BREAKING DICHOTOMIES AT THE CORE OF EMPLOYMENT DISCRIMINATION LAW

WILLIAM R. CORBETT*

* Frank L. Maraist and Wes S. Malone Professor of Law, Paul M. Hebert Law Center of Louisiana State University. I am grateful to Professors Deborah L. Brake, Sandra F. Sperino, Charles A. Sullivan, and Rebecca Hanner White for their reviews of, and helpful comments on, an earlier draft of this Article. I thank Dean Thomas C. Galligan, Jr. and the LSU Law Center for a research grant that supported my work on this Article. I thank Jessica M. Thomas, LSU Law Class of 2018, and Brooke C. Bahlinger, LSU Law Class of 2019, for their research assistance.

I. INTRODUCTION

The body of federal employment discrimination law in the United States is now about fifty-three years old, with most law emanating from Title VII of the Civil Rights Act of 1964.[1] The doctrine of employment discrimination law has been developed in a voluminous body of case law interpreting the lean statutory language of Title VII and the later-enacted laws, with the Supreme Court building a doctrinal core that has the appearance of order. There are two general theories of discrimination,[2] disparate treatment and disparate impact, which, according to the Court's chronicle, were expressed by Congress in separate subsections of Title VII and then in analogous provisions in the other employment discrimination statutes. These two theories of discrimination are distinct and fundamentally different from each other, and their underlying principles cannot be mixed or blended. Associated with the two theories are proof frameworks or proof structures with ordered elements into which claimants must fit their evidence in order to recover.[3] Satisfaction or nonsatisfaction of each step in the frameworks has a procedural effect in a case.[4] There also are distinct defenses that are affiliated with each of the theories. The proof frameworks, defenses, and other tenets must be kept within the theory with which they are associated. Moreover, it has been a somewhat implicit principle, which has become increasingly explicit, that there are only two theories of discrimination under Title VII. Additional types of claims that are recognized as actionable do not constitute new theories; instead, they must be classified under treatment or impact. One must categorize any employment discrimination claim as fitting under disparate treatment or disparate im-

1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. 2000e to 2000e-17). Title VII of the Civil Rights Act of 1964 was signed into law by President Lyndon B. Johnson on July 2, 1964, and it became effective July 2, 1965. *Id.* § 716a, 78 Stat. at 266 (stating that the effective date shall be one year after the date of enactment).

2. Presumably, there is a third theory—failure to make reasonable accommodations—under the Americans with Disabilities Act (ADA), as it is declared to be a type of disability discrimination by section 102. 42 U.S.C. § 12112(a) (2012). The Supreme Court's decision that there is no separate cause of action for nonaccommodation of religion under Title VII does not necessarily call the separate theory under the ADA into question. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015).

3. Within disparate treatment there are individual disparate treatment claims and systemic disparate treatment claims, and each has its own proof frameworks. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 (1977). Both require proof of intent.

4. In its opinion that created the pretext proof framework for individual disparate treatment cases, the Supreme Court explained the nature of what it was creating: "The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

pact, and then it can be analyzed using the appropriate framework. Dichotomies and categorization form the core of employment discrimination doctrine. This is an orderly state of law, but it is only the verisimilitude of order.

It has become increasingly apparent that the two theories of employment discrimination are not really distinct, and the Court cannot, and should not, avoid blending them. Contrary to the Court's proclamations that there are only two theories of discrimination,[5] there appear to be more, and there is a need for candid recognition of theories or causes of action beyond these two to properly evaluate the many types of claims. Below the level of the two theories, when claims are categorized as individual disparate treatment, courts and lawyers do not know which framework to apply to such claims, and forcing them into one or the other often obfuscates rather than facilitates analysis of the claim. This core of employment discrimination, which categorizes claims within distinct theories and then funnels them into proof structures, is a thin facade with waning theoretical integrity and increasing practical disutility. Yet, the Court has clung tenaciously to the perceived order, insisting that the exclusive theories can be maintained as a dichotomy and all claims can be processed, and ultimately resolved, through the proof frameworks.

Beyond the stultifying rigidity of this core based on dichotomies and categorization, the Supreme Court has demonstrated considerable capacity for creativity in employment discrimination doctrine while declaring adherence to the core. The Court has at various points in the history of discrimination law recognized what I will call, although the Court will not, new theories to address invidious discrimination. Notable among these innovations are recognition of the hostile environment sexual harassment theory,[6] the sex or gender stereotyping theory,[7] and the associational or relational theory.[8]

Two of the Supreme Court's employment discrimination decisions in 2015, *Young v. United Parcel Service*[9] and *EEOC v. Abercrom-*

5. *See, e.g.*, Sandra F. Sperino, *Justice Kennedy's Big New Idea*, 96 B.U. L. REV. 1789, 1794 (2016) (stating that courts presume that disparate treatment and disparate impact "represent a complete description of the type of claims recognized under Title VII"). The Supreme Court and lower courts at times have referred to disparate treatment and disparate impact as theories of discrimination and at other times as causes of action. *See infra* Part IV.B.1. Regardless of the term used for these overarching concepts, the categorization of a claim under them is important because the applicable proof frameworks, defenses, and other principles flow from such classification.

6. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

7. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

8. Thompson v. N. Am. Stainless, LP, 562 U.S. 170 (2011).

9. 135 S. Ct. 1338 (2015).

bie & Fitch Stores, Inc.,[10] facially proclaim the stability of the old order but substantively reveal that the Court is willing to innovate and diverge from the established core of rigid dichotomies. In both decisions, the Court engages, to some extent, in the supposedly anathematic blending of disparate treatment and disparate impact, although the Court disclaims such heresy. The opinions also employ the dichotomy of individual disparate treatment proof structures. *Young* uses the pretext analysis creatively but in a way that undermines its meaning and significance. *Abercrombie & Fitch* employs the mixed-motives analysis while tacitly revealing the reason why the dichotomy of individual disparate treatment proof frameworks must be abandoned. Rather than suggesting chaos in employment discrimination law, the two decisions hold promise for its improvement. Such improvement, however, is only likely to be realized to a significant degree if the Court follows up these decisions by acknowledging first, the demise of the dichotomies of theories and proof frameworks and second, the variety of theories or causes of action that it already has recognized.

In a third decision in 2015, the Court rendered an opinion that could further undermine the core of employment discrimination law, although the case was not an employment discrimination case. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the Court held that the disparate impact theory is available under the Fair Housing Act (FHA).[11] The majority opinion analyzed the issue under the FHA by tracing the development of disparate impact under employment discrimination laws. The opinion blithely undermines the axiom that the Supreme Court gleaned disparate treatment and disparate impact from separate subsections of Title VII.[12] If Congress did not articulate the theories in separate statutory provisions, the argument for theoretical distinctiveness and the imperative for never blending principles is less compelling.[13]

Understanding what drove the Court to render these three opinions that furtively diverge from the established core yields insights into the current disarray masquerading as order in employment discrimination law. Such understanding also could provide a constructive way to move forward with forging a simpler, less rigid, less ritualistic, and more coherent body of law that more effectively addresses the actual occurrences of discrimination in the workplace. The new

10. 135 S. Ct. 2028 (2015).

11. 135 S. Ct. 2507, 2518 (2015).

12. *Id.* at 2519. *See* Sperino, *supra* note 5, at 1791.

13. Sperino, *supra* note 5, at 1815 (stating that "Justice Kennedy's reading of Title VII invites courts to disregard the accidental dichotomy created in *Griggs*.").

doctrine would not be based on an exclusive dichotomy of theories or frameworks. It would recognize a variety of theories or causes of action and not insist upon strict separation of theories and nonblending of principles associated with theories. At a time when many scholars are arguing for recognition of new theories of discrimination to address the veiled, unconscious, or institutional discrimination that is more prevalent in society and the workplace today,[14] the Court's opinions in *Young* and *Abercrombie & Fitch* give reason for optimism.[15] However, those decisions also should foment pessimism, as the Court diverged from the old core but simultaneously proclaimed that it was not doing so. Both decisions reveal a Court that implicitly recognizes the broken core doctrine and that teeters on the brink of diverging from the restrictive dichotomies. Alas, the Court cannot break from the appearance of order.

Part II examines the evolution of principles that are at the core of employment discrimination law: the dichotomy of discrimination theories and the dichotomy of individual disparate treatment proof frameworks. It also traces and considers the less prominent but emergent principle of the exclusivity of the two theories. Part III discusses how the Court diverged from these central principles to varying degrees in *Young*, *Abercrombie & Fitch*, and *Inclusive Communities*. This Part also considers the failed effort of the Equal Employment Opportunity Commission (EEOC), soon after these decisions, to use *Young* as support for breaking the dichotomy of theories in *EEOC v. Catastrophe Management Solutions*.[16] *Catastrophe Management Solutions* serves as an exemplar of why the discrete and exclusive theories fail to effectively address some types of workplace discrimination. Part IV explains the disorder that prevails beneath the surface in the statutes, theories, and proof frameworks that constitute the quietly eroding core of em-

14. *See, e.g.*, Stephanie Bornstein, *Reckless Discrimination*, 105 CAL. L. REV. 1055, 1103-07 (2017) (arguing for recognition of a theory of reckless discrimination) [hereinafter Bornstein, *Reckless*]; Richard Thomas Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1384 (2014) (proposing that employment discrimination law should shift in focus from causation and intent to a focus on employers' duty of care to avoid perpetuating segregation and hierarchy); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 967-72 (1993) (positing that much of the existing regime of employment discrimination law is negligence-based and arguing for a general theory of negligent discrimination); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1433-39 (2009) (arguing for a reconceptualized theory of discrimination based on membership causation).

15. Sperino, *supra* note 5, at 1816 (positing that the dichotomy model permits easy dismissal of claims based on structural discrimination, unconscious bias, and negligence, whereas a model viewing discrimination as a spectrum permits a more open inquiry).

16. 852 F.3d 1018 (11th Cir. 2016), *reh'g denied*, 876 F.3d 1273 (11th Cir. 2017).

ployment discrimination law. Part IV also considers the Court's capacity for creativity and innovation that implicitly undermines the failing core of employment discrimination law. Part V describes the improved doctrine that could emanate from *Young, Abercrombie & Fitch,* and other decisions. The Court could reject the dichotomy of theories and proof structures. In its place, the Court could permit the blending of principles across theories, could eschew cabining evidence as relevant and probative under one theory, and could expressly recognize a variety of theories or causes of action. It also could rectify the proof structure conundrum for intentional discrimination claims under Title VII by eliminating the *McDonnell Douglas* pretext analysis[17] and proclaim that all such claims be analyzed under the "motivating factor" standard of causation and mixed-motives analysis added to Title VII by the Civil Rights Act of 1991.[18] Such Court-developed doctrine could not completely abrogate the dichotomy of theories because some aspects are memorialized in the statutes. Furthermore, the Court could not produce complete symmetry across the statutes because the Civil Rights Act of 1991 amended Title VII to codify and slightly modify existing case law in ways that it did not amend the Age Discrimination in Employment Act or the Americans with Disabilities Act.[19] Moreover, there are other differences in statutory language among the three laws that suggest or require distinctions. To realize fully this less rigid and ritualistic approach to analysis of employment discrimination claims and achieve harmonization across the statutes, it will be necessary for Congress to amend the statues to remove some of the current provisions that ensconce the old core based on distinctiveness, separation, and exclusivity of theories as well as the dichotomy of disparate treatment proof structures.

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17. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973).

18. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C). Two of the most significant codifications were the insertion of mixed-motives and disparate-impact frameworks in Title VII. In so amending Title VII, Congress was adopting, with modifications, the mixed-motives proof structure articulated by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and adjusting (or restoring to prior understanding) the disparate-impact framework discussed by the Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). That Congress did not similarly amend the ADEA and the ADA would later result in the Court's interpretation of these changes as being inapplicable to the ADEA. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009) (holding the mixed-motives framework of the 1991 Act inapplicable to the ADEA); Smith v. City of Jackson, 544 U.S. 228 (2005) (announcing a disparate impact framework different from that installed in Title VII by the 1991 Act).

19. *See infra* Part IV.A.

II. THE CORE OF EMPLOYMENT DISCRIMINATION LAW: DICHOTOMY AND EXCLUSIVITY

Three laws form the principal statutory bases of employment discrimination law[20]: Title VII of the Civil Rights Act of 1964 (Title VII),[21] the Age Discrimination in Employment Act (ADEA),[22] and the Americans with Disabilities Act (ADA).[23] The key language of each of the two earliest laws, Title VII and the ADEA, declares it an "unlawful employment practice" for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against" an employee regarding terms and conditions of employment "because of . . . [the protected characteristic]."[24] "Discriminate," which serves as the catchall term to cover other adverse employment actions, has become the salient term to identify this area of the law. Title VII and the ADEA do not include a definition of discrimination.[25] At the time of the enactment of Title VII, discrimination in common parlance[26] would have been understood to mean "distinguish[ing] unjustly."[27] The wording of the ADA prohibition is different, declaring that "[n]o covered entity shall discriminate against a qualified individual on the basis of

20. Congress enacted the Genetic Information Nondiscrimination Act in 2008. Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified as amended in scattered sections of 26, 29 & 42 U.S.C.). The volume of charges filed under this Act has been small, and there are few reported cases discussing this Act. Regarding the number of charges filed, see *Charge Statistics (Charges filed with the EEOC) FY 1997 Through FY 2016*, U.S. EQUAL OPPORTUNITY COMM'N https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm [https://perma.cc/UQD6-R58N].

21. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 66 (codified as amended at 42 U.S.C. 2000e to 2000e-15 (2012)). Race discrimination claims also can be asserted under section 1981. 42 U.S.C. § 1981 (2012). The analysis of race claims under section 1981 is not separate from or different than the analysis of such claims under Title VII. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989). The Civil Rights Act of 1991 amended Title VII and created a freestanding section 1981a, which provides for damages and jury trials in Title VII intentional discrimination cases for which damages are not available under section 1981. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071 (codified at 42 U.S.C. § 1981a (2012)).

22. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (2012)).

23. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12117 (2012)).

24. 42 U.S.C. § 2000e-2(a); 29 U.S.C. § 623(a) (2012). In a minor variation in language, the ADEA provision states that "[i]t shall be unlawful for an employer" rather than declaring as Title VII does that "[i]t shall be an unlawful employment practice." In another inconsequential variation, the ADEA omits the word "to" before "discriminate."

25. Michael Evan Gold, *Disparate Impact is Not Unconstitutional*, 16 TEX. J. C.L. & C.R. 171, 175 (2011).

26. FDIC v. Meyer, 510 U.S. 471, 476 (1994) ("In the absence of . . . a definition, we construe a statutory term in accordance with its ordinary or natural meaning.").

27. Gold, *supra* note 25, at 176.

disability."[28] The ADA then lists seven acts that constitute such discrimination.[29] Thus, the ADA does define discrimination in a way that Title VII and the ADEA do not, and this may result in the Court or courts interpreting the statute as creating more than two theories of recovery or causes of action under the ADA.

Given the lean prohibitory language of Title VII and the ADEA, the courts developed through case law the concepts and principles for proving and analyzing claims. Working from two separate statutory provisions in Title VII,[30] the Court developed two principal theories of discrimination—disparate treatment (intentional discrimination)[31] and disparate impact (unintentional discrimination).[32] Under individual disparate treatment, the Supreme Court developed two proof structures for proving and analyzing intentional discrimination: the pretext framework first announced in *McDonnell Douglas Corp. v. Green*[33] and the mixed-motives framework articulated by the Court in *Price Waterhouse v. Hopkins*,[34] which was revised and codified by Congress, at least for Ti-

28. 42 U.S.C. § 12112(a) (2012). The original language in the ADA, as enacted in 1990, prohibited discrimination "because of the disability of such individual." The language was changed by the ADA Amendments Act of 2008. Pub. L. No. 110-325 § 5, 122 Stat. 3553, 3557.

29. *Id.* § 12112(b).

30. It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2(a) (2012).

31. The Court also recognized distinctions between individual and systemic disparate treatment, with a separate proof framework for systemic. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

32. The Court has declared that disparate treatment is manifested in § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1), and disparate impact is embodied in § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2). *See* Smith v. City of Jackson, 544 U.S. 228, 235 (2005); *see also* Sperino, *supra* note 5, at 1789. It is now accepted that the Court grounded disparate impact in § 703(a)(2) when it recognized the theory in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Court did not expressly state that, however, until its decision eleven years after *Griggs* in *Connecticut v. Teal*, 457 U.S. 440, 448 (1982). *See* Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 454 (2005).

33. 411 U.S. 792 (1973).

34. 490 U.S. 228 (1989).

tle VII,[35] in the Civil Rights Act of 1991.[36] This dichotomy of proof structures is of great importance in employment discrimination law because the overwhelming majority of claims are individual disparate treatment claims.[37] Because the proof structures are used to analyze claims and decide dispositive motions in the trial courts, this dichotomy has immense practical significance. The Court set forth the disparate impact theory and a rough version of the affiliated proof framework in *Griggs v. Duke Power Co.*,[38] and Congress revised and codified that framework for Title VII, but not the ADEA and the ADA, in the Civil Rights Act of 1991.[39]

The core of employment discrimination law, the basis for deciding all claims, has been two separate subsections of the discrimination statutes yielding two separate theories of discrimination for which the Court and Congress developed associated distinct proof frameworks.[40] Every employment discrimination claim is categorized as

35. The Court explained that the mixed-motives framework does not apply under the ADEA in *Gross v. FBL Financial Services Inc*., 557 U.S. 167, 180 (2009). The Court later held that mixed motives is not applicable under the antiretaliation provision of Title VII in *University of Texas Southwest Medical Center v. Nassar*, 133 S. Ct. 2517, 2534 (2013). It probably does not apply under the ADA, but the Supreme Court has not decided the issue, and there is a split of authority on the issue. *See* Gentry v. E. W. Partners Club Mgmt. Co., 816 F.3d 228, 234 (4th Cir. 2016) (joining Sixth and Seventh Circuits in applying but-for causation); Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 321 (6th Cir. 2012) (holding mixed-motives analysis is not applicable to the ADA based on *Gross*); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 963-64 (7th Cir. 2010) (same). *But see* Hoffman v. Baylor Health Care Sys., 597 F. App'x 231, 237 (5th Cir. Jan. 6, 2015) (stating that standard of causation under the ADA is "motivating factor"), *cert. denied*, 136 S. Ct. 45 (2015); Siring v. Or. State Bd. of Higher Educ. 977 F. Supp. 2d 1058, 1063 (D. Or. 2013) (same).

36. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075-76 (codified in scattered sections of 42 U.S.C.). The two parts of the mixed-motives analysis are at 42 U.S.C. § 2000e-2(m) (2012) ("motivating factor") and 42 U.S.C. § 2000e-5(g)(2)(B) (2012) (same-decision defense).

37. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 989 (1991) (stating that only 101 of 7,613 employment discrimination claims in 1989 alleged disparate impact); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 1251, 1302 (1998) ("by the end of the [1980s] the overwhelming majority of Title VII suits involved individual claims of disparate treatment discrimination brought by individual private litigants"); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 198 (2009) (stating that "the vast majority of discrimination claims in federal court" are disparate treatment cases). It seems likely that the predominance of disparate treatment claims has increased since the enactment of the Civil Rights Act of 1991, which made compensatory and punitive damages and jury trials available in intentional discrimination, but not disparate impact, cases.

38. 401 U.S. 424 (1971).

39. The framework is at 42 U.S.C. § 2000e-2(k) (2012). The Supreme Court explained that the statutory version of the disparate impact framework does not apply to the ADEA in *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005).

40. *See, e.g.*, Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L.J. 559, 568-69 (2017) (stating that "the separation of disparate treatment from disparate impact is

disparate treatment or disparate impact, and then the evidence can be funneled into a proof structure affiliated with that theory. In this design, theories and proof frameworks must be kept distinct and proliferation of theories must be avoided. As Professor Deborah L. Brake depicts it, "the picture that emerges reveals an area of law bound by rigid proof frameworks—in which the sorting of evidence into discrete categories and shifting burdens of proof take center stage—and a sharp dichotomy separating disparate treatment and disparate impact claims."[41] Over the years, there have been increasing signs that the Supreme Court is having difficulty keeping discrimination claims tethered to this core.

A. Disparate Treatment and Disparate Impact: The Dichotomy of Theories

Today, it is axiomatic that there are two principal theories of employment discrimination under Title VII and the ADEA—disparate treatment and disparate impact.[42] Failure to make reasonable accommodation was thought by most courts[43] and scholars[44] to be a separate theory before *Abercrombie & Fitch*, but it was limited to religion, disability,[45] and perhaps pregnancy.[46] The exclusivity and distinctiveness of the theories has been so sacrosanct,[47] even if not uni-

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the foundation on which employment discrimination doctrine is built"); Sperino, *supra* note 5, at 1794 (stating that the dichotomy of theories, emanating from separate statutory sections, with their separate proof structures, has "huge implications for both the theory and the practice of federal discrimination law").

41. *See, e.g.*, Brake, *supra* note 40, at 562.

42. *Id.* at 560; Sperino, *supra* note 5, at 1790; Zatz, *supra* note 14, at 1361.

43. *See, e.g.*, Reed v. Great Lakes Cos., 330 F.3d 931 (7th Cir. 2003); Wilson v. U.S. W. Commc'ns, 58 F.3d 1337 (8th Cir. 1995).

44. Roberto L. Corrada, *Toward an Integrated Disparate Treatment and Accommodation Framework for Title VII Religion Cases*, 77 U. CIN. L. REV. 1411, 1411 (2009); Oppenheimer, *supra* note 14, at 936 (positing that Court in describing all employment discrimination cases as coming within disparate treatment or disparate impact failed to account for a third theory—failure to accommodate); Zatz, *supra* note 14, at 1361 (referring to nonaccommodation as "another recognized theory of discrimination").

45. Presumably, failure to reasonably accommodate is a separate theory under the ADA, but *Abercrombie & Fitch* may call that presumption into question. The statutory provision of Title VII interpreted by the Court in *Abercrombie & Fitch* presents a less compelling case for a separate theory than the differently situated ADA provision. Whether failure to reasonably accommodate is a separate theory under the ADA is considered *supra* note 2 and *infra* note 305.

46. *See* Young v. United Parcel Serv., 135 S. Ct. 1338 (2015) (permitting a plaintiff to assert a failure-to-accommodate pregnancy claim within the *McDonnell Douglas* pretext framework).

47. Where do harassment and stereotyping fit? Some commentators categorize them, and the Court would seem to agree, as subsets of disparate treatment. *See, e.g.*, Bornstein, *Reckless*, *supra* note 14, at 1061, 1080 (referring to harassment and nonaccommodation as additional theories and then sub-types of disparate treatment). One of the principal argu-

versally applauded,[48] that it seems that Congress must have declared the theories when it enacted Title VII or the Court must have immediately gleaned them from the statute in its early interpretations of Title VII. In reality, however, Congress did not declare those theories in Title VII, and the Court did not definitively discover them in its earliest encounters with the statute. A short history in support of this point is in order because it goes some way toward undermining the inviolability of this dichotomy of theories. Their pedigree is not as closely linked to the statutes as it has come to be understood.

To begin with, neither the term "disparate treatment" nor "disparate impact" appeared in Title VII when it was enacted in 1964.[49] Thus, the Supreme Court must have gleaned those theories, as a matter of interpretation, from the statutory language. While that is true, the theories did not spring up fully developed or even named in the earliest Court decisions. As Professor Sandra Sperino describes it, the emergence of this dichotomy was "quite accidental."[50] The Supreme Court's most quoted articulation of the two theories of discrimination appears in a footnote in *International Brotherhood of Teamsters v. United States*:[51]

> "Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. . . .
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ments of this Article is that harassment, stereotyping, nonaccommodation, and other types of claims should be recognized as theories of discrimination and not categorized as subsets of disparate treatment. Moreover, the decision to classify them as subsets of disparate treatment, rather than freestanding theories, restricts the development and flexibility of employment discrimination law. *See* Sperino, *supra* note 5, at 1816.

48. *See, e.g.*, Sperino, *supra* note 5, at 1802; Zatz, *supra* note 14, at 1361.

49. *See, e.g.*, Elaine W. Shoben, *Employee Recruitment by Design or Default: Uncertainty under Title VII*, 47 OHIO ST. L.J. 891, 892 n.5 (1986) (noting that neither term is used in Title VII). Neither term was used in the congressional committee report. H.R. REP. NO. 88-914 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391. "Disparate treatment" is still absent in the statutes, but the term "disparate impact" now does appear. In the Civil Rights Act of 1991, Congress amended Title VII expressly to provide for a disparate impact framework. *See* 42 U.S.C. § 2000e-2(k) (2012). The 1991 Act also enacted a freestanding section 1981a, which provides for compensatory and punitive damages in cases of "unlawful intentional discrimination," which the statute explains is "not an employment practice that is unlawful because of its disparate impact." 42 U.S.C. § 1981a(1)(2) (2012).

50. Sperino, *supra* note 5, at 1815.

51. 431 U.S. 324 (1977).

> . . . Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. . . . Either theory may, of course, be applied to a particular set of facts.[52]

Although the fact seems lost in antiquity, before *Teamsters*, the Supreme Court had not used the terms "disparate treatment" and "disparate impact" to name the theories of discrimination.[53] *Griggs v. Duke Power Co.*[54] is the origin of disparate impact in Supreme Court case law, and *McDonnell Douglas Corp. v. Green*[55] may be said to be the genesis of disparate treatment in the Court's case law.[56] While *Griggs* is the opinion that adopted the disparate impact theory and *McDonnell Douglas* announced a proof structure to be used under disparate treatment, neither case so labeled the theories.

McDonnell Douglas was the Court's third encounter with Title VII.[57] In that decision, the Court began drawing the lines of demarcation between the two unnamed theories. The Eighth Circuit, in the opinion below, relied heavily on the *Griggs* decision to fashion its analysis of the intentional discrimination claim. The Supreme Court in *McDonnell Douglas*, however, explained that relying on *Griggs* was incorrect because that case differed from *McDonnell Douglas* in important respects. While *Griggs* involved the employer's use of a facially neutral test and criterion that disproportionately excluded African Americans, *McDonnell Douglas* involved a disagreement about the reason why the employer did not rehire the plaintiff, or as the Court put it, this plaintiff "appear[ed] in different clothing" than

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52. *Id.* at 335-36 n.15 (citations omitted).

53. Barbara Lindemann Schlei and Paul Grossman used these labels for the theories in the first edition of their influential treatise. Gold, *supra* note 25, at 173 & 173 n.12 (citing BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1-12 (1976)).

54. 401 U.S. 424 (1971).

55. 411 U.S. 792 (1973).

56. Although Congress did not use the term "disparate treatment" in the statute, there was no disagreement that Congress's principal objective was to prohibit intentional discrimination. *Teamsters*, 431 U.S. at 335-36 n.15. According to Professor Belton, "[t]here is no real dispute that at the time Congress enacted Title VII, it intended to prohibit blatant, overt, or intentional racially discriminatory employment practices in the private sector. The terms 'to discriminate,' 'intended,' and 'intentionally' are used repeatedly throughout the Act." Belton, *supra* note 32, at 438.

57. The first was *Phillips v. Martin Marietta*, 400 U.S. 542 (1971), and the second was *Griggs* in 1971.

did the plaintiff in *Griggs*.[58] By the time of the *Teamsters* decision in 1977, the Court had crystalized the two theories of discrimination.

The concept of employment discrimination did not spring into existence with the enactment of Title VII. Before *Griggs* and the Court's other early efforts to define discrimination, there were views about what types of employment discrimination were or might be prohibited by Title VII. Before the enactment of Title VII, more than twenty-five states and Puerto Rico had enacted fair employment practice laws prohibiting employment discrimination based on race.[59] Still, as Professor Alfred Blumrosen describes it, the definition and contours of discrimination had not been firmly established by 1965, the effective date of Title VII.[60] Blumrosen identified three concepts about the nature of employment discrimination that had emerged in the law and literature.[61] The first was acts causing economic harm in which the actor is motivated by animus toward the group of which the victim is a member, for which the common law parallels were willful and wanton misconduct and mens rea in criminal law.[62] The second was economic harm caused by an actor treating members of one group less favorably than similarly situated members of another group, with negligence and equal protection constitutional cases serving as its common law parallels.[63] The third was conduct that has an adverse effect on members of one group compared to members of another group, for which res ipsa loquitur, interference with advanta-

58. *McDonnell Douglas*, 411 U.S. at 806.

59. Sanford Jay Rosen, *The Law and Racial Discrimination in Employment*, 53 CAL. L. REV. 729, 775-76 (1965). New York was the first state to pass such a law in 1945. *Id.* at 775.

60. Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 66 (1972). Professor Blumrosen was the Chief of Conciliations for the EEOC from 1965 to 1967 and was instrumental in developing the EEOC's positions in early litigation. He identifies as the reason for the lack of development that state civil rights agencies focused their efforts on "voluntary compliance" and did not process many cases through state agency procedures and hearings. *Id.* at 66; *see also* Rosen, *supra* note 59, at 778, 780 (observing that state and local FEP agencies relied heavily on conciliation and voluntary compliance). As a result of this "nonlitigation approach" by state agencies, there were few state court opinions grappling with the meaning of discrimination. Blumrosen, *supra*, at 66.

61. Blumrosen, *supra* note 60, at 67.

62. *Id.* Professor Arthur Bonfield, another commentator, writing soon after the enactment of Title VII, considered the prohibitory language of Title VII, the Model Act of the National Conference of Commissioners on Uniform State Laws, and the state fair employment practice laws. *See generally* Arthur E. Bonfield, *Substance of American Fair Employment Practices Legislation I: Employers*, 61 NW. U. L. REV. 907 (1967). He noted that all of the statutes' general omnibus prohibition clauses (§703(a) in Title VII) prohibited employment practices only when coupled with a certain state of mind. *Id.* at 955-56. However, Bonfield also observed that section 703(a)(2) and analogous state fair employment practice provisions prohibit segregation and classification. *Id.* at 965-66.

63. Blumrosen, *supra* note 60, at 67.

geous relations, and strict liability were the common law analogues.[64] Considering these early concepts or theories of discrimination and their purported common law analogues, we can see that disparate treatment and disparate impact have come to include them, but have narrowed them to two and have not retained all of the common law analogues. It seems that disparate treatment is comprised of the first two concepts identified by Blumrosen, but negligence was dropped as an analogue for unequal treatment, and the analogue of intentional torts was adopted for the two concepts that were folded into disparate treatment. The third version has come to be labeled disparate impact, although its common law analogues are debatable.

Beginning with *McDonnell Douglas*, the Court has, in several opinions, labored to maintain lines of demarcation between disparate treatment and disparate impact.[65] In *Hazen Paper Co. v. Biggins*,[66] the Court stated, "[w]e long have distinguished between 'disparate treatment' and 'disparate impact' theories of employment discrimination."[67] The plaintiff in *Hazen Paper Co.* sued his employer for violations of both the ADEA and the Employee Retirement Income Security Act of 1974[68] for terminating his employment only weeks before his pension vested.[69] The Court was concerned that the court of appeals, in affirming a judgment in favor of the plaintiff on the age discrimination claim, had relied heavily on evidence indicating the employer's purpose was to prevent the pension from vesting. However, pension vesting is based on years of service, and that is a distinct concept from age.[70] As the Court expressed it, firing the plaintiff because he had over nine years of service and his pension was about to vest would not be tantamount to firing him because of his age.[71] Explaining that disparate treatment was the "essence of what Congress sought to prohibit in the ADEA,"[72] the Court alerted lower courts to the possibility that the disparate impact theory of discrimination

64. *Id.*

65. *See* Brake, *supra* note 40, at 564-69 (tracing this theme through Court decisions). Despite the Court's escalating insistence on the separation of the two theories, it endeavored, in some earlier opinions, to make the disparate impact proof structure parallel the *McDonnell Douglas* disparate treatment structure. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 426 (1975) (explaining the parallels between the first two stages of the proof structures).

66. 507 U.S. 604 (1993).

67. *Id.* at 609.

68. 29 U.S.C. § 1140 (2012).

69. *Hazen Paper Co.*, 507 U.S. at 606-07.

70. *Id.* at 611-12.

71. *Id.*

72. *Id.* at 610.

might not apply to the ADEA.[73] However, this possibility was later dispelled by the Court in *Smith v. City of Jackson*.[74] The main thrust of the Court's *Hazen Paper Co.* opinion is that the evidence relied upon by the court of appeals may establish a disparate impact claim, which the Court suggested may not be actionable under the ADEA, and it may or may not support a disparate treatment claim.[75] The Court reversed and remanded for clarification.

The Supreme Court also engaged in boundary maintenance between theories in *Raytheon Co. v. Hernandez*.[76] The plaintiff sued his employer for disparate treatment discrimination under the ADA. The employee had been employed with Raytheon and had been given the option to resign in lieu of termination after testing positive for drug (cocaine) use. The reason stated for separation from employment in his file was "discharge for personal conduct (quit in lieu of discharge)."[77] Over two years later, plaintiff applied for rehire and provided letters of reference regarding his rehabilitation. The person who reviewed plaintiff's application rejected it based on Raytheon's purported policy of not rehiring employees who were terminated for workplace misconduct. She said that she did not know of plaintiff's drug use issues when she made the decision not to rehire.[78] Plaintiff sued under the disparate treatment theory, arguing that the employer refused to rehire him because of his record of past drug addiction or because it regarded him as a drug addict.[79] The district court, court of appeals, and Supreme Court all found that plaintiff's claim sounded in disparate impact, not disparate treatment, and he had failed to plead or raise disparate impact in a timely manner.[80] However, in analyzing the plaintiff's disparate treatment claim under the *McDonnell Douglas* pretext analysis, the court of appeals rejected the employer's proffered legitimate, nondiscriminatory reason at stage two of the analysis. As the Supreme Court put it, "the [c]ourt of [a]ppeals held that a neutral no-rehire policy could never suffice in a case where the employee was terminated for illegal drug use, because

73. *See, e.g.*, EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995); Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir. 1996).

74. 544 U.S. 228 (2005).

75. *Hazen Paper Co.*, 507 U.S. at 609-10. The Court would display a more open approach to what disparate impact-type evidence might prove in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015). The Court held that intent might be inferred from evidence of disparate impact, notwithstanding the employer's legitimate, nondiscriminatory reason. For a detailed discussion of *Young*, see *infra* Part III.A.

76. 540 U.S. 44 (2003).

77. *Id.* at 47.

78. *Id.*

79. *Id.* at 49.

80. *Id.*

such a policy has a disparate impact on recovering drug addicts."[81] The Court explained that the appellate court's error was conflating the proof frameworks of the two distinct theories of discrimination.[82] Beyond its rejection of the employer's legitimate, nondiscriminatory reason, the appellate court diverged completely from the disparate treatment pretext analysis and discussed that the neutral no-rehire policy would screen out applicants with a record of drug addiction and that the employer had offered no business necessity defense for maintaining the policy.[83] Business necessity, however, is a statutory defense to disparate impact claims.[84] The Court explained that "such an analysis is inapplicable to a disparate-treatment claim."[85] Citing and quoting from *Teamsters* and *Hazen Paper Co.*, the Court declared that "[t]his Court has consistently recognized a distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact."[86]

Although the Court's decision in *Wal-Mart Stores, Inc. v. Dukes*[87] is most often thought of for the procedural ramifications of its rejection of class certification in sex discrimination claims against Wal-Mart, the majority opinion also reveals the Court once again laboring to maintain the boundaries between disparate treatment and disparate impact. The plaintiffs asserted a systemic disparate treatment theory that implicated both impact and treatment. According to the Court, the plaintiffs claimed that Wal-Mart gave local managers discretion over pay and promotions that they exercised disproportionately in favor of men, thus producing a disparate impact on female employees.[88] The next step in the plaintiffs' claim was that Wal-Mart was aware of the impact, and its refusal to restrict the managers' discretion constituted disparate treatment.[89] The Court's majority opinion noted that the issue of commonality on class certification "necessarily overlaps with respondents' merits contention that Wal-Mart engages in a *pattern or practice* of discrimination."[90] The Court noted that commonality might be satisfied if either the employer used a biased testing procedure or the employer operated under a general

81. *Id.* at 51.

82. *Id.*

83. *Id.* at 54.

84. *Id.* (referring to "factors that pertain to disparate-impact claims but not disparate-treatment claims").

85. *Id.* at 55.

86. *Id.* at 52.

87. 564 U.S. 338 (2011).

88. *Id.* at 343-44.

89. *Id.* at 345.

90. *Id.* at 352.

policy of discrimination.[91] The Court observed that the case did not involve a test, so it turned to the possibility of a general policy of discrimination and found the case bereft of evidence of that feature as well.[92] The Court rejected the plaintiffs' social framework evidence because their expert could not specify how regularly stereotypes played a meaningful role in Wal-Mart's employment decisions.[93] The Court majority recognized that giving discretion to lower-level supervisors could, in an appropriate case, be the basis for a disparate impact claim.[94] However, the Court was troubled that what the plaintiffs were arguing was that the systemic disparate treatment and the commonality had to come from what the Court characterized as Wal-Mart's "policy *against having* uniform employment practices."[95]

It is hard to untangle the Court's misgivings in *Wal-Mart* regarding the commonality requirement in class certification[96] from its merits-based concerns about the theories of discrimination. It does seem, however, that the Court was very uncomfortable with the plaintiffs' theory that the managers' exercise of discretion resulted in an impact that Wal-Mart was aware of but failed to correct, resulting in systemic disparate treatment. Professor Richard Thompson Ford explained the plaintiffs' theory as Wal-Mart's having not "taken sufficient care to prevent" sex discrimination.[97] The case is reminiscent of an earlier case, *Watson v. Fort Worth Ban & Trust*,[98] in which the Court reluctantly held that disparate impact could be applied to subjective employment practices.[99] Thus, the Court's discomfort with the plaintiffs' substantive theory of discrimination in *Wal-Mart* seemed to be rooted in the notion that it did not fit well within either disparate treatment or disparate impact and seemed to involve some blending of theories.

