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If the Train Should Jump the Track ...: Divergent Interpretations of State and Federal Employment Discrimination Statutes

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"IF THE TRAIN SHOULD JUMP THE TRACK . . .": DIVERGENT INTERPRETATIONS OF STATE AND FEDERAL EMPLOYMENT DISCRIMINATION STATUTES

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I. INTRODUCTION

Statutory interpretation at the state level is an oft-neglected topic of legal scholarship.[1] Although legal scholars continue to debate the merits of the various schools of statutory construction, the debate centers almost entirely on the work performed by federal judges. When scholars do turn their attention to the interpretive work of state judges, they generally examine the interpretation of state constitutional provisions that parallel the federal Constitution and the pros and cons of the so-called "new judicial federalism."[2] Rarely is there much discussion as to the possibility that state judges might approach the task of statutory interpretation differently than their federal counterparts or that the task of interpreting state statutes that parallel federal law might raise different concerns than are raised with respect to constitutional interpretation.[3]

All of which is somewhat curious. The mere fact that most state judges, at some point in their careers, obtain the approval of the electorate for continuation in office would seem to inject a variable into the interpretive process that is lacking in the federal bench.[4] Moreover, even if one assumes (as many judges and scholars do) that judges approach statutory interpretation in the same manner they approach constitutional interpretation,[5] the interpretation of state statutes with parallel federal counterparts would seem to raise many of the same issues that dominate much of the discussion regarding the propriety of state courts departing from the United States Supreme Court's interpretation of the federal Constitution.

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[1] *See* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 19-20 (1995) (noting that few recent commentaries address different set of issues facing state judges construing state statutes).

[2] *See generally* Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93 (2000) (advocating independent state constitutional interpretation as means of elevating federal constitutional dialogue); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992) (arguing that state constitutional discourse is inherently flawed because Americans value national citizenship over state in definition of individual rights).

[3] Kaye, *supra* note 1, at 20.

[4] *See infra* notes 177-183 and accompanying text.

[5] *See* Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 3-4 (2004) (observing "peculiar agreement between defenders of originalism and dynamism that constitutional and statutory interpretation should converge").

In at least one area of law, the questions of how state judges approach statutory interpretation and how they should approach that task when dealing with a state statute that closely parallels federal law are increasingly taking on greater significance. Interpretational issues surrounding the various federal employment discrimination statutes have become exceedingly complex and politically charged over the past fifteen years.[6] The basic command of most antidiscrimination statutes is straightforward enough: employers may not discriminate on the basis of particular characteristics such as race, sex, age, or disability.[7] As case law under these statutes developed and courts were called upon to interpret the statutes more frequently, however, more complicated statutory construction issues emerged. From time to time, Congress stepped in to overrule some of the United States Supreme Court's more controversial interpretations.[8] Rather than resolving the controversy, however, congressional response sometimes engendered future confusion.[9]

Furthermore, as courts moved beyond some of the interpretational issues that could arguably be resolved by well-established methods of statutory interpretation, the deceptively simple language of Title VII and the Age Discrimination in Employment Act (ADEA) forced courts to grapple with interpretational issues for which the traditional tools of statutory interpretation—the statutory text and legislative history—provided little guidance. In an attempt to give form to the language of federal antidiscrimination law, federal courts have been forced to resort to

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[6] *See* Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 309 (2004) ("After more than a decade of litigation under the revised [Civil Rights Act], it is fair to say that Title VII law has never been more complex and confusing.").

[7] Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2000); 42 U.S.C. § 1981 (2000); Title VII of Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2000); Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (2000).

[8] *See, e.g.*, Civil Rights Act of 1991, 42 U.S.C. § 1981(b) & (c) (2000) (modifying statute in response to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)).

[9] *See, e.g.*, Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479, 1484 (1996) (noting competing interpretations of Civil Rights Act of 1991 relating to concept of business necessity in disparate impact claims).

a form of statutory interpretation that resembles common law rulemaking far more than traditional statutory interpretation.[10]

As these types of interpretational issues multiplied and became more complex at the federal level, state courts confronted similar issues. At the dawn of the modern era, federal and state antidiscrimination laws typically ran parallel to one another. Indeed, in many instances, a state's antidiscrimination statute was based upon or used language almost identical to federal law.[11] This fact, coupled with the general principle of construction that federal decisional law concerning a parallel statute is highly persuasive (although obviously not controlling),[12] meant that a parallel interpretation of the substantive provisions of a state antidiscrimination statute was almost a foregone conclusion when a state appellate court confronted an interpretational issue previously encountered by the Supreme Court or a majority of federal appellate courts. However, as interpretational issues at the federal level became more complex and (in at least some instances) more controversial, state antidiscrimination law had more opportunities to "jump the track" and take alternative courses.

Perhaps not surprisingly, a number of state appellate courts in recent years have declined to follow federal court interpretations of employment discrimination statutes when dealing with their own parallel state statutes.[13] To be sure, this is not a totally new phenomenon.[14] Nor is the phenomenon of divergent interpretations

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[10] *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 764-65 (1998) (relying on common law agency principles to formulate rule for deciding when employer is subject to vicarious liability for hostile work environment created by supervisor); Motzer v. Global Assoc., No. 448495, 2001 WL 811713, at *2 (Conn. Super. Ct. June 19, 2001) ("*Ellerth*, although nominally a statutory case, stands in the highest tradition of common law decision making, striking a fair balance between the interests of employees and employers in a developing area of the law.").

[11] *See* Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 627 (2004) (noting that just prior to federal enactment of ADA, numerous states used federal Rehabilitation Act as model for their disability discrimination statutes).

[12] *See, e.g.*, Chmielewski v. Xermac Inc., 580 N.W.2d 817, 821 (Mich. 1998) (noting that analogous federal precedents are persuasive but not binding in statutory interpretation).

[13] *See infra* notes 71-199 and accompanying text.

[14] *See, e.g.*, Mass. Elec. Co. v. Mass. Comm'n Against Discrimination, 375 N.E.2d 1192, 1200 (Mass. 1978) (refusing to adopt Supreme Court's rationale in *General Electric Co. v. Gilbert*, 429 U.S. 125, 134-35 (1976), that discrimination on basis of pregnancy is not equivalent of sex discrimination).

of parallel statutes necessarily limited to the employment discrimination field.[15] Nevertheless, there has almost certainly been a marked increase in recent years in the number of instances in which state antidiscrimination law has jumped the track of federal antidiscrimination law. Examples range from what conditions qualify as disabilities[16] to under what circumstances an employer can be held vicariously liable for sexual harassment committed by a supervisor.[17]

Even where state discrimination statutes have not yet jumped the track, the potential for divergent interpretations has increased. Recent interpretative issues decided by the Supreme Court—such as whether an age discrimination plaintiff may proceed under a disparate impact theory[18] and what the standard in such cases should be,[19] whether a cause of action for reverse age discrimination exists,[20] under what circumstances an employer may be held vicariously liable for harassment resulting in a constructive discharge,[21] and whether the venerable *McDonnell Douglas* framework should remain the standard for analyzing disparate treatment claims[22]—are waiting to be examined under parallel state antidiscrimination statutes.[23]

This Article posits that, as the stakes in employment discrimination cases become higher and the issues of statutory

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[15] *See, e.g.*, Graham v. DaimlerChrysler Corp., 101 P.3d 140, 149 (Cal. 2004) (noting "in the realm of attorney fees for private attorneys general, this court has markedly diverged from United States Supreme Court precedent"); Lenaerts v. D.C. Dep't of Employment Servs., 545 A.2d 1234, 1238 n.9 (D.C. 1988) (stating, in context of interpretation of workers' compensation statutes, that "it is said, with respect to borrowed statutes, that 'only the decisions of the court of last resort are normally adopted with the statute' " (citation omitted)).

[16] Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 963 (Mass. 2001).

[17] Chambers v. Trettco, Inc., 614 N.W.2d 910, 917-18 (Mich. 2000).

[18] Smith v. City of Jackson, 125 S. Ct. 1536, 1540 (2005).

[19] *See* Steven M. Berline & Jeanne R. Broderson, *High Court Partially Shuts Door to N.Y. Age-Discrimination Claims*, N.Y. L.J., Aug. 8, 2005, at 4 (noting that prior to *Smith*, courts subjected age discrimination suits under New York law to same analysis as claims brought under ADEA, despite textual differences between laws, but that *Smith* is likely to have "narrowing effect").

[20] Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 581 (2004).

[21] Pa. State Police v. Suders, 542 U.S. 129, 152 (2004).

[22] *See infra* notes 90-119 and accompanying text.

[23] *See* Ace Elec. Contractors v. IBEW, 414 F.3d 896, 900-01 (8th Cir. 2005) (concluding that, unlike ADEA, Minnesota's Human Rights Act does not permit employers to favor older workers on basis of age).

interpretation become more complex, the potential for divergent interpretations between state and federal antidiscrimination law will only increase. Indeed, it is entirely possible that state courts will increasingly heed the advice of Justice William J. Brennan, who suggested that Supreme Court interpretations of the federal Constitution should not necessarily be dispositive of questions regarding individual rights under state constitutions, even where the language of the two provisions is identical.[24] Although this "new judicial federalism" was originally championed in the context of state constitutional interpretation, its basic theme—that state courts need not follow the federal courts in lockstep on matters of construction concerning the protection of individual rights—resonates with equal strength in the context of employment discrimination law.

The Article also posits that, thus far, state courts have failed to formulate a coherent theory for dealing with such situations. Although state courts routinely adopt the federal courts' constructions of parallel federal statutes for use in their own antidiscrimination statutes, there is rarely much, if any, explanation of why such a lockstep approach is appropriate. In light of the increased potential for state courts to confront issues of interpretation already addressed by the federal courts and the increased potential for state and federal interpretations to come into conflict, state courts need to develop a workable approach for dealing with such matters. This Article attempts to provide such an approach.

Part II of this Article discusses some possible reasons accounting for the willingness of state courts to adopt the federal courts' interpretations of parallel federal law with little independent analysis.[25] Part III briefly explains the new judicial federalism movement, some of the criticisms it has engendered, and its potential application to the interpretation of employment discrimination statutes.[26] Part IV examines some of the reasons why, both as a practical and theoretical matter, state judges might approach the task of statutory interpretation differently than their

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[24] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495, 502 (1977).

[25] *See infra* notes 30-47 and accompanying text.

[26] *See infra* notes 48-70 and accompanying text.

federal counterparts, and why the potential for divergent interpretations of parallel state and federal employment law is increasing.[27] Finally, Part V proposes a substantive canon of construction[28] that would aid state judges in dealing with situations where the potential for divergent interpretations exists.[29] Under this canon, there would be a general presumption in favor of uniform construction between state and federal statutes that employ identical or substantially similar language. As explained, this presumption is justified on the grounds of preserving the reputational integrity of both state courts and the United States Supreme Court, promoting legislative efficiency, and fostering deference to legislative intent.

II. STATE ANTIDISCRIMINATION STATUTES AND FACTORS LEADING TO PARALLEL INTERPRETATIONS

Virtually all states have statutes prohibiting employment discrimination in the private sector.[30] Although numerous states had employment discrimination statutes on the books prior to the enactment of the Civil Rights Act of 1964, Congress's decision to outlaw discrimination in the workplace prompted more states to enact similar statutes and to expand upon the protection afforded under existing state statutes.[31] Despite some substantive differences, a considerable amount of federal-state redundancy has

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[27] *See infra* notes 71-199 and accompanying text.

[28] "The phrase 'substantive canons of construction' is used to refer to content-based rules of statutory interpretation, whose application is triggered by the content rather than the linguistic form of the statute." *The Supreme Court, 2002 Term: Leading Cases*, 117 HARV. L. REV. 459, 459 n.1 (2003); *see also* Andrew C. Spiropoulos, *Making Laws Moral: A Defense of Substantive Canons of Construction*, 2001 UTAH L. REV. 915, 934 (2001) (stating that substantive canons "establish policy rules and presumptions in interpreting statutes").

[29] *See infra* notes 200-449 and accompanying text.

[30] *See* Long, *supra* note 11, at 628 (noting prevalence of state disability discrimination statutes).

[31] *See* Susan Elizabeth Powley, *Exploring a Second Level of Parity: Suggestions for Developing an Analytical Framework for Forum Selection in Employment Discrimination Litigation*, 44 VAND. L. REV. 641, 667-68 (1991) (comparing employment discrimination coverage under state and federal law); *see also* Julie M. Spanbauer, *Kimel and Garrett: Another Example of the Court Undervaluing Individual Sovereignty and Settled Expectations*, 76 TEMP. L. REV. 787, 794-96 (2003) (discussing early attempts by states to address employment discrimination).

developed over the years regarding the interpretation of these statutes. Some state antidiscrimination statutes specifically require interpretation in conformity with parallel federal law.[32] Even though such forced consistency is the exception rather than the norm, state courts have routinely adopted the federal courts' interpretations of parallel federal law with little or no independent analysis of the applicable state statute.[33] In fact, state courts sometimes appear to bend over backwards in construing state antidiscrimination statutes in order to keep state and federal law on the same track.[34]

Several factors help explain the general rule of this lockstep approach to the interpretation of parallel state and federal employment discrimination statutes. First, protection from discrimination in the workplace is a relatively recent phenomenon and one driven largely by federal law. State attempts to address employment discrimination were generally seen as failures at the time of Title VII's enactment in 1964.[35] Although some states had outlawed discrimination in the workplace prior to the enactment of Title VII, few had previously outlawed sex discrimination, as Title VII did, and it was not until Title VII became law that a majority of states adopted their own antidiscrimination statutes.[36] Moreover, it was not until Title VII went into effect that courts and commentators turned their attention to common law erosions of the at-will employment rule in the states.[37] Similarly, even though many states prohibited discrimination against individuals with disabilities prior to the enactment of the ADA in 1990,[38] state laws

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[32] *See, e.g.*, IND. CODE ANN. § 22-9-5-27 (2004) (requiring Illinois Civil Rights Commission to adopt rules not in conflict with employment discrimination provisions of ADA).

[33] *See, e.g.*, *infra* notes 222, 298, 389 and accompanying text (discussing state courts' responses to several United States Supreme Court decisions concerning ADA).

[34] *See infra* notes 217-221 and accompanying text.

[35] *See* Herbert Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations*, 14 BUFF. L. REV. 22, 23-24 (1964) (discussing failure of state FEPC laws to improve employment status of racial minorities).

[36] Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 91 (2002).

[37] The law review article generally credited with triggering the re-examination of the employment at-will rule was published in 1967. Lawrence E. Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

[38] 42 U.S.C. §§ 12101-12213 (2000).

were far from uniform and frequently provided less protection than that ultimately provided by the ADA.[39] In short, federal law has traditionally set the standard for individual rights in the employment context, with state legislatures and courts taking their cues from federal law.

Second, a strong feeling exists among state judges that consistency and uniformity of interpretation is, per se, a compelling value.[40] Aside from affording employers and employees with some understanding of their relative rights and obligations prior to dispute, uniform construction of parallel state and federal statutes reduces forum shopping.[41] Occasionally, announced rules of statutory construction encourages this tendency toward homogeneity. The borrowed statute doctrine, for example, establishes a presumption that a legislature that borrows statutory language from another jurisdiction intended to adopt the judicial interpretations of the highest court of the other jurisdiction.[42] Thus, where a state has borrowed the language of Title VII or the ADA for use in its own employment discrimination statute, courts will ordinarily presume that the state legislature intended to adopt the construction afforded those statutes by the United States Supreme Court prior to enactment by the state legislature.

Finally, where the Supreme Court has spoken or there is a prevailing view among the federal courts, an institutional pressure on a state court to interpret a state statute in a consistent manner

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[39] *See* Long, *supra* note 11, at 626-27 (discussing states' varying definitions of "disability" and obligations for employers prior to 1990).

[40] *See* Peper v. Princeton Univ. Bd. of Trs., 389 A.2d 465, 478 (N.J. 1978) ("[W]here [federal antidiscrimination standards] are useful and fair, it is in the best interests of everyone concerned to have some uniformity in the law."); Winn v. Trans World Airlines, Inc., 484 A.2d 392, 404 (Pa. 1984) ("[T]his Court has, in the interest of uniformity and predictability in enforcement of equal employment legislation, construed the Human Relations Act in light of principles of fair employment law which have emerged relative to the corresponding federal statute, Title VII of the Civil Rights Act of 1964."); W. Va. Univ. v. Decker, 447 S.E.2d 259, 265 (W. Va. 1994) (noting court had previously adopted formulation of disparate impact defense under Title VII articulated by United States Supreme Court "simply because uniformity in these matters is valuable *per se*").

[41] *See* Brooks v. Lexington-Fayette Urban County Hous. Auth., 132 S.W.3d 790, 801 (Ky. 2004) (discussing reasons for Kentucky state court to construe law as consistent with federal law).

