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The Tort Label

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INTRODUCTION

Courts and commentators often label federal discrimination statutes as torts.[1] Since the late 1980s, the courts increasingly applied tort concepts to these statutes.[2] This Article details a radical shift in the prominence and importance of tort law within discrimination jurisprudence. It then explores how the Supreme Court's modern statutory analysis misunderstands both tort law and discrimination law.

The Supreme Court's use of tort common law in discrimination cases has become more robust and automatic over time. In the late 1980s, the Court noted that "common-law principles may not be transferable in all their particulars to Title VII."[3] By 2011, the Court declared: "[W]e start from the premise that when Congress creates a federal tort it adopts the background of general tort law."[4] It then automatically applied proximate cause to an employment statute.[5] The Supreme Court now claims that discrimination statutes' status as torts conveys specific textual statutory meaning.[6]

The reflexive use of tort law in employment discrimination cases is problematic for many reasons. When applying tort law to discrimination claims, the Court fails to consider the important fact that Congress fundamentally altered the common law employment relationship when it made it illegal for employers to discriminate based on protected traits. The Court counterintuitively assumes that even though the discrimination statutes change the common law—the at-will employment relationship—Congress meant to retain common law meanings for statutory words. This argument is facially problematic, especially because the Supreme Court did not interpret the Age Discrimination in Employment Act of 1967 (ADEA)

1. Staub v. Proctor Hosp., 131 S. Ct. 1186, 1192 (2011); Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2350 (2009); Shager v. Upjohn Co., 913 F.2d 398, 404 (7th Cir. 1990); DAN B. DOBBS, THE LAW OF TORTS § 102, at 237 n.2 (2000); David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 72 n.33 (1995). *But see* Robert Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235 (1988) (arguing that common law causation principles should not be robustly applied to discrimination law).

2. For a complete discussion of this evolution of thought, see *infra* Part I. *See also* Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 7 (1990) (discussing decisions from the 1989 Supreme Court term that applied common law concepts to employment law).

3. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986), *quoted in* Faragher v. City of Boca Raton, 524 U.S. 775, 792 (1998).

4. *Staub*, 131 S. Ct. at 1191.

5. *Id.* at 1192.

6. *See, e.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2532–33 (2013).

or Title VII of the Civil Rights Act of 1964 through a common law lens during the first three decades after their enactment.[7]

The tort label is also difficult to mesh with textualist statutory interpretation. The discrimination statutes are not structured like torts and do not rely primarily on tort terms of art. When plaintiffs prove discrimination claims, they are not proving elements that mimic any traditional common law tort. Another conceptual error occurs when the Court borrows indiscriminately from across tort regimes without recognizing that various pockets of tort obligations reflect different doctrinal choices that may not transfer well to other pockets of obligation. For example, the Supreme Court repeatedly applies negligence concepts to discrimination claims, even though it also claims that disparate treatment claims require proof of intent.[8]

The tort label also overestimates the work that tort law can adequately perform in statutory interpretation. Tort law generally does not have independent descriptive power. It does not cohere around a narrow enough set of theoretical or doctrinal concepts to provide an answer to many statutory questions. The Supreme Court often ignores the possibilities provided by tort law and explains tort law as being more fixed, narrow, and normatively uncontested than it actually is.

When the Court describes tort law, it has already made important choices about which portions of tort law to integrate into discrimination law, and these choices involve narrow conceptions of causation and harm. Using this narrow tort frame leads to discrimination law that is primarily concerned with individual remedies, rather than a broader response to societal discrimination. The move to tort law is thus part of a broader story about the privatization of discrimination law that can be seen in the greater acceptance of private arbitration[9] and the move away from systemic discrimination claims.[10]

Prioritizing a narrow view of tort law removes textually supportable options from statutory analysis without meaningful discussion about why the courts narrowed the potential statutory landscape. The courts never consider whether their narrow notions of tort causation and harm are reflected in the discrimination statutes' text, intent, or purpose. The primary aim of this Article is to urge courts to respect the complexity of the judgments at issue by resisting the simple, but also simplistic, allure of the reflexive use of tort law. While these errors are problematic when tort

7. *See infra* Section I.A.

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

9. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1465–66 (2009) (enforcing a union agreement to arbitrate individual civil rights claims).

10. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552, 2561 (2011) (holding that each plaintiff had to establish that she was discriminated against in the same way).

law is used as persuasive authority, they become even more problematic when tort law is given a high priority in discrimination analysis.

This is not to argue that tort law has no place in statutory construction. It provides a language for discussing competing concerns and encapsulates a wealth of prior thinking about difficult issues. Theoretical and doctrinal debates in tort law are important because they help to elucidate which values should be prioritized and why. But calling a statute a tort does not automatically ground it in a specific theoretical construct or even a narrow range of constructs and thus the explanatory power of the organizational label is weak.

This Article demonstrates the dangers of the tort label, using the lens of two core discrimination statutes: Title VII and the ADEA.[11] However, the discussion has broader implications. Courts have applied the tort label to a variety of statutes and in a wide array of contexts.[12]

This Article proceeds as follows. Part I discusses the move to tortify federal discrimination law. Parts II, III, and IV highlight serious problems with the way the courts understand, use, and apply tort law in the discrimination context. Part V discusses the stakes of the tort label, including its tendency to lead to unsatisfactory reasoning that is not supported by congressional intent or by the statutes' text, history, or structure.

I. THE TORTIFICATION OF EMPLOYMENT DISCRIMINATION

Courts, the Equal Employment Opportunity Commission (EEOC), and legal scholars often describe the core federal antidiscrimination statutes as torts.[13] Over the past several decades, courts have increasingly used tort

11. 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. V 2011) (Title VII); 29 U.S.C. §§ 621–34 (2006 & Supp. V 2011) (ADEA). The arguments made in this Article are applicable in the ADA context as well. 42 U.S.C. §§ 12101–213 (2006 & Supp. V 2011) (ADA). The author is not making arguments about cases brought pursuant to 42 U.S.C. § 1981 (2006).

12. *See, e.g.*, Rehberg v. Paulk, 132 S. Ct. 1497, 1502 (2012) (describing how the Supreme Court has applied common law immunity principles to claims under § 1983); Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011) (applying tort doctrines to the Uniformed Services Employment and Reemployment Rights Act and citing cases); Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 543 (1994) (applying common law negligence concepts to the Federal Employers' Liability Act (FELA)); Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 531–33 (1983) (describing the application of common law rules to the Sherman Act).

13. *See* Shager v. Upjohn Co., 913 F.2d 398, 404 (7th Cir. 1990) (referring to the ADEA as a statutory tort); Oppenheimer, *supra* note 1, at 72 n.33; Cheryl Krause Zemelman, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 196–97 (1993) (discussing the wide acceptance of Title VII violations as torts). Two commentators note that the move to the tort common law was cemented during the 1989 Supreme Court term. *See* Blumoff & Lewis, *supra* note 2, at 3. *But see* William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let*

law to interpret these statutes. This Part discusses how the Supreme Court has changed the way it invokes tort law over time.

A. *The Pre-Tort Years: 1964–1988*

Title VII, which is considered to be the cornerstone federal discrimination statute, provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[14]

Although not identical, the ADEA has similarly broad operative language.[15] The language of both of these statutes is inexact, and Congress did not specifically define key concepts such as "otherwise to discriminate" or "because of."[16]

Early Supreme Court decisions interpreting these statutes did not explicitly invoke tort law to define key concepts, such as causation, intent, or harm. In 1971, the Supreme Court decided *Griggs v. Duke Power Co.*,[17] its first case to consider intent, causation, and harm questions under Title VII. In *Griggs*, the Court recognized a disparate impact theory under Title VII[18] and, in doing so, the Court did not draw upon tort law. The Court explicitly rejected the idea that Title VII requires a showing of intent.[19] The reasoning of the case focused on the goals of Title VII, the interests of

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Employment Discrimination Speak for Itself, 62 AM. U. L. REV. 447, 478 (2013) (arguing that the 1973 *McDonnell Douglas* decision was a masked form of res ipsa loquitur).

14. 42 U.S.C. § 2000e-2(a) (2006).

15. 29 U.S.C. § 623(a) (2006). This Article does not significantly discuss the Americans with Disabilities Act, although it contains broad operative language similar to that of Title VII and the ADEA. 42 U.S.C. § 12112(a) (Supp. V 2011).

16. *See* 29 U.S.C. § 630; 42 U.S.C. § 2000e.

17. 401 U.S. 424 (1971).

18. *See id.* at 430–31.

19. *Id.* at 432.

employers, and an eye toward the practical realities of rules that created "built-in headwinds."[20] The Court also recognized that EEOC guidelines were entitled to deference.[21]

In 1973, the Court decided *McDonnell Douglas Corp. v. Green*,[22] the next major case to explain the core protections of Title VII. In *McDonnell Douglas*, the Supreme Court created a three-part, burden-shifting test for analyzing individual disparate treatment cases.[23] Under *McDonnell Douglas*, a court first evaluates the prima facie case, which requires proof of the following:

> (i) [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[24]

If the plaintiff establishes the prima facie case, a rebuttable presumption of discrimination arises.[25] The burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for rejecting the employee.[26] If the defendant meets this requirement, the plaintiff can still prevail by demonstrating that the defendant's reason for the rejection was simply pretext.[27] This three-part test does not invoke specific tort principles and does not mimic any particular tort.

During this time, the Court also determined the contours of pattern or practice claims and religious accommodation claims without relying on tort doctrine.[28] The strongest use of tort ideas during this time period occurred in the remedies context.[29] In *Albemarle Paper Co. v. Moody*,[30] the

20. *Id.* at 430–32 (internal quotation marks omitted).

21. *Id.* at 433–34.

22. 411 U.S. 792 (1973).

23. *Id.* at 802–04.

24. *Id.* at 802. The factors considered in the prima facie case may vary depending on the factual scenario presented in the case. *Id.* at 802 n.13.

25. *Id.* at 802.

26. *Id.*

27. *Id.* at 804. In later cases, the Court clarified how the test operates, but the Court did not rely on tort concepts in these later cases. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507–08 (1993); Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254–56 (1981).

28. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84–85 (1977); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 360–61 (1977).

29. Recently, the Supreme Court implied that *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978), used tort law. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2524–25 (2013). While the case did use the words, "but for," there is no strong indication that the Court was invoking tort law. *Manhart*, 435 U.S. at 711.

30. 422 U.S. 405 (1975).

Supreme Court described Title VII as requiring a "make whole" remedy.[31] However, this analysis was not based solely on tort law, as the Court also invoked contract principles.[32] It also noted that Title VII's back pay remedy derived from the National Labor Relations Act (NLRA).[33] In another case, in a nonemployment civil rights context, a plurality rejected the idea that "a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated."[34]

Toward the end of this era, the Court also suggested that it would be appropriate to apply common law principles of agency to sexual harassment claims, but declined to definitively rule on this issue.[35] Importantly, the Court noted that "such common-law principles may not be transferable in all their particulars to Title VII."[36]

Until 1989, the Supreme Court did not rely heavily on tort analysis or common law analysis in discrimination cases brought under Title VII or the ADEA.[37] Rather, the initial contours of pattern and practice, disparate

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31. *Id.* at 418–19 (internal quotation marks omitted). The Court further reasoned:

> If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the "make whole" purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in "bad faith."

Id. at 422; *see also* Ford Motor Co. v. EEOC, 458 U.S. 219, 230 (1982) (discussing the make whole purpose of Title VII); Lorillard v. Pons, 434 U.S. 575, 583 (1978) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary." (alteration in original) (quoting Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59 (1911)) (internal quotation marks omitted)); Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976) (discussing the make whole nature of a Title VII remedy); *id.* at 774–75 & n.34 (also noting that the NLRA is the model for discrimination damages).

32. *Moody*, 422 U.S. at 418–19 (citing Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867)); *see also* Hishon v. King & Spalding, 467 U.S. 69, 74 (1984) (using contract language to describe Title VII).

33. *Moody*, 422 U.S. at 419.

34. City of Riverside v. Rivera, 477 U.S. 561, 574 (1986).

35. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

36. *Id.*

37. *See* Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 91–92 (1981) (rejecting a common law right of contribution under Title VII); Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253–54 (1981) (discussing how the presumption created by a prima facie case is a feature of the common law created by previous Supreme Court cases). In *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976), the Court indicated that a plaintiff could prevail if she established "but for" cause. In a later case, the plurality noted that this did not describe the minimal causal standard that a plaintiff is required to meet. Price Waterhouse v. Hopkins, 490 U.S. 228, 240 n.6 (1989) (discussing that the plaintiff does have to show a "but for" cause, but if the plaintiff is able to, she will prevail).

treatment, sexual harassment,[38] and disparate impact occurred without heavy reliance on tort law.[39]

B. *The Middle Years: 1989–2008*

The Supreme Court's decision in *Price Waterhouse v. Hopkins*[40] is a watershed case in the intersection of tort and discrimination law. After this case, the Supreme Court began to use tort law more often in discrimination cases. However, during this period the use of tort law was not usually automatic, and when the Court invoked tort law, it balanced the use of tort law principles with the needs of the discrimination statutes.

In *Price Waterhouse*, the Supreme Court considered whether a plaintiff could prevail on a Title VII claim if she could show that both legitimate and discriminatory reasons played a role in the employer's refusal to promote her.[41] In a concurring opinion, Justice Sandra Day O'Connor proclaimed that Title VII is a "statutory employment 'tort.'"[42]

Justice O'Connor's use of the tort label is problematic in several respects. Justice O'Connor cited no authority for this statement.[43] She does not provide a historical, theoretical, or doctrinal account of the relationship between common law torts and Title VII.[44] Her description of tort law is narrow to the extent that she characterized the words "because of" to mean "but for" cause.[45] Justice O'Connor described tort causation as requiring "but for" cause, but did not note that the common law also provides other factual cause standards.[46]

At the same time, her concurrence did not reflect the rigid formality that would occur in later cases. While Justice O'Connor believed that causation meant "but for" cause, she disaggregated this question from the question of

38. *Meritor*, 477 U.S. at 67; Martha Chamallas, *Beneath the Surface of Civil Recourse Theory*, 88 IND. L.J. 527, 538–39 (2013) (discussing a debate about the intersection of tort law and sexual harassment).

