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ESSAY

THE STRANGE CAREER OF TITLE VII'S § 703(M): AN ESSAY ON THE UNFULFILLED PROMISE OF THE CIVIL RIGHTS ACT OF 1991

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I

In this Symposium, we mark the fiftieth anniversary of the enactment of Title VII of the Civil Rights Act of 1964, a feat of legislative progress that coalesced around the vigorous advocacy of a number of grass-roots efforts and more than a few political figures. On that July evening half of a century ago, the *New York Times* special report on the signing of the bill concisely captured the essence of its importance:

President Johnson signed the Civil Rights Act of 1964 tonight. It is the most far-reaching civil rights law since Reconstruction days.¹

[†] John E. Ryan Professor of International Business & Workplace Law, Atlanta's John Marshall Law School, Atlanta, Georgia. The title of this Essay was in part inspired, of course, by the title of C. Vann Woodward's iconic book, *The Strange Career of Jim Crow* (Baton Rouge, 1955). See Howard N. Rabinowitz, *More Than the Woodward Thesis: Assessing the Strange Career of Jim Crow*, 75 J. AM. HIST. 842 (1988). I dedicate this Essay to two people who have profoundly influenced and inspired me: my friend and faculty colleague for over a dozen years, Professor Helen Hickey de Haven, a profoundly talented and creative teacher and scholar of labor and employment law, who was kind enough to read an earlier draft of this Essay and share comments with me; and to the late Professor Robert Belton, a pioneer in bringing the law of employment discrimination into the curriculum of America's law schools and with whose casebook I first taught the course. See Grace Renshaw, *Robert Belton, Trailblazing Scholar of Employment Law, Dies*, VANDERBILT NEWS (Feb. 10, 2012), <http://news.vanderbilt.edu/2012/02/robert-belton-obituary/>.

¹ E.W. Kenworthy, *President Signs Civil Rights Bill; Bids All Back It*, N.Y. TIMES, July 3, 1964, at 1, available at <http://partners.nytimes.com/library/national/race/070364race-ra.html>.

The presidential signature was affixed on the same day that the author turned two years of age—July 2, 1964. Thus, it is fair to say that the author did not experience the world before Title VII. Rather, the author has grown up—literally—with Title VII.

One of the earliest commentators on the then newly enacted law was Francis Vaas, a partner at Boston's Ropes & Gray law firm, who chronicled its legislative history.² In surveying a wide array of issues and features under the employment provisions of the Civil Rights Act, Mr. Vaas wrote the following prophetic lines:

Of comparable significance may be the Senate's rejection of numerous other amendments proposed during the Senate debate but withdrawn or rejected during cloture [sic]. For example, Senator McClellan proposed that an unfair employment practice should be found to exist only when the discrimination complained of was *solely* because of race, color, religion, sex or national origin. This proposal was rejected. The fact that it was made points up what is a continuing issue under the Labor Management Relations Act (LMRA). For an unfair employment practice to exist, what must be the causal nexus or relationship between the improper motive and the overt act? Must the improper motive be the dominant factor, a substantial contributing factor or merely a factor leading to the overt act? The answers to these questions await the clarification of the law by administrative practice and judicial decision. Presumably court decisions under the LMRA will be the more reliable and significant guide, rather than the more onerous interpretation which the NLRB has occasionally applied.³

That clarification was a long time in coming. Indeed, it was not until the Civil Rights Act of 1991 ("1991 CRA") that Congress—seeking to reverse the effects of a string of rulings by the Reagan Supreme Court—made a legislative effort to do so. Yes, even when it had arrived, few recognized that it had come.

In its first twenty-five years, the causation question in Title VII was a subject of inconclusive discussion. In 1982, eighteen years into the Title VII era, one commentator observed:

² See generally Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431 (1966).

³ *Id.* at 456–57 (footnotes omitted) (citing *NLRB v. Lowell Sun Publ'g Co.*, 320 F.2d 835, 842 (1st Cir. 1963) (Aldrich, J., concurring); *Frosty Morn Meats, Inc. v. NLRB*, 296 F.2d 617, 620 (5th Cir. 1961); *NLRB v. Whitin Mach. Works*, 204 F.2d 883, 885 (1st Cir. 1953); *Bussmann Mfg. Co. v. NLRB*, 111 F.2d 783, 787 (8th Cir. 1940)).

Various formulations of the appropriate standard of causation for disparate treatment actions have been suggested in the decisional law and elsewhere. At one end of the spectrum is a test, specifically rejected by Congress, that requires the plaintiff to establish that the unlawful factor was the sole factor behind the decision. At the other end is a causal theory that prohibits a decision that was based in part on an impermissible consideration even if a legitimate reason was also relied on. In between is a test that would invalidate personnel action that was based in substantial part on a discriminatory ground, and another that requires the plaintiff to prove that the impermissible consideration was a determinative factor, i.e., a factor that made a difference in the ultimate result.⁴

The issue was one of real importance, as Professor Brodin explained in language that is rarely seen anymore in the technocratic opinions of the federal courts:

[There are] congressional and judicial pronouncements that the primary objective (or at least one primary objective) of title VII is the elimination of discrimination in employment opportunities. With this deterrence goal in mind, why should a plaintiff be required, in order to establish a violation, to go beyond proving that race or another forbidden criterion was a motivating factor in the decision? Put differently, should an employer be permitted to avoid liability completely by showing that his consideration of the unlawful factor happened in this particular instance to be "harmless"? Considering that discriminatory criteria are by definition aimed against groups, it is at least probable that such an employer is engaged in discriminatory decisionmaking regarding its other minority or female employees and applicants as well. As such, a same-decision causal theory is not likely to provide the "spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of their discriminatory practices. Indeed, the refusal of the courts to take *some* action against such "harmless" discrimination might actually encourage the continuation of such conduct.⁵

⁴ Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 293 (1982) (footnotes omitted).

⁵ *Id.* at 317 (footnotes omitted).

What appeared to be confusing to the courts was an unusual feature of Title VII, compared to other legislation:

"[C]laims under Title VII involve the vindication of a major public interest." The statute was enacted against a background of hundreds of years of racism and racial violence and represents a congressional determination that continued discrimination in employment is against the public interest. In focusing solely on the impact of discrimination on the litigant who has chosen to challenge it, the same-decision standard represents "an attempt to individualize or personalize an evil or wrong that is basically an institutional wrong." Congress has relied primarily on private litigants for the judicial enforcement of title VII, thus imbuing these private actions with a social function unaddressed [by looking solely at a Title VII claim as an individual plaintiff's cause of action].⁶

A watershed event in the ability of the private attorneys general to enforce Title VII and other Employment Discrimination Law ("EDL") statutes in federal court was the issuance of the canonical *Celotex* trilogy in 1986,⁷ which, as Professor McGinley pointed out over twenty years ago, "ha[s] had perhaps an even more devastating effect on civil rights law than the substantive decisions of the 1989 cases" because the *Celotex* trilogy "changed the manner in which courts approach summary judgment, making it easier for defendants to obtain summary judgment in cases of at least arguable discrimination," which, prior to the trilogy, included a palpable "reluctan[ce] to grant summary judgment to a defendant in a civil rights case where questions of motive, intent and credibility existed."⁸

The 1991 CRA, then, held great promise when it responded to the provocation of *Price Waterhouse v. Hopkins*⁹ to address a larger problem—the problem that Francis Vaas identified in

⁶ *Id.* at 319–20 (footnotes omitted).

⁷ See *infra* notes 28–42 and accompanying text.

⁸ Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206 (1993). *Celotex* itself has provoked continued debate, as exemplified by Arthur Miller's denunciation and by Adam Steinman's attempt at rehabilitation. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 984–85 (2003); Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 85–86 (2006).

⁹ 490 U.S. 228 (1989).

1966. However, the often-invoked canon of statutory construction—start and stop with the text unless it is necessary to go to the legislative history to figure out what an ambiguous text means¹⁰—has been tossed to the side, and the contextual history of overruling *Price Waterhouse* has been invoked by normally textualist judges who refuse to believe that Congress actually meant what it wrote. It is upon that sobering reality that we must reflect, even as we celebrate Title VII's achievements over the last half century.¹¹

II

As I argued in a trio of articles a decade ago, Congress thought it had solved the causation question in its legislation overturning the 1989 United States Supreme Court cases, the Civil Rights Act of 1991¹² (“1991 CRA”). Yet, the critical provision that solved the causation question posed by Vaas in 1966—§ 703(m),¹³ added to Title VII by § 107 of the 1991 CRA and captioned as *Clarifying Prohibition Against Impermissible*

¹⁰ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 56–68, 369–90, 397–98 (2012).

¹¹ Shortly after the 1991 CRA became law, Professor Robert Belton published a presciently titled article on that law. See Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921 (1993). At that time, Professor Belton observed:

The Congressional compromise that was necessary to enact the 1991 Act raises a host of issues that are not unlike those the courts had to address during the first decade of developments under Title VII. . . . [T]he denouement of the 1991 Act rests initially with the federal courts as it did during the first decade of the 1964 Act. How the courts respond to the issues raised by the new act will determine whether Title VII, the ADA, the ADEA, and section 1981, as amended by the 1991 Act, are to be revived as potent tools for the elimination of discrimination in the workplace, or whether they will again be reduced to, in the words of Judge Sobeloff, “mellifluous but hollow rhetoric.”

Id. at 964. Professor Belton’s article, however, did not seem to prognosticate how summary judgment would evolve to become the most serious item on the 1991 CRA’s “unfinished agenda.”

¹² See generally Jeffrey A. Van Detta, *Requiem for a Heavyweight: Costa as Countermonument to McDonnell Douglas—A Countermemory Reply to Instrumentalism*, 67 ALB. L. REV. 965 (2004); Jeffrey A. Van Detta, “*Le Roi Est Mort*” Redux: Section 703(m), Costa, McDonnell Douglas, and the Title VII Revolution—A Reply, 52 DRAKE L. REV. 427 (2004); Jeffrey A. Van Detta, “*Le Roi Est Mort; Vive Le Roi!*”: An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After *Desert Hotels v. Costa* into a “Mixed-Motives” Case, 52 DRAKE L. REV. 71 (2003) [hereinafter Van Detta, *Vive Le Roi!*].

¹³ 42 U.S.C. § 2000e-2(m) (2012).

*Consideration of Race, Color, Religion, Sex, or National Origin in Employment Practices*¹⁴—received little attention from the federal courts before the Supreme Court's 2003 decision in *Desert Palace, Inc. v. Costa*,¹⁵ where the Court held that a jury instruction on § 703(m)'s "motivating factor" standard was warranted in a case that presented as the classic *McDonnell-Douglas-Burdine* pretext paradigm.¹⁶ But as it has turned out in the intervening eleven years since 2003, *Costa* changed next to nothing. Many commentators, and almost all federal courts, refused to believe that Congress could have intended to answer the profound question left open in 1964 in such a way, without leaving legislative history to make that clear.¹⁷ The absurdity of the position—that we cannot read a statute to say what it says because the legislative history does not confirm that the statute says it—certainly plays into the court of Justice Scalia's pointed criticisms of the use of legislative history.¹⁸

What the lower federal courts appear to refuse to believe is that Congress would have left it in the hands of a jury to determine whether an adverse employment action taken against, for example, an African-American employee was in some discernable way motivated by that employee's race—for example, in which race was "a motivating factor."¹⁹ The lower federal

¹⁴ Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075.

¹⁵ 539 U.S. 90, 101 (2003) ("In order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'").

¹⁶ See, e.g., Kerry S. Acocella, Note, *Out with the Old and in with the New: The Second Circuit Shows It's Time for the Supreme Court To Finally Overrule McDonnell Douglas*, 11 CARDOZO WOMEN'S L.J. 125, 148–49 (2004).

¹⁷ See, e.g., Christopher R. Hedican et al., *McDonnell Douglas: Alive and Well*, 52 DRAKE L. REV. 383, 400 (2004); Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. C.R. & C.L. 1 (2005).

¹⁸ See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 31 (Amy Gutmann ed., 1997) (elaborating on the arguments for textual fidelity and for eschewing reliance on legislative history); Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1611–13, 1615–17 (2012). For more nuanced and sophisticated principles for the proper use of legislative history, rather than an absolutist rejection of it, see Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 90–134 (2012).

¹⁹ The United States Court of Appeal for the Fourth Circuit gave a typical statement of this position in *Diamond v. Colonial Life & Accident Insurance Co.*, 416 F.3d 310, 318–19 (4th Cir. 2005).

courts explained away the language as merely a modification of the *Price Waterhouse* case's discussion of a special class of cases where the decision makers were foolhardy enough to make explicit their consideration of the employee's protected characteristic.²⁰ Even the lone federal district court judge who clearly saw the effect of the 1991 CRA right from the start—Paul Magnuson of the District of Minnesota²¹—finally threw in the

²⁰ See, e.g., Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse Is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887 (2004); see also Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651 (2000); Robert A. Kearney, *The High Price of Price Waterhouse: Dealing with Direct Evidence of Discrimination*, 5 U. PA. J. LAB. & EMP. L. 303 (2003); Steven M. Tindall, Note, *Do as She Does, Not as She Says: The Shortcomings of Justice O'Connor's Direct Evidence Requirement in Price Waterhouse v. Hopkins*, 17 BERKELEY J. EMP. & LAB. L. 332 (1996); Michael A. Zubrensky, Note, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After Price Waterhouse v. Hopkins*, 46 STAN. L. REV. 959 (1994).

²¹ See, for example, *Griffith v. City of Des Moines*, 387 F.3d 733, 739 (8th Cir. 2004) (Magnuson, J., concurring), in which Judge Magnuson's views are most clearly and forcefully explicated:

For thirty years, courts have been slaves to the *McDonnell Douglas* burden shifting paradigm that is inconsistent with Title VII. *McDonnell Douglas* cannot be reconciled with the Civil Rights Act of 1991, as it is indignant to the clear text of the statute. *McDonnell Douglas* impermissibly focuses on the but-for cause of the employment decision, when all that the Civil Rights Act of 1991 requires is that discrimination be a motivating factor in the employment decision. Because a plaintiff need not demonstrate that discrimination was the but-for cause in the employment decision, all cases under Title VII should be evaluated to determine whether invidious discrimination in *any way* influenced or motivated the employment decision. *McDonnell Douglas* fails to always achieve this result, while the motivating factor test consistently does.

McDonnell Douglas should not be used by courts to analyze Title VII claims. The burden-shifting framework is not supported in the language of the statute, nor does it impose liability under Title VII as Congress intended. Under *McDonnell Douglas*, requiring the employer to articulate a nondiscriminatory reason for the employment decision is worthless.

Id. at 745. Although his views did not carry the day, Judge Magnuson forcefully recounted how the courts have wrought complexity out of what Congress constructed simply:

In 1991, Congress extended the protection of the Civil Rights Act, which until that point only prohibited employment decisions motivated *primarily* by an improper characteristic such as race or gender. In amending the Civil Rights Act in 1991, Congress sought to prohibit any consideration of race or other improper characteristic, no matter how slight, in employment decisions. Despite this clear language, courts continued to apply a test that determined whether a discriminatory motive was the necessary and sufficient cause of an employment decision, not one to determine whether a discriminatory motive played a lesser role in the employment decision.

towel when, after sitting by designation on a panel of the United States Court of Appeals for the Eighth Circuit in which the court did not adopt the view he set forth in *Dare v. Wal-Mart Stores, Inc.*,²² he wrote in a district court decision:

Although this Court is bound to follow the law as interpreted in the Eighth Circuit, the Court notes its disagreement with the Eighth Circuit's interpretation of the Civil Rights Act of 1991. In 1991, Congress amended the Civil Rights Act of 1964, and clarified that a plaintiff establishes an unlawful employment practice when he or she "demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Rather than prohibiting only employment decisions motivated *primarily* by discrimination, Congress sought to impose liability on the employer if discrimination was a motivating factor, no matter how slight, in the employment decision. This amendment eviscerated the indirect/direct evidence distinction articulated in *Price Waterhouse*. Without this evidentiary distinction, *McDonnell Douglas* should have fallen into disuse and the "motivating factor" test articulated in the amendment should have emerged. Nevertheless, courts have ignored the Civil Rights Act of 1991 and have duly followed *Price Waterhouse*. Though this Court has opined that *Desert Palace* signaled the demise of *McDonnell Douglas*, the Eighth Circuit has found otherwise. Bound by this precedent, this Court must analyze [the plaintiff's] claims accordingly.²³

Courts ignored the Civil Rights Act of 1991 in 1991, and they continue to ignore this congressional mandate today. *Desert Palace* exposes the legal fiction for what it is, and in its wake, I can no longer adhere to or apply an arbitrary and antiquated test that has been superseded by Congress.

Id. at 739.

²² 267 F. Supp. 2d 987, 994 (D. Minn. 2003).