[42] Lenaerts v. D.C. Dep't of Employment Servs., 545 A.2d 1234, 1238 n.9 (D.C. 1988) (quoting Zerbe v. State, 583 P.2d 845, 846 (Alaska 1978)).

undoubtedly exists. Divergent interpretations, particularly those in the face of established Supreme Court precedent, may result in reputational costs to the wayward state court, which may be seen as engaging in results-oriented judging.[43] Simply stated, a state judge, despite having the inherent authority to construe a state statute in a manner inconsistent with federal law, may hesitate to announce to the world that a majority of the country's highest court got the issue wrong, either because the judge wants to avoid charges of judicial activism or out of respect for the reputation of the Supreme Court.[44]

Divergent interpretations may also result in other kinds of institutional costs. Although state courts hear more cases overall than federal courts[45] and the number of state employment discrimination cases has grown in recent years,[46] these cases make up a smaller portion of the state courts' overall caseload than at the federal level.[47] Thus, given state judges' relative lack of experience in this area and their greater time constraints, it is understandable that a state court would simply adopt the federal courts' construction of a parallel statute without engaging in any independent analysis.

III. THE NEW JUDICIAL FEDERALISM MOVEMENT AND ITS PARALLELS TO THE INTERPRETATION OF EMPLOYMENT DISCRIMINATION STATUTES

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[43] *See infra* note 57 and accompanying text.

[44] *See* State v. Hempele, 576 A.2d 793, 815 (N.J. 1990) (O'Hern, J., concurring in part and dissenting in part) (discussing authoritative impact of U.S. Supreme Court, "guardian of our liberties," on state court decisions).

[45] Judith S. Kaye, *Things Judges Do: State Statutory Interpretation*, 13 TOURO L. REV. 595, 599 (1997).

[46] *See* John W. Parry, *Executive Summary and Analysis*, 18 MENTAL & PHYSICAL DISABILITY L. REP. 614, 618 (1994) (noting shift by plaintiffs to state courts from traditionally preferred federal forum); Powley, *supra* note 31, at 663 (noting "growing number of plaintiffs" seeking redress in state courts).

[47] According to one estimate, "[e]mployment discrimination cases now make up almost ten percent of federal courts' dockets." Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1424 (2004). Although comparable state court statistics are difficult to come by, employment discrimination cases comprised only 1.4% of the civil cases disposed of by state courts in the seventy-five largest counties in the U.S. in 2001. THOMAS H. COHEN & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001, at 1 (2004), *available at* http://www.ojp.usdoj.gov/bjs/abstract/ctcvlc01.htm.

A. THE NEW JUDICIAL FEDERALISM

The idea that state and federal law need not march in lockstep first gained prominence in the field of constitutional law. During the 1970s, state courts more frequently interpreted their own constitutions to provide greater protection for individual liberties than similar provisions of the federal Constitution, primarily in response to a perceived trend in the Supreme Court toward decreased protection for individual rights.[48] With words of encouragement from Justice Brennan,[49] proponents of this "new judicial federalism" more frequently rejected the notion that the United States Supreme Court had the final say in establishing a floor of individual rights.

Proponents of the new judicial federalism offered numerous arguments in support of this approach to state constitutional interpretation. Some took the view that independent analysis of state constitutions encouraged a dialogue between the federal and state courts concerning the proper scope of individual rights.[50] Others argued that independent analysis of state constitutions better reflected the unique and shared values within an individual state.[51] For critics of the lockstep approach, state courts that refuse to engage in independent analysis of state constitutional provisions amount to "Pavlovian responses" to federal law.[52] State judges who engage in such an approach have relinquished the opportunity to engage the federal courts in a meaningful dialogue and have ceded the field of the protection of individual rights to the federal courts.[53]

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[48] James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1031 (2003).

[49] *See* Brennan, *supra* note 24, at 503 (noting "state courts can breathe new life into the federal due process clause by interpreting their common law, statutes and constitutions to guarantee a 'property' and 'liberty' that even the federal courts must protect").

[50] Goldfarb, *supra* note 36, at 90; *see also* Friedman, *supra* note 2, at 128-29 (advocating federal and state court dialogue to further understanding of individual rights under federal Constitution and to develop state constitutional law).

[51] *See* Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 391 (1998) (summarizing this position and stating that "[t]hose who believe that states do constitute communities urge independent interpretation").

[52] Stone v. St. Joseph's Hosp. of Parkersburg, 538 S.E.2d 389, 410 (W. Va. 2000) (McGraw, J., concurring in part and dissenting in part) (discussing construction of state antidiscrimination statute).

[53] *See* Gardner, *supra* note 48, at 1060 (discussing independent state and federal analysis

Given the long shadow cast by the Supreme Court and the Court's insistence that state courts clearly and expressly indicate that their decisions are based on adequate and independent state grounds,[54] state courts have generally felt compelled to base their alternative constructions on differences between state and federal law, rather than merely on the grounds that they disagree with the Supreme Court's interpretation of a parallel constitutional provision.[55] In making the decision to depart from federal authority, state courts frequently rely upon the language of the provision in question, historical context, case law development, the construction of similar provisions in other state constitutions, and policy concerns.[56]

This tendency to justify departure from federal precedent on supposed differences between state and federal sources has led to perhaps the most common criticism of the new judicial federalism: that it amounts simply to results-oriented judging[57] and "a kind of forum shopping for liberals."[58] In addition to broader, theoretical criticisms, critics attack judicial federalism by arguing that in order to justify a departure from federal precedent, state courts must exaggerate differences and find uncertainty in federal law where none exists.[59] Although differences in state law may sometimes

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of state constitutions).

[54] *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983) (noting that to avoid federal court review of decisions, state courts not basing decisions on federal precedent should indicate separate state grounds for decisions).

[55] *See, e.g.*, Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991) (discussing U.S. Supreme Court requirement that state courts make independent findings regarding state grounds for their decisions). *But see* James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219, 1289 (1998) ("[A]s a coequal participant with federal courts in the interpretation of a common constitutional heritage, a state court is entitled to part company with the United States Supreme Court for no other reason than, in the state court's view, the Supreme Court has gotten it wrong."). Professor Gardner has been one of the more outspoken critics of the new judicial federalism. Schapiro, *supra* note 51, at 398.

[56] *See Edmunds*, 586 A.2d at 895 (discussing sources instrumental to court's construction of Pennsylvania constitution); Baker v. State, 744 A.2d 864, 873 (Vt. 1999) (discussing sources used by Vermont Supreme Court to construe state's constitution).

[57] *See* Ronald K.L. Collins, *Foreword: The Once 'New Judicial Federalism' and its Critics*, 64 WASH. L. REV. 5, 6 (1989) (discussing underlying premises and claims held by critics of new judicial federalism); Gardner, *supra* note 48, at 1063 (discussing state court's departure from federal reasoning merely to avoid outcome "dictated by federal law").

[58] Paula W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 464 (1995).

[59] *See, e.g.*, Gardner, *supra* note 48, at 1062-64 (noting examples).

mandate a different interpretation of state constitutional law, critics argue that departure from federal law is, as often as not, the result of an illegitimate approach to judging.[60]

B. PARALLELS TO THE INTERPRETATION OF STATE EMPLOYMENT DISCRIMINATION STATUTES

There are several parallels between the approach of state courts regarding the interpretation of state constitutions and state employment discrimination statutes. First and most obviously, both deal with the concepts of equality and individual rights.[61] Constitutional law discussions permeate numerous Supreme Court decisions involving Title VII, including the legality of voluntary affirmative action programs[62] and disparate impact.[63] The converse is true as well, with the basic *McDonnell Douglas* burden-shifting framework of Title VII finding its way into the law concerning peremptory challenges.[64]

Second, there is clear similarity between the patterns of state court involvement in both constitutional and antidiscrimination issues. In the constitutional context, it was only natural that state constitutional law remained relatively dormant during the 1960s as constitutional rights were being expanded by the United States Supreme Court.[65] It was not until this trend began to reverse in the 1970s that state courts fully stepped into the breach. Employment discrimination law has followed a similar path. Early Title VII

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[60] *Id.* at 1059-60.

[61] While many state decisions that have departed from federal constitutional law have involved the criminal law area, a significant number of decisions have involved the Due Process and Equal Protection Clauses. *See* James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1187 (2000) (citing studies concerning state constitutional due process and equal protection challenges).

[62] United Steelworkers of Am. v. Weber, 443 U.S. 193, 209 (1979).

[63] Washington v. Davis, 426 U.S. 229, 244-45 (1976) (finding disparate impact without discriminatory intent not in violation of Equal Protection Clause).

[64] *See* Batson v. Kentucky, 476 U.S. 79, 93-94 (1986) (remanding criminal defendant's equal protection claim based on racial discrimination in jury selection using *McDonnell Douglas* framework).

[65] Brennan, *supra* note 24, at 495.

judicial decisions were generally seen as pro-plaintiff until a string of Supreme Court decisions in the 1980s reversed the trend.[66]

Finally, the functional similarity of state court approaches to interpretations of parallel constitutional and statutory provisions is striking. With state antidiscrimination statutes, a few state courts simply take a lockstep approach and follow the Supreme Court's interpretation of federal antidiscrimination law whenever practicable.[67] As with constitutional interpretation, most state courts start with the assumption that federal law provides the correct standard for its state law counterpart.[68] Only where a court "can identify some objective factor of text, history, precedent or state values to justify the divergence" will it reach a different result.[69] Finally, a few states take what would be called a "primacy" approach in the context of constitutional interpretation, whereby the state looks first to its own law and to federal law only for guidance.[70]

IV. THE POTENTIAL FOR A NEW JUDICIAL FEDERALISM IN EMPLOYMENT DISCRIMINATION LAW

Although divergent interpretations of parallel state antidiscrimination statutes have not yet developed into a fully formed "movement" with doctrinal underpinnings comparable to the new judicial federalism, a number of factors are nudging state courts to interpret their own antidiscrimination statutes independently of federal law.

A. MORE CASES

One likely predictor for a rise in the number of divergent state and federal interpretations of antidiscrimination law is the sheer

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[66] *See* Kenneth R. Davis, Price-*Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 895 (2004) (asserting that "*McDonnell Douglas*, in the pre-*Hicks* era, was decidedly pro-plaintiff").

[67] *See supra* notes 33-34 and accompanying text.

[68] Gardner, *supra* note 48, at 1061 (describing interstitial approach to state constitutional interpretation).

[69] *Id.*

[70] *Id.* at 1055.

number of employment discrimination lawsuits in the judicial system. After a relatively slow beginning, the number of employment discrimination cases filed in federal courts exploded between the years 1970 and 1989.[71] This trend continued relatively unabated into the 1990s.[72] As the amount of case law at the federal level grew, so too did the amount of potentially *bad* case law for plaintiffs. Although any number of reasons explain why an employment discrimination plaintiff might prefer a state court over a federal court,[73] in the federal courts employment discrimination plaintiffs, like plaintiffs in the constitutional context, could logically be expected to seek alternative forums in the state courts and alternative remedies under state antidiscrimination statutes, given the potential obstacles in the federal courts.[74]

By choosing to rely on state law and filing in state court, several possibilities for more favorable outcomes might open up to plaintiffs. It is possible, for example, that the language of the state statute may differ in some meaningful—and potentially beneficial—way from federal law.[75] By relying on state law, the particularly fortunate plaintiff may discover that the state statute contains a statement of purpose that is arguably broader than federal law[76] or language specifically directing reviewing courts to interpret the provisions of the statute liberally,[77] thus providing a statutory hook for a state court on which to hang its hat when departing from federal precedent. Even where the language of the two statutes is identical

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[71] Michael H. Leroy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 OHIO ST. J. ON DISP. RESOL. 249, 290-91 n.215 (2003).

[72] *See id.* (indicating continued increase in cases filed).

[73] *See, e.g.*, Powley, *supra* note 31, at 670 (noting that "because some state statutes offer broader coverage . . . [and] superior remedies . . . plaintiffs may find these statutes attractive supplements or potential alternatives to federal law").

[74] *See* Janet Bond Arterton, *Employment Discrimination Claims in State Court: A Laboratory for Experimentation*, 13 N.Y.U. REV. L. & SOC. CHANGE 499, 499 (1985) (suggesting in 1985 that in light of restrictive Supreme Court interpretations of federal employment discrimination law, "the utilization of state courts as substantive alternatives for vindicating employees' unjustified discharges represents the new, and perhaps the only, opportunity for creative expansion of discrimination claims").

[75] *See infra* notes 221-224 and accompanying text.

[76] *See* Wondzell v. Alaska Wood Prods., Inc., 601 P.2d 584, 585 (Alaska 1979) (finding that state statute was intended to be more broadly construed than federal law).

[77] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 151B, § 9 (West 2004) ("This chapter shall be construed liberally for the accomplishment of its purposes . . . .").

or substantially the same, the institutional pressures pushing a state court toward uniformity are largely absent if a plaintiff files a complaint in state court before a majority of federal courts have staked out a position on the issue or before the Supreme Court has definitively resolved the issue.

Of course, it is far more likely that a state court will consider federal precedent and adopt a parallel construction of state law.[78] In some cases, however, the plaintiff basing a discrimination claim on state law simply has little to lose. As state courts gain more experience with employment discrimination cases, they can draw from a greater reservoir of state precedent. And as this reservoir expands, so does the potential for conflict with federal law. In short, the sheer number of issues arising under state and federal antidiscrimination statutes creates an incentive for plaintiffs to sometimes bypass federal law, thus creating the potential for divergent interpretations of state and federal employment discrimination statutes.

B. MORE COMPLEX CASES

As the number of employment discrimination cases has increased, the field of employment discrimination law has itself become exceedingly complex.[79] This complexity carries with it the potential for disagreements in interpretation. It should not be surprising, therefore, to see more state courts called upon to enter the confusion.

1. Poorly Drafted Statutes. To be blunt, one cause of the current climate of uncertainty regarding federal employment discrimination law is congressional failure to make its intent clear with respect to some portions of Title VII.[80] For example, in 1991, Congress responded to a series of controversial decisions by the Supreme Court concerning the disparate impact theory of liability under Title

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[78] The same is true of state constitutional interpretation, even after the rise of the new judicial federalism. *See* G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1116-17 (1997) (discussing tendency, in spite of new judicial federalism, for lockstep interpretations of parallel statutes in state courts).

[79] *See supra* note 6 and accompanying text.

[80] *See* Spiropoulos, *supra* note 9, at 1520 (asserting that "Congress may have shirked its duty . . . [to] articulate clear legal rules in its statute").

VII by amending the Act.[81] By 1989, the Supreme Court had established an employer-friendly standard of the business necessity defense in disparate impact claims in *Wards Cove Packing Co. v. Atonio*.[82] With the Civil Rights Act of 1991, Congress announced that one of its purposes was "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.* . . . and in the other Supreme Court decisions prior to *Wards Cove*."[83] The problem is that neither *Griggs* nor the other decisions prior to *Wards Cove* are completely clear on what that standard is.[84] Congress somewhat careless use of language in this instance has led to disagreement among the federal courts concerning the appropriate standard.[85] Not surprisingly, this disagreement has materialized at the state court level as well.[86]

2. Statutory Law, Common Law Rulemaking. Another factor that explains some of the complexity surrounding modern employment discrimination law is the fact that many interpretational issues now require courts to stray from the textual language and legislative history into the realm of more explicit judicial rulemaking. For example, the statutory text of Title VII provides precious little guidance to a court considering the circumstances under which an employer may be held vicariously liable for sexual harassment committed by a supervisor.[87] Indeed, the statute does not even use the term "sexual harassment," let alone describe the two traditional types of sexual harassment, quid pro quo and hostile work

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[81] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 2 U.S.C. & 42 U.S.C.).

[82] 490 U.S. 642, 653 (1989).

[83] Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (1991).

[84] Lanning v. Se. Pa. Transp. Auth., 181 F.3d 478, 497-99 (3d Cir. 1999) (Weis, J., dissenting).

[85] *See* Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 95 (2d Cir. 2000) ("The Act's ambiguous language . . . has allowed a number of contradictory standards to emerge.").

[86] *Compare* Albaugh v. City of Columbus, 725 N.E.2d 719, 724 (Ohio Ct. App. 1999) (stating that employer-friendly *Wards Cove* standard applies to disparate impact claims brought under Ohio's antidiscrimination statute), *with* Novack v. Nw. Airlines, 525 N.W.2d 592, 597-98 (Minn. Ct. App. 1995) (explaining that Minnesota's statute employs *both* employer-friendly *Wards Cove* standard and less employer-friendly pre-*Wards Cove* standard), *and* Crocker v. Pielch, No. CIV.A. PC 2000-1771, 2002 WL 1035424, at *6 (R.I. Super. Ct. May 9, 2002) (stating that Rhode Island's statute, which defines "business necessity" to mean "essential to effective job performance" is stricter than federal standard).

[87] *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 752 (1998) (addressing this question).

environment.[88] Instead, a court confronting this issue must resort to common law agency principles and guess which standard of liability would best further Congress's purpose in prohibiting discrimination "because of sex."[89] This results in a form of statutory interpretation that resembles common law rulemaking and constitutional interpretation more than traditional statutory interpretation.

