JUSTICE KENNEDY'S BIG NEW IDEA

SANDRA F. SPERINO*

INTRODUCTION 1790
I. THE FALSE DICHOTOMY 1793
  A. Disparate Impact 1795
  B. Disparate Treatment 1797
II. ADVERSE ACTIONS 1803
III. THE NEW TEXTUAL READING 1808
IV. ELIMINATING THE CURRENT ADVERSE ACTION DOCTRINE 1811
V. THE FUTURE OF DISCRIMINATION LAW 1814
  A. A Spectrum, Not a Dichotomy 1814
  B. New Analysis of Intent and Causation 1818
  C. A Fresh Look at Structure 1821
  D. Tortification 1823
  E. A New or Different McDonnell Douglas Test 1826
CONCLUSION 1830

In a 2015 case, the Supreme Court held that plaintiffs could bring disparate impact claims under the Fair Housing Act (the "FHA"). In the majority opinion, Justice Kennedy relied heavily on the text and supporting case law interpreting Title VII of the Civil Rights Act ("Title VII") and the Age Discrimination in Employment Act (the "ADEA"). Without explicitly recognizing the powerful new idea he was advocating, Justice Kennedy's majority opinion radically reconceptualized federal employment discrimination jurisprudence. This new reading of Title VII and the ADEA changes both the theoretical framing of the discrimination statutes and greatly expands their scope.

Title VII and the ADEA have two main operative provisions. For the most part, courts have framed intentional discrimination claims through the first provision. Justice Kennedy instead views both the first and second provisions as relating to intentional discrimination. This Article is the first to explore the far-reaching implications of this new interpretation. More than fifty years after the passage of Title VII, it is as if we have found a completely new statutory provision. This Article shows how viewing the second provision as one that

* Associate Dean of Faculty and Professor, University of Cincinnati College of Law. I would like to thank Professors Janet Moore, Michael Selmi, and Michael Solimine for their comments on earlier drafts of this Article as well as my colleagues who participated in the University of Cincinnati College of Law Summer Workshop Series. I am also deeply indebted to my research assistant Liza Newman for her editing assistance.

concerns intentional discrimination requires wholesale changes in the way that courts frame discrimination cases.

INTRODUCTION

In 2015, in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,[1] the Supreme Court held that plaintiffs could bring disparate impact claims under the Fair Housing Act (the "FHA").[2] In the majority opinion, Justice Kennedy relied heavily on the text and supporting case law interpreting Title VII of the Civil Rights Act of 1964 ("Title VII") and the Age Discrimination in Employment Act of 1967 (the "ADEA").[3] Without explicitly recognizing the powerful new idea he was advocating, Justice Kennedy radically reconceptualized federal employment discrimination jurisprudence.

This new reading of Title VII and the ADEA changes both the theoretical framing of the discrimination statutes and greatly expands their scope. But perhaps even more surprising is Justice Thomas's dissent in the same case, which also supports, at least in part, a broader interpretation of the discrimination laws' reach.[4] This Article explains why Justice Kennedy's majority opinion and even Justice Thomas's dissent have the power to restructure federal employment discrimination law.

Two powerful concepts shape modern discrimination doctrine. The first idea is that discrimination claims are divided into roughly two kinds of claims: disparate treatment or disparate impact.[5] The second idea is the adverse action doctrine.[6] Courts use the adverse action doctrine to impose significant limits on the kinds of employer actions they are willing to call discrimination.[7] Justice Kennedy's opinion has the potential to fundamentally alter the way courts think about the adverse action doctrine and the dichotomy between disparate impact and disparate treatment claims.

The perceived dichotomy between disparate impact and disparate treatment cases is one of the foundational structures of federal discrimination claims. As currently constructed, these claims have different animating theories and proof frameworks. Disparate treatment claims require an employee to show that intentional discrimination played a role in an employment outcome.[8] Disparate

[1] 135 S. Ct. 2507 (2015).

[2] *Id.* at 2525.

[3] *Id.* at 2516-21. It is unclear whether this discussion is dicta. Justice Kennedy does not explicitly recognize that his reading of Title VII and the ADEA is different from traditionally articulated ways of reading them.

[4] *Id.* at 2526 (Thomas, J., dissenting).

[5] *See infra* Part I.

[6] *See infra* Part II.

[7] *See infra* Part II.

[8] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

impact does not require the employee to establish intent, but instead allows an employee to prove discrimination by demonstrating the statistically disparate effect of seemingly neutral tests and policies.[9]

In the popular telling, these concepts also arise from different textual provisions of Title VII of the Civil Rights Act. Disparate treatment claims derive from 42 U.S.C. § 2000e-2(a)(1). Disparate impact claims derive from § 2000e-2(a)(2). For ease of discussion, this Article will refer to § 2000e-2(a)(1) as the first provision and § 2000e-2(a)(2) as the second provision.

In *Inclusive Communities*, five Supreme Court Justices agreed that the second provision is both a disparate impact provision and a disparate treatment provision.[10] Even Justice Thomas agreed that the second provision is a disparate treatment provision.[11] Under this new textual reading, both the first and second provisions relate to disparate treatment claims. Justice Kennedy's reading forces a fresh analysis of Title VII (and the ADEA). Even though Title VII has been on the books for more than fifty years, the second provision has been largely ignored outside the disparate impact context and is, therefore, both underused and undertheorized. It is as if a new provision of Title VII has been discovered.

Reading the second provision as a disparate treatment provision should also spell the end of the adverse action doctrine developed by the lower federal courts. Under this doctrine, courts have declared a wide swath of conduct as not serious enough to count as discrimination. For example, many courts have declared it legal for an employer to give an employee a negative evaluation because of her race or sex.[12] Courts also have held that discipline and lateral transfers do not count as discrimination.[13] However, if Title VII's second provision defines illegal disparate treatment, it is clear that the adverse action

---

[9] *See, e.g.*, 42 U.S.C. § 2000e-2(k) (2012).

[10] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2512, 2516-21 (2015).

[11] *Id.* at 2526 (Thomas, J., dissenting).

[12] *See, e.g.*, Taylor v. N.Y.C. Dep't of Educ., No. 11-CV-3582, 2012 WL 5989874, at *5 (E.D.N.Y. Nov. 30, 2012) (determining that being rated as having unsatisfactory performance is not sufficient to constitute an adverse action); Sotomayor v. City of New York, 862 F. Supp. 2d 226, 254 (E.D.N.Y. 2012) (stating that criticizing an employee "in the course of evaluating and correcting her work is not an adverse employment action" under the statute), *aff'd*, 713 F.3d 163 (2d Cir. 2013); Siddiqi v. N.Y.C. Health & Hosps. Corp., 572 F. Supp. 2d 353, 367 (S.D.N.Y. 2008); Johnson v. Frank, 828 F. Supp. 1143, 1153 (S.D.N.Y. 1993) (holding that a rating of "unacceptable" in a mid-year review is not an adverse employment action).

[13] Alvarado v. Tex. Rangers, 492 F.3d 605, 612 (5th Cir. 2007); Chukwuka v. City of New York, 795 F. Supp. 2d 256, 262 (S.D.N.Y. 2011) (holding that "threats of disciplinary action . . . do not constitute adverse employment actions in the absence of other negative results" (quoting Uddin v. City of New York, 427 F. Supp. 2d 414, 429 (S.D.N.Y. 2006))), *aff'd*, 513 F. App'x 34 (2d Cir. 2013); Santana v. U.S. Tsubaki, Inc., 632 F. Supp. 2d 720, 721 (N.D. Ohio 2009).

doctrine should no longer exist. The second provision prohibits employer actions that "limit . . . 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."[14] To the extent that the adverse action doctrine has a statutory basis, it derives from Title VII's first provision that prohibits employers from discriminating in the "terms, conditions, or privileges of employment."[15] Title VII's second provision does not contain this language and is textually much broader than the first provision.

Justice Kennedy's reading of Title VII's second provision suggests that there should not be a sharp line between disparate impact and disparate treatment. Rather, disparate impact and disparate treatment are similar to one another and even derive from the same substantive provision. Breaking down the perceived sharp line between disparate impact and disparate treatment cases opens up new theoretical and practical possibilities for Title VII.

This Article explores several of these new possibilities. Justice Kennedy's new reading of Title VII creates space to explore new frameworks for analyzing discrimination, ones that combine elements of intentional and nonintentional discrimination. The new reading also requires a complete rethinking of harassment doctrine, which to date draws solely from Title VII's first provision. Reading the second provision as one that relates to disparate treatment claims also means that an employee can prevail on an individual discrimination claim without showing any kind of intent. This is a major reshaping of current discrimination law. Even if courts continue to cling to intent as an element of disparate treatment claims, courts should re-evaluate their current notions of intent in light of the new possibilities offered by Title VII's second provision.

Justice Kennedy's new idea also should lead courts to re-examine the test promulgated in *McDonnell Douglas Corp. v. Green*,[16] which is the central test used by courts to evaluate intentional discrimination cases. It also makes it less likely that recent Supreme Court opinions are correct when they compare the federal discrimination statutes to tort law.[17]

This Article proceeds in five parts. Part I discusses the way the Supreme Court has described discrimination claims and the proof structures it has developed. Part II discusses the concept of "adverse action" and how it sharply restricts the harms courts recognize as discrimination. Part III provides an in-depth analysis of Justice Kennedy's majority opinion and Justice Thomas's dissent in *Inclusive Communities*.[18] Part IV explores why this opinion should

[14] 42 U.S.C. § 2000e-2(a).

[15] *Id.* § 2000e-2(a)(1).

[16] 411 U.S. 792, 802-03 (1973).

[17] *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2525 (2013); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176-77 (2009).

[18] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2510 (2015).

eliminate the adverse action doctrine currently developing in the lower federal courts. Part V proposes numerous theoretical and practical innovations that could result from Justice Kennedy's opinion.

I. THE FALSE DICHOTOMY

Justice Kennedy's new reading of Title VII fundamentally shifts the way courts have heretofore understood Title VII. To understand why, it is first necessary to briefly examine the pre-existing case law and scholarly literature. The case law and much of the scholarly commentary proceed from a common premise: the idea that disparate treatment and disparate impact claims evolved from two separate parts of Title VII.

Title VII is the cornerstone of federal employment discrimination law. Title VII prohibits an employer from discriminating against an employee because of race, sex, national origin, color, or religion.[19] Courts and scholars commonly describe Title VII as providing two kinds of claims: disparate treatment and disparate impact. While also contesting the dichotomy, Noah Zatz has noted that "[f]ew propositions are less controversial or more embedded in the structure of Title VII analysis than that the statute recognizes only '"disparate treatment" and "disparate impact" theories of employment discrimination.'"[20] Courts often proclaim that a "plaintiff can bring a Title VII claim under either a disparate treatment theory or a disparate impact theory."[21] Indeed, even the Supreme Court "has recognized that two forms of discrimination are prohibited under Title VII: disparate treatment and disparate impact."[22]

Courts and scholars have also noted that disparate treatment and disparate impact claims derive from two separate provisions within Title VII.[23] Under Title VII's first provision, it is unlawful for an employer "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."[24] Courts characterize this first provision as describing disparate treatment claims.[25] They also commonly note that a disparate treatment claim

---

[19] 42 U.S.C. § 2000e-2(a).

[20] *See* Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1368 (2009).

[21] Fuller v. Gen. Cable Indus., Inc., 81 F. Supp. 2d 726, 727 (E.D. Tex. 2000); *see also* Carpenter v. Boeing Co., 456 F.3d 1183, 1186 (10th Cir. 2006).

[22] Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 617 n.2 (1999) (Thomas, J., dissenting); *see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[23] *See infra* Sections II.A & II.B. This sentence is meant to be descriptive and does not describe the author's view of the discrimination statutes.

[24] 42 U.S.C. § 2000e-2(a)(1).