39. The minimal role played by tort law during this period is even more remarkable given that the Supreme Court had conceptualized other civil rights statutes as torts during this period. For example, in 1974, the Court characterized the housing discrimination provisions of the Civil Rights Act as "sound[ing] basically in tort." Curtis v. Loether, 415 U.S. 189, 195–96 (1974). The Court was not able to decide what the closest tort analog should be. *See id.* at 195 & n.10 (arguing that housing discrimination could be like common law innkeeper duties, defamation, intentional infliction of emotional distress, or a dignitary tort).

40. 490 U.S. 228.

41. *Id.* at 232.

42. *Id.* at 264 (O'Connor, J., concurring in the judgment).

43. *Id.*

44. *See id.* at 261–79.

45. *Id.* at 262–63 (citing Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 499 (1986) (White, J., dissenting)).

46. *Id.*; *see, e.g.*, Taylor v. Fishkind, 51 A.3d 743, 759 (Md. Ct. Spec. App. 2012) (recognizing "substantial factor" as a factual cause standard in tort causation).

which party was responsible for proving causation.[47] Justice O'Connor viewed the case as requiring the Court to determine "what allocation of the burden of persuasion on the issue of causation best conforms with the intent of Congress and the purposes behind Title VII."[48] Her analysis drew on the foundation of prior Title VII and constitutional cases but did not describe how the common law of torts intersects with these statutory and constitutional sources.[49] She also recognized that given the specific ways employment decisions are made, requiring a plaintiff to prove that a protected trait was a definitive reason for an employment outcome may be "tantamount to declaring Title VII inapplicable to such decisions."[50]

The other Justices' responses to Justice O'Connor's claim that Title VII is a tort demonstrated the weak power of the tort label in 1989. A plurality of four Justices described the statutory problem before it, not through the lens of tort law, but rather as a broader question about the nature of causation.[51] The issue was not about what tort law required, but about what kind of conduct violates Title VII. The plurality recognized that this question required the Court to consider how Title VII balanced the interests of employees and employers.[52] It rejected the idea that causation meant that the plaintiff is required to establish "but for" cause.[53] The plurality reasoned that "[t]o construe the words 'because of' as colloquial shorthand for 'but-for causation,' . . . is to misunderstand them."[54] Justice Byron White's concurrence also rejected the automatic use of tort law to resolve the case, and instead relied on First Amendment case law.[55]

The dissent in *Price Waterhouse* is also relevant to the development of the tort label. Justice Anthony Kennedy, joined by Chief Justice William Rehnquist and Justice Antonin Scalia, reasoned that to impose a standard less than "but for" cause is to "impose liability without causation."[56] This statement about tort law is simply incorrect and foreshadowed later misunderstanding of tort law. The dissent also tried to characterize prior Title VII cases as relying on tort law, even though the cases themselves did not specifically draw on tort law.[57]

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47. *Price Waterhouse*, 490 U.S. at 262–63 (O'Connor, J., concurring in the judgment).

48. *Id.* at 263. Justice O'Connor cited multiple tort cases that allowed burden shifting to bolster her position. *Id.* at 263–64.

49. *See id.*

50. *Id.* at 273.

51. *Id.* at 237 (plurality opinion).

52. *Id.* at 239.

53. *Id.* at 239–40.

54. *Id.* at 240.

55. *Id.* at 258–60 (White, J., concurring in the judgment).

56. *Id.* at 282 (Kennedy, J., dissenting).

57. *Id.* at 282; *see, e.g.*, Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867 (1984); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

In 1991, Congress responded to *Price Waterhouse* and other decisions by amending Title VII.[58] Importantly, the 1991 amendments do not mimic tort common law. Congress inserted language in Title VII to clarify that a plaintiff may prevail under Title VII if she establishes that a protected trait was a "motivating factor" for a decision, and the employer may establish a defense only if it shows it would have made the same decision absent a protected trait.[59] Congress also amended Title VII's disparate impact provisions, and these amendments also do not mimic tort law.[60]

Price Waterhouse foreshadowed the importance of tort law in the employment discrimination context, but the immediate period after *Price Waterhouse* did not witness the extensive use of tort principles.[61] During this time period, the Supreme Court decided many important cases without relying on tort law. In recognizing disparate impact under the ADEA, the Court relied on Title VII case law, the text of the ADEA, and EEOC regulations.[62] The Court clarified the causal standard required for Title VII and ADEA disparate impact cases without using tort law.[63] The Court discussed causal connections in the ADEA by stating that age had to play a "determinative" role in the outcome of the case.[64] Even when the Court held that an adverse action in a retaliation context had to be something that would dissuade a reasonable person from complaining, it did not invoke tort law for the reasonable person standard.[65] During this period, when the

58. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; *see also* Landgraf v. USI Film Prods., 511 U.S. 244, 250–51 (1994) (stating that "[t]he 1991 [Civil Rights] Act is in large part a response to a series of decisions of this Court," including *Price Waterhouse*).

59. Civil Rights Act of 1991 § 107(a) (codified at 42 U.S.C. § 2000e-2(m) (2006)) (codifying the "motivating factor" criterion); *id.* § 107(b) (codified at 42 U.S.C. § 2000e-5(g)(2)(B)) (establishing the employer's defense).

60. *Id.* § 105 (codified as amended at 42 U.S.C. § 2000e-2(k)). *See generally* Smith v. City of Jackson, 544 U.S. 228, 240 (2005). In 1991, Congress also provided enhanced remedies under Title VII and these could be characterized as tort-like. However, Title VII narrowly defines compensatory damages and has a cap on total compensatory damages and punitive damages that is not tied to harm, but rather to the size of the employer. 42 U.S.C. § 1981a(a)–(b). Further, Title VII's back pay provision has been characterized as deriving from contract. Those who argue that enhanced damages make Title VII more tort-like would also need to consider whether the lack of these damages in the ADEA context makes that statute less like a tort.

61. UAW v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991) (using the term "but for," but failing to clarify whether the term is being used in its tort sense).

62. *Smith*, 544 U.S. at 233–40. In this case, a concurrence by Justice O'Connor indicated that the words "because of" in the ADEA context meant intent or motive. *Id.* at 249 (O'Connor, J., concurring in the judgment).

63. Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 95–96 (2008); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656–57 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–75 (codified at 42 U.S.C. § 2000e-2(k)), *as recognized in* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003).

64. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000) (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)) (internal quotation marks omitted).

65. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68–70 (2006).

Court invoked tort law, it often rejected portions of tort analysis and argued that "common-law principles may not be transferable in all their particulars to Title VII."[66]

Two tax cases during this period also rejected tort labels. In *United States v. Burke*, the Supreme Court held that the remedies available in Title VII cases prior to 1991 did not reflect tort-like ideas of injury and remedy.[67] In a concurring opinion, Justice David Souter noted that there are reasons to both place Title VII within and also to exclude it from the realm of torts.[68] He noted that discrimination causes a tort-like dignitary harm, but argued that the primary remedy of back pay is contractual in nature and that Title VII's ban on discrimination is an implied contractual term in employment relationships.[69] Justices O'Connor and Clarence Thomas dissented, arguing that even though Title VII did not have tort-like remedies, its purposes and operation are like those of tort law.[70] *Burke*'s rejection of tort law was a narrow one because the Court noted that the 1991 amendments to Title VII evinced more tort-like remedies.[71]

In *Commissioner v. Schleier*, the Court reasoned that the ADEA is not "based upon tort or tort type rights" because it does not provide a comprehensive remedies structure.[72] Justice O'Connor and two other Justices dissented in *Schleier*, arguing that the ADEA results in a personal injury, as that term is defined for tax purposes.[73] Justice O'Connor compared the ADEA to a defamation tort claim and noted that the availability of a jury trial and liquidated damages makes the ADEA tort-like.[74]

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66. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544–45 (1999) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986)) (internal quotation marks omitted) (discussing tort law with respect to punitive damages). In some cases, references to tort sources are not used to imbue the statute with tort law. *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624, 650 (1998) (quoting a torts treatise for the idea that medical professionals can deviate from a consensus view). The Supreme Court has also applied tort reasoning to other federal employment statutes. *See, e.g.*, Consol. Rail Corp. v. Gottshall, 512 U.S. 532 (1994).

67. United States v. Burke, 504 U.S. 229, 241 (1992), *superseded by statute on other grounds*, Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605, 110 Stat. 1755, 1838 (codified as amended at I.R.C. § 104 (2006)); *see also* Comm'r v. Schleier, 515 U.S. 323, 330–31, 336 (1995) (holding that certain ADEA damages are independent of personal injury damages), *superseded by statute on other grounds*, Small Business Job Protection Act of 1996 § 1605.

68. *Burke*, 504 U.S. at 246–48 (Souter, J., concurring).

69. *Id.* at 247–48.

70. *Id.* at 248–49 (O'Connor, J., dissenting).

71. *Id.* at 241 n.12 (majority opinion).

72. *Schleier*, 515 U.S. at 336 (quoting 26 C.F.R. § 1.104-1(c) (2013)) (internal quotation marks omitted).

73. *Id.* at 342–43 (O'Connor, J., dissenting).

74. *Id.* at 341–43.

Outside of *Price Waterhouse*, the most robust use of the common law during this period came in cases that dealt with agency principles and statutory coverage.[75] In *Clackamas Gastroenterology Associates v. Wells*, the Court noted that when a statute uses a word with a settled meaning at common law, then the Court would use the common law to fill any gaps in meaning.[76] The Court then referred to common law master-servant law to help resolve the case, even though the type of entity at issue in the case, the professional corporation, did not exist at the common law.[77] *Clackamas* is typical of the cases during this period as its holding does not adopt the common law wholesale. Rather, the Court used the common law to justify applying a test created by the EEOC, a test that does not mimic the common law in all respects.[78]

In *Faragher v. City of Boca Raton*[79] and *Burlington Industries v. Ellerth*,[80] the Supreme Court decided when employers would be liable for the actions of agents in harassment cases. The Court repeatedly relied on agency principles applicable to tort claims.[81] However, neither opinion discussed why the Court applied tort law agency principles to discrimination claims, other than noting that Title VII uses the term "agent."[82] Further, these cases balance agency considerations with what the Court claimed are limits imposed by Title VII.[83] As discussed in more detail later, the Court created a new law of agency for Title VII harassment cases that does not mimic agency law applied in tort cases.[84]

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75. Some may argue that the use of a reasonable person standard in harassment cases is tort-like, but reasonableness is used to define the severity of the harm and considers the reasonable person's perception of harm, s*ee* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993), unlike the tort concept of a reasonable person, which determines the standard of care the defendant owes the plaintiff. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 3 (2010). The Supreme Court did not invoke tort law when defining sexual harassment to contain a reasonable person test, and the factors the Court directs lower courts to consider in defining when a reasonable person would objectively encounter harm are different than how the reasonable person test is conceived in the common law. *Harris*, 510 U.S. at 21–22. Further, the reasonable person standard is also used in criminal law and in contracts.

76. *Clackamas*, 538 U.S. 440, 447 (2003). In *Kolstad v. American Dental Ass'n*, the Court used the common law of remedies and agency and cited the restatements of torts and agency relating to punitive damages and vicarious liability, respectively. 527 U.S. 526, 537─38, 542–44 (1999). The Court also created a hybrid legal doctrine that does not rely purely on tort or agency law. *Id.* at 545–46.

77. *Clackamas*, 538 U.S. at 447–48.

78. *Id.* at 448–51.

79. 524 U.S. 775 (1998).

80. 524 U.S. 742 (1998).

81. *Faragher*, 524 U.S. at 793–94, 796–97, 801–02; *Ellerth*, 524 U.S. at 755–60; *see also Kolstad*, 527 U.S. at 542–45; Baker v. Weyerhaeuser Co., 903 F.2d 1342, 1346 (10th Cir. 1990) (using tort principles of vicarious liability to assess defendant–employer's liability for Title VII hostile-work-environment sexual harassment).

82. *See Faragher*, 524 U.S. at 791–92.

83. *See, e.g.*, *id*. at 792.

84. *See infra* notes 272–76 and accompanying text.

Faragher and *Ellerth* made several references to tort law. *Faragher* held that an employer will be liable for coworker harassment if the employer is negligent in allowing the conduct to occur.[85] It indicated that one objective of Title VII is to make an individual whole.[86] In *Ellerth*, the Court discussed workplace tortfeasors and the concept of avoidable consequences.[87] Despite the references to tort law, the doctrine created in *Faragher* and *Ellerth* is not tort law. Rather, it is a hybrid of agency law, tort law, prior case law in discrimination cases, and Title VII remedies principles.

C. *The Modern Cases: 2009 to Present*

Three opinions during this time period show a change in the way that tort law is invoked in discrimination cases: *Gross v. FBL Financial Services*,[88] *Staub v. Proctor Hospital*,[89] and *University of Texas Southwestern Medical Center v. Nassar*.[90] In these three cases, the use of tort law commands a majority of the Court. The use of tort law is also tied to textual claims, where certain words or concepts in discrimination law are directly interpreted through the lens of tort law.