Perhaps the clearest example of this more complicated form of statutory interpretation is the ongoing battle over the future viability of the time-honored *McDonnell Douglas* burden-shifting framework used throughout employment discrimination cases. As originally devised by the Supreme Court, a plaintiff claiming intentional discrimination first had to make out a prima facie case by proving the following: (1) membership in a protected class; 2) the plaintiff applied for and was qualified for the job at issue; 3) the plaintiff was rejected for the job in question; and 4) the position remained open and the employer continued to seek applicants from persons with the same qualifications as the plaintiff.[90] At that point, the burden shifted to the defendant to rebut the presumption of intentional discrimination arising from the establishment of the prima facie case by producing evidence of a legitimate, nondiscriminatory reason for rejecting the plaintiff.[91] Once the employer satisfied this burden, the burden shifted back to the plaintiff to prove that the employer's reason was merely a pretext for discrimination.[92] Although simple on its face, this three-part approach contained numerous areas for potential disagreement. Was the employer's burden on the second stage a burden of proof, or was it one merely of production?[93] If, as the Supreme Court ultimately decided, the employer's burden was a burden of production,[94] did an employee automatically avoid summary

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[88] *See id.* at 752 (citing 42 U.S.C. § 2000e-2(a)(1) and noting that these terms first appeared in academic literature before being adopted by courts).

[89] *Id.* at 754-55, 764-65.

[90] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-06 (1973).

[91] *Id.*

[92] *Id.*

[93] *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981) (finding employer has burden of production rather than persuasion in second part of *McDonnell Douglas* test).

[94] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993); *Burdine*, 450 U.S. at 254.

judgment simply by establishing that the employer's reasons were pretextual (the "pretext only" standard), was the employee required to put forth some additional evidence of discrimination (the "pretext plus" standard), or was a showing of pretext sometimes, but not always, sufficient to avoid summary judgment?[95]

Reasonable arguments existed on each side of these issues, and the literal text of Title VII in no way mandated the Court's ultimate resolution of them. At each stage of the original test's refinement, federal courts grappled with the subtleties of a procedural test that was largely untethered to any statutory language and that could, depending upon how those subtleties were resolved, make things much easier or much harder for plaintiffs to hold their employers liable for intentional discrimination.[96] Not surprisingly, federal courts split on the issues prior to their ultimate resolution by the Court.[97] Given the great importance courts attach to consistency in procedural matters,[98] most state courts fell into line with the Supreme Court's ultimate resolution of these issues.[99] In the interim, however, there were similar splits among the states.[100]

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[95] *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (holding that employee's prima facie case and fact finder's disbelief of employer's reason were sufficient to prevent summary judgment for employer).

[96] *See* Smith v. Bridgestone/Firestone, Inc., 2 S.W.3d 197, 200 (Tenn. Ct. App. 1999) (stating that lower courts were left to determine proper standard for proving pretext in *McDonnell Douglas* framework).

[97] *Id.* at 200-01 (noting that federal and state courts were largely left to their own devices prior to *Hicks* and that three different interpretations of *McDonnell Douglas* test emerged).

[98] *See* Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 311-18 (2001) (arguing notion of uniformity is so pervasive that state statutes straying from uniform rules in form will be held to conform in practice).

[99] *See, e.g.*, *Smith*, 2 S.W.3d at 202 (recognizing "[t]he degree to which this expanding body of federal law has now subsumed state law").

[100] *Compare* Town v. Michigan Bell Tel. Co., 568 N.W.2d 64, 69 (Mich. 1997) (adopting prevailing contemporary view among federal circuits that plaintiff's showing of pretext may create jury question as to intentional discrimination, but does not necessarily require this result), *with* Blare v. Husky Injection Molding Sys. Boston, Inc., 646 N.E.2d 111, 117 (Mass. 1995) (holding that "once a plaintiff has established a *prima facie* case and further shows *either* that the employer's articulated reasons are a pretext *or* by direct evidence that the actual motivation was discrimination, the plaintiff is *entitled* to recovery" (emphasis added)), *and* Columbus Paper & Chem., Inc. v. Chamberlain, 687 So. 2d 1143, 1149, 1152 (Miss. 1996) (citing federal "pretext plus" authority and interpreting *Hicks* to mean that "plaintiff had to show 'pretext' *and* that [an impermissible characteristic] was the basis for the employer's termination" (emphasis added)). Following the U.S. Supreme Court's final resolution of the

Even where the text of Title VII did provide some guidance as to the procedural framework governing intentional discrimination claims, the federal courts may have completely misunderstood that guidance for twelve years. Historically, the *McDonnell Douglas* framework only applied where the plaintiff lacked direct evidence of discrimination.[101] Under this approach, the inquiry focused on the employer's "true" reason for its decision.[102] In contrast, the *McDonnell Douglas* burden-shifting framework did not apply where the plaintiff had some type of "smoking gun" evidence of discriminatory intent and the employer nonetheless argued that it would have made the same adverse decision even absent the impermissible consideration of a particular characteristic. Instead, the "mixed motives" framework developed in *Price Waterhouse v. Hopkins* applied.[103] Thus, two analytically distinct frameworks existed in the world of employment discrimination law, with the appropriate framework dependent upon whether a plaintiff had direct or circumstantial evidence of discrimination.[104]

As part of the 1991 amendments to Title VII, Congress created section 2000e-2(m), which provides that "an unlawful employment

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great "pretext only" versus "pretext plus" debate in *Reeves*, a few state courts retreated from their prior employee-friendly "pretext only" standards and fell into line with the federal standard announced in *Reeves*. *Compare Blare*, 646 N.E.2d at 117 (using "pretext only" standard), *with* Abramiam v. President & Fellows of Harvard Coll., 731 N.E.2d 1075, 1085 (Mass. 2000) (stating court never intended its decision in *Blare* to *compel* verdict for plaintiff who proves pretext); *compare* United Planning Org. v. D.C. Com'n on Human Rights, 530 A.2d 674, 680 (D.C. 1987) (citing pre-*Hicks* authority to find that "[Supreme Court precedent] makes it absolutely clear that a plaintiff who establishes a *prima facie* case of intentional discrimination and who discredits the defendants' rebuttal should prevail, even if he or she has offered no direct evidence of discrimination"), *with* Hollins v. Fed. Nat. Mortgage Ass'n, 760 A.2d 563, 571 (D.C. 2000) ("[I]t is not enough for the employee simply to show that the employer's proffered reason for the employment action is pretextual . . . ."). Even after *Hicks* settled the dispute at the federal level, at least one state refused to follow federal precedent, reasoning that its state evidentiary code was dramatically different than federal rules of evidence. Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225, 228-29 (N.D. 1995).

[101] *See* William R. Corbett, Casenote, McDonnell Douglas*, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 204 (2003) (explaining that "cases involving direct evidence were analyzed under mixed-motives, and cases involving circumstantial evidence were analyzed under the [*McConnell Douglas*] framework").

[102] *See* Davis, *supra* note 66, at 859-60 (stating *McDonnell Douglas* framework is based on notion that "either the discriminatory reason or nondiscriminatory reason—but not both—motivated the adverse employment action").

[103] 490 U.S. 228, 244-45 (1989) (plurality opinion); Corbett, *supra* note 101, at 204.

[104] Corbett, *supra* note 101, at 204.

practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating* factor for any employment practice."[105] On its face, section 2000e-2(m) would seem to apply to both single-motive/indirect evidence cases and mixed-motives/direct evidence cases and to create a "universal causation standard."[106] Nevertheless, many courts clung to the prior distinction, believing that the amendment merely overruled Justice O'Connor's view in *Price Waterhouse* that a plaintiff must establish discriminatory intent under a "substantial factor" test.[107] These courts believed that the distinction between single-motive and mixed-motives cases was left untouched by the addition of section 2000e-2(m).[108] Thus, the prevailing rule remained that a plaintiff needed direct evidence of discrimination in order to be entitled to a mixed-motives jury instruction.

The Supreme Court's 2003 decision in *Desert Palace, Inc. v. Costa* cast this approach into doubt.[109] Relying on the plain language of section 2000e-2(m), the Court held that a plaintiff does not need to produce direct evidence of discrimination to be entitled to a mixed-motives jury instruction.[110] Regardless of the type of evidence relied upon, a plaintiff must simply establish that a protected characteristic played a motivating factor in the decision.[111] With the primary basis for the *McDonnell Douglas*/*Price Waterhouse* distinction—the existence or lack of direct evidence—now obliterated, federal courts were left to wonder what, if anything, remained of *McDonnell Douglas*.[112]

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[105] 42 U.S.C. § 2000e-2(m) (2000) (emphasis added).

[106] Davis, *supra* note 66, at 890, 893-94.

[107] *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring).

[108] *See, e.g.*, Watson v. Se. Pa. Transp. Auth., 207 F.3d 207, 218-19 (3d Cir. 2000) (preserving distinction between mixed-motives and pretext cases).

[109] Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

[110] *Id.* at 101-02.

[111] *Id.*

[112] *See, e.g.*, Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004) (concluding that "*Desert Palace* had no impact on prior Eighth Circuit summary judgment decisions"); Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc., 285 F. Supp. 2d 1180, 1196 (N.D. Iowa 2003) (arguing that third stage of *McDonnell Douglas* analysis must be modified); Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 991-93 (D. Minn. 2003) (holding that *Desert Palace* applies to both single-motive and mixed-motives cases and that courts need not follow *McDonnell Douglas* framework).

To be sure, commentators have repeatedly criticized the distinction between single-motive and mixed-motives cases as creating a "false dichotomy"[113] and failing to reflect the realities of employer decisionmaking.[114] Nonetheless, the dichotomy persisted at the federal level and remained the norm for a dozen years. What is perhaps most interesting about *Costa* is that it took nearly a dozen years from the enactment of section 2000e-2(m) for the federal courts to attempt to fit the section's language within the broader framework of *McDonnell Douglas* and *Price Waterhouse*. As the Supreme Court explained in *Costa*, if Congress had meant for section 2000e-2(m) to apply only when direct evidence of discrimination existed, it could have made that intent clear by including language to that effect.[115] Yet, the federal courts somehow allowed themselves to be convinced for the better part of twelve years that the *judge-made* direct/indirect evidence *Price Waterhouse* distinction largely remained good law. Having "worshipped at the monument of *McDonnell Douglas*" for so long, federal judges had difficulty accepting that Congress had effectively altered that monument.[116]

If *Costa* truly is the cataclysmic event some have described,[117] the decision will have ripple effects beyond the federal court system. Like their federal counterparts, state judges, who had traditionally fallen into lockstep with the Supreme Court regarding *McDonnell Douglas*, are now struggling with the implications of the decision.[118]

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[113] *Dunbar*, 285 F. Supp. 2d at 1196.

[114] *See, e.g.*, Corbett, *supra* note 101, at 214-15 (noting search for single motive "seldom if ever reflects reality, as employers rarely make employment decisions for one reason").

[115] *Costa*, 539 U.S. at 99.

[116] 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, 444 (2004).

[117] *See id.* at 427 (noting "demise of *McDonnell Douglas*" after *Costa*); Corbett, *supra* note 101, at 199 ("It would be hard to find an opinion of the United States Supreme Court that said less but changed an area of the law more dramatically.").

[118] *See* Reeves v. Safeway Stores, Inc., 16 Cal. Rptr. 3d 717, 729 n.11 (Cal. Ct. App. 2004) (noting that *Costa* "raises the possibility—some would say 'hope'—that the 'mixed motive' approach may displace all but the first stage of the *McDonnell Douglas* framework," but that both parties agreed *McDonnell Douglas* framework applied); Plagmann v. Square D Co., No. 03-0465, 2004 WL 2809521, at *2 (Iowa Ct. App. Dec. 8, 2004) (declining to address whether *Costa* modified analysis of state law claims because plaintiff failed to preserve issue for appeal, but noting that this failure "may not matter" because, *inter alia*, Iowa's statute differs from Title VII); Chief Justice for Admin. & Mgmt. of the Trial Ct. v. Mass. Comm'n Against Discrimination, 791 N.E.2d 316, 322 (Mass. 2003) (implying that *Costa* is not inconsistent with Massachusetts law in that neither requires the impermissible factor to be sole factor in

And if the state courts' response to the initial evolution of the *McDonnell Douglas* test is any indication,[119] the short-term future is uncertain. Indeed, given the controversial nature of the theoretical underpinnings for the *McDonnell Douglas/Price Waterhouse* distinction, it is likely that at least some state courts will reject whatever federal standard ultimately emerges.

3. More Complex Statutes. A third reason to believe that divergent interpretations of parallel state and federal antidiscrimination law will increase is that the new generation of employment discrimination statutes, such as the ADA, are themselves textually and theoretically more complex. Like much of the federal Constitution, Title VII's basic prohibition against intentional discrimination is laden with ambiguity.[120] At least, however, it is short. In contrast, with the ADA,[121] one must sift through numerous terms, each having its own specialized meaning, before ever getting to the basic issue of when an employer has discriminated against an individual with a disability. As a result, the relative density of the ADA's language has resulted in a staggering number of interpretational issues.

To assess an ADA claim, one must first determine whether an individual has a disability. The ADA contains three separate, but related, definitions of the term, each containing potential ambiguities.[122] Once this determination is made in a plaintiff's favor, the plaintiff must still be "qualified" in order to claim protection under the ADA.[123] This, in turn, requires a court to consider the meaning of two more potentially ambiguous concepts: (1) whether the individual is capable, with or without *reasonable*

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adverse decision and continuing to apply *McDonnell Douglas* framework in indirect evidence case); Sniecinski v. Blue Cross & Blue Shield of Mich., 666 N.W.2d 186, 192-93 (Mich. 2003) (reaffirming, after *Costa* was decided, that mixed-motives cases under Michigan's antidiscrimination statute must be established through direct evidence).

[119] *See supra* note 100 and accompanying text.

[120] *See, e.g.*, David S. Schwartz, *When is Sex Because of Sex?: The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1708 (2002) (noting courts' differing conceptions of meaning of "because of sex" in Title VII).

[121] 42 U.S.C. §§ 12101-12213 (2000).

[122] Under the Act, an individual with a disability is one who (a) has a physical or mental impairment that substantially limits one or more major life activities, (b) has a record of such impairment, or (c) is regarded as having such an impairment. 42 U.S.C. § 12102(2) (2000).

[123] *Id.* § 12112(a).

accommodation, of performing (2) the *essential functions* of the particular job the individual holds or desires.[124] While the statute provides some guidance as to the meaning of the term "essential functions," it does nothing more than provide a non-exhaustive list of possible reasonable accommodations.[125]

Assuming the plaintiff makes it this far, the judge's task may not be over; the employer may argue that it is excused from providing a reasonable accommodation because it would impose an "undue hardship"—a term that the statute defines only as "significant difficulty or expense."[126] Only upon resolution of these issues can the court proceed to the *McDonnell Douglas* portion of the claim—a portion which may no longer exist after *Costa*.[127] Thus, the sheer number of potentially ambiguous terms within the ADA has created the potential for divergent interpretations among federal and state courts.

C. MORE CONTROVERSIAL CASES

At its core, employment discrimination law is all about attempting to strike the appropriate balance between employer autonomy and individual rights. Many issues regarding the workplace directly implicate much broader economic, psychological, and philosophical issues. Accordingly, issues of statutory construction often require courts to make difficult policy decisions, thus increasing the odds of conflicting decisions.

The ADA provides perhaps the best example. Because the ADA takes a different approach to the problem of discrimination than older antidiscrimination statutes, the potential for divergent interpretations under the ADA's ambiguous language is increased. Whereas Title VII requires employers to treat their similarly-situated employees similarly, the ADA requires employers to treat individuals with disabilities differently.[128] By mandating

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[124] *Id.* § 12111(8).
[125] *Id.* § 12111(9).
[126] *Id.* § 12111(10).
[127] *See supra* notes 112-118 and accompanying text.
[128] *See* US Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002) ("By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially."); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and*

"reasonable accommodation,"[129] the ADA requires employers to modify existing policies and practices so that individuals with disabilities can perform the essential functions of their positions. This naturally means that, employers are required to provide "preferential" treatment for such individuals, provided such treatment is "reasonable" and does not impose an undue hardship on the employer.[130] Therefore, the ADA cuts into the discretion of employers to run their workplaces as they see fit perhaps more than other antidiscrimination statutes. Accordingly, judicial interpretation of the ADA's definition of a qualified individual with a disability will likely have a substantial effect on the balance between employer autonomy and individual rights.

At the same time, the reasonable accommodation requirement raises the specter that the ADA provides "special rights" for individuals with disabilities, rather than providing equality of opportunity.[131] Not surprisingly, some commentators have suggested that the courts have interpreted the ADA's terms more strictly than Congress intended.[132] For example, given the vague nature of the reasonable accommodation requirement and the potential effect a broad interpretation of that requirement might have on employers and nondisabled employees, a court might be expected to establish a high threshold for qualification as disabled in order to reduce the number of instances in which the reasonable accommodation is implicated.[133] Defining the terms "substantially limits" and "major life activities" narrowly allows a court to avoid difficult choices about the scope of the ADA's restriction on

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Reasonable Accommodation, 46 DUKE L.J. 1, 10-11 (1996) ("Reasonable accommodation . . . requires employers to treat some individuals—those disabled persons who would be qualified if the employer modified the job to enable them to perform it—differently.").

[129] 42 U.S.C. § 12112(b)(5)(a) (2000).

[130] *US Airways*, 535 U.S. at 397.

[131] *See* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 50 (2000) (noting that "rather than viewing ADA cases as disputes about fundamental civil rights, many judges treat them as requests for special benefits made by employees who are performing poorly").

[132] *See id.* at 21 (noting text of ADA does not mandate Court's narrow interpretation of statute).