[25] *See, e.g.*, Farmer v. Campbell Soup Supply Co., No. 1:14CV179, 2014 WL 1608282, at *1-2 (M.D.N.C. Apr. 22, 2014); Copeling v. Ill. State Toll Highway Auth., No. 12 C

requires an employee to prove that an employer intentionally discriminated.[26] As one court stated, "[i]f there was no discriminatory intent, there cannot be liability under . . . Title VII, on a disparate treatment theory."[27] Under Title VII's second provision, it is unlawful for an employer "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."[28]

These two, main operative provisions form the foundation of Title VII's text. Courts and scholars routinely refer to this second provision as the genesis of disparate impact claims under Title VII.[29] In case after case, the Supreme Court has indicated that the first provision refers to disparate treatment, and the second provision refers to disparate impact.[30] Not surprisingly, this dichotomy has rarely been explicitly litigated in the lower federal courts. For example, when faced with questions about the dichotomy, the United States Court of Appeals for the Sixth Circuit held that the current reading was "too long established to be lightly overruled."[31]

The supposed dichotomy between these two provisions is important because it has huge implications for both the theory and the practice of federal discrimination law. As described more fully below, courts believe that disparate impact and disparate treatment have their own animating ideologies and also their own separate proof structures. They also tend to presume that disparate treatment and disparate impact represent a complete description of the type of claims recognized under Title VII. Although this Article will largely focus on Title VII, its reasoning would also apply to federal age and

---

10316, 2014 WL 540443, at *2 (N.D. Ill. Feb. 11, 2014) ("Subsection (a)(1) prohibits disparate treatment, while subsection (a)(2) prohibits employment practices that result in a disparate impact against a protected group."); Mays v. BNSF Ry. Co., 974 F. Supp. 2d 1166, 1169 (N.D. Ill. 2013); Knight v. G.W. Plastics, Inc., 903 F. Supp. 674, 679 (D. Vt. 1995).

[26] *See, e.g.*, Melendez v. Ill. Bell Tel. Co., 79 F.3d 661, 669 (7th Cir. 1996) (stating that under Title VII a plaintiff must "prove that he has been the victim of intentional discrimination").

[27] Grano v. Dep't of Dev. of Columbus, 637 F.2d 1073, 1082 (6th Cir. 1980).

[28] 42 U.S.C. § 2000e-2(a).

[29] Smith v. City of Jackson, 544 U.S. 228, 236 (2005); *Copeling*, 2014 WL 540443, at *2; *Mays*, 974 F. Supp. 2d at 1169; Marcia L. McCormick, *The Allure and Danger of Practicing Law as Taxonomy*, 58 ARK. L. REV. 159, 174 (2005) ("Section (a)(2) . . . has been interpreted to prohibit discriminatory effects, and that theory is labeled disparate impact."); *see also* Aldridge v. City of Memphis, No. 05-2966-STA-dkv, 2008 WL 2999557, at *5 (W.D. Tenn. July 31, 2008) (characterizing 29 U.S.C. § 623(a)(2) of ADEA analogously), *aff'd*, 404 F. App'x 29 (6th Cir. 2010).

[30] *See, e.g.*, *Smith*, 544 U.S. at 234-35; Griggs v. Duke Power Co., 401 U.S. 424, 426 n.1 (1971).

[31] EEOC v. J.C. Penney Co., 843 F.2d 249, 252 (6th Cir. 1988).

disability discrimination claims. The ADEA and the Americans with Disabilities Act (the "ADA") have similar, although not identical, operative language.[32]

A. *Disparate Impact*

The history of disparate impact in Supreme Court opinions begins in 1971. In the seminal case of *Griggs v. Duke Power Co.*, the Supreme Court interpreted Title VII to allow plaintiffs to assert discrimination based on a disparate impact theory.[33] *Griggs* preceded the Supreme Court's sharp turn toward textualism in the 1980s and cannot be characterized as a textual opinion.[34] In a footnote, the Supreme Court noted that Title VII's second provision was a disparate impact provision.[35]

In *Griggs*, the Court did not discuss how disparate impact theory derives from the text of Title VII. Rather, the Supreme Court relied heavily on the purposes of Title VII and the way that race played a role in employment outcomes. The Supreme Court announced an animating principle for disparate impact, reasoning that Title VII prohibited not only intentional conduct but policies and practices that created "built-in headwinds" to the hiring of black employees.[36] The Supreme Court articulated a reason for recognizing a category of discrimination called disparate impact and began to provide a rudimentary structure for evaluating it.[37] This rudimentary structure provided that the employer's testing and high school diploma requirements at issue in the case were discriminatory because they did not "bear a demonstrable relationship to successful performance."[38]

---

[32] 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) (2012). The ADA, meanwhile, prohibits discrimination "against a qualified individual with a disability because of the disability of such individual 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." 42 U.S.C. § 12112(a) (2012). It then further defines discrimination in a separate subsection, containing seven separate definitional sections. *Id.* § 12112(b)(1)-(7).

[33] *Griggs*, 401 U.S. at 432 ("Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.").

[34] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2544 (2015) (Alito, J., dissenting) (positing that *Griggs* did "not even cite the provision of Title VII on which the plaintiffs' claims were based").

[35] *Griggs*, 401 U.S. at 426 n.1 (focusing only briefly on the text of the statute).

[36] *Id.* at 432.

[37] *Id.* at 431.

[38] *Id.*

Over time, the Supreme Court further developed, refined, and altered this basic structure through a series of cases,[39] including *Watson v. Fort Worth Bank & Trust*[40] and *Wards Cove Packing Co. v. Antonio*.[41] In *Watson*, the Court (in a portion of the opinion joined by a plurality) indicated that to prove a disparate impact the 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 employment practice caused the disparity.[42] The burden of production then shifts to the defendant to show that "its employment practices are based on legitimate business reasons."[43] Once the defendant meets this burden, the plaintiff can prevail by showing that other practices could have been used that would not create the same disparity.[44] A year later, in *Wards Cove*, a five-Justice majority largely reaffirmed the *Watson* plurality's interpretation of the requirements for proving a disparate impact claim.[45]

Congress amended Title VII in 1991 to explicitly codify disparate impact into Title VII.[46] The 1991 amendments imported the concept of a specific employment practice from the case law, but also allowed plaintiffs the ability to challenge combined practices that created a disparate impact if they were unable to separate the practices.[47] Under the amendment, once the plaintiff shows that an employment practice creates a disparate impact based on a protected trait, it is the employer's burden to establish that a practice is "job related for the position in question and consistent with business necessity."[48] 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.[49]

In 2005, the Supreme Court also interpreted the ADEA as providing a disparate impact claim.[50] In doing so, the Supreme Court relied on the ADEA's second provision, which is textually identical to Title VII's second provision, except that it substitutes age as the protected class.[51] In recognizing disparate

---

[39] Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[40] 487 U.S. 977, 982 (1988).

[41] 490 U.S. 642, 651 (1989).

[42] *Watson*, 487 U.S. at 994.

[43] *Id.* at 998.

[44] *Id.*

[45] *Wards Cove*, 490 U.S. at 656-57.

[46] Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2(k)(2012)).

[47] *See* 42 U.S.C. § 2000e-2(k)(1)(B).

[48] *Id.* § 2000e-2(k)(1)(A)(i).

[49] *See id.* § 2000e-2(k)(1)(A)(ii) (describing how "the complaining party" can demonstrate "an alternative employment practice" that the employer "refuses to adopt").

[50] Smith v. City of Jackson, 544 U.S. 228, 233 (2005).

[51] 29 U.S.C. § 623(a)(2) (2012).

impact under the ADEA, the Supreme Court relied heavily on its earlier decision in *Griggs* and even noted, "We thus squarely held that § 703(a)(2) of Title VII did not require a showing of discriminatory intent."[52] In the ADEA context, the Supreme Court explicitly referred to and interpreted the ADEA's second provision as relating to disparate impact.[53] While the Supreme Court recognized disparate impact claims under the ADEA, it created a new test for ADEA disparate impact claims, based at least in part on perceived differences in the text and purposes of the ADEA and Title VII.[54]

There are three main themes to take away from this Section. First, the Supreme Court's pre-existing cases directly stated that disparate impact claims derive from the second provisions of Title VII and the ADEA. Second, the Supreme Court's pre-existing cases imagined a very specific animating purpose for disparate impact cases—to provide a remedy when there is not intentional discrimination. Finally, these pre-existing cases assume that the textual and theoretical differences between disparate impact and disparate treatment demand separate proof structures. A plaintiff trying to establish a disparate impact claim must prove different factors than a plaintiff trying to prove disparate treatment.

B. *Disparate Treatment*

The Supreme Court has called disparate treatment "the most easily understood type of discrimination."[55] Such cases require the plaintiff "to prove that the defendant had a discriminatory intent or motive."[56] Surprisingly, the federal courts have created a complex array of frameworks that they use to analyze these "easy" disparate treatment cases.[57] A full discussion of the frameworks and all of their nuances is not necessary here, but it is helpful to discuss three different ways of thinking about disparate treatment: direct evidence cases, mixed-motive cases, and harassment cases.

During the 1960s, plaintiffs often claimed that employers were making explicit race- or gender-based decisions according to company policies.[58]

---

52 *Smith*, 544 U.S. at 235.

53 *Id.* at 232-33.

54 *Id.* at 233 ("Unlike Title VII, however, [the ADEA] contains language that significantly narrows its coverage by permitting any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age' . . . ."); *see also* Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 87 (2008) (refining further the ADEA disparate impact test).

55 Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

56 Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 986 (1988).

57 *See generally* Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 (2011).

58 *See, e.g.*, Vogler v. McCarty, Inc., 294 F. Supp. 368, 374 (E.D. La. 1968) (alleging that an employer engaged in discrimination by only hiring union members, when union itself engaged in discriminatory membership practices); Weeks v. S. Bell Tel. & Tel. Co.,

These claims of facially discriminatory policies later became grouped into a type of individual disparate treatment case referred to as a direct evidence case.[59] Courts tended to use simple formulations in evaluating direct evidence cases, essentially requiring a plaintiff to establish that a decision was taken because of a protected trait.[60] Although it is rare that modern courts will characterize a case as a direct evidence case, employees can proceed under a direct evidence framework if they have strong evidence of discrimination.[61] For example, if a supervisor told an employee that he was not promoting her because he did not think women should be in positions of authority, this would be a direct evidence case. The employee has evidence that a decision maker explicitly took sex into account when deciding which employee to promote.

In 1973, the Supreme Court issued a decision that radically changed the way courts analyze discrimination cases. In *McDonnell Douglas Corp. v. Green*,[62] the Supreme Court created a three-part, burden-shifting test for analyzing individual disparate treatment cases that did not rely on direct evidence.[63]

---

277 F. Supp. 117, 117-18 (S.D. Ga. 1967) (alleging that an employer had a policy of making gender a qualification for switchman position); Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781, 781 (E.D. La. 1967) (alleging discrimination based on a company policy that required women to resign upon marriage); Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332, 336 (S.D. Ind. 1967) (alleging that a company's use of male and female layoff lists was discriminatory).

[59] *See, e.g.*, Stone v. Autoliv ASP, Inc., 210 F.3d 1132, 1136 (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 appear 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 also has explained that "such evidence is rare." Argyropoulos v. City of Alton, 539 F.3d 724, 733 (7th Cir. 2008) (citation omitted). "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, 854 (10th Cir. 2007)).

[60] *See, e.g.*, Mach v. Will Cty. Sheriff, 580 F.3d 495, 499 (7th Cir. 2009) ("The direct method required Mach to produce direct or circumstantial evidence that the Sheriff transferred him because of his age."); Paz v. Wauconda Healthcare & Rehab. Ctr., LLC, 464 F.3d 659, 666 (7th Cir. 2006) (suggesting that under the direct method of proving discrimination a court should not use a burden-shifting framework).

[61] Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002).

[62] 411 U.S. 792 (1973).

[63] *Id.* at 802-03. Some circuits will allow a plaintiff to make a case of discrimination

Under *McDonnell Douglas*, a court first evaluates the prima facie case, which requires the following proof:

> (i) that [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 complainant's qualifications.[64]

The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the applicant's rejection.[65] If the defendant meets this requirement, the plaintiff can still prevail by demonstrating that the defendant's reason for the rejection was simply pretext.[66] In *McDonnell Douglas* itself, the Court noted that the facts required to prove a prima facie case will necessarily vary depending on the case.[67] As the lower federal courts began applying *McDonnell Douglas* to different factual scenarios, they began to develop different iterations of the test, following its basic three-part, burden-shifting structure, while substituting different language within the prima facie case. Over time, the Supreme Court clarified and altered the *McDonnell Douglas* test.[68]

After *McDonnell Douglas*, the Supreme Court created a new framework for evaluating mixed-motive cases.[69] In a mixed-motive case, there is evidence that both discriminatory and legitimate reasons played a role in an employment decision or outcome. In *Price Waterhouse v. Hopkins*, the Court held that a plaintiff must establish that a protected trait was a motivating factor in the employment decision.[70] 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.[71]

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).