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91. *Id.* at 353.

92. *Id.* at 355.

93. *Id.* at 356-57. Professor Bornstein discusses the decision as significantly limiting the tools for redressing implicit bias discrimination. Stephanie Bornstein, *Unifying Antidiscrimination Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 920-21 (2016) [hereinafter Bornstein, *Unifying*].

94. *Wal-Mart*, 564 U.S. at 355.

95. *Id.*

96. *See* FED. R. CIV. P. 23(a)(2).

97. Ford, *supra* note 14, at 1387.

98. 487 U.S. 977 (1988). *Watson*, like *Wal-Mart*, was a case that sought to extend discrimination theory by expanding the applicability of disparate impact. Professor Susan Sturm views *Watson* as adopting a structural approach to remedying discrimination. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 484-89 (2001). However, plaintiffs have not fared well in subsequent cases in which they attacked subjective practices using disparate impact. Samuel Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 22-23 (2006).

99. *Watson*, 487 U.S. at 999.

In yet another decision, in *United Automobile Workers v. Johnson Controls, Inc.*, the Court adhered to separation of disparate treatment and disparate impact.[100] In the Seventh Circuit opinion, the court had found that Johnson Controls' fetal protection policy could be defended successfully under business necessity.[101] The Supreme Court reversed, explaining that business necessity is a defense for a disparate impact claim, but the claim against Johnson Controls was a disparate treatment claim, to which the more stringent defense of bona fide occupational qualification[102] applies.[103] Thus, the defenses associated with each theory must be kept distinct.[104]

As the foregoing discussion demonstrates, the Court has, in several opinions, insisted on maintaining the dichotomy of disparate treatment and disparate impact.

B. Pretext and Mixed Motives: The Dichotomy of Individual Disparate Treatment Proof Frameworks

Analysis of discrimination claims is all about distinction and categorization—maintenance of dichotomies. If a claim is categorized by a court as individual disparate treatment[105] rather than disparate impact, the appropriate proof framework must be selected and applied to evaluate the claim. After the development of the *McDonnell Douglas* pretext structure in 1973 and the *Price Waterhouse v. Hopkins*[106] mixed-motives structure in 1989, the lower courts adopted a basis for deciding which proof framework applied to a given disparate treatment claim. If a claim involved *merely* circumstantial evidence of discrimination, the *McDonnell Douglas* pretext framework applied, and if a claim included direct evidence, then the mixed-motives analysis applied.[107] The type-of-evidence demarcation was taken from Justice

100. United Auto. Workers v. Johnson Controls, Inc., 499 U.S. 187 (1991).

101. *Id.* at 193.

102. 42 U.S.C. § 2000e-2(e) (2012).

103. *Johnson Controls*, 499 U.S. at 200-01.

104. In the Civil Rights Act of 1991, Congress codified this result in § 703(k)(2), which states, "[a] demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter." 42 U.S.C. § 2000e-2(k)(2) (2012).

105. Systemic disparate treatment claims are evaluated under a less rigid framework established in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). Under that structure, a plaintiff proves that intentional discrimination is the employer's standard operating procedure, typically by statistical and anecdotal testimony.

106. 490 U.S. 228 (1989).

107. *See generally* Kenneth R. Davis, *Price-Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 878-82 (2004); Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas?, 53 EMORY L.J. 1887, 1910 (2004).

O'Connor's concurrence in *Price Waterhouse*.[108] Although the standard was criticized because of the amorphous distinction between circumstantial and direct evidence,[109] there was at least a precedential basis of distinction. In *Desert Palace, Inc. v. Costa*, the Supreme Court abrogated the distinction.[110] The Court held that a plaintiff asserting a Title VII individual disparate treatment claim is not required to present direct evidence in order to be entitled to a "motivating factor"[111] jury instruction.[112] The Court reasoned that when Congress codified a modified version of mixed motives in the Civil Rights Act of 1991 in sections 703(m) and 706(g)(2)(B), Congress said nothing of direct evidence.[113] The *Desert Palace* decision raised the question of whether the *McDonnell Douglas* pretext framework survived the decision.[114] If it did, what was the new line of demarcation between the two frameworks?

Since *Desert Palace*, courts have struggled with the issue of what to do with the two frameworks in the absence of any direction regarding under what circumstances to apply each.[115] When the Fifth Circuit, in *Rachid v. Jack in the Box, Inc.*,[116] took on the task of addressing the question *Desert Palace* left open, it merged the pretext and mixed-motives analyses into what it termed the "modified *McDonnell Douglas* approach."[117] This approach retained the three stages of the pretext analysis, although they seemed perfunctory when the court grafted the "motivating factor" standard of mixed motives onto the third stage as an alternative to pretext.[118]

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108. Price Waterhouse v. Hopkins, 490 U.S. 228, 270-71 (1989) (O'Connor, J., concurring).

109. *See, e.g.*, Costa v. Desert Palace, Inc., 299 F.3d 838, 852-53 (9th Cir. 2002) (describing the categories developed by First Circuit Judge Selya), *aff'd*, 539 U.S. 90 (2003).

110. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

111. 42 U.S.C. § 2000e-2(m) (2012).

112. *Desert Palace, Inc.*, 539 U.S. at 101-02.

113. *Id.* at 98-99.

114. *See, e.g.*, Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 990-93 (D. Minn. 2003); Brake, *supra* note 40, at 566; Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 102-03 (2004); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 765-66 (2005); 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); Zimmer, *supra* note 107, at 1929-32.

115. For an opinion summarizing the positions of the various circuits, see *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 398-99 (6th Cir. 2008), *cert. denied*, 556 U.S. 1235 (2009) (describing the holdings of various circuit courts with respect to the appropriate proof structures for disparate treatment claims after *Desert Palace*); *see also* Sullivan, *supra* note 37, at 210 n.81 (collecting court decisions and articles).

116. 376 F.3d 305 (5th Cir. 2004).

117. *Id.* at 312.

118. *Id.*

The Supreme Court appears to have reasserted the vitality of the *McDonnell Douglas* pretext framework by invoking it in *Young v. United Parcel Service, Inc.*[119] In *Young*, the Court used the pretext structure to fashion an unusual hybrid disparate treatment-disparate impact analysis to address a pregnancy discrimination claim based on failure to accommodate.[120] However, the emasculated version of the analysis fashioned in *Young* and the Court's use of motivating factor in *Abercrombie & Fitch*, along with its statements about motivating factor relaxing the Title VII standard of causation, should demonstrate that *McDonnell Douglas* cannot be maintained as a parallel-proof framework. It may be retained as an analytical tool, but it should be subordinate to the one statutory proof framework. I argue below that it is a mistake to retain it as an analytical tool.[121]

Assuming both frameworks survived *Desert Palace*, fifteen years later neither the Supreme Court nor Congress has declared a basis for distinction.[122] The Court should have abandoned the dichotomy of individual disparate treatment proof structures years ago.

C. Disparate Treatment and Disparate Impact: Nonproliferation of Theories

The Court, in its efforts to maintain the distinctions between disparate treatment and disparate impact, also has implied that those are the only theories of discrimination under Title VII.[123] However, it was not clear that failure to make reasonable accommodations was precluded as a third theory, applicable to at least religion.[124] While the theme of an exclusive dichotomy of theories has been implicit in the Court's decisions over the years, the Court in *Abercrombie & Fitch* expressly declared that disparate treatment and disparate impact "are the only causes of action under Title VII,"[125] thus laying to rest the idea that nonaccommodation of religion is a distinct

119. 135 S. Ct. 1338, 1353-54 (2015).

120. *See infra* Part III.A.

121. *See infra* Part V.B.III.

122. *See, e.g.*, Brake, *supra* note 40, at 566 (stating that "determining which of these two proof frameworks applies in any given Title VII individual disparate treatment case, and discerning how the two models interrelate, remains a muddled mess").

123. *See, e.g.*, Sperino, *supra* note 5, at 1791; Zatz, *supra* note 14, at 1368-69.

124. *See supra* notes 43 & 44 (stating that courts and commentators considered nonaccommodation to be a separate theory of religious discrimination).

125. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015).

theory of discrimination or cause of action under Title VII[126]—or that anything else could be. Is this declaration of restriction of theories consequential to the ongoing development of employment discrimination doctrine? I think it is, and I will explore why this is troubling. First, it is not necessarily an accurate description of existing law.[127] Second, the restriction seems likely to limit the malleability of the law to address much of the discrimination occurring in modern workplaces.[128]

Beyond the Court's decisions, there is no statutory language in the 1964 Act that restricts Title VII to the development of two theories of discrimination. There is, however, statutory language from the Civil Rights Act of 1991 that suggests there are only two general theories. Section 1981a makes jury trials and compensatory and punitive damages available in cases of "unlawful intentional discrimination," (or disparate treatment cases).[129] Accordingly, cases involving an employment practice that is "unlawful because of its disparate impact"[130] are not eligible for either jury trials or damages. Thus, the classification of a claim as either treatment or impact has significant practical consequences.

III. THE COURT'S 2015 REASONABLE ACCOMMODATION DECISIONS PLUS ONE

A. Young v. United Parcel Service, Inc.*: Forcing a Nonaccommodation Claim into the* McDonnell Douglas *Pretext Framework and Blending Theories*

Young was an air driver for United Parcel Service (UPS), where she had worked since 1999. Air drivers take packages and letters delivered by air, load them onto their trucks, and deliver them. UPS had a requirement that all drivers must be able to lift and handle packages weighing up to seventy pounds and to assist with packages weighing up to 150 pounds. When Young became pregnant, she was restricted from lifting over twenty pounds for the first twenty weeks of her pregnancy and over ten pounds thereafter. UPS informed her that she could not work at her driver job as long as she was under the lifting restriction. Young unsuccessfully argued to be permitted to

126. The decision does not necessarily determine the issue under the ADA, in which the structure of the statute, delineating nonacccommodation as a form of discrimination, supports a separate theory or cause of action. *See* 42 U.S.C. § 12112 (2012).

127. *See infra* Part IV.B.1.

128. *See infra* Part IV.B.1.

129. 42 U.S.C. § 1981a(1)-(2) (2012).

130. *Id.*

continue in her driver job (because other employees had offered to assist her with lifting) or to do a light-duty job temporarily during her pregnancy. UPS had made such accommodations for other employees in three scenarios. First, UPS offered temporary transfers to light-duty jobs for workers who suffered on-the-job injuries. Second, under the terms of the collective bargaining agreement, UPS was required to give "inside jobs" to drivers who lost their certification by the Department of Transportation. Finally, UPS provided reasonable accommodations, including some job reassignments, for disabled employees pursuant to the ADA. After Young's request for accommodation was denied, she was placed on leave under the Family and Medical Leave Act, and when that leave expired, she took extended leave without pay and lost her group medical coverage.[131]

Young filed a charge of discrimination with the EEOC, alleging sex, race, and pregnancy discrimination.[132] In her subsequent lawsuit, she asserted claims for sex, race, and disability discrimination.[133] Young moved to dismiss voluntarily her race discrimination claim,[134] and the trial court granted summary judgment in favor of the defendant on her disability and sex discrimination claims.[135] Regarding the sex discrimination claims, the district court granted summary judgment, reasoning that Young did not produce direct evidence of discrimination and that she could not establish a prima facie case under the *McDonnell Douglas* framework because she did not identify a similarly situated comparator who was treated more favorably.[136]

The Fourth Circuit affirmed. First, the court rejected the interpretation of the Pregnancy Discrimination Act's (PDA) second clause as requiring employers to treat pregnant workers the same as similarly disabled nonpregnant workers by granting the same accommodations. The Fourth Circuit characterized that interpretation of the PDA as creating an impermissible "most favored nation"[137] status for pregnant employees.[138] The court refused to adopt a broad reading of the second clause, which would create a cause of action separate and distinct from a sex discrimination claim under section 703(a).[139] Second, the Fourth Circuit rejected the comments of a supervisor as di-

131. Young v. United Parcel Serv. Inc., 135 S. Ct. 1338, 1346-47 (2015).

132. Young v. United Parcel Serv. Inc., 707 F.3d 437, 442 (4th Cir. 2013), *rev'd*, 135 S. Ct. 1338 (2015).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 446.

138. *Id.* at 446.

139. *Id.* at 447.

rect evidence of employer discriminatory motive.[140] Finally, the court evaluated Young's claim under the *McDonnell Douglas* pretext framework and held, as the district court had, that Young could not establish a prima facie case because she produced no evidence that similarly situated employees outside the protected class received more favorable treatment.[141] The court found that other types of employees given temporary job reassignments were not appropriate comparators.[142]

The Supreme Court's majority opinion considered two interpretations of the second clause of the PDA.[143] It rejected UPS's reading that the second clause does no more than define sex discrimination to include pregnancy discrimination because the first clause does that, and such an interpretation would render the second clause superfluous.[144] The majority also rejected the broader reading advocated for by Young because the majority agreed with the Fourth Circuit that it did not think Congress intended, in enacting the PDA, to create pregnancy as a "most-favored-nation status."[145] Instead, the majority interpreted the second clause as permitting a plaintiff to prove a pregnancy discrimination claim with indirect evidence using the *McDonnell Douglas* analysis.[146] The majority described the analysis as proceeding in the following way. First, the plaintiff would establish a prima facie case by proving that she belongs to a protected class, she sought an accommodation, and the employer denied the accommodation, although it did accommodate others similarly able or unable to work. Next, the employer would give a legitimate, nondiscriminatory reason for denying the accommodation, but that reason normally could not be that accommodating pregnant women was more expensive or less convenient. Finally, the plaintiff would prove the employer's reason was pretextual, and a jury question could be created on this issue, by producing suf-

140. *Id.* at 449.

141. *Id.* at 450-51.

142. *Id.*

143. The PDA, as incorporated into Title VII, provides as follows:

> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k) (2012).

144. Young v. United Parcel Serv. Inc., 135 S. Ct. 1338, 1352-53 (2015).

145. *Id.* at 1349-50.

146. *Id.* at 1353-54.

ficient evidence that the employer's legitimate, nondiscriminatory reason actually imposes a significant burden on pregnant women—a burden which cannot be justified by the given reason and which permits an inference of discrimination.[147]

Justice Alito, concurring in the judgment, did not rely on the *McDonnell Douglas* analysis to interpret the second clause, but instead offered an interpretation of the meaning of the second clause of the PDA that was also different from either of the two advocated for by the parties. According to Justice Alito, an employer violates the second clause if it does not have a neutral business reason other than expense or inconvenience for treating pregnant employees differently than nonpregnant employees who are reassigned.[148]

The dissent, authored by Justice Scalia, argued that the majority and the concurrence erred by not accepting UPS's reading of the second clause of the PDA as adding nothing but clarity to the first clause, which simply defines pregnancy discrimination as a form of sex discrimination.[149] The dissent saw the second clause as capable of only the two interpretations argued for by the parties.[150] Because the majority's application of the *McDonnell Douglas* pretext analysis requires a court to evaluate the effect of the employer's legitimate, nondiscriminatory reason, the dissent characterized the approach as "allowing claims that belong under Title VII's disparate-impact provisions to be brought under its disparate-treatment provisions instead."[151] Justice Scalia's dissent also took the Alito concurrence to task for its "text-free broadening" of the second clause.[152]

Justice Kennedy's dissenting opinion expressed agreement with Justice Scalia's dissent, which he joined, but also denounced indifference to the plight of pregnant women in the workforce.[153] Kennedy's dissent attempted to minimize the effect of interpreting the second clause of the PDA as Justice Scalia did by pointing out that there are other laws that may protect and assist working pregnant women, including the Family and Medical Leave Act and the ADA Amendments Act of 2008.[154] The Kennedy dissent agreed with the Scalia dissent that the majority's interpretation of the PDA risks conflating disparate treatment and disparate impact. Justice

147. *Id.* at 1354-55.
148. *Id.* at 1359 (Alito, J., concurring).
149. *Id.* at 1363 (Scalia, J., dissenting).
150. *Id.* at 1364.
151. *Id.* at 1366.
152. *Id.*
153. *Id.* at 1366-67 (Kennedy, J., dissenting).
154. *Id.* at 1367-68.

Kennedy added that the majority's analysis "injects unnecessary confusion into the accepted burden-shifting framework established in *McDonnell Douglas*."[155]

B. EEOC v. Abercrombie & Fitch Stores, Inc.*: Reining Claims into Disparate Treatment and Disparate Impact and Blurring the Distinction*

The job applicant who filed a charge was a Muslim woman who interviewed for a job with Abercrombie & Fitch while wearing a hijab. During the interview, the subject of the applicant's headscarf never came up and she never indicated that she wore the headscarf for religious reasons or that she would need an accommodation to address any conflict between her religious practice and Abercrombie's clothing policy.[156] The assistant manager who interviewed her gave her a favorable rating for hiring, but she inquired of the store manager whether the headscarf would be considered prohibited employee dress under the company's "Look Policy."[157] Receiving no answer, she asked for guidance from the district manager, allegedly informing him that she thought the applicant wore the headscarf for religious reasons.[158] The district manager advised that the headscarf would violate the policy regardless of the reason for which it was worn and instructed the assistant manager not to hire her. The EEOC sued Abercrombie for failing to make a reasonable accommodation for the applicant's religious practice.[159]

The district court granted summary judgment for the EEOC on the issue of liability. The court rejected Abercrombie's argument that the EEOC failed to establish the notice element of a prima facie case because the applicant never informed Abercrombie that she wore the headscarf for religious reasons and that she would need an accommodation.[160] The district court recognized the conflict in the circuits on the issue but concluded that the Tenth Circuit most likely would hold that the notice requirement would be satisfied if an employer had enough information to make it aware of the need for

155. *Id.* at 1368.

156. EEOC v. Abercrombie & Fitch, 731 F.3d 1106, 1113 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).

157. *Id.* at 1114.

158. *Id.* at 1114-15.

159. *Id.* at 1114.