[133] Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 320-21 (2001).

employers' discretion to establish workplace rules and policies. Thus, it is perhaps not surprising that the Supreme Court's decisions to date have interpreted the definition of disability narrowly.[134]

Although many state antidiscrimination statutes employ almost identical definitions of disability,[135] several state statutes define the term in slightly different language[136] or not at all.[137] Based on the perceived need for consistency of substantive definitions and concerns over reputational costs, state judges may be inclined to either finesse the textual differences where they exist or simply borrow the federal definition to fill in the gap in state law. Indeed, some state courts have done exactly that.[138] The ADA is not an ordinary statute, however. The Supreme Court's restrictive reading of the ADA's terms has provoked a large outcry from academics and the original sponsors of the measure in Congress.[139] These critics contend that the Court has effectively thwarted Congress's purpose in enacting the ADA.[140] In short, many now perceive the ADA as having largely failed in its mission of improving employment prospects for individuals with disabilities.[141] Thus, the policy aspects inherent in any interpretation of statutory language are more pronounced in the context of disability discrimination statutes, increasing the potential for divergent interpretations.[142]

Furthermore, decisions regarding the balance between employer autonomy and individual rights are more likely to capture the

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[134] Long, *supra* note 11, at 599.

[135] *See, e.g.*, MONT. CODE ANN. § 49-3-101(3) (2004) (using federal definition).

[136] *See, e.g.*, WIS. STAT. ANN. § 111.32(8) (2004) (defining individual with disability as one with physical or mental impairment that makes achievement unusually difficult or limits capacity to work, record of such impairment, or being perceived as having such impairment).

[137] *See, e.g.*, WYO. STAT. ANN. § 27-9-101(a) (2004) (lacking definition of "disability").

[138] *See, e.g.*, Kitten v. State Dep't of Workforce Dev., 644 N.W.2d 649, 661 (Wis. 2002) (stating that definition of disability found in ADA is virtually identical despite textual differences).

[139] *See* Tony Coelho, *Our Right to Work, Our Demand to be Heard: People with Disabilities, the 2004 Election, and Beyond*, 48 N.Y.L. SCH. L. REV. 729, 734 (2004) (explaining that, through its decisions on ADA, the Supreme Court "wrote me out of my own bill").

[140] *Id.*

[141] *See, e.g.*, Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 6 (2004) (stating ADA has failed to achieve significant improvements in employment for individuals with disabilities).

[142] *See infra* notes 253-267, 363-418 and accompanying text (discussing such interpretations).

attention of judges and legislators than many other issues. Based on past congressional practice,[143] federal judges are well aware that a decision perceived as tipping the balance too far in one direction may produce a congressional response. Even where judicial interpretation of an antidiscrimination statute has not yet provoked the ire of a legislature, the balance between employer autonomy and individual rights may be so precarious that seemingly minor shifts in one direction or the other may be enough to cause substantial uncertainty among the affected parties.

In this charged environment, it is not surprising that federal decisions sometimes produce a response not only from Congress, but from state legislators and courts. In direct response to the Supreme Court's interpretations of the ADA's definition of disability, at least two state legislatures have amended their employment discrimination statutes to provide for more expansive coverage.[144] Before Congress could overrule the Supreme Court's holding that discrimination on the basis of pregnancy was not discrimination because of sex,[145] the appellate courts of several states quickly announced that, regardless of how the Supreme Court interpreted Title VII, pregnancy discrimination amounted to sex discrimination under those states' antidiscrimination statutes.[146] Even prior to *Costa*, at least one state court rejected the distinction between indirect and direct evidence cases on the grounds that the federal tests failed to adequately protect individuals from discrimination.[147] Another established a more plaintiff-friendly standard regarding pretext than ultimately emerged at the federal level.[148] And although all the above responses created *greater* protection for individual plaintiffs, state legislatures and courts occasionally respond to federal precedent increasing employee protection by

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[143] *See supra* notes 83, 105 and accompanying text.

[144] *See* Long, *supra* note 11, at 634-37 (detailing amendment of definition of "disability" in California and Rhode Island statutes).

[145] Gen. Elec. Co. v. Cailburt, 429 U.S. 125, 136 (1976).

[146] *See* Mass. Elec. Co. v. Mass. Comm'n Against Discrimination, 375 N.E.2d 1192, 1200 (Mass. 1978) (listing state decisions).

[147] *See* Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 625-27 (Minn. 1988) (applying broader state test over federal test).

[148] *See* Joyal v. Hasbro, Inc., 380 F.3d 14, 17 (1st Cir. 2004) (describing plaintiff-friendly Massachusetts law in Lipchitz v. Raytheon Co., 751 N.E.2d 360, 366 (2001)).

bringing previously more expansive state law back into line with federal law or by interpreting parallel state statutes more narrowly.[149]

D. DIFFERING APPROACHES TO STATUTORY INTERPRETATION AMONG STATE AND FEDERAL JUDGES

One final predictor of future divergent interpretations of parallel state antidiscrimination statutes—and one that might explain some of the existing diversity—is the possibility that state judges simply approach the task of statutory interpretation differently from their federal counterparts.[150] A state judge might approach statutory interpretation in a different manner from a federal judge for any number of reasons that have nothing to do with institutional differences between state and federal courts. Differences in approaches to statutory interpretation are at least as likely to result from different judicial sensibilities between two judges as from the fact that one judge sits on a state bench and the other a federal bench.[151] Nonetheless, a number of differences between state and federal courts, both mechanical and theoretical, may logically result in at least some differences in approaches.

1. Mechanical Reasons. To varying degrees, federal courts rely on the text of the statute, legislative history, administrative rules and interpretations, and general canons of statutory construction. Although state judges will theoretically always begin with the statutory text and may resort to canons of construction in construing

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[149] *See* ARK. CODE ANN. § 16-123-102(3) (2004) (containing post-ADA definition of disability that does not include ADA's "record of" or "regarded as" prongs); Muller v. Hotsy Corp., 917 F. Supp. 1389, 1414 n.10 (N.D. Iowa 1996) (noting Iowa Supreme Court has articulated standard, specifically rejected by Congress in adopting ADA, for reasonable accommodations under state disability discrimination statute imposing lower burden on employers than does ADA); *see also* Kathy A. Bullerdick, *Missouri Commission Changes Sexual Harassment Rules*, MO. EMP. L. LETTER, Aug. 2001 (noting that Missouri Commission on Human Rights amended its rules regarding vicarious liability to bring them more into line with federal law).

[150] *See* Kaye, *supra* note 1, at 20 (arguing that state courts' interpretations are more rooted than federal courts' in common law principles).

[151] *See* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 3-4 (1997) (noting that different interpretative approaches are not usually product of different jurisdictions); Eric Lane, *How to Read a Statute in New York: A Response to Judge Kaye and Some More*, 28 HOFSTRA L. REV. 85, 87-88 (1999) (supporting view that interpretation cannot be divided into state and federal approaches).

a statute, their ability or willingness to rely on legislative history or administrative rules and interpretations may differ from their federal counterparts, based on the peculiarities of the jurisdiction.

Unlike state constitutional history,[152] there is a general lack of statutory legislative history at the state level.[153] Although state courts may look at the timing of statutory enactments and their amendments in order to gain insight into a legislature's purpose, few states publish transcripts of legislative debates or committee reports.[154] Therefore, as an institutional matter, state courts are generally less able to rely on the type of legislative history that is frequently used at the federal level to resolve issues of statutory construction. This reality forces state judges to look elsewhere in their quest to provide meaning to the text in question. In some instances, this may result in increased reliance on federal authority. Where the statutory text is ambiguous, state courts may be inclined to adopt the federal courts' interpretation of a parallel statute on the assumption that consistency for consistency's sake is a good thing. In other instances, however, a departure from federal precedent may be justified by slight differences in statutory text or adherence to the principle of stare decisis.[155]

State and federal courts may also differ in their ability or willingness to defer to administrative interpretations of statutory text. Although many states have human rights agencies with the power to promulgate rules concerning antidiscrimination measures, there is considerable diversity among the states regarding the extent to which these agencies actually exercise that authority. Some state human rights commissions have published in-depth rules and interpretations, whereas others have produced little, if anything. The paucity of legislative history and administrative guidance within a particular state might prompt a state court to rely more

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[152] *See* Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont's State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73, 86 (2001) (noting that state constitutional history has been integral to development of new judicial federalism due to greater availability of such history in state, as compared to federal, government).

[153] *See* Kaye, *supra* note 1, at 30 (noting that legislative history is sparsely recorded in New York, which likely applies to other states).

[154] *See* Kaye, *supra* note 45, at 600 (noting "much less" legislative history at state level).

[155] *See infra* notes 438-449 and accompanying text.

heavily on federal interpretations of statutory language. In contrast, where there is greater administrative activity, there is greater potential for an administrative agency to adopt a rule contrary to an established federal rule.[156]

State courts may also differ from federal courts regarding the amount of deference they extend to agency interpretations. For example, the federal courts have sometimes refused to extend *Chevron* deference[157] to some of the EEOC's pronouncements concerning the various antidiscrimination statutes, either because the EEOC lacked substantive rulemaking power[158] or because the pronouncements were in the form of interpretive guidance, rather than legislative in nature.[159] In some instances, however, a state court's view of the state's human rights commission may be more friendly than the federal courts' general perception of the EEOC,[160] or the state human rights commission may have greater rulemaking authority than the EEOC.[161] In such cases, an agency interpretation may more heavily influence a state court's resolution of a statutory interpretational issue than at the federal level.

2. Theoretical Reasons. Another factor possibly supporting the conclusion that state judges approach the task of statutory interpretation differently from their federal counterparts is the reality that there is a closer relationship between the judiciary and other branches at the state level.[162] In the words of one state judge,

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[156] *See* MD. CODE REGS. 14.03.02.03(B) (2003) (stating, in opposition to federal law, that determination of individual's substantial limitation in major life activity should be made without regard to mitigating effects of remedial devices or appliances).

[157] *See* Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, 467 U.S. 837, 843 (1984) (requiring courts to follow any "permissible" agency construction of statute where Congress has not precisely addressed relevant issue).

[158] *See, e.g.*, Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) (noting Congress did not grant EEOC "authority to promulgate rules or regulations pursuant to [Title VII]").

[159] *See* EEOC v. Exxon Corp., 203 F.3d 871, 873 (5th Cir. 2000) (stating that language in interpretive guidance, not being part of regulations, is not entitled to *Chevron* deference).

[160] *Compare* Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532, 533 (2000) ("The EEOC, however, has historically been given short shrift by litigants and by the judiciary."), *with* Dahill v. Police Dept. of Boston, 748 N.E.2d 956, 961 (Mass. 2001) (adopting interpretation of state disability discrimination contained in Massachusetts Commission Against Discrimination guidelines and stating that such guidelines were "entitled to substantial deference").

[161] *See, e.g.*, Pollock v. Wetterau Food Dist. Group, 11 S.W.3d 754, 767 (Mo. Ct. App. 2000) (noting broader authority granted to Missouri Commission on Human Rights).

[162] *See* Christine M. Durham, *The Judicial Branch in State Government: Parables of Law,*

"[t]he governing principle" at the state level "is not separation but networking."[163] Unlike their federal counterparts, state judges routinely perform a variety of functions traditionally associated with the executive branch, such as administering family court mediation programs and domestic violence programs.[164] There are also numerous opportunities for state courts to interact with the legislature. The rulemaking power enjoyed by state courts provides a greater opportunity for dialogue with the legislature on policy matters than exists at the federal level,[165] as does the power to issue advisory opinions enjoyed by some state courts.[166] Although both state and federal courts are sensitive to legislative budget constraints, the legislature in many states has "ultimate control over how the courts spend their money."[167] This greater control over judicial purse strings may provide opportunities for state legislatures to punish courts for controversial decisions[168] and make state judges more sensitive to the threat of such reprisals.[169]

As a result of this greater interaction, a dialogue between the branches concerning judicial decisions is more likely to exist at the state level. Although federal decisions may sometimes provoke a response from Congress, the nature of the legislative process insures that direct rebukes of judicial decisions usually occur only where Congress views a series of decisions as having swung the pendulum too far to one side or where an individual decision is highly

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Politics, And Power, 76 N.Y.U. L. REV. 1601, 1608 (2001) (noting interbranch relations at state level do not mirror those at federal level); Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1560-61 (1997) (discussing different approaches to separation of powers taken by states).

[163] Peters, *supra* note 162, at 1561.

[164] *See* Durham, *supra* note 162, at 1609-11 (describing judicial interaction with executive and legislative branches at state level).

[165] *Id.*; *see also* Peters, *supra* note 162, at 1561 (addressing judicial participation in state legislative process).

[166] *See* Peters, *supra* note 162, at 1560-61 (noting that though most do not, some state courts may issue advisory opinions on pending legislation).

[167] Durham, *supra* note 162, at 1612.

[168] *See id.* at 1612-13 (detailing skirmish between California legislatures and California courts).

[169] *See* State *ex rel.* Rist v. Underwood, 524 S.E.2d 179, 195, 198 (W. Va. 1999) (Maynard, J., dissenting) (expressing concern that by "thumb[ing] its nose" at legislature, court had invited legislature to take adverse action with respect to judicial salaries, adequate funding of court staff and equipment, and judicial tenure).

controversial.[170] In contrast, state legislatures and judiciaries more routinely engage in an open dialogue.[171] As a practical matter, this may be true partly because the local nature of state government increases the opportunity for formal and informal interactions among members of the three branches.[172] Also, because a state legislature need only monitor the work of one or two courts, as opposed to the "blizzard of opinions emanating from the federal courts," it is more likely that a state legislature will be aware of and able to respond to the decisions of state courts.[173] Given this reality, state courts may be better situated than federal courts to put legislators on notice of perceived flaws or inequities in statutory language and invite revision.[174]

Also, the state courts' history of common law rulemaking ensures a greater dialogue than exists at the federal level. Legislatures frequently codify or reject pre-existing common law rules developed by courts and engage in continuous refinement of those rules with the courts.[175] Thus, state judges may approach statutory interpretation with a higher expectation that the legislature will step in and "correct" judicial interpretation of a statute.[176]

Differences in selection and retention of judges may also result in different approaches to statutory interpretation. The overwhelming

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[170] *See supra* notes 81-145 and accompanying text (discussing Civil Rights Act Amendments of 1991 and Pregnancy Discrimination Act); *see also* Johnson v. Transp. Agency, 480 U.S. 616, 629 n.7 (1987) (noting idea of dialogue between legislature and courts regarding correctness of judicial interpretation of statute); Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance?: Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1055 (1991):

> Legislative action will probably occur when the decision has received media attention, when one or more legislators or legislative committees become interested in the subject, when there is near unanimity that the court decision is wrong, when a powerful interest group or governmental agency is affected by the decision and seeks legislative relief, or when the decision arouses passionate response among various constituencies.

[171] Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 48 n.214 (1998).

[172] *Id.*

[173] *Id.*

[174] Indeed, in some states, judges are required by law to make "constructive suggestions they may deem necessary for the improvement of the administration of justice" outside the context of judicial opinions. Abrahamson & Hughes, *supra* note 170, at 1072.

[175] Kaye, *supra* note 45, at 601-02.

[176] Kaye, *supra* note 1, at 23.

majority of state judges are elected to office or retained in office by popular vote.[177] Most do not enjoy life tenure.[178] In some respects, one might expect this reality to produce less rather than more uniformity between state and federal law. One might think that judicial elections encourage strategic voting among judges in controversial cases so as to minimize electoral risks.[179] As decisions departing from federal precedent are more likely to be controversial than decisions in conformity with federal precedent, one would naturally expect a judge subject to election to seek to minimize risk. Depending upon the salience of the issue to be decided or the time to a judge's re-election,[180] however, the risks associated with departing from federal precedent may be minimal.

The different nature of judicial selection at the state level may also lead some judges to view themselves as having a different role to play because they are elected. As is arguably the case with constitutional interpretation, state judges may be more inclined to view their state's selection and retention methods as conferring a "democratic imprimatur" that allows a freer hand in policy making.[181] Elected judges may be more willing to acknowledge that judging involves lawmaking and that lawmaking involves policy choices.[182] In short, because they know their policy choices are subject to review by the electorate, some state judges may feel less constrained about making explicit policy choices than their federal counterparts.[183]

This greater willingness to speak the language of public policy may also be explained in large measure by the fact that, as an institutional matter, state courts are in the business of shaping the

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[177] *Id.*

[178] Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 976 (2001).

[179] Owen G. Abbe & Paul S. Herrnson, *How Judicial Election Campaigns Have Changed*, 85 JUDICATURE 286, 295 (2002).

[180] Powley, *supra* note 31, at 666.

[181] Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 899 (1989).

[182] *See* Hans A. Linde, *Observations of a State Court Judge*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 117, 117 (Robert A. Katzmann ed., 1988) ("The active participation of state judges in the policy process is much more taken for granted and much less controversial than the involvement of federal judges in the national government.").