[64] *McDonnell Douglas*, 411 U.S. at 802.

[65] *Id.*

[66] *Id.* at 804.

[67] *Id.* at 802 n.13.

[68] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993) (holding that while the fact finder's rejection of the employer's proffered reason permits the fact finder to infer discrimination, it does not compel such a finding); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255-56 (1981) (explaining that the defendant's burden at the second step in the framework is a burden of production only).

[69] Price Waterhouse v. Hopkins, 490 U.S. 228, 241-43 (1989).

[70] *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, 300-01 (2010).

[71] *Price Waterhouse*, 490 U.S. at 244-45; *see also* Desert Palace, Inc. v. Costa, 539 U.S. 90, 92 (2003) (resolving a question left unresolved in *Price Waterhouse* regarding whether a

In 1991, Congress amended Title VII to partially codify the holding of *Price Waterhouse*.[72] Congress indicated that a plaintiff could prevail on a discrimination claim under Title VII by establishing that a protected trait was a motivating factor in an employment decision.[73] Congress also created an affirmative defense, which, if proven, would be a partial defense to damages.[74] Courts began referring to the 1991 amendments as establishing a mixed-motive claim with a two-part framework.[75]

The Supreme Court later took a very different approach to mixed-motive cases in the ADEA discrimination and Title VII retaliation contexts. The Supreme Court held that for an employee to prevail on either one of these claims, she must establish that her protected trait or protected activity was the "but for" cause of the contested employment outcome.[76]

The Supreme Court also has recognized harassment claims and created a separate test for evaluating them.[77] To be actionable, a hostile work environment must affect the terms, conditions, or privileges of employment.[78] In interpreting when harassment rises to this level, the Court held that it must be "sufficiently severe or pervasive to alter the conditions of the victim's

plaintiff must provide direct evidence to be entitled to a mixed-motive framework).

[72] Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2(m) (2012)).

[73] *See* 42 U.S.C. § 2000e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice . . . .").

[74] *Id*. at § 2000e-5(g)(2)(B). 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 or ADA. Struve, *supra* note 70, at 288. The question eventually arose whether mixed-motive claims were actionable under the ADEA. In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Supreme Court held that plaintiffs proceeding under the ADEA must prove that age was the "but for" cause of the alleged employment action. *Id.* at 176-77.

[75] *See, e.g.*, Porter v. Natsios, 414 F.3d 13, 18-19 (D.C. Cir. 2005).

[76] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2525 (2013) (claiming that Congress must have legislated with the backdrop of default tort law principles in mind); *Gross*, 557 U.S. at 176 (reasoning that the plain meaning of the ADEA's language creates a "but for" causation requirement). As of the writing of this Article, it is uncertain whether litigants can still use the *McDonnell Douglas* test in either ADEA or Title VII retaliation cases, although many circuit courts have allowed it. *See, e.g.*, Daniels v. Sch. Dist. of Phila., 776 F.3d 181, 192 (3d Cir. 2015) (analyzing ADEA, Title VII, and the state claims under the *McDonnell Douglas* framework); Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 110-11 (2d Cir. 2010) (applying the *McDonnell Douglas* framework to Title VII and ADEA retaliation claims); Imwalle v. Reliance Med. Prods., Inc., 515 F.3d 531, 544 (6th Cir. 2008) (holding that *McDonnell Douglas* is the appropriate framework for retaliation claims under the ADEA and Title VII).

[77] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

[78] *Id.* at 67.

employment."[79] In 1993, the Supreme Court held that a plaintiff alleging harassment need not allege psychological injury, but would be required to establish that she subjectively believed the environment to be hostile or abusive and that the environment would be so viewed by an objective person.[80] In making this latter inquiry, the Court stated:

> But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.[81]

The Court also indicated that the harassing conduct must be unwelcome.[82]

---

[79] *Id.* (citation omitted).

[80] Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993) ("Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.").

[81] *Id.* at 23. Although there are some variations, courts tend to articulate a harassment claim as requiring (1) proof that the plaintiff is a member of a protected class, (2) that she was subjected to unwelcome harassment, (3) that the harassment was based on sex, and (4) that it affected a term, condition, or privilege of her employment. Sandoval v. Am. Bldg. Maint. Indus., Inc., 578 F.3d 787, 801 (8th Cir. 2009). The fourth element contains both objective and subjective components, requiring the harassment to be "severe or pervasive enough to create an objectively hostile or abusive work environment," as well as requiring the victim to subjectively perceive the working conditions to be so altered. *Id.* (citations omitted).Even as the contours of harassment claims become fixed, employer liability for harassment remained unresolved. In 1998, the Supreme Court addressed agency issues. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 746-47 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998). Continuing with its reliance on proof structures, the Court once again enunciated a multi-part test. An employer will be liable for a supervisor's harassment that results in a tangible employment action. *Ellerth*, 524 U.S. at 762; *Faragher*, 524 U.S. at 778. The Court defined a tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761. If a supervisor engages in harassment that does not result in a tangible employment action, then the employer can avoid liability by establishing an affirmative defense. As articulated by the Court, the affirmative defense has two elements: "(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." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 777-78.

[82] *Meritor*, 477 U.S. at 68.

Over time, the federal courts have also adopted separate tests for failure to accommodate,[83] retaliation,[84] and pattern or practice.[85]

Notice that the frameworks for disparate treatment cases do not mimic or overlap the frameworks used in disparate impact cases. Disparate impact cases focus largely on three factors: (1) identification of the contested practice or practices; (2) whether there is significant statistical proof that a practice had a disproportionate impact; and (3) whether the employer can establish an available affirmative defense. In contrast, the frameworks for disparate treatment focus on concepts such as intent and causation—they rely more heavily on evidence of what supervisors or coworkers did or said.

Not only are the frameworks different, but the two concepts are often described as having different animating purposes. Disparate impact focuses on the effects of decisions that are not facially discriminatory. For the most part, disparate treatment is recognized in cases where race, sex, or other protected traits are explicitly taken into account in making a negative decision. Recall that courts largely conceive of these two kinds of discrimination as emanating from separate sources. Courts repeatedly cite Title VII's second provision as the disparate impact provision. They repeatedly cite the first provision as the disparate treatment provision.

My prior scholarly work and the work of a small number of other scholars have challenged this dichotomy between disparate impact and disparate treatment claims.[86] Nonetheless, it is fair to say that the overwhelming consensus, at least descriptively, is that disparate impact and disparate

[83] *See, e.g.*, Gratzl v. Office of the Chief Judges of the 12th, 18th, 19th & 22nd Judicial Circuits, 601 F.3d 674, 678 (7th Cir. 2010) (discussing elements of failure to accommodate claim under ADA). Failure to accommodate does not derive from the same operative language as other discrimination claims. *See* 42 U.S.C. § 2000e(j) (2012) (providing for religious accommodation); *Id*. at §§ 12111(9)-(10), 12112(b)(5)(A) (providing for disability accommodation).

[84] *See, e.g.*, Collazo v. Bristol-Myers Squibb Mfg., Inc., 617 F.3d 39, 46 (1st Cir. 2010). Sometimes, retaliation claims derive from a statute's primary operative language, and other times statutes have separate retaliation provisions. *Compare* Gomez-Perez v. Potter, 533 U.S. 474, 481 (2008) (construing ADEA federal sector discrimination prohibition to also prohibit retaliation), *with* 42 U.S.C. § 2000e-3(a) (creating an anti-retaliation provision under Title VII).

[85] *See, e.g.*, Hohider v. United Parcel Serv., Inc., 574 F.3d 169, 178 (3d Cir. 2009) (describing pattern or practice framework). The Supreme Court first enunciated the pattern or practice framework in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), drawing from its earlier decision in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). *Teamsters*, 431 U.S. at 360; *see also* 42 U.S.C. § 2000e-6(a) (allowing EEOC to file pattern or practice suits).

[86] *See* Sperino, *supra* note 57, at 94; *see also* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 920 (1993); Zatz, *supra* note 20, at 1360 (suggesting that Title VII could be read to "mandate[] reasonable accommodation by employers").

treatment are two separate claims that derive from two separate places within Title VII, and that therefore demand separate proof structures. As shown later in Parts III and V, Justice Kennedy's interpretation of Title VII in *Inclusive Communities* has the power to radically change this current understanding.

II. ADVERSE ACTIONS

One key feature of modern employment discrimination jurisprudence is the dichotomy between disparate impact and disparate treatment cases. Another key feature is the growing power of the adverse action doctrine in the lower federal courts. Under the adverse action doctrine, a court will dismiss a case because an employee has not alleged a workplace harm that is serious enough to result in legal liability. Imagine an employee named Michaela. Michaela is black. Her supervisor Bill is white. Bill accidentally copies Michaela on an email in which he states he "will never give a black employee a positive evaluation." Later, Bill gives Michaela a negative evaluation. Is Bill's conduct legal discrimination? According to one of the most important federal appellate courts in the country, the answer is no.[87] The negative evaluation does not count as discrimination.

The scenario described in the preceding paragraph is derived from a hypothetical created by the United States Court of Appeals for the D.C. Circuit.[88] Here is how the appellate court reached its decision that a negative evaluation, even if based on race, does not count as discrimination. The appellate court relied on a large number of cases requiring a plaintiff proceeding under Title VII to prove she suffered an adverse employment action.[89] These cases defined an adverse action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits."[90] The appellate court referred to the "terms, conditions, or privileges of employment" language in Title VII's first provision, which the court interpreted as requiring that an employee "experience[] materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm."[91] The appellate court further noted that "not everything that makes an employee unhappy is an actionable adverse action."[92]

---

[87] Douglas v. Donovan, 559 F.3d 549, 555 (D.C. Cir. 2009).

[88] *Id.*

[89] *Id.* at 552.

[90] *Id.* (citing Taylor v. Small, 350 F.3d 1286, 1293 (D.C. Cir. 2003) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998))).

[91] *Id.* (quoting Forkkio v. Powell, 306 F.3d 1127, 1131 (D.C. Cir. 2002) (citing Holcomb v. Powell, 433 F.3d 889, 902 (D.C. Cir. 2006)).

[92] *Id.* (quoting Russell v. Principi, 257 F.3d 815, 818 (D.C. Cir. 2001)).

In many cases, judges have used the court-created adverse action doctrine to limit the reach of discrimination law. Under the adverse action doctrine, courts have deemed a wide range of conduct as falling outside the reach of federal discrimination law. Even if an employee has evidence that the employer took an action because of the employee's race or sex, courts will not label such conduct discrimination. Although the cases are not completely uniform, courts have held that the following conduct is not discriminatory:

- giving an employee a negative evaluation or write-up;[93]
- denying a lateral transfer;[94]
- transferring an employee to a less desirable job;[95]
- reprimanding or threatening an employee with disciplinary action;[96]
- excessively scrutinizing an employee's job performance;[97]
- threatening to fire an employee;[98]

---

[93] *See, e.g.*, Taylor v. N.Y.C. Dep't of Educ., No. 11-CV-3582, 2012 WL 5989874, at *5 (E.D.N.Y. Nov. 30, 2012) (being rated as having unsatisfactory performance not sufficient to constitute an adverse action); Sotomayor v. City of New York, 862 F. Supp. 2d 226, 254 (E.D.N.Y. 2012) ("Criticism of an employee in the course of evaluating and correcting her work is not an adverse employment action."), *aff'd*, 713 F.3d 163 (2d Cir. 2013); Siddiqi v. N.Y.C. Health & Hosps. Corp., 572 F. Supp. 2d 353, 367 (S.D.N.Y. 2008); Johnson v. Frank, 828 F. Supp. 1143, 1153 (S.D.N.Y. 1993).

[94] *See, e.g.*, Alvarado v. Tex. Rangers, 492 F.3d 605, 612 (5th Cir. 2007); Santana v. U.S. Tsubaki, Inc., 632 F. Supp. 2d 720, 721 (N.D. Ohio 2009) ("Plaintiff cannot meet this burden, because, as a matter of law, the Sixth Circuit has held that the mere denial of a 'lateral transfer' does not, absent something more in terms of the negative aspects of its impact, constitute an adverse employment action.").