²³ *Klyuch v. Freightmasters, Inc.*, 393 F. Supp. 2d 788, 793 (D. Minn. 2005) (Magnuson, J.) (citations omitted).

In addition, other circuit courts have continued to struggle with squaring § 703(m) with pre-1991 jurisprudence.²⁴ Some of these courts, however, have at least seen that the district courts' tendency to see stark, categorical distinctions between circumstantial evidence cases and direct evidence cases can lead to grants of summary judgment that are unsustainable on appeal.²⁵

III

The great tragedy—one truly of national proportions—is that the federal courts' incredulity at the plain language of the 1991 CRA's § 703(m) is actually fueled by another well-meaning, but

²⁴ *E.g.*, Pheng Vuong v. N.Y. Life Ins. Co., 360 F. App'x 218, 220 (2d Cir. 2010) (“When analyzing a claim of unlawful employment discrimination, we proceed under either the framework set out in *McDonnell Douglas Corp. v. Green* or under the ‘mixed-motive’ analysis of *Price Waterhouse v. Hopkins*.” (citations omitted)); *Chadwick v. Wellpoint, Inc.*, 561 F.3d 38, 45 n.8 (1st Cir. 2009) (“The *Desert Palace* decision has proved ripe terrain for scholarly debate over how that decision interacts with the *McDonnell Douglas* framework. Suffice it to say that the two decisions have not been definitively disentangled or reconciled . . .” (citation omitted)); *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 n.10 (6th Cir. 2008) (“We decline to adopt the view, proposed by some courts and commentators, that the *McDonnell Douglas/Burdine* framework has ceased to exist entirely following *Desert Palace*.”); *Diamond*, 416 F.3d at 316–17 (rejecting the arguments that “*Desert Palace* ‘makes it clear that . . . all Title VII cases are to be analyzed as mixed motive cases’ and that the ‘shifting burden’ test first articulated in *McDonnell Douglas Corp. v. Green* . . . no longer applies at the summary judgment stage and a plaintiff can ‘avert’ summary judgment simply by establishing a ‘prima facie case’ of discrimination” (first omission in original)); *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 340 (5th Cir. 2005) (“*Desert Palace* had no effect on pretext cases under *McDonnell Douglas*.”); *Watson v. Se. Penn. Transp. Auth.*, 207 F.3d 207, 211, 217 (3d Cir. 2000) (opinion by then-Circuit Judge Samuel Alito) (addressing whether § 107(a) of the 1991 CRA eliminated the distinction between the standards of causation applicable to “pretext” and “mixed-motive” cases and holding that “[w]hile we certainly do not pretend that the text of Section 107(a) speaks with unmistakable clarity, the text suggests to us that Section 107(a) was designed to apply only to *Price Waterhouse* ‘mixed-motive’ cases”); *Rozskowiak v. Vill. of Arlington Heights*, 2004 WL 816432, at *6 (N.D. Ill. Mar. 26, 2004) (“Having reviewed *Desert Palace*, and in the absence of binding authority to the contrary, the court declines to adopt the *Dare* court’s analysis and concludes that *McDonnell Douglas* remains a viable framework for evaluating summary judgment motions.”).

²⁵ *Chadwick*, 561 F.3d at 46 (“We reject the district court’s requirement that Miller’s words explicitly indicate that Chadwick’s sex was the basis for Miller’s assumption about Chadwick’s inability to balance work and home. To require such an explicit reference (presumably use of the phrase ‘because you are a woman,’ or something similar) to survive summary judgment would undermine the concept of proof by circumstantial evidence, and would make it exceedingly difficult to prove most sex discrimination cases today.” (footnote omitted)).

ultimately disastrous, statutory enactment. That enactment is the 1991 CRA itself.²⁶ The 1991 CRA both created and undid its own promising prospects; or, more precisely, the Congress that drafted and enacted the 1991 CRA undid it from the beginning. Just how did Congress manage this to reach this zenith of ineffectual impotence?

By pushing too far—by changing the character of Title VII by engrafting onto a statute, which up to that time had accomplished more in the American workplace than any other single law than perhaps the Fair Labor Standards Act (“FLSA”)—the double albatrosses of (a) tort-like damages such as compensatory and punitive damages and (b) tort-like adjudication in the form of jury trials. The provision of which I speak is codified at 42 U.S.C. § 1981a—the provision that took Title VII cases from the bench trial to the jury trial. Coming on the heels of the *Celotex* trilogy, this transformation could not have been more ill timed.

From 1964 to 1991, Title VII cases were bench trials.²⁷ Why should that make a difference? It makes a difference because it is one thing for a federal district judge to decide whether a case should be resolved on summary judgment but another thing for a judge to decide through a bench trial. As Judge Richard Posner observed in an age discrimination case litigated prior to the 1991 CRA, because “the usual factfinder in an age discrimination case is a jury, not a judge as in a Title VII case,” the “judge’s decision

²⁶ For a good account of the background leading up to the 1991 CRA, see William A. Wines, *Title VII Interpretation and Enforcement in the Reagan Years (1980–89): The Winding Road to the Civil Rights Act of 1991*, 77 MARQ. L. REV. 645 (1994).

²⁷ See *Johnson v. Ga. Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969); *Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232, 1239 n.5, 1242 (N.D. Ga. 1968), *rev'd on other grounds*, 421 F.2d 888 (5th Cir. 1970); Comment, *Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U. CHI. L. REV. 167, 168 (1969); Note, *Congressional Provision for Nonjury Trial Under the Seventh Amendment*, 83 YALE L.J. 401, 417, 419 (1973). But see *Beesley v. Hartford Fire Ins. Co.*, 717 F. Supp. 781, 784 (N.D. Ala. 1989), *aff'd on reconsideration*, 723 F. Supp. 635 (N.D. Ala. 1989); Charles A. Horowitz, *Judge Acker's Last Stand: The Northern District of Alabama's Lonesome Battle for the Right to Trial by Jury Under Title VII*, 39 WASH. U. J. URB. & CONTEMP. L. 135, 136–37 (1991). In a subsequent case, *Walton v. Cowin Equipment Co.*, the United States Court of Appeals for the Eleventh Circuit set Judge Acker straight, “[T]he Eleventh Circuit held that a binding jury trial is forbidden in a Title VII case, which the Eleventh Circuit finds always to be ‘equitable.’” 774 F. Supp. 1343, 1344 (N.D. Ala. 1991) (citing *Walton v. Cowin Equip. Co.*, 930 F.2d 924 (11th Cir. 1991), which reversed Judge Acker’s initial decision reported at 733 F. Supp. 327 (N.D. Ala. 1990)).

to grant a motion for summary judgment may be a good predictor of the outcome of a bench trial before the same judge; it may not be a good predictor of the outcome before a jury.²⁸

The judge reading the summary judgment papers might very well want to hear testimony before reaching a ruling in the case. In holding a bench trial, the judge has not increased the risk of error; additionally, bench trials in individual Title VII cases are not inordinately lengthy.²⁹

Committing to a jury trial is another thing altogether. This is where the *Celotex* trilogy works its greatest effect. The cases were written on the implicit assumption that juries cannot be trusted in close cases where judges are not impressed with the evidence.³⁰ Trying a case by a jury requires a much more substantial investment of time and resources than trying a bench trial. It also limits when the cases can be tried because there must be a venire in summons from which to draw juries. Moreover, when juries are on hand, federal judges have enormous pressure to employ the jurors for pending criminal prosecutions, which have grown exponentially since Title VII became law in 1964, and that pressure, under the suffocating weight of the Sixth Amendment's speedy trial command, has been incredibly deleterious to the trial of civil cases in federal courts. Even where these institutional concerns are not substantial, the federal judges are also well aware of how much more challenging it is for them to manage a jury trial and how many more opportunities there are for error, both in evidentiary rulings as well as the charges to the jury.

Thus, it is my contention that the rise of the *Celotex* trilogy in 1986 followed closely after by the 1991 CRA's jury trial provision³¹ have synergistically combined to undermine

²⁸ *Shager v. Upjohn Co.*, 913 F.2d 398, 403 (7th Cir. 1990).

²⁹ See Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, 80 CHI.-KENT L. REV. 933, 954–57 (2005).

³⁰ See, e.g., Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 310–12 (2013). But see Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 862 (2007) (arguing that the authors' empirical analysis "call[s] into question the interpretation that the [*Celotex*] trilogy led to expansive increases in summary judgment" and asserting "that changes in civil rules and federal case-management practices prior to the trilogy may have been more important in bringing about changes in summary judgment practice").

³¹ 42 U.S.C. § 1981a(c) (2012).

enforcement of Title VII by individuals seeking to vindicate the values of the statute through lawsuits as private attorneys general.³² The jury-trial element has perversely—even if subconsciously—increased judicial anxiety about having juries decide Employment Discrimination Law (“EDL”) claims. That anxiety in turn, I argue, has increased judicial willingness to use summary judgment as a jury-control device. This tendency was identified in Age Employment Discrimination Act (“ADEA”) cases before the well-meaning sponsors of the 1991 CRA expanded the jury trial right to Title VII.³³ Under the reign of the 1991 CRA, the effect on Title VII cases has been devastating. An entire class of cases—filed under a law³⁴ designed to eradicate the most invidious forms of discrimination known in America by expanding the scope of actionable discrimination, placing fact finding in the hands of peer juries and enhancing remediation of the harm caused by discrimination—has been effectively excluded from the federal courts.³⁵

³² See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 73–74 (2010).

³³ *Shager*, 913 F.2d at 403. Judge Posner’s astute-as-usual observation was that because “the usual factfinder in an age discrimination case is a jury, not a judge,” the judicial angst that tempted judges to grant summary judgment in cases that the judge deemed “marginal” had a distorting effect: “A judge’s decision to grant a motion for summary judgment may be a good predictor of the outcome of a bench trial before the same judge; it may not be a good predictor of the outcome before a jury.” *Id.* at 403.

³⁴ Other scholars have focused on the empirics that suggest that plaintiffs have an average forty percent success rate in Title VII cases that do make it to juries, whereas they have a success rate only in the twenties for Title VII bench trials. See, e.g., Michael Selmi, *The Supreme Court’s Surprising and Strategic Response to the Civil Rights Act of 1991*, 46 WAKE FOREST L. REV. 281, 302 n.100 (2011). That is all very well—but the plaintiff has to make it past Rule 56 to reach a jury, and even those plaintiffs that prevail before a jury find further menace in the district court’s power to snatch defeat from the jaws of victory in the form of Rule 50(b) motions for judgment as a matter of law and Rule 59 new trial motions. *Ash v. Tyson Foods Inc.*, 129 F. App’x 529 (11th Cir. 2005), provides a classic example of that denouement. See *infra* Part IV.

³⁵ See generally Wendy Parker, *Juries, Race, and Gender: A Story of Today’s Inequality*, 46 WAKE FOREST L. REV. 209 (2011). In introducing her empirical study of jury verdicts in those Title VII cases that manage to survive the scythe of Rule 56’s grim reaper, Professor Parker observed:

[The 1991 CRA] was thought to be a victory for employment discrimination plaintiffs—a “dramatic” expansion of their rights. Twenty years later, however, we are told that the news for employment discrimination plaintiffs has gone “from bad to worse.” Employment discrimination plaintiffs should expect defendants to win their pretrial motions. Even if plaintiffs survive pretrial practice, they will likely lose at trial. Other than

This is not just a hunch on my part. Empirical data on the rate at which EDL cases are currently being dispatched on summary judgment by the federal courts amply justifies the concern.³⁶ Poor prospects for running the Rule 56 and 50 motions gauntlet, now enhanced by the effect of *Twiqbal*³⁷ and the return of factual pleading,³⁸ also have a suppressive effect on plaintiffs' willingness to stay the course, leading to earlier and more frequent settlements than we otherwise would expect if Title VII were functioning in the way Congress meant for it to function.³⁹

settlement, the chances of any plaintiff recovery are quite thin. Employment discrimination plaintiffs, or perhaps their lawyers, seem to have gotten the message. Employment discrimination suits are declining—even while [EEOC] filings are increasing. Federal litigation is becoming less and less relevant to redressing employment discrimination.

Id. at 209–10 (footnotes omitted).

³⁶ See, e.g., Hon. Richard G. Kopf, *Civil Jury Trials, Summary Judgment, Employment Cases and the Northern District of Georgia Study—Preliminary Observations*, HERCULES & UMPIRE (Oct. 22, 2013), <http://herculesandtheumpire.com/2013/10/22/civil-jury-trials-summary-judgment-employment-cases-and-the-northern-district-of-georgia-study-preliminary-observations>; Memorandum from Joe Cecil & George Cort to Judge Michael Baylson (Aug. 13, 2008), available at www.uscourts.gov/file/sujulrs2pdf.

³⁷ Cristina Calvar, Note, “*Twiqbal*”: A Political Tool, 37 J. LEGIS. 200, 202 n.21 (2012) (“The nickname ‘*Twiqbal*’ has gained increasing popularity when collectively referring to the heightened pleading requirements set forth by *Twombly* and *Iqbal*.” (citing Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 54 (2010))). The term has even entered the vernacular of some judges. See, e.g., *RHJ Med. Ctr., Inc. v. City of DuBois*, 754 F. Supp. 2d 723, 730 (W.D. Pa. 2010) (“In the past, a motion for judgment on the pleadings under FED. R. CIV. P. 12(c) was analyzed under the same standard as a 12(b)(6) motion, wherein the Court must ‘accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the non-moving party.’ . . . That *was* the standard. No longer. There is a ‘new sheriff in town’ now policing FED. R. CIV. P. 12(c), and his name is ‘*Twiqbal*.’ ”).

³⁸ See, e.g., Miller, *supra* note 32, at 14, 19–20; Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What's Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH L. REV. 587, 593–94 (2011) (adapting Miller’s remarks at the inaugural Walter B. Huffman Distinguished Lecture Series); see also Miller, *supra* note 30, at 346.

³⁹ Professor Miller’s articles cited *supra* note 38 in the previous footnote amply demonstrate this point.

This put Title VII in the federal judiciary's metaphorical crosshairs, and it has not been able to escape since.⁴⁰ In fact, Congress walked right into the buzzsaw of the revolution that the Supreme Court's 1986 *Celotex* trilogy⁴¹ had ignited in the aggressive use of summary judgment to clear civil dockets⁴² in order to make way for the Sixth Amendment pressurized federal criminal prosecutions which had begun to suck up—most unnecessarily⁴³—the vast majority of every federal district court's attention and time.⁴⁴

⁴⁰ One eminent jurist to recently write on the subject, the Honorable Denny Chin, sees the situation rather differently—and perhaps things were different in his federal district courtroom, given the introspection Judge Chin offers in his article and his previous scholarship on the subject. Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. SCH. L. REV. 671 (2012–13); Denny Chin & Jodi Golinsky, *Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659 (1998).

⁴¹ See generally *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

⁴² See, e.g., Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1348 (2005) (noting that the trilogy “altered well-established summary judgment practice, and . . . decisively opened the eyes of the federal courts” to the potential for summary judgment to control civil dockets).

⁴³ See Roger J. Miner, *The Tensions of a Dual Court System and Some Prescriptions for Relief*, 51 ALB. L. REV. 151, 165–66 (1987).