[183] Durham, *supra* note 162, at 1606.

common law.[184] On a mechanical level, the backdrop of the common law may influence a state judge's approach to the task of statutory interpretation.[185] Numerous canons of construction, such as those stating that statutes in derivation of the common law should be construed narrowly[186] and that courts should follow common law usage where a legislature has employed words with settled common law traditions,[187] have developed to help judges find a balance between common law and statutory rules. But the common law functions of state judges may influence decisions in other, less mechanical ways. As "the keepers of the common law,"[188] state judges, in the words of Judge Judith S. Kaye of the New York Court of Appeals, "regularly, openly, and legitimately speak the language of the common law whereas federal courts do not."[189] According to Judge Kaye, the essence of the common law is lawmaking and policymaking by judges.[190] As such, the task of developing the common law routinely requires state judges to weigh changing and competing social interests while deciding a particular case or controversy.[191]

To Judge Kaye, statutory interpretation is not terribly different. Although the principle of stare decisis places some limits on the ability of judges to make decisions based purely on policy considerations, the language of a statute likewise restricts a judge's ability to substitute his or her own policy views for those of the legislature.[192] However, regardless of whether a court is dealing with common law or a statute, there will inevitably be ambiguities and gaps that simply cannot be filled by reference to the statutory text or extrinsic sources that might shed light on the legislature's

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[184] *See* Kaye, *supra* note 1, at 6 (stating that "state courts—not federal courts—are the keepers of the common law").

[185] Peters, *supra* note 162, at 1556.

[186] *Id.*

[187] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322 (1992).

[188] Kaye, *supra* note 1, at 6.

[189] *Id.* at 20. *But see* Michael J. Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 GONZ. L. REV. 131, 160 (2003-04) ("[M]ore and more decisions from the federal courts have the look, taste, smell, and feel of common law.").

[190] Kaye, *supra* note 1, at 5.

[191] *See id.* (noting that common law as body of rules not only resolves conflicts at hand but also guides future conduct).

[192] *Id.* at 5-6, 26.

intent.[193] Although there is nothing revolutionary about such a view,[194] Kaye argues that this approach is particularly appropriate for state judges, who likely will not have the same extrinsic sources upon which to rely in divining the legislature's intent.[195] Also implicit in Judge Kaye's argument is the notion that state judges are particularly well suited to make such decisions. According to Kaye, "When the meaning of a statute is in dispute, there remains at the core the same common-law process of discerning and applying the purpose of the law."[196] Because state judges are "schooled in the common law"[197] and hence less tied to formalist notions of judging than their federal counterparts, state judges may consider themselves more adept at discerning the purpose of a statute and more accustomed to basing their decisions on policy grounds than their federal counterparts.[198]

Even where a state judge is not so predisposed, as a matter of mechanics, state judges are more likely than federal judges to be forced to reconcile common law decisions with statutory text, thus influencing the ultimate construction of a statute. Employment discrimination statutes were enacted against the backdrop of the common law employment at-will rule. Even prior to the enactment of state and federal employment discrimination statutes, state courts relied on relevant common law tort and agency principles to determine under what circumstances an employer may be held liable for the wrongs of its employees. The Supreme Court's recent decisions defining "employer," "employee," and vicarious liability in the context of Title VII and the ADEA relied heavily on common law principles.[199] These decisions make clear that common law principles will continue to play an important role in the evolution of federal antidiscrimination law. Given the potential for conflict

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[193] *Id.* at 10, 29.

[194] *See, e.g.*, Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 285-86 (1989) (discussing necessity for judges to resolve issues even where statute or legislative intent provides inadequate guidance).

[195] Kaye, *supra* note 1, at 29-30.

[196] *Id.* at 25.

[197] *Id.* at 34.

[198] *See* John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1662-63 (2001) (stating that state judges' common law powers historically made it natural to view statutes as starting point for further analysis).

[199] *See supra* notes 10, 89 and accompanying text.

between these federal decisions and pre-existing state court decisions on similar topics, state courts will likely be called upon more frequently to decide whether to depart from stare decisis and bring state law back into line with federal law.

V. OF PAVLOVIAN RESPONSES AND DIVERGENT INTERPRETATIONS

Given the increasing potential for divergent interpretations of parallel antidiscrimination statutes, state courts need to develop a coherent approach to situations where this possibility arises. At present, many state courts routinely adopt the settled constructions of parallel federal statutes with little or no explanation of their reasons for doing so.[200] To the extent these courts ever explain why federal decisions are persuasive to the point of being close to de facto mandatory authority, the explanations usually fall into one of two categories.

First, some simply suggest that consistency for consistency's sake is a good thing.[201] When courts elaborate on this concept, they sometimes cite the evils that may flow from divergent state and federal interpretations, such as forum shopping.[202] In other areas of law, such as cases under the Uniform Commercial Code (UCC), uniformity is said to be justified on the grounds that increased certainty of legal results reduces the costs of litigating over uncertain or ambiguous legal issues.[203] Unlike the UCC, however, Title VII expresses no desire to promote uniformity of the law.[204] In fact, Congress clearly expressed a willingness to permit and even encourage experimentation by the states by disavowing any intent to occupy the field of employment discrimination law.[205] Thus,

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[200] *See supra* note 33 and accompanying text.

[201] *See supra* note 40 and accompanying text.

[202] *See, e.g.*, Brooks v. Lexington-Fayette Urban County Hous. Auth., 132 S.W.3d 790, 801-02 (Ky. 2004) (listing discouraging forum shopping as one benefit of lockstep interpretation).

[203] Daniel A. Gecker & Kevin R. Huennekens, *Waiving Goodbye to the UCC: A Proposal to Restrict the Continuing Erosion of Rights Under an Imperfect Code*, 28 LOY. L.A. L. REV. 175, 175 (1994).

[204] *See* U.C.C. § 1-102(3)(c) (1999) ("Underlying purposes and policies of this Act are . . . to make uniform the law among the various jurisdictions.").

[205] 42 U.S.C. § 2000h-4 (2000); *see* Powley, *supra* note 31, at 667 ("Congress designed Title VII to supplement, rather than replace, State laws.").

unlike uniform laws, where the express goal of uniformity might imbue another jurisdiction's interpretation with some inherent indicia of persuasiveness, nothing within the language of Title VII or other federal employment discrimination statutes expressly applies pressure on state courts to adopt federal interpretations.[206] Indeed, many state employment discrimination statutes differ markedly from federal law regarding matters such as jurisdictional thresholds and available remedies that naturally encourage the very evils a presumption in favor of parallel construction seeks to avoid.[207]

The other most common explanation for the commonality of interpretations is that state law closely resembles or was based on pre-existing federal law.[208] Here, state courts rarely attempt to explain why the fact that a state legislature modeled an antidiscrimination statute after federal law or used similar language should lead to an identical construction of ambiguous language. Although the borrowed statute rule lends itself to parallel construction by a state court where federal decisional law predates enactment of the state statute, the rule does not encourage judges to follow subsequent decisional law from the federal courts.[209]

Despite the state courts' general failure to articulate the reasons behind the presumption in favor of parallel construction in the employment discrimination context, there are convincing arguments for interpreting parallel law uniformly, in addition to the practical concerns of forum shopping and uncertain results. As explained in the following sections, uniform interpretation in the employment discrimination field is more likely to further the preference of the enacting or current state legislature while promoting legislative efficiency. Generally, uniform construction should be preferred when possible because it is less likely to subject state judges to

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[206] *See* Holiday Inns, Inc. v. Olsen, 692 S.W.2d 850, 853 (Tenn. 1985) ("This court should strive to maintain the standardization of construction of uniform acts to carry out the legislative intent of uniformity.").

[207] Powley, *supra* note 31, at 667-68.

[208] *See, e.g.*, Chang v. Inst. for Public-Private P'ships, Inc., 846 A.2d 318, 324 (D.C. 2004) (noting state law definition of disability closely resembles that of ADA).

[209] *Cf.* Crosby v. Alton Ochsner Med. Found., 276 So. 2d 661, 665 (Miss. 1973) (finding that Mississippi's adoption of Georgia statute did not bind court to follow subsequent interpretations of Georgia courts).

charges of results-oriented judging and to call into question unnecessarily the wisdom or moral authority of the Supreme Court.

State courts should adopt a substantive canon of construction for situations in which they must interpret state law in the shadow of parallel federal law. A state court should feel free to engage the state legislature and the federal courts in a dialogue concerning the individual rights embodied in the statutes where there are meaningful differences in terms of statutory text, legislative history, or agency interpretations; where no consensus exists at the federal level regarding the interpretation of a parallel federal statute; or where, in those rare cases, it can be said in good faith that the federal courts' interpretation of a parallel statute is plainly wrong. In other cases, however, state courts should defer to the federal courts' interpretation of the parallel statute. Adoption of this substantive canon would increase predictability in the resolution of such issues. Perhaps more importantly, adopting this canon is the best means of promoting legislative intent, fostering legislative efficiency, and preserving the reputational integrity of the Supreme Court and state courts.[210]

A. THE CASE FOR INDEPENDENT ANALYSIS

One of the primary criticisms of the lockstep approach to state constitutional interpretation is that it prevents any meaningful dialogue between the states and the federal government regarding the concept of individual rights.[211] For proponents of judicial federalism, this failure to examine state law critically is particularly troubling given the courts' role as guardians of individual rights.[212]

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[210] In this respect, the justifications offered in this Article are similar to those typically offered for the avoidance canon of construction. Under this canon, courts should "ascertain whether a construction of the statute is fairly possible by which the question [of the statute's constitutionality] may be avoided." *Child Pornography—Statutory Interpretation*, 109 HARV. L. REV. 279, 285 (1995) (citing Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Braindeis, J., concurring)). The canon is typically explained as an attempt to protect the credibility of courts, avoid absurd results, promote legislative efficiency, and facilitate judicial deference to legislative intent. *Id.*

[211] Friedman, *supra* note 2, at 133-34; Gardner, *supra* note 2, at 792-93.

[212] 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, 550-51 (1986) (noting importance of broad state court interpretation of state constitution to development of

In arriving at the conclusion that the protections afforded by a state constitution are identical to those afforded by the federal Constitution, state courts adopting the lockstep approach have sometimes ignored textual differences that might support a contrary conclusion.[213] In doing so, they subject themselves to the criticism that they have abdicated their judicial responsibility.[214] In the following section, I argue that in some situations, these same concerns are present when a state court uncritically accepts federal law as establishing the standard for protection from employment discrimination.

1. Where Meaningful Differences Exist Between State and Federal Law. One of the chief criticisms of the new judicial federalism focuses on the willingness of state courts to exaggerate the differences between state and federal constitutions in order to justify a departure from federal precedent.[215] However, where meaningful distinctions between state and federal law exist, it represents an abdication of the judicial function for a court to fall into lockstep with federal authority with little or no independent examination of the distinctions. By giving effect to such meaningful distinctions, state courts may also preserve the states' role as "laboratories for innovation and experiment."[216]

a. ADA Examples: Limitations vs. Substantial Limitations. A fairly egregious example of state judges' tendency to be blinded by federal law existed in California for several years regarding the state's disability discrimination statute. In 1992 (two years after the ADA's passage), the California legislature amended California's Fair Employment and Housing Act (FEHA).[217] Rather than defining

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individual rights).

[213] *See* Ruth V. McGregor, *Recent Developments in Arizona State Constitutional Law*, 35 ARIZ. ST. L.J. 265, 268-69 (2003) (implying state court historically rationalized and evaded differences in language of state and federal statute to promote lockstep approach); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1220 (1999) (stating lockstep approach in state courts may ignore clear evidence of disparities in state and federal constitutions).

[214] Schapiro, *supra* note 51, at 422-23; Brennan, *supra* note 212, at 552.

[215] *See supra* note 57 and accompanying text.

[216] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[217] CAL. GOV'T CODE § 12940 (West 2004); *see also* Michael L. Murphy, *Assembly Bill 2222: California Pushes and Breaks the Disability Law Envelope*, 51 CATH. U. L. REV. 495, 505-07 (2002) (describing history of FEHA).

disabilities in terms of *substantial* limitations, the FEHA simply spoke of limitations of major life activities.[218] As numerous federal courts had concluded that Congress's inclusion of the word "substantially" worked to limit dramatically the scope of the ADA's definition,[219] this difference should have been significant. Despite the obvious textual difference, several California courts required plaintiffs to establish *substantial* limitations of major life activities, sometimes expressly relying on the ADA for support.[220] Ultimately, the California legislature stepped in with an amendment that restated the obvious in no uncertain terms: notwithstanding any inconsistent interpretation, the legislature intended state law to require a limitation rather than a *substantial* limitation.[221] Given the clear differences between the FEHA and the ADA, the only plausible explanations for the prior inconsistent interpretations are that (a) the courts so clearly viewed federal law as establishing the norm that only an explicit command from the legislature would justify a divergent interpretation, or (b) the courts simply viewed federal law as striking the more appropriate balance, and in the absence of an explicit command from the legislature, they would interpret the statute in a manner consistent with this policy choice.

b. ADA Examples: Mitigating Measures. A number of states have also fallen into lockstep with the Supreme Court's holding in *Sutton v. United Air Lines, Inc.* that an individual's use of mitigating measures (such as corrective lenses, medication, etc.) must be taken into account when assessing whether the individual is substantially limited in a major life activity under the ADA's definition of disability.[222] According to the Court, the plain language of the ADA

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[218] Colmenares v. Braemer Country Club, 63 P.3d 220, 223 (Cal. 2003) (citing 1992 Cal. Stat. 4308, amending § 12926(k)).

[219] *See infra* notes 280-281 and accompanying text.

[220] *See Colmenares*, 63 P.3d at 226 n.6 (listing with disapproval state cases applying federal test to FEHA claims).

[221] CAL. GOV'T CODE § 12926.1(d) (West 2004).

[222] Sutton v. United Airlines, Inc., 527 U.S. 471, 482 (1999); *see* Grant v. May Dep't Stores Co., 786 A.2d 580, 584-85 (D.C. 2001) (finding nurse who controlled diabetes with insulin not disabled under *Sutton* test); Seaman Unified Sch. Dist. No. 345 v. Kansas Comm'n on Human Rights, 990 P.2d 155, 158 (Kan. 1999) (applying *Sutton* to find diabetic employee not disabled); Kuechle v. Life's Companion P.C.A., Inc., 653 N.W.2d 214, 221 (Minn. Ct. App. 2002) (approving trial court analysis accessing agoraphobic nurse's disability status under *Sutton*); Davis v. Computer Maint. Serv., Inc., No. 01A01-9809-CV00459, 1999 WL 767597, at *9 (Tenn.

definition requires that a plaintiff's use of mitigating measures be considered when assessing whether the plaintiff's impairment substantially limited a major life activity.[223] As the Court noted, the statute uses the present indicative verb form in the phrase "substantially limits."[224] Therefore, the Court reasoned, the plain language of the statute mandates that a plaintiff's impairment must presently substantially limit a major life activity.[225] Conditions that " 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken" do not presently substantially limit a major life activity.[226]

In addition, the Court concluded that the overall text of the Act supported this construction. The legislative Findings and Purposes contained within the text of the Act itself suggested to the Court that Congress "did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities."[227] The Findings and Purposes indicate that forty-three million Americans have disabilities.[228] "Had Congress intended to include all persons with corrected physical limitations among those covered by the Act," the Court concluded, "it undoubtedly would have cited a much higher number of disabled persons in the findings."[229] Finally, in her concurring opinion, Justice Ginsburg found it telling that the Findings and Purposes referenced individuals with disabilities as being a "discrete and insular minority [who have been] subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society."[230] People with

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Ct. App. Sept. 29, 1999) (affirming summary judgment for employer under *Sutton* analysis of diabetic employee's claim).

[223] *Sutton*, 527 U.S. at 482.

[224] *Id.*

[225] *Id.*

[226] *Id.* Further, the Court reasoned that the ADA definition of disability speaks to the effect that an impairment has on an *individual*. *Id.* at 483. If a court were to "make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition," the court would not be engaging in the type of individualized inquiry that the statute mandates. *Id.*

[227] *Id.* at 484.

[228] 42 U.S.C. § 12101(a)(1) (2000).

[229] *Sutton*, 527 U.S. at 487.

[230] *See id.* at 494 (Ginsburg, J., concurring) (quoting 42 U.S.C. § 12101(a)(7)).

correctable disabilities, Justice Ginsburg believed, simply did not fit within that class.[231]

The *Sutton* decision generated an outpouring of criticism. Critics questioned how the Court could conclude that the statutory language had a plain meaning in light of the fact that a clear majority of the federal appellate courts had reached a contrary conclusion.[232] Particularly galling to some critics was the Court's use of the Act's Findings and Purposes to reach its conclusion.[233] The Court itself noted that, although Congress concluded that forty-three million Americans had disabilities, no one was completely sure where that number had come from.[234] Moreover, both the legislative history and the sources supposedly accounting for the estimate assumed that at least some people with correctable conditions would be considered as having disabilities under the ADA. Thus, the Court's conclusion excludes a group of people that helped make up the forty-three million count.[235]

Another criticism was that by concluding that "disability" had a plain meaning, the Court avoided reference to the ADA's legislative history, which seemed to indicate that Congress intended for the determination of whether an individual is substantially limited to be made without regard to the availability of mitigating measures.[236] The Court's decision not to defer to the EEOC's interpretation of the ADA's definition of disability also drew fire.[237] Prior to *Sutton*, the EEOC took the view that "[t]he determination of whether an

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[231] *Id.*

[232] *Id.* at 495-96 (Stevens, J., dissenting) (noting that eight federal courts had held statute defines "disability" without regard to mitigating measures).