[95] *See, e.g.*, Lara v. Unified Sch. Dist. # 501, No. 08-3320, 2009 WL 3382612, at *3 (10th Cir. Oct. 22, 2009) (holding that a threatened transfer is not enough to constitute an unlawful employment practice); Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996); Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994) (being given more stressful job duties is not sufficient); Craven v. Tex. Dep't of Criminal Justice-Institutional Div., 151 F. Supp. 2d 757, 766 (N.D. Tex. 2001); *cf.* Sanchez v. Denver Pub. Sch., 164 F.3d 527, 532 (10th Cir. 1998) (holding that a job transfer that increases a teacher's commute from a few minutes to between thirty and forty minutes is not sufficient). *But see* Czekalski v. Peters, 475 F.3d 360, 364 (D.C. Cir. 2007) (allowing that some lateral transfers do constitute adverse actions); Collins v. Illinois, 830 F.2d 692, 703 (7th Cir. 1987) (finding that an adverse action occurred when an employer moved an employee's office to an undesirable location, and forbade her from using the firm's stationery and support services).

[96] *See* Chukwuka v. City of New York, 795 F. Supp. 2d 256, 262 (S.D.N.Y. 2011), *aff'd*, 513 F. App'x 34 (2d Cir. 2013).

[97] *See id.*

[98] *See* Myers v. Md. Auto. Ins. Fund, Civ. No. CCB-09-3391, 2010 WL 3120070, at *5 (D. Md. Aug. 9, 2010) (holding that negative performance-related discussions are not

- assigning additional work;[99]
- assigning more difficult job assignments;[100] and
- refusing to recommend an employee for an award that might result in a monetary award that is thirty-five times the employee's annual salary.[101]

Even if an employee presents evidence that these actions were taken because of a protected trait, courts will hold that the employee has not suffered the kind of harm for which legal redress is available.

This idea that intentional discrimination claims are confined by the "terms, conditions, and privileges of employment" language in Title VII's first provision also plays a large role in harassment cases. Again, an example from an actual case is helpful. In one case, an employee presented evidence that he was repeatedly subjected to racial symbols and racial slurs at work.[102] He testified that his coworkers displayed the rebel flag on toolboxes and on work hats, and that he saw the letters "KKK" on a bathroom wall and one other location in the workplace.[103] He testified that supervisors repeatedly referred to him using racial epithets or racially charged language, including calling him the N-word and calling him "boy."[104] He presented evidence that a supervisor told him two or three times that he was going to kick his "black ass."[105] He also presented evidence that another supervisor told him if he looked at "that white girl" he would "cut" him.[106] The court held as a matter of law that this employee did not have a claim for racial harassment.[107] The court held that what happened to this employee, if true, was not sufficiently severe or pervasive to count as racial harassment.[108] The outcome of this case is driven by the "severe or pervasive" requirement in harassment cases. This concept, like the adverse action concept in other discrimination cases, limits the reach of harassment law.

sufficient to give rise to a claim).

[99] Han v. Whole Foods Mkt. Grp., Inc., 44 F. Supp. 3d 769, 789 (N.D. Ill. 2014) ("Generally, an increase in job responsibilities is not an adverse action.").

[100] White v. Hall, 389 F. App'x 956, 960 (11th Cir. 2010) (dismissing a claim because an alleged increase in workload is not sufficiently tangible to state a claim).

[101] Douglas v. Donovan, 559 F.3d 549, 557 (D.C. Cir. 2009) (Tatel, J., dissenting).

[102] Barrow v. Ga. Pac. Corp., 144 F. App'x 54, 57 (11th Cir. 2005).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.* at 58.

[108] *Id.* at 57-58.

The Supreme Court recognized harassment in the case of *Meritor Savings Bank v. Vinson*.[109] In doing so, the Supreme Court derived the harassment cause of action from Title VII's first provision, the provision that contains the "terms, conditions, or privileges of employment" language.[110] The Court's opinion focused heavily on how a sexually or racially offensive environment affects these terms, conditions, or privileges.[111] Given its focus on the "terms, conditions, or privileges" language in *Meritor*, the Court indicated that there would be some conduct that would not meet these standards.[112] The Court interpreted federal discrimination law to require an employee to show that the harassment was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[113] These words do not appear anywhere in the text of Title VII. Rather, they are a judicial gloss on or an explanation of Title VII's first provision.

In *Meritor*, a bank teller alleged that her supervisor "made repeated demands upon her for sexual favors . . . both during and after business hours, . . . fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions."[114] In the *Meritor* case, there was no question that the employee's evidence, if proven, was serious enough to be called harassment.

In a later case, *Harris v. Forklift Systems, Inc.*,[115] the Supreme Court provided more details about what "severe or pervasive" means.[116] It held that harassment exists when "the [employee's] environment would reasonably be perceived, and is perceived, as hostile or abusive."[117] To determine whether harassment occurred, the factfinder should look at all of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[118] When evaluating whether conduct is severe or pervasive, courts should consider what a reasonable person in the same circumstances would think. Importantly, this second case relied solely on Title VII's first provision as the basis for the harassment claim.[119] The Supreme Court did not consider how Title VII's second provision might affect its analysis.

---

[109] 477 U.S. 57, 73 (1986).

[110] *Id.* at 63-67 (likening sexual harassment to "harassment based on race").

[111] *Id.* at 63-66.

[112] *Id.* at 67 (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971).

[113] *Id.* (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

[114] *Id.* at 60.

[115] 510 U.S. 17 (1993).

[116] *Id.* at 22.

[117] *Id.*

[118] *Id.* at 23.

[119] *See id.* at 21.

The "severe or pervasive" requirement is a court-created doctrine. Some conduct is clearly going to be so serious that it always counts as harassment. For example, if a supervisor rapes an employee, no court wound deny that this conduct fits within the definition of severe.[120] Or, if a woman is subjected to sexual epithets and taunting every day for a lengthy period, courts would agree that the harassment is pervasive.[121] Some conduct is never going to meet this standard. For example, if a supervisor refuses to sing "Happy Birthday" to an employee because of her sex, this one minor incident would not trigger liability. This bottom limit is expressed through the legal concept *de minimis non curat lex*.[122]

In the middle, some judges see an area of uncertainty. Here are examples of cases that judges have dismissed because they were not severe or pervasive enough to constitute harassment:

- Plaintiff presented evidence that "supervisor repeatedly asked [her] about her personal life, told her how beautiful she was, asked her out on dates, called her a 'dumb blond,' put his hands on her shoulders at least six times, placed 'I love you' signs in her work area, and tried to kiss her on three occasions."[123]
- Plaintiff presented evidence that a coworker "placed his hand on her stomach and commented on its softness and sexiness."[124] After Plaintiff told her coworker "to stop touching her and then forcefully pushed him away," he "forced his hand underneath her sweater and bra to fondle her bare breast."[125] After she told him he had "crossed the line," he again tried to fondle her breasts but stopped when another employee arrived at the office.[126]
- Plaintiff presented evidence that her supervisor told her "she had been voted the 'sleekest ass' in the office" and, on another occasion, "deliberately touched [her] breasts with some papers that he was holding in his hand."[127]

---

[120] *See Meritor*, 477 U.S. at 60.

[121] *See Forklift Systems,* 510 U.S. at 19.

[122] *See, e.g.*, G.M. Sign, Inc. v. Elm St. Chiropractic, Ltd., 871 F. Supp. 2d 763, 768 (N.D. Ill. 2012) (citing Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992)). *De minimis non curat lex* is literally*:* "The law does not concern itself with trifles."

[123] Bonora v. UGI Utils., Inc., No. CIV.A. 99-5539, 2000 WL 1539077, at *4 (E.D. Pa. Oct. 18, 2000) (citing Weiss v. Coca-Cola Bottling Co., 990 F.2d 333, 338 (7th Cir. 1993)).

[124] Brooks v. City of San Mateo, 229 F.3d 917, 921, 926 (9th Cir. 2000).

[125] *Id.* at 921.

[126] *Id.*

[127] Quinn v. Green Tree Credit Corp., 159 F.3d 759, 768 (2d Cir. 1998).

- Plaintiff presented evidence that her supervisor repeatedly "fondled his genitals in front of her and used lewd and sexually inappropriate language."[128]

Although it is not exactly clear how the current contours of the "severe or pervasive" test connect to Title VII's statutory language, numerous courts have cited to Title VII's first provision as the source of this requirement in harassment cases.[129] The lower federal courts have construed the "terms, conditions, or privileges of employment" language in Title VII's first provision as a significant limit on the types of harms for which Title VII will provide a remedy. Importantly, the "serious or pervasive" standard is grounded in Title VII's first provision. The Supreme Court has never considered whether a harassment claim can be grounded in Title VII's second provision.

III. THE NEW TEXTUAL READING

A 2015 Supreme Court case has the power to radically change both the adverse action doctrine and the perceived dichotomy between disparate impact and disparate treatment claims. In *Inclusive Communities*, the Supreme Court considered whether the Fair Housing Act provides a disparate impact cause of action.[130] The Supreme Court held that plaintiffs could proceed on a disparate impact theory under the FHA.[131] In doing so, both the majority opinion and Justice Thomas's dissent point to a new reading of the federal employment discrimination law.

The majority opinion in *Inclusive Communities* was written by Justice Kennedy and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. It begins by reciting the difference between disparate treatment and disparate impact claims:

> In contrast to a disparate-treatment case, where a "plaintiff must establish that the defendant had a discriminatory intent or motive," a plaintiff bringing a disparate impact claim challenges practices that have a "disproportionately adverse effect on minorities" and are otherwise unjustified by a legitimate rationale.[132]

After outlining the facts of the case and the history of fair housing efforts in the United States, Justice Kennedy turned to Title VII as a model for resolving the

---

[128] Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151, 1159 (8th Cir. 1999), *abrogated by* Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011).

[129] *See, e.g.*, Ostrofsky v. Sauer, No. CIV S-07-0987 MCE EFB PS, 2008 WL 283986, at *1 (E.D. Cal. Feb. 1, 2008); Knight v. CMH Homes, Inc., 3:07-CV-307, 2007 WL 2905608, at *2 (E.D. Tenn. Oct. 3, 2007).

[130] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513 (2015).

[131] *Id.* at 2525.

[132] *Id.* at 2513.

FHA question.[133] He referenced the Supreme Court's 1971 opinion in *Griggs* and indicated that this case relied only on the second provision of Title VII when establishing disparate impact as a cognizable claim under Title VII.[134] Justice Kennedy also noted that the Supreme Court interpreted the ADEA as allowing for disparate impact liability.[135]

Even though the language of the FHA does not mimic the language of Title VII or the ADEA, Justice Kennedy used the reasoning and policy underlying the employment discrimination cases to interpret the FHA.[136] The FHA makes it illegal:

> To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable* or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.[137]

Justice Kennedy stated that the words "otherwise make unavailable" were the critical words for the question before the Court.[138] He explained that these words do not focus on intent, but rather on effects or outcomes.[139]

Justice Kennedy then turned back to Title VII and the ADEA as models. Title VII's second provision indicates that it is an unlawful employment practice for an employer:

> [T]o 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.[140]

Similarly, the ADEA's second provision makes it an unlawful employment practice for an employer:

> [T]o 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 . . . .[141]

Justice Kennedy's analysis then took an interesting turn. Under the conventional understanding of discrimination law, a reader would expect Justice Kennedy to say that the second provisions of Title VII and the ADEA

[133] *Id.* at 2516.
[134] *Id.* at 2516-17.
[135] *Id.* at 2517.
[136] *Id.* at 2518.
[137] 42 U.S.C. § 3604(a) (2012) (emphasis added).
[138] *Inclusive Cmtys.*, 135 S. Ct. at 2518.
[139] *Id.* at 2518-19.
[140] 42 U.S.C. § 2000e-2(a)(2) (emphasis added).
[141] 29 U.S.C. § 623(a)(2) (2012) (emphasis added).

are disparate impact provisions. Rather than reading these second provisions as solely relating to disparate impact, Justice Kennedy read them as containing both disparate treatment and disparate impact claims.

