.²⁸³

It is often the federal courts that are interpreting state law.²⁸⁴ In many cases, a plaintiff brings federal and state discrimination claims in the same case that is being heard in federal court.²⁸⁵ In some of these cases, the federal court has subject matter jurisdiction over the state law claim under supplemental jurisdiction.²⁸⁶ In these instances, courts may decline supplemental jurisdiction over the state law claims at several procedural junctures. The federal statute regarding supplemental jurisdiction allows federal courts to decline jurisdiction when the state claims involve complicated questions of state law.²⁸⁷ If the federal court retains jurisdiction, it could later decline supplemental jurisdiction if it dismisses all of the federal claims.²⁸⁸ In some states, the federal courts also have the option of referring questions of state law to the state supreme court for determination.²⁸⁹

Both state and federal courts should consider whether it is actually necessary to determine an issue of state employment discrimination law to adjudicate the case before them. In many instances, a court may be able to resolve the case in one party's favor using any applicable standard.²⁹⁰ In some cases the court may refuse to decide an issue of state law because one or more of the parties has failed to properly plead or raise the particular issue.²⁹¹

In many instances where federal law is especially fractured, avoiding state law issues may provide time for federal law to reach consensus on a particular issue or for Congress to act.²⁹² This is not to argue that state law

²⁸³ For example, many courts have strict procedural rules that limit their consideration of substantive issues. See Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 CORNELL L. REV. 203, 213-14 (2011).

²⁸⁴ See, e.g., *Leadbetter v. Gilley*, 385 F.3d 683, 688 (6th Cir. 2004).

²⁸⁵ *Id.*

²⁸⁶ See, e.g., *Issac v. N.C. Dep't of Transp.*, 192 F. App'x 197, 199 (4th Cir. 2006).

²⁸⁷ 28 U.S.C. § 1367(c)(1) (2006).

²⁸⁸ *Id.* § 1367(c)(3).

²⁸⁹ For a general discussion of certification and referral of state law questions, see Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1733-38 (2003).

²⁹⁰ *Hannah Arterian Furnish, A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C. L. REV. 419, 442 (1982).

²⁹¹ See *Arviso v. L.J. Leasing, Inc.*, No. CV-09-01102-PHX-FJM, 2010 WL 4922708, at *6 (D. Ariz. Nov. 29, 2010) (using ADEA to evaluate Arizona state law claims because plaintiff did not contest defendant's argument that ADEA interpretation applies).

²⁹² It is important to note that congressional action without subsequent state legislative action does not necessarily mean that the state and federal statutes should be read differently. In many instances when Congress has amended the federal employment discrimination statutes, it is at least arguable that

should then be read in tandem with federal law, but rather that more considered decision making can be used when interpreting the state statute becomes necessary.

F. *State Legislative Fixes*

Of course, it also is possible that legislatures could make a variety of choices regarding whether to align with federal law. For example, a state could explicitly resolve many of the concerns raised in this Article, by explicitly defining its statute's causal language and harm standard.

Another legislative fix would be for the state legislative body to enact legislation reiterating that the state law is to be construed separately from federal law or that the state law is to be construed liberally to effectuate its original purposes. This is the course that Congress chose when amending the ADA's definitional section.²⁹³ Likewise, language was added to the New York City Human Rights Law to clarify that it is to be construed broadly, regardless of the interpretations of corresponding state or federal laws.²⁹⁴

States could also go in the opposite direction. Despite the substantive and procedural concerns raised in this Article, a state might want to align its statute with federal law. To do so, many of the states would need to amend their statutory language to more closely align it with federal law, including adding the 1991 Title VII amendments and creating different provisions for age claims and claims based on other protected traits. The state laws might still be subject to circuit splits that occur relating to the frameworks, but the uncertainty would be far less than the uncertainty that currently exists.

V. USING STATE LAW TO TRANSFORM FEDERAL LAW

It is important that state law develop independence from federal law to avoid federal law's increasing disarray. However, the separation may provide substantive benefits for federal law, as well.

In many ways, separate state law interpretation could demonstrate that the disarray in federal law is unnecessary and ill-considered. Consider the current federal law regarding proof structures. There are different frameworks for analyzing disparate impact claims under the ADEA and Title VII.²⁹⁵ Mixed-motive claims are allowed under Title VII, but the ADEA

Congress is simply returning the statutory language to its original meaning and away from an incorrect interpretation made by the courts. *See supra* note 276 and accompanying text.

²⁹³ 42 U.S.C. § 12102(4) (Supp. II 2009).

²⁹⁴ N.Y.C. ADMIN. CODE § 8-130 (N.Y. Legal Publ'g Corp., LEXIS through 2012).

²⁹⁵ *See discussion supra* Part I.B.

requires the plaintiff to establish but-for causation.²⁹⁶ Some courts funnel single-motive claims through the *McDonnell Douglas* framework, while using a different framework for so-called mixed-motive claims or for single-motive claims based on direct evidence.²⁹⁷ The courts have been unable to consistently define the difference between circumstantial and direct evidence.²⁹⁸

It is not clear that any of this procedural and substantive complexity actually helps courts better determine whether discrimination has occurred. Indeed, in some circumstances, the complexity appears to thwart plaintiffs from being able to litigate claims.²⁹⁹ State law can provide a model for thinking about discrimination that is not entangled in these proof structures. If state systems develop without strange burden shifts, the direct/circumstantial evidence dichotomy, and without subtle shifts in substantive language, a model will exist to determine whether these changes affect discrimination claims or whether they just unnecessarily complicate the inquiry.

Separately construing state law can also help Congress and the courts think about whether different protected traits require different legal treatment. Since the enactment of Title VII, there has been scholarly disagreement regarding whether race and sex are theoretically and practically similar enough to be treated within the same discrimination language.³⁰⁰ With the separate passage of the ADEA, the Wirtz Report, and the courts' later reliance on that report, similar questions exist regarding age.³⁰¹ In differentiating the ADEA from Title VII, the Supreme Court seems concerned that employers will face inappropriate liability for actions that have a disparate impact based on age if the courts apply a Title VII disparate impact analysis to age claims.³⁰² However, it is arguable that the Supreme Court is making too much of the Wirtz Report and the textual differences between the ADEA and Title VII. State law can provide a model for thinking about whether it makes sense to deal with all protected traits in a unified way.

CONCLUSION

In the past two decades, federal discrimination law has become increasingly fractured. These fractures raise critical questions regarding how

²⁹⁶ See discussion *supra* Part I.B.

²⁹⁷ See *supra* notes 49-67 and accompanying text.

²⁹⁸ See *supra* note 47.

²⁹⁹ See, e.g., *Harmon v. Earthgrains Baking Cos.*, No. 08-5227, 2009 WL 332705, at *1 (6th Cir. Feb. 11, 2009) (using *McDonnell-Douglas* test to dismiss plaintiff's claim).

³⁰⁰ Cf., e.g., Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 743 (2011).

³⁰¹ See *supra* notes 40-42 and accompanying text.

³⁰² *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005).

causation and harm should be defined. They also create procedural confusion for both litigants and courts.

Given this chaos, continuing to interpret state law in tandem with federal law is not sound. Rather, state and federal courts should interpret state laws on their own merits, recognizing that few state employment discrimination statutes mimic their federal counterparts in all important respects. The differences in language, structure, and legislative history counsel against blindly interpreting state discrimination statutes in tandem with their federal counterparts. In freeing state discrimination law from the unnecessary complications of the federal landscape, a second model can emerge that may persuade federal decision makers to reconsider the various proof structures and analytical frameworks they have adopted.