[233] *See, e.g.*, *id.* at 511 (Stevens, J., dissenting) (discussing unreliability of 43 million figure provided by Congress).

[234] *Id.* at 484. The Supreme Court cited several possible sources for the figure, none of which contained an estimate of 43 million. *Id.* at 485. These sources actually employed definitions of disability different than those used in the Rehabilitation Act and the ADA. Lisa Eichhorn, *Applying the ADA to Mitigating Measures Cases: A Choice of Statutory Evils*, 31 ARIZ. ST. L.J. 1071, 1113 (1999).

[235] *Sutton*, 527 U.S. at 512 (Stevens, J., dissenting).

[236] White, *supra* note 160, at 560; *see also* H.R. REP. NO. 101-485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334 ("Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."); Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 84 (2000) (finding court "guilty" of ignoring ADA's legislative history).

[237] *See* White, *supra* note 160, at 538 (describing Court's refusal to defer to EEOC interpretation as "troubling").

individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[238] At the time of the decision, most federal courts had deferred to the EEOC's position on the matter.[239] Aside from the fact that the Court felt the definition had a plain meaning, the Court pointed out that while Congress had empowered the EEOC to issue regulations enforcing the employment provisions of Title I of the ADA, the statutory definition of "disability" fell outside Title I and was instead contained within the generally applicable provisions of the ADA.[240] Therefore, the Court was unwilling to defer to the EEOC's interpretation of the statute on the question of mitigating measures.[241]

The criticism of *Sutton* has continued in the ensuing years. For example, Bonnie Poitras Tucker has argued that in promulgating the "mitigating measures" rule, the *Sutton* Court "seem[ed] more concerned with requiring people with disabilities to . . . take all possible steps to change or rehabilitate themselves than with enforcing the ADA's goal of preventing discrimination based on irrational stereotypes, prejudice or benevolent paternalism."[242] Others have noted the practical Catch-22 that the rule creates for some plaintiffs.[243] Under the *Sutton* rule, an individual who takes medication or uses mitigating devices to offset the effects of an impairment may not be disabled enough to qualify as having a disability.[244] If the individual does not employ such mitigating measures, however, the effects of an individual's impairment may be severe enough that the individual is no longer capable of performing

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[238] 29 C.F.R. app. § 1630.2(j) (1998); H.R. REP. NO. 101-485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334.

[239] *Sutton*, 527 U.S. at 495-96 (Stevens, J., dissenting).

[240] *See id.* at 478-79 (discussing three agencies with authority to regulate Act).

[241] *See id.* at 483-84 (noting EEOC guidelines approach runs "counter to the individualized inquiry approach mandated by the ADA," and could lead to "anomalous result").

[242] Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 349 (2001).

[243] Mark A. Rothstein et al., *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 WASH. U. L.Q. 243, 254 n.72 (2002).

[244] *Id.* at 254-55.

the essential functions of the position, thus rendering the individual unqualified.[245]

Despite the criticism, there is an undeniable logic to the *Sutton* Court's reading of the ADA.[246] The Court's conclusion that the ADA's definition of disability has a plain meaning may represent a broad understanding of the term "plain meaning," but it is likely the most reasonable and natural reading of the statute's actual language.[247] Although the Court's use of the forty-three million estimate is somewhat suspect, the estimate is a part of the statute itself and does provide at least some clue as to whom Congress thought it was protecting in enacting the statute. Finally, one does not have to be a devout textualist to find persuasive Justice Ginsburg's point about the congressional finding that individuals with disabilities comprise a "discrete and insular minority."

Regarding the Court's avoidance of the ADA's legislative history, some have questioned whether the legislative history is as clear as is often claimed.[248] For example, prior to *Sutton*, the Fifth Circuit had concluded that nothing within the ADA's legislative history compelled the conclusion that "*all* impairments must be considered in their unmitigated states and *no* mitigating measures may ever be taken into account."[249] Indeed, perhaps the biggest obstacle that the petitioners in *Sutton* faced was the nature of their impairments. Both petitioners were severely myopic, but with corrective lenses their vision was 20/20.[250] Despite the passages in the legislative history, which primarily concern impairments of a fairly serious nature, it is difficult to believe that Congress intended the ADA's definition of disability to cover fairly common impairments that could be corrected through the use of something as simple and inexpensive as eyeglasses. In other words, if a court asked itself how

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[245] *Id.* at 254 n.72.

[246] *See* Charles B. Craver, *The Judicial Disabling of the Employment Discrimination Provisions of the Americans with Disabilities Act*, 18 LAB. LAW. 417, 438 (2003) (supporting majority's decision in *Sutton*).

[247] *See, e.g.*, Washington v. HCA Health Servs., 152 F.3d 464, 469 (5th Cir. 1998), *vacated*, 527 U.S. 1032 (1999) (noting that opinions advocating taking mitigating measures into account offer "most *reasonable* reading" of ADA).

[248] *See id.* at 468 (noting inconsistencies in congressional reports); McGowan, *supra* note 236, at 85 (discussing terms not clearly defined in legislative history).

[249] *Washington*, 152 F.3d at 470.

[250] Sutton v. United Airlines, Inc., 527 U.S. 471, 475 (1999).

Congress would have dealt with the facts of *Sutton*,[251] it is difficult to accept the proposition that Congress would have concluded that the *Sutton* petitioners had a disability. Had the Court reached the opposite conclusion, employers potentially would have been responsible for providing costly and disruptive reasonable accommodations for individuals with easily correctable impairments.

In sum, *Sutton* presented a classic question of statutory interpretation in which perfectly reasonable arguments can be mustered to support either conclusion on the mitigating measures rule.[252] Unfortunately for state courts who must interpret their own states' disability discrimination statutes, this only makes the task more difficult.

As discussed in the next section, the fact that a federal law is controversial or that a contrary interpretation of a parallel statute is defensible or might represent a better policy choice in the eyes of a state judge is not a sufficiently strong justification to depart from federal law. However, by conducting an independent analysis of a parallel state statute, a court may find that there are, in fact, differences that do not simply provide a fig leaf for the departure from federal level, but actually strongly support such a departure. In 2001, the Massachusetts Supreme Judicial Court confronted the question of whether *Sutton*'s mitigating measures rule applied to Massachusetts's antidiscrimination statute in the case of a hearing-impaired police officer who used hearing aids to mitigate the effects of his hearing impairment.[253] Even though Massachusetts's statutory definition of "handicap" was identical to the ADA's definition of "disability," the court held in *Dahill v. Police Department of Boston* that the statute did not require consideration of mitigating or corrective measures in assessing whether an individual's impairment substantially limited the individual in a major life activity.[254]

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[251] *See* United States v. Klinger, 199 F.2d 645, 648 (2d Cir. 1952) (suggesting this approach to statutory interpretation).

[252] *See* White, *supra* note 160, at 586 (stating that "how best to resolve the mitigating measures puzzle was an issue on which reasonable people could disagree").

[253] Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 958 (Mass. 2001).

[254] *Id.*

In reaching this result, the court conducted an independent analysis of Massachusetts's antidiscrimination statute and concluded that several factors justified a different interpretation from that of the ADA in *Sutton*.[255] Unlike the Supreme Court, the *Dahill* court concluded that the text was not clear as to whether the use of mitigating measures must be taken into account in assessing whether an impairment substantially limits a major life activity.[256] Nor did the legislative history of Massachusetts's statute compel the conclusion reached by the Supreme Court in *Sutton*. According to the court, when the Massachusetts legislature amended the statute in 1983, it explicitly patterned the definition of "handicap" after the definition in the Rehabilitation Act.[257] The court assumed that the legislature intended the statute to be interpreted consistently with then-existing Rehabilitation Act case law.[258] Because no federal court had expressly decided the mitigating measures question by that point, the legislative history did not compel a particular conclusion on the question.[259]

Left with ambiguous text and ambiguous legislative history, the Massachusetts Supreme Judicial Court concluded that several differences between the Massachusetts statute and the ADA justified a departure from the Supreme Court's reasoning in *Sutton*. First, after *Sutton*, the Massachusetts Commission Against Discrimination (MCAD) concluded that the determination of whether an individual has a handicap *should not* take into account an individual's use of corrective or mitigating measures.[260] Although

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[255] *Id.*

[256] *Id.* at 960.

[257] *Id.*

[258] *Id.* at 960-61.

[259] *Id.*

[260] *See id.* at 961, 963. The MCAD actually stated that mitigating measures should not be taken into account when assessing whether an individual has an *impairment*. *Id.* at 961. Arguably, that is not the same thing as stating that such measures should not be taken into account when assessing whether an individual has an impairment *that substantially limits a major life activity*. The MCAD, however, seems to have intended to establish a standard whereby an individual's use of mitigating measures should not be taken into account when determining whether the individual has a "handicap." The MCAD's guidelines provide that "an employee with a serious mental illness that affects her ability to work in a broad range of jobs may be considered 'handicapped,' even if the symptoms of the mental illness can be mitigated or eliminated by medication." Massachusetts Commission Against Discrimination, Guidelines: Employment Discrimination on the Basis of Handicap, http://www.state.ma.us/

the EEOC's similar conclusion had been rejected, the Massachusetts court saw an important distinction. Whereas Congress had not conferred upon the EEOC the authority to interpret and implement the ADA's general definition of disability, the MCAD did have such authority under the Massachusetts statute.[261] Thus, the MCAD's interpretation was entitled to "substantial deference."[262]

In addition, the Massachusetts statute specifically directs courts to construe the statute liberally in order to accomplish its purposes.[263] Thus, unlike the presumption of strict interpretation mandated by the Supreme Court in the ADA context,[264] interpretation of Massachusetts's statute proceeds from the assumption of a more liberal construction. "Surely," the court reasoned, "one aspect of that remedial purpose is to encourage impaired persons to overcome or mitigate their disabilities."[265]

Considered as a whole, *Dahill* is not a situation (as is often alleged with the new judicial federalism movement) in which a state court simply disagrees with a Supreme Court decision and inflates minor differences between state and federal law into full-blown distinctions in order to justify its preferred result. The Massachusetts Supreme Judicial Court may have, and indeed probably did, disagree with the *Sutton* court's policy choice. Nevertheless, the textual differences and historic deference to agency interpretations in Massachusetts not only support, but point strongly in favor of an interpretation of Massachusetts law contrary to that offered by the Supreme Court regarding the ADA.[266] Other

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mcad/disability1.html#one (last visited Sept. 26, 2005). Thus, the MCAD appears to have made a conscious decision to reject the mitigating measures rule announced in *Sutton*. *See* MCAD Rejects Supreme Court's Recent Definition of Disability, http://www.shpclaw.com/updates/mcad.html (last visited Sept. 26, 2005) (noting MCAD's rejection of narrower United States Supreme Court interpretation of "disability" under ADA).

[261] *Dahill*, 748 N.E.2d at 963.

[262] *Id.* at 961. Given the Massachusetts courts' history of deference to the judgments of the MCAD, see, e.g., *Beaupre v. Cliff Smith Assocs.*, 738 N.E.2d 753, 764 (Mass. Ct. App. 2000), the court's deference in this instance was largely consistent with past practice.

[263] *Dahill*, 748 N.E.2d at 962 (citing MASS. COMP. LAWS ANN. § 4 (West 2004)).

[264] *See infra* note 282 and accompanying text.

[265] *Dahill*, 748 N.E.2d at 962.

[266] At least one of the differences the *Dahill* court viewed as "critical" does not hold up under close scrutiny. Unlike the ADA, the Massachusetts statute did not contain any estimate of the number of individuals with disabilities. *Id.* at 963. As discussed previously, the *Sutton* majority found it important that Congress estimated the number of Americans with

state courts may find similar differences supporting such a result if and when they conduct their own independent analysis of state law.[267]

2. Ongoing Debates at the Federal Level. On issues where no uniform federal standard regarding a question of individual rights has emerged, there is a benefit in permitting debate to flourish. Obviously, debate among the lower courts and other political actors may sharpen and focus the legal arguments pertaining to a particular issue. But by allowing the debate among the lower courts to percolate, the Supreme Court also allows more central questions regarding the basis for the right asserted to be more thoroughly fleshed out. This "percolation" policy of the Supreme Court specifically contemplates states partaking in the debate.[268]

States initially helped shape the debate over equality in the workplace by acting before Congress to outlaw various forms of discrimination in the private sector.[269] Since that time, the dialogue has more closely resembled that of a monologue, with Congress and the federal courts doing most of the talking. But when the federal and state governments are both reading from essentially the same text and uncertainty exists in the courts as to the meaning of that text, the potential for dialogue concerning the meaning of that text

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disabilities to be 43 million; according to the majority, that number surely would have been higher had Congress intended to cover individuals who employed corrective or mitigating measures. *See supra* notes 228-229 and accompanying text. Because Massachusetts's statute contained no such estimate, the *Dahill* court found *Sutton*'s reasoning to be of little use. *Dahill*, 748 N.E.2d at 963-64. The fact that the Massachusetts legislature did not estimate the number of Massachusetts citizens with disabilities is hardly surprising because (1) the statute was modeled after the Rehabilitation Act, which itself only estimated that "millions of Americans have one or more physical or mental disabilities," and (2) no other state legislature has seen fit to provide in its statute a more exact estimate of the number of citizens with disabilities. If the Massachusetts legislature had provided such an estimate when it amended the statute in 1980, that estimate would have been groundbreaking when it was announced and hopelessly outdated by the time of the *Dahill* opinion. In addition, as noted, Congress's estimate that there were 43 million Americans with disabilities was largely created out of whole cloth to begin with. *See supra* notes 227-235. Thus, it is somewhat peculiar that a court would find the *absence* of such an estimate to have any particular significance.

[267] *See* MD. CODE REGS. 14.03.02.03(B) (2003) (stating, contrary to federal law, that determination of whether an individual is substantially limited in major life activity should be made without regard to mitigating effects of remedial device or appliance).

[268] Ronald Dworkin, *Rawls and the Law*, 72 FORDHAM L. REV. 1387, 1401 (2004).

[269] *See* Long, *supra* note 11, at 626; *supra* note 31 and accompanying text.

exists.[270] Thus, where no uniform position on fundamental questions of equality has emerged in the federal courts, it would be the height of pandering for a state court to fail to enter the debate.

Perhaps the clearest example of the potential benefits of a state court partaking in a dialogue with the federal courts concerning the nature of discrimination in the workplace concerns the current controversy over the continued viability of the *McDonnell Douglas* burden-shifting framework. As the *McDonnell Douglas* framework developed, state courts, for the most part, adopted the approach for use with their own antidiscrimination statutes.[271] Because *McDonnell Douglas* was designed to provide an orderly method of handling intentional discrimination claims and establishing the parties' relative burdens of production and persuasion, this development made considerable sense. As time went on, however, some of the shortcomings of the approach became more apparent.[272]

Now that the *Costa* decision has impliedly called into question the distinction between single-motive and mixed-motives cases, the federal courts are engaged in an ongoing discussion regarding whether the old rules still apply.[273] For all intents and purposes, the federal standard has long been the uniform state standard, so state courts are just as equipped as federal courts to enter the discussion. Rather than burying their heads in the sand and reflexively relying on a possibly outdated standard, state judges can and should re-examine their past positions to determine whether they are truly in line with the goals of employment discrimination law.

3. Incorrect Interpretations by the Supreme Court. Given the nature of constitutional texts, there is rarely one "correct" interpretation of a constitutional provision.[274] While a state appellate court may disagree for any number of reasons with the United States Supreme Court's interpretations of the words "liberty" or "due process," it is difficult for a state court to say with a straight face that the Supreme Court got the matter objectively wrong. In

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[270] Friedman, *supra* note 2, at 133.

[271] *See supra* notes 98-100 and accompanying text.

[272] *See* Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc., 285 F. Supp. 2d 1180, 1192-95 (N.D. Iowa 2003) (discussing lower courts' differing applications of *McDonnell Douglas* framework after *Desert Palace*).

[273] *See supra* notes 105-119 and accompanying text.

[274] *See* Friedman, *supra* note 2, at 134.

contrast, statutes are generally more concrete in nature and more likely to lend themselves to a conclusion that there is a correct, or more natural, interpretation of the text. At a minimum, the range of permissible readings of statutory language is likely to be narrower than that of constitutional language. Where state and federal courts work with essentially the same text, state courts should be less hesitant about departing from Supreme Court decisions that can legitimately be viewed as having been wrongly decided. In departing from the Supreme Court's holdings in such cases, state courts can remain true to their obvious duty to construe a statute in the most logical manner and act as defenders of the rights of employees and employers.

Although only rarely can the Supreme Court's interpretation of a statute be categorized as being objectively "wrong," there will occasionally be decisions that come as close as possible to meeting this standard.[275] One such case is the Supreme Court's conclusion that to constitute a disability under the ADA, the impact of an individual's impairment *must* be "permanent or long term."[276] Under the ADA, an individual with a disability is one who (a) has a physical or mental impairment that substantially limits one or more major life activities, (b) has a record of such impairment, or (c) is regarded as having such an impairment.[277] This definition is virtually identical to that used the Rehabilitation Act of 1973,[278] the ADA's predecessor, which prohibited discrimination by any program or activity receiving federal assistance.[279] Even prior to the enactment of the ADA, some federal courts seized on the words "substantially" and "major" in the Rehabilitation Act's definition of disability to conclude that only the "truly disabled" were entitled to protection from discrimination.[280] According to these courts, Congress's use of the words "substantially" and "major" was

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[275] *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 55-58 (2001) (noting potential for judges to arrive at erroneous conclusions regarding meaning of statutory provisions).