160. *Id.* at 1110-11.

accommodation.[161] At trial on the issue of damages only, the jury awarded the EEOC $20,000 in compensatory damages.[162]

On appeal, the Tenth Circuit reversed the summary judgment and granted summary judgment in favor of Abercrombie, holding:

> [I]n order to establish the second element of their prima facie case under Title VII's religion-accommodation theory, ordinarily plaintiffs must establish that they initially informed the employer that they engage in a particular practice for religious reasons and that they need an accommodation for the practice, due to a conflict between the practice and the employer's work rules.[163]

The Supreme Court granted certiorari to resolve a split in the circuits as to whether a claim for failure to make reasonable accommodation requires that the applicant or employee have informed the employer of the need for an accommodation. The Court held that Title VII does not require that the employee give such notice or that the employer have actual knowledge of an applicant's or employee's need for an accommodation. The majority opinion, authored by Justice Scalia, began with a pronouncement that Title VII recognizes only two "causes of action"—disparate treatment and disparate impact.[164] That statement is the majority opinion's tacit rejection of a separate theory of discrimination for failure to make a reasonable accommodation. Justice Thomas in his dissenting opinion more expressly stated this proposition and his agreement with the majority on the point.[165] The majority then turned to the principal issue of whether the employer must have actual knowledge of the applicant's need for an accommodation. The majority answered that question by looking to statutory language. Title VII prohibits adverse job actions " 'because of' . . . religion.' "[166] The Court then noted that the "because of" standard is relaxed in Title VII to "motivating factor."[167] Title VII does not, by its terms, impose a knowledge requirement, whereas the ADA does impose such a requirement.[168] Motive and knowledge are distinct concepts, and the statutory language of Title VII requires motive, not knowledge.[169] Although knowledge may make it easier to infer motive, knowledge is not

161. *Id.* at 1114-15.
162. *Id.* at 1115.
163. *Id.* at 1131.
164. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015).
165. *See infra* text accompanying notes 183-200.
166. *Abercrombie & Fitch*, 135 S. Ct. at 2032.
167. *Id.* (citing 42 U.S.C. § 2000e-2(m) (2012)).
168. *Id.* at 2033 (citing 42 U.S.C. § 12112(b)(5)(A) (2012)).
169. *Id.*

necessary for liability to attach.[170] In a footnote, the Court observed that it is arguable that an employer cannot discriminate " 'because of' a 'religious practice' " unless it either knows or suspects the practice to be religious.[171] The Court found it unnecessary to resolve that issue in the case, however, because Abercrombie did "at least suspect[]" that the applicant wore the headscarf for religious reasons and the issue was not briefed or argued.[172]

Next, the majority rejected the defendant's argument that failure to accommodate a religious practice must be brought as a disparate impact claim rather than a disparate treatment claim. The Court explained that that interpretation might have been correct "if Congress had limited the meaning of 'religion' . . . to religious *belief[s]*" rather than including religious practices.[173] Because practices are included they must be accommodated, and failure to accommodate practices can be the subject of a disparate treatment claim.[174] The majority further rejected Abercrombie's argument that application of a neutral policy cannot constitute intentional discrimination. The fact that Title VII requires reasonable accommodation of religious practices means that it does not require neutral treatment of religious practices; instead, it requires that employers accord religious practices "favored treatment."[175] Neutral policies must give way to the need for reasonable accommodation.[176]

Justice Alito, concurring, agreed with the majority that it is not a prerequisite that an applicant or employee must inform the employer of the need for accommodation.[177] However, he took the position that an employer cannot be held liable for an adverse action because of an employee's religious practice unless the employer knows that the practice is for a religious reason.[178] In this case, that requirement was satisfied because the interviewer came to the correct conclusion that the applicant was wearing the headscarf because she was Muslim.[179] Justice Alito explained that intentional discrimination is blameworthy conduct. For an employer to be held liable without knowledge would be liability without fault.[180]

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170. *Id.*
171. *Id.* at 2033 n.3.
172. *Id.* at 2033.
173. *Id.*
174. *Id.* at 2034.
175. *Id.*
176. *Id.* at 2034.
177. *Id.* at 2035 (Alito, J., concurring).
178. *Id.*
179. *Id.*
180. *Id.* at 2036.

Next, Justice Alito disagreed with the majority that it is the plaintiff's burden to prove the employer's failure to accommodate. Rather, he interpreted the statutory text to make it an affirmative defense of the employer on which it bears the burdens of production and persuasion.[181] Thus, once the plaintiff proves that the employer took an adverse action because of an employee's or applicant's religious observance or practice, the burden is on the employer to prove that it could not reasonably accommodate the observance or practice without undue hardship.[182]

Justice Thomas concurred in part and dissented in part. The only point on which he agreed with the majority was that there are only two causes of action under Title VII—disparate treatment and disparate impact.[183] Justice Thomas then pronounced his main point of disagreement with the majority: in his view, application of a neutral policy in making an employment decision cannot result in liability for intentional discrimination.[184] The opinion reiterates the well-known distinctions between disparate treatment and disparate impact.[185] Intentional discrimination occurs when an employer treats one employee or applicant less favorably than another because of a protected characteristic. In contrast, disparate impact involves an employer's maintenance and application of a facially neutral practice that has a significant adverse effect on members of a group with a protected characteristic. The disparate impact theory does not require proof of intent to discriminate, but the disparate treatment theory does require such proof.[186] Applying those definitions to the facts of the case, Justice Thomas concluded that Abercrombie's facially neutral Look Policy could not constitute disparate treatment because it does not treat religious practices less favorably than similar secular practices.[187] While the policy may have resulted in liability under the disparate impact theory, the EEOC did not assert that theory.[188]

Justice Thomas contended that the majority expanded the meaning of "intentional discrimination" by including within it an employer's refusal to treat a religious practice more favorably than similar secular practices.[189] He argued that the majority's rationale of read-

181. *Id.* at 2036.
182. *Id.*
183. *Id.* at 2037 (Thomas, J., concurring in part and dissenting in part).
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 2038.
188. *See id.* at 2037.
189. *Id.* at 2038.

ing the definition of religion in section 701(j) into the section prohibiting discrimination does not resolve whether Abercrombie refused to hire the applicant because of her religious practice. The key issue is whether the phrase "because of such . . . religious practice" means that an employer takes an adverse action because of the religious nature of the employee's practice or because the employee's practice happens to be religious.[190] The second meaning is too expansive for intentional discrimination because it requires no discriminatory motive and results in strict liability.[191] Justice Thomas explained that the Court long ago had established that intentional discrimination requires not that an employer act with awareness that the consequences will disadvantage members of a group with a protected characteristic, but that it act "at least in part 'because of' " the adverse effect.[192]

Justice Thomas did recognize that an employer's refusal to accommodate may constitute intentional discrimination in a situation in which the employer accommodates a similar secular practice, as that could involve unequal treatment of like things based on religion.[193] In contrast, the majority's approach requires favored treatment, not equal treatment, to avoid liability for intentional discrimination.[194]

Justice Thomas argued that the majority's holding, which treated the application of a facially neutral policy as intentional discrimination, is inconsistent with longstanding administrative interpretation and precedents in the Court and lower courts.[195] He explained that the EEOC, soon after the 1972 amendment of Title VII to define religion as including a duty to make reasonable accommodation, espoused an interpretation that failure-to-accommodate claims come under disparate impact.[196] Moreover, the Supreme Court did not treat failure to accommodate as intentional discrimination in *Trans World Airlines, Inc. v. Hardison*.[197] Justice Thomas then turned to prior court of appeals decisions that had incorrectly interpreted Title VII to create an independent claim of failure to accommodate that is distinct from disparate treatment and disparate impact. Although their interpretation was incorrect, Justice Thomas

190. *Id.*
191. *Id.* at 2039.
192. *Id.* (quoting Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).
193. *Id.* at 2039 (Thomas, J., concurring in part and dissenting in part).
194. *Id.*
195. *Id.* at 2039-40.
196. *Id.* at 2040.
197. 432 U.S. 63 (1977).

explained that they did recognize that application of a facially neutral policy does not come under disparate treatment.[198]

Finally, Justice Thomas characterized the EEOC's position on the application of a facially neutral policy as having changed from first, the position articulated in its Compliance Manual, in which it distinguishes failure-to-accommodate claims from disparate treatment claims, and second, its earlier position in the *Abercrombie & Fitch* case, in which it distinguished an authority relied upon by the defendant as involving intentional discrimination rather than nonaccommodation.[199]

Justice Thomas concluded by agreeing with the majority to end the concept of a freestanding failure-to-accommodate claim but disagreeing with it on the creation of "an entirely new form of liability: the disparate-treatment-based-on-equal-treatment claim."[200]

C. Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*: Eroding the Statutory Basis for the Dichotomy of Theories*

The plaintiff, a nonprofit corporation that assists low-income families in obtaining affordable housing, sued the Texas department responsible for distributing federal tax credits for the development of housing in low-income areas.[201] The plaintiff sued under the Fair Housing Act (FHA),[202] alleging that the department granted too many credits in predominantly black inner-city areas and too few in predominantly white suburban areas, supporting its theory with statistical evidence.[203] The plaintiff alleged that the effect of this practice was to perpetuate "segregated housing patterns."[204] The district court applied the disparate impact framework, finding that the plaintiff established a prima facie case and that the department failed to satisfy its burden that there were no less discriminatory alternatives.[205] The Fifth Circuit, following its precedent, held that disparate impact claims are available under the FHA, but it reversed and remanded, holding that, pursuant to a regulation of the Department of Housing and Urban Development, the district court should not have shifted

198. *Abercrombie & Fitch*, 135 S. Ct. at 2041 (Thomas, J., concurring in part and dissenting in part).

199. *Id.*

200. *Id.*

201. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2514 (2015).

202. 42 U.S.C. §§ 3601-3619 (2012).

203. *Inclusive Cmtys*, 135 S. Ct. at 2514.

204. *Id.*

205. *Id.*

the burden to the defendant to prove a less discriminatory alternative.[206] The defendant department filed a petition for writ of certiorari raising the question whether the FHA recognizes disparate impact claims.[207]

Before addressing the issue under the FHA, the Court turned to two older discrimination statutes—Title VII and the ADEA—to aid in interpreting the FHA. The majority concluded that the case law under the two employment discrimination statutes "instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose."[208] Looking at the language of section 804(a),[209] the Court explained that the language "otherwise make unavailable" refers to the consequences of an action rather than [an] actor's intent."[210] Comparing that language with the identical language in section 703(a)(2) of Title VII and section 4(a)(2) of the ADEA, the Court found that all three support an effects-based theory of discrimination.[211] Then, surprisingly, the Court stated that the language came "at the end of lengthy sentences that begin with prohibitions on disparate treatment, [and] they serve as catchall phrases looking to consequences, not intent."[212] This was the first time that the Court had suggested that section 703(a)(2) of Title VII and section 4(a)(2) of the ADEA provided for both disparate treatment and disparate impact. The Court went on to hold that disparate impact is cognizable under the FHA.[213]

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206. *Id.* at 2515.

207. *Id.*

208. *Id.* at 2518.

209. Section 804(a) provides:

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
>
> (a) 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.

42 U.S.C. § 3604(a) (2012).

210. *Inclusive Cmtys*, 135 S. Ct. at 2518 (quoting United States v. Giles, 300 U.S. 41, 48 (1937)).

211. *Id.* at 2517-19.

212. *Id.* at 2519.

213. *Id.* at 2521.

D. The Eroding Dichotomies

1. Blending Theories

Both *Young* and *Abercrombie & Fitch* preserve the plaintiffs' failure-to-accommodate claims under the disparate treatment theory, but they do so by blurring the lines between treatment and impact. Although the Court majority in both cases disclaimed that it was diverging from established employment discrimination doctrine by blending theories, Justice Thomas's dissents insist that it was.

In the *Young* adaptation of the *McDonnell Douglas* pretext analysis, the Court modified two stages of the analysis and blended the disparate treatment and disparate impact principles.[214] At stage two of the analysis, the Court stated that the employer normally could not satisfy the legitimate, nondiscriminatory reason by stating that accommodation of pregnant workers would be more expensive or less convenient.[215] A legitimate reason, even if weak, has been sufficient to satisfy the employer's burden at stage two. This has been true even if the reason given by the employer might support a disparate impact claim.[216] Indeed, in the *McDonnell Douglas* decision itself the error of the lower court was its rejection of the employer's reason for not rehiring the plaintiff because the reason was, in the words of the lower court, " 'subjective' rather than objective . . . ."[217] Thus, the ruling in *Young*—that legitimate, nondiscriminatory reasons can be inadequate—is a significant break from past applications of pretext analysis and appears to be based on a concern with the disparate impact the excluded reasons would produce. At stage three of the analysis, the blending of theories is palpable. The Court stated that at the third stage the plaintiff could prove pretext and reach a jury with proof that the employer's policy imposed a significant burden on pregnant workers, which the employer's " 'legitimate, nondiscriminatory' reason[]" could not justify, thereby producing "an inference of intentional discrimination."[218] As Professor Brake declares, the Court's statement that proof of disparate impact can establish discriminatory intent "rips the seams out of the traditional understanding of what separates impact from treatment claims."[219] First, contrary to all earlier proclamations in *Raytheon Co. v. Hernandez*,[220] *Hazen*

214. Brake, *supra* note 40, at 560-61.

215. Young v. United Parcel Serv. Inc., 135 S. Ct. 1338, 1354 (2015).

216. *See, e.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44, 55 (2003).

217. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1973) (citation omitted).

218. *Young*, 135 S. Ct. at 1354.

219. Brake, *supra* note 40, at 584.

220. 540 U.S. 44, 55 (2003).

Paper Co. v. Biggins,[221] and other decisions, the Court in *Young* said that evidence of impact could establish intent.[222] Second, the Court's explanation of stage three essentially engrafts onto it a version of the disparate impact defense of business necessity—whether the employer's reasons are good enough to justify the burden imposed. One can explain this pretext analysis as heavily infused with disparate impact principles by recognizing that the Court was taking account of what appears to be a duty in Title VII to accommodate pregnancy. However, the Court was unwilling to so interpret the PDA and to recognize a freestanding theory of recovery and cause of action. Accordingly, it blends treatment and impact in a disfigured version of the *McDonnell Douglas* pretext framework. It is no wonder that the Court tried to downplay the significance of the blended analysis it fashioned, declaring this analysis to be limited to the PDA,[223] and stating that most future pregnancy nonaccommodation claims likely would be brought and analyzed under the ADA Amendments Act of 2008.[224] Those limitations notwithstanding, the EEOC recognized the blending of theories in *Young* and argued that the decision supported the blending advocated for by the agency in *EEOC v. Catastrophe Management Solutions*.[225]

Justice Thomas, dissenting in *Abercrombie & Fitch*, was correct that the majority was blending treatment and impact in a way that the Court had eschewed in the past. As Justice Thomas expressed it, "equal treatment is not disparate treatment."[226] Although he agreed that a nonaccommodation claim could come under disparate treatment, evidence would be needed that the employer denied an accommodation for a religious practice while granting it for a similar secular practice.[227] The factual scenario in *Abercrombie & Fitch* was similar to that in *Raytheon Co. v. Hernandez*,[228] in which the employer contended that it applied a facially neutral rehire policy to deny a former employee and applicant a job.[229] The Court suggested in *Raytheon* that the plaintiff may have successfully pursued a disparate impact claim, which he did not timely assert, but could not establish

221. 507 U.S. 604 (1993).

222. Brake, *supra* note 40, at 585.

223. *Young*, 135 S. Ct. at 1355.

224. *Id.* at 1348.

225. 852 F.3d 1018 (11th Cir. 2016), *reh'g denied*, 876 F.3d 1273 (11th Cir. 2017). *See infra* Part III.E.

226. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2039 (2015) (Thomas, J., dissenting).

227. *Id.*

228. 540 U.S. 44 (2003).

229. *See supra* notes 76-86 and accompanying text (discussing *Raytheon*).

a disparate treatment claim.[230] In *Abercrombie & Fitch*, the employer argued that its application of a facially neutral practice could not be the basis for a disparate treatment claim. The Court majority responded that while that argument "may make sense in other contexts," Title VII does not require mere neutrality regarding religion but instead grants it "favored treatment," imposing an affirmative obligation on employers.[231] Thus, as in *Young*, faced with a definitional statute requiring reasonable accommodation, the Court blurred the lines between treatment and impact in order to avoid recognizing a separate theory and cause of action for failure to reasonably accommodate but, at the same time, to permit a plaintiff to proceed with an intentional discrimination claim.

The majority's observation in *Inclusive Communities* that section 703(a)(2) provides for both disparate treatment and disparate impact is, as Professor Sperino has elucidated, a startling revelation, as though "Justice Kennedy discovered a new provision in Title VII."[232] For decades it has been dogma that disparate treatment emanates from section 703(a)(1) and disparate impact from section 703(a)(2). As Sperino suggests, the demise of the myth of the distinct origins of disparate treatment and disparate impact could be the first step in undermining the entire dichotomy—separate theories and separate proof structures. It is possible to conceptualize discrimination in different ways,[233] including hybrid structures.[234] Specifically, Professor Sperino noted the modified *McDonnell Douglas* structure the Court fashioned in *Young*.

It is arguable that the unexpected recognition of disparate treatment in section 703(a)(2) is not a game-changing development. After all, Congress did enact a separate disparate impact provision in Title VII in the Civil Rights Act of 1991.[235] However, the new section uses the phrase "unlawful employment practice based on disparate impact."[236] "Unlawful employment practice" is the term used in section 703(a),[237] so the tether to the two original subsections remains. Furthermore, the Court in *Abercrombie & Fitch* explained that Congress, by adding the "motivating factor" subsection of Title VII in section

230. Raytheon Co. v. Hernandez, 540 U.S. 44, 53, 55 (2003).

231. *Abercrombie & Fitch*, 135 S. Ct. at 2034.

232. Sperino, *supra* note 5, at 1814.

233. *Id.* at 1815.

234. *Id.* at 1817.

235. 42 U.S.C. § 2000e(2)(k) (2012).

236. *Id.*

237. *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 669 (2001).

703(m),[238] relaxed the "because of" standard of but-for causation found in the phrase "because of" in section 703(a)(1).[239] Left unsaid by the Court was that the same "because of" language is in section 703(a)(2), so the "motivating factor" relaxation of but-for causation should apply equally to disparate impact.[240] If the theories share a common causation standard, which serves as the overarching question in determining liability, the theories are not truly distinct. Moreover, as will be developed further,[241] the Court's recognition of a relaxed standard of causation for Title VII[242] also may offer a statutory basis for breaking the dichotomy of proof structures and imposing a more uniform analysis within disparate treatment under Title VII.

2. Undermining the McDonnell Douglas *Pretext Framework*

The Court's analysis in both *Young* and *Abercrombie & Fitch* unwittingly demonstrates why the dichotomy of disparate treatment proof frameworks cannot be maintained. This should have been clear since *Desert Palace* in 2003. In each of these cases, the Court places a failure-to-accommodate claim in one of the treatment proof frameworks and in the process undermines *McDonnell Douglas*.

In *Young*, the Court instructed that the plaintiff may prove a disparate-treatment-nonaccommodation claim by using the *McDonnell Douglas* framework.[243] The Court then modified the analysis at stages two and three in fundamental ways that involved a blending of treatment and impact, as described above. Ultimately, the modified framework does not measure discrimination by proof of pretext at all. The impact evidence, which it approves as a means of proving intent, does not do so by proving the employer's reason is a pretext. Rather, it proves that the employer does not want to bear the burden, expense, and/or inconvenience of accommodating pregnant employees. Although the Court stated that this version of the pretext analysis is limited to PDA claims,[244] it is the latest demonstration that going through the three stages of the pretext framework really means very little and simply delays and obfuscates the ultimate question of

238. 42 U.S.C. § 2000e-2(m) (2012).

239. EEOC v. Abercrombie & Fitch, Stores, Inc., 135 S. Ct. 2028, 2032 (2015).

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

241. *See infra* Part V.A.