He explained: "'Otherwise' means 'in a different way or manner,' thus signaling a shift in emphasis from an actor's intent to the consequences of his actions."[142] He further opined about the meaning of the "otherwise adversely affect" language:

> Located at the end of lengthy sentences that begin with prohibitions on *disparate treatment*, they serve as catchall phrases looking to consequences, not intent. And all three statutes [the FHA, Title VII, and the ADEA] use the word "otherwise" to introduce the results-oriented phrase.[143]

This reading radically reconceptualizes the second provision of both the ADEA and Title VII. Justice Kennedy explicitly stated that the first portion of Title VII's second provision is a disparate treatment provision, not a disparate impact provision as commonly thought.

While arguing for a different outcome, Justice Thomas's dissent also advocated for a different reading of Title VII's second provision. Justice Thomas disagreed with the majority's holding that the FHA provides for a disparate impact claim.[144] In rejecting this reading, Thomas also looked to Title VII's text and jurisprudence for guidance. Justice Thomas argued that the Supreme Court's 1971 *Griggs* opinion was wrong.[145] Under his reading, Title VII's second provision has always been about disparate treatment and never about disparate impact. He emphatically argued: "We should drop the pretense that *Griggs*' interpretation of Title VII was legitimate. 'The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact.'"[146]

Admittedly, Justice Thomas would advocate for a very narrow reading of Title VII's second provision. He would read it as excluding disparate impact,[147] and he would also interpret it to encompass narrow notions of both intent and causation.[148] However, as discussed in the next Part, reading Title VII's second provision as an intentional discrimination provision reshapes how lower federal courts should think about the harm threshold for discrimination

---

[142] *Inclusive Cmtys.*, 135 S. Ct. at 2519 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1598 (1971)).

[143] *Id.* (emphasis added).

[144] *Id.* at 2531 (Thomas, J., dissenting).

[145] *Id.* at 2526.

[146] *Id.* (quoting Ricci v. DeStefano, 557 U.S. 557, 577 (2009)).

[147] Justice Thomas did indicate that he might be willing to limit *Griggs*'s holding to the Title VII context for purposes of stare decisis. *Id.* at 2531.

[148] *Id.* at 2526-27 (discussing how the second provision would encompass the "but-for" causation model).

claims. This change would substantially alter how some lower federal court judges conceive of the employment discrimination statutes' reach.

IV. ELIMINATING THE CURRENT ADVERSE ACTION DOCTRINE

After *Inclusive Communities*, at least six members of the current Supreme Court agree: both Title VII's first provision and its second provision relate to disparate treatment cases. Interpreting Title VII in this way creates a strong argument that the adverse action doctrine developing in the lower federal courts is wrong. It also should lead to a rethinking of the "severe or pervasive" requirement in harassment cases. Reading the second provision in this new way should greatly expand the reach of the federal discrimination statutes.[149]

Title VII's first provision prohibits employers from firing a person or refusing to hire him or her because of a protected trait like race or sex.[150] Title VII's first provision also makes it illegal for an employer "otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" because of a protected trait.[151] The lower federal courts have not always used a strictly textual analysis in adverse action cases, but some courts have interpreted this provision as requiring a fairly high level of harm before Title VII provides a remedy.[152] As discussed earlier, lower federal courts have dismissed discrimination cases by holding that negative evaluations, lateral transfers, discipline, and other similar actions are not serious enough to fall within Title VII's reach.[153]

If we take Justice Kennedy's majority opinion and Justice Thomas's dissent at face value and follow them to their logical conclusions, Title VII's reach is much broader than many lower federal courts currently allow. Relying solely on textual analysis, it is easy to see how this new way of looking at Title VII disparate treatment claims radically changes how some courts currently view their scope.

Under this new reading, Title VII's second provision makes it illegal for an employer to "*limit* . . . 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"[154] because of a protected trait. There are four important terms that the second provision adds to the analysis: "limit," "in any way," "employment opportunities," and "tend to deprive."

[149] Although the following discussion focuses on Title VII, similar arguments can also be made in the ADEA and ADA contexts.

[150] 42 U.S.C. § 2000e-2(a)(1) (2012) (forbidding adverse employment actions motivated by one or more protected categories).

[151] *Id.*

[152] *See supra* notes 93-101 and accompanying text.

[153] *See supra* notes 93-101 and accompanying text.

[154] 42 U.S.C. § 2000e-2(a)(2) (emphasis added).

The term “limit” does not refer to any specific kind of adverse employment action. It does not rely on the “terms, conditions, or privileges” language of Title VII’s first provision. The term “in any way” also indicates that the second provision is not confined to terms, conditions, or privileges of employment. The phrase “employment opportunities” also expand the reach of Title VII. The word “opportunity” means “[a] chance for progress or advancement, as in a career.”[155] It also means “a chance to do something, or a situation in which it is easy for you to do something.”[156]

Doing a purely textual analysis, the second provision prohibits an employer from doing things that reduce an employee’s ability to progress or advance in their career in any way. This is a very different, and much more expansive, understanding of what Title VII prohibits than the current adverse action concept percolating in the lower federal courts. Under the second provision, it is much clearer that a negative evaluation should count as cognizable discrimination if race, sex, or other protected traits played a role in the negative evaluation. Negative evaluations are ways that employers express their opinions about an employee’s current work performance and also his or her chances for promotions, raises, and other benefits. If an employee gets a negative evaluation, that evaluation could later be used to decide whether the employee gets fired as part of a reduction in force or whether the employee gets asked to apply for promotions. If an employee gets a bad evaluation from one supervisor, a new supervisor may read the bad evaluation, thus tainting the new supervisor’s views of the employee’s work ethic and performance. Thus, this negative evaluation either limits or potentially limits the employee’s opportunities.

This broader reading of Title VII is not only textually supported. Importantly, this understanding is also in line with the Supreme Court’s early statements about Title VII’s reach. In *McDonnell Douglas*, the Supreme Court noted that “[i]n the implementation of [employment] decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.”[157] Reading Title VII’s second provision as a disparate treatment provision makes it clear that Title VII is not limited to any formal definition of “terms, conditions, or privileges of employment.”[158]

The phrase “tend to deprive” also increases the reach of Title VII. That language indicates that Title VII not only prohibits actions that actually do deprive an employee of employment opportunities, but also those that might do so in the future. Some courts have justified their refusal to recognize conduct

---

[155] *Opportunity*, THE FREE DICTIONARY, http://www.thefreedictionary.com/opportunity [https://perma.cc/8CK4-K9G7] (last visited July 10, 2016).

[156] *Opportunity*, MACMILLAN DICTIONARY, http://www.macmillandictionary.com/dictionary/british/opportunity [https://perma.cc/Q8ZE-RUCK] (last visited July 10, 2016).

[157] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

[158] In making this argument, I am not asserting that the lower federal courts have properly construed the phrase “terms, conditions, or privileges.”

as an adverse action because it has not yet caused the employee harm.[159] For example, a court might state that a negative evaluation does not cause harm until it results in termination, a demotion, or some other similar action. The second provision eliminates this argument. A negative evaluation that might deprive an employee of opportunities in the future is cognizable. The employee does not need to wait for further harm to materialize. There is harm because of the potential limit on future opportunities.

Justice Thomas's reading of the employment discrimination statutes would go even further. Recall that Justice Kennedy reads the phrase "otherwise adversely affect" as referring to disparate impact claims. However, Justice Thomas does not. He interprets the entire second provision as relating to disparate treatment claims. Under Justice Thomas's reading, any intentional employer action that otherwise adversely affects an employee would be a cognizable claim under Title VII.[160] Even Justice Kennedy's reading might encompass a similarly broad interpretation of intentional discrimination claims. Justice Kennedy sees the second provision as a hybrid of disparate treatment and disparate impact language. It is possible to read Justice Kennedy's opinion as being open to the possibility that the "otherwise adversely affect" language in the second provision refers both to disparate treatment and disparate impact claims.

The Supreme Court has never directly ruled on the adverse action requirement outside of the retaliation and harassment contexts. Given that the lower federal courts have developed a robust and sometimes contradictory adverse action doctrine in discrimination cases, it is likely that the Supreme Court will soon be asked to rule on this issue. Justice Kennedy's new reading of Title VII thus comes at a crucial time for discrimination law. If the Court takes up this issue, it should examine it through both Title VII's first and second provisions.

Justice Kennedy's and Justice Thomas's readings also call for a fresh look at harassment jurisprudence. When the Supreme Court defined harassment to require that the plaintiff establish severe or pervasive conduct, the Court relied solely on Title VII's first provision.[161] The Supreme Court has never considered the contours of a harassment claim under Title VII's second provision. A harassment claim derived from Title VII's second provision should not contain the limit of severe or pervasive conduct, as currently required to state a harassment claim. The "severe or pervasive" requirement represents the Supreme Court's interpretation of the phrase "terms, conditions,

[159] *E.g.*, Littleton v. Pilot Travel Ctrs., LLC, 568 F.3d 641, 644 (8th Cir. 2009).

[160] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2527-28 (2015) (Thomas, J., dissenting).

[161] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

or privileges" in Title VII's first provision.[162] The second provision does not contain the same limit.[163]

Justice Kennedy's opinion and even Justice Thomas's dissent offer a powerful way to change discrimination law. Recasting Title VII's second provision as a disparate treatment provision should lead courts to abandon the adverse action requirement in discrimination cases and to reconsider the "severe or pervasive" requirement in harassment cases. In making these arguments, I am not claiming that any action, no matter how small, would be actionable under Title VII. A long-standing judicial canon prevents the law from providing a remedy for de minimis harm.[164] However, there is a wide swath of workplace conduct that is more than de minimis but that is not cognizable under current understandings of "adverse action" or "severe or pervasive." Reading Title VII's second provision as a disparate treatment provision gives courts the opportunity to explore this interstitial space.

V. THE FUTURE OF DISCRIMINATION LAW

It is difficult to overstate the magnitude of Justice Kennedy's new reading of Title VII in *Inclusive Communities*. It represents a revolutionary understanding of both the theory and practice of employment discrimination law. Even though Title VII has been the law for more than fifty years, its second provision has largely been relegated to disparate impact claims and is, therefore, both underused and undertheorized. Reframing the second provision as a disparate treatment provision radically alters fundamental aspects of discrimination law. In essence, it is as if, after fifty years, Justice Kennedy discovered a new provision in Title VII. This exciting development provides scholars with a fresh impetus to theorize Title VII with proper respect for both its first and second provisions. It also demands a new textual analysis of Title VII. In this Part, I discuss important changes that might result from this expanded reading of Title VII.

A. *A Spectrum, Not a Dichotomy*

Justice Kennedy's reading of Title VII provides a different mental picture for framing discrimination laws' potential. Justice Kennedy's reading suggests that discrimination is not a dichotomy, but a spectrum of actionable conduct. This is a major theoretical shift in discrimination law.

---

[162] *See supra* notes 109-29 and accompanying text.

[163] 42 U.S.C. § 2000e-2(a)(2) (2012) (lacking the phrase "terms, conditions, or privileges").

[164] *See* G.M. Sign, Inc. v. Elm St. Chiropractic, Ltd., 871 F. Supp. 2d 763, 768 (N.D. Ill. 2012) ("The doctrine of *de minimis non curat lex* is a bedrock principle of law that 'is part of the established background of legal principles against which all enactments are adopted.'" (quoting Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992))).

When the Supreme Court decided *Griggs* in 1971, it set up the currently perceived dichotomy between disparate impact and disparate treatment claims. *Griggs* described disparate impact as not requiring proof of intent,[165] which suggested that other discrimination claims did require such proof. The implication that disparate impact does not require proof of intent and that all other claims do, is one of the central, structural features of modern discrimination law. Yet, in some ways, the dichotomy is quite accidental. The fact that there are two main operative provisions also implied that there were only two different ways of conceiving discrimination (disparate treatment and disparate impact). Justice Kennedy's reading of Title VII invites courts to disregard the accidental dichotomy created in *Griggs*. Disparate impact and disparate treatment are no longer separate claims stemming from separate parts of the statute. Rather, they are different ways of thinking about the same concept: discrimination. Once it is clear that there is no dichotomy, there is more space for thinking of other ways to conceptualize discrimination.

One way to imagine the practical implications of this shift is to think of discrimination as a rail line. One platform on that line is intentional discrimination claims. Indeed, this is a very popular platform for many discrimination plaintiffs. These employees have evidence that supervisors or coworkers intentionally took their race, sex, or other protected traits into account in a negative way when making an employment decision. Plaintiffs' lawyers may feel more confident framing their clients' cases as intentional discrimination claims, because they may rightfully believe that judges and juries are more likely to see intentional conduct as discriminatory,[166] and because Title VII provides enhanced damages for intentional discrimination.[167] Another platform on the rail line is the disparate impact concept as later codified within Title VII[168] or as enunciated by the Supreme Court in the ADEA context.[169] However, this rail line also contains other platforms, platforms that we have failed to explore because we have tended to view discrimination as a dichotomy rather than a spectrum.