[276] Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002).

[277] 42 U.S.C. § 12102(2) (2000).

[278] Rehabilitation Act of 1973, Pub. L. No. 93-112, § 7(6), 87 Stat. 355 (codified as amended at 29 U.S.C. § 705(9) (2000)).

[279] *Id.* § 504 (codified as amended at 29 U.S.C. § 794(a) (2000)).

[280] Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986).

intended to clarify that those "whose disability was minor and whose relative severity of impairment was widely shared" were excluded from coverage.[281]

This view of the definition of disability became more common with the enactment of the ADA. It reached its pinnacle in the Supreme Court's decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, in which the Court declared that the terms of the ADA's definition of disability must be interpreted strictly "to create a demanding standard for qualifying as disabled."[282] Despite Congress's use of the words "substantially" and "major," the idea that an antidiscrimination statute must be interpreted strictly flies in the face of the canon of construction that remedial statutes should be interpreted broadly.[283]

More objectively wrong, however, is the Court's conclusion that to constitute a disability, the impact of the impairment *must* be "permanent or long term."[284] The Court offered little explanation for this conclusion. Presumably, it was partly based on the Court's debatable prior conclusion that the terms in the ADA's definition of disability must be interpreted strictly.[285] As further support, the court cited to the EEOC regulations defining the phrase "substantially limits," which did reference the permanent or long-term impact resulting from an impairment.[286]

The Court's holding in this respect is subject to at least two substantial criticisms. First, the EEOC regulation cited does not actually *require* that the impact of an impairment be permanent or

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[281] *Id.*; *see* Fuqua v. Unisys Corp., 716 F. Supp. 1201, 1205-07 (D. Minn. 1989) (noting Congress's use of these "important adjectives" and concluding that classifying plaintiff as having disability would undermine purposes of Act); Elstner v. Sw. Bell Tel. Co., 659 F. Supp. 1328, 1342-43 (S.D. Tex. 1987) (relying on *Forrisi*'s reasoning to conclude individual did not have disability); *see also* Oesterling v. Walters, 760 F.2d 859, 861 (8th Cir. 1985) (concluding that plaintiff's varicose veins constituted impairment affecting major life activities of standing and sitting, but did not substantially limit such activities); Pridemore v. Legal Aid Soc'y of Dayton, 625 F. Supp. 1171, 1175 (S.D. Ohio 1985) (concluding that attorney's cerebral palsy did not substantially limit any of attorney's major life activities); Stevens v. Stubbs, 576 F. Supp. 1409, 1414 (N.D. Ga. 1983) (concluding that "transitory illnesses which have no permanent effect on the person's health" do not qualify as disabilities).

[282] Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002).

[283] Sutton v. United Air Lines, Inc., 527 U.S. 471, 504 (Stevens, J., dissenting).

[284] *Toyota Motor*, 534 U.S. at 198.

[285] *Id.* at 197.

[286] *Id.* at 198.

long term. Instead, the "permanent or long term impact" of an impairment is simply one factor to consider, along with the "duration or expected duration of the impairment" and the "nature and severity of the impairment."[287] Of course, in the majority of instances, the fact that the impact of an impairment is short-term or temporary is probably a good indication that the impairment does not (in the case of an actual disability claim) substantially limit a major life activity, did not (in the case of a "record of" claim), or is not perceived as being so limiting (under a "regarded as" theory). Impairments of short-term duration that have no lasting impact are likely to be less serious.[288] Thus, an individual with a broken leg expected to heal normally probably does not have a disability because (1) there is likely no long-term impact, (2) the expected duration of the impairment is likely fairly short, and (3) a broken leg is simply not a "serious" impairment in the same sense as, say, diabetes.[289] Nothing within the ADA's language, however, compels the conclusion that the impact of an impairment *must always* be permanent or long-term.[290] Indeed, such a blanket approach toward determining the existence of a disability conflicts with the Court's prior admonitions that the determination be made on an individualized basis.[291] Nor does the ADA's legislative history suggest that temporary conditions are not covered under the definition.[292] Instead, there are numerous indications that Congress

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[287] 29 C.F.R. § 1630.2(j)(2) (2004); Navarro v. Pfizer Corp., 261 F.3d 90, 100 n.6 (1st Cir. 2001) ("[T]he three listed factors can combine in a number of different ways, even to the exclusion of one or more of them.").

[288] *See* 29 C.F.R. app. § 1630.2(j) (2004) ("[T]emporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are *usually* not disabilities." (emphasis added)).

[289] *See id.* (discussing factors to be considered when deciding if impairment is substantially limiting).

[290] *See* Paula E. Berg, *Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 YALE L. & POL'Y REV. 1, 19 (1999) (noting that ADA does not limit "disability" to long-term or permanent condition).

[291] *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999) (explaining need for individualized inquiry when determining disability status); *cf. Navarro*, 261 F.3d at 100 (rejecting view that regulations establish "mandatory checklist" for qualifying as having a disability on grounds that this would conflict with "Court's heavy emphasis on the individualized nature of what constitutes a disability for purposes of the ADA").

[292] Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 475 (1997).

was primarily concerned with excluding minor or trivial impairments from the definition.[293] Although most impairments that are of relatively short duration and have little long-term impact on an individual are likely to be minor or trivial, there might be limited situations (such as cancer) in which this is not the case.[294]

Moreover, if by "impact" the Court meant that a plaintiff must suffer permanent or long-term *residual effects* from the impairment, which is how the EEOC defines the term "impact,"[295] the enunciation of such a rule borders on the nonsensical. The ADA's "record of" prong was specifically included to cover those individuals who have completely recovered from a substantially limiting impairment, or an impairment that may have no permanent or long-term impact.[296] Perhaps not surprisingly, some federal courts have ignored the Court's "permanent or long term" rule in the case of plaintiffs proceeding under the "record of" prong and relied instead upon the EEOC's original multifactor approach.[297]

Thus, to the extent that inherently ambiguous language can ever be interpreted incorrectly, a strong argument exists that the Court simply got it wrong when it held that the impact of an impairment must be permanent or long-term. Despite this fact, several state courts have adopted the rule, with no independent analysis, for use with their own state's disability discrimination statutes.[298] Where

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[293] *See id.*

[294] *See* Barbara Hoffman, *Between a Disability and a Hard Place: The Cancer Survivors' Catch-22 of Proving Disability Status Under the Americans with Disabilities Act*, 59 MD. L. REV. 352, 353 (2000) (discussing how cancer patients face discrimination in workplace); Jane Byeff Korn, *Cancer and the ADA: Rethinking Disability*, 74 S. CAL. L. REV. 399, 404 (2001) (same).

[295] 29 C.F.R. app. § 1630.2(k) (2003).

[296] 42 U.S.C. § 12102(2)(B) (2000); *see* H.R. REP. NO. 101-485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334 (noting that "record of" protection extends to those who formerly suffered from substantially limiting impairment).

[297] *See* McMullin v. Ashcroft, 337 F. Supp. 2d 1281, 1296-97 (D. Wyo. 2004) (basing record of disability analysis on serious, duration, and permanent impact of impairment); Vandeveer v. Fort James Corp., 192 F. Supp. 2d 918, 936-37 (E.D. Wis. 2002) (explaining EEOC's factors for assessing substantial limitation in major life activity).

[298] Hallahan v. Courier-Journal, 138 S.W.3d 699, 711-12 (Ky. Ct. App. 2004); Hanson v. Friends of Minn. Sinfonia, No. A03-1061, 2004 WL 1244229, at *5 (Minn. Ct. App. June 8, 2004); Yamamoto v. Midwest Screw Prods., No. 2000-L-200, 2002 WL 1400106, at *4 (Ohio Ct. App. June 28, 2002); Columbia Plaza Med. Ctr. of Fort Worth Subsidiary v. Szurek, 101 S.W.3d 161, 167-68 (Tex. Ct. App. 2003); Kitten v. State Dep't of Workforce Dev., 644 N.W.2d 649, 661 (Wis. 2002).

a valid case can be made that another court has gotten an issue of interpretation wrong, not simply in terms of the policy choice it made, but in terms of objective construction, the state court should not feel a need to justify a divergent interpretation on supposed differences between the statutes.

B. THE CASE FOR UNIFORM CONSTRUCTION OF PARALLEL EMPLOYMENT DISCRIMINATION STATUTES

In the instances described above, state courts may fulfill their duties and remain faithful to the principles of federalism by departing from the Supreme Court's interpretation of federal antidiscrimination law when construing a parallel state statute. In many instances, however, a state court's decision to adopt the federal courts' interpretation of a parallel statute with no independent analysis of the state statute raises few concerns. Indeed, in most cases, state courts should proceed from the assumption that federal decisional law represents the appropriate model for use in an identical or similarly worded state employment discrimination statute. Despite the criticisms often leveled at federal judges concerning the development of employment discrimination law, there are relatively few issues about which it can be said that the courts have gotten it objectively wrong. There are many instances on which the consensus is that the federal courts have more or less gotten it right. Where there is disagreement, it is frequently at the margins or involves the types of policy objections that a legislative amendment could correct.

Thus, there should not be anything particularly shocking about the fact that, at least concerning these types of issues, state courts often adopt a federal rule with no independent analysis of state law.[299] Where there is general consensus and disagreement exists only at the margins, there is little call for dialogue. And where the disagreements are inherently policy-oriented, the dangers implicit in a divergent interpretation—such as creating unpredictability,

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[299] *See* Gardner, *supra* note 48, at 1059 (positing that most likely reason why state courts adopt federal constitutional doctrine is "because they like it and think that it does a perfectly adequate job of protecting the liberty in question").

frustrating legislative preferences, fostering legislative inefficiency, and questioning the wisdom, motives, and moral authority of the state court in question or the Supreme Court—outweigh the justifications for divergent interpretation.

1. Legislative Preference Justifications for Parallel Construction. One of the most common justifications for state court departure from federal *constitutional* law is that many state constitutional provisions either predate the federal Constitution or were borrowed from another state's constitution.[300] Whatever force such arguments may carry in constitutional interpretation, they carry far less weight as a general matter in the context of the interpretation of state antidiscrimination statutes. By and large, modern state employment discrimination statutes were inspired by or specifically modeled after federal law.[301] It was not until the passage of Title VII that the prohibition against sex discrimination became the norm in the states.[302] The majority of states did not prohibit age discrimination in their parallel employment discrimination statutes

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[300] *See, e.g.*, State v. Smith, 814 P.2d 652, 662 (Wash. 1991) (Utter, J., concurring) ("The fact that our constitutional provision was modeled after another state's provision, and not the federal one, indicates that it was meant to be interpreted independently."); James D. Heiple & Kraig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation*, 61 ALB. L. REV. 1507, 1512-13 (1998) (arguing that states should not be bound by federal interpretation of parallel constitutional provisions because states borrowed constitutional language from each other prior to drafting of federal Constitution).

[301] According to one study, only twenty-two states had some type of employment discrimination statute containing an administrative enforcement mechanism. DUANE LOCKARD, TOWARD EQUAL OPPORTUNITY: A STUDY OF STATE AND LOCAL ANTI-DISCRIMINATION LAWS 24, tbl. II (1968). Shortly after Title VII was enacted, state legislatures had two possible models from which to draw: Title VII and the *Model Anti-Discrimination Act* produced by the Uniform Law Commissioners. UNIFORM LAW COMMISSIONERS MODEL ANTI-DISCRIMINATION ACT (Nat'l Conference of Comm'rs on Unif. State Laws) (1966). In some instances, it appears that state legislatures relied on the latter model at least as much as on Title VII. *See* Ray v. Miller Meester Adver., Inc., 684 N.W.2d 404, 408 (Minn. 2004) ("Portions of the [Minnesota Human Rights Act], including the sex discrimination prohibition, appear to be patterned after the Uniform Law Commissioners' Model Anti-Discrimination Act, not Title VII."). However, a greater number of state courts have concluded that their statutes were modeled after Title VII. *See, e.g.*, Hoffman-La Roche, Inc. v. Zeltwager, 144 S.W.3d 438, 445 (Tex. 2004) (stating Act's aim to administer Title VII policies). The same is true with respect to the ADEA, see, e.g., State *ex rel.* Goddard v. Phoenix Union High School Dist. No. 210, 96 P.3d 220, 223 (Ariz. Ct. App. 2004) (noting that state modeled its act after original version of the ADEA), and the ADA and Rehabilitation Act. *See infra* note 305 and accompanying text.

[302] *See* Goldfarb, *supra* note 36, at 91 (explaining that Title VII "went further" than most existing state statutes by prohibiting sex discrimination).

until the passage of the ADEA.[303] Further, the overwhelming majority of states that enacted such legislation adopted the ADEA's age limit of forty years of age or older.[304] The Rehabilitation Act and the ADA caused most states either to prohibit disability discrimination or to amend their existing disability discrimination statutes.[305] Where states actually led the federal government in terms of prohibiting discrimination, many subsequently amended their statutes to bring their substantive provisions into line with the parallel federal provisions.[306] In short, although state experimentation may have initially spurred congressional action, Congress ultimately established the basic texts from which most states now work, and federal law has long set the prevailing standards in employment discrimination law.

At the same time, substantial overlap exists between the efforts of state and federal antidiscrimination law to eliminate workplace discrimination. Where a state antidiscrimination agency exists, Title VII requires that a plaintiff also file charges with that agency.[307] Before taking any action regarding an alleged violation of Title VII, the EEOC must notify the appropriate state agency and afford the agency a reasonable time to act under state law.[308] Indeed, federal officials immediately recognized the need for cooperative and work-sharing approaches between the state and federal levels after the enactment of Title VII in 1964.[309]

This overlap and contemplated coordination between state and federal antidiscrimination law provides a reasonable basis for estimating a legislature's preference regarding the interpretation of

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[303] *See* H.R. REP. NO. 90-805, at 2 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2215 (noting that twenty-four states had age discrimination legislation at time ADEA was being considered).

[304] *See* Brad C. Friend, Note, Bailey v. Norfolk & Western Railway Co.*: Creating a Collateral Victim Doctrine Under the West Virginia Human Rights Act*, 106 W. VA. L. REV. 417, 435 (2004) ("[O]nly a few states have age discrimination laws that allow plaintiffs under forty years of age to sue for age discrimination.").

[305] *See* Long, *supra* note 11, at 625-27 (noting that with development of ADA and Rehabilitation Act states began to revise their statutes).

[306] *See, e.g.*, *id.* (discussing state antidiscrimination statutes).

[307] 42 U.S.C. § 2000e-5(c) (2000).

[308] *Id.* § 2000e-5(d).

[309] *See* LOCKARD, *supra* note 301, at 97-98 (noting how federal and state governments began working together on problems they encountered).

parallel statutes. One of the most basic assumptions surrounding the interpretation of statutes is that a court should select the construction that best approximates what the legislature would have chosen had it thought through the issue.[310] Regardless of the theory of statutory interpretation to which one ascribes, there are at least a few preferences that one can safely assume all legislatures share, either on an informal basis or through a formal canon of construction.[311] For example, as a matter of common sense, it is safe to assume that, where such circumstances can be isolated, any legislature would prefer that a court choose the most reasonable interpretation of a statute from a series of clearly inferior possible interpretations.[312] As a more formal matter, it is well established that, at least in statutory law, dramatic changes in the development of the law should ordinarily be left to the legislature rather than the courts.[313] While this interpretive rule is usually justified on the grounds that legislatures are more explicitly in the business of policymaking than courts, it is equally valid to justify the rule on the grounds that, as a general matter, a legislature would prefer to set matters of fundamental, substantive policy.[314] As Professor Einer Elhauge has suggested, some interpretive default rules are better justified on the grounds that they track the preferences of the current legislature, rather than on the grounds of original legislative intent.[315] Regardless, generally applicable interpretive rules are

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[310] *See* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2049 (2002) (emphasizing importance of enacting legislature's intent).

[311] *See id.* at 2051 ("[M]any canons of constitution are generally default rules that reflect what any legislative policy would want.").

[312] A more formal version of this informal assumption is the absurdity doctrine, under which a statute should be interpreted to avoid absurd results. *See id.* at 2052 (defining absurdity in this context as violating common sense or conflicting with statute's purpose).

[313] *See, e.g.*, Veltman v. Detroit Edison Co., 683 N.W.2d 707, 713-14 (Mich. Ct. App. 2004) (declining to depart from court rules because such departure would cause "a change in fundamental and substantive law, a change better left to the Legislature").

[314] Occasionally, of course, legislatures explicitly delegate to the courts the task of filling in the gaps in a broadly worded statute. Kaye, *supra* note 1, at 28. In other instances, such as was arguably the case with the Civil Rights Act Amendments of 1991, the legislature appears to have made a conscious decision not to determine what the law should be and to dump the difficult choices onto the courts under the guise of legislative decisionmaking. Lanning v. Se. Pa. Transp. Auth., 181 F.3d 478, 497 (3d Cir. 1999) (Weis, J., dissenting).