242. This refers to section 703 discrimination claims, not section 704 retaliation claims. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013). The Court held in *Nassar* that the "motivating factor" standard applies to section 703, but not section 704, claims. That is the current state of the law, but, as I discuss below, I think *Nassar* should be overruled.

243. Young v. United Parcel Serv. Inc., 135 S. Ct. 1338, 1353-54 (2015).

244. *Id.* at 1355 ("This approach, though limited to the Pregnancy Discrimination Act context . . . .").

whether the employer intentionally discriminated.[245] Furthermore, the *Young* version of the pretext analysis does not measure but-for causation, which *McDonnell Douglas* has been thought to incorporate,[246] but instead measures a lower standard—perhaps motivating factor.[247]

The Court, in *Abercrombie & Fitch*, turned to section 703(m)'s "motivating factor" standard to explain that the plaintiff need not prove knowledge of her religion, but instead motive.[248] In so doing, the Court invoked the first part of the mixed-motives proof framework, which in statutory form consists of section 703(m) and the section 706(g)(2)(B) same-decision defense. The Court explained that in Title VII, the "because of" standard of section 703(a) is "relaxe[d]" by section 703(m)'s motivating factor standard.[249] As will be discussed in greater depth below, that statement, echoing and enhancing a statement made by the Court in *University of Texas Southwestern Medical Center v. Nassar*,[250] completely undermines *McDonnell Douglas* as a parallel proof structure to mixed-motives.

3. Potential Impact of the Decisions in Collapsing the Dichotomies

In the end, the decisions demonstrate that the Court can no longer honestly maintain the disparate treatment-disparate impact dichotomy and avoid the proliferation of more theories of discrimination while also effectively addressing claims of discrimination in the workplace. They also demonstrate that the dichotomy of disparate treatment proof structures should be collapsed to one. *Abercrombie & Fitch* leaves little doubt about this latter point.

There is something exciting about the opinions because there is a great need in this area of law for a significant deviation from established doctrine. This needed change would strip away many of the principles and structures developed by decades of case law and would reform the law regarding proof of discrimination in a more open-ended and less stylized and rigid way.[251] *Young* and *Abercrombie & Fitch* may be harbingers of such a transformation. On the other hand, there is something frustrating and perhaps stulti-

245. *See, e.g.*, William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself*, 62 AM. U. L. REV. 447, 501-05 (2013).

246. *See infra* Part V.B.3.

247. I am grateful to Professor Deborah Brake for highlighting this point.

248. EEOC v. Abercrombie & Fitch, Stores, Inc., 135 S. Ct. 2028, 2033 (2015).

249. *Id*. at 2032.

250. 133 S. Ct. 2517, 2530 (2013).

251. Professor Brake defends the Court's doctrinal shift as serving well to address issues of pregnancy discrimination and nonaccommodation. Brake, *supra* note 40, at 561.

fying about the opinions because of their professed adherence to established core principles that do not fit the cases well and the Court's insistence that nothing is changing.[252]

E. EEOC v. Catastrophe Management Solutions*: The EEOC Attempts to Break the Dichotomy of Theories*

The EEOC did not wait long to employ *Young* in its efforts to break the dichotomy, bringing a case that appeared to fit under disparate impact as a disparate treatment claim, and attempting to blend principles from disparate treatment and disparate impact. According to the Eleventh Circuit, the EEOC attempted to "conflate[] the distinct Title VII theories of disparate treatment . . . and disparate impact" in *EEOC v. Catastrophe Management Solutions*.[253]

The case involved an employer's withdrawing of an offer of employment to an applicant because she refused to discontinue wearing her hair in dreadlocks.[254] The EEOC pursued only a disparate treatment theory. The EEOC argued that *Young* stood for the proposition that adverse impacts, effects, and disadvantages could establish a claim for disparate treatment.[255] The Eleventh Circuit rejected the argument, adhering to dogma that the two theories are embodied in separate provisions in Title VII and are not interchangeable.[256] The court rejected the EEOC's argument, stating that "[b]ecause this is a disparate treatment case, and only a disparate treatment case, we do not address further the EEOC's arguments that [the defendant's] race-neutral grooming policy had (or potentially had) a disproportionate effect on other black job applicants."[257] The court rejected the EEOC's reliance on *Young*, explaining that the rationale and holding of *Young* are limited to the language of the PDA provision.[258] Furthermore, the Court explained that it did not interpret *Young* as holding that an employer's neutral policy that has adverse effects on members of a protected group, without more, can be the basis for imposing liability under disparate treatment.[259]

It is appropriate that the EEOC attempted to break the dichotomy of theories and blend them in *Catastrophe Management Solutions*.

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252. *Id.* (predicting that *Young* does not signal a general upheaval in the dichotomy of theories).

253. 852 F.3d 1018, 1021 (11th Cir. 2016), *reh'g denied*, 876 F.3d 1273 (11th Cir. 2017).

254. *Id.* at 1021-22.

255. *Id.* at 1024-25.

256. *Id.* at 1024.

257. *Id.* at 1024-25.

258. *Id.* at 1025.

259. *Id.* at 1026.

The factual scenario and legal issues presented in the case are similar to those in *Abercrombie & Fitch* except the issue is race discrimination rather than religious discrimination. In both cases, an applicant was denied a job because her dress or grooming practice, which was linked to a protected characteristic, violated the company's dress or grooming policy, and the employer was not willing to make an exception or accommodation. Both cases were pled and argued by the EEOC as disparate treatment cases. However, both can be accurately described as being about an employer's refusal to make a reasonable accommodation for a practice linked to a characteristic protected by Title VII. *Catastrophe Management Solutions* presented an opportunity for the Eleventh Circuit to recognize the blending of disparate treatment and disparate impact, but the court felt constrained by the limitation announced by the Supreme Court in *Young* that its analysis in that case was limited to pregnancy discrimination claims.[260]

IV. THE VERISIMILITUDE OF ORDER

The center of employment discrimination law depends on two exclusive and distinct theories of employment discrimination emanating from separate subsections of the statutes with each theory having associated proof structures. Each claim of discrimination is analyzed by categorizing it within the applicable theory and then the appropriate proof structure. That is order. But the semblance of order is a façade; *Young* and *Abercrombie & Fitch* are the latest glimpses into the chaos beneath this façade. This Part discusses the verisimilitude of order and why it is important that the current disorder give way to a more accurate core doctrine.

A. The Disarray of the Current Statutes

Our principal employment discrimination statutes are a mess. Congress enacted three principal laws: Title VII enacted in 1964,[261] the ADEA enacted in 1967,[262] and the ADA enacted in 1990.[263] Over five decades, Congress has amended these laws several times in an effort to keep pace with the doctrinal developments in the Supreme

260. Young v. United Parcel Serv. Inc., 135 S. Ct. 1338, 1355 (2015) ("This approach, though limited to the Pregnancy Discrimination Act context . . . .").

261. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

262. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634).

263. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213).

Court. Among the amendments have been the PDA in 1978;[264] the amendment to add the definition of religion, including nonaccommodation, in 1972;[265] the Civil Rights Act of 1991;[266] the ADA Amendments Act of 2008;[267] and the Lilly Ledbetter Fair Pay Act of 2009.[268]

A basic problem is that much has happened in the case law development of employment discrimination law since 1964 and 1967, and Title VII and the ADEA have not been amended to take account of much of that development. The amendments of Title VII that have been enacted have been principally legislative abrogations of Supreme Court decisions with which Congress disagreed, although some of the amendments have adopted Court doctrine or a modified version. There has been no comprehensive reconsideration of the laws in light of over fifty years of development and evolution of doctrine, and there has been no substantial harmonization of the three laws.

The ADA, the most recently enacted of the three laws, is the law that best takes account of the doctrine developed since 1964. The ADA also was significantly amended in 2008 by the ADA Amendments Act.[269] To get a sense of the difference between the ADA and the two earlier laws, compare the section prohibiting discrimination in Title VII, section 703,[270] with that under the ADA, section 102.[271] The ADA section is more detailed than that in Title VII and evidences Congress's awareness of theories or causes of action developed in the case law over the years.

The most ambitious amendment of the employment discrimination laws was the Civil Rights Act of 1991. Its purpose was to overturn a number of Supreme Court opinions[272] and to create a freestanding section 1981a, providing for damages and a concomitant right to a jury trial in intentional discrimination cases under Title VII (when

264. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2012)).

265. Act of Mar. 24, 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified at 42 U.S.C. § 2000e(j) (2012)).

266. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

267. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553-54 (codified as amended at 42 U.S.C. § 12101 (2012)).

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

269. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§12101-12213).

270. 42 U.S.C. § 2000e-2(a) (2012).

271. 42 U.S.C. § 12112(b) (2012).

272. *See* H.R. REP. NO. 102-40, at 2-4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694-96.

unavailable under section 1981) and the ADA.[273] While the 1991 Act addressed a number of problems in employment discrimination law and should be considered a positive development in many ways, it also bred much of the asymmetry that currently exists in employment discrimination law. Because the 1991 Act amended Title VII to add statutory versions of the mixed-motives analysis[274] and the disparate impact analysis,[275] but did not similarly amend the ADEA and the ADA, the Supreme Court has interpreted the 1991 Act as creating asymmetry by holding that there is no mixed-motives analysis under the ADEA[276] and holding that the disparate impact analysis under the ADEA differs from the statutory version in Title VII.[277] The Court also interpreted the 1991 Act as creating asymmetry within Title VII, construing the motivating factor standard and mixed-motives analysis as not applying to the antiretaliation provision in Title VII.[278]

To appreciate the state of the statutes, consider a few statutory problems that were implicated in *Young*, *Abercrombie & Fitch*, and *Inclusive Communities*. First, the PDA that was at issue in *Young* was Congress's response to a Supreme Court decision that rejected a pregnancy discrimination claim because Title VII prohibited sex discrimination, not pregnancy discrimination.[279] To fix that interpretation, Congress amended section 701 to provide a definition of sex discrimination that includes "pregnancy, childbirth, or related medical conditions."[280] Did Congress intend to provide for a duty of reasonable accommodation for pregnancy? Because Congress principally was overturning a Supreme Court decision that defined sex discrimination in a way with which Congress disagreed, it placed the new section in the definitions section of Title VII, and the matter of whether the statute imposed a duty of accommodation was unclear, as *Young* demonstrated.

Second, as Title VII was amended to include a duty of reasonable accommodation for religious beliefs and practices, is failure to accommodate a separate theory or cause of action for religious discrimination under Title VII? The Court in *Abercrombie & Fitch* said that it is not. As with pregnancy, that may be because the 1972 amendment that

273. 42 U.S.C. § 1981a(1)-(2) (2012).

274. 42 U.S.C. §§ 2000e-2(m) & 2000e-5(g)(2)(B) (2012).

275. *Id.* § 2000e-2(k).

276. Gross v. FBL Fin. Servs., 557 U.S. 167 (2009).

277. Smith v. City of Jackson, 544 U.S. 228 (2005).

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

279. Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

280. 42 U.S.C. § 2000e(k) (2012).

added section 701(j) to define religion to include failure to accommodate was a congressional reaction to EEOC guidelines interpreting the law as creating a duty to accommodate religious belief or practice[281] and court of appeals decisions that rejected efforts to extend religious discrimination to nonaccommodation.[282] As already discussed, the Court's conclusion in *Abercrombie & Fitch* that there is not a separate theory or cause of action under Title VII for nonaccommodation of religion was surprising to many.[283] It seems that the Court ruled as it did because Congress placed the accommodation requirement in the definitional section 701, not the prohibition of unlawful employment practices in section 703. Of course, this was precisely the case with pregnancy accommodation in *Young* as well. As Professor Noah D. Zatz observes, Congress amended the definitions of religion and pregnancy rather than the definition of discrimination, retaining a "nominal commitment" to disparate treatment (intent) but concomitantly rendering it incoherent.[284] Presumably the Court would not hold that there is no separate theory of nonaccommodation if it were interpreting the duty to provide reasonable accommodation under the ADA because section 102 specifically states that failure to accommodate is a distinct form of unlawful discrimination.

Third, where is the disparate impact theory or cause of action located in Title VII? The Court in *Inclusive Communities* accepted the party line that *Griggs* discovered it in section 703(a)(2).[285] Justice Thomas agreed with that and railed against that discovery.[286] Of course this debate about section 703(a)(2) mattered in *Inclusive Communities* because the Title VII section, as well as the ADEA provision, was being used to interpret similar language in the FHA. However, if limited to employment discrimination law, one could say that the debate about section 703(a)(2), disparate impact, and *Griggs* is old news and matters little because Congress, in the Civil Rights Act of 1991, codified a proof framework for disparate impact in section 703(k).[287] Essentially, it does not matter whether the Court was right to glean disparate impact from section 703(a)(2) because Congress expressly recognized the theory in the 1991 Act. However, the 703(a)(2)/*Griggs* issue is relevant to the debate about the absolute dichotomy—the distinction between disparate treatment and dispar-

281. Oppenheimer, *supra* note 14, at 937-38.

282. *See, e.g.*, *id.* at 938-39; Corrada, *supra* note 44, at 1427-31.

283. *See supra* notes 43-44.

284. Zatz, *supra* note 14, at 1428.

285. Tex. Dep't Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2516-17 (2015).

286. *Id.* at 2526-27 (Thomas, J., dissenting).

287. 42 U.S.C. § 2000e-2(k) (2012).

ate impact. Moreover, section 703(k), added by the 1991 Act, is made to derive from 703(a) as it refers to "unlawful employment practice," which is the term used by section 703.[288] Thus, it is a sound argument that disparate impact is derived from section 703(a)(2) and still resides there, and section 703(k) merely establishes or restores the proof framework for the theory. That interpretation seems to be consistent with the analysis in *Inclusive Communities*.

Fourth, of the several problems created by Congress in the Civil Rights Act of 1991, two are based on the Supreme Court's dichotomy of employment discrimination theories. First, in the new section 1981a, Congress sought to create a right to recover compensatory and/or punitive damages under both Title VII for sex, national origin, and religious intentional discrimination claims and the ADA for disabilities claims. The right already existed for race claims if plaintiffs sued under section 1981.[289] When such damages are claimed, the statute also creates a right to a jury trial.[290] In part then, section 1981a was to make other Title VII claims more equal to race claims.[291] But they are not quite equal because, in order to achieve passage of the law, it was necessary to cap damages in section 1981a, and such caps do not exist for race claims brought under section 1981. In creating the rights to damages and a jury trial, Congress also unwisely, in my view, ensconced, to some extent, the disparate treatment-disparate impact dichotomy in the statutes. Damages were made available for claims of "intentional discrimination (not an employment practice that is unlawful because of its disparate impact)."[292] This distinction was not original to Congress, however, as the Supreme Court interpreted disparate treatment claims as cognizable under section 1981, but not disparate impact.[293] Thus, Congress, in limiting damages and jury trials to intentional discrimination as distinguished from impact-based discrimination, was following and codifying a Court interpretation.[294] However, this distinction appears quite accidental, as it was based not on a careful consideration of what damages should be available under the Title VII theories

288. *See* Jolls, *supra* note 237, at 669.

289. 42 U.S.C. § 1981 (2012).

290. *Id.* § 1981a(c).

291. Congress did not address the ADEA in section 1981a because it has a different remedial scheme that is based on the Fair Labor Standards Act and provides for liquidated damages for willful violations. 29 U.S.C. § 626(b) (2012).

292. 42 U.S.C. §1981a(1)-(2) (2012).

293. Gen. Bldg. Ass'n v. Pennsylvania, 458 U.S. 375, 381-90 (1982).

294. *See* H.R. REP. NO. 102-40, at 25 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 717-18; *id.* at 69, *reprinted in* 1991 U.S.C.C.A.N. 694, 755 (dissenting views).

of discrimination but on the Court's interpretation of section 1981, a post-Civil War civil rights statute.

A second part of the 1991 Act codifies an aspect of the dichotomy of theories. Echoing the Supreme Court in *UWA v. Johnson Controls*,[295] Congress placed in the statutory disparate impact proof structure a provision that states that the statutory defense to disparate impact—business necessity/job relatedness—is not applicable to a disparate treatment claim, for which the statutory defense is a bona fide occupational qualification. The statute states that "[a] demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter."[296]

The foregoing statutory provisions and the Court's interpretations in *Young* and *Abercrombie & Fitch* of the PDA and the definition of religion, respectively, make debunking the dichotomy and expanding the theories more difficult. Nonetheless, there are judicial interpretations of the current statutes that can accomplish this result to some degree.[297] The better approach, however, is for Congress (1) to repeal the statutory recognition of the dichotomy of theories in section 1981a, and (2) to amend Title VII and the ADEA to expressly provide for several theories, causes of action, or unlawful practices, following the model of the ADA.

B. Theories and Proof Frameworks Gone Awry

While the Court declared disparate treatment and disparate impact the exclusive "causes of action" in *Abercrombie & Fitch*,[298] it often has referred to them as "theories,"[299] indeed referring to them as such in *Young*.[300] On the other hand, many authorities, including justices on the Supreme Court, have referred to disparate treatment and disparate impact as ways of proving a claim of discrimination.[301] A way of proving a claim of discrimination is dif-

295. 499 U.S. 187, 197-98 (1991). The case is discussed *supra* text accompanying notes 100-04.

296. 42 U.S.C. § 2000e-2(k)(2) (2012).

297. *See infra* Part V.B.

298. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015).

299. *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977), quoted *supra* text accompanying note 52; *see also* Hazen Paper Co. v. Biggins, 507 U.S. 604, 609-10 (1993).

300. Young v. United Parcel Serv. Inc., 135 S. Ct. 1338, 1361 (2015).

301. *See* Gold, *supra* note 25, at 173-75 (citing, with other authorities, the dissenting opinion of Justice Powell in *Connecticut v. Teal*, 457 U.S. 440, 458-59 (1982), and the plurality opinion in *Watson v. Fort Worth Bank*, 487 U.S. 977, 985-87 (1988)).

ferent than a theory of discrimination.[302] The proof frameworks with their steps or elements approximate the elements of a tort claim—slots into which evidence must be inserted on pain of dismissal for failure to satisfy an element—[303] although there are differences. Courts do not adhere to the elements of the proof structures as strictly or consistently as they do the elements of tort theories.[304] The proof frameworks also differ from the elements in tort claims in that the *McDonnell Douglas* framework incorporates shifting burdens of production, and the mixed-motives framework includes a shifting burden of persuasion. Despite the differences, just as one must fit evidence into the elements of fraud or battery, for example, to prove intentional tort liability, one must fit evidence into a proof structure to prove discrimination. The proof structures are the templates used to prove discrimination.

It should not be surprising that the theories often are merged with the proof structures and thought of as a way of proving discrimination. From their origins, the two theories have been developed in conjunction with their proof frameworks, as they were in *Griggs* and *McDonnell Douglas*. Under the dichotomy-based core, any given claim is categorized under the appropriate theory and then analyzed under the appropriate affiliated proof framework. For purposes of this section, I will adopt the Court's common characterization of disparate treatment and disparate impact as theories of discrimination and treat them as overarching explanations of discrimination and discrimination law doctrine and the proof frameworks as providing the elements of proof and analysis.