Scholars have provided rich theoretical groundwork for thinking about discrimination in other ways: structural discrimination, negligent discrimination, and unconscious discrimination. Structural discrimination theorists have proposed that the locus of discrimination is not always a bad individual or a company policy, but rather unthinking assumptions about how work is organized.[170] Structural discrimination often results from a mix of

---

[165] *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[166] Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1278 (2012).

[167] 42 U.S.C. § 1981a(b)(1) (2012).

[168] *See* 42 U.S.C. § 2000e-2(k).

[169] *See* Smith v. City of Jackson, 544 U.S. 228, 232 (2005).

[170] 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).

intentional, negligent, and unconscious motives and actions. Unconscious discrimination posits that discrimination is not always caused by conscious animus against a protected group.[171] David Benjamin Oppenheimer proposed a theory of negligent discrimination.[172] Under this proposal, an employer would be liable for negligent discrimination under two circumstances. First, the employer would be liable "when [it] fails to take all reasonable steps to prevent discrimination that it knows or should know is occurring, or that it expects or should expect to occur."[173] Second, an employer would face liability "when it fails to conform its conduct to the statutorily established standard of care by making employment decisions that have a discriminatory effect, without first carefully examining its processes, searching for less discriminatory alternatives, and examining its own motives for evidence of stereotyping."[174]

Thinking about discrimination as a dichotomy allows for easy dismissal of claims based on structural discrimination, unconscious bias, or negligence. The current framework assumes that an employee must prove intentional discrimination or disparate impact. Since none of these claims fit comfortably within either of those two models, it is easy to dismiss such claims as not being viable discrimination claims. Under the current framework, if a claim does not fit within either model, it must be dismissed because disparate treatment and disparate impact represent the only acceptable ways of thinking about discrimination. A switch to a spectrum framework invites more open inquiry into these other types of discrimination.

For the most part, courts have funneled effects-based discrimination claims through the disparate impact model. Remember that this model requires the plaintiff to establish large statistical disparities between outcomes based on a protected trait. In many cases, courts have dismissed disparate impact cases because the plaintiff does not work in a large enough workplace to create the required statistical significance or because the challenged practice does not impact enough people to create the required level of statistical significance.[175]

---

[171] *See* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 745-46 (2005); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-25 (1987); Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 418-19 (2000). 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.

[172] Oppenheimer, *supra* note 86, at 900.

[173] *Id.*

[174] *Id.*

[175] *See, e.g.*, Danielson v. Yakima Cty., No. 10-CV-3115-TOR, 2013 WL 2639241, at *2, *6 (E.D. Wash. June 12, 2013) (finding that an employee could not produce evidence of statistical significance where there were only eight applicants for a position); Jones v. Bayer Healthcare LLC., No. C 03-05531 JSW, 2007 WL 879020, at *7 (N.D. Cal. Mar. 21, 2007) (dismissing case where an employee's department was found to be too small to constitute a

Thus, the disparate impact cause of action is only a viable option in a limited number of factual circumstances.

Seeing Title VII's second provision as a disparate treatment provision or as a hybrid disparate treatment/disparate impact provision necessarily leads to the following practical questions: Can an employee prove a nonintentional discrimination claim without proceeding through the current, onerous disparate impact standard? Is there a way of showing that an employer limited an employee's opportunities without relying on statistics? If so, what would the contours of such a claim be?

To be sure, courts may still be unwilling to recognize these claims, even with the broader framing. However, the framing itself is less of an obstacle under the spectrum approach than it is under the dichotomy approach. This more open framing also invites courts to think about claims that stem from multiple sources. For example, imagine a company with a mostly male workforce that uses a "tap on the shoulder" promotion process. Over the past twenty years, this process has resulted in men being disproportionally selected for promotions. A female employee also has a supervisor that makes sexist remarks and downgrades her work for no reason. The female employee does not apply for a promotion because she never hears of the opportunity and because she thinks her boss will not support her. This set of facts raises two ways of thinking about discrimination: intentional and structural. There is currently no model in discrimination law that combines these ideas and allows them both to be applied at the same time to the same set of facts.

Under the current framework, it is likely that this case would be dismissed. The sexist comments may not reach the level of being severe or pervasive. The downgrading of the employee's work may not reach the level of an adverse employment action. The employee may not be able to make the required statistical case to show that the tap on the shoulder promotion process created a disparate impact. Nonetheless, it seems reasonable that a jury, if presented with these facts, could find that the employee's sex played a role in limiting her job opportunities.

Justice Kennedy's reading of Title VII suggests that disparate impact and disparate treatment are much closer than previously perceived—so close that they are part of the same textual provision. This new way of thinking about Title VII opens the possibility for hybrid proof structures that combine elements of existing structures.

group of statistical significance), *aff'd*, 302 F. App'x 590 (9th Cir. 2008); Spence v. City of Phila., No. Civ.A.03-CV-3051, 2004 WL 1576631, at *8-10 (E.D. Pa. July 1, 2004) (finding that a pool of sixteen applicants was too small to be statistically significant), *aff'd*, 147 F. App'x 289 (3d Cir. 2005).

B. *New Analysis of Intent and Causation*

Courts have long assumed that an employee proceeding on a disparate treatment claim must prove some form of intent.[176] These statements have been more reflexive than reasoned. But the *Inclusive Communities* opinion provides a new opportunity to explore the lack of textual and other support for such a claim. Even though the Supreme Court has often stated that disparate treatment claims require proof of intent,[177] the Court has never done a textual analysis of Title VII to determine whether the text justifies this conclusion.

Under the old view of discrimination law, Title VII's first provision was denominated the "intentional discrimination" provision by default. In *Griggs*, when the Supreme Court denominated the second provision as the "effects-based" or disparate impact provision,[178] Title VII's first provision became the intentional discrimination provision by default. Recall that the Supreme Court decided *Griggs* prior to the modern emphasis on textualism. If the Court re-examined the text of Title VII, it would find that this idea is not on sound textual footing. The first provision of Title VII does not use the word "intent" or even any similar words to intent, such as mens rea or recklessness.[179]

In recent cases, the Supreme Court has interpreted the "because of" language within both the ADEA and Title VII's retaliation provision to relate to causation.[180] Given that the "because of" language refers to causation, it is difficult to understand how the Supreme Court can textually claim that Title VII requires proof of intent. The textual case is even weaker if the second provision is both a disparate treatment provision and a disparate impact provision, as Justice Kennedy reasons. Under the second provision, an employer cannot "limit" employees or applicants "in any way that would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race, color, religion, sex, or national origin."[181] None of these words point to intent as it is currently understood in discrimination cases.

One common textual device is to look up the meaning of words in a dictionary. The word "limit" means something that "bounds, constrains, or confines."[182] Reading the second provision as a whole, any employer practice

---

[176] *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 577 (2009); Grano v. Dep't of Dev. of City of Columbus, 637 F.2d 1073, 1081-82 (6th Cir. 1980).

[177] *See, e.g.*, *Ricci*, 557 U.S. at 577.

[178] *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[179] 42 U.S.C. § 2000e-2(a)(1) (2012).

[180] *See, e.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2525-26 (2013); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009) ("[T]he ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act.").

[181] 42 U.S.C. § 2000e-2(a)(2).

[182] *Limit*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/limit [https://perma.cc/EMV5-TQ8H] (last visited July 10, 2016).

that constrains or confines an employee's employment opportunities, or even tends to do so, is prohibited if such constraint is because of a protected trait. Thus, this provision only requires that race, sex, or other protected traits negatively impact the employee's employment.

An example is helpful. Let's say that a manager hires ten employees within the course of a month. He hires them all for the same entry-level position, and they all possess the same level of skills and experiences. The manager pays the women $9 an hour and the men $10 an hour. One of the women sues the employer for sex discrimination. At his deposition, the manager testifies that he has no idea why he decided to pay the women less than the men. Under the current framework, the woman's case might not make it past summary judgment. She cannot proceed on a disparate impact claim because ten employees do not make a statistically significant sample for a disparate impact analysis. A judge may find that she cannot proceed on a disparate treatment claim because she cannot show that the manager intended to take her sex into account. However, if we ask a jury whether the employee would have been paid $10 an hour if she were a man, it is easy to imagine the jury finding discrimination on the part of the employer. The manager's thoughtless practices were just as detrimental to the employee's pay as intentional conduct would have been. Men made more money; women made less. Under the new framing, the key inquiry becomes whether the protected trait made a difference in the outcome.

Justice Kennedy's reading of the second provision also strongly suggests that the words "because of" do not indicate intent. Because Justice Kennedy sees the second claim as containing both disparate impact and disparate treatment provisions, it would be nonsensical to read the words "because of" as being words of intent (as that word is traditionally used in discrimination cases). To read those words as requiring intent would nullify any disparate impact language within the provision. The federal courts have long clung to the idea that most Title VII cases require intent, despite the lack of textual evidence of an intent requirement. Even if courts continue to assert that employees must prove intent to prove disparate treatment, Justice Kennedy's new reading of the second provision invites new scrutiny of the meaning of intent.

Many scholars have argued for a broader definition of the concept of intent under the discrimination statutes.[183] If the language in Title VII's second provision is about disparate treatment, then courts will need to rethink whether their current discussions about the role of intent in discrimination cases have fully captured all of Title VII's operative language. Any notions of intent developed by courts to date have by default only encapsulated Title VII's first provision because that is the only provision most courts understood as involving intentional discrimination.

---

[183] *E.g.*, Michael Selmi, *Statistical Inequality and Intentional (Not Implicit) Discrimination*, 79 LAW & CONTEMP. PROBS. 199, 201 (2016).

Similarly, the second provision invites a new understanding of cat's paw cases. Within the category of intentional discrimination, courts have used the term "cat's paw" to describe cases in which one individual acts with a discriminatory motive, but another individual makes the decision to take the employment action against the individual.[184] Although the exact contours of the cat's paw theory have not been worked out, these cases often involve a biased supervisor or coworker who provides false information to a decision maker, and the decision maker then makes a negative decision based on the false information. The Supreme Court has identified cat's paw cases as being those cases that arise when the official who takes an action has "no discriminatory animus but is influenced by previous company action that is the product of a like animus in someone else."[185]

The Supreme Court has only decided cat's paw liability where a supervisor acted with bias.[186] An employer is liable under a cat's paw theory when a supervisor performs an act motivated by animus that "is *intended* by the supervisor to cause an adverse employment action . . . if that act is a proximate cause of the ultimate employment action . . . ."[187]

Given that the second provision is not concerned with specific employment decisions, but rather the broader employment opportunities of employees, it seems unlikely that the strictures of the current cat's paw doctrine should apply to cat's paw cases brought under Title VII's second provision. An employee should be able to argue that the biased person's comments or conduct limited her work opportunities in some way.

Further, viewing the second provision as a disparate treatment provision should help expand notions of corporate intent. Title VII is an interesting statute because it only creates liability for the employer and not for any individuals who engage in intentional discrimination.[188] However, in recent decades, courts have largely focused on the role that particular individuals play in causing certain outcomes. They describe intent in terms of individuals.[189] Courts have not focused heavily on the company's own direct liability for creating the environments in which the discriminatory decisions are allowed to

---

[184] The term "cat's paw" refers to a fable in which a monkey convinces a cat to pull chestnuts from a fire. The cat burns its paws trying to obtain the chestnuts and the monkey eats all of them. Staub v. Proctor Hosp., 562 U.S. 411, 415 n.1 (2011).

[185] *Id.* at 417.

[186] *Id.* at 420-21.

[187] *Id.* at 422 (citation omitted). Even though *Staub* was a case involving the Uniformed Services Employment and Reemployment Rights Act of 1994 (the "USERRA"), *id.* at 416, courts have applied it in the Title VII context. *See, e.g.*, Goodsite v. Norfolk S. Ry. Co., 957 F. Supp. 2d 888, 897 (N.D. Ohio 2013); Rajaravivarma v. Bd. of Trs. for the Conn. State Univ. Sys., 862 F. Supp. 2d 127, 149-50 (D. Conn. 2012) (explaining that there is "no reason why *Staub*'s holding should be limited to the USERRA context").