In *Gross*, the Court held that the ADEA required a showing of "but for" cause.[91] In so holding, the Court rejected the idea that the ADEA should use the same causal standard as Title VII. After rejecting the Title VII causal standard, the Justices were faced with a choice. What should the ADEA's causal standard be? For the majority opinion, the answer was simple. The words "because of" mean "but for" cause.[92] In support of this proposition, Justice Thomas cited two cases outside the employment discrimination context as well as a torts treatise.[93] Just like Justice O'Connor's concurrence in *Price Waterhouse*,[94] Justice Thomas did not explain why citing a torts treatise was appropriate. To reach this holding, Justice Thomas was required to ignore a prior Supreme Court case that

85. *Faragher*, 524 U.S. at 807–08.

86. *Id.* at 805–06.

87. Burlington Indus. v. Ellerth, 524 U.S. 742, 760, 764 (1998); *see also* Pa. State Police v. Suders, 542 U.S. 129, 146 (2004) (noting *Faragher*'s and *Ellerth*'s use of the doctrine of avoidable consequences). Importantly, in an earlier decision, the Court noted that the avoidable consequences doctrine is a general principle of remedies in both the torts and contracts contexts. Ford Motor Co. v. EEOC, 458 U.S. 219, 231 & n.15 (1982).

88. 129 S. Ct. 2343 (2009).

89. 131 S. Ct. 1186 (2011).

90. 133 S. Ct. 2517 (2013).

91. *Gross*, 129 S. Ct. at 2352 (internal quotation marks omitted).

92. *See id.* at 2350.

93. *Id.* (citing Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 653–54 (2008) and Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 63–64 & n.14 (2007)).

94. *See supra* notes 43–46 and accompanying text.

suggested a different conclusion.[95] Importantly, the opinion ignored that tort common law provides more than one factual cause standard.

The *Gross* decision is also notably different than O'Connor's concurrence in *Price Waterhouse*. It is strongly textual and purports to rely on the plain meaning of the words "because of."[96] The opinion did not grapple with whether the "but for" standard furthers the goals of the ADEA.[97] The opinion also stated that the plaintiff bears the burden of proving "but for" cause because this is the typical way burdens are allocated in litigation.[98] If Congress wanted to upset this typical allocation, it is required to explicitly do so.[99] This statement is strange given that *Price Waterhouse* allocated burdens differently without an express statutory provision and that tort law also allows for burdens to be allocated differently in some scenarios.

The Supreme Court also invoked common law tort principles in *Staub v. Proctor Hospital*, in which the Court interpreted the Uniformed Services Employment and Reemployment Rights Act (USERRA) as containing a proximate cause element, even though the statute does not use the term "proximate cause."[100] The Court's short analysis began with the statement: "[W]e start from the premise that when Congress creates a federal tort it adopts the background of general tort law."[101]

Staub used two common law ideas: intent and proximate cause. The Court noted that intent requires a person to intend the consequences of his actions or believe that consequences are substantially certain to occur.[102] The Court also cited the *Restatement (Second) of Torts* and cases that relied on common law proximate cause arguments to define proximate cause in the USERRA context.[103] Lower courts have applied and are likely to keep applying this reasoning in the Title VII context because in the

95. *Gross*, 129 S. Ct. at 2351–52 (indicating that *Price Waterhouse* should not be extended to the ADEA because the current Supreme Court Justices may not resolve the question the same way and because its framework is unworkable).

96. *See id.* at 2350 (defining the phrase by referring to 1 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 194 (1966), 1 OXFORD ENGLISH DICTIONARY 746 (1933), and THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 132 (1966)).

97. Justice Breyer's dissent argued that "but for" cause is problematic in cases involving motives rather than physical forces. *Id.* at 2358–59 (Breyer, J., dissenting). He also recognized that the defendant is in the better position to understand why an employment decision is made. *Id.* at 2359.

98. *Id.* at 2351 (majority opinion).

99. *Id.*

100. Staub v. Proctor Hosp., 131 S. Ct. 1186, 1190–92 (2011).

101. *Id.* at 1191.

102. *Id.* at 1191, 1192 & n.2.

103. *Id.* at 1192 & n.2 (citing Hemi Grp., LLC v. City of N.Y., 130 S. Ct. 983, 989 (2010), Sosa v. Alvarez-Machain, 542 U.S. 692, 704 (2005), and Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 837 (1996)).

Staub decision, the Supreme Court emphasized the similarities between USERRA and Title VII.[104]

The *Staub* case has been particularly effective at connecting tort law and employment law. In 2011, the EEOC issued regulations about how disparate impact claims would proceed under the ADEA. The EEOC cited *Staub* as a basis for importing tort principles into this analysis.[105] The EEOC cryptically noted that it was not adopting tort law wholesale, but using it for guidance.[106] It then cited the *Restatement (Second) of Torts* for the propositions that greater care should be exercised if greater harm exists[107] and "whether an employer knew or reasonably should have known of measures that would reduce harm informs the reasonableness of the employer's choices."[108]

The *Nassar* case continued this trend. In that case, the Court determined whether a plaintiff proceeding on a Title VII retaliation claim is required to establish "but for" cause.[109] As with *Gross*, the opinion partially relied on the complex relationship between past Supreme Court precedents and the 1991 amendments to Title VII.[110] However, this does not detract from the importance of the role of torts in this case. Once the Court decides not to follow *Price Waterhouse* and the 1991 amendments to Title VII, it must make a choice regarding what the causation standard should be. The choice the Court makes—"but for" cause—is largely driven by the majority opinion's narrow view of tort law and by *Gross*, which also relied on tort law.[111]

Nassar invoked tort law from the beginning of the opinion, defining the case as one involving causation and then noting that causation inquiries most commonly arise in tort cases.[112] The majority engaged in a lengthy discussion of causation's role in tort law, with numerous citations to the

104. *Id.* at 1191; Davis v. Omni-Care, Inc., No. 10-3806, 2012 WL 1959367, at *109 & n.8 (6th Cir. June 1, 2012); Jajeh v. Cnty. of Cook, 678 F.3d 560, 572 (7th Cir. 2012).

105. Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act, 77 Fed. Reg. 19,080, 19083 (Mar. 30, 2012) (to be codified at 29 C.F.R. pt. 1625) [hereinafter EEOC Regulations].

106. *Id.*

107. *Id.* at 19089 & n.71 (quoting RESTATEMENT (SECOND) OF TORTS § 298 cmt. b (1965) for the proposition that "[t]he greater the danger, the greater the care which must be exercised").

108. *Id.* at 19089–90, 19090 n.73 (quoting RESTATEMENT (SECOND) OF TORTS § 292 cmt. c (1965) for the proposition that "[i]f the actor can advance or protect his interest as adequately by other conduct which involves less risk of harm to others, the risk contained in his conduct is clearly unreasonable").

109. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2522–23 (2013).

110. *See id.* at 2525–28; Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2348–50 (2009).

111. *Nassar*, 133 S. Ct. at 2525–28, 2534; *Gross*, 129 S. Ct. at 2350.

112. *Nassar*, 133 S. Ct. at 2522.

Restatement and a torts treatise.[113]

The Court indicated that "textbook tort law" requires "but for" cause.[114] As discussed throughout this Article, this is a woefully inaccurate account of tort law, which allows for substantial cause as an option in multiple sufficient cause cases. The Court noted the possibility of multiple sufficient causes, indicated that these cases are rare in tort law, and then failed to explain why retaliation claims would always require "but for" cause.[115]

The Court's use of the *Restatement* to justify the "but for" standard is especially problematic. The Court cited *Restatement of Torts* § 431, Comment *a* (negligence), to support "but for" cause.[116] However, the *First Restatement* uses a substantial factor formulation to define cause.[117] This *Restatement* reflects a different view of causation than the way it would be conceived now. During this time, the question of legal cause combined ideas of proximate cause and factual cause. The Court also used *Restatement* sections that apply to negligence claims, even though the Court has characterized disparate treatment law as requiring intent.[118] The Court cited the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*, even though that *Restatement* did not exist when Congress created Title VII's retaliation provision.[119]

Unlike *Gross*, the *Nassar* decision did try to grapple with some policy implications of the choice of causal standards. The Court chose "but for" cause because it claimed that lessening the standard would lead to frivolous claims.[120] The "but for" standard is being invoked for reasons of judicial administration and to purposefully tilt the law in a particular direction.

Together *Staub*, *Gross*, and *Nassar* represent a shift in the way the Supreme Court uses tort law. A reliable majority of Justices are comfortable using tort law without much additional argument about why tort law is appropriate. Tort law is no longer just persuasive authority that serves as one source of potential meaning in discrimination cases. Rather, the Justices can use tort law to find a specific meaning to particular statutory words or ideas. This Article does not argue that this shift happens

113. *Id.* at 2524–25 (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 & cmt. b (2010), RESTATEMENT (SECOND) OF TORTS § 432(1) (1965), and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 265 (5th ed. 1984)).

114. *Id.* at 2525.

115. *Id.* (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 & cmt. b (2010)).

116. *Id.*

117. RESTATEMENT (FIRST) OF TORTS § 431 (1934).

118. *Nassar*, 133 S. Ct. at 2525 (citing RESTATEMENT (SECOND) OF TORTS § 432(1) (1965)).

119. *Id.*

120. *Id.* at 2531–32.

in all cases, but rather that the trend is toward a more automatic and robust use of tort law.[121] Further, this move to tort law is also occurring at the same time the Supreme Court is eschewing modes of pragmatic reasoning in favor of textual arguments.[122] Thus, the story of the tort label is entwined with the rise of textualism.

Although this Article focuses on the way the Supreme Court has used tort law, the lower courts also label discrimination statutes as torts[123] and apply common law tort reasoning to them.[124] Scholars and the EEOC also refer to the statutes as torts and use common law reasoning.[125] Courts have repeatedly claimed that employment discrimination statutes are torts explicitly, in dicta, or implicitly by referring to common law tort concepts.[126] Unfortunately, they have not explained what it means for the statutes to be torts.[127]

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121. This Article does not argue that tort reasoning is required to reach the results in each of these cases. This section makes a descriptive claim about how the Court invokes tort law.

122. *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) (reasoning that a rise in textualist statutory interpretation promotes consistency in the judicial decision-making process).

123. *See, e.g.*, Wanchik v. Great Lakes Health Plan, Inc., 6 F. App'x 252, 261 (6th Cir. 2001) (quoting Fenton v. HiSAN, Inc., 174 F.3d 827, 829 (6th Cir. 1999)) (calling Title VII a "statutory tort"); Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1250 (11th Cir. 1998) (applying tort doctrine of avoidable consequences); Nolan v. Duffy Connors LLP, 542 F. Supp. 2d 429, 433–34 (E.D. Pa. 2008) (discussing Title VII and the ADEA in concluding that the Pennsylvania Human Relations Act "creates statutory torts that cover the same types of harms as its federal cousins"). *But see* EEOC v. Nat'l Educ. Ass'n, Alaska, 422 F.3d 840, 844─45 (9th Cir. 2005) ("Title VII is not a fault-based tort scheme. Title VII is aimed at the consequences or effects of an employment practice and not at the . . . motivation of co-workers or employers." (alterations in original) (quoting Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991)) (internal quotation marks omitted)).

124. *See, e.g.*, United States v. Vulcan Soc'y, Inc., 897 F.2d 30, 35 (E.D.N.Y. 2012).

125. *See, e.g.*, EEOC Regulations, *supra* note 105, at 19083; John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 597 (2005); Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 519–20 (2002); Mark C. Weber, *Beyond* Price Waterhouse v. Hopkins*: A New Approach to Mixed Motive Discrimination*, 68 N.C. L. REV. 495, 538 (1990).

126. Curtis v. Loether, 415 U.S. 189, 196 n.10 (1974) ("An action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress. Indeed, the contours of the latter tort are still developing, and it has been suggested that 'under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort.'" (quoting CHARLES O. GREGORY & HARRY KALVEN, JR., CASES AND MATERIALS ON TORTS 961 (2d ed. 1969))); *see also* Comm'r v. Schleier, 515 U.S. 323, 333 (1995) (accepting for sake of argument that an ADEA claim is a tort claim or a tort-type claim); United States v. Burke, 504 U.S. 229, 254 (1992) (O'Connor, J., dissenting) (referring to Title VII as a "tort-like cause of action"); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 683 (1983) (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (referring to "but for" causation)); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976) (referring to "but for" causation).

127. *See, e.g.*, Miller v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1979) (declaring that Title VII defines wrongs that are a kind of tort without providing any supporting explanation).

II. THE AT-WILL EXCEPTION AND PRECEDENT PROBLEMS

The prior Part shows how modern Supreme Court cases use tort law in discrimination cases. The following sections detail serious mistakes in this statutory analysis. This Part discusses how the Supreme Court fails to consider that the discrimination statutes' status as an exception to at-will employment affects the use of tort common law. The Supreme Court also does not grapple with the fact that the first decades of statutory analysis did not occur through the lens of tort law.

Let's assume that a court wants to discover the meaning of the term "because of" under a discrimination statute. Even if the court characterizes the statute as a tort, the automatic use of tort law would never be appropriate. This is because federal discrimination law created a large exception to prior common law norms about the employment relationship.

At common law, the employment relationship is defined by the concept of at-will employment. Absent a contract or contrary law, at-will employment allows an employer to hire, fire, or change the conditions of employment for any reason or no reason.[128] Many states have developed their own exceptions to at-will employment.[129] In most states, without the existence of federal employment discrimination laws or a corollary state statute, the common law would allow the employer to terminate an individual based on a protected trait, such as sex or race.[130] The employment discrimination statutes created large exceptions to common law notions of at-will employment.[131] Any analysis that purports to integrate common law principles with the discrimination statutes must recognize and account for this foundational aspect of the discrimination statutes. This central aspect of discrimination law weighs strongly against the use of the common law as the automatic and primary source of statutory meaning.