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302. Professors Linda Hamilton Krieger and Susan T. Fiske explain that a claim for relief can be viewed as a "claim schema" with a narrative side and a formal analytical side. On the formal analytical side, a claim schema can be divided into a set of essential elements that must be present in a narrative in order for the claimant to recover. Thus, in order to recover, a claimant must introduce evidence of each element. *See* Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1011-12 (2006).

303. *Id.* at 1012. Krieger and Fiske distill the elements of disparate treatment as follows: (1) member of a protected group; (2) subjected to an adverse employment action; and (3) protected status was a motivating factor in the adverse action. *Id.*

304. For example, the Supreme Court stated in the *McDonnell Douglas* opinion itself that the prima facie proof required "is not necessarily applicable in every respect to differing factual situations." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973). Moreover, the Supreme Court held that a plaintiff's complaint is not insufficient and subject to dismissal for failure to plead the elements of the *McDonnell Douglas* prima facie case in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002).

1. Theoretical Disarray

The Court has proclaimed that under Title VII (and the ADEA)[305] there are two, and only two, well-defined and discrete theories of discrimination. That is the core of employment discrimination law doctrine, but it is not an accurate description of the law. It is a matter of some importance to see the inaccuracy and to appreciate the potential consequences of maintaining this false dichotomy. Although I concede that there is a reasonable argument that the best path for the future of employment discrimination law is to maintain the false dichotomy, I think we have reached the point at which that path should no longer be followed.

Theories of recovery should provide cogent explanations as to why the law permits a recovery for certain actions. Because the Supreme Court often treats employment discrimination law as tort law and imports tort law principles,[306] it is useful to think of the characteristics of tort theories of recovery. The overarching tort theories are intentional torts, negligence, and strict liability.[307] Each theory is defined to a large extent by an element or elements common to all claims under its ambit, such as intent for all intentional torts and failure to exercise reasonable care and causation for all negligence claims. Generally, the principles and doctrine developed under one theory are cabined under that theory, but there are some migrations across theories, such as in comparative fault and products liability. The three tort theories provide an explanation for all of the claims for which recovery is permitted in tort law.

Disparate treatment and disparate impact are the analogous theories of recovery in employment discrimination law. The Court has made three claims regarding these theories that do not accurately describe them. First, the Court has described the two theories as well-defined and cohesive with each having a unifying concept. Second, the Court has described them as distinct, insisting that their

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305. Presumably, there is still a freestanding theory of failure to make reasonable accommodations under the ADA. *See* CHARLES A. SULLIVAN & MICHAEL J. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 373 (9th ed. 2017). Prior to *Abercrombie & Fitch*, courts treated failure to accommodate as a separate theory of recovery or cause of action under the ADA and stated a separate framework for nonaccommodation claims. *See, e.g.*, Basith v. Cook Cty., 241 F.3d 919, 927 (7th Cir. 2001) ("Thus, under the ADA, there are two distinct categories of disability discrimination claims: failure to accommodate and disparate treatment."). *Abercrombie & Fitch* does not necessarily dictate that reasonable accommodation is not a separate theory under the ADA because the requirement of reasonable accommodation is situated in the section defining prohibited discrimination, 42 U.S.C. § 12112, rather than in definitional provisions as in Title VII.

306. *See infra* notes 314-17 and accompanying text.

307. *See* Catherine E. Smith, *Looking to Torts: Exploring the Risks of Workplace Discrimination*, 75 OHIO ST. L.J. 1207, 1215 (2014).

tenets and doctrine cannot be blended. Third, the Court has declared that they are the exclusive theories of recovery. The order at the core of employment discrimination law is based on these myths.

The Court in its earliest declaration of order and dichotomy in *International Brotherhood of Teamsters v. United States*[308] stated that disparate treatment is the "most easily understood type of discrimination," based on unequal treatment with proof of discriminatory motive being required.[309] As the theory has developed and evolved, it has become clear that it is not so easily understood.[310] It is not clear whether the key animating principle is unequal treatment, intent, motive,[311] or a standard of causation.[312] Given the early theories of discrimination that were combined under disparate treatment—economic harm motivated by animus and economic harm caused by unequal treatment of similarly situated persons—[313] the confusion should not be surprising.

The Supreme Court has drawn from tort law to develop the theories and principles of employment discrimination law, even referring to employment discrimination statutes as "federal tort[s]."[314] Most of the importation of tort law has occurred within disparate treatment.[315] The tort law analogue for disparate treatment is intentional torts, for which a plaintiff must prove "intent," defined as purpose (desire) or knowledge to a substantial certainty that the tortious result will occur.[316] Although the tort concept may align

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308. 431 U.S. 324 (1977).

309. *See supra* text accompanying note 52.

310. *See, e.g.*, Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 914-15 (2005) [hereinafter Sullivan, *Disparate Impact*].

311. *See id.* (discussing the Court's vacillation between motive and intent).

312. *See, e.g.*, Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed-Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17 (1991) (discussing the nuances of mixed-motives cases and criticizing the focus on causation).

313. *See supra* text accompanying notes 61-64 (discussing early theories of discrimination as described by Professor Blumrosen).

314. The Court declared that "when Congress creates a federal tort it adopts the background of general tort law." Staub v. Proctor Hosp., 562 U.S. 411, 417 (2011); Price Waterhouse v. Hopkins, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring). Several scholars have been critical of the seemingly unprincipled importation of unmodified tort principles into employment discrimination law. *See generally* Martha Chamallas & Sandra F. Sperino, *Torts and Civil Rights Law: Migration and Conflict: Symposium Introduction*, 75 OHIO ST. L.J. 1021 (2014).

315. *See, e.g.*, sources cited *infra* note 317 (discussing Supreme Court decisions that imported tort law into disparate treatment); *see also* Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1 (discussing the Court's use of proximate cause as the standard for "cat's paw" or derivative liability).

316. RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1965); RESTATEMENT (THIRD) OF TORTS § 8A (AM. LAW INST. 2000); Garratt v. Dailey, 279 P.2d 1091, 1092-94 (Wash. 1955).

with harm motivated by animus, it does not necessarily match harm caused by unequal treatment of similarly situated persons, which can be *merely* negligent. The analogy between disparate treatment and intentional torts seems even more suspect in view of the fact that the causation standards incorporated into disparate treatment,[317] including proximate cause,[318] are drawn from negligence law.

Disparate impact never has been well defined, and its underlying rationale is nebulous.[319] From its origin in *Griggs*, there was the debate regarding whether disparate impact is a means of "smoking out" veiled intentional discrimination or it is in fact a distinct effects-based theory.[320] The Court's efforts to keep disparate impact distinct from disparate treatment and to avoid having it become a subset of intentional discrimination suffered a setback in *Watson v. Fort Worth Bank & Trust*, in which the Court reluctantly recognized that disparate impact could be applied to subjective employment practices.[321] The Court in *Watson* recognized that "some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."[322]

Given the uncertainty about disparate impact, it is unsurprising that the tort analogue for disparate impact is unclear. Professor Blumrosen identified res ipsa loquitur and strict liability as the common law parallels for the early theory of disparate impact.[323] However, given the development of the theory in case law, coupled with Congress's adoption of a proof structure in Title VII that has stages of business necessity/job relatedness[324] and alternative employment practices,[325] it appears ultimately to be negligence-based.[326]

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317. Regarding the importation of tort causation standards, *see* Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051, 1055-67 (2014); Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 881-900 (2012).

318. Staub v. Proctor Hosp., 131 S. Ct. 1186 (2011).

319. *See,* e.*g.*, Jolls, *supra* note 237, at 652-53; Sullivan, *Disparate Impact*, *supra* note 310, at 964.

320. *See, e.g.*, Jolls, *supra* note 237, at 652-53 (discussing broad and narrow conceptions of disparate impact); Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523 (1991) (describing fault theory and effects theory).

321. 487 U.S. 977 (1988).

322. *Id.* at 987. *See* Sullivan, *Disparate Impact*, *supra* note 310, at 964-65.

323. Blumrosen, *supra* note 60, at 67.

324. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

325. *Id.* § 2000e-2(k)(1)(A)(ii).

326. *See, e.g.*, Oppenheimer, *supra* note 14, at 931.

Separation and distinctiveness of theories is another tenet of the mythical order, which the Court has declared many times.[327] Despite its blending of the theories, *Young* is unlikely to be read by either the Supreme Court or lower courts as a significant departure from the dichotomy or as authorizing further departures.[328] Indeed, the Court majority in *Young* disclaimed the dissent's argument that it was blending theories and announced that the allegedly hybrid analysis was limited to PDA claims.[329] The Court also is unlikely to interpret *Abercrombie & Fitch* as authorizing further blending of theories. Indeed, the Court majority did not seem to think it had violated the dichotomy of theories, offering no response to the dissent's characterization of the theory as "disparate-treatment-based-on-equal-treatment."[330]

A third myth is that there are only two theories of discrimination.[331] That myth is sustainable in part because of the amorphous nature of the two accepted theories. Many theories, claims, or causes of action have been forced into disparate treatment or disparate impact, with disparate treatment taking the lion's share. Hostile environment harassment claims, third-party harassment claims, failure to accommodate claims, and gender, race, or other stereotyping claims often have been categorized as disparate treatment claims, although many such claims appear to be negligence-based. The scholarly critiques of the unsuitable fit between these types of claims and disparate treatment, as it has been defined by the Court, have been legion. For example, Professor Noah Zatz contended that third-party harasser claims do not exhibit the intent requirement of disparate treatment and instead import a reasonable accommodation mandate into Title VII that does not appear in the statutory language.[332] He identified a unifying and overarching concept in membership causation.[333] Many commenta-

327. *See supra* Part II.A.

328. *See e.g.*, EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1025 (11th Cir. 2016) (stating that "*Young*, however, does not work a dramatic shift in disparate treatment jurisprudence"); Brake, *supra* note 40, at 561 (predicting that "*Young* does not likely forecast a more general upheaval of the boundary separating disparate impact and disparate treatment").

329. Young v. United Parcel Serv. Inc., 135 S. Ct. 1338, 1355 (2015) (stating that "the continued focus on whether the plaintiff has introduced sufficient evidence to give rise to an inference of *intentional* discrimination avoids confusing the disparate-treatment and disparate-impact doctrines").

330. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2041 (2015) (Thomas, J., dissenting).

331. *Id.* at 2032 (majority opinion).

332. Zatz, *supra* note 14, at 1362.

333. Zatz, *supra* note 14.

tors have noted that sexual harassment claims do not fit well under disparate treatment.[334] Professor David Oppenheimer described this phenomenon generally, explaining that the existing employment discrimination law frequently and—in many types of cognizable claims—actually is based on negligence,[335] although the Court does not acknowledge this.

The classification of types of claims under the dichotomy of theories becomes particularly vexatious when courts place failure-to-accommodate claims under disparate treatment, as the Supreme Court did in *Young* and *Abercrombie & Fitch*. Of course, the requirement of reasonable accommodation is expressly provided for in Title VII for only religion and arguably pregnancy. It also exists in the ADA, where, unlike under Title VII, the section prohibiting discrimination lists it as a separately enumerated act of discrimination.[336] Before *Abercrombie & Fitch*, most courts treated failure to make reasonable accommodation for religion as a separate theory or cause of action under Title VII,[337] and religious nonaccommodation claims could be said to require notice and be negligence-based.[338] Not until *Young* and *Abercrombie & Fitch* was the Court squarely confronted with nonaccommodation as a separate theory or cause of action.

Most scholars think that nonaccommodation is a theory of discrimination that is distinct in fundamental ways from the equal treatment underpinnings of disparate treatment.[339] Indeed, the requirement of accommodation is often juxtaposed with antidiscrimination as a distinct concept. Under that view, antidiscrimination requires disregard of differences, equal treatment, and is redistributive only to the extent necessary to produce such equal treatment, whereas accommodation requires regard of differences, special treatment,

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334. *See* Brake, *supra* note 40, at 586 (stating that harassment claims, although categorized as disparate treatment, are "difficult to situate as simple disparate treatment"); Henry L. Chambers, Jr., *A Unifying Theory of Sex Discrimination*, 34 GA. L. REV. 1591, 1593 (2000) (positing that sexual harassment hostile environment claims do not fit well under disparate treatment and recommending creation of a new cause of action combining hostile environment and disparate treatment). *Cf.* Zatz, *supra* note 14, at 1367 (positing that hostile environment claims do not invoke a distinct theory but are instead "something else entirely: a form of harm").

335. Oppenheimer, *supra* note 14, at 937-69 (listing harassment, nonaccommodation, and stereotyping as examples of negligence-based employment discrimination).

336. 42 U.S.C. § 12112 (b)(5)(A) (2012).

337. Corrada, *supra* note 44, at 1411 (2009); Zatz, *supra* note 14, at 1369.

338. Zatz, *supra* note 14, at 1364 (citing Oppenheimer).

339. *See, e.g.*, Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307 (2001); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1 (1996); *see also* Oppenheimer, *supra* note 14, at 937-44 (describing failure to accommodate as negligence based).

and is redistributive in that it imposes special costs due to the differences and special treatment.[340] Yet, Professor Christine Jolls has demonstrated that there is significant overlap between the broader field of antidiscrimination law and accommodation.[341] Although accommodation may be, for the most part, distinct from equal treatment, disparate impact, in several respects, imposes requirements of accommodation.[342]

In the groundbreaking decision of *Hively v. Ivy Tech Community College*, in which the en banc Seventh Circuit pronounced that discrimination because of sexual orientation is discrimination because of sex, the court noted that the Supreme Court has recognized a variety of claims under employment discrimination law that may have surprised the members of the 88th Congress, which enacted Title VII.[343] The court mentioned sexual harassment, same-sex sexual harassment, discrimination based on actuarial assumptions, and gender stereotyping as among those claims.[344]

Thus, the Court's proclamation that there are only two theories of discrimination is a dubious proposition descriptively. The Court is able to sustain it only because of the amorphous definitions and contours of the two accepted theories. Most significantly, disparate treatment is not limited to intentional discrimination, and the Court and courts have forced diverse theories under disparate treatment. That was true even before *Young* and *Abercrombie & Fitch*.

This inaccurate description might be tolerable if it did not have significant deleterious effects, but it sometimes leads to bad results in employment discrimination law. Categorization under a theory matters because the Court and Congress have been clear that intentional discrimination is the principal evil targeted by Congress in 1964.[345] Intentional discrimination is the theory for which Congress, in the Civil Rights Act of 1991, created greater rights. Because of the Court's and Congress's greater condemnation of intentional discrimination and the practical advantages of pursuing intentional discrimination claims, the EEOC has tried to fit claims, whenever viable, under disparate treatment, as in *Catastrophe Management Solutions*.[346] When the EEOC or any plaintiff categorizes a claim as dis-

340. *See* Issacharoff & Nelson, *supra* note 339.

341. *See* Jolls, *supra* note 237, at 651 (positing that "there is no way . . . to distinguish the specified aspects of antidiscrimination law from requirements of accommodation").

342. *Id.* at 653-66.

343. 853 F.3d 339, 345 (7th Cir. 2017) (en banc).

344. *Id.*

345. *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

346. 852 F.3d 1018, 1021 (11th Cir. 2016), *reh'g denied*, 876 F.3d 1273 (11th Cir. 2017); *see supra* Part III.E.

parate treatment or disparate impact, a couple of problems can result. For one, if the court disagrees with the plaintiff about the appropriate theory for the claim, the plaintiff may lose the case, as in *Raytheon Co. v. Hernandez* and *Catastrophe Management Solutions*.[347] For another, unclear and confusing case law can be produced as a result of trying to fit a claim within a single, distinct theory that is not a good fit, as in *Young* and *Abercrombie & Fitch*.

Beyond its descriptive inaccuracy, the limitation of discrimination to two distinct theories is normatively troubling. Many scholars have discussed the need for the law of discrimination to address "second generation" discrimination,[348] in which the discrimination is more subtle, implicit, cognitive, and/or structural: "[c]ognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality."[349] Many scholars have argued that the current theories and "tools" of employment discrimination law are ill suited to addressing such discrimination.[350] More than half a century after the enactment of the first employment discrimination law, a variety of theories, many of which already have been recognized but forced under disparate treatment, should better achieve the objectives of employment discrimination law going forward rather than pretending that cognizable claims fit under a theory supposedly based on intent that has been stretched beyond recognition.

I concede, however, that there is a good argument for tolerating the myths and accepting the problems associated with them. Because the Court, Congress, and society seem most comfortable with law that provides redress for intentional discrimination,[351] it may be that employment discrimination law has a better chance to develop and address various types of discrimination by the Court's blending employment discrimination law theories while saying that it is not and

347. 540 U.S. 44 (2003); 852 F. 3d 1018 (11th Cir. 2016).

348. *See, e.g.*, TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW (Cambridge Univ. Press 2017); Sturm, *supra* note 98, at 460; Bornstein, *Reckless*, *supra* note 14, at 1061-62; *see also* Bagenstos, *supra* note 98.

349. Sturm, *supra* note 98, at 460.

350. *See, e.g.*, Bagenstos, *supra* note 98, at 12-14.

351. The Court declared disparate treatment to be the "most obvious evil Congress had in mind when it enacted Title VII." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); *see also* Bagenstos, *supra* note 98, at 3-4 (observing that there is limited political support for extending discrimination law beyond a broadly accepted class of cases based on employer fault); Ford, *supra* note 14, at 1391 (describing the comfort associated with defining discrimination as decisions motivated by a discrete state of mind and the discomfort associated with the doctrine of effects or impact); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 773 (2006) (discussing the crucial role that blame and intent play in fostering willingness to remedy discrimination).

classifying under the disparate treatment theory claims that do not fit. In a similar vein, Professor Michael Selmi argued that recognition of the disparate impact theory by the Court in 1971 in *Griggs* was a mistake because the unintended consequence limited the development of a more expansive concept of intent.[352] Arguably, the Court is now doing what Selmi argued should have been done rather than recognizing an alternative theory—expanding the definition of intent.

While there is merit to the idea of expanding the definition of intent and the concept of disparate treatment, it is not now as promising an approach as it would have been in 1971 when *Griggs* was decided. Disparate treatment has been developed and defined over several decades. It is defined by concepts of motive, tort causation, and proof structures that supposedly incorporate those concepts. The result when trying to fit other theories into disparate treatment is what we have in *Young* and *Abercrombie & Fitch*—a Court uncomfortably trying to make such claims work while providing reassurances that there are only two distinct theories. Thus, this expansion now looks like judicial sleight of hand. It seems as likely that this approach is not sustainable and soon will jeopardize rather than confirm political and societal support for employment discrimination law. Professor Robert Post posits that it can be damaging to the doctrinal structure of the law when judges cannot explain the actual justifications for their decisions.[353] Judges, lawyers, and citizens can lose confidence in the integrity of the law when legal doctrine appropriates terms that have a common meaning and uses them in ways that bear little resemblance to that meaning.

There are significant descriptive and normative problems associated with the anachronistic order of two distinct and exclusive theories of discrimination. In light of these problems, the Court in *Young* and *Abercrombie & Fitch*, notwithstanding its blending of theories, failed to take opportunities to break the dichotomy of theories and begin fashioning a better order. Nonetheless, there is a seed of hope in the opinions that the Court and courts could use to fashion a new core.