[188] 42 U.S.C. § 2000e-2(a) (2012).

[189] *See, e.g.*, *supra* note 81.

happen and on what a corporate intent doctrine would entail in a modern workplace.

The second provision of Title VII invites another look into the idea of corporate intent for several reasons. The provision's focus on employment opportunities points more to the overall trajectory of an employee's career with an employer, rather than on specific decisions, like hiring or firing, by specific people.[190] Further, disparate impact is largely seen as a company's direct action. Because courts have largely read the second provision as one about a company's direct actions in the disparate impact context, it seems plausible that the provision also speaks to the company's actions for disparate treatment claims that arise from that same second provision.

C. *A Fresh Look at Structure*

A new textual analysis also helps to untangle a knotty problem that has been plaguing the lower federal courts. Given the old way of perceiving the structure of Title VII, courts have tended to view the statute as having multiple "claims." As described in greater detail in Part I, courts often recognize disparate impact as a separate "claim." Courts often divide Title VII disparate treatment claims into kinds of claims, such as single-motive claims and mixed-motive claims, each with its own proof structure or structures. Viewing different types of discrimination as multiple claims has important consequences for pleading and discovery. Justice Kennedy's reading of Title VII's second provision emphasizes that thinking of different kinds of discrimination as separate "claims" is likely incorrect.

An example of this claim mentality and its consequences is helpful. In the 1989 case of *Price Waterhouse v. Hopkins*,[191] the Supreme Court interpreted Title VII as allowing mixed-motive claims.[192] In 1991, Congress amended Title VII, adding § 2000e-2(m) to the statute.[193] That section provides that a plaintiff may prevail on a Title VII claim by establishing that a protected trait was a motivating factor in an employment decision. Congress also created an affirmative defense, which, if proven, would be a partial defense to damages.[194] Even though the text of Title VII did not use the terms "mixed-motive," courts began referring to § 2000e-2(m) as establishing a mixed-motive claim.[195] Some courts distinguished these mixed-motive claims from

---

[190] 42 U.S.C. § 2000e-2(a)(2).

[191] 490 U.S. 228 (1989).

[192] *Id.* at 241-43.

[193] Civil Rights Act of 1992, Pub. L. No. 102-166, § 107, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2(m)).

[194] 42 U.S.C. § 2000e-5(g)(2)(B) (describing the limitations on relief under § 2000e-2(m) if the defendant is able to prove that the same actions would have been taken even without the improper consideration).

[195] *See, e.g.*, Porter v. Natsios, 414 F.3d 13, 19 (D.C. Cir. 2005) (referring to the "mixed-motive framework" under § 2000e-2(m)).

what courts called the "single-motive" claim provided under the statute's main language in § 2000e-2(a)(1).[196] This organizational structure has a host of practical consequences. In some cases, courts refused to instruct juries using the "motivating factor" language if a plaintiff did not refer to § 2000e-2(m) in her complaint.[197] In other cases, courts refused to consider cases under the "motivating factor" standard if the plaintiff failed to make a mixed-motive argument at summary judgment.[198]

More importantly, the circuit courts have not been able to consistently resolve the interplay between the *McDonnell Douglas* test and language in § 2000e-2(m). Many circuits have asserted that single-motive claims and mixed-motive claims are distinct and require separate proof structures.[199] The Fifth Circuit Court of Appeals created a hybrid structure that combines *McDonnell Douglas* and motivating factor language.[200] This means that litigants and courts use different proof structures for proving discrimination claims depending on the circuit in which the case is heard.

In 2013, the Supreme Court decided *University of Texas Southwestern Medical Center v. Nassar*.[201] Buried within the opinion are two sentences that point to a different understanding of the structure of Title VII. The Supreme Court noted: "For one thing, § 2000e-2(m) is not itself a substantive bar on discrimination. Rather, it is a rule that establishes the causation standard for proving a violation defined elsewhere in Title VII."[202] These sentences mean that there is no such thing as a mixed-motive claim or a single-motive claim. Courts and litigants are entitled to use the "motivating factor" definition of causation found in § 2000e-2(m) for all intentional discrimination claims.

Justice Kennedy's new reading of Title VII provides further support for this idea. Justice Kennedy interprets Title VII's second provision as both a disparate treatment and disparate impact provision. It would be very odd indeed if Title VII had three disparate treatment claims: one found in the first provision, another found in the second provision, and yet a third found later in § 2000e-2(m). The only way to avoid this contorted reading is to read the statute as the Court did in *Nassar*: Title VII's first two provisions are the core

---

[196] *Id.*

[197] *See* EEOC v. Aldi, Inc., Civ. No. 06-01210, 2009 WL 3183077, at *12 (W.D. Pa. Sept. 30, 2009).

[198] Ginger v. District of Columbia, 527 F.3d 1340, 1345 (D.C. Cir. 2008) (explaining that the plaintiffs "might have had a compelling case" if they brought a mixed-motive claim rather than just a single-motive claim); *see also* Tobin v. Liberty Mut. Ins. Co., 433 F.3d 100, 105 n.3 (1st Cir. 2005) (refusing to consider a motivating-factor test on appeal).

[199] *See, e.g.*, Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005).

[200] Taylor v. Peerless Indus. Inc., 322 F. App'x 355, 360-61 (5th Cir. 2009).

[201] 133 S. Ct. 2517, 2525-28 (2013).

[202] *Id.* at 2530.

language of the statute; § 2000e-2(m) is not a separate claim; and it is a definition of the core language.[203]

Seeing the structure in this way should resolve many practical problems in discrimination cases. Courts should no longer dismiss a plaintiff's mixed-motive claims if the plaintiff fails to cite § 2000e-2(m). Plaintiffs should be able to proceed on either single-motive or mixed-motive theories of their cases without invoking specific provisions of Title VII. While judges and litigants will still need to craft jury instructions that reflect the facts of specific cases, judges should not disallow certain jury instructions because of a plaintiff's failure to invoke certain specific provisions within the discrimination statutes.

D. *Tortification*

Justice Kennedy's new framing of Title VII's text provides further evidence to counter a recent move by the Supreme Court to claim that Title VII is a tort. In my prior work, I have explored the tortification of discrimination law.[204] Courts and commentators often label federal discrimination statutes as torts.[205] Since the late 1980s, courts have increasingly applied tort concepts to these statutes and that trend has picked up steam within the last decade. In a series of recent cases, the Supreme Court has claimed that because discrimination statutes are torts, courts can look to tort law for the specific meaning of words within Title VII and the ADEA.[206]

This tortification of discrimination law is most clearly seen in *Nassar*.[207] In that case, the Court held that an employee bringing a retaliation claim under Title VII is required to establish "but for" cause.[208] The opinion partially relied on the complex relationship between the Court's own precedents and the 1991 amendments to Title VII. It also heavily relied on the idea that the federal

---

[203] *Id.*

[204] *See generally* Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051 (2014) (examining the application of tort law concepts to federal discrimination statutes over time).

[205] Staub v. Proctor Hosp., 562 U.S. 411, 417-18 (2011); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009); Shager v. Upjohn Co., 913 F.2d 398, 404 (7th Cir. 1990); DAN B. DOBBS, THE LAW OF TORTS 17 (2000). *But see* Robert Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235, 1242 (1988) (arguing that common law causation principles should not be robustly applied to discrimination law); David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 153 (1995) (concluding that the common law of agency is not being applied correctly in sexual harassment cases).

[206] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2524-25 (2013) (explaining that common law causation standards are the "background against which Congress legislated in enacting Title VII"); *Gross*, 557 U.S. at 176.

[207] *Nassar*, 133 S. Ct. at 2525 (starting with basic tort principles to circumscribe the appropriate causation standard in a Title VII action).

[208] *Id.* at 2534.

discrimination statutes are torts. *Nassar* invoked tort law from the beginning of the opinion, defining the case as one involving causation and then noting that causation inquiries most commonly arise in tort cases.[209] The majority engaged in a lengthy discussion of causation's role in tort law, with numerous citations to the Restatement and a torts treatise.[210] The Supreme Court held, contrary to strong countervailing arguments, that an employee bringing a retaliation claim under Title VII is required to prove her complaint or other protected activity was the "but for" cause of a negative employment outcome.[211] The choice the Court makes—"but for" cause—is largely driven by the majority opinion's narrow view of tort law and by *Gross*, which also relied on tort law.[212]

The idea that Title VII is a tort in any way that conveys a specific meaning is problematic for many reasons.[213] While discrimination statutes are torts in some general sense that they do not arise out of criminal law and are not solely contractual, it is far from clear that these statutes are enough like traditional torts to justify the reflexive and automatic use of tort law. Employment discrimination statutes created large exceptions to common law ideas of at-will employment, and strong textual arguments militate against prioritizing tort law as source of meaning. It seems odd to graft common law understandings of words and phrases to statutory regimes that largely reject the underlying governing premises of the common law.

Nor is it clear that tort law's theory provides much help in resolving any of the statutory issues in federal discrimination law, given the multi-paradigmatic nature of tort theory.[214] Tort law generally does not have independent descriptive power. It does not cohere around a narrow enough set of theoretical or doctrinal concepts to provide an answer or even a small subset of answers to many statutory questions. While tort theory provides a rich history and language for discussing competing aims, it does not often provide clear answers to specific statutory questions. Another problem of importing tort law into discrimination law derives from the way the Supreme Court has chosen to frame tort law. In recent cases, the Court has often characterized tort law as possessing narrow conceptions of causation and harm.[215] Using this narrow tort

---

[209] *Id.* at 2522.

[210] *Id.* at 2524-26 (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 & cmt. b (2010); RESTATEMENT (SECOND) OF TORTS §§ 432(1), 435a & cmt. a, 870 cmt. l (1963 and 1964); RESTATEMENT OF TORTS §§ 279 & cmt. c, 280, 431 cmt. a, 432(1) & cmt. a (1934); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 265 (5th ed. 1984)).

[211] *Id.* at 2534.

[212] *See* Gross v. FBL Financial Servs., Inc., 557 U.S. 167, 176 (2009).

[213] Sperino, *supra* note 204, at 1052. The notion that modern statutes derive from the common law has been questioned for over 100 years. *See* Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 384 (1908).

[214] Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 435-36 (2011).

[215] *Nassar*, 133 S. Ct. at 2525; *Gross*, 557 U.S. at 176.

framework leads to discrimination law that is primarily concerned with individual remedies, rather than a broader response to societal discrimination.

It is the language of Title VII that provides the most compelling argument against tortification. Title VII's main operative language does not contain any words that are uniquely tort terms of art. The main operative provisions of Title VII do not use the words intent, factual cause, proximate cause, or damages, which are key words used in tort causes of action.[216] Congress has used these terms of art in certain instances and thus knows how to specifically invoke principles like proximate cause.[217] Even the words "because of" are, at best, an ambiguous reference to tort law; tort causes of action typically do not define causation inquiries using the term "because of."[218]

And, it is the textualism argument where Justice Kennedy's new understanding of the structure of Title VII adds further evidence to the idea that Title VII is not a tort. Justice Kennedy states that Title VII's second provision is about both disparate impact and disparate treatment.[219] Both of these ideas are expressed within one statutory provision. There was no existing traditional common law tort in 1964 that represented such a hybrid. Indeed, the very structure of tort law (and the way that it is traditionally taught in law schools) resists this hybridization. There is no traditional tort that uses language like the language in Title VII's second provision, and the second provision does not use any core concepts from tort law. While there are very

---

[216] *See* 42 U.S.C. § 2000e-2(a) (2012) (describing unlawful employment practices without using any common law terms of art). Further, there are numerous instances where Congress could have easily chosen language to mimic traditional tort law, but chose not to do so. In 1991, when Congress amended Title VII to make it clear that plaintiffs are not initially required to establish "but for" causation, Congress chose to define the plaintiff's burden as establishing that the protected trait played a "motivating factor" in the employment decision. 42 U.S.C. § 2000e-2(m) (making it unlawful for a protected trait to be used as a "motivating factor for any employment practice"). This motivating factor language is different from the substantial factor language used at the common law. *See, e.g.*, Taylor v. Fishkind, 51 A.3d 743, 759 (Md. Ct. Spec. App. 2012).