When courts are faced with a question about the meaning of a particular word or concept in a discrimination statute, before applying tort common law, the court must first consider whether Congress's rejection of portions of the common law affects the intersection of tort law and discrimination law. Failure to do this represents a gross misunderstanding about the intersection of federal discrimination law and the common law. It is

128. BLACK'S LAW DICTIONARY 604 (9th ed. 2009).

129. *See Employment At-Will Exceptions by State*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/labor-and-employment/at-will-employment-exceptions-by-state.aspx (last visited June 26, 2014) (providing a list of states with corresponding at-will employment exceptions). For example, Montana has a statute that abrogates, in part, the at-will doctrine regarding certain terminations. *See* MONT. CODE ANN. § 39-2-904 (2013).

130. Howard v. Wolff Broad. Corp., 611 So. 2d 307, 312–13 (Ala. 1992).

131. Blumoff & Lewis, *supra* note 2, at 70 (discussing how Title VII abrogates common law understandings of employment).

absolutely clear that the discrimination statutes do not call for a wholesale use of the common law because to do so would eradicate the statutes' main protections. This key fact creates difficult interpretive questions if one assumes tort common law should apply to discrimination statutes. If Congress meant to alter the common law relationship in a significant way, did it also mean to fully retain common law meanings for core statutory words? If so, which words and concepts retained their common law meanings and how are these meanings changed by the limits Congress imposed on employers' ability to make decisions based on protected traits?

Staub, *Gross*, and *Nassar* all fail to make this key inquiry. In *Staub*, the Court failed to ask whether Congress's creation of an antidiscrimination exception to the common law altered whether the Court should apply proximate cause to the statute at all, or created a different version of proximate cause that is not coterminous with the common law.[132] It also failed to consider whether common law ideas of intent are appropriate in the discrimination context.[133] In *Gross* and *Nassar*, the Court failed to consider whether the factual cause inquiry should be different in discrimination cases because the ADEA and Title VII reject portions of the common law.[134]

Indeed, there are certain pockets of antidiscrimination obligation that are so contrary to tort law that it is difficult to imagine how using tort law would be doctrinally or theoretically satisfying. Consider, for example, religious or disability accommodation. It is difficult to conceive how tort principles developed in the context of strict liability, negligence, or intentional torts could be applied wholesale to these claims. Both religious and disability accommodation cases require affirmative conduct by the employer that is unlike duties tort law imposes on employers. In the disability context, employers are required to engage in an interactive process to assist the employee in developing a work environment that reasonably accommodates the employee's disability. These claims are so different from tort law that their very existence undermines the argument that the discrimination statutes are torts.

Another interpretive issue arises from the fact that the Supreme Court did not typically invoke tort law in early discrimination cases. The disparate impact theory and its elements are not derived from tort law. The multi-step *McDonnell Douglas* test[135] does not stem from tort law. The plurality in *Price Waterhouse* rejected traditional common law

132. *See* Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191–92 (2011); *see also id.* at 1193–94.

133. *See id.* at 1191–92.

134. *See* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2350–51 (2009); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

135. For an articulation of the test, see *supra* notes 23–27 and accompanying text.

formulations of cause and imposed a two-tiered analysis.[136] Any later attempts to imbue the discrimination statutes with a torts sensibility must contend with foundational opinions not grounded in tort doctrine or theory. Recent attempts to force discrimination statutes into a torts mold are awkward because they ignore that the foundational cases in discrimination law are not based in tort law.

III. INTERPRETIVE DILEMMAS

Let's assume that courts could overcome the difficulties discussed in the prior section and find that certain statutory terms or concepts are not affected by discrimination statutes' relationship with the common law or prior precedent. Even then, it is still hard to equate discrimination terms and concepts with common law analogs. Discrimination statutes' text and architecture do not mimic common law torts, and discrimination concepts do not map onto tort concepts well. The Court also has failed to recognize the relational nature of tort concepts—that the meaning of words are not static, but rather depend on the surrounding elements of the tort.

A. *The Language and Structure Problem*

Neither the language nor the structure of discrimination statutes mimics tort law. The discrimination statutes do not use tort terms of art. The main operative provisions of Title VII and the ADEA do not use the words intent, factual cause, proximate cause, or damages, which are key words used in tort causes of action. Congress has used these terms of art in other statutes and thus knows how to specifically invoke tort principles when it wants to do so.[137]

Even the words "because of" are, at best, an ambiguous reference to tort law. Tort causes of action typically do not define causation inquiries using the term "because of."[138] Thus, when Congress used the words "because of," it is textually possible that Congress did not intend a common law meaning.

The discrimination statutes are not structured like the elements of traditional torts. Tort law has developed a preference for a small set of central elements that define each cause of action. Take, for example, the traditional articulation of the elements of negligence as a breach of a duty

136. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).

137. *See, e.g.*, 33 U.S.C. § 2704(c)(1) (2006) (providing that plaintiffs may recover damages in excess of prescribed caps if a showing of proximate cause is made); Federal Employees' Compensation Act, ch. 458, 39 Stat. 742–43 (1916) (codified as amended at 5 U.S.C. § 8102 (2006)) (providing that the United States shall not be liable to an injured employee whose "intoxication . . . is the proximate cause of the injury").

138. *See, e.g.*, Taylor v. Fishkind, 51 A.3d 743, 759 (Md. Ct. Spec. App. 2012).

that causes damages.[139] The original operative language of Title VII is divided into two core provisions, which are facially more complex than the elements of tort claims.[140] As discussed in more detail below, Title VII is further complicated by the 1991 amendments to the statute, in which Congress added additional language regarding disparate impact claims and further defined the causal inquiry.[141]

There are numerous instances where Congress could have easily chosen language to mimic traditional tort law, but did not. In 1991, when Congress amended Title VII to make it clear that plaintiffs were not initially required to establish "but for" causation, Congress chose to define the plaintiff's burden as establishing that the plaintiff's protected trait played a "motivating factor" in the employment decision.[142] This motivating factor language is different than the substantial factor language used at the common law.[143] The affirmative defense that Congress approved for motivating factor cases is a limited affirmative defense for damages, rather than liability.[144] When Congress defined compensatory damages under Title VII, it provided a narrower definition of these damages than that imposed by common law.[145] The damages provision for the ADEA, which is modeled from the Fair Labor Standards Act,[146] provides only limited remedies and not the full panoply of damages that would be available at common law.[147]

Likewise, the defenses available for discrimination cases do not mimic the common law. Congress provided instances where the employer would be excused from liability, even when conduct might otherwise appear to be discriminatory. For example, an employer may escape liability under Title VII if a protected trait is a bona fide occupational qualification (BFOQ).[148] An employer may implement bona fide seniority systems.[149] Under the ADEA, an employer may make age-based employment decisions for certain executives and policymakers.[150] Given these provisions, it is odd to assume that provisions in the discrimination statutes are coterminous with tort law.

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139. 57A AM. JUR. 2D *Negligence* § 71 (2014).
140. 42 U.S.C. § 2000e-2(a)(1)–(2) (2006).
141. *See supra* Part I.B (discussing 1991 amendments).
142. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m).
143. *See, e.g.*, *Taylor*, 51 A.3d at 759.
144. 42 U.S.C. § 2000e-5(g)(2)(B).
145. 42 U.S.C. § 1981a(b)(2).
146. 29 U.S.C. § 216(b) (2006).
147. 29 U.S.C. § 626(b).
148. 42 U.S.C. § 2000e-2(e).
149. 42 U.S.C. § 2000e-2(h).
150. 29 U.S.C. § 631(c)(1).

The substantial number of statutory provisions that do not mimic tort common law raises another challenge to textual tort analysis. The Supreme Court does not consider how these non-tort provisions affect the claim that some words nonetheless retain a tort meaning.

B. *The Mapping Problem*

For purposes of this section, assume that the tort universe consists of three kinds of torts—intentional, negligence, and strict liability—that these torts are defined by their core elements, that these torts remain unchanged by statutory torts, and that these torts are concerned with limited types of harm. For lack of a better terminology, this section refers to such a view of tort law as a traditional view. Even if we artificially limit tort law to these contours, it still proves unsatisfactory in answering discrimination questions. Discrimination law's analytical frameworks do not have direct analogs in tort law.

The Supreme Court has described different frameworks for analyzing discrimination cases, which the courts divide into two broad categories: disparate treatment and disparate impact.[151] Disparate treatment cases are further subdivided into individual disparate treatment, harassment, and pattern or practice cases.[152]

Within the individual disparate treatment category, some courts further subdivide cases into direct evidence and circumstantial evidence cases.[153] The courts also often categorize individual disparate treatment cases as either single-motive or mixed-motive.[154] Cases that involve explicitly discriminatory policies or conduct are called direct evidence cases and are analyzed under a fairly simple formulation, requiring a plaintiff to establish that a decision was taken because of a protected trait.[155]

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151. *See* Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1368 (2009) ("Few propositions are less controversial or more embedded in the structure of Title VII analysis than that the statute recognizes only 'disparate treatment' and 'disparate impact' theories of employment discrimination." (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993))).

152. *Id.* at 1414 (discussing the subdivision into individual disparate treatment and harassment cases); *accord* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 348–49 (1977) (discussing Congress's proscription of discriminatory policies or practices).

153. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (explaining that when direct evidence of discrimination is available, the burden-shifting framework articulated in *McDonnell Douglas* does not apply); *Teamsters*, 431 U.S. at 358 & n.44 (explaining that direct evidence is not required under the *McDonnell Douglas* framework).

154. Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989). The author strongly disagrees with the way courts characterize discrimination claims. These paragraphs are meant to be descriptive only.

155. *See, e.g.*, Stone v. Autoliv ASP, Inc., 210 F.3d 1132, 1136 (10th Cir. 2000) (indicating that a company policy of discrimination constitutes direct evidence).

Plaintiffs who do not have direct evidence and who allege discrimination was the cause of their harm often proceed through the three-part *McDonnell Douglas* burden-shifting framework.[156] So-called Title VII mixed-motive cases, which involve claims where both legitimate and discriminatory reasons caused an action, are analyzed using the statutory language added in the 1991 amendments.[157] Harassment cases are analyzed under a multiple-part framework developed by the courts.[158] The plaintiff must prove the harassment was "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[159] Pattern or practices cases usually involve claims by numerous individuals that the defendant had an actual policy of discrimination or that its conduct demonstrated that discrimination was the norm.[160]

Outside of the intentional discrimination context, courts have recognized disparate impact claims. Disparate impact occurs when a specific employment practice creates a disproportionate impact on a protected group unless the defendant can prove an affirmative defense, which differs by statutory regime. Under Title VII, the defendant can prevail if it can demonstrate that the practice is job-related and consistent with business necessity.[161] Under the ADEA, the defendant can prevail if it demonstrates that the practice was based on a reasonable factor other than age (RFOA).[162]

To apply common law tort principles to discrimination law, it is necessary to determine whether discrimination law mimics a traditional tort pocket of obligation. This is because common law torts vary markedly in the interests they protect and their underlying goals. None of the traditionally recognized discrimination types maps well onto traditional torts.

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156. *See, e.g.*, Pye v. Nu Aire, Inc., 641 F.3d 1011, 1019 (8th Cir. 2011). This is not always the case. *See, e.g.*, Coffman v. Indianapolis Fire Dep't, 578 F.3d 559, 563 (7th Cir. 2009) (allowing a plaintiff to make a case of discrimination without resorting to *McDonnell Douglas* if the plaintiff has "either direct or circumstantial evidence that supports an inference of intentional discrimination"); Taylor v. Peerless Indus. Inc., 322 F. App'x 355, 360 (5th Cir. 2009) (applying a modified *McDonnell Douglas* framework).

157. *See* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349 (2009). The Supreme Court held that "but-for" cause is required under the ADEA. *Id.* at 2352. This question has not been definitively resolved in the ADA context.

158. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65–67 (1986).

159. *Id.* at 67 (alteration in original) (internal quotation marks omitted).

160. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 348–49 (1977).

161. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006). A plaintiff can also prevail in a disparate impact case under Title VII if it can demonstrate that the employer could have used alternate business practices that would not have resulted in the disparity. *See id.* § 2000e-2(k)(1)(A)(ii). This option is not available under the ADEA. Smith v. City of Jackson, 544 U.S. 228, 243 (2005).

162. Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 91 (2008); *see also id.* at 92–93.

First, consider disparate treatment law. It could plausibly be argued that disparate treatment cases are like intentional torts because both require the establishment of intent. However, this comparison is only true in a general sense because it ignores two important factors: whether individual disparate treatment cases actually require a showing of intent and whether the intent required is similar to the type required in intentional tort cases.

Describing the intent necessary for traditional common law intentional torts is not an easy task. However, it is possible to rely on rudimentary descriptions of this intent to show the difficulty of importing the common law into employment discrimination cases. Common law intent is often described as being concerned with the subjective state of the actor, which is ascertained from the available evidence. The defendant is liable if he engaged in a volitional act that he knew or with a substantial certainty knew would cause interference with other people or property.[163] Some torts impose a higher intent requirement, essentially requiring something like *mens rea*.[164] Importantly, tort law offers numerous options regarding how intent can be defined.

Scholars disagree on whether disparate treatment cases require a showing of intent, both as a descriptive and a normative matter.[165] Even if it is possible to say that, as a descriptive matter, courts require plaintiffs to establish intent in disparate treatment cases, this intent standard is itself inconsistent. When some courts describe intent, they describe it as requiring animus,[166] which seems more akin to the higher *mens rea*-like requirement imposed for a few intentional torts. However, it appears that the courts have largely rejected an argument that the defendant could be liable for intentional discrimination if it knew with substantial certainty that its actions were causing differential treatment based on a protected trait.[167] Thus, the current concept of intent in employment discrimination cases fits uncomfortably within traditional tort descriptions of intent.