2. The Proof Frameworks

The difficulties posed by the two proof structures for individual disparate treatment have been chronicled exhaustively.[354] *Young* and

352. Selmi, *supra* note 351, at 706.

353. *Cf.* Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 33 & 33 n.152 (2000) (although recognizing that important values can be served by "judicial indirection" and inarticulate expression).

354. *See supra* Part II.B.

Abercrombie & Fitch provide the latest reminders of why the two distinct and exclusive frameworks do not provide useful tools of proof and analysis, which is what they were designed to be. First, there is no line of demarcation as to which applies in any given case. Second, *Young* appears to be a reaffirmation of the continuing viability of the pretext analysis, but *Abercrombie & Fitch* unwittingly undermines it.[355] However, I think that the deformed pretext analysis developed in *Young* provides little support for the proposition that pretext analysis remains a parallel proof structure to mixed motives. *Abercrombie & Fitch* demonstrates why the *McDonnell Douglas* pretext analysis should not survive the combination of enactments of both the Civil Rights Act of 1991 and the *Desert Palace* decisions. Although the sustainability of the pretext analysis was debatable after *Desert Palace*, *Abercrombie & Fitch* should be the last nail in the coffin of *McDonnell Douglas*. At a minimum, the Supreme Court should declare that proof that the employer's reason for the adverse action is pretextual is merely a way of satisfying the statutory standard that discrimination is a motivating factor.[356]

In *Young*, the Court instructed that a plaintiff pursuing a pregnancy nonaccommodation claim could prove disparate treatment by using the pretext framework and using impact-type evidence to prove pretext and intent.[357] Why did the Court not at least discuss the alternative of the mixed-motives analysis using the statutory "motivating factor" standard? The answer cannot be that there was no direct evidence for two reasons: first, there was direct evidence, and second, the direct/circumstantial evidence line was erased by *Desert Palace*. The Government's amicus brief pointed out the error of the lower courts in invoking the *McDonnell Douglas* analysis, although the brief based the argument on the direct/circumstantial distinction.[358] Professor Brake and I both have noted that the Court's opinion reads as if *Desert Palace* never had been decided.[359] The Court, while doing

355. As discussed above, the statements in *Abercrombie & Fitch* that undermine the continuing viability of the *McDonnell Douglas* analysis are similar to statements made by the Court in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013). *See supra* Part III.D.2.

356. I am grateful to Professor Rebecca Hanner White for making the point that the pretext analysis could serve this function.

357. Young v. United Parcel Serv. Inc., 135 S. Ct. 1338, 1353-54 (2015).

358. "Because petitioner presented direct evidence of sex discrimination, the courts below had no need to resort to the analytical framework of *McDonnell Douglas Corp. v. Green* . . . which is used to ferret out hidden motives." Brief for the United States as Amicus Curiae Supporting Petitioner at 9-10, *Young*, 135 S. Ct. 1338 (No. 12-1226), 2014 WL 4536939, at *10.

359. Brake, *supra* note 40, at 597; William R. Corbett, Young v. United Parcel Service, Inc., McDonnell Douglas *to the Rescue?*, 92 WASH. U. L. REV. 1683, 1696-98 (2015).

creative blending of discrimination theories in *Young*, nonetheless, clung to *McDonnell Douglas*, as Professor Brake aptly put it, "like a child with a favorite blanket."[360]

In *Abercrombie & Fitch*, the Court held that the plaintiff did not have to prove actual knowledge of her religion in a failure-to-accommodate disparate treatment claim, but instead must prove that her religion was a motivating factor in the decision.[361] Although the Court did not note it, "motivating factor" is the first part of the statutory version of the mixed-motives framework installed in Title VII in section 703(m)[362] by the Civil Rights Act of 1991. The second part is the same-decision defense in Section 706(g)(2)(B).[363] The Court did not so much as mention the *McDonnell Douglas* pretext proof structure as an option even though it had been invoked by the lower courts.[364] The Court did not seem to view the issue as a choice between proof structures, but instead a discussion of standards of causation. Nonetheless, the Court tacitly placed the claim under the statutory mixed-motives analysis. Moreover, the Court's statement regarding standards of causation explains why the two frameworks cannot continue to coexist. The Court stated that Title VII has a "because of," which means but for, standard of causation in Section 703(a).[365] However, Section 703(m) "relaxes this standard" to "motivating factor."[366] Although the Court likely did not intend it, that interpretation of the relationship between the two sections should spell the end of the *McDonnell Douglas* pretext framework.

However, the Court almost certainly will not interpret its statements in *Abercrombie & Fitch* as signaling the end of the pretext analysis. The Court already had made the point about the role of the motivating factor standard in 2013 in *University of Texas Southwestern Medical Center v. Nassar*.[367] In that case, which held that but-for causation is required under Title VII's antiretaliation provision and no mixed-motives analysis is available, the Court stated as follows:

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360. Brake, *supra* note 40, at 598.

361. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2033 (2015).

362. 42 U.S.C. § 2000e-2(m) (2012).

363. *Id.* § 2000e-5(g)(2)(B).

364. The district court and the court of appeals had applied versions of the *McDonnell Douglas* analysis that they modified for failure-to-accommodate claims. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 8, 28, *Young*, 135 S. Ct. 1338 (No. 12-1226), 2014 WL 4536939, at *10; EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015). The EEOC argued that even if the analysis were correct, "nothing in this Court's jurisprudence supports imposing a rigid notice requirement because a burden-shifting framework is used." *Id.* at 28-29.

365. *Abercrombie & Fitch*, 135 S. Ct. at 2032.

366. *Id.*

367. 133 S. Ct. 2517, 2534 (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."[368] The Court's reason for saying this was to undermine the proposition that Congress's enactment of a broadly phrased antidiscrimination statute may indicate congressional intent to prohibit discrimination against those who oppose that type of discrimination; the motivating factor standard is not such a broad prohibition of discrimination.[369] Professor Sperino has interpreted those two sentences in *Nassar* as abrogating the distinction between mixed-motives and single-motive claims in Title VII.[370] Yet, she observed that *Nassar* did not reveal what to do about the two proof structures for Title VII individual disparate treatment, and speculated that the resilient *McDonnell Douglas* structure was likely to remain viable.[371]

Professor Sperino's prediction proved accurate as the Court employed the pretext analysis in *Young* in 2015. Then in *Abercrombie & Fitch*, the Court restated the proposition about motivating factor from *Nassar* more pointedly, stating that section 703(m) relaxes the standard of causation in section 703(a).[372] The Court was clear that the later-enacted language "relaxes" (replaces) the earlier enacted language.[373] Furthermore, I think the statements in *Nassar* and *Abercrombie & Fitch* should not only put an end to the single-motive/mixed-motives dichotomy, but also should spell the end of the pretext framework. I acknowledge that the Court is not likely to see it that way, given the reappearance of the pretext structure in *Young* after *Nassar*.

The Court has made clear that the statutory language "because of" means but-for causation.[374] Although the Court has never expressly stated it, most commentators think that the *McDonnell Douglas* pretext analysis incorporates but-for causation.[375] A plurality of the Court implicitly suggested that proposition in *Price Waterhouse*, rea-

368. *Id.* at 2530.

369. *Id.*

370. Sandra F. Sperino, Nassar's *Silver Lining*, U. CIN. L. REV. F. (2013), https://uclawreview.org/2013/10/01/nassars-silver-lining/ [https://perma.cc/UXS7-S57F].

371. *Id.*

372. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015).

373. For a similar interpretation of later-enacted language superseding or replacing earlier-enacted language in ERISA, see *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1658 (2017).

374. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2528 (2013); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

375. *See, e.g.*, Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. C.R. & C.L. 1, 17-18 (2005); Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 123 (2007).

soning that "because of" does not mean "but for" and developing an alternative analysis to *McDonnell Douglas*.[376] But-for causation is the standard of causation under the ADEA after *Gross*, and the Court has applied the *McDonnell Douglas* analysis in ADEA cases, although stating that it has never decided whether the analysis is applicable.[377] But-for causation may be required under the ADA, and the Court also applied the *McDonnell Douglas* framework in an ADA case, stating only that the courts of appeals consistently have applied the structure to evaluate disparate treatment claims, including ADA claims, on motions for summary judgment.[378] Despite no definitive holding from the Court, there are indications that the standard of causation associated with the *McDonnell Douglas* pretext analysis is but for. At a minimum, the development of the mixed-motives analysis as an alternative suggests that the causation standard of the pretext analysis is higher than motivating factor. If that is correct, then the pretext framework should cease to exist as a parallel framework to the statutory mixed-motives framework under Title VII.

After the enactment of the Civil Rights Act of 1991 and *Desert Palace*, it was arguable that there were two standards of causation in Title VII: "because of"/but for in section 703(a) and "motivating factor" in section 703(m). Some courts employed that approach to draw a new line of demarcation and justify the continued existence of the pretext analysis, which was used in "because of"/but-for claims. For example, the Sixth Circuit used that approach in *White v. Baxter Healthcare Corp.*,[379] labeling claims brought pursuant to section 703(a) single-motive claims and claims brought pursuant to section 703(m) mixed-motive claims.[380] Now that the Court has explained, in *Nassar* and *Abercrombie & Fitch*, that "because of" and "motivating

376. Price Waterhouse v. Hopkins, 490 U.S. 228, 241-42 (1989).

377. *See Gross*, 557 U.S. at 175 n.2 (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000)); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311 (1996)).

378. Raytheon Co. v. Hernandez, 540 U.S. 44, 49 n.3 (2003) (citing Pugh v. Attica, 259 F.3d 619, 626 (7th Cir. 2001)).

379. 533 F.3d 381, 400 n.10 (6th Cir. 2008), *cert. denied*, 556 U.S. 1235 (2009). The court stated:

> However, as is clear from [an earlier part of this opinion], the *McDonnell Douglas*/*Burdine* framework continues to guide our summary judgment analysis of single-motive discrimination claims brought pursuant only to Title VII's general anti-discrimination provision, 42 U.S.C. § 2000e-2(a)(1), and not pursuant to 42 U.S.C. § 2000e-2(m). We decline to adopt the view, proposed by some courts and commentators, that the *McDonnell Douglas*/*Burdine* framework has ceased to exist entirely following *Desert Palace*.

380. The Eleventh Circuit purported to adopt the Sixth Circuit's approach from *White* in *Quigg v. Thomas County School District*, 814 F.3d 1227, 1240 (11th Cir. 2016).

factor" are not two different standards of causation in Title VII, but rather that section 703(m) relaxes the but-for standard of section 703(a), the pretext analysis must be abandoned. The three stages of the pretext analysis no longer can have significant procedural effects. If a plaintiff can satisfy "motivating factor," that plaintiff cannot be required to prove pretext, nor can a defendant be precluded from raising the second part of the mixed-motives framework—the same-decision defense.

However, it can be argued that, notwithstanding the relaxation of the causation standard in Title VII, the pretext analysis can be retained as a way for plaintiffs to present their evidence to establish motivating factor.[381] While that is true, such retention likely will lead to incorrect results because courts will misunderstand the new role of the analysis and accord it the significance it had in the past. The fact that the ultimate question is whether race or sex was a motivating factor deprives the three stages of the pretext analysis of procedural significance. If a plaintiff fails to prove pretext, that is not determinative, as the plaintiff still might satisfy motivating factor causation. Retaining the pretext analysis means only that a plaintiff may present evidence to establish pretext, and that should satisfy motivating factor. However, it is not necessary to retain the pretext proof structure to assure that pretext evidence is admissible, relevant, and probative. Retaining such analysis suggests that it has its former procedural effects, and that is incorrect. Retaining this analysis to assure, unnecessarily, that pretext evidence is considered as proof of motivating factor is likely to result in courts giving it the procedural effects it no longer can have.

As with the dichotomy of theories (disparate treatment and disparate impact), the myth of the dichotomy of individual disparate treatment proof structures is not innocuous. Confusion and uncertainty about the proof frameworks are harmful in a most practical way. The frameworks are the tools used to do the everyday work of courts—to analyze claims for purposes of various dispositive motions and stages of litigation, such as summary judgment, judgment as a matter of law, and jury instructions. If attorneys and judges cannot determine which framework is appropriate for a given case or do not know how to apply the frameworks, we have no consistent, dependable law to resolve cases. Moreover, once a claim is slotted under a theory and a proof structure, the evidence introduced must fit within that proof structure; if the evidence does not conform to the elements, it may be disregarded or regarded as not sufficiently probative of discrimination.

381. *See* Sperino, Nassar's *Silver Lining*, *supra* note 370.

The Seventh Circuit explained the dangers of requiring evidence to conform to ill-fitting proof frameworks and of applying overly rigid structures in *Ortiz v. Werner Enterprises, Inc*.[382] In that case, the Seventh Circuit reversed a grant of summary judgment in favor of a defendant in a discrimination case in which the district court had divided evidence between the direct and indirect methods of proving discrimination and determined that the plaintiff failed to create a "convincing mosaic of discrimination" under either method.[383] First, the appellate court explained that the "convincing mosaic" language, articulated by the Seventh Circuit in *Troupe v. May Dept. Stores Co*.,[384] was intended to be a metaphor for a court's consideration of the evidence rather than a new test that had to be satisfied by plaintiffs.[385] Instead, in the aftermath of *Troupe*, courts treated it as a new test. The *Ortiz* court reiterated that "convincing mosaic" is not a legal test and overruled a series of Seventh Circuit cases to the extent that they relied on it as such.[386] Next, the Seventh Circuit trained its sights on the direct and indirect methods of proving discrimination and declared that courts must cease from classifying evidence as direct or indirect and treating such evidence as subject to distinct approaches.[387] The court stated that the legal standard is "simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action."[388] "Evidence is evidence," the court stated, and should be considered as a whole.[389] Having explained well the problems posed by the dichotomy of proof structures, however, the court then asserted that all that it had said did not affect the *McDonnell Douglas* framework or "any other burden-shifting framework, no matter what it is called as a shorthand."[390] Although the court professed to want a unified analysis, it was unwilling to explain the relationship between the pretext and mixed-motives proof structures, ending much as the Supreme Court did in *Desert Palace*. However, the court did go on to assess the evidence under the standard it stated—whether a reasonable juror could infer that

382. 834 F.3d 760 (7th Cir. 2016).
383. *Id.* at 763.
384. 20 F.3d 734 (7th Cir. 1994).
385. *Ortiz*, 834 F.3d at 764.
386. *Id.* at 765.
387. *Id.* at 765-66.
388. *Id.* at 765.
389. *Id.*
390. *Id.* at 766.

the employer took the adverse action based on ethnicity—and under that standard, reversed the summary judgment.[391] Although the Seventh Circuit flinched in *Ortiz*, based on its reverence for *McDonnell Douglas*, rather than solve the two-proof-structure conundrum, it noted the mismanagement of evidence that can occur with the current dichotomy of proof structures.

The dichotomy of individual disparate treatment proof frameworks is obsolete, and the Court twice has stated the reason, based on the statutes, why it should be abrogated.

V. BREAKING THE DICHOTOMIES AND RECOGNIZING ADDITIONAL THEORIES

Young and *Abercrombie & Fitch* are the latest indications that the supposed order in employment discrimination law is chimerical. The core of employment discrimination law based on dichotomies of theories and disparate treatment proof structures is not required or necessarily supported by the statutes; it is not descriptive of the doctrine that has developed and evolved; and it is not sufficient to address the discrimination that occurs in the workplace today. That core is instead a relic from the early years of employment discrimination law to which the Court and lower courts tenaciously have clung.[392] *Young* and *Abercrombie & Fitch* both expose the myth and demonstrate that the Court can use the existing statutes and case law doctrine to fashion a new core of discrimination law doctrine that is unconstrained by the dichotomies. Yet, the Court's contrived adherence to the old order in the two opinions suggests its reluctance to embrace this path forward.

A. Movement Must Begin with the Court

Movement in the direction of breaking the dichotomies of theories and proof frameworks and recognizing more theories of discrimination almost certainly must be initiated by the Court. The history of the evolution of employment discrimination law over fifty years is an interaction in which the Court declares doctrine in the first instance, and Congress occasionally steps in to modify and codify.[393] Congress undoubtedly will not intervene at this point in response to *Young* and

391. *Id.*

392. Professor Blumrosen, in describing the three early concepts of discrimination, aptly observed that those concepts "represent ways of thought that possess a long jurisprudential history and are embedded in the attitudes of lawyers," and "[o]nce a concept is grasped, it is often applied without conscious awareness of or reference to its genesis." Blumrosen, *supra* note 60, at 71.

393. *See supra* Part IV.A.

Abercrombie & Fitch because the Court purported to be making no significant changes in discrimination doctrine.

Congress's amendments to Title VII indicate that Congress has accepted the Court's model of employment discrimination law as composed of a well-defined dichotomy of theories. So, what would Congress likely do if the Court announced the end of the dichotomy of theories? There is reason to believe that Congress also would accept decisions of the Court announcing that employment discrimination law does not consist of merely a well-defined dichotomy of theories. Although it is true that many amendments to the employment discrimination statutes have been legislative abrogations of Supreme Court decisions, Congress has codified some of the Court's most significant concepts and principles and left many others undisturbed. The Civil Rights Act of 1991 codified versions of the disparate-impact and mixed-motives frameworks developed by the Court.[394] Congress did not disturb the gender stereotyping concept announced by the Court in *Price Waterhouse v. Hopkins*[395] in the 1991 Act, even though Congress, in the Act, was tinkering with the mixed-motives framework announced in that case. Congress disturbed neither the hostile environment theory of sexual harassment accepted by the Court in *Meritor Savings Bank v. Vinson*[396] nor the recognition of same-sex sexual harassment in *Oncale v. Sundowner Offshore Services, Inc.*[397] There are many other examples. Suffice it to say that Congress generally follows the lead of the Court in matters of employment discrimination law. Most of the congressional amendments overturning Supreme Court decisions have been responses to decisions that narrowed or reduced the protections of the laws. Consider, for example, the Pregnancy Discrimination Act Amendments, the religious accommodation amendment, the Civil Rights Act of 1991, and the ADA Amendments Act of 2008.[398] If the Court chose to abrogate the dichotomy of theories and expand employment discrimination law, it seems unlikely that Congress would intervene to prevent such change. Beyond nonintervention, Congress may choose to assist.

In sum, the Court could, to a significant extent, abolish the dichotomies of theories and proof structures and recognize new theories under the existing statutes. Although the courts can accomplish much of this change under the existing statutes, there are a number of amendments that Congress could make to facilitate these changes,

394. *Id.*

395. 490 U.S. 228 (1989).

396. 477 U.S. 57 (1986).

397. 523 U.S. 75 (1998).

398. *See supra* Part IV.A.

but such action will not occur without a declaration of change by the Court.