⁴⁴ An illuminating discussion of these problems from a view in the trenches may be found in Mark W. Bennett, *From the “No Spittin’, No Cussin’ and No Summary Judgment” Days of Employment Discrimination Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 688 (2012–13). Judge Bennett sits on the United States District Court for the Northern District of Iowa and authored one of the early cases trying to mediate between *Costa* and *McDonnell-Douglas-Burdine*. See *Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc.*, 285 F. Supp. 2d 1180, 1190–1200 (N.D. Iowa 2003); see also *Griffith v. City of Des Moines*, 387 F.3d 733, 735–36 (8th Cir. 2004) (“*Desert Palace* had no impact on prior Eighth Circuit summary judgment decisions.”); *Jones v. Cargill, Inc.*, 490 F. Supp. 2d 994, 1003 n.8 (N.D. Iowa 2007) (“The Eighth Circuit Court of Appeals expressly disavowed *Dunbar* in *Griffith v. City of Des Moines*.”). I must concede here that Judge Bennett was kind enough to single out one of my articles—and particularly its discussion of his *Dunbar* opinion—both for attention and a bit of skewering over my use of a sophisticated metaphor, from—Egads!—the realm of astronomy, to illustrate a simple point. See Mark Bennett, Remarks at Panel III Celebrating the 40th Anniversary of Title VII: Closing the Gaps—Making Title VII More Effective for All: Damages, Jury Trials, and the Civil Rights Act of 1991 (June 30, 2004) (transcript available at <http://www.eeoc.gov/eeoc/history/40th/panel/40thpanels/panel3/transcript.html>). Touché. I was an amateur astronomer in my teenage years during the 1970s, and it did not occur to me the metaphor would be seen as egg-headed by an

The “tortification” of Title VII—a perhaps crude but evocative word that I choose here to never let us forget just how unwarranted and unnatural has been the raiment with which the 1991 CRA forcibly fitted Title VII—creates many disadvantages for the evolution of civil rights in our country, for the eradication of discrimination in our workplaces, and for the attainment of the amended Title VII’s § 703(m) goals of lightening the terrifically difficult burden of proof in these supposedly “post-racial” times. I myself argued in prior writings that Title VII is a statutory tort, but I did so in a metaphorical sense. My focus was on comparing the effect of a prima face case of tort to a prima facie case of discrimination under Title VII and the other EDL statutes.⁴⁵ I certainly did not intend to suggest that the limiting doctrines on negligence invented by nineteenth and early twentieth century courts to protect business interests should be applied to Title VII. Yet, the Roberts-Retro Supreme Court has apparently espoused that view in its most unfortunate recent decision in *Proctor v. Staub Hospital*,⁴⁶ where the Court purported to interpolate proximate causation doctrine from the common law of tort into the law of federal employment discrimination.⁴⁷ I renounce the extension of the tort label to that totally unwarranted degree. No one has better chronicled and exposed the ills of tortification than Professor Sandra Sperino of the University of Cincinnati College of Law. In a series of well thought out, closely argued, and incontrovertibly reasoned publications, Professor Sperino has found the tort label, as she more elegantly calls it, to be—as I would put it somewhat more proactively than might she—the scarlet letter that has created a virtual judicial banishment of the statute to the hinterlands of the federal court docket and of Congress’s enforcement agenda.⁴⁸

experienced federal judge. I would be delighted to share with Judge Bennett my personal copy of J.L.E. DREYER, A HISTORY OF ASTRONOMY FROM THALES TO KEPLER (1906), a classic that is unfortunately neglected in our twenty-first century world.

⁴⁵ See Van Detta, *Vive Le Roi!*, *supra* note 12, at 81–85.

⁴⁶ *Staub v. Proctor Hosp.*, 562 U.S. 411, 411–12 (2011).

⁴⁷ See Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1432–34 (2012).

⁴⁸ See Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1 (2013); Sandra F. Sperino, *Let’s Pretend Discrimination Is a Tort*, 75 OHIO ST. L.J. 1107 (2014); Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051 (2014).

Perhaps Congress thought that tortifying Title VII, while at the same time lightening the plaintiff's metaphysical burden of proof, would attract more attorneys to represent wronged individuals in the process that the 1964 Congress saw as key to the success of Title VII—the prosecution of individual lawsuits as private attorneys general, which inspired the fee-shifting provisions of § 706(k)⁴⁹ that suspended the operation of the traditional American rule⁵⁰ allowing reasonable attorney fees to the prevailing plaintiff.⁵¹ But quite the opposite has happened

⁴⁹ Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(k), 78 Stat. 259, 261 (codified at 42 U.S.C. § 2000e-5(k) (2012)).

⁵⁰ *Fox v. Vice*, 563 S. Ct. 2205, 2213 (2011) (discussing the traditional American rule which “requires each party to bear his own litigation expenses, including attorney’s fees, regardless whether he wins or loses” while noting that “Congress has authorized courts to deviate from this background rule in certain types of cases by shifting fees from one party to another”); see Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1093 n.19 (2007) (discussing “a private attorney general exception to the American rule that each party pays its own lawyer”).

⁵¹ See, e.g., Albiston & Nielsen, *supra* note 50, at 1093 n.24 (“Courts generally interpret ‘prevailing party’ fee-shifting statutes to permit asymmetrical recovery: Prevailing plaintiffs generally recover fees as a matter of course, but prevailing defendants recover their fees only when the plaintiff’s action was ‘frivolous, unreasonable, or groundless.’ This interpretation avoids deterring plaintiffs from bringing good faith civil rights claims when success is uncertain.” (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978)) (citation omitted)); Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1341 1346–52 (2012) (“This model is known as the ‘private’ attorney general because it effectively delegates pursuit of the statute’s public goals to private parties.”). Professor Johnson insightfully elaborated:

The primacy of the private attorney general model was not inevitable, but it has become the central conception of civil rights enforcement for good reason: In the end, it was the best deal that civil rights advocates could get from Congress. When Congress debated the fair employment provisions of the 1964 Civil Rights Act, civil rights supporters initially pursued a bureaucratic enforcement regime of resolving complaints, modeled on the National Labor Relations Act and state fair employment practices commissions. The administrative agency would investigate charges, determine if probable cause existed, conciliate claims, and if conciliation failed, prosecute claims before the agency’s quasi-judicial board. This initial model made administrative enforcement exclusive, with no private right to sue in court. For civil rights proponents, the administrative process was superior to the judicial process: cheaper, quicker, less complex, more flexible, and more predictable and coherent than private litigation. But after opponents resisted the creation of powerful federal administrative agencies with the authority to resolve civil rights claims, private enforcement emerged as the compromise.

because the federal judiciary has stepped in—steeped in horror and dread of runaway juries, magnet fora, opened floodgates of litigation, and, frankly, overenforcement. Indeed, the federal courts have evidenced in deed if not in word an attitude toward Title VII that seems to bubble up from the same unhappy wellspring of thought with which New York's Justice Joseph Bradley wrote in the *Civil Rights Cases*⁵² that protected classes—in that case, African Americans—were being treated as “special favorite[s] of the laws,” as he struck down the 1964 Civil Rights Act's predecessor, the Civil Rights Act of 1875. In short, if the cases go down in flames from the beginning, the incentives for vindication of Title VII through the activities of “private attorneys general”⁵³ fall nearly to a subminus zero.⁵⁴ Judge Richard Posner recognized this in a case some twenty years ago—and although he recognized this, he opined that the federal courts had little power to correct the situation:

The practical inability of a plaintiff in a Title VII case to get past summary judgment unless he presents evidence other than what comes out of his own mouth could be thought troubling.

Id. at 1351 (footnotes omitted); see also Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (2003) (“Virtually all modern civil rights statutes rely heavily on private attorneys general.”). For a discussion on the further nuances that have come to characterize the “private attorney general” concept in American law, see William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2130–31 (2004).

⁵² 109 U.S. 3, 25 (1883) (“When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.”).

⁵³ For the origin of this term, see Robert Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Development*, 20 ST. LOUIS U. L.J. 225, 227 n.12 (1976); see also *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 413–15 (1975).

⁵⁴ See Albiston & Nielsen, *supra* note 50, at 1088 (recounting aptly the integral nature of meaningful opportunities for attorney fee recoveries as the engines that drive—and make possible—lawsuits by private individuals to enforce rights under federal antidiscrimination law); see also *id.* (“Congress saw the need for fee-shifting statutes based in part on evidence that the vast majority of civil rights victims could not afford representation, and that private attorneys were refusing to take civil rights cases because of the limited potential for compensation. Congress explicitly noted that civil rights enforcement ‘depend[s] heavily upon private enforcement,’ and that ‘fee awards’ are essential ‘if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.’” (alteration in original) (footnote omitted)).

Even with the recent amendments to Title VII, the expected judgment in an employment discrimination case, especially one brought by an hourly-wage worker, will rarely be large enough to repay a substantial investment in the development of evidence at the summary judgment stage, which is to say before the case even gets to trial. And on the other hand employers have incentives to invest heavily in the defense of these cases, in order to deter the bringing of them. The asymmetry puts the plaintiff at a disadvantage, as this case illustrates. There is no basis for confidence that the defendant did not discriminate against [the plaintiff] on account of his race and age; it is simply that [the plaintiff] has not presented enough evidence, perhaps because he could not afford to present more, to withstand the company's motion.⁵⁵

What is, perhaps, even more troubling than the acknowledgement of the federal courts' inability to ease the employee's burden without depriving the employer of, what are viewed as, procedural rights conferred upon him by settled law,⁵⁶ however, is Judge Posner's subtle but critical view of the trial judge's role in ruling on an employer's summary judgment motion in an EDL case:

We must remember that a canonical formulation of the test for whether to grant summary judgment is whether, if the record at trial were identical to the record compiled in the summary judgment proceedings, the movant would be entitled to a directed verdict because no reasonable jury would bring in a verdict for the opposing party.⁵⁷

That viewpoint launched more opinions granting employers' summary judgment motions than Helen's face launched ships. It says that federal judges know better than juries what discrimination is, and where it is to be found, simply from reading a paper record, than the judges might know if they informed themselves—with or without a sitting jury, from the testimonies of real people in the crucible of a trial. At least some federal judges—from hard-earned courtroom experience—have learned better.⁵⁸

⁵⁵ *Russell v. Acme-Evans Co.*, 51 F.3d 64, 70–71 (7th Cir. 1995) (citation omitted) (citing Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974)).

⁵⁶ *Id.* at 71.

⁵⁷ *Id.* at 70 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

⁵⁸ District Judge Larry Alan Burns candidly acknowledged his error in having granted summary judgment in a case that the Ninth Circuit reversed and sent back

IV

The saga of *Ash v. Tyson Foods, Inc.*⁵⁹ epitomizes the attitude that federal judges know better than juries what discrimination is and where it is to be found. What is interesting in this case is the lengths that the federal judiciary went to nullify a jury's determination that an employer had racially discriminated against two plaintiffs and that the employer as a consequence should pay them compensatory and punitive damages.⁶⁰ It is also significant that twelve of the fourteen opinions in the case rendered between 2004 and 2014 were unpublished. That practice hides the courts' actions from the general public. It makes the law accessible only to those who are either more sophisticated in tracking down unpublished slip opinions or to those with sufficient means to retain lawyers who can afford subscriptions to proprietary online search engines.⁶¹

to him for trial—a trial whose outcome made him eat his own words, candidly and forthrightly:

This case went to trial and [the defendant] lost—badly. The jury awarded [the plaintiff] \$296,252 in economic damages, \$850,000 in non-economic damages, and \$3.5 million in punitive damages. Now, with \$4,646,252 on the line, [the defendant] has filed a motion for a new trial that tries to blame its loss on legal missteps by the Court, improper statements by [the plaintiff's] counsel, and misconduct by the jury, rather than the actual testimony and arguments the jury heard. The motion is DENIED. The Court's only error in this case, apparently, was giving [the defendant] false hope that [the plaintiff] had no case by initially entering summary judgment in its favor, a ruling that in retrospect was obviously mistaken.

Steffens v. Regus Grp., PLC, No. 08cv1494-LAB (BLM), 2013 WL 4499112, at *1 (S.D. Cal. Aug. 19, 2013) (denying employer's Rule 59 motion). Judge Burns was referring to the employer's motion for summary judgment that he had granted in an opinion, *Steffens v. Regus Grp., PLC*, No. 08cv1494-LAB (BLM), 2011 WL 666906 (S.D. Cal. Feb. 16, 2011), which a Ninth Circuit panel consisting of Judges B. Fletcher, Wardlaw, and Bybee reversed in a memorandum opinion and remanded for a jury trial. *Steffens v. Regus Grp., PLC*, 485 F. App'x 187, 189 (9th Cir. 2012). The June 5, 2012 oral argument at the Ninth Circuit is instructive. See Oral Argument, *Steffens*, 485 F. App'x 187 (No. 11-55379), available at http://www.ca9.uscourts.gov/media/view.php?pk_id=0000009229.

⁵⁹ 129 F. App'x 529 (11th Cir. 2005).

⁶⁰ *Id.* at 534–35, 537.

⁶¹ The case against the use of unpublished opinions is very well established. See Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions To Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757 (1995); see also Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755 (2003); Deborah J. Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71 (2001); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the*

A

The case was filed in 1996 after plaintiffs, Anthony Ash and John Hithon, African Americans who were superintendents at Tyson's Gadsen, Alabama poultry plant, applied for two shift manager positions at the Gadsen plant but were passed over in favor of two white employees in the summer of 1995.⁶² Proceeding under Title VII and the Civil Rights Act of 1866, the plaintiffs—originally part of a larger group of plaintiffs—survived eight years of proceedings, including summary judgment motions filed against them, to finally reach a jury in 2004, which promptly awarded them reach a verdict “of compensatory damages in the amount of \$250,000.00, and punitive damages in the amount of \$1,500,000.00.”⁶³ The district court just as promptly snatched away those verdicts from the plaintiffs.⁶⁴ In ruling on Tyson's postverdict motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), the U.S. magistrate judge in that case effectively reweighed the evidence from his view of the world—not from the jury's. For example, the magistrate concluded that while there was evidence of pretext in the employer's defense, it just was not pretextual enough to support an inference of racial discrimination—regardless of whether the decision maker followed the company's own policy in making the decision or whether he even was aware that there were written job

U.S. Courts, 56 STAN. L. REV. 1435 (2004). Compare *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000), *reh'g en banc granted & vacated on other grounds*, 235 F.3d 1054 (8th Cir. 2000), with *Hart v. Massanari*, 266 F.3d 1155, 1159–62 (9th Cir. 2001). The Federal Judicial Conference promulgated Federal Rule of Appellate Procedure 32.1 in 2006, which permits unrestricted citation to unpublished federal appeals courts decisions—but pointedly “says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court.” FED. R. APP. P. 32.1 advisory committee's note. See generally Anne Coyle, *A Modest Reform: The New Rule 32.1 Permitting Citation to Unpublished Opinions in the Federal Courts of Appeals*, 72 FORDHAM L. REV. 2471 (2004); Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705 (2006). The only thing worse, however, than the practice of unpublished, nonprecedential opinions, is to make those unpublished opinions precedential while still largely hidden from the general public's view.

⁶² *Ash*, 129 F. App'x at 531.

⁶³ *Ash v. Tyson Foods, Inc.*, No. Civ. A. 96-RRA-3257-M, 2004 WL 5138005, at *1 (N.D. Ala. Mar. 26, 2004).

⁶⁴ *Id.* at *9.

qualifications for the position.⁶⁵ The magistrate judge then proceeded to pick apart each piece of probative evidence in isolation.

About the use of the term “boy” by the white decision maker to refer to each of the plaintiffs, the magistrate judge decided that—as a matter of law—no reasonable jury could find that the moniker had racial overtones.⁶⁶ Yet, a duly empanelled and properly instructed federal court jury had found precisely that.

About Hithon’s contention—that the jury obviously had shared—that his qualifications were better than the white employees whom the decision maker actually promoted, the magistrate judge said that “even if it could be found that Hithon was more qualified than [both of the white employees], the disparity would not be so great as to allow a finding of discrimination based on the difference.”⁶⁷ How in the world, one might legitimately wonder, could a judge in the Rule 50 context purport to reweigh evidence? The magistrate judge did not have to look far to find a tool fitted to his task. In an earlier decision,⁶⁸ a panel of the United States Court of Appeals for the Eleventh Circuit had—to the great misfortune for civil rights enforcement across a broad swath of the old confederacy—latched on to some profoundly unfortunate language from an opinion issued by the court with jurisdiction over the other broad swath of the old confederacy, the United States Court of Appeals for the Fifth Circuit.⁶⁹ The test is one so antithetical to both the 1964 Civil Rights Act and the 1991 Civil Rights Act almost to beggar belief:

⁶⁵ *Id.*

⁶⁶ *Id.* at *6–7. The magistrate judge’s rationalization has to be read to be believed:

The plaintiffs also point to the testimony that on one occasion [the supervisor] called Hithon “boy,” and on two occasions he called Ash “boy.” In a production meeting, [the supervisor] said “Hey, boy” as Hithon was walking through the door. In the cafeteria, Hatley said to Ash, “Boy, you think you’ve got enough starch in those jeans?” Ash’s wife told [Ash’s supervisor] that her husband was not a boy, and [the supervisor] laughed. Neither Ash nor Hithon complained about the statements. Even if [the supervisor] made these statements, it cannot be found, without more, that they were racial in nature.

Id. (citations omitted).

⁶⁷ *Id.* at *6.

⁶⁸ *Id.* at *5 (citing *Lee v. GTE Fla., Inc.*, 226 F.3d 1249, 1254 (11th Cir. 2000)).

⁶⁹ *Lee*, 226 F.3d at 1254 (citing *Deines v. Tex. Dep’t of Protective & Regulatory Servs.*, 164 F.3d 277, 280–81 (5th Cir. 1999)).