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163. Garratt v. Dailey, 279 P.2d 1091, 1093–94 (Wash. 1955). The exact articulation of intent varies depending on the intentional tort at issue.

164. Derek W. Black, *A Framework for the Next Civil Rights Act: What Tort Concepts Reveal About Goals, Results, and Standards*, 60 RUTGERS L. REV. 259, 278–79 (2008).

165. *See, e.g.*, *id.* at 270–71; David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 919–20 (1993); Stacey E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141, 1145 (2007); Charles A. Sullivan, *Accounting for* Price Waterhouse*: Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1118, 1136–37 (1991). *See generally* Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495 (2001) (analyzing the intent requirement in the context of both vertical and horizontal decision-making processes).

166. *See, e.g.*, Staub v. Proctor Hosp., 131 S. Ct. 1186, 1189, 1191–92 (2011).

167. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552–56 (2011).

It is at least possible to state that most intentional discrimination cases, at least descriptively, are not negligence cases. To date, the courts have not embraced arguments that plaintiffs may establish a discrimination claim via a negligence analysis.[168] Despite this, courts have used the tort label to apply negligence-based concepts to the discrimination statutes, failing to recognize that such concepts may not fit well if discrimination law is not perceived as a negligence regime.[169]

Disparate impact shares traits with strict liability and negligence, depending on how the plaintiff would prevail in a given suit.[170] In some cases, a plaintiff may prevail by establishing a particular employment practice created a large disparity based on a protected trait, if the employer is not able to establish an affirmative defense to liability.[171] In Title VII cases, the defendant may prevail by showing that its practice was job-related and consistent with business necessity.[172] The defendant is liable whether or not it intended to create the disparity, and even if it took reasonable measures to try to prevent it. Thus, these cases share commonalities with strict liability. In Title VII cases, a plaintiff may also prevail by establishing that the employer could have adopted alternate practices that would not result in a disparity, but chose not to do so.[173] These cases sound more like negligence as the employer is being held liable for its failure to take reasonable care to prevent disparate results.[174]

Even though disparate impact might share some traits with traditional torts, the analogy is still inapt. The substantive standard requires the plaintiff to identify the specific employment practice at issue and that

168. *See, e.g.*, Aaron v. Sears, Roebuck & Co., No. 3:08CV1471, 2009 WL 803586, at *2 (N.D. Ohio Mar. 25, 2009) ("He also alleges Defendant was merely 'negligent' in its hiring practices, which does not rise to the standard of intentional discrimination required by Title VII."); Jalal v. Columbia Univ., 4 F. Supp. 2d 224, 241 (S.D.N.Y. 1998) ("Title VII, however, provides no remedy for negligent discrimination . . . ."). *See generally* Oppenheimer, *supra* note 165 (arguing that negligent discrimination should form the basis of an action under Title VII). Courts do recognize employer liability for negligence where the employer has failed to take action to prevent or correct harassment; however, that liability depends on there first being a showing of harassment. *See, e.g.*, Zarazed v. Spar Mgmt. Servs., Inc., No. Civ.A. 05-2621, 2006 WL 224050, at *7 (E.D. Pa. Jan. 27, 2006). For an interesting discussion of how Title VII already incorporates a negligence standard, see Zatz, *supra* note 151, at 1364.

169. *See Staub*, 131 S. Ct. at 1191–92. *See generally* Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1.

170. Oppenheimer, *supra* note 165, at 931–36.

171. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

172. *Id.*

173. *Id.* § 2000e-2(k)(1)(A)(ii).

174. Oppenheimer, *supra* note 165, at 931–36.

practice must be tied to a specific kind of outcome.[175] Further, courts require significant statistical proof regarding disparity based on a protected trait.[176] Even if disparate impact could be analogized to certain kinds of torts, it is not proven like a traditional tort. Further, disparate impact is imbued with court judgments about how discrimination happens and how employers should be liable for societal discrimination.

Discrimination claims are also an imperfect fit with traditional torts because of the kinds of harms that are protected at common law. Discrimination claims outside of the harassment context often do not involve physical injury.[177] Indeed, it is difficult to define the harms of discrimination in a singular way. The harms of discrimination are often economic in nature but also involve harms to personal dignity, equality norms, and group harms. As Professor Martha Chamallas has noted, "such claims often articulate a type of injury—disproportionately experienced by members of subordinated groups—that cannot be pinned down as psychological, economic, or physical in nature, or as either individual or group based."[178] The "multidimensional quality of the harm" in harassment cases "defies categorization under traditional headings" and makes it problematic to map traditional tort causes of action onto discrimination.[179]

Statutes also impose accommodation duties.[180] For example, an employer is required to accommodate certain religious beliefs and practices.[181] Under the ADA, employers also are required to accommodate employees with disabilities.[182] Accommodation law is perhaps the farthest from the common law given its affirmative obligations not only to avoid harm but also to alter environments and policies.

It is difficult to argue that specific words in the discrimination statutes have tort meaning when the ways plaintiffs prove discrimination claims and the ways employers defend these claims do not map well onto any tort cause of action. There is no way of proving discrimination claims that fully

175. 42 U.S.C. § 2000e-2(k)(1)(A)(i). Under Title VII, a plaintiff may allege that combined practices created a disparate impact if the plaintiff can show that the practices are not capable of separation. *Id.* § 2000e-2(k)(1)(B)(i).

176. Bridgeport Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140, 1146 (2d Cir. 1991) (noting the rule that statistical evidence must reveal "a disparity so great that it cannot reasonably be attributed to chance").

177. Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2140 (2007).

178. *Id.* at 2147.

179. *Id.* at 2146–47.

180. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 79–81, 83 n.14 (1977) (discussing the employer's obligation under Title VII to make some effort to accommodate an employee's religious beliefs in certain circumstances).

181. *Id.*

182. 42 U.S.C. § 12112(b)(5) (2006) (defining discrimination under the ADA as a failure to provide reasonable accommodations).

mimics an intentional tort, a strict liability tort, or a negligence tort. Disparate impact claims and accommodation claims are so far outside the realm of traditional torts that their presence within the discrimination canon is a sharp rebuke to the claim that the discrimination statutes are common law torts. As one commentator noted in the criminal law context:

> Principles of legal reasoning and jurisprudential legitimacy counsel that the use of analogy and precedent in judicial decisions be grounded in reasoning that is by some measure a "fit" with the matter before the Court. This imperative, and the companion norm that some explanation be provided to justify reliance on indirectly applicable legal authority, is only enhanced when a court draws from outside the immediate doctrinal domain in which a case dwells.[183]

Simply put, the automatic application of tort law to the core substantive provisions of the discrimination statutes is not appropriate because discrimination claims share no direct analog to any traditional tort.

C. *The Relational Aspect of Torts*

References to general tort law or even references to specific pockets of tort obligation are unsatisfactory because they fail to recognize the relational nature of tort doctrine. Tort elements are relational in the sense that their meaning is not independent but depends on the goals of the underlying tort and the other elements of the tort claim.

The common law of torts is an evolving doctrine that responds to different policies and goals, depending on the underlying pocket of obligation. Core concepts such as duty and fault define how ancillary doctrines respond. And these ancillary doctrines are often specific to certain kinds of torts or to specific pockets of obligation. Given these differences, concepts that apply to one type of tort may not apply at all or in the same way as the concept would be applied to another type of tort. This is true even though courts may use the same words to describe the underlying concepts. Tort causes of action are "like a group of individuals sharing family resemblances, with remote cousins looking quite different than siblings."[184]

Judge Guido Calabresi evocatively describes this point in the following passage:

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183. Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 703–04 (2011) (footnotes omitted).

184. JOEL LEVIN, TORT WARS 1 (2008) (citing LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 67 (1953)).

> [C]ourts have been able to hold two faulty, independent hunters both liable in cases like *Summers v. Tice*, even though only one of their shots hit the victim and even though a showing of *but for* cause was supposedly a prerequisite for liability. They would not as readily have found two equally faulty independent rapists to be the fathers of an illegitimate child—even though the causal evidence as to the wrongdoing was precisely the same as in *Summers v. Tice* and even though the victim was equally innocent. Rightly or wrongly, the effects (and hence the function) of paternity actions are conceived to be very different from those of money damage claims for injuries. What is "cause" for one need not be "cause" for the other.[185]

Even when verbal formulations are similar, courts often apply different standards depending on the underlying conduct and motivations of the parties.[186]

Further, over time, courts can cling to the same legal language but fundamentally reframe the underlying inquiry to change the overall outcome of cases.[187] Professor Suzanna Sherry describes how judges may change the underlying assumption on which doctrine is based without any facial recognition of underlying shifts in the law.[188]

Consider the question of whether to apply a particular causation standard to a statute. In the employment discrimination context, courts are considering what type of causation is imbedded in a statute by interpreting terms such as "because of." There are several tort standards for causation, and the importance of causation within tort law varies depending on the type of tort involved.[189] It is impossible to look at generic causal language

185. Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 106 (1975) (citations omitted).

186. Richard W. Wright, *The Standards of Care in Negligence Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 249, 260 (David G. Owen ed., 1995) (describing different factors that might affect substantive reasonableness standards).

187. MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 132–33 (2010) (discussing how courts used the "but-for" causation standard in wrongful birth cases but reframed the causal inquiry over time to allow plaintiffs to proceed on claims).

188. Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 147, 159–60 (discussing how the Supreme Court uses the term "strict scrutiny" with different meanings depending on changed facts without recognizing any underlying change in doctrine).

189. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 33 (2010) (discussing how in some jurisdictions proximate cause plays a diminished role in intentional tort cases); Mark Bartholomew & Patrick F. McArdle, *Causing Infringement*, 64 VAND. L. REV. 675, 721–26 (2011) (discussing "but for" and "substantial factor" causal standards); Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 832 (2009) ("In cases involving fraud . . . . [c]ourts rarely consider proximate cause extensively.").

and determine which kind of causation the statute provides because "[c]ausation issues are colored . . . by issues of responsibility and harm that connect to it on either side."[190] Any claims that the analysis is a pure tort analysis should be viewed with suspicion.[191]

Words in tort law have different meanings given the underlying legal claim and factual circumstances. "The real explanation has to be completed in every case from the policies and values underlying the recognition of the primary duty which is in question."[192] Courts applying the tort label often fail to see this key point.

For example, in *Gross*, the Court reasoned that the terms "because of" means "but for" causation.[193] However, the common law actually has a richer, more nuanced view of causation. While "but for" cause may be the dominant way of thinking about negligence causation, the substantial factor test can also be used, including in discrimination cases.[194] In other words, the common law adjusts the causal standard in circumstances where "but for" causation does not work. Further, the common law allows the burden of persuasion on causation to shift to the defendant in certain cases when there are policy or other reasons to make the shift.[195] Even in the narrow context of factual cause, the Supreme Court has numerous choices to make about which causal standard to impose and upon which party to impose it. Further, the causal inquiry is not of key importance in intentional tort cases, where proof of intent lessens the need for a focus on causation.[196] The Supreme Court should at least consider these possibilities in discrimination cases, where the employer has the best access to

190. David G. Owen, *Foreword* to PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 186, at 1, 18.

191. Often, concepts in tort law are also relational in the sense that they depend on the underlying relationship between the parties. John C.P. Goldberg & Benjamin C. Zipursky, *The* Restatement (Third) *and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 707 (2001). Take for example the duty owed to persons on land. The duty owed depends on whether the person is a trespasser, an invitee, or a child. *See id.* at 670 (providing examples of relational concepts). At times, the necessary relationship is stated in the primary rule, but at other times, a decision maker would need to understand the entire scope of a rule and its exceptions to understand relational concepts. Likewise, questions of when a party will be held liable for the actions of others highly depend on the relationship between the parties.

192. Peter Birks, *The Concept of a Civil Wrong*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 186, at 31, 51. Further, tort law often changes, depending on other structures that support similar goals. The most common of these systems are systems of mandatory or optional insurance. Izhak Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 27–29 (1980).

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

194. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 249–50 (1989); *see also* Bartholomew & McArdle, *supra* note 189, at 724–25.

195. *See, e.g.*, Tex. Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–56 (1981).

196. *See supra* note 189 and accompanying text.

information about its decision-making, where multiple individuals often make decisions, and where it may be difficult for the plaintiff to tease apart varying motives for a particular act.

Careful analysis also would require courts to examine whether Congress has already spoken to the underlying concerns in other ways. To date, courts have often failed to do this. Rather, when they apply the tort label, they look narrowly at a particular word used in the common law and import common law ideas, without considering whether the statute addresses those same concerns elsewhere. As discussed earlier, modern statutes are not typically constructed out of the same handful of elements as traditional tort law. Thus, ideas such as cause and harm can be expressed throughout statutory regimes and can be addressed in numerous ways that do not mimic common law articulations of these same ideas. Courts that fixate on one common law term and thereby import meaning into a statute risk ignoring congressional expressions related to the underlying concern expressed throughout a statutory regime.

IV. WHAT TORT LAW IS (AND IS NOT)

When the Supreme Court uses the tort label, it also overestimates the work that tort law can do in answering statutory questions. Labeling a statute as a tort does not provide a meaningful answer to most statutory interpretation questions. This Part describes how the definition of torts, its theory, and its doctrine do not provide meaningful assistance with statutory interpretation because they do not provide courts with a workably determinate set of options or direction on how to choose between conflicts within those options.[197]

It does this by showing what tort law is, and importantly, what it is not. Tort law is an area that coheres around few central concepts and does not contain a core guiding theoretical principle or principles. Importantly, this Part discusses why the idea of a general tort law is a fallacy. Even if one looks to specific tort doctrines or concepts, such as causation, these smaller units of tort law are relational and thus provide little help in answering statutory questions.