[217] *See, e.g.*, 33 U.S.C. § 2704(c)(1) (2012) (providing that plaintiffs may recover damages in excess of the statutory cap if they make a showing of proximate cause); Act of June 5, 1924, ch. 261, § 2, 43 Stat. 389, 389 (defining an injury to include "any disease proximately caused" by federal employment); Act of Oct. 6, 1917, ch. 105, § 306, 40 Stat. 398, 407 (stating that the United States is liable to a member of the Armed Forces for a post-discharge disability that "proximately result[ed] from [a pre-discharge] injury"); Act of Sept. 7, 1916, ch. 458, § 1, 39 Stat. 742-43 (stating that the United States is not liable to injured employees whose "intoxication . . . is the proximate cause of the[ir] injury").

[218] *See, e.g.*, *Taylor*, 51 A.3d at 759 (reciting the elements of negligence as "1) that the defendant was under a duty to protect the plaintiff from injury, 2) that the defendant breached that duty, 3) that the plaintiff suffered actual injury or loss, and 4) that the loss or injury proximately resulted from the defendant's breach of the duty").

[219] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2519 (2015).

strong textual arguments that Title VII's first provision is not a tort, these arguments grow even stronger with the second provision. The second provision does not look like anything found within the Restatements of Torts.

Even Justice Thomas's interpretation of Title VII in *Inclusive Communities* contributes to the idea that Title VII is not an intentional tort. Justice Thomas perceived of Title VII as requiring some form of intent.[220] Yet, the second provision of Title VII does not contain any word or words that were used at the common law to signify intent. In a prior opinion, Justice Thomas already characterized the words "because of" as being words of causation.[221] In the common law of torts, these two concepts are described through different words.

E. *A New or Different* McDonnell Douglas *Test*

The *Inclusive Communities* decision also should lead courts and litigants to argue about the contours and possibility of the continued existence of the *McDonnell Douglas* test. This test has since become one of the key analytical devices judges use to evaluate intentional discrimination cases. Critics have argued that the test is problematic for many different reasons. The *Inclusive Communities* case provides two new reasons for criticism: the test does not incorporate elements of Title VII's second provision, and the test unnecessarily isolates "intentional" discrimination claims from other claims.

There are three main criticisms of the *McDonnell Douglas* test: (1) it is confusing and difficult to apply; (2) it does not have a supportable connection to the text of Title VII; and (3) it is inconsistent with the Federal Rules of Civil Procedure. The three-part burden-shifting structure of *McDonnell Douglas* is atypical. In its second step, the test oddly splits the plaintiff's burden of persuasion from the burden of production, and the defendant carries the burden of production only. In the third step, that burden of production reverts back to the plaintiff if the employer is able to carry its minimal responsibility of articulating a legitimate, nondiscriminatory reason for the employment action at issue in the case.[222] Understandably, both courts and litigants have struggled to understand and apply the test. Some members of the Supreme Court have noted that "[l]ower courts long have had difficulty applying *McDonnell Douglas*."[223] Judge Wood of the Seventh Circuit Court of Appeals, in a concurring opinion joined by Judges Tinder and Hamilton, called attention to "the snarls and knots" that *McDonnell Douglas* inflicts on courts and litigants.[224] She derided the test as "an allemande worthy of the 16th

[220] *Id.* at 2526-27 (Thomas, J., dissenting).

[221] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

[222] *See supra* notes 62-68 and accompanying text.

[223] Price Waterhouse v. Hopkins, 490 U.S. 228, 291 (1989) (Kennedy, J., dissenting).

[224] Coleman v. Donahoe, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring) ("The original *McDonnell Douglas* decision was designed to clarify and to simplify the plaintiff's task . . . unfortunately, both of those goals have gone by the wayside.").

century."[225] Judge Tymkovich of the Tenth Circuit Court of Appeals has argued that the test creates confusion and that it distracts courts away from the ultimate inquiry of whether discrimination occurred.[226] One commentator described the test as having "befuddled most of those who have attempted to master it,"[227] and calls the burden-shifting framework "complex" and "somewhat Byzantine."[228]

This confusion is likely engendered, at least in part, from the fact that *McDonnell Douglas* is not derived directly from the text of Title VII.[229] This is not surprising because the Supreme Court decided the case in 1973, before the full rise of textualism as an interpretative methodology.[230] The confusion has only grown since 1991.[231] In that year, Congress amended Title VII to clarify that a plaintiff may prevail on a Title VII discrimination claim if she establishes that a protected trait was a motivating factor in an employment decision.[232] The language used by Congress in the 1991 amendments does not

---

[225] *Id.*

[226] Timothy M. Tymkovich, *The Problem with Pretext*, 85 DENV. U. L. REV. 503, 521-22 (2008).

[227] Kenneth R. Davis, *Price-Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 859 (2004).

[228] *Id.* at 862.

[229] *See* Griffith v. City of Des Moines, 387 F.3d 733, 740 (8th Cir. 2004) (Magnuson, J., concurring) ("Absent from [*McDonnell Douglas*] was any justification or authority for this scheme.").

[230] The test is best characterized as a use of the Supreme Court's supervisory authority, rather than an exercise of statutory interpretation. 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, 765-74 (2006) (discussing *McDonnell Douglas* in light of the Court's supervisory power and possible textualist arguments).

[231] William R. Corbett, *An Allegory of the Cave and the* Desert Palace, 41 HOUS. L. REV. 1549, 1551-52 (2005); William R. Corbett, McDonnell Douglas*, 1972-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 212 (2003); William R. Corbett, *Of Babies, Bathwater, and Throwing Out Proof Structures: It Is Not Time to Jettison* McDonnell Douglas, 2 EMP. RTS. & EMP. POL'Y J. 361, 364 (1998); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1226 (1995) (describing Title VII as being theoretically incoherent and unworkable); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2312-13 (1995); Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. L. 371, 372-81 (1997); Sperino, *supra* note 230, at 762-90 (arguing that *McDonnell Douglas* was not supported by the language of Title VII and thus lacks a proper statutory foundation); Jeffrey A. Van Detta, "*Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 76 (2003).

[232] Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2(m) (2012)).

mimic the three-part burden-shifting structure of *McDonnell Douglas*.[233] Even though it has been more than twenty years since the 1991 amendments, there has been no satisfactory agreement regarding how the *McDonnell Douglas* test intersects with the mixed-motive rubric. Some courts treat *McDonnell Douglas* as the primary way to evaluate single-motive discrimination claims, while others have tried to integrate *McDonnell Douglas* and the 1991 amendments into one comprehensive test.[234]

Over the past several decades, courts have limited the procedural junctures at which they will use the *McDonnell Douglas* test. The Supreme Court held a plaintiff is not required to plead the elements of *McDonnell Douglas* to withstand a motion to dismiss.[235] The test should not be used to review jury verdicts.[236] In some circuits, it is improper for judges to instruct juries using the three-part framework. The Fourth Circuit Court of Appeals has noted that the shifting burdens of production "are beyond the function and expertise of the jury" and are "overly complex."[237] Thus, in some circuits, the primary procedural juncture at which courts use *McDonnell Douglas* is the summary judgment stage. Unfortunately, courts have not reconciled how the use of *McDonnell Douglas* at the summary stage alone is consistent with the Federal Rules of Civil Procedure.[238]

The *Inclusive Communities* decision adds further ammunition to the argument that *McDonnell Douglas* is problematic. Under both Justice Kennedy's and Justice Thomas's new reading, Title VII's second provision is no longer solely a disparate impact provision. If the second provision instead speaks to intentional discrimination claims, then *McDonnell Douglas* should incorporate ideas from the second provision.

As discussed in Part I, courts often interpret the *McDonnell Douglas* test as requiring an employee to prove that she suffered an adverse action. The second provision's broader coverage would eliminate this element from the *McDonnell Douglas* test. The *McDonnell Douglas* test also relies on the idea that cases involving circumstantial evidence of discrimination should be

---

[233] *See* 42 U.S.C. § 2000e-2(m)).

[234] Two sentences in the Supreme Court's decision in *Nassar* clarify the relationship between different portions of Title VII. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2530 (2013) ("For one thing, § 2000e–2(m) is not itself a substantive bar on discrimination. Rather, it is a rule that establishes the causation standard for proving a violation defined elsewhere in Title VII.").

[235] Swierkiewicz v. Sorema, 534 U.S. 506, 510 (2002).

[236] U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-14 (1983).

[237] Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1137 (4th Cir. 1988); *see also* Sanders v. N.Y.C. Human Res. Admin., 361 F.3d 749, 758 (2d Cir. 2004); Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 576 (5th Cir. 2004); Sanghvi v. City of Claremont, 328 F.3d 532, 540 (9th Cir. 2003); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999).

[238] *See* FED. R. CIV. P. 56(a).

evaluated differently than cases involving direct evidence. While this dichotomy has always been suspect, *Inclusive Communities* provides another opportunity to reconsider whether the test is necessary or whether the statutory language itself expresses the proper ways of questioning whether discrimination exists.

Another idea found in Title VII's second provision is also missing from the *McDonnell Douglas* formulation. The main inquiry under *McDonnell Douglas* is whether the employer's reason for an action is pretext.[239] However, Title VII's second provision combines both disparate treatment and disparate impact, suggesting the two are more closely related than currently thought.[240] The *McDonnell Douglas* test unnecessarily isolates "intentional" discrimination claims from other ideas about what constitutes discrimination.

There is an interesting connection between *Inclusive Communities* and another recent Supreme Court case, *Young v. United Parcel Service, Inc.*[241] In *Young*, the Court held that an employee could proceed on an intentional discrimination claim if her employer accommodated some employees who were not able to work but refused to accommodate pregnant employees.[242] In doing so, the Court issued a bizarre version of the *McDonnell Douglas* test. This new version of the *McDonnell Douglas* test requires the plaintiff to make a prima facie case: "that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"[243] The employer must then present a legitimate, nondiscriminatory reason for its decision.[244] However, this reason cannot be that it is more expensive or less convenient to add pregnant women to the category.[245] The plaintiff can then rebut the employer's showing by "providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's . . . reasons are not sufficiently strong to justify the burden, but rather . . . give rise to an inference of intentional discrimination."[246]

This new test is very different from the traditional three-part, burden-shifting test. First, it appears that the lower federal courts play some role in scrutinizing the employer's legitimate, nondiscriminatory reason. For example, let's say an employer has a policy that it only accommodates employees with a

[239] *See supra* Section I.B.

[240] 42 U.S.C. § 2000e-2(a)(1) (2012).

[241] 135 S. Ct. 1338, 1345 (2015).

[242] *Id.* at 1344 (framing the issue as whether the "employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work").

[243] *Id.* at 1354.

[244] *Id.*

[245] *Id.*

[246] *Id.*

disability and employees with on-the-job injuries because other laws require the employer to make these accommodations. It also accommodates employees who are injured at company softball games. This is a facially neutral policy. Yet, the majority opinion seems to require an inquiry into why pregnant women are not also included, and whether expense or convenience plays a role.[247] What this inquiry is and how it would happen are left unexplored. The new test also changes the pretext inquiry in the third step. While the *Young* majority focused on intentional discrimination, its inquiry into burdens and the employer's reasons for acting looks more like the kind of inquiry we would see in a disparate impact case. The Court noted that if an employee established "that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers," this might be intentional discrimination.[248]

The *Young* decision expresses two ideas that may gain momentum outside the pregnancy discrimination context if litigants and courts consider them in light of *Inclusive Communities*. The first idea is that the *McDonnell Douglas* test can and should be radically changed to allow for new ideas of discrimination. The second is that the *McDonnell Douglas* test can incorporate ideas of both intentional and nonintentional discrimination.

CONCLUSION

It is rare after a statute is on the books for more than fifty years to find a new statutory provision. Justice Kennedy's interpretation of Title VII's second provision in the *Inclusive Communities* decision suggests just that. Title VII has two disparate treatment provisions, one of which has rarely been invoked outside of a limited context.

Justice Kennedy's view of Title VII's core operative language opens a new era of statutory exploration for federal employment discrimination law. While this Article begins the conversation about what Title VII's second provision means, it also serves as an open invitation to litigants, courts, and scholars to imagine the full theoretical and practical possibilities for Title VII's second provision.

[247] *Id.* (requiring the employer to justify its refusal to accommodate after the plaintiff has made a prima facie case).

[248] *Id.*