Other circuits have more clearly articulated the evidentiary burden a plaintiff must meet in order to prove pretext by showing she was substantially more qualified than the person promoted. In *Deines*, for example, the Fifth Circuit affirmed the district court's instruction to the jury stating that "disparities in qualifications are not enough in and of themselves to demonstrate discriminatory intent unless those disparities are so apparent as virtually to jump off the page and slap you in the face." The court explained that the phrase "jump off the page and slap [you] in the face" . . . should be understood to mean that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question. This evidentiary standard does not alter the plaintiff's evidentiary burden to prove the fact of intentional discrimination by a preponderance of the evidence. Instead, the standard only describes the character of this particular type of evidence that will be probative of that ultimate fact.⁷⁰

What an incredibly bitter irony—so far had the federal courts strayed from the prize, that is, elimination of discrimination in employment—that three different courts and seven different judges reached the conclusion that Title VII plaintiffs contending they were more qualified than the employee selected for promotion had to prove not only that their qualifications were superior—but that they were a quantum leap so obviously superior that no reasonable person on the face of the earth could disagree with plaintiffs' contentions. This is certainly the closest I have ever seen a court in a civil case come to requiring a plaintiff to prove his claim using the criminal law standard of beyond a reasonable doubt, rather than the applicable preponderance of the evidence standard. Only an imperious federal court could believe that by declaring "[t]his evidentiary standard does not alter" the burden of proof but merely "describes the character of" the evidence, that it had somehow justified the perversion of law it had worked.⁷¹ Those with long memories might be forgiven for thinking of the Roman

⁷⁰ *Ash*, 2004 WL 5138005, at *5 (alteration in original) (citations omitted) (quoting *Lee*, 226 F.3d at 1254 (quoting *Deines*, 164 F.3d at 280–81)).

⁷¹ *Deines*, 164 F.3d at 281.

emperor who declared his horse a "Consul of Rome"⁷² and expected his subjects to believe it simply because he had uttered it.⁷³

Perhaps the crowing ingloriousness of this inglorious opinion was the magistrate judge's blithe footnote: "Any other assertion of discrimination not commented on is no more probative of discrimination than the assertions discussed."⁷⁴ While the jurors were no doubt thanked for their service at the end of the trial, what would they conclude were they to read that the magistrate judge considered them either imbeciles or so biased themselves that they could not see straight?

B

Ash and Hithon deserved better treatment at the hands of the court of appeals in Atlanta, which at one time had been a bulwark of civil rights.⁷⁵ The Eleventh Circuit panel decreed that as a matter of law, no reasonable juror could rely on the testimony about the supervisor's use of the word "boy" in referring to either of the plaintiffs as evidence of discrimination: "While the use of 'boy' when modified by a racial classification like 'black' or 'white' is evidence of discriminatory intent . . . the use of 'boy' alone is not evidence of discrimination."⁷⁶

Further, "[i]n a failure to promote case," the Eleventh Circuit panel decreed not only that "a plaintiff cannot prove pretext by simply showing that [h]e was better qualified than the individual who received the position that [h]e wanted," but also that "[p]retext can be established through comparing qualifications only when 'the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face.'" ⁷⁷ The panel emphasized the nearly metaphysical distinction that "an

⁷² SUTONIUS I, at 418, 499 (J.C. Rolfe trans., Loeb Classical Library 1998) (1913).

⁷³ See E. Freeman, *Camus, Suetonius, and the Caligula Myth*, 24 SYMP.: Q.J. MODERN LITERATURES 230, 233 (1970).

⁷⁴ *Ash*, 2004 WL 5138005, at *9 n.8.

⁷⁵ See generally JACK BASS, UNLIKELY HEROES (1981); ANNE EMANUEL, ELBERT PARR TUTTLE: CHIEF JURIST OF THE CIVIL RIGHTS REVOLUTION (2011).

⁷⁶ *Ash v. Tyson Foods, Inc.*, 129 F. App'x 529, 533 (11th Cir. 2005) (per curiam).

⁷⁷ *Id.* (alterations in original).

employee's showing that the employer hired a less qualified candidate is probative of whether the employer's reason is pretextual, but not proof of pretext."⁷⁸

These rulings destroyed Ash's case and much of Hithon's. The court also threw out both the compensatory and punitive damages verdicts in favor of the plaintiffs. Only a sliver of Hithon's case remained "because he demonstrated that [his supervisor] interviewed him after [the supervisor] had already hired King, indicating that [the supervisor's] stated reasons for rejecting Hithon—his lack of a college degree, his position as a manager at a financially troubled plant, and his lack of experience outside of the Gadsen plant—were pretextual."⁷⁹ However, the panel ruled that there would have to be a new trial on damages, because neither plaintiff's evidence, in their second-guessing view, was "insubstantial" and did not, as a matter of law, prove either emotional distress or humiliation from discrimination or that the employer "knew [it] was violating federal law" when it discriminated against Hithon.⁸⁰

C

Rather than simply returning to the district court to re-try Hithon's case, counsel for Ash and Hithon filed a petition for certiorari with the assistance of Professor Eric Schnapper.⁸¹ The petition shone a stark light on the pernicious effects of the law that the Eleventh Circuit panel had blithely recited in its unpublished opinion. First, the petition assailed the slap-you-in-the-face standard, observing that "[t]his vivid metaphor is actually the legal standard applied in more than a hundred lower court decisions . . . [and] is a standard which has proven virtually impossible to meet."⁸² In fact, this judicial gloss on Title

⁷⁸ *Id.*

⁷⁹ *Id.* at 534.

⁸⁰ *Id.* at 536.

⁸¹ See, e.g., Tony Mauro, *Appellate Lawyer of the Week: Eric Schnapper*, *University of Washington Law School*, NAT'L L.J. (Oct. 27, 2010), available at LEXIS; see also Eric Schnapper, U. WASH. SCH. L., <http://www.law.washington.edu/directory/profile.aspx?ID=155> (last visited Jan. 18, 2016); Eric Schnapper, OYEZ, https://www.oyez.org/advocates/eric_schnapper (last visited Jan. 18, 2016); UW School of Law, *Eric Schnapper*, *Betts Patterson Mines Professor of Law Installation*, YOUTUBE, (Nov. 28, 2012), <https://www.youtube.com/watch?v=mygmi9qTwrC>.

⁸² Petition for Writ of Certiorari, *Ash v. Tyson Foods, Inc.*, 546 U.S. 544 (2006) (No. 05-379), 2005 WL 2341981, at *10.

VII—even as it was amended by § 703(m) of the 1991 CRA—proved almost as antithetical to its enforcement as the segregationists who assailed the Civil Rights Act of 1964 in the debates preceding its eventual passage:

The “slap in the face” standard, avowedly stringent in theory, is fatal in practice. In the ten Eleventh Circuit decisions applying this standard, no plaintiff ever succeeded in making the requisite showing. The court of appeals has applied that standard both to direct summary judgment for defendants and, as here, to overturn jury verdicts. Equally striking is the pattern of decisions among district court decisions in the Eleventh Circuit. Since that circuit adopted the “slap in the face” standard in 2000, it has been applied in 34 district court decisions reproduced in Westlaw. In every one of them the district (or magistrate) judge held that the plaintiff had failed to show that the disparities in qualifications were so great that they jumped off the page and slapped one (i.e. the judge) in the face.⁸³

About the racial epithet, the petition recited the history of “one of the most infamous racial epithets that continues from the era of Jim Crow: addressing an adult African-American man as ‘boy,’” infamous as a “form of verbal abuse [having] its origins in the slave era.”⁸⁴ Rightfully, the petition observed:

⁸³ *Id.* at *11–12 (footnotes omitted); see also *Clark v. Alfa Ins. Co.*, No. Civ. A. 00–AR–3296–S, 2002 WL 32366291, at *2 (N.D. Ala. May 28, 2002) (“[T]his court’s face does not feel slapped.”). Similarly, in the Fifth Circuit, another “face-slap” circuit, courts “ha[d] applied this standard to direct summary judgment for defendants, to affirm a directed verdict for defendant, to reverse as clearly erroneous trial judge findings of discrimination, and to overturn jury verdicts of discrimination,” with the results that (1) “[n]o Fifth Circuit panel has ever found that this standard was met” and (2) “[i]n the last six years [that is, 1999–2005], among district court decisions in the Fifth Circuit available on Westlaw, the ‘slap in the face’/‘cry out’ standard has been applied in 40 cases; in all but one case the district (or magistrate) judge held that the plaintiff’s evidence did not meet that standard.” Petition for Writ of Certiorari, *Ash*, 546 U.S. 544 (No. 05-379), 2005 WL 2341981, at *13–15 (footnotes omitted).

⁸⁴ Petition for Writ of Certiorari, *Ash*, 546 U.S. 544 (No. 05-379), 2005 WL 2341981, at *22.

In the teeth of the long and sordid use of this racial epithet, the Eleventh Circuit Court of Appeals in the instant case has held that, when a white person addresses an adult African-American as "boy" (rather than "black boy") "the use of 'boy' alone is not evidence of racial discrimination."⁸⁵

Succinctly, the petition concluded, "That holding is not merely wrong; it can fairly be characterized as astounding."⁸⁶

The Supreme Court was astounded enough to grant the petition, and eschewing even an argument, reversed the Eleventh Circuit in a per curiam rebuke. The per curiam Court gave short shrift to the "face-slap" standard, ruling that "[t]he visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications."⁸⁷ It gave even less credence to the Eleventh Circuit's bizarre holding on the evidentiary significance of management calling African-American men "boy," taking the time to point out the following to the lower courts:

Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous.⁸⁸

The per curiam Court therefore simultaneously granted certiorari, vacated the Eleventh Circuit's judgment, and remanded the case to the Eleventh Circuit to "determine in the first instance whether the two aspects of its decision here determined to have been mistaken were essential to its holding."⁸⁹

⁸⁵ *Id.* at *24.

⁸⁶ *Id.* at *25.

⁸⁷ *Ash*, 546 U.S. at 457.

⁸⁸ *Id.* at 456.

⁸⁹ *Id.* at 458.

D

One might think that the Eleventh Circuit panel would have been chastened by this rebuke. But skeptics worried. In the words of Professor Leon Friedman at Hofstra, “The question on remand [was]: [I]s the [Eleventh Circuit] going to find some other reason for taking away the jury verdict?”⁹⁰

And find another reason for taking away the jury verdict they did. The Eleventh Circuit’s panel of the Alabama duo, Judges Dubina and Carnes, and Judge Marcus from Florida, gave no ground. Taking the case up again after remand from the Supreme Court, the panel, again speaking per curiam, held fast to rejecting any legal significance to testimony that the plant manager called the plaintiffs “boy”:

After reviewing the record, we conclude once again that the use of “boy” by [the supervisor] was not sufficient, either alone or with the other evidence, to provide a basis for a jury reasonably to find that Tyson’s stated reasons for not promoting the plaintiffs was racial discrimination. The usages were conversational and as found by the district court were non-racial in context. But even if somehow construed as racial, we conclude that the comments were ambiguous stray remarks not uttered in the context of the decisions at issue and are not sufficient circumstantial evidence of bias to provide a reasonable basis for a finding of racial discrimination in the denial of the promotions. The lack of a modifier in the context of the use of the word “boy” in this case was not essential to the finding that it was not used racially, or in such a context as to evidence racial bias, in the decisions at issue, even if “boy” is considered to have general racial implications. The statements were remote in time to the employment decision, totally unrelated to the promotions at issue, and showed no indication of general racial bias in the decision making process at the plant or by [the supervisor]. Moreover, there is nothing in the record about the remaining factors to support an inference of racial animus in the use of the term “boy.”⁹¹

⁹⁰ Leon Friedman, *Other Civil Rights Decisions in the October 2005 Term: Title VII, IDEA, and Section 1981*, 22 TOURO L. REV. 1047, 1050 (2007).

⁹¹ *Ash v. Tyson Foods, Inc.*, 190 F. App’x 924, 926 (11th Cir. 2006). It is interesting that the panel retroactively applied to the trial record the factors just articulated by the Supreme Court, rather than instead choosing to remand the case for retrial under that test, which would have allowed all parties the opportunity to frame their cases accordingly. The panel’s decision is reflective of a serious misconception on the part of judges in evaluating biased remarks for, as Professor

Tristin Greene has explained, “[c]ourts applying Title VII tend to focus their inquiry on the state of mind of an identified decisionmaker or decisionmakers at the moment in time that a specific employment decision was made,” and thus, by “[v]iewing facts through this narrow lens, courts close emotion experienced in day-to-day interaction (racial or otherwise) out of antidiscrimination discourse.” Tristin K. Green, *Racial Emotion in the Workplace*, 86 S. CAL. L. REV. 959, 983 (2013). Continuing the thought, Professor Green observes:

The stray remarks doctrine is used regularly by courts in cases involving racial language or language reflecting racial bias, like *Ash v. Tyson Foods, Inc.*, but the same narrow inquiry closes out the many more interracial relations that do not involve racial language. The narrow focus on state of mind at a discrete moment in time ignores the reality that most employment decisions are based on working relationships that are ongoing and have developed over time.

Moreover, the stray remarks doctrine is but one example of a broader tendency on the part of courts to isolate specific employment decisions from the web of workplace relationships and the contexts in which those relationships and employment decisions arise. Even if commentators (and courts) agree in theory that disparate treatment law requires only a showing that the adverse employment action was taken “because of” membership in a protected group and not a showing of purpose or conscious motivation on the part of a specific decisionmaker, the prevailing conception of discrimination as involving a decision at a precise moment in time tends to close racial emotion out of antidiscrimination concern.

Id. at 986–87 (footnotes omitted). Courts would do well to heed Professor Green’s proposal for reconceptualizing such expressions of racial emotion in the workplace as evidence highly relevant to the jury’s role in assessing discrimination claims from a holistic perspective—what the author would describe as the “a motivating factor” perspective intended by § 703(m) of the 1991 CRA—rather than from the sterile and intellectually vacuous perspective of the “direct evidence of the decision maker’s intent” standard:

There are a number of ways in which the law can better see and address racial emotion as a source of discrimination in the workplace. . . . The overarching goal is conceptual. Judges, lawyers, members of the media, and laypeople can better conceptualize discrimination as a problem not just of biases that operate in the minds of specific, identifiable decisionmakers at discrete moments in time, but as also a problem of relations that are capable of being derailed by negative racial emotions as well as cognitive biases. Acknowledging that relations can be a root of discrimination and group-based disadvantage is an important first step in addressing racial emotion and opening opportunities for developing positive racial emotion in the workplace. Acknowledging racial emotion, and not just cognitive biases, as a source of disadvantage and inequality within those relations is the next step.

Following from this conceptual shift, courts should resist the temptation to assume (or presume) that an acrimonious workplace relationship is solely personal, and therefore nonracial. Racial emotion is personal and racial. It is experienced by people in interracial interaction and can result in relationships that exhibit emotionally laden, hostile behavior. Absent evidence that an acrimonious or otherwise emotionally laden relationship is nonracial, such as evidence that hostility developed after a specific,

As for the “face-slap” test, the panel acknowledged that “the Supreme Court instructed that the visual image of words ‘jumping off the page to slap you in the face’ was unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications” and instead reached the same result under a considerably less vivid but equally opaque test: “[D]isparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.”⁹² Petitions for

nonracial incident, courts should permit an inference of discrimination to follow from animosity in interracial relations.

Id. at 1008–09 (footnote omitted). As an example particularly pertinent to cases such as *Ash v. Tyson*, Professor Green explains:

The overarching conceptual shift described above would nonetheless be aided by a simple categorical recognition of the relational behaviors that are most likely to trigger negative racial emotion, acrimonious relationships, and workplace inequality. These are the behaviors that are most disastrous to interracial relationships. I call this category of behavior “racial assault.” . . . What is behavior of racial assault? Behavior of racial assault should be defined legally as behavior that is expressively subordinating. Use of racially subordinating language, such as . . . [the stand-alone pejorative phrase] “boy” [that the plant manager used in *Ash v. Tyson Foods, Inc.*] to refer to blacks, statements reflecting normative and/or descriptive race-based stereotypes about a person’s ability to do a job, such as “black people should stay in their place” or “that’s a lot of money for a black to count,” and other behavioral expressions of subordination and dominance, such as construction or display of nooses, would all be considered behaviors of racial assault. The legal inquiry would turn not on state of mind of the person exhibiting behavior of racial assault, but on the message of subordination that it sends and the racial emotion that is likely to result. The law should treat racial assault behavior as presumptively discriminatory and as constituting a hostile work environment. Behaviors of racial assault are presumptively racial and the emotion experienced by racial minorities subjected to these behaviors is presumptively reasonable, as a matter of policy as much as a matter of fact. Courts should not be permitted to substitute their own judgment about what the actor “intended” for a legal presumption in these cases. Further, the law should presume that adverse employment decisions made by someone who has exhibited racial assault behavior as to any individuals against whom the behavior was directed were motivated at least in part by race. The presumption should apply no matter how remote in time from the decision at issue the behavior was exhibited. Only if the employer can show that it would have made the same decision anyway should the relief available to the plaintiff be limited.

Id. at 1010–11 (footnotes omitted).