An example of the type of reasoning this Article contests is the kind found in the *Staub* case. In that case the Supreme Court declared: "[W]e start from the premise that when Congress creates a federal tort it adopts the background of general tort law."[198] The Court then cited the *Restatement (Second) of Torts* and cases that relied on common law proximate cause arguments to define proximate cause in the USERRA

197. Richard W. Wright, *Right, Justice and Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 186, at 159, 159–60.

198. Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011).

context.[199] In doing so, it ignored the contested definition of proximate cause, its varying application to different kinds of torts, and its evolution over time.[200]

A. *The Definition of "Torts"*

Tort law can be defined as being "about the wrongs that a private litigant must establish to entitle her to a court's assistance in obtaining a remedy and the remedies that will be made available to her."[201] Another common definition of a tort is a "civil wrong, other than breach of contract, for which the court will provide a remedy."[202] A less litigation-centric definition of torts is that the "law of torts concerns the obligations of persons living in a crowded society to respect the safety, property, and personality of their neighbors, both as an *a priori* matter and as a duty to compensate for wrongfully cased harm, *ex post*."[203]

Many modern statutes could properly be classified as torts in these general senses. However, it is important to realize that none of these definitions are helpful in answering most, if any, statutory interpretation questions. As Professor Max Radin noted, it is of little value to label a tort as "something that is actionable but is neither a contract nor a quasi-contract."[204] It is necessary to look beyond these general definitions to determine the central features of tort law.

The torts literature describes five universal and fairly noncontroversial aspects of tort law. First, tort law is unlike criminal law, in that the remedy does not include imprisonment and the state is not the actor solely responsible for prosecuting the action. Second, tort law is a means of social control that attempts to reduce undesirable conduct. In contrast with some other forms of social control, tort law accomplishes this goal by "marking out conduct, or the failure to attain a required standard of conduct, as wrongful."[205] This aspect is subject to the caveat that, at times,

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199. *Id.* at 1192 & n.2 (citing Hemi Grp., LLC v. City of N.Y., 130 S. Ct. 983, 989 (2010), Sosa v. Alvarez-Machain, 542 U.S. 692, 704 (2005), and Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 837 (1996)).

200. Sandra F. Sperino, *Statutory Proximate Cause*, 88 NOTRE DAME L. REV. 1199, 1220, 1234–35 (2013).

201. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 919 (2010). One of the leading torts treatises explains that "a really satisfactory definition of a tort is yet to be found." KEETON ET AL., *supra* note 113, § 1 at 1.

202. KEETON ET AL., *supra* note 113, § 1 at 2.

203. David G. Owen, *Foreword* to PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 186, at 7.

204. Max Radin, *A Speculative Inquiry into the Nature of Torts*, 21 TEX. L. REV. 697, 698–99 (1943).

205. Tony Honoré, *The Morality of Tort Law—Questions and Answers*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 186, at 78.

nonwrongful conduct is discouraged in tort regimes, such as harm-causing dangerous activities in strict liability or legal activities in nuisance cases.

Third, absent contractual waiver, tort law allows a party access to some state-sanctioned system (often a court system) to both avert and seek compensation for tortious conduct.[206] Fourth, tort law typically involves an obligation of a liable defendant to compensate the plaintiff for harm.[207] Fifth, tort law often allows for the possible recovery of compensatory damages.[208]

Just like the general definitions of tort law, these unifying aspects of tort law are not helpful in answering most, if any, interpretation questions related to employment discrimination. These central aspects do not define the duties owed, the relationships that must exist between parties, or the defenses that may be used to escape liability. These concepts do not tell us which parties the law should favor or what interests are being protected. The general concept of tort law does not answer who is required to pay for the harms and under what mechanisms a person must be compensated.

B. *Tort Theory*

Labeling statutes as torts does not help ground the statute in a theoretical framework. This difficulty relates to three features of tort theory. First, tort law lacks a consistent unifying theory or even a manageable menu of theoretical considerations. Professor Jules Coleman explains the "law of torts is extremely complex and . . . resists simple analysis."[209] One commentator describes modern tort law as "schizophrenic, at cross-purposes."[210] Second, it is often unclear whether tort theory is meant to be descriptive or normative.[211] Third, much of the theoretical tort work considers certain types of harms, such as personal

206. *Id.* at 77.

207. Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 494 (1989).

208. Levin, *supra* note 184, at 1; *see also* United States v. Burke, 504 U.S. 229, 235 (1992) ("Indeed, one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff fairly for injuries caused by the violation of his legal rights." (quoting Carey v. Piphus, 435 U.S. 247, 257 (1978)) (internal quotation marks omitted)). Perhaps most controversially, many tort theorists describe causation as central to tort law. Honoré, *supra* note 205, at 80; Weinrib, *supra* note 207, at 494. A general concept of causation is not helpful to resolving many statutory questions because it does not describe how close the causal connection needs to be and also does not describe when causation alone will be an insufficient basis for imposing liability.

209. Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 428 (1982).

210. Englard, *supra* note 192, at 29 (citation omitted) (internal quotation marks omitted).

211. Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 186, at 99, 100 (noting the controversy of the idea that wealth maximization is a descriptively adequate way to describe tort law).

injury, and it is difficult to understand how this work would carry over into the discrimination context with a more complex harm doctrine.

Tort law does not have a central theoretical unifying theory, aim, principle, or foundation. Professor Michael L. Rustad explains that tort law is a "multi-paradigmatic field" that emphasizes a broad range of goals such as morality, corrective justice, social utility, and policy.[212] Some scholars argue that tort law should be grounded in corrective justice, while others argue that the dominant consideration should be economic efficiency.[213] Some identify distributive goals as a major facet of modern tort law.[214] Professor Ernest Weinrib describes instrumentalist approaches to tort law as "focusing on goals, such as compensation, deterrence, loss-spreading, cheapest cost avoidance, or wealth maximization" and whether tort law accomplishes them.[215] Many scholars concede that the theoretical aspects of tort law they prefer do not adequately resolve or describe all aspects of tort law.[216] Some scholars even celebrate the multiple aims and functions of tort law.[217]

There is strong disagreement in tort scholarship about the goals and functions of tort law.[218] Likewise, there is strong disagreement about its proper scope. Some scholars posit that tort law allows courts to engage in social engineering while others believe torts should return to more limited functions.[219] Further, it often is difficult to parse the exact line between torts and other areas, such as criminal law and contracts.[220]

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212. Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 435–36 (2011).

213. Coleman, *supra* note 209, at 421. Some even argue that ideas of corrective justice should be grounded in economic principles. *Id.*; *see also* Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 427 (1992) (noting the tendency to try to ground tort law in "one fundamental, overarching principle").

214. *See* Englard, *supra* note 192, at 28.

215. Weinrib, *supra* note 207, at 487.

216. *See, e.g.*, Posner, *supra* note 211, at 101.

217. *See, e.g.*, Izhak Englard, *The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 186, at 183, 183.

218. *See* Rustad, *supra* note 212, at 437–39, 448; John C.P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1512 (2002) ("If, for Koenig and Rustad, the great thing about tort is that it permits judges and juries to adopt the role of unappointed corporate ombudsmen, for Posner the great thing about tort is that it permits judges to act as roving efficiency commissioners charged with the task of identifying and achieving the cost-efficient mix of precaution and injury."). *See generally* Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349 (1992) (discussing the moral foundation for the fault principle in corrective justice); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) (discussing the tension between economic and fairness theories of tort as they relate to negligence and strict liability theories).

219. Rustad, *supra* note 212, at 437–39, 454.

220. *Id.* at 435–36.

Scholars who do agree on the correct theoretical framework for viewing tort law often disagree about how to define core concepts within the framework.[221] Consider a group of individuals who all agree that tort law should be driven by cost-benefit analysis. These individuals may still possess widely divergent opinions about who is the best party to be liable for conduct. Some may want the party best financially able to pay, while others may want the loss to fall on parties who can obtain insurance. Some cost-benefit advocates may want to maximize utility or promote efficiency.[222]

Even scholars that agree on the appropriate theoretical construct disagree on how much work the construct can do descriptively or normatively.[223] A tort theory that explains why liability exists may not explain who is responsible for compensating for the wrong and under what circumstances. It also is unlikely that such a theory would explain how the proof requirements for establishing violations should function.[224]

The search for a unifying theme becomes more complex because it is often unclear whether theoretical arguments are "about the ideal system of tort law" or "interpretive accounts of the common law of torts."[225] Theoretical scholars also disagree on correct accounts of tort law's history and modern practice.[226]

Further, much of the theoretical work in tort law addresses a certain class of harms, such as personal injury, or a particular type of tort, such as negligence.[227] And this theoretical work may be incomplete in its

221. *See, e.g.*, Jules L. Coleman, *The Practice of Corrective Justice*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 186, at 53, 58 ("Those who have offered corrective justice accounts of tort law differ with respect to: (1) the conditions of responsibility; (2) whether in order to invoke corrective justice, losses must be wrongful; (3) what makes conduct wrongful within the ambit of corrective justice—and more."); *id.* at 66 (noting that areas of convergence among corrective justice theories of tort law include ideas of human agency, rectification, and correlativity).

222. LEVIN, *supra* note 184, at 45.

223. Coleman, *supra* note 209, at 429 (explaining differences among scholars and commentators who agree that tort law can be explained through corrective justice). Coleman explains, "Epstein, Fletcher, and myself reach different conclusions regarding the extent to which the principle of corrective justice could figure in an adequate theory of liability and recovery in torts . . . ." *Id.* at 435.

224. *See* Guido Calabresi & Alvin K. Klevorick, *Four Tests for Liability in Torts*, 14 J. LEGAL STUD. 585, 592–93 (1985).

225. George P. Fletcher, *The Search for Synthesis in Tort Theory*, *in* TORT LAW 105, 105 (Ernest J. Weinrib ed., 1991).

226. Goldberg, *supra* note 218, at 1504–06 (providing a history of tort law). *See generally* Rustad, *supra* note 212 (contesting Professor Goldberg's historical account); CHAMALLAS & WRIGGINS, *supra* note 187, at 63 (discussing how negligence is considered to be the theoretical and practical core of the field and discussing the *Restatement*'s reference to accidental injury as the core problem of tort law).

227. *See, e.g.*, Fletcher, *supra* note 225, at 106 (limiting his inquiry to personal injury, "the core injury in the law of torts"); Goldberg & Zipursky, *supra* note 201, at 923–24, 955, 977.

descriptive or normative force related to other types of injury. Even more broadly based theoretical work has difficulty contending with certain pockets of obligation.[228] When theoretical precepts are applied more broadly, they often describe more traditional forms of injury or harm.[229] For statutes, it may be difficult to determine whether statutory definitions of harm or injury that do not comport with traditional tort conceptions of those concepts fit well within the theoretical paradigm.

Even if the broader field of torts is broken down to its component parts, such as negligence or intentional torts, there is little useful theoretical ground to mine for purposes of statutory interpretation. Since much of the theoretical work focuses on negligence law, the theoretical indeterminacy discussed above makes negligence theory problematic in the statutory context. However, even intentional tort law and strict liability suffer from the same problems.[230]

These problems exist even if one ignores practical issues, such as determining how tort theory is translated into workable legal doctrines. When courts espouse tort principles in specific cases, it is unclear how much of the doctrine is being driven by the specific case and how much is driven by tort theory.[231] Further, judges describing and developing tort law may be unaware of or even hostile to tort theory. In many instances, judges do not describe the basis for a legal standard.[232]

C. *The General Tort Law Fallacy*

Some might argue that while looking to definitions or theory is not helpful, relying on tort doctrine provides solutions to statutory interpretation problems. At times, courts have claimed to invoke the general common law to resolve a problem. A major goal of this Article is to eradicate references to the "general common law" in statutory construction, because there is no general common law for most tort questions.

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228. Goldberg & Zipursky, *supra* note 201, at 951–52 (noting the difficulty wrongs-based theories of tort law encounter with strict liability).

229. RICHARD A. EPSTEIN, A THEORY OF STRICT LIABILITY: TOWARD A REFORMULATION OF TORT LAW 15–49 (Cato Inst. 1980) (describing a theory of torts premised on causation by using paradigms such as "A hit B").

230. Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CAN. J.L. & JURISPRUDENCE 147, 147 (1988) ("[A] general theory of strict liability is . . . not even a possibility. . . ."); William M. Landes & Richard A. Posner, *An Economic Theory of Intentional Torts*, 1 INT'L REV. L. & ECON. 127, 135–39 (1981); *see also* Dorsey D. Ellis, Jr., *An Economic Theory of Intentional Torts: A Comment*, 3 INT'L REV. L. & ECON. 45, 51–52 (1983); EPSTEIN, *supra* note 229, at 68 (discussing how his strict liability theory prioritizes notions of individual liberty over notions of negligence).

231. Fletcher, *supra* note 225, at 130.

232. LEVIN, *supra* note 184, at 30.

An example may be helpful. In *Staub v. Proctor Hospital*, the Supreme Court applied the concept of proximate cause to the Uniformed Services Employment and Reemployment Rights Act (USERRA).[233] The Court stated: "[W]hen Congress creates a federal tort it adopts the background of general tort law."[234] It then purported to apply a general common law standard of proximate cause to USERRA.[235] However, the Court's reference to a general common law of proximate cause is illusory. There is simply no uniform view of proximate cause that applies across all tort regimes. Rather, the meaning of proximate cause and the importance of it within tort analysis changes depending on the underlying tort at issue. Importantly, the Court does not explicitly recognize that proximate cause most often plays a role in negligence and strict liability cases and that it is rarely used in the intentional tort context.[236] It ignores the basic fact that many tort doctrines differ depending on the underlying pocket of obligation under consideration.