B. The Court Could Begin Building the New Core on the Existing Statutes

1. Blending Theories

Despite its protestations to the contrary, the Court breached the dichotomy of disparate treatment and disparate impact in *Young* and *Abercrombie & Fitch*. The next step should be to admit that plaintiffs pursuing a disparate treatment claim can invoke principles and case law of disparate impact and vice versa. There are only two statutory provisions that require some separation and distinctiveness between the theories,[399] and neither prevents the courts from substantial blending of theories.

The most obvious example of blending is recognizing that evidence should not be considered treatment-type evidence or impact-type evidence. That is, a particular type of evidence is not required to prove intent or impact. The Court stated that evidence of an unjustified impact could prove intent in *Young*.[400] Nonetheless, the EEOC's effort to use effects evidence to prove intent in *Catastrophe Management Solutions* failed.[401]

Circuit courts already have accorded decisive weight to impact-type evidence and formulated standards using impact language in disparate treatment claims in some contexts. Consider, for example, rules or policies that facially discriminate based on sex for which courts do not necessarily find disparate treatment because the rules do not impose unequal burdens. Circuit courts have applied such mixed standards in the context of dress and grooming policies and physical fitness tests.

The Ninth Circuit approved a test for determining whether an appearance and grooming policy with different requirements based on sex violates the law in *Jesperson v. Harrah's Operating Co*.[402] The "Personal Best" program at issue made several distinctions and, at issue in the case, required women but not men to wear makeup to

399. There is only one statutory provision that expressly prohibits such blending. As amended by the Civil Rights Act of 1991, section 703(k)(2) provides that business necessity cannot be used as a defense to a claim of intentional discrimination. There also is the provision in section 1981a that makes damages available for intentional discrimination claims but not disparate impact claims. *See infra* Part V.C.

400. *See supra* Part III.A & III.D.1.

401. *See supra* Part III.E.

402. 444 F.3d 1104 (9th Cir. 2006) (en banc).

work.[403] The policy facially discriminated, but the court announced that the standard for determining illegal sex discrimination is whether the rule or policy creates an unequal burden on one sex.[404]

The Fourth Circuit applied an equality-of-burdens test to a gender-normed physical fitness test administered by the FBI in *Bauer v. Lynch*.[405] The passing standard required a different number of push-ups and sit-ups, and a different time in both a 300-meter sprint and a one-and-a-half mile run for men and women.[406] The standard was facially discriminatory and appeared to violate section 703(l) of Title VII,[407] which prohibits adjustment of test scores or different cutoff scores based on protected characteristics. The district court granted summary judgment for the plaintiff, reasoning that the different cutoffs were facially discriminatory and not saved by any defense.[408] The Fourth Circuit declared that "[m]en and women simply are not physiologically the same for the purposes of physical fitness programs."[409] The court reversed the summary judgment, holding that such a gender-normed fitness test is not illegal if it imposes an equal burden of compliance on men and women and requires the same level of fitness for both.[410]

More significant than blended tests, standards, and evidence, the flexibility permitted by breaking the dichotomy and blending theories also should permit courts to recognize recovery for failure to make reasonable accommodations for race, color, sex, and national origin under Title VII and age under the ADEA. The Court permitted plaintiffs to proceed with what were essentially a pregnancy accommodation claim in *Young* and a religion accommodation claim in *Abercrombie & Fitch* in part by infusing disparate treatment with disparate impact principles.[411] Although Title VII has definition subsections for pregnancy and religion, with the pregnancy provision implicitly suggesting a requirement of accommodation and the religion provision expressly providing for it, the Court permitted both claims to proceed under disparate treatment without recognizing a separate

403. *Id.* at 1107.

404. *Id.* at 1110-11.

405. 812 F.3d 340 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 372 (2016).

406. *Id.* at 344.

407. 42 U.S.C. § 2000e-2(l) (2012).

408. *Bauer*, 812 F.3d at 346 (recounting the district court's ruling).

409. *Id.* at 350.

410. *Id.* at 351.

411. It should not be surprising that the blending of theories facilitated maintenance of failure-to-accommodate claims, as disparate impact derives more from accommodation theory than from equal treatment or animus-based theories. *See* Jolls, *supra* note 237, at 645.

"cause of action" for failure to accommodate.[412] If nonaccommodation is cognizable under disparate treatment, then it should be recognized for all of the protected characteristics.

Beyond the *Young* and *Abercrombie & Fitch* decisions permitting nonaccommodation claims to proceed under disparate treatment, there is another reason that expansion of nonaccommodation claims should require no express statutory provision. The Court and lower courts have recognized other types of employment discrimination claims without express authorization in the statute, such as harassment and stereotyping. Another example of a claim recognized under Title VII without express statutory authorization is associational or relational discrimination. The ADA makes it an unlawful employment practice for an employer to discriminate against an employee because of her relationship or association with a person who has a known disability.[413] Although Title VII does not expressly provide for such an associational discrimination claim, appellate courts have recognized it for race.[414] Moreover, the Supreme Court recognized an associational or relational claim under the antiretaliation provision, without express statutory authorization in Title VII, in *Thompson v. North American Stainless, LP*.[415] Thus, it should be no bar to expansion of nonaccommodation claims that there is not an express statutory provision for nonaccommodation claims for race, color, sex, national origin, or age.

2. Recognizing More Than Two Theories or Causes of Action

The Court should abandon the notion, articulated in *Abercrombie & Fitch*, that there are only two theories or causes of action for discrimination under Title VII and presumably the ADEA.[416] As already discussed, the Court and courts have recognized several different causes of action, including harassment, stereotyping, and nonaccommodation, that do not fit well under either disparate treatment or

412. Young v. United Parcel Serv. Inc., 135 S. Ct. 1338, 1344 (2015); EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2031-32 (2015).

413. 42 U.S.C. § 12112(b)(4) (2012).

414. *See, e.g.*, Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986); Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 589 (5th Cir. 1998); Ellis v. United Parcel Serv. Inc., 523 F.3d 823, 828 (7th Cir. 2008); *see also* Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209 (2012) (discussing race associational discrimination claims).

415. 562 U.S. 170 (2011).

416. There appear to be more causes of action expressly provided for in the ADA. *See* 42 U.S.C. § 12112 (2012). However, one could argue that section 1981a's provision making compensatory and punitive damages available under the ADA for intentional discrimination, but not disparate impact, cuts against that interpretation. *See* 42 U.S.C. § 1981a(a)(2) (2012).

disparate impact.[417] Declaring that there are only two theories enables the Court to invoke absolute separation of principles and force claims into the affiliated proof frameworks. If the Court is willing to abandon the dichotomy of two theories, it does not jeopardize the established order to recognize forthrightly that there are several theories or causes of action. The Court should expressly recognize that it permits recovery for discrimination based on intent and negligence and continue to permit the development of analyses and principles that facilitate evaluation of claims, such as the frameworks for harassment claims[418] and failure-to-accommodate claims.[419] However, as the Court often has declared, the ultimate issue in cases is whether an adverse employment action was taken because of a protected characteristic of the claimant,[420] and that question changes in light of the *Abercrombie & Fitch* declaration regarding a relaxed causation standard in Title VII to whether discrimination was a "motivating factor" in the adverse employment action.

Recognizing multiple theories faces one statutory impediment. As long as section 1981a distinguishes between "intentional discrimination" and "disparate impact" for purposes of damages and the right to a jury trial, all theories or causes of action will have to be labeled as either "intentional" or "disparate impact." This is not an impediment to recognition of different theories because claims that the Court does not label as "disparate impact" necessarily come under "intentional." Yet, so that the terms used in discrimination doctrine comport with generally accepted meanings, Congress should amend section 1981a as described below to eliminate this "intentional"/ "disparate impact" distinction.

3. Abrogating Pretext and Adopting the Uniform Analysis of Mixed Motives for all Title VII Claims Except Disparate Impact

Many have argued that *Desert Palace* could or should have ended the dichotomy of proof frameworks.[421] Since *Abercrombie & Fitch* pronounced (for the second time)[422] the relaxed standard of causation

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417. *See supra* Part IV.B.1.

418. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) (establishing a framework for analyzing claims of supervisor sexual harassment).

419. *See, e.g.*, Wilson v. U.S. W. Commc'ns, 58 F.3d 1337 (8th Cir. 1995) (setting out the elements for a claim for failure to make reasonable accommodations for religion).

420. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 518 (1993) (stating that "the ultimate question [is] discrimination *vel non*") (quoting U. S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1981)); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

421. *See supra* note 114.

422. The Court's first such pronouncement was in *Nassar*. *See supra* notes 367-70.

in Title VII, the Court should now dispense with the *McDonnell Douglas* framework and declare the statutory mixed-motives framework as applicable to all Title VII intentional discrimination claims, meaning non-disparate impact cases.[423] All such Title VII cases thus would be evaluated under section 703(m)'s "motivating factor" standard, subject to the same-decision defense of section 706(g)(2)(B), which limits remedies if the defendant satisfies its burden. The ultimate question thus focuses specifically, as the Court in *Abercrombie & Fitch* explained, on whether the protected characteristic was a motivating factor of the employer's adverse action.

The Court could achieve more uniformity by also adopting the mixed-motives analysis to resolve causation issues in Title VII retaliation claims under section 704,[424] but to do so the Court would have to overrule *University of Texas Southwest Medical Center v. Nassar*.[425] The Court could achieve even greater uniformity by making the mixed-motives analysis applicable to ADEA claims, which would require overruling *Gross v. FBL Financial Services*.[426]

No congressional action is needed to dispatch with the *McDonnell Douglas* analysis. It is a creation of case law and has never been codified. The mixed-motives analysis, on the other hand, was codified in Title VII by the Civil Rights Act of 1991. The surviving framework must be the statutory one.

C. Congress Could Facilitate Building the New Core by Amending the Statutes

As discussed, the Court and lower courts could work with the existing statutes to rebuild a workable core, breaking from the old dichotomy of theories. However, one amendment to the statutes could facilitate the movement. Congress could amend the statutes in additional ways to remove all vestiges of the dichotomies, but those more extensive amendments raise difficult questions and suggest compre-

423. A logical extension of my arguments regarding blending of theories is that there be a uniform standard of causation across theories. Congress began with the same "because of" language applicable to all claims in sections 703 and 704 of Title VII. I think there is a basis for this uniform standard now. The Court's declaration in *Abercrombie & Fitch* that section 703(m) relaxes the standard of causation in section 703(a) suggests that the motivating factor standard applies to disparate treatment and disparate impact claims under section 703(a). Although there are ways of interpreting around this, it is not an unreasonable interpretation of the language of section 703(m) and the relaxed causation statement of *Abercrombie & Fitch*. If a uniform standard of causation were to be adopted for all theories of discrimination, however, it seems unlikely that "motivating factor" would suffice, as the focus is on motive.

424. 42 U.S.C. § 2000e-3(a) (2012).

425. 133 S. Ct. 2517 (2013).

426. 557 U.S. 167 (2009).

hensive revision of the employment discrimination laws. While I have argued that we have reached a point in the life cycle of our laws where such revision is needed,[427] I also have admitted that such revision is unlikely to happen.[428] Moreover, some amendments that eliminate aspects of the dichotomy of theories should await consideration and development in the Court. What I propose, then, rather than comprehensive reform is a specific amendment that would remove statutory recognition of the dichotomy of theories and would permit express recognition of various theories. I will mention other amendments that could follow later after doctrine develops in the courts.

The amendment most obviously needed is removal of the most prominent codification of the dichotomy: the provision in section 1981a of compensatory and punitive damages and a concomitant right to a jury trial for intentional discrimination claims, meaning claims not based on disparate impact. Only one amendment would completely eradicate the dichotomy of theories and the need to categorize claims—removing the reference to the theories from the statute. Congress could amend the statute to make damages and jury trials available for all employment discrimination claims. I consider this the preferable amendment because it is most consistent with abolishing the dichotomy of theories and recognizing a variety of theories. Moreover, this change is most consistent with current law, as most claims now come within the definition of intentional discrimination, meaning not disparate impact.[429] Furthermore, the limitation of damages to intentional discrimination claims is not a result of careful consideration by Congress of under what circumstances damages should be available in discrimination cases. Instead, it resulted from the availability of damages under section 1981[430] for race cases, and the Court's interpretation that disparate impact claims are not cognizable under section 1981.[431] If, however, Congress were unwilling to make damages available for all employment discrimination cases, it is possible to craft other amendments that delete references to "intentional discrimination" and "disparate impact." The approaches

427. *See* William R. Corbett, *What Is Troubling About the Tortification of Employment Discrimination Law?*, 75 OHIO ST. L.J. 1027, 1058-61 (2014); William R. Corbett, *Calling on Congress: Take a Page from Parliament's Playbook and Fix Employment Discrimination Law*, 66 VAND. L. REV. EN BANC 135 (2013).

428. *See supra* note 427.

429. *See supra* Part IV.B.1.

430. 42 U.S.C. § 1981 (2012).

431. Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (2002). *See* H.R. REP. NO. 102-40, at 2-4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 717 ("It is the Committee's intention that damages should be awarded under Title VII in the same circumstances in which such awards are now permitted under U.S.C. [§] 1981 in intentional race discrimination cases.").

would be establishing a standard for proving into or out of damages. Because the vast majority of claims now fit under the category of intentional, not disparate impact, the approach that is more consistent with both the current state of the law and Congress's purpose in the 1991 Act is to provide for damages unless a defendant proves it is entitled to avoid them. An example of this approach is found in the Fair Labor Standards Act,[432] in which liquidated damages are available unless the defendant satisfies the burden of proving it was "in good faith" and "had reasonable grounds for believing" that it was not violating the Act.[433] This approach also would be consistent with Congress's adoption in the Civil Rights Act of 1991 of the "same-decision defense" under the statutory mixed-motives analysis in section 706(g)(2)(B).[434] Under this defense, a plaintiff is entitled to all relief available, including damages, unless a defendant can prove out of such relief by establishing that it would have taken the same action "in the absence of the impermissible motivating factor."[435] A different approach, and one that seems less consistent with the purpose of the 1991 Act and current law, is to require plaintiffs to prove entitlement to damages. The ADEA, for example, provides for liquidated damages in cases of "willful violations."[436] Similarly, section 1981a authorizes recovery of punitive damages only if an employer commits an unlawful practice "with malice or with reckless indifference."[437] Thus, there are several different amendments that could be made in section 1981a to create availability of damages and jury trials on a basis other than the distinction between intentional discrimination and disparate impact claims.

A second statutory recognition of the dichotomy between treatment and impact is the prohibition on using business necessity as a defense to a claim of intentional discrimination in section 703(k)(2).[438] The Court articulated this principle in *UAW v. Johnson Controls*,[439] and Congress codified it in the Civil Rights Act of 1991. The underlying idea is that the statutory defense of bona fide occupational qualification[440] is a defense to disparate treatment, and that defense

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432. 29 U.S.C. §§ 201-219 (2012).

433. *Id.* § 260 (2012).

434. 42 U.S.C. § 2000e-5(g)(2)(B) (2012).

435. *Id.*

436. 29 U.S.C. § 626(b) (2012). The Supreme Court interpreted "willful" as meaning that the employer "knew or showed reckless disregard" for whether its conduct violated the ADEA. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 126 (1985).

437. 42 U.S.C. § 1981a(b)(1) (2012).

438. 42 U.S.C. § 2000e-2(k)(2) (2012).

439. 499 U.S. 187 (1991).

440. 42 U.S.C. § 2000e-2(e)(1) (2012).

should be more difficult to satisfy than the defense to disparate impact (business necessity and job relatedness). Although this statutory provision does maintain the dichotomy to the extent of providing for distinct defenses for treatment and impact, the matter of a uniform defense within Title VII, let alone the ADEA and the ADA, which have different defenses,[441] is a game that is not worth the candle at this point. Attempting to create a uniform defense in Title VII alone necessarily would raise the issue of the codification of the entire disparate impact framework in section 703(k) by the 1991 Act because it codifies the stages of business necessity/job relatedness[442] and alternative employment practice.[443] Thus, purging the statutes of all vestiges of the dichotomy of theories tends toward a comprehensive reconsideration and revision of the employment discrimination laws that could harmonize Title VII, the ADEA, and the ADA. While I advocate such a comprehensive revision, it should, and undoubtedly will, await some doctrinal movement and changes by the Court.[444]

VI. CONCLUSION

The core of employment discrimination law is a dichotomy of theories of discrimination purportedly embodied in distinct statutory sections of Title VII. The theories and all principles associated with them must be kept separate. There are proof frameworks associated with each of the theories. They, too, are distinct. Every discrimination claim must be evaluated by categorizing it under a theory and then funneling the evidence into a proof structure. The two theories of discrimination are exclusive; all claims must come under one of the two. This is the rigid structure at the core of employment discrimination law.

In 2015, the Court's decisions in *Young* and *Abercrombie & Fitch* exposed the destabilized core as the majority opinions blended principles of the two theories and applied one disparate treatment proof

441. The ADEA's defense to disparate impact is, by Court interpretation, "reasonable factors other than age" set forth in 29 U.S.C. § 623(f). Smith v. City of Jackson, 544 U.S. 228, 239 (2005). The ADA has a defense of direct threat. 42 U.S.C. § 12113(b) (2012). This ADA defense seems roughly analogous to the bona fide occupational requirement (BFOQ) defense of Title VII and the ADEA, but it likely is not as broad, requiring individualized analysis rather than blanket exclusion as permitted under BFOQ. *See* Ann Hubbard, *The ADA, the Workplace, and the Myth of the "Dangerous Mentally Ill*,*"* 34 U.C. DAVIS L. REV. 849, 894 (2001).

442. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

443. *Id.* § 2000e-2(k)(1)(A)(ii).

444. An amendment of Title VII and the ADEA, modeled on the ADA prohibition of discrimination, 42 U.S.C. § 12112, could prompt the Supreme Court to recognize multiple theories of discrimination. However, I think there is almost no chance that Congress would take the lead in enacting such an amendment.

framework in each case while undermining the continuing viability of *McDonnell Douglas*. Nonetheless, the Court declared the exclusivity of the two theories and insisted that is was maintaining the dichotomy. The Court further undermined the case for the dichotomy when it told a new version of the story of the two subsections of Title VII from which the theories emanate in *Inclusive Communities*.

Considering theories of discrimination, it is not surprising that it was two cases involving failure-to-accommodate claims that prompted the Court to blend theories. Accommodation does not fit neatly within treatment or impact. Moreover, Congress's incorporation of accommodation provisions into definitional sections of Title VII permitted the Court to attempt to fit the accommodation claims within disparate treatment rather than to recognize another freestanding theory of discrimination.

The Court's 2015 opinions in *Young* and *Abercrombie & Fitch* reveal that the myth of the dichotomy of theories and proof structures is no longer viable. However, rather than dreading the potential for chaos in employment discrimination law, we should welcome the potential for innovation and creativity that lurks in *Young* and *Abercrombie & Fitch*. Some help is needed from Congress to amend the employment discrimination statutes. In the meantime, the Supreme Court could fashion a new core that is supported by the statutes and is not tethered to a dichotomy of theories or proof frameworks. But, to do so the Court must recognize the inadequacy of the accidental dichotomies and move past them. The Court could not bring itself to do so in *Young* and *Abercrombie & Fitch*.