⁹² *Ash*, 190 F. App’x at 927 (internal quotation marks omitted).

rehearing and rehearing en banc were promptly denied in short order⁹³ followed by a denial of a second certiorari petition in early 2007.⁹⁴

E

In 2008, Mr. Hithon's case was retried to a jury, "where the jury again found discrimination and awarded damages for back pay in the amount of \$35,000.00, damages for mental anguish in the amount of \$300,000.00, and punitive damages in the amount of \$1,000,000.00."⁹⁵ Tyson filed another Rule 50(b) motion, which the district court granted in part "on the question of the sufficiency of the evidence to support a finding that [the supervisor's] actions warranting punitive damages could be imputed to Tyson," and thus the district court set aside the punitive damages award in its entirety.⁹⁶ "All other Rule 50(b) relief requested by the defendant" was denied.⁹⁷

⁹³ *Ash v. Tyson Foods, Inc.*, 213 F. App'x 973 (11th Cir. 2006).

⁹⁴ *Ash v. Tyson Foods, Inc.*, 549 U.S. 1181 (2007).

⁹⁵ *Hithon v. Tyson Foods, Inc.*, No. 96-RRA-3257-M, 2008 WL 4921515, at *1 (N.D. Ala. Sept. 30, 2008).

⁹⁶ *Id.* at *10. On the Rule 50(b) motion, the district court concluded that, inter alia, "it is clear from the evidence that Tyson provided federal anti-discrimination law training to its employees, including [the supervisor]" and that thus, "the evidence was sufficient for the jury to conclude that [the supervisor's] actions were malicious or recklessly indifferent to the plaintiff's known federally protected rights." *Id.* at *6. However, the district court bought Tyson's arguments: (1) [T]he decision maker, "Hatley, a plant manager with Tyson, was not high enough up the corporate ladder to impute his malicious, recklessly indifferent, or otherwise egregious acts to it," *id.* at *7; (2) "Tyson's higher management was never informed of Hatley's discriminatory acts or that they approved of his behavior in any way" and thus, "Hatley's actions, whether or not amounting to actual malice or reckless indifference, cannot be imputed to Tyson," *id.* at *9; and (3) "Tyson had implemented several policies to prevent discrimination in promotion and hiring decisions, as previously set out" and thus, "Hatley's actions in violation of Tyson's discrimination policies cannot be imputed to the employer in order to impose punitive damages," *id.* at *10. The district court purported to apply the rulings of the Supreme Court in *Kolstad v. American Dental Association* that (1) punitive damages could be imposed in Title VII action without a "showing of egregious or outrageous discrimination independent of the employer's state of mind;" (2) "employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages;" and (3) "employer may not be vicariously liable for the discriminatory employment decisions of managerial agents," for purposes of imposing punitive damages, "where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.'" 527 U.S. 526, 535-36, 545 (1999).

⁹⁷ *Hithon*, 2008 WL 4921515, at *10. That included Tyson's arguments "contest[ing] the sufficiency of the evidence to support a finding of discrimination

Cross-appeals ensued, and—surprise, surprise—the appellate court once again reversed the verdict in favor of Hithon, once more concluding that no reasonable jury could possibly have found in Hithon's favor.⁹⁸ But the Eleventh Circuit panel for this fourth round had changed.⁹⁹ Only Judge Carnes remained from the original panel that heard the first three appeals.¹⁰⁰ In this fourth panel, he was joined by Circuit Judge Pryor as well as District Judge David Dowd, sitting by designation.¹⁰¹ And while the opinion was again offered as per curiam, only Judges Carnes and Pryor joined it. Quite unusually for an opinion that a panel designates as “unpublished,” this opinion featured a dissent—by Senior District Judge David D. Dowd, Jr., of the Northern District of Ohio. Although the standard of deferential jury review was recited—“[v]iewing the evidence as a whole in the light most favorable to Hithon”¹⁰²—the per curiam opinion dissected the trial record to such an extent that not only was this the longest opinion in the case to date, it also appeared to be a de novo reweighing of each scrap of evidence,¹⁰³ almost as if the judges were lecturing the jury on just how “inept” they were in discharging their duties—just as “inept” as the first jury whose verdict the Eleventh Circuit reversed in 2005.

This time, however, the third judge did not buy into the injudicious contempt for the jury verdicts displayed in the opinion of the other two jurists. Judge Dowd was short and sweet: “I respectfully dissent. Two juries have found the issues in favor of the plaintiff Hithon and granted both compensatory and punitive damages. In my view, the record supports an affirmance of the second jury verdict as to compensatory damages.”¹⁰⁴ Judge Dowd also opined that “the record also supports a conclusion that a punitive damages award is

[and] the sufficiency of the evidence to support an award of compensatory damages.” *Id.* at *1.

⁹⁸ *Ash v. Tyson Foods, Inc.*, 392 F. App'x 817, 821 (11th Cir. 2010) (per curiam).

⁹⁹ *Id.* at 818.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 833.

¹⁰³ *Id.* at 819–33.

¹⁰⁴ *Id.* at 833 (Dowd, J., dissenting). The panel's decision drew coverage from *New York Times* Legal Reporter Adam Liptak. See Adam Liptak, *To Juries, Discrimination; to Judges, Conversation*, N.Y. TIMES, Sept. 7, 2010, at A16.

justified,” but the record shows, he said, that “the amount of punitive damages awarded by the jury is excessive.”¹⁰⁵ Judge Dowd therefore favored an affirmance of everything except the punitive damages verdict and proposed that there should be “a new trial on punitive damages, unless the plaintiff accepts a remittitur.”¹⁰⁶

F

And here the plot thickens. Not since Owen J. Roberts decided that the legislative branch of government really was ascendant over the judiciary after all in the famous “switch in time saved nine”¹⁰⁷ had a court done such a startling about-face.¹⁰⁸ In the face of a petition for rehearing—both panel and en banc—the panel granted the petition for rehearing and issued an opinion,¹⁰⁹ although issued under Judge Carnes’s name,¹¹⁰ that largely followed the path limned by Judge Dowd in his previous dissent, repudiating—without expressly acknowledging the repudiation—the utter misapplication of the standard of reviewing a jury verdict for sufficiency of the evidence.¹¹¹ Applying the correct standards—that is, that “[w]e will reverse

¹⁰⁵ *Ash*, 392 F. App’x at 833.

¹⁰⁶ *Id.* Let anyone mistake this as the handiwork of a flaming liberal, Judge Dowd, born in 1929, is a former Republican judge of the Ohio Supreme Court and was nominated for the federal district court by Ronald Reagan in 1982. See *David Dudley Dowd Jr.*, SUP. CT. OHIO & OHIO JUD. SYS., <http://www.supremecourt.ohio.gov/SCO/formerjustices/bios/dowd.asp> (last visited July 28, 2015). Judge Dowd retired from the federal bench in July 2014. See Ed Meyer, *Retiring Federal Judge David D. Dowd Jr. Reflects on Long Career on Bench*, AKRON BEACON J., (July 12, 2014, 6:21 PM), <http://www.ohio.com/news/local/retiring-federal-judge-david-d-dowd-jr-reflects-on-long-career-on-bench-1.503974>.

¹⁰⁷ See, e.g., William E. Leuchtenburg, *Charles Evans Hughes: The Center Holds*, 83 N.C. L. REV. 1187, 1198–1201 & n.92 (2005).

¹⁰⁸ The Eleventh Circuit’s decision once again drew national attention from legal reporter Adam Liptak who did not hesitate to apply the term “about-face” to this last word from the federal court of appeals in Atlanta. See Adam Liptak, *A Judicial About-Face, Grudging but Rare, in a Bias Case*, N.Y. TIMES, Dec. 28, 2011, at A16. Mr. Liptak observed, “The new decision followed unflattering news coverage of the earlier one and might have been prompted by the possibility of a rebuke from the full 11th Circuit.” *Id.* The article quoted a less generous assessment by attorney Stephen Bright of the Southern Center for Human Rights: “He said the case demonstrated ‘how judges manipulate facts and law to make a case come out the way they want it to’” and that “[t]he new opinion flatly contradicts the first one in several places.” *Id.* (internal quotation marks omitted).

¹⁰⁹ *Ash v. Tyson Foods, Inc.*, 664 F.3d 883, 887 (11th Cir. 2011).

¹¹⁰ *Id.* at 886.

¹¹¹ *Id.* at 892.

only if the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict,” and that “[w]e view all the evidence and draw all inferences from it in the light most favorable to Hithon because he is the nonmoving party”—correctly, the court upheld every aspect of the jury verdict on discrimination and compensatory damages¹¹² and rejected specious arguments by the employer running the gamut from “law of the case”¹¹³ to challenges to various evidentiary rulings at trial that favored Hithon.¹¹⁴

The about-face showed most dramatically in three different aspects of the fifth *Ash v. Tyson Foods, Inc.* opinion. First, the panel’s emphasis in reviewing whether the evidence sustained the jury’s verdict on pretext was 180 degrees from its earlier, dismissive attitude; the panel much more appropriately framed the standard:

When pretext is the issue, and judgment as a matter of law to the defendant is under consideration, we “must evaluate whether the plaintiff has demonstrated such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.”¹¹⁵

Second, the panel found enlightenment in applying the Supreme Court’s standard to the evidence that the decision maker had referred to Mr. Hithon and Mr. Ash as “boy”:

In our now-vacated *Ash IV* opinion, we concluded that the evidence about the use of the word “boy” that was presented at the second trial “was not ‘new and substantially different’ enough for us to revisit the conclusion of law made in our *Ash III* decision after the Supreme Court’s remand.” [B]ut we now reach a different conclusion. Some new and substantially different evidence about Hatley’s use of the word “boy” was

¹¹² *Id.* at 890–900 (quoting *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1275 (11th Cir. 2008) (internal quotation marks omitted)).

¹¹³ *Id.* at 891–92.

¹¹⁴ *Id.* at 898.

¹¹⁵ *Id.* at 892 (quoting *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997)).

presented at the second trial and that evidence cannot be considered in isolation. We instead must consider it in combination with all of the other evidence.¹¹⁶

Third, the panel viewed the evidence cumulatively—rather than in the divide-and-conquer, seriatim manner that they had in all of the earlier, per curiam decisions¹¹⁷—and reached an entirely different conclusion than Judges Carnes and Pryor had reached previously:

¹¹⁶ *Id.* at 897 (citations omitted) (quoting *Ash v. Tyson Foods, Inc.*, 392 F. App'x 817, 833 (11th Cir. 2010) (citing *Ash*, 664 F.3d at 892 n.4). On the contextual meaning of the word “boy” in cases such as *Ash v. Tyson Foods, Inc.*, Debo P. Adegbile and John Payton of the NAACP's Legal Defense and Education Fund, submitted an amicus brief in the case. See Amici Curiae Brief in Support of Plaintiff-Appellant's Petition for Rehearing En Banc of Civil Rights Leaders et al., *Hithon v. Tyson Foods, Inc.*, 144 F. App'x 795 (11th Cir. 2005) (No. 08-16135-BB). The amici were a roster of some of the most venerable figures in the fight against racial discrimination:

Hon. U.W. Clemon, Alabama's first African-American federal judge; Ms. Dorothy Cotton, the Education Director for the Southern Christian Leadership Conference (SCLC) (1960–68); Rev. Robert S. Graetz, Jr., a leader of the Montgomery Bus Boycott; Dr. Bernard LaFayette, Jr., a leader in the Civil Rights Movement; Rev. Joseph E. Lowery, a founder and former president of the SCLC; Mrs. Amelia Boynton Robinson, Selma civil rights activist; Hon. Solomon Seay, Jr., eminent Alabama civil rights attorney; Rev. Fred L. Shuttlesworth, civil rights pioneer and a founder of SCLC; Rev. C.T. Vivian, Executive Staff for the SCLC; Dr. Wyatt Tee Walker, former Chief of Staff to Dr. King; the Hon. Andrew Young, former Executive Director of the SCLC, Mayor of Atlanta, Congressman, and Ambassador to the United Nations.

Id. at 1–2. The amici described their interest in the case in memorable terms:

Amici have a profound interest in the outcome of this case and in the preservation of the legal protections for which they have committed their lives. Moreover, the Amici are intimately familiar with the language of racial discrimination and its demeaning and harmful effects. They share the view that use of the term “boy” to describe an African-American man is deeply offensive and that its use reflects discriminatory intent.

Id. at 1 (footnote omitted). The amici zeroed in on what they aptly described as “the panel's misinterpretation of the ‘boy’ testimony in *Ash v. Tyson Foods, Inc.*, 190 F. App'x 924 (11th Cir. 2006) . . . and in the panel's August 17, 2010 opinion, *Ash v. Tyson Foods, Inc.*, 2010 WL 3244920 (11th Cir. Aug. 17, 2010).” *Id.* at 1 n.1. It is evident that Judges Carnes and Pryor were influenced to come around to Judge Dowd's view by the powerful witness borne by these illustrious men and women—yet, Judge Carnes's only reference to the amici in the opinion was to scold the amici for “recount[ing] the facts incorrectly when discussing the evidence at the second trial about the one occasion when Hatley used the word ‘boy’ in reference to Ash and the other occasion when Hatley used the word in reference to Hithon.” *Ash*, 664 F.3d at 896 n.9. That footnote ends with the barb, “Although we welcome amicus curiae briefs that are helpful, misstatements of facts are not helpful.” *Id.*

¹¹⁷ *Ash*, 664 F.3d at 897.

In light of all of the evidence, we cannot say that “the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict.” The verdict could have gone either way, and it went Hithon’s way. We cannot say that the evidence he presented at the second trial was not sufficient to demonstrate “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.”¹¹⁸

G

For sixteen years, Robert Hithon waited to see any justice done for his employer’s discrimination against him in 1995. Yet, it took him seven appeals and two jury trials to get even a measure of justice that would prove fleeting and no longer subject to vacatur by a nonempathetic federal appeals court. Few litigants have the determination—not to mention the legal counsel—to wage that kind of battle nor can our system bear the weight of such titanic struggles over what was a fairly straightforward case of disparate treatment—not a putative 500,000 across-the-board attack on the disparate impact of an employer’s policies. Justice delayed is justice denied, as the saying goes. Nowhere is that more apparent than in this case, which mirrors the federal courts’ indifference to § 703(m) for over

¹¹⁸ *Id.* at 898 (citations omitted). Judge Dowd, however, failed to persuade his colleagues on the punitive damages issues—Judges Carnes and Pryor still insisted that, as a matter of law, the plant manager’s actions were not attributable to the corporation itself, and thus, Tyson escaped the award of any punitive damages. *Id.* at 900–07. There is much doubt about their analysis, particularly the fact that they cite Tyson’s adoption of antibias policies at the corporate level as evidence of good faith to defeat malice or recklessness under 42 U.S.C. § 1981a, *id.* at 904–05, while the panel cited and quoted *Kolstad v. American Dental Association*, 527 U.S. 526, 545–46 (1999). While the critique could be the subject of a separate article, it suffices to observe here that merely one year before *Kolstad* was decided, the Court in a pair of sexual harassment cases decided that an employer’s having anti-sexual harassment policies in place but failing to ensure that they were enforced served as a basis for liability, rather than exoneration. See Jeffrey A. Van Detta, *Lawyers as Investigators: How Ellerth and Faragher Reveal a Crisis of Ethics and Professionalism Through Trial Counsel Disqualification and Waivers of Privilege in Workplace Harassment Cases*, 24 J. LEGAL PROF. 261, 263 & n.8 (2000) (discussing the impact of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)); see also Green, *supra* note 91, at 1011 (“The law should treat racial assault behavior as presumptively discriminatory and as constituting a hostile work environment.”).

a decade after it was enacted and then for another decade after the Supreme Court had made clearer the breadth of its applicability. The saga of *Ash v. Tyson Foods, Inc.* thus, as I began this Section by asserting, epitomizes the attitude that federal judges know better than juries what discrimination is and where it is to be found. It is precisely the same attitude that has thwarted § 703(m) of Title VII from liberating Title VII—and, for that matter, 42 U.S.C. § 1981—claims from the *McDonnell Douglas-Burdine* straightjacket.

Very revealing on this point is Judge Carnes's belatedly holistic description of the evidence Hithon presented at trial:

[W]e consider all of the evidence cumulatively, viewing it in the light most favorable to Hithon, to determine whether it is enough for a reasonable jury to have found that Tyson discriminated against Hithon based on race by promoting Dade to the shift manager position. As we have discussed, there was enough evidence for a reasonable jury to have found pretextual Tyson's proffered race-neutral reason of wanting a shift manager who had not been in management at the failing plant; to have found that there was a written job requirement of three to five years experience in the poultry business, which Hithon met but Dade did not; to have found that there was also an unwritten job requirement of experience in first and second processing, which Hithon met but Dade did not; and to have found that Hatley, the decision maker, used the word "boy" in a racially demeaning way to refer to Hithon and another African-American male employee on two occasions just before the decision was made.¹¹⁹

Here, had the federal courts applied the motivating factor standard, just as the trial court in *Costa v. Desert Palace, Inc.* had done in instructing its jury,¹²⁰ there is no doubt that Mr. Hithon's path to justice would have been years earlier in arriving at its destination—and the case of Mr. Ash, his coplaintiff, might have gotten the proper consideration it deserved. When the Eleventh Circuit finally candidly and correctly described the trial record, it becomes clear that the evidence would have met the motivating factor standard.