A nonexhaustive list of other examples is helpful. Foundational concepts such as factual and legal cause have different iterations and importance, depending on whether the underlying tort is characterized as an intentional tort or negligence.[237] Contributory negligence is a defense to negligence claims, but not typically to intentional torts.[238] Punitive damages are available for certain kinds of torts and not for others.[239] The types of torts at issue often affect contribution rules.[240]

The way the Supreme Court invokes tort law often ignores the options tort law provides. *Staub* is a good example of the dangers of the tort label. The Court exaggerates the work that tort law can perform by failing to fully and accurately describe the various options available under tort law. In *Staub*, the Supreme Court imported proximate cause into USERRA without reconciling the contested and varying iterations of proximate cause.[241] Indeed, the *Staub* Court could have used tort law to reach the opposite holding that cat's paw liability existed without a proximate cause

233. 131 S. Ct. 1186, 1190–92 (2011). For a comprehensive discussion of *Staub*, see generally Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012) (arguing that *Staub* adds an element to the plaintiff's burden in employment discrimination cases).

234. *Staub*, 131 S. Ct. at 1991.

235. *Id.* at 1192–93.

236. David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1773 n.30 (1997); Belton, *supra* note 1, at 1250.

237. Tony Honoré, *Necessary and Sufficient Conditions in Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 186, at 363, 363 (noting that causation depends on whether fault or strict liability is at issue).

238. Goldberg & Zipursky, *supra* note 201, at 967.

239. *Id.*

240. *Id.*

241. *See* Staub v. Proctor Hosp., 131 S. Ct. 1186, 1193 (2011).

limitation. It could have reasoned that discrimination is an intentional tort and that intentional torts do not typically rely on notions of proximate cause.

Gross and *Nassar* also suffer from the same flawed reasoning. Both cases held that tort law required a plaintiff to establish "but for" cause.[242] Tort law provides a "but for" cause standard in some instances, but it also allows a plaintiff to establish causation using a "substantial factor" standard in instances where "but for" cause is problematic.[243] Tort law also allows the court to shift the burden of disproving causation to the defendants in certain instances.[244] These two characteristics of causation are basic ideas that are taught in first-year torts classes. Nonetheless, the Supreme Court failed to consider whether discrimination cases fit within the class of cases for which "but for" cause is inadequate and also failed to consider whether discrimination cases present scenarios in which shifting burdens to the defendant would be appropriate. The Court thus relied on a selected slice of tort law that is narrower than the common law. The Supreme Court made important choices about what version of tort law to rely on, but these choices are hidden within a purportedly textual analysis in which the Court misrepresents the uniformity of the common law.

V. THE STAKES OF THE TORT LABEL

The tort label dramatically distorts the way that courts make decisions relating to the discrimination statutes. This Article urges courts to engage in a more honest and intellectually compelling interpretation of the discrimination statutes, an interpretation that fully comprehends existing ambiguities within both discrimination and tort law. In undertaking this task, this Article gives proper deference to legal realists and critical race and feminist scholars who generally question the interpretive enterprise. As noted by others, "between the extremes of 'formalism' and radical skepticism, there is substantial room in which to operate."[245] This Part outlines the stakes if the courts continue on their current interpretive path.

A. *Limited Reasoning*

The tort label is dangerous because it allows courts to ignore the central problems of employment discrimination. The consequences of the tort label when combined with a narrow vision of tort law can best be illustrated by imagining what the disparate impact doctrine would look like if the Supreme Court had applied this narrow tort lens in 1971. The Court

242. *See supra* notes 91, 109 and accompanying text.
243. *See supra* note 194 and accompanying text.
244. *See supra* note 195 and accompanying text.
245. Goldberg & Zipursky, *supra* note 191, at 730.

would have reasoned that Title VII is a tort, that torts require either but-for or substantial-factor causation, and that no individual could prove that the company's policies (rather than societal discrimination) caused the harm. Even those that disagree with the disparate impact theory would agree that this reasoning is inadequate to the kind of problem posed in the *Griggs* case.[246]

Many important employment discrimination questions remain unanswered. Unconscious discrimination theorists posit that discrimination is not always caused by conscious animus against a protected group.[247]

Structural discrimination theorists propose that the locus of discrimination is not always a bad individual or a company policy but rather unthinking assumptions about how work is organized.[248] Structural discrimination often occurs from a mix of intentional, negligent, and unconscious motives and actions.

Courts have not yet fully considered structural discrimination and unconscious discrimination cases, but it easy to see how the tort label analysis could be used to reject these kinds of claims without any true discussion. Courts could analogize discrimination law to a fixed, narrow version of tort law with a "purely mechanistic depiction of causation," a failure to fully imagine how groups and entities can cause harm, and an inability to fully capture systemic risk.[249] If courts view discrimination statutes as torts, then they can easily use tort law to deny structural and unconscious discrimination claims. This interpretation would not require any dialogue about the purposes of employment discrimination law, how protected traits limit people within modern workplaces, or whether Congress meant to reach these types of claims.

Courts may be unwilling to recognize claims of structural and unconscious discrimination, but simply claiming that tort law requires such a result is inadequate.[250] This limited reasoning is not demanded by the discrimination statutes' language, structure, or purposes. Nor does congressional intent or Court precedent demand such limited analysis.

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246. For a discussion of *Griggs*, see *supra* notes 17–21 and accompanying text.

247. *See* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 745 (2005); Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 419 (2000); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–27 (1987).

248. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 92, 126–27, 138 (2003).

249. Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENVTL. L. 1, 6 (2011) (noting how tort law lags in its recognition of systemic risk and harm).

250. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 3 (2006) (arguing that courts may not be willing to go beyond the traditionally accepted underpinnings of discrimination law).

The tort label also unnecessarily limits the choices available under the statutes. It does this by prioritizing tort meanings over other available meanings. It then compounds this problem by oversimplifying tort law and describing it as more uniform and less contested than it actually is.

Take again the factual cause issue discussed throughout this Article. There are numerous plausible standards that courts could invoke to describe causation under the discrimination statutes' original operative language, including "but for" cause, substantial factor, or motivating factor. The courts could diminish the importance of the factual cause inquiry in cases where plaintiffs prove intent. The courts could shift various portions of the causation burden to different parties. Tort label analysis reduced all of these options to one without explaining why. The Supreme Court's claim that discrimination is a tort, and that tort law has a uniform, narrow view of causation, hides these choices.

B. *Consistently Poor Analysis*

One key problem with applying the tort label to employment discrimination statutes is that the courts and EEOC seem ill equipped to apply it well. As discussed throughout this Article, the Supreme Court has relied on certain assumptions that are simply untrue, such as the idea that a general common law exists.[251] They have incorrectly represented the common law as monolithic across different types of torts and failed to understand the potential breadth within each tort doctrine. They have failed to recognize the relational nature of words within tort doctrines. They have ignored that employment discrimination statutes modify key aspects of at-will employment, that they do not use unique tort terms of art, and that they are not structured like torts. The courts have also failed to understand that only weak arguments support the automatic reach to tort law and that stronger textual and purpose-based arguments countenance greatly reducing tort law's role.

The tort label, when combined with a textual approach to interpretation, also ignores a fundamental difference between tort elements and statutory regimes. Modern statutes often provide complex, interrelated provisions to calibrate when liability should attach and to further the regime's underlying goals.[252] Importing the common law without considering the entire statutory regime risks upsetting congressional judgments about these issues.

If future analysis just avoided these critical mistakes, it would be significantly less flawed than the current approach. It is unclear whether the poor analysis is due to a failure to understand tort law or whether it is

251. *See supra* Section IV.C.

252. *See, e.g.*, 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. V 2011) (Title VII).

an intentional attempt to hide policymaking. Whatever the source, it is concerning whenever a particular reasoning device routinely leads to results that do not make sense when subjected to scrutiny.

These mistakes are not confined to the Supreme Court. In 2012, the EEOC issued regulations interpreting the meaning of the reasonable factor other than age (RFOA) provision under the ADEA.[253] The EEOC considered how the RFOA provision operates in disparate impact cases.[254]

As discussed above, disparate impact cases do not share a common heritage with tort law. The first step of a disparate impact claim requires the plaintiff to establish that a specific employment practice created a disproportionate impact because of a protected trait.[255] This is a standard that has no corollary in common law causation or intent.

The second step in an ADEA disparate impact case is for the employer to establish that the disparate impact was due to a RFOA.[256] The courts have not fully explained what RFOA means, but the case law to date suggests the employer's required proof would be minimal.[257] In an admirable effort to give the RFOA standard more meaning, the EEOC issued 29 C.F.R. § 1625.7(e). In issuing the regulation, the EEOC indicated that it relied on §§ 292 and 298 of the *Restatement (Second) of Torts*.[258]

Any critique of the EEOC's efforts should begin with a complimentary nod toward the political reasoning that undergirds its efforts. The EEOC is using the tort label to make its more pro-plaintiff definition of this doctrine palatable by tying it to a conservative source of law—the common law. While understanding that this move is politically savvy, it is important to consider whether the general move to tort law is a good one for the employment discrimination statutes generally. This is especially true because of the possibility that introducing tort law in one area will lead to further convergence of tort and employment discrimination law in other ways.[259]

There are several problematic aspects of the EEOC's reasoning. Both §§ 292 and 298 of the *Restatement* govern negligence claims.[260] The EEOC thus tries to graft a partial negligence analysis as the second step in a disparate impact analysis that is not based on tort law generally or negligence law specifically.

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253. EEOC Regulations, *supra* note 105, at 19095.

254. *Id.*

255. 42 U.S.C. § 2000e-2(k)(1); Smith v. City of Jackson, 544 U.S. 228, 241 (2005).

256. Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 96 (2008).

257. Judith J. Johnson, *Reasonable Factors Other Than Age: The Emerging Specter of Ageist Stereotypes*, 33 SEATTLE U. L. REV. 49, 80–81 (2009).

258. EEOC Regulations, *supra* note 105, at 19089–90 nn.71, 73.

259. Laurin, *supra* note 183, at 710.

260 RESTATEMENT (SECOND) OF TORTS §§ 292, 298 (1965).

Section 292 of the *Restatement* governs the factors to be considered in determining the utility of an actor's conduct.[261] Yet the EEOC did not resolve whether its regulation imported ideas such as the Hand formula and economic efficiency into the ADEA. Importantly, ideas about the utility of an actor's conduct are especially value laden and thus courts will have great leeway in judging this utility. Applying a subsection based on utility concerns is especially problematic in the discrimination context because it suggests that the underlying goals of the discrimination statutes might be subject to some form of cost-benefit analysis.

Also interesting is the EEOC's choice to insert portions of the negligence analysis into an RFOA inquiry that otherwise does not look like negligence analysis. For example, the new regulation requires courts to consider whether "the factor is related to the employer's stated business purpose."[262] There is very little discussion regarding how select portions of the negligence standard are supposed to intersect with the ADEA-specific portions of the regulation. The EEOC picks and chooses pieces of the *Restatement*'s negligence analysis but does not explain whether the remaining sections should be used in RFOA decisions or in interpreting the ADEA more broadly.

In disparate impact cases, the defendant is the one raising RFOA. The burdens of production and persuasion mimic those of affirmative defenses. Yet the EEOC relies on negligence analysis to interpret RFOA, while also claiming that it is not adopting negligence concepts that are often raised and proved by defendants such as contributory negligence and assumption of risk.[263]

While the EEOC does note that it is not adopting the tort law wholesale, it does not answer the difficult questions related to its use of tort law.[264] Was it necessary to use tort law? What work does tort law actually perform? Why did it choose tort law? Why did it rely on standards for negligence that largely apply in a physical harm context? Can courts use other principles in the surrounding sections of the *Restatement* to define RFOA? Why did the agency use the *Restatement (Second) of Torts*, rather than the *Restatement (Third) of Torts*? Is the ADEA generally amenable to tort analysis? Like much tort analysis in discrimination cases, the reader is left without a clear understanding of whether an independent tort principle commands a certain outcome or whether tort law could justify almost any regulation the EEOC wanted to craft.

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261. RESTATEMENT (SECOND) OF TORTS § 292 (1965).

262. 29 C.F.R. § 1625.7(e)(2)(i) (2013).

263. EEOC Regulations, *supra* note 105, at 19083. The author agrees that neither of these concepts should apply to disparate impact; however, by amorphously inserting negligence references in the RFOA calculus, courts should expect defendants to start making such arguments.

264. *Id.*

When courts use the tort label, they often engage in similarly unsatisfying reasoning. For example, in *Staub*, the Supreme Court indicated that the use of causal factor language in a statute incorporates "the traditional tort-law concept of proximate cause."[265] This statement suggests that there is a fixed and constant theoretical and factual application of proximate cause. This statement ignores the fact that proximate cause is a notoriously complex concept with contested goals.[266] *Staub* never explains why USERRA is a tort or how much tort doctrine can be used to interpret its provisions. Courts often apply the tort label in this cursory way.

There is strong disagreement regarding the appropriate role of the courts in making statutory inquiries, such as whether the courts should consider only Congress's expectations as actually expressed in statutory language, whether they should ascertain intent from other sources, or whether courts have broader powers to engage in common law decision-making or decision-making that relies on the broader purposes of the underlying statutory regimes.[267] At a minimum, though, it is appropriate to demand that courts use reasoning devices that meet some basic level of legal reasoning. Given the number of analytical missteps in the way courts apply tort law to discrimination law, it is debatable whether the use of the tort label meets minimal standards for judicial reasoning.

C. *The Fuzzy Nature of the Tort Label*

The tort label also is highly susceptible to manipulation, especially given the way that courts currently use it.[268] Strangely, the tort label both

265. Staub v. Proctor Hosp., 131 S. Ct. 1186, 1193 (2011).

266. *See* Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 51 (1991); *see also* BLACK'S LAW DICTIONARY 250 (9th ed. 2009) (providing multiple definitions of proximate cause and indicating that the following terms also reflect proximate cause: direct cause, efficient cause, legal cause, procuring cause, and remote cause, among others). Further, the definition of proximate cause has changed over time. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. a (2010).