[315] Elhauge, *supra* note 310, at 2049-51.

often merely common-sense assumptions about how any legislature would prefer to see an interpretive issue resolved.[316]

In many instances, divining a legislature's preference is not an easy task. In the case of a state court reviewing a borrowed statute or a statute involving substantial state-federal cooperation in terms of enforcement, the task may be somewhat simpler. One reasonable assumption from the fact that a state based the substance of its employment discrimination law on federal law or otherwise followed the lead of the federal government in addressing the problem of discrimination in employment is that the state legislature liked the substance of the federal statute and the decisional law as it existed under that statute at the time of enactment. By following the federal government's lead, a state legislature can be presumed to have believed that the substantive provisions of federal law represented a reasonable response to the problem the statute addresses. While many states have expanded the scope of their antidiscrimination statutes by lowering jurisdictional thresholds, expanding remedies, or even outlawing forms of discrimination not expressly prohibited by federal law,[317] the commonality between state and federal law in other substantive matters is largely attributable to the states' decision to bring their statutes into line with federal law. And where a legislature has adopted the substantive provisions of federal law, but tinkered with some of the jurisdictional, procedural, or remedial provisions of federal law, the logical inference is that the legislature has done all of the tinkering at the margins it cares to do and believed, at the time of borrowing, that federal law was essentially heading down the right track.

It may be fiction to believe that a borrowing legislature would therefore prefer that its own state courts prefer every subsequent federal judicial interpretation of the federal statute over its possible, alternative constructions. The initial decision to borrow federal law, however, can reasonably be viewed as establishing a general

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[316] *See, e.g.*, Right to Choose v. Byrne, 450 A.2d 925, 938 (N.J. 1982) (assuming that legislature would prefer interpretation of statute that saves statute from being struck down altogether as unconstitutional); Elhauge, *supra* note 310, at 2053-54 (noting government wants validity of statute "to maximize the satisfaction of the political preferences that led to the enactment").

[317] *See supra* note 207 and accompanying text.

preference in favor of future parallel construction of the state statutes, provided that those constructions are reasonable and generally consistent with the progression of federal law existing at the time of borrowing. In other words, as long as subsequent federal decisional law remains within the orbit of permissible constructions of a statute and does not itself fundamentally alter the previous approach to the problems at hand, there should be a presumption that the enacting state legislature would prefer that state law develop in the same fashion. If, however, the federal decision is either objectively unreasonable or represents a dramatic departure from the direction of federal law existing at the time of enactment by the state, the presumption in favor of consistency evaporates.

For example, much has been made of the fact that the federal courts have supposedly taken a much stricter view of the ADA than of the ADA's predecessor, the Rehabilitation Act.[318] If it were true that the federal courts suddenly did an about-face in interpreting the ADA, then a borrowing state legislature could be presumed to be concerned about the subsequent turn of events. In such a case, a state court may justifiably give effect to the enacting legislature's original belief that federal law would continue to develop roughly as it had under the Rehabilitation Act. Alternatively, a state court may resolve the issue under any of the various approaches to statutory interpretation. If, for example, federal courts had almost uniformly paid little heed to the words "substantially" and "major" in the Rehabilitation Act's definition of disability and glossed over them or announced a policy of liberal construction, or if the federal courts had almost uniformly held that mitigating measures should not be taken into account in determining whether an individual's impairment substantially limited a major life activity, the federal courts' subsequent handling of ADA cases would have represented a substantial departure from pre-existing Rehabilitation Act law and

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[318] *See, e.g.*, Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 91-93 (2000) (discussing Supreme Court's departure from Rehabilitation Act precedent in interpretation of ADA); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 111 (1999) (suggesting more rigorous approach by courts in ADA context).

would have represented a fundamentally different approach to the problem of disability discrimination.

Despite claims to the contrary, federal (and state) law was not clearly proceeding in such a direction when the ADA was enacted. Decisional law under of the Rehabilitation Act's definition of disability was relatively scarce to begin with[319] and more mixed than some critics of the federal courts' treatment of the ADA acknowledge.[320] Initially, relatively few individuals were denied coverage under section 504 of the Rehabilitation Act.[321] By the mid-1980s, however, courts began to pay more attention to the terms within the Rehabilitation Act's definition of disability, sometimes to the detriment of plaintiffs.[322] Prior to the ADA's enactment, no court had ever explicitly decided the mitigating measures question presented in *Sutton*,[323] and several had stated that the Rehabilitation Act's definition called for strict interpretation.[324] Indeed, it is more accurate to say that the arguments in favor of a more generous construction of the definition of disability advocated by some had not yet been put to the test when the ADA was enacted. Thus, there was no clear pattern to which a state legislature could point and say, "This is the way we want things to go in the future."

Therefore, the tendency of state courts to adopt *Sutton*'s mitigating measures rule for use with their own state's disability discrimination statute makes a certain amount of sense as a matter of promoting legislative intent. Although *Sutton* involved a fundamental question concerning the meaning of disability law, it did not represent a dramatic departure from pre-existing

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[319] Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 433 (1995).

[320] *See* Burgdorf, *supra* note 292, at 439-49, 469-75 (citing numerous examples of Rehabilitation Act case law in which federal courts took restrictive approach to defining disability); *supra* notes 280-281 and accompanying text (noting focus of some courts on terms "substantially" and "major" in Rehabilitation Act's definition of disability); *infra* notes 384-385 and accompanying text (noting that number of federal and state courts had interpreted "major life activity" narrowly with respect to major life activity of "working").

[321] Tudyman v. United Airlines, 608 F. Supp. 739, 745-46 (C.D. Cal. 1984) (noting that by 1984 only one court had found plaintiff not to be handicapped).

[322] *See supra* notes 280-281 and accompanying text.

[323] *See supra* note 258 and accompanying text.

[324] *See supra* notes 280-281 and accompanying text.

Rehabilitation Act case law. Further, as many of the state disability discrimination statutes existing at the time of the ADA's enactment were modeled after the Rehabilitation Act's identical definition of disability,[325] it is difficult to conclude that state courts' subsequent decisions to follow *Sutton* were contrary to their state legislature's intent. This is not to say a departure from *Sutton* could not be justified on grounds of legislative intent. If, for example, a state legislature waited until 1998, the year before *Sutton*, to borrow the ADA's language for use in its own state, a reviewing state court might conclude, based on the fact that almost every federal circuit to rule on the issue had reached the opposite conclusion, that the *Sutton* rule represented a fundamental departure from federal law existing at the time of enactment. Nor should a state legislature's decision, standing alone, to model state law after federal law be construed as a mandate or delegation of duty to the state court to ensure that the two laws always remain on the same track. However, only where federal law itself has jumped the track on which it was traveling at the time of the state law's enactment should the presumption in favor of parallel construction give way.

2. Legislative Efficiency Justifications for Parallel Construction.

a. Pragmatic and Legislative Preference Justifications for Parallel Construction. The presumption in favor of uniformity is also justified by pragmatic and theoretical concerns regarding legislative efficiency. The term "legislative efficiency" has several possible meanings. On a pragmatic level, the term can be used as a proxy for legislative preference. For example, one justification for the substantive canon of construction that courts should avoid, when possible, a construction of a statute that calls into question the statute's constitutionality is that the canon best estimates a legislature's probable preference: a legislature would prefer "validation over invalidation."[326] Invalidation would necessarily create "a vacuum in the regulatory scheme,"[327] thus requiring a

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[325] Long, *supra* note 11, at 627.

[326] Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 469 (1989).

[327] Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 CHI.-KENT. L. REV. 481, 485 (1990).

legislature to expend time and energy re-addressing the initial problem.

In much the same way, giving effect to a presumption in favor of uniformity when confronting the meaning of two identical or similarly worded statutes alleviates the burden on state legislatures to monitor and respond to every judicial decision involving a question of parallel construction. While state legislatures may be better positioned and more likely to "correct" judicial decisions with which it disagrees than is Congress, state legislative resources are also limited, and state legislatures remain somewhat "sluggish" in responding to judicial decisions.[328] Departing from persuasive federal authority, much like departing from mandatory precedent, imposes transition costs.[329] Unless federal decisional law represents a dramatic departure from its previous course, there is little reason to believe that a legislature would want a court to create discord between state and federal law as long as the federal interpretation is reasonable.

For example, in 1998, the United States Supreme Court held in *Faragher v. City of Boca Raton*[330] and *Burlington Industries, Inc. v. Ellerth* that where a supervisor with immediate, or successively higher, authority over an employee creates a hostile work environment through sexually harassing behavior, an employer is subject to vicarious liability.[331] Where the harassment results in a tangible employment action, such as discharge, the employer has no affirmative defense.[332] Where no tangible employment action is taken, however, an employer may raise an affirmative defense to liability or damages. Specifically, the employer must establish (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (b) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.[333]

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[328] *See* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 247 (1999) (describing state legislatures as "sluggish when it comes to correcting judicial mistakes").

[329] *See* Nelson, *supra* note 275, at 63 (noting transition costs imposed by departing from precedent).

[330] 524 U.S. 775 (1998).

[331] *Faragher*, 524 U.S. 775, 807-08 (1998); *Ellerth*, 524 U.S. 742, 765-66 (1998).

[332] *Faragher*, 524 U.S. at 808; *Ellerth*, 524 U.S. at 765.

[333] *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

Nothing in the text of Title VII required such a reading of the statute or even provided much guidance for a court. Instead, based on common law agency principles and the policies underlying Title VII, the Court struck what it believed to be a fair balance between the rights and interests of the competing parties.[334] Although commentators have criticized various aspects of the decisions,[335] the criticisms largely involve matters of degree rather than attacks on the basic assumption that only employers who fail to guard against and respond diligently to instances of sexual harassment should be held liable.[336] A new paradigm may have emerged, but it was not one that represented a dramatic departure from lower court decisions or the Supreme Court's own past pronouncements. As the Court noted, virtually every federal court that considered the question found vicarious liability when a discriminatory act resulted in a tangible employment action.[337] Instead, the decisions were an attempt to restore order among the competing standards of the lower courts in other situations. In addition, the decisions did not dramatically tip the balance in favor of either Title VII plaintiffs or defendants. In short, neither side gained a clear victory.[338] Thus, although *Faragher* and *Ellerth* may be extremely important decisions, the approach that emerges from the two cases is better characterized as a reasonable approach to a difficult policy question than a dramatic leap in any particular direction.

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[334] *Ellerth*, 524 U.S. at 764.

[335] *See, e.g.*, Paula J. Dalley, *All In a Day's Work: Employers' Vicarious Liability for Sexual Harassment*, 104 W. VA. L. REV. 517, 551-56 (2002) (criticizing Court for misapplying agency law in *Faragher* and *Ellerth*).

[336] *See* Chamallas, *supra* note 6, at 373 (noting that thrust of criticism of decisions is targeted at lower courts' effectively placing burden on plaintiff to disprove second prong of affirmative defense). For example, even those who are most critical of the *Faragher* and *Ellerth* decisions and believe that strict liability should apply take the position that an employer should at least have the opportunity to limit damages by demonstrating an adequate response to a complaint of sexual harassment. Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 735-36 (2000).

[337] *Ellerth*, 524 U.S. at 760.

[338] *See* Swinton v. Potomac Corp., 270 F.3d 794, 804 (9th Cir. 2001) ("[I]t is not clear under which rubric [vicarious liability or negligence] employers are 'better off' from an evidentiary and legal standpoint."); Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 519 (2002) (noting "defendant-friendly" aspects of decisions); Grossman, *supra* note 336, at 702-03 (noting that "some employer-friendly commentators praised the new rules," but "most observers characterized the *Faragher / Ellerth* scheme as a loss for employers").

The other noteworthy feature of the opinions was the Court's clarification of the concepts of quid pro quo harassment and hostile work environment claims.[339] As sexual harassment law originally developed, courts attempted to draw a clear distinction between harassment consisting of a supervisor's conditioning benefits on submission to sexual advances (quid pro quo harassment) and harassment consisting of unwelcome conduct of a sexual nature that created a hostile and abusive work environment. The distinction between the two types of harassment was important because employer liability varied depending on which form of harassment was at issue and the approach a court happened to follow.[340] The courts' insistence upon a rigid demarcation between the two forms of harassment was the subject of criticism before *Faragher* and *Ellerth*[341] and occasionally broke down in practice, as evidenced by the facts of *Ellerth* itself.[342]

While the *Faragher* and *Ellerth* decisions created a bright line in terms of employer liability depending upon whether the harassment resulted in a tangible employment action, the Supreme Court blurred the line between quid pro quo and hostile environment claims.[343] The Court stated that use of the terms may still be helpful in "making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this they are of limited utility."[344] Thus, the focus after *Faragher* and *Ellerth* is less on the type of harassment at issue than on the nature of the tangible consequences of the harassment.

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[339] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 786-88 (1998) (distinguishing hostile work environment as one that alters conditions of employment); *Ellerth*, 524 U.S. at 751, 753-54 (noting difference depends on whether threat was carried out).

[340] *See, e.g.*, Jansen v. Packaging Corp. of Am., 123 F.3d 490, 493-95 (7th Cir. 1997) (en banc, per curiam) (summarizing conflicting standards), *aff'd* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

[341] Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 335 (1990); Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POL'Y 307, 308 (1998).

[342] *Ellerth* involved unfulfilled threats of adverse action, thus removing it from the parameters of the paradigmatic quid pro quo case. *Ellerth*, 524 U.S. at 751. Despite this inconsistency, some courts viewed similar fact patterns as fitting within the category of quid pro quo harassment. *Id.* at 750 (noting approach of several members of lower court).

[343] *See Faragher*, 524 U.S. at 807-08 (noting no affirmative defense when there is tangible employment action); *Ellerth*, 527 U.S. at 761-65 (same).

[344] *Ellerth*, 524 U.S. at 751.

Nonetheless, the Court explained, "To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII."[345] Thus, the Court's de-emphasis of the terms "quid pro quo" and "hostile environment" is less of a dramatic paradigm-shifting event than a common-sense refinement of a useful analytic concept, and lower courts continue to make use of the terms in this context.[346]

Given the prominent role common law agency principles played in *Faragher* and *Ellerth*, one might expect state courts to be reluctant to adopt the holdings of the decisions. After all, as "keepers of the common law," state courts were in the business of determining employers' vicarious liability years before either Congress or the Supreme Court entered the picture and might feel no particular pressure to bow to the Supreme Court's common law rulemaking. Moreover, it took the Supreme Court nearly fifteen years to formalize a standard for vicarious liability; in the interim, many state courts were forced to confront the issue head on and adopt their own standards. Not surprisingly, some adopted or retained standards that were arguably at odds with the Supreme Court's standard in *Faragher* and *Ellerth*.[347] Thus, adopting the *Faragher* and *Ellerth* approach would require some state courts not only to take a backseat in common law rulemaking, but also to overrule or modify prior precedent.

In reality, even prior to *Faragher* and *Ellerth* state courts frequently looked to Title VII federal decisions in determining employer liability under their own state statutes.[348] And thus far,

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[345] *Id.* at 753.

[346] Allan H. Weitzman, *Employer Defenses To Sexual Harassment Claims*, 6 DUKE J. GENDER L. & POL'Y 27, 44 n.119 (1999).

[347] *See, e.g.*, Vitale v. Rosina Food Prod., Inc., 727 N.Y.S.2d 215, 217 (N.Y. App. Div. 2001) (differentiating state from federal standards for imposing liability in sexual harassment suits); Barker v. Botting, No. 55962-O-I, 2004 WL 938553, at *4-5 (Wash. Ct. App. May 3, 2004) (declining to follow *Faragher* without guidance from state supreme court and retaining prior analysis).

[348] *See, e.g.*, *Ellerth*, 524 U.S. at 755 (noting that often, "determinations of employer liability under state law rely in large part on federal court decisions under Title VII"); Sangster v. Albertson's, Inc., 991 P.2d 674, 679 (Wash. Ct. App. 2000) (citing circuit court opinions regarding conditions under which employer liability for supervisor conduct is automatic).

most state appellate courts confronting the issue have adopted the *Faragher* and *Ellerth* rule, even when it has meant overruling or modifying prior decisions.[349] Where state courts have refused to abandon prior precedent establishing a different standard of vicarious liability, it has been on the grounds of real[350] or supposed differences between the state and federal statutes, rather than solely on the grounds of adherence to the principle of stare decisis.[351]

Assuming a state court or legislature has not previously adopted a more extreme rule, such as strict liability for employers in any harassment case, it is reasonable to assume that the state legislature has no particularly strong preference as between two reasonable middle courses. Where the state legislature has made an initial decision to borrow from federal law, the state courts have subsequently looked to federal law in interpreting the state statute, and there is no fundamental change in approach, it is reasonable to infer a legislative preference to keep the state and federal laws on the same track. As a matter of legislative efficiency, it makes more sense to infer a legislative preference in favor of maintaining consistency between state and federal law in such circumstances than to infer that the legislature would prefer that the state be an outlier in antidiscrimination law, thus inviting some of the dangers of forum shopping.

b. Democratic Governance Justifications for Parallel Construction. Another conception of legislative efficiency relates to concepts of democratic governance. One commonly asserted justification for active judicial decisionmaking in statutory interpretation is that it fosters legislative deliberation of and

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[349] Bank One, Ky., N.A. v. Murphy, 52 