¹¹⁹ *Ash*, 664 F.3d at 897–98.

¹²⁰ See *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 846 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003).

V

Employers, like Tyson in the *Ash* case, who put their decisions into a zone of uncertainty where they have not adopted internal process, or not followed the internal process that they have in place, or in which they have followed process, but the veracity of the reasons given for the action nonetheless are in doubt should have to persuade the society in which they operate of their motive. At present, such cases fall on summary judgment more often than they do not.¹²¹ The federal courts should recognize that this incursion of Federal Rule of Civil Procedure 56 oversteps the boundaries limned by the Seventh Amendment and should instead equate an employer-created zone of uncertainty with mandatory trial. This very point was established twenty-seven years ago by the late Judge Irving R. Kaufman, legendary and controversial circuit judge of the United States Court of Appeals for the Second Circuit,¹²² in his dramatic and riveting opening of the Second Circuit's opinion in *Donahue v. Windsor Locks Board of Fire Commissioners*¹²³:

¹²¹ See, e.g., *Shager v. Upjohn Co.*, 913 F.2d 398, 403 (7th Cir. 1990) (Posner, J.) (“The growing difficulty that district judges face in scheduling civil trials, a difficulty that is due to docket pressures in general and to the pressure of the criminal docket in particular, makes appellate courts reluctant to reverse a grant of summary judgment merely because a rational factfinder *could* return a verdict for the nonmoving party, if such a verdict is highly unlikely as a practical matter because the plaintiff's case . . . is marginal.”).

¹²² See Jeffrey A. Van Detta, *Politics and Legal Regulation in the International Business Environment: An FDI Case Study of Alstom, S.A., in Israel*, 21 U. MIAMI BUS. L. REV. 63–64 nn. 227–29 (2013) (discussing the appellate court career of Judge Kaufman). The author was law clerk to Second Circuit Judge Roger J. Miner from 1987–88, and we frequently sat on panels with Judge Kaufman—who by then had taken senior status yet still wrote widely-publicized opinions, such as *Bandes v. Harlow & Jones, Inc.*, notable for opening in ringing tones:

Within our nation's borders, we have adhered to the principle that government may not deprive its citizens of property without due process of law and just compensation. Of course, this ideal, embodied in the fifth and fourteenth amendments to the Constitution, constrains our federal and state governments, not those of other countries. But when a foreign sovereign, following hostilities, confiscates a defeated group's property and attempts to extend that taking to interests held here, a United States court will effectuate the seizure for only the weightiest reasons.

852 F.2d 661, 663 (2d Cir. 1988); see Harold H. Lubacsh, *U.S. Court Rejects a Sandinista Suit over Assets*, N.Y. TIMES (July 20, 1988), <http://www.nytimes.com/1988/07/20/world/us-court-rejects-a-sandinista-suit-over-assets.html>.

¹²³ 834 F.2d 54 (2d Cir. 1987). *Donahue* was one of the cases argued before and decided by a panel including Judge Miner and Senior Judge Kaufman during the time of my clerkship with Judge Miner. See *supra* note 122.

The fundamental obligation of the federal courts is to adjudicate disputes. Not all controversies present triable issues, however, and the courts have a responsibility to vigilantly weed out those cases that do not merit further judicial attention. The procedural tool of summary judgment enables courts to terminate meritless claims, but this potent instrument must be used with the precision of a scalpel. The courts must take care not to abort a genuine factual dispute prematurely and thus deprive a litigant of his day in court.¹²⁴

Judge Kaufman elaborated on the theme of using summary judgment as a precision instrument to be wielded with great attention, rather than as a stamping machine in an industrialized legal process, employing a helpful metaphor, in sharp contrast to the Eleventh Circuit's *Ash v. Tyson Foods, Inc.* decision:

A summary judgment motion presents a judge with an arduous task, and this appellant's aggressive behavior has not made our undertaking any easier. The Roman philosopher Plautus warned us that there is no smoke without fire but, if this were always true, federal courts would not be able to distinguish between meritless and meritorious suits. Here, however, Plautus's advice is most appropriate. Although Donahue's complaint raises mostly smoke, it also reveals a flame that should have precluded summary judgment against him.¹²⁵

Well aware of the potential mischief that the *Celotex* trilogy was beginning to work, Judge Kaufman restated the law in a way that should put federal district judges on guard, particularly in "motive" cases such as those under our federal Employment Discrimination Law ("EDL"):

Although the basic principles for granting summary judgment are well-settled, the frequency of cases in which it is granted improvidently persuades us that these tenets bear repetition. Fed. R. Civ. P. 56(c) provides, in part, that summary judgment shall be rendered only when a review of the entire record demonstrates "that there is no genuine issue as to any material fact." The burden falls on the moving party to establish that no relevant facts are in dispute. Moreover, in determining whether a genuine issue has been raised, a court must resolve all ambiguities and draw all reasonable inferences against the

¹²⁴ *Donahue*, 834 F.2d at 55.

¹²⁵ *Id.* at 57.

moving party. Therefore, not only must there be no genuine issue as to the evidentiary facts, but there must also be no controversy regarding the inferences to be drawn from them.¹²⁶

Judge Kaufman zeroed in on the employer's role in creating a zone of uncertainty around its decisions affecting the plaintiff's employment:

[W]e note the words of the Seventh Circuit Court of Appeals on a similar dispute: ["We regret that this trivial episode, arising from the daily grist of personnel management matters at [an employer], has been elevated to the status of a 'federal case.' But it seems to us that the management . . . is most at fault in what appears to be a ponderously inappropriate reaction"]¹²⁷

It is precisely those cases in which the employer's actions and words have created a zone of uncertainty that federal judges—admonished by the words of both Judge Posner and the late Judge Kaufman—must stay the hand of summary judgment and recognize that there is, indeed, ipso facto, a “controversy regarding the inferences to be drawn”¹²⁸ from the facts, regardless of whether the facts themselves are undisputed. By this simple—yet earth-shaking—difference in perspective, the courts can compensate for their insularity and mediate the effect of what the federal courts have done to § 703(m) despite the clear and logically inescapable implications of *Costa*. Even that is not a perfect solution, of course, because our jury pools and jury selection can be rife with inequalities.¹²⁹ However, it is a better solution than having cases dismissed under the formalistic rituals of *Celotex* and *McDonnell Douglas*.

¹²⁶ *Id.* (citations omitted) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Schwabenbauer v. Bd. of Educ. of the City Sch. Dist. of Olean*, 667 F.2d 305, 313 (2d Cir. 1981); *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319–20 (2d Cir. 1975)).

¹²⁷ *Id.* at 59 (omissions in original) (quoting *Yoggerst v. Stewart*, 623 F.2d 35, 41 (7th Cir. 1980)).

¹²⁸ *Id.* at 57.

¹²⁹ *See, e.g.*, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 633–34 (1991); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150 (2010).

VI

Will the courts find their way back to Judge Kaufman's sensible understanding of the proper role of summary judgment in Employment Discrimination Law ("EDL") cases? Even if they do, will it help much if they continue to misapply § 703(m)? Short of a politically unlikely statutory amendment telling them to do so—and even then, old habits die hard—it seems that those who would see a renaissance of the idea of robust EDL enforcement must take the task in additional directions, after half of a century, to make Title VII work—and work not just for the employers and labor organizations in the United States but for the individual worker as well. I do not have the temerity to assert that I have formulated the grand strategy to bring this about. I conclude this Essay simply by putting forth some of my thinking on the subject in hopes of contributing to—even if only by provoking—additional discourse that may prove helpful to realizing Dr. Martin Luther King Jr.'s dream in the twenty-first century, especially for those growing up, like my twelve-year-old son, Levi, in the millennial generation.¹³⁰

¹³⁰ See, e.g., *Fulfilling Dr. King's Dream: A Charge From Alumna Heather McGhee*, MILTON ACADEMY, (Jan. 1, 2012), http://auth.milton.commonspotcloud.com/news/12-1_mlk_speaker.cfm. In this stirring message, Ms. McGhee, who went on from her Milton graduation in 1997 to earn a Bachelor of Arts degree in American Studies from Yale University and a Juris Doctor from the University of California at Berkeley School of Law, proclaimed:

We are the children of Dr. King's dream, because we are the most diverse generation in American history. We are the generation charged with fulfilling that dream. I believe that our generation, the Millennials, will finally and fully realize a sustainable and fair economy for everyone, regardless of what zip code or school district you were born into. Everyone should be able to meet their basic needs and have a chance of fulfilling their dreams.

Id. (internal quotation mark omitted). "If Dr. King were alive," Ms. McGhee emphasized, "he would be calling on people—particularly young people—to address economic justice in this country." *Id.* (internal quotation marks omitted); see also Heather McGhee, *A Message to Millennials: We Are the Children of Dr. King's Dream*, HUFFINGTON POST, (Jan. 17, 2012, 6:24 PM), http://www.huffingtonpost.com/heather-mcghee/a-message-to-millennials-_b_1208971.html (last updated Mar. 18, 2012, 5:12 AM); Susan R. Jones, *Dr. Martin Luther King, Jr.'s Legacy: An Economic Justice Imperative*, 19 WASH. U. J.L. & POL'Y 39, 39 (2005).

A

For some time, I have thought that Title VII would have been better off had the Equal Employment Opportunity Commission (“EEOC”) been transformed into an administrative enforcement and strong policy-making agency like the National Labor Relations Board (“NLRB”)—the very thing that more than a few in Congress sought to avoid in 1964.¹³¹ I still believe that route provides the best chance to improve enforcement.¹³² However, political reality sets in and creates a virtually unscalable wall. The Supreme Court’s decision in *NLRB v. Noel Canning*¹³³ means that any administrative agency with adjudatory functions against business can be held hostage to the political dysfunction that has poisoned our advice-and-consent process. Just as the NLRB will remain chronically understaffed—and therefore unable to make and enforce the law, which was why the recess appointment power began to be used more assertively—so, too, would a restructured EEOC. In fact, I suspect that more than a few supporters of *Noel Canning* would find a toothed EEOC to be of far greater threat and worthy of diminution, denigration, and economic starvation than even the NLRB.

B

Should we look then to state-level enforcement—through state Fair Employment Practices (“FEP”) agencies? I had at one time thought so, and that thought is shared by excellent

¹³¹ *E.g.*, Johnson, *supra* note 51, at 1351; see Katherine A. Macfarlane, *The Improper Dismissal of Title VII Claims on “Jurisdictional” Exhaustion Grounds: How Federal Courts Require That Allegations Be Presented to an Agency Without the Resources To Consider Them*, 21 GEO. MASON U. C.R. L.J. 213, 213, 216, 229–32 (2011) (examining “Title VII and the EEOC, and contend[ing] that, far from enforcing Title VII, the EEOC is no more than an administrative waiting room”).

¹³² And I am in some good company with those who have espoused that viewpoint. *See, e.g.*, Eleanor Holmes Norton, *Equal Employment Law: Crisis in Interpretation—Survival Against the Odds*, 62 TUL. L. REV. 681, 681 n.3 (1988). Eleanor Holmes Norton chaired the EEOC during the presidency of Jimmy Carter. *See id.*; see also Marcia L. McCormick, *The Truth Is out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 30 BERKELEY J. EMP. & LAB. L. 193, 228 (2009) (“In light of this and other concerns, it might instead be better for the agency to find facts and issue an order that is not self-enforcing but which can be enforced in federal court if the employer does not comply, similar to federal enforcement of the National Labor Relations Board orders.”).

¹³³ 134 S. Ct. 2550 (2014).

company.¹³⁴ However, there are more than a few states where enforcement is needed. In those states that need enforcement, either no private-sector state FEP laws exist or are likely to be enacted anytime soon, or the laws that do exist create a bare cause of action without a state investigatory or enforcement agency for the private sector.¹³⁵ Furthermore, the same political elements that oppose federal regulation of workplace activities are equally active at the state level. Finally, even states with long and distinguished records of FEP enforcement can have judiciaries that boot opportunities to strengthen the application of their own FEP laws, as Justice Goodwin Liu's metaphysically complex discussion of causation for the California Supreme Court did to California's Fair Employment and Housing Act ("FEHA")

¹³⁴ See Sandra F. Sperino, *Revitalizing State Employment Discrimination Law*, 20 GEO. MASON L. REV. 545, 546 (2013) (urging independence from federal EDLs in interpreting state FEP laws as befits their differing language, structure, and legislative provenance). A renewed focus on state constitutionalism is a parallel example. See, e.g., William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986); Stephen Kanter, *Sleeping Beauty Wide Awake: State Constitutions as Important Independent Sources of Individual Rights*, 15 LEWIS & CLARK L. REV. 799, 810 (2011); Sanford Levinson, *America's "Other Constitutions": The Importance of State Constitutions for Our Law and Politics*, 45 TULSA L. REV. 813, 813-14 (2010); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081, 1092 (1985); Stanley Mosk, *The Power of State Constitutions in Protecting Individual Rights*, 8 N. ILL. U. L. REV. 651, 651 (1988); Robert F. Williams, *Response: Why State Constitutions Matter*, 45 NEW ENG. L. REV. 901, 910-11 (2011); see also Elizabeth Rodd, *Light, Smoke, and Fire: How State Law Can Provide Medical Marijuana Users Protection from Workplace Discrimination*, 55 B.C. L. REV. 1759, 1761-62 (2014).

¹³⁵ Professor Sperino wrote, "All fifty states also have enacted statutes that prohibit discrimination in the workplace." Sperino, *supra* note 134, at 557. Sperino backs that description up with abundant citations to specific statutes in each of the fifty states. *Id.* at 557 n.109. Of the states cited, however, several do not have antidiscrimination laws that (a) apply to private, as opposed to public, sector employment and (b) do not provide a private right of action for aggrieved individuals nor a state agency that investigates charges of discrimination against private-sector employees. For example, the Georgia and Mississippi statutes cited apply only to public-sector employers and employees, and there is no private-sector FEP agency. See GA. CODE ANN. §§ 45-19-29 to 45-19-35 (1978), MISS. CODE ANN. §§ 25-9-103, 25-9-149 (1980). Similarly, the Arkansas Human Rights Act and the North Carolina Equal Employment Practices Act, while applicable to the private sector, provide no state FEP agency. See ARK. CODE ANN. § 16-123-107(a)(1) (1993); N.C. GEN. STAT. ANN. § 143-422.2 (1977); see also Bonnie Hatchett, *Arkansas Civil Rights Act of 1993*, ENCYCLOPEDIA ARK. HIST. & CULTURE, <http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=7312> (last updated June 19, 2015). The Alabama statute covers only age discrimination and provides no private-sector FEP agency. See ALA. CODE §§ 25-1-21 to 25-1-28 (1997).

in *Harris v. City of Santa Monica*.¹³⁶ Given an opportunity to strike a blow for enforcement by adopting a motivating factor standard that would revolutionize FEHA litigation, the California Supreme Court instead chose the curious *via media* of adopting the confusing “substantial motivating factor test”:

Requiring the plaintiff to show that discrimination was a substantial motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, for reasons explained above, proof that discrimination was a substantial factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time.¹³⁷

¹³⁶ 294 P.3d 49 (Cal. 2013).

¹³⁷ *Id.* at 66, 51, 72 (emphasis omitted) (“A bus driver alleged that she was fired by the City of Santa Monica (the City) because of her pregnancy in violation of the prohibition on sex discrimination in the Fair Employment and Housing Act (FEHA). The City claimed that she had been fired for poor job performance. At trial, the City asked the court to instruct the jury that if it found a mix of discriminatory and legitimate motives, the City could avoid liability by proving that a legitimate motive alone would have led it to make the same decision to fire her. The trial court refused the instruction, and the jury returned a substantial verdict for the employee.”). The California Court of Appeals reversed the trial court, holding that “the requested instruction was legally correct and that refusal to give it was prejudicial error.” *Id.* Justice Liu’s opinion affirmed the remand for retrial, but at least struck a *via media* so that although when “the employer proves by a preponderance of the evidence that it would have made the same decision for lawful reasons, then the plaintiff cannot be awarded damages, backpay, or an order of reinstatement,” at least “where appropriate, the plaintiff may be entitled to declaratory or injunctive relief” and “also may be eligible for an award of reasonable attorney’s fees and costs.” *Id.* at 72. In this way, the California Supreme Court ended up essentially following the 1991 CRA provision, codified in § 706(g)(2)(B), that when a Title VII plaintiff makes a motivating factor showing, the defendant can escape all but liability for declaratory relief, injunctive relief, and attorney fees. 42 U.S.C. § 2000e-5(g)(2)(B) (2012). However, the California Supreme Court could have done much, much better for enforcement of the FEHA, both by adopting a motivating factor standard, and by finding, as the trial judge had, that once discrimination was proven to be a motivating factor, all relief was available to plaintiff. Once again, it appears, we have a state court seduced by the peculiarities of Title VII and the troublesome 1991 CRA amendments rather than striking out boldly against workplace bias by strengthening its own state’s law beyond the confines of the federal paradigms. See Sperino, *supra* note 134, at 569. At least one federal district judge in California, however, has characterized the California Supreme Court’s opinion in *Harris* as a “rigorous analysis of the FEHA’s language and purpose.” *Steffens v. Regus Grp., PLC*, No. 08cv1494–LAB (BLM), 2013 WL 4499112, at *5 (S.D. Cal. Aug. 19, 2013).