267. *See generally* WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 3, 5 (1999) (discussing "ordinary judging" and arguing that judges can "help[] the legislature implement good government by fitting statutes into their past and their future"); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994) (arguing for a more fluid notion of statutory interpretation); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 5–7 (1982) (arguing that so-called judicial activism is actually a function courts perform in diminishing the importance of outdated statutes "in the face of the manifest incapacity of legislatures to keep those statutes up to date").

268. The courts' jurisprudence about when to apply the tort label is so unstable that the decision whether to even apply the label is confusing and fails to provide any guidance about the potential outcome of future cases. *See* Heck v. Humphrey, 512 U.S. 477, 492 (1994) (Souter, J., concurring in the judgment) ("While I do not object to referring to the common law when resolving

closes avenues of potential argument and at the same time often provides the courts with an empty vessel they can later fill with their own non-tort meaning. The tort label gives the appearance that courts are tying statutory interpretation to traditional sources of law, but the courts often misstate the traditional sources of law or radically alter them without explanation.

As discussed throughout this Article, courts use the tort label to foreclose the possibility of statutory ambiguity. For example, the words "because of" mean tort causation and tort causation requires the plaintiff to establish "but for" cause. This reasoning makes several debatable assumptions. The words "because of" are not common law terms of art and, given the structure of the discrimination statutes and decades of precedent, it is unlikely that the common law is the only source of meaning for these words. Further, there are several iterations of common law causation. Statutory ambiguity might countenance the use of nontextual sources of meaning and would also allow for administrative agencies to play a greater role in shaping the law. The tort label hides these statutory ambiguities and forecloses textually plausible interpretations of the discrimination statutes.

In many cases, there is no plausible claim that the common law demands a particular choice because the common law itself is not uniform. The difficulty of using common law words is complicated because the same words often have different meanings in different pockets of obligation, in response to different factual situations, and even over time. Whenever the underlying common law doctrine has contested meanings or goals, the courts often provide little analysis about why they chose certain meanings or goals over others.

At times, the courts choose not to resolve underlying ambiguities of the common law tort concepts they adopt. In *Staub*, for example, the Court described proximate cause as being concerned with whether there is a "direct relation between the injury asserted and the injurious conduct alleged," with whether the cause is "too remote, purely contingent, or indirect," and with whether the cause was of "independent origin that was not foreseeable."[269] Thus, the Court cited multiple proximate cause rationales that might lead to different results in different factual contexts.[270] When courts fail to resolve the underlying disarray within a common law concept, they risk importing an empty vessel into a statutory regime. Thus, a particular term has no fixed definition, but can take

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the question this case presents, I do not think that the existence of [a] tort . . . alone provides the answer.").

269. *Staub*, 131 S. Ct. at 1192 (quoting Hemi Grp., LLC v. City of N.Y., 130 S. Ct. 983, 989 (2010) and Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 837 (1996)) (internal quotation marks omitted).

270. *Id.*

whatever meaning or meanings the court chooses to apply in a particular instance.[271]

Courts also claim to invoke the mantle of traditional common law principles, while issuing opinions that do not necessarily follow from the common law. Take, for example, the Supreme Court's use of a tort/agency analysis. In *Meritor Savings Bank v. Vinson*, the Supreme Court held that sexual harassment claims were cognizable under Title VII, but then noted, with only a cursory discussion, that the employer would not be held automatically liable for all harassment that occurred in the workplace.[272] The Court noted in *Meritor* that the use of the word "agent" in Title VII evinced an intent to place a limit on the actions for which employers would be held liable, and then it cited the *Restatement*.[273] The Court indicated that agency principles might play a role in such cases, but declined to further describe what role they would play.[274] This slim reed would be the entry point through which the Supreme Court later justified its purported use of common law agency principles in Title VII.

In two subsequent cases, *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, the Court took on the question left open in *Meritor*. In *Faragher*, the Court transformed *Meritor*'s noncommittal phrasing into strong pronouncements. The Court indicated that *Meritor* expressed the idea that courts look to the common law of agency to develop employer liability standards, even though *Meritor* cannot be read this broadly.[275] Although the *Faragher* court noted that the *Meritor* court cautioned that "common-law agency principles may not be transferable in all their particulars to Title VII," the *Faragher* Court transformed *Meritor*'s citing of the *Restatement* into an embrace of common law agency principles.[276]

Importantly, the Court's invocation of the common law and the way that it presented the common law doctrines foreclosed the possibility that

271. Another example of this type of reasoning is found in *Clackamas Gastroenterology Associates v. Wells*, 538 U.S. 440 (2003). In *Clackamas*, the Court purported to adopt a common law test to determine whether a shareholder–director was an employee under discrimination law, even after the Court admitted that the traditional common law did not recognize the type of legal entity at issue in the lawsuit and thus did not directly address the question before the Court. *Id.* at 447. Further, the Court altered the common law it claimed to adopt, while also failing to address why it rejected the economic realities test used in other employment contexts. *Id.* at 448–50 (explaining that "[a]t common law the relevant factors defining the master-servant relationship focus on the master's control over the servant" and then announcing six factors relevant in the inquiry).

272. *Meritor*, 477 U.S. 57, 66–67, 72 (1986).

273. *Id.* at 72 (citing RESTATEMENT (SECOND) OF AGENCY §§ 219–37 (1958)).

274. *Id.*

275. Faragher v. City of Boca Raton, 524 U.S. 775, 791–92 (1998).

276. *Id.* (quoting *Meritor*, 447 U.S. at 72) (internal quotation marks omitted).

employers would be automatically liable for all cognizable sexual harassment that occurs in the workplace. This move substantially narrowed the potential options that the court would consider in thinking about agency.

Common law tort and agency principles entered Title VII with very little discussion about why they should be imported. Noticeably, the Court did not seriously grapple with whether Title VII, either descriptively or normatively, was created against a backdrop of the common law. Neither of the opinions engaged in a searching analysis of the text, intent, or purpose of Title VII with regard to whether the statutes imported common law agency principles. Nor did the Court explore what the use of the common law in the statutory regime says about the appropriate link between the common law and statutes.

After using the label of common law agency, the Court then created an agency analysis for Title VII that does not mimic the common law of agency. The Supreme Court held that employers will be automatically liable if they take a tangible employment action against employees.[277] In cases where a supervisor engages in harassment that does not result in a tangible employment action, the employer can prevail if it proves a two-part affirmative defense.[278] The Court created this test by using the general idea of agency, the principle of avoidable consequences from tort law, and by creating a new goal for Title VII: that it was designed not only to remedy discrimination, but to prevent it from happening in the first place.[279]

The Court thus used the common law label to justify creating an analysis that is completely unlike the common law.[280] Professor Michael Harper noted the Court "cited no common law cases in [its] cursory, formal, and rather abstract discussion of the Restatement exception on which [it] relied."[281]

Even though the Court issued *Faragher* and *Ellerth* on the same day, it did not create a uniform rationale for why agency analysis should be imported into Title VII. For example, in *Ellerth*, the Court's opinion focused on the strands of agency analysis that impute liability to the

277. *Id.* at 807.

278. *Id.*

279. *Id.* at 804–06.

280. *Id.* at 797, 802 n.3 (stating that "[t]he proper analysis, here, then, calls not for a mechanical application of indefinite and malleable factors" from the *Restatement*, and also indicating that the Court was not using pure common law).

281. Michael C. Harper, *Employer Liability for Harassment Under Title VII: A Functional Rationale for* Faragher *and* Ellerth, 36 SAN DIEGO L. REV. 41, 55 (1999).

employer when the employee is aided by the agency relationship.[282] In *Faragher*, by contrast, the Court noted that liability might be imputed because the supervisor is aided by the employer,[283] but also noted that liability might be appropriate because the supervisor is acting as a proxy for the company[284] or because the supervisor is acting within the scope of his authority.[285] Even stranger, *Faragher* then appears to not rely on any of these rationales and instead conducts "an [i]nquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment."[286]

Not only did the Supreme Court fail to resolve the proper theoretical basis for importing tort and agency principles, it could not even agree on the proper source from which to derive those principles. For example, *Ellerth* relied heavily on the *Restatement*, which it believed enunciated the "general common law of agency, rather than on the law of any particular State."[287] However, *Faragher* explicitly rejected "a mechanical application of indefinite and malleable factors set forth in the Restatement."[288]

After all of these retreats from the common law standard, it is fair to say that the Supreme Court did not import common law agency into Title VII, but rather used vague and amorphous ideas centered on a theme of agency to create a new analysis for Title VII. This leads to the question of why the Supreme Court felt the need to start with the common law at all.

Reaching to common law helps to hide the level of policymaking in which the Court is engaging. It gives the impression that the courts are engaging in a traditional analysis. Notice that this Article is not arguing that courts should never engage in interpretation that results in policymaking. However, it questions whether we can ever fully understand the extent of what the courts are doing if they continue to claim reliance on what appears to be a traditional analysis. A more honest opinion would have declared that Congress failed to define the term "agent" under the statute, that there are many competing definitions of employer liability for the acts of agents from a wide variety of sources (including the common law), that the statutory language provides little basis for differentiating between these standards, and then described how the Court navigated

282. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998) ("Although few courts have elaborated how agency principles support this rule, we think it reflects a correct application of the aided in the agency relationship standard.").

283. *Faragher*, 524 U.S. at 789.

284. *Id.* at 789–90.

285. *Id.* at 791.

286. *Id.* at 797.

287. *Ellerth*, 524 U.S. at 754 (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989)).

288. *Faragher*, 524 U.S. at 797.

through these options. Instead, the Court ended up with an unsatisfying analysis because it tried to cram Title VII into a common law box.

D. *The Priority Problem*

Another fundamental problem with the tort label is the way it prioritizes the common law over other potential sources of statutory meaning and dramatically limits administrative deference.

When courts define employment discrimination as torts, they conceive tort law as deriving from the common law, not other statutes. Thus, while the Supreme Court labels discrimination statutes as statutory torts, these statutory torts do not serve as a source of meaning for interpretive questions. Rather, when the Court refers to tort law, it means the common law. When courts search for tort law, they refer to various Restatements or to state common law, but usually do not include federal statutory law within the definition of federal common law.[289] Even when courts cite prior statutory cases, these cases often relied heavily on common law iterations of the underlying doctrines.[290]

This is an impoverished view of tort law. If discrimination and other statutes are torts, then courts should be able to draw tort meaning from them, as well as from other statutes that courts have labeled as torts. Through statutes, Congress has radically changed notions of causation. Take for example the disparate impact inquiry under the discrimination statutes.[291] Another example is the causation standard adopted in the Federal Employers' Liability Act cases, in which the courts have rejected application of traditional factual cause.[292] Statutes, including portions of Title VII that were interpreted prior to the tort label, express different notions of causation, intent and harm than those found in the common law. One of the few good reasons for applying the tort label to discrimination law would be that early thinking about causation, intent, and harm under

289. *See, e.g.*, Hubbard v. Allied Van Lines, Inc., 540 F.2d 1224, 1229 (4th Cir. 1976) (considering whether a federal statute provided for certain damages, the court, instead of conducting statutory interpretation, looked at the *Restatement (Second) of Torts* for guidance).

290. For example, in *Staub v. Proctor Hospital*, 131 S. Ct. 1186, 1192 (2011), the Court cited several statutory cases that purport to be based on the common law. *See* Hemi Grp., LLC v. City of N.Y., 130 S. Ct. 983, 989 (2010) ("Proximate cause for RICO purposes . . . should be evaluated in light of its common-law foundations . . . ."); Sosa v. Alvarez–Machain, 542 U.S. 692, 712 (2004) ("Although we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.").

291. *See supra* Section V.B.

292. CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2636 (2011) ("FELA's language on causation . . . 'is as broad as could be framed.' Given the breadth of the [causation] phrase . . . we have recognized that, in comparison to tort litigation at common law, 'a relaxed standard of causation applies under FELA.'" (citation omitted) (quoting Urie v. Thompson, 337 U.S. 163, 181 (1949) and Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 543 (1994))).

Title VII could be extended into other areas.

When the courts look only to the common law to answer statutory questions, they ignore other potential sources of meaning. Prioritizing the common law is puzzling because there is ample evidence that the discrimination statutes rely on concepts from the National Labor Relations Act, the Fair Labor Standards Act, and state employment discrimination statutes.[293]

The Supreme Court tort label analysis also decreases the role of the EEOC to interpret statutory ambiguity. According to the Supreme Court, certain words in the discrimination statutes clearly require certain tort meanings. In making this claim, the Court is refusing to recognize any potential ambiguity in the statutory language. Denying ambiguity is important because it means that the Court will not be required to examine whether the EEOC's views on a particular issue are entitled to deference.[294]

CONCLUSION

The tort label leads to reasoning that is superficial and not transparent about its motivations and goals. Courts do not engage in nuanced discussions about the kind of reasoning they are using or the values they are prioritizing in reaching the result. Importantly, the tort label gives the appearance that the courts are engaging in a form of traditional analysis that is noncontroversial.

This Article argues that multiple claims courts make about the employment discrimination statutes related to the tort label are so baseless that they do not even reach a minimal level of legitimate reasoning. Claims that a general common law exists, that core substantive words derive solely or even primarily from pure common law, or that the common law is and should be the starting point for statutory analysis are not supportable.

In rejecting the automatic prioritizing of tort law, this Article challenges courts to reconcile competing sources of meaning in employment discrimination law and discuss why the court is choosing one option over others. While this method may appear to be more difficult than current tort reasoning, it is only so because the tort label suppresses many important discussions. Hopefully, jettisoning the tort label will lead to statutory analysis that is more rigorous and honestly performed.

293. *See supra* notes 33, 146 and accompanying text.

294. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1994); Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).