The result of the California Supreme Court's ruling in *Harris* is the almost proverbial, Solomonic split, resulting in a hybrid standard that is likely to sew further confusion that in the end will be more harmful to FEHA plaintiffs than helpful.

That is not to say that the EDL plaintiffs' bar, allied with groups that lobby for the interests of workers, should not push the state agencies, legislatures, and courts to improve the availability and quality of state FEP laws. They should take particular heed from Professor Sandra Sperino's important admonition:

[C]ontinuing to interpret state law in tandem with federal law is not sound. Rather, state and federal courts should interpret state laws on their own merits, recognizing that few state employment discrimination statutes mimic their federal counterparts in all important respects. The differences in language, structure, and legislative history counsel against blindly interpreting state discrimination statutes in tandem with their federal counterparts. In freeing state discrimination law from the unnecessary complications of the federal landscape, a second model can emerge that may persuade federal decision makers to reconsider the various proof structures and analytical frameworks they have adopted.¹³⁸

This, however, can be a mixed bag, too. To be sure, some courts reach to distinguish federal EDL when it helps to expand or firm up the remedial aspects of a state's FEP law;¹³⁹ yet, even within the same state, other courts have seized on the independent state interpretation of its FEP law to restrict its efficacy and reach.¹⁴⁰

¹³⁸ Sperino, *supra* note 134, at 590; see Sandra F. Sperino, *Diminishing Deference: Learning Lessons from Recent Congressional Rejection of the Supreme Court's Interpretation of Discrimination Statutes*, 33 RUTGERS L. REC. 40, 42–43 (2009) (“Many federal and state courts apply interpretations of federal statutes when interpreting the state regimes. Blanket acceptance of this statutory construction principle is flawed for several reasons, some of which are highlighted further by Congress’ recent rejection of so many Supreme Court interpretations of discrimination law.” (footnote omitted)).

¹³⁹ *Goodpaster v. Schwan's Home Serv., Inc.*, 849 N.W.2d 1, 4, 9–10 (Iowa 2014) (citing Sperino, *supra* note 138, at 42) (reversing employer's summary judgment).

¹⁴⁰ *Pippen v. State*, 854 N.W.2d 1, 4, 14–15 (Iowa 2014) (citing Sperino, *supra* note 134, at 546) (affirming employer's summary judgment).

C

While the 1991 CRA's emendation of Title VII with § 703(m) has been the focus of this Essay thus far, another provision of the 1991 CRA that merits some focus is § 118 of the Act, which was not codified in Title VII, but rather expressed the congressional view of the public policy surrounding alternative dispute resolution ("ADR") as a means of resolving EDL claims—Congress was for ADR but said little about under what circumstances.¹⁴¹

In the cases like the one that put employer-mandated arbitration of EDL claims on the map, *Gilmer v. Interstate/Johnson Lane Corp.*,¹⁴² some employers undoubtedly ended up losing the arbitration and quite possibly had greater damages awarded to the former employee in arbitration than would have been available to him in a federal court jury trial.¹⁴³

¹⁴¹ Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1081, 1081 (captioned "Alternative Means of Dispute Resolution") ("Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title."); see Pat K. Chew, *Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied*, 46 WAKE FOREST L. REV. 185, 188–90 (2011). See generally Angelito Remo Sevilla, *The End of Duffield and the Rise of Mandatory Arbitration: How Courts Misinterpreted the Civil Rights Act's Arbitration Provision*, 93 CALIF. L. REV. 323 (2005). For discussion of § 118's legislative history, see, for example, *EEOC v. Luce, Forward, Hamilton, & Scripps*, 303 F.3d 994, 1011–12 (9th Cir. 2002) (Pregerson, J., dissenting), and *EEOC v. Luce, Forward, Hamilton, & Scripps*, 345 F.3d 742, 754, 759–61 (9th Cir. 2003) (en banc) (Pregerson, J., dissenting).

¹⁴² 500 U.S. 20 (1991).

¹⁴³ See George Nicolau, *Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications and Implications for Employees, Employers and Practitioners*, 1 U. PA. J. LAB. & EMPL. L. 177, 190–92 & nn.80–82 (1998). One commentator noted:

A basic question not addressed by the Court in *Gilmer* was whether the case's holding extends beyond the securities regulation context. That is, should statutory discrimination claims generally be subject to compulsory arbitration by private, unregulated arbitrators? Throughout *Gilmer*, the Court emphasizes the extensive self-regulation of the securities industry and the protections built into the arbitral system. For example, in rejecting the "generalized attack" on the fairness of the arbitral proceeding, the Court asserts that "NYSE arbitration rules, which are applicable to the dispute in this case, provide protection against biased panels." . . . It is at least arguable that securities arbitration is highly regulated and thus procedurally fair, and that the predominantly older-white-male arbitrators would be generally more sympathetic to the predominantly white male securities-industry ADEA plaintiffs. The same cannot be said for the non-securities, non-ADEA context.

But these early cases seemed to arise mostly under the Age Discrimination in Employment Act¹⁴⁴—which was the only federal antidiscrimination statute that *Gilmer* itself subjected to employer-mandated arbitration at the time¹⁴⁵ whose cabined damages provisions¹⁴⁶ offset the availability of jury trial.¹⁴⁷ In the wake of *Gilmer*, some commentators sounded a hopeful note that with federal court delay and expense, arbitration of EDL claims might prove advantageous to individuals.¹⁴⁸ Others condemned it from the beginning, dubbing employer-mandated arbitration of EDL claims “the yellow dog contract of the 1990s.”¹⁴⁹ In the twenty-three years since *Gilmer* was handed down, empirical studies have been done of the fate of EDL claims in arbitration, despite the difficulties posed by the extent of private and unpublished awards.¹⁵⁰ Some—primarily older—studies showed that employees enjoyed an advantage in arbitration; but later,

Donna Meredith Matthews, Note, *Employment Law After Gilmer: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 BERKELEY J. EMP. & LAB. L. 347, 370, 372 & n.170 (1997) (footnote omitted) (“ADEA claims are predominantly brought by white men with relatively high-status, well-paid jobs, and they primarily allege discriminatory discharge.” (citing George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 491 (1995)).

¹⁴⁴ Jenifer A. Magyar, Case Comment, *Statutory Civil Rights Claims in Arbitration: Analysis of Gilmer v. Interstate/Johnson Lane Corp.*, 72 B.U. L. REV. 641, 641–42 (1992).

¹⁴⁵ *Id.*; see also Matthews, *supra* note 143, at 371 (“Yet without much discussion, the lower courts have extended the decision in *Gilmer* beyond the ADEA context, finding mandatory arbitration clauses enforceable for a range of statutory claims, including those arising under Title VII, the ADA, the Equal Pay Act, and 42 U.S.C. § 1981” (footnotes omitted)).

¹⁴⁶ See, e.g., Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 WAYNE L. REV. 1093, 1203–08 & n.366 (1993).

¹⁴⁷ *Id.* at 1206–07 n.365; see, e.g., *Lorillard v. Pons*, 434 U.S. 575 (1978).

¹⁴⁸ See Robert J. Lewton, Comment, *Are Mandatory, Binding Arbitration Requirements a Viable Solution for Employers Seeking To Avoid Litigating Statutory Employment Discrimination Claims?*, 59 ALB. L. REV. 991, 1028–29 (1996). See generally Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998).

¹⁴⁹ See generally Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENVER U. L. REV. 1017 (1996). Another view expressed was that *Gilmer*'s opening of the Pandora's box of arbitrating EDL claims might lead to sufficient judicial supervision of the arbitral process among a discrete group of arbitration providers that, over time, gives rise to de facto, European-style “labor courts.” Robert N. Covington, *Employment Arbitration After Gilmer: Have Labor Courts Come to the United States?*, 15 HOFSTRA LAB. & EMPL. L.J. 345, 411–15 (1998).

¹⁵⁰ See, e.g., Chew, *supra* note 141, at 193.

and more extensive, studies suggested that employees fare considerably worse in arbitration than they have in federal court.¹⁵¹ Reporting a study that she undertook to compare arbitral with judicial results in racial harassment cases, Professor Chew of the University of Pittsburgh reached some sobering conclusions:

Arbitration is not really a distinct and alternative dispute resolution system, but instead appears increasingly coordinated with the judicial system. . . . Arbitrators routinely cite legal principles and legal cases as precedents. Arbitrators resolve the dispute and impose that resolution on the parties, and their awards are generally not reviewable by the courts. Some arbitrators are reaching conclusions that are ordinarily reserved for judges—for instance, granting the employer's motion for summary judgment. This qualitative analysis provides consistent evidence that arbitrators are beginning to sound, think, and act like judges.¹⁵²

Moreover, Professor Chew found evidence of some of the same attitudes of arbitrators that were evidenced by most of the federal appeals judges involved in *Ash v. Tyson Foods, Inc.*:

[A]rbitrators not only cite legal principles, they tend to interpret these principles in the same way as do judges, adhering to the same paradigm of racial harassment. Namely, they expressly focus on old-fashioned blatant and egregious racism, while discounting or ignoring modern racism as evidence of racial harassment. Also, even when they noted the employees' allegations of old-fashioned racism, arbitrators nonetheless found them insufficient to hold for the employee. For example, in cases in which employees complained of racial slurs . . . or other forms of explicit racism, arbitrators nonetheless concluded that racial harassment had not occurred. If anything, arbitrators were less persuaded than judges by employees' allegations of explicit racism. Arbitrators frequently reasoned that the harassment was not "severe or pervasive" enough to create a racially hostile environment for the employee. In some of the cases, arbitrators expressly doubted the employees' credibility or questioned the employees' own subjective belief that their harassment was race based, instead being persuaded by the employers' telling of the story.¹⁵³

¹⁵¹ *Id.* at 195–98, 204, 207 (footnotes omitted).

¹⁵² *Id.* at 206–07 (footnote omitted).

¹⁵³ *Id.* at 206 (footnotes omitted).

This is disturbing news; but it should not be surprising. If federal judges—who enjoy life tenure on good behavior—are reluctant to see what is before them, why should we expect arbitrators, who make a living hearing cases but are selected from panels of arbitrators on a case by case basis—with employers exercising heavier influence and with more access to information on the arbitrator's past rulings—to be more courageous or engaged in the struggle on which President Johnson launched our nation when he signed Title VII into law a half of a century ago?¹⁵⁴

Still, arbitration may offer the best hope—through a combination of initiatives by the leading arbitration services, reformed arbitration rules and practices from industries where EDL claims are frequently arbitrated, and reformatory regulation by the EEOC and Congress.¹⁵⁵ If the American

¹⁵⁴ See, e.g., Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 5, 7, 19 (1994).

¹⁵⁵ A very recent study of the ADR program of the Financial Industry Regulatory Authority ("FINRA") shows the potential for fairer arbitral results offered by reformed procedures and increased EDL training requirements for arbitrators who hear employment-related disputes. J. Ryan Lamare & David B. Lipsky, *Employment Arbitration in the Securities Industry: Lessons Drawn from Recent Empirical Research*, 35 BERKELEY J. EMP. & LAB. L. 113, 131–33 (2014). FINRA regulates some 5,000 securities firms in the United States, along with 633,000 representatives in those firms. *Id.* at 115. "One of FINRA's primary responsibilities involves the administration of an ADR program for the resolution of disputes between customers and brokers (seventy-five percent of all filings), brokers and brokers (two percent of filings), and employees and their firms (twenty-three percent of filings)." *Id.* at 115–16. Of particular interest to us are the following features of FINRA's employee-firm arbitration procedures:

The system provides different rules for arbitrations concerning statutory discrimination claims. For instance, the maximum filing fee for discrimination claims is \$200, whereas the fee can rise as high as \$1,800 for non-discrimination cases. In addition, beginning in 2000, FINRA instituted stricter requirements regarding the composition of arbitration panels when discrimination has been alleged. In these cases, tripartite panels must consist of all public arbitrators (rather than a mixture of public and industry arbitrators), and the chair (or sole) arbitrator cannot have primarily represented employers or employees in the past five years.

Id. at 117 (footnotes omitted). The authors' empirical study led them to conclude, among other things, that "FINRA's rule changes in 2000, designed to enhance the fairness and due process protections of complaints in discrimination cases, proved to have a very significant positive effect on the outcomes obtained by complainants in arbitration cases." *Id.* at 131. Indeed, "the rules FINRA used to protect employee-disputants appear to have had dramatic effects on arbitration awards, suggesting that procedural safeguards may be more important than whether an arbitration program is mandatory or voluntary." *Id.* at 131–32. While FINRA arbitrations of

Arbitration Association and the Federal Mediation and Conciliation Service ("FMCS"), for example, were to provide additional training courses for arbitrators to learn how to use evidence from the social sciences¹⁵⁶ as part of their approach to

EDL claims have not yet reached what the authors would consider full parity with court-outcomes—depending, of course, how one factors in the premature demise of so many EDL claims in federal court under the sway of Federal Rule of Civil Procedure 56—the FINRA approach provides a very useful template on which to build better and fairer systems of EDL claim arbitration:

But our analysis also suggests that employees in the securities industry with discrimination complaints fared less well than employees with other types of claims. Again, we lack the data to estimate what employees with discrimination complaints might have received had they litigated their claims. What we have uncovered, however, is *prima facie* evidence that, all other things considered, in the securities industry arbitrators treat employees with discrimination complaints less favorably than they treat employees with non-discrimination claims. This result may stem from the fact that arbitrators are more reluctant to find that an employer has violated a statute than they are to find that an employer has breached a contract. Lastly, we find that, controlling for other relevant factors, women have obtained lower arbitration awards than men in the securities industry. On the one hand, critics might add this finding to their arsenal of objections to employment arbitration. On the other hand, our evidence suggests that the effect of gender on arbitration awards probably results from long-standing employment practices in the securities industry and not from the nature of the arbitration process itself. Clearly, there is no evidence to support the proposition that arbitrators consciously discriminate against women complainants in the industry. In sum, in common with other researchers, we find that employment arbitration in the securities industry potentially has defects identified by critics of the practice. However, we also find that the regime of rules used by the provider can substantially correct those defects. For instance, where other arbitral forums (namely, AAA) have been studied, evidence indicates that there is at least the potential for bias to affect arbitration outcomes. However, in our study of FINRA, using generally comparable data, we find no such evidence of bias. As such, we argue that employment arbitration systems should not be considered monolithic in nature—the problems with arbitration that might have occurred under one regime may be less present, or nonexistent, under a different system. Specifically, we maintain that the FINRA approach to arbitration serves as a useful template for designing a system that limits many of the concerns around employment arbitration. The FINRA system has strict arbitrator training and disclosure requirements (especially for discrimination claims), employs a randomized and automated selection process, and makes arbitrator decisions publicly available.

Id. at 132.

¹⁵⁶ Bankruptcy Judge Stan Bernstein suggested this for his judicial brethren who are faced with "tension between 'doing justice' in the individual case and at the same time considering the impact of a decision on readily identifiable institutions." *In re Awuku*, 248 B.R. 21, 25 (Bankr. E.D.N.Y. 2000) ("Those of us who came to law after years of professional training in the social or policy sciences struggle to

arbitrated EDL cases, a finer-tuned, more well-informed, and more holistic instrument could be created for detecting the twenty-first century incarnations of employment discrimination, without the difficulties that individual plaintiffs face in introducing such evidence in federal court.¹⁵⁷ Moreover, had Congress empowered the EEOC to issue regulations to implement § 118 of the 1991 CRA, those regulations could limn the contours of a fair and even-handed arbitral program that could make arbitration a viable alternative to federal court litigation for employers and employees alike.¹⁵⁸

reconcile the traditional common law approach with the systemic perspective of our earlier studies. The Chief Judge of the Seventh Circuit, the Honorable Richard A. Posner, is the most insistent voice in calling for a pragmatic jurisprudence that requires judges in rendering their decisions to give sufficient weight to the perspectives of the social sciences . . .”). But see *In re Taylor*, in which District Judge Hellerstein rejected the social science role because “[t]he bankruptcy court allowed its notion of ‘pragmatic jurisprudence’ to affect a proper reading of Title 11 of the Bankruptcy Code.” 248 B.R. 37, 41 n.9 (S.D.N.Y. 2000) (footnote omitted), *vacated on other grounds*, 243 F.3d 124 (2d Cir. 2001).

¹⁵⁷ Cutting-edge work being done in this area includes Tanya Katerí Hernández, *One Path for “Post-Racial” Employment Discrimination Cases—The Implicit Association Test Research as Social Framework Evidence*, 32 LAW & INEQ. 309 (2014). As Professor Hernandez concludes, “without an implicit bias research social framework, plaintiffs . . . are left struggling to explain the unexplainable—the existence of racially distinctive treatment without any overt employer references to race-based justifications or stereotypes,” but “[w]ith an implicit bias research social framework, a fact-finder has a lens for identifying how, even in the absence of racially biased or stereotyped employer statements, racially differentiated treatment can be explained by socially pervasive implicit bias.” *Id.* at 346.

¹⁵⁸ It is worth noting in this context that jury trials of Title VII claims are not a panacea for the victims of discrimination who have the courage and fortitude to become plaintiffs. Professor Wendy Parker’s findings on jury determinations in post-1991 CRA Title VII cases offer a sobering picture of juries who seem to prefer some classes of plaintiffs over others:

[I]f plaintiffs present their cases to juries—the stage at which they enjoy their highest chance of success—losses are still likely. Nor are trials without risks for plaintiffs. In my Study of 102 jury trials and 10 bench trials, plaintiffs were much more likely to be ordered to write defendants a check—for the defendants’ costs—than the other way around. Most troubling, this is not a story of equality. Plaintiffs win most often before juries, but jury win rates differ with the category of plaintiff. For example, this Study reveals that African Americans and Latinos claiming race discrimination have the lowest jury win rates. Empirical studies of employment discrimination litigation usually do not distinguish among the types of discrimination alleged or the types of plaintiffs involved. The very few that do have also found that African Americans have lower win rates at various procedural stages. No study examining this issue has found differently. Thus, although my evidence is far from overwhelming—I

Unfortunately, Congress has been stingy with delegating rulemaking authority to the EEOC, and even where that authority has been delegated—as it was, for example, with respect to portions of the Americans with Disabilities Act and the Age Discrimination in Employment Act—the courts have cabined that authority considerably.¹⁵⁹ The 1964 Congress pulled substantive rulemaking authority from the EEOC, leaving it only with authority to make “procedural regulations.”¹⁶⁰ While the EEOC has issued policy statements opposing mandatory arbitration obligation, it currently lacks the power¹⁶¹ to issue regulations outright that would define the acceptable limits of mandatory arbitration programs¹⁶² after their full blessing by the Supreme Court in 2001.¹⁶³ The agency might consider issuing cause determinations in any case where an employer-mandated arbitration agreement in the background does not conform to certain procedural regulations—or even simply pursuing the claims on behalf of the employee since the Supreme Court has

analyze only 102 jury trials—it adds to the increasing evidence of inequality.

Parker, *supra* note 35, at 210–11 (footnotes omitted). No easy solutions to this phenomenon are at hand. “Why African Americans and Latinos have depressed win rates—a finding not unique to this jury study—could possibly be explained by biases jurors typically bring to the jury room, and an increase in jury diversity could possibly help to ameliorate some of this bias.” *Id.* at 238.

¹⁵⁹ See, e.g., Shawn D. Vance, *How the Supreme Court's Toyota Decision Impacted the View of EEOC's Regulatory Authority*, 26 BERKELEY J. EMP. & LAB. L. 475, 493 (2005).

¹⁶⁰ See, e.g., RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* 78–79 (1997).

¹⁶¹ See generally Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 3–5, 19–35 (1999) (discussing the EEOC Policy Statement on Mandatory Arbitration issued on July 10, 1997); Beth M. Primm, Comment, *A Critical Look at the EEOC's Policy Against Mandatory Pre-Dispute Arbitration Agreements*, 2 U. PA. J. LAB. & EMP. L. 151, 160 (1999).

¹⁶² BALES, *supra* note 160, at 85–88.

¹⁶³ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 120 (2001). Of the *Adams* case, leading management-side employment-law practitioners have observed that the Supreme Court “reached a decision that is certain to have a significant effect on the enforcement of mandatory arbitration agreements in the non-union employment setting.” *Circuit City Stores, Inc. v. Adams and EEOC v. Waffle House, Inc.: The Court Addresses the Enforceability of Mandatory Arbitration Agreements*, JONES DAY (Aug. 2001), <http://www.jonesday.com/icircuit-city-stores-inc-v-adamsi-and-ieeoc-v-waffle-house-inci-the-court-addresses-the-enforceability-of-mandatory-arbitration-agreements-08-01-2001/>. Practitioners explain, “Agreeing with the overwhelming majority of Circuit Courts of Appeals, the Supreme Court held in *Circuit City Stores, Inc. v. Adams* that valid arbitration agreements between most employers and employees are fully enforceable under the Federal Arbitration Act (“FAA”).” *Id.*

held that employer-employee arbitration agreements have no effect on EEOC enforcement suits¹⁶⁴—but given scarce resources, this would likely prove little more than a bluff, which the federal courts would call¹⁶⁵ and Congress would punish.¹⁶⁶

D

What about the President's authority to bind federal contractors—a substantial class of employers in the United States with the largest businesses—to impose reform through Executive Order? President Obama has been using Executive Orders to give bite to a variety of employment laws in his second term. For example, on July 31, 2014, President Obama signed an Executive Order, entitled “Fair Pay and Safe Workplaces,” that forbids companies with more than one million dollars in government contracts to require mandatory arbitration of employee claims “arising under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment.”¹⁶⁷

¹⁶⁴ EEOC v. Waffle House, Inc., 534 U.S. 279 (2002). The Court left open the possibility, however, that the EEOC's subsequent suit might very well be limited by an arbitration award on the claim or by a settlement reached between employer and employee as part of the arbitral process. *Id.* at 297.

¹⁶⁵ Federal courts have called similar bluffs in EEOC attempts to use litigation to oppose mandatory arbitration in the days before the Supreme Court handed down *Circuit City*. See BALES, *supra* note 160, at 85–86.

¹⁶⁶ Similarly, Congress punished the NLRB in the 1990s by cutting its budget when it was considering rulemaking to expedite the union election process. See, e.g., WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB—A MEMOIR (2000); Michael Ashley Stein, *Hardball, Politics, and the NLRB*, 22 BERKELEY J. LAB. & EMPL. L. 507 (2001) (reviewing GOULD, *supra*).

¹⁶⁷ Exec. Order No. 13,673, § 6(a), 79 Fed. Reg. 45,309, 45,314 (July 31, 2014); see Jon A. Geier et al., *New “Fair Pay and Safe Workplaces” Executive Order Places Unprecedented Demands on Federal Contractors*, PAUL HASTINGS (Aug. 6, 2014), <http://www.paulhastings.com/publications-items/details/?id=70bae169-2334-6428-811c-ff00004cbded#page=1>. The implementation of this Executive Order is described by the management attorneys at Paul Hastings as a combination of carrot and stick:

This Executive Order is effective immediately and will apply to all solicitations for federal contracts as set forth in final rules issued by the Federal Acquisition Regulation (“FAR”) Council. It will, however, be implemented on new contracts “in stages on a prioritized basis, during 2016,” according to the White House fact sheet. The proposed regulations by the FAR Council and related guidance from the Secretary of Labor will further outline the parameters of these new obligations. As contractors await the proposed regulations and guidance, they should at a minimum evaluate their existing or contemplated arbitration programs to determine whether, and if so how, they may be impacted by the Executive Order.

Id. The operative language is section 6 of the Executive Order:

(a) Agencies shall ensure that for all contracts where the estimated value of the supplies acquired and services required exceeds \$1 million, provisions in solicitations and clauses in contracts shall provide that contractors agree that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment may only be made with the voluntary consent of employees or independent contractors after such disputes arise. Agencies shall also require that contractors incorporate this same requirement into subcontracts where the estimated value of the supplies acquired and services required exceeds \$1 million.

(b) Subsection (a) of this section shall not apply to contracts or subcontracts for the acquisition of commercial items or commercially available off-the-shelf items.

(c) A contractor's or subcontractor's agreement under subsection (a) of this section to arbitrate certain claims only with the voluntary post-dispute consent of employees or independent contractors shall not apply with respect to:

(i) employees who are covered by any type of collective bargaining agreement negotiated between the contractor and a labor organization representing them; or

(ii) employees or independent contractors who entered into a valid contract to arbitrate prior to the contractor or subcontractor bidding on a contract covered by this order, except that a contractor's or subcontractor's agreement under subsection (a) of this section to arbitrate certain claims only with the voluntary post-dispute consent of employees or independent contractors shall apply if the contractor or subcontractor is permitted to change the terms of the contract with the employee or independent contractor, or when the contract is renegotiated or replaced.

Exec. Order No. 13,673, § 6, 79 Fed. Reg. at 45,314. Emily Bazelon, writing for *Slate*, placed this most recent Executive Order in the context of a series of Executive Orders issued since January 2014:

Last month [that is, June 2014], [President] Obama banned federal contractors from discriminating against gay workers. . . . [That followed an Executive Order issued] in January raising the minimum wage for new federal contractors to \$10.10 an hour.

. . . [T]he latest executive order . . . packs the biggest punch. "This is one of the most important positive steps for civil rights in the last 20 years," Paul Bland, executive director of Public Justice, a public-interest law group, says of the July 31 order. The employer-side law firm Littler Mendelson calls it "the most sweeping order to date" that the Obama administration has aimed at federal contractors.

. . . .

. . . [Paul] Bland argues that [although the Executive Order's reach is limited to that subset of federal contractors with federal contracts worth over \$ 1 million,] it's still a huge deal because it treats forced arbitration as a central civil rights issue. "For the President of the United States to say that this is a substantial priority of his Administration, to the point that the United States will refuse to contract with corporations that force their workers into arbitration, is an enormous marker," he wrote

Maybe someday, this will inspire some other Congress to throw the blanket over everyone. That used to happen, I swear. When the Supreme Court

made it harder for employees to win discrimination suits in the 1980s, Congress responded with a 1991 law that rolled back those rulings. The same dynamic was in play when the Lilly Ledbetter Fair Pay Act passed in 2009, and Congress stuck up for workers complaining of unequal pay (but didn't address mandatory arbitration, because it wasn't widespread yet). Obama's new order is one way to push back against a conservative Supreme Court majority with a strikingly pro-business record.

Emily Bazelon, *Obama Is on a Pro-Labor Roll*, SLATE (Aug. 7, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/obama_executive_order_on_mandatory_arbitration_huge_news_for_workers_rights.html. The president also recently issued Executive Order 11,478 that amends Executive Order 11,246 to prohibit federal contractors from discriminating against their employees on the basis of sexual orientation and gender identity. David Hudson, *President Obama Signs a New Executive Order To Protect LGBT Workers*, WHITE HOUSE (July 21, 2014, 3:00 PM), <https://www.whitehouse.gov/blog/2014/07/21/president-obama-signs-new-executive-order-protect-lgbt-workers>. President Obama is in good historical company in using Executive Orders to create nondiscrimination in a significant sector of the economy—federal governmental contractors—as a harbinger of reform for the private sector more broadly:

In 1941, under pressure from Brotherhood of Sleeping Car Porters union president A. Philip Randolph and a burgeoning civil rights movement, President Franklin Delano Roosevelt issued Executive Order 8802, which required that defense contracts include provisions to bar private contractors from discriminating on the basis of race, creed, color or national origin. The order also established the President's Committee on Fair Employment Practice, which was empowered to investigate discrimination cases and "to take appropriate steps to redress grievances which it finds to be valid."

John Nichols, *Congressional Republicans Call Obama 'Lawless' for Issuing Executive Orders. That's Just Wrong.*, NATION, (Feb. 11, 2014), <http://www.thenation.com/blog/178318/house-republicans-called-obama-lawless-using-executive-orders-thats-just-wrong>; see also John Nichols, *By John Boehner's Logic, a Lot of Presidents Should Have Been Sued*, NATION, (Aug. 5, 2014), <http://www.thenation.com/article/john-boehners-logic-lot-presidents-should-have-been-sued/> [hereinafter Nichols, *By John Boehner's Logic*]. The fight against employment discrimination was more often than not led by a succession of Executive Orders after 8802—that is, Exec. Order No. 9346, 8 Fed. Reg. 7183 (May 27, 1943) (President Roosevelt) (applying the antidiscrimination requirements of Executive Order 8802 to all government contractors); Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948) (President Truman) (banning discrimination based on "race, color, religion or national origin" in the U.S. military, and establishing "a high-level committee to investigate instances of bias and to make recommendations for how to eliminate it"); Exec. Order No. 10,308, 16 Fed. Reg. 12,303 (Dec. 3, 1951) (President Truman) (creating the "Committee on Government Contract Compliance, which was charged with assuring that federal contractors continued, in the post-World War II era, to comply with the non-discrimination provisions of Executive Order 8802"); Exec. Order No. 10,479, 18 Fed. Reg. 4899 (Aug. 13, 1953) (President Eisenhower) (establishing "the President's Advisory Committee on Government Organization (an expansion of the Government Contract Committee) to assure that federal contractors respected all anti-discrimination orders and initiatives, declaring 'It is the obligation of the contracting agencies of the United States Government and government contractors to ensure compliance with, and successful execution of, the equal employment opportunity

Perhaps rather than stopping with the issuance of an Executive Order banning compulsory arbitration for employees of million-dollar federal contractors, President Obama's legal team should develop an Executive Order that creates a fair, transparent, and effective system of EDL arbitration that all federal contractors must adopt, following some of the more enlightened thinking on the subject of how to make arbitration work for employment claimants,¹⁶⁸ particularly for the millions

program of the United States Government.'"); Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961) (President Kennedy) (requiring "government contractors to 'take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin,'" and creating "the President's Committee on Equal Employment Opportunity . . . to work with federal agencies to advance the initiative"); Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965) (President Johnson) (prohibiting "federal contractors and federally assisted construction contractors and subcontractors, who do over \$10,000 in Government business in one year, from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin"). According to the Department of Labor:

Executive Order 11246, as amended and further strengthened over the years, remains a major safeguard, protecting the rights of workers employed by federal contractors—approximately one-fifth of the entire US labor force—to remain free from discrimination on the basis of their gender, race, religion, color or national origin . . . and opening the doors of opportunity through its affirmative action provisions.

John Nichols, *By John Boehner's Logic*, *supra* (omission in original) (internal quotation marks omitted). These Executive Orders have been a "major safeguard, protecting the rights of workers employed by federal contractors—approximately one-fifth of the entire U.S. labor force—to remain free from discrimination on the basis of their gender, race, religion, color or national origin . . . and opening the doors of opportunity through its affirmative action provisions." Office of Federal Contract Compliance Programs, *History of Executive Order 11246*, U.S. DEPT LABOR, http://www.dol.gov/ofccp/regs/compliance/ca_11246.htm (omission in original).

¹⁶⁸ See, e.g., Richard A. Bales & Sue Irion, *How Congress Can Make a More Equitable Federal Arbitration Act*, 113 PENN. ST. L. REV. 1081, 1083–84 (2009); Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 810–12 (2008); see also Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment Discrimination Claims*, 46 U. MICH. J.L. REFORM 789, 790 (2013). In addition, such an Executive Order should tackle, to the maximum extent possible, how to limit judicial review through the arbitration agreement itself, so that management-oriented courts are not tempted to begin imposing the whole *McDonnell-Douglas-Burdine* regime on EDL arbitrations. See Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 HARV. NEGOTIATION L. REV. 167, 172 (2008). Finally, the Executive Order should establish boundaries for the arbitral process that minimize, to the greatest extent possible, the recognized phenomenon of "the repeat player effect"—to prevent the advantage that can be gained by "repeat player defendants (e.g., employers) in mandatory employment arbitration settings because of their ability to structure the process to their advantage." Edward

who lack¹⁶⁹ the fortitude and financial backing of a John Hithon to wage a twenty-year federal court battle for justice when they have been discriminated against by their employers. That might very well provide the best shot to end the strangeness of § 703(m)'s career over the last quarter of a century and thereby, at last, to create an environment in which the promise of the 1991 CRA might actually approach meaningful fulfillment.

Silverman, Article, *The Suspicious Existence of the "Repeat Player Effect" in Mandatory Arbitration of Employment Disputes*, NAT'L L. REV. (Mar. 31, 2013), <http://www.natlawreview.com/article/suspicious-existence-repeat-player-effect-mandatory-arbitration-employment-disputes>.

¹⁶⁹ See St. Antoine, *supra* note 168, at 790–92, 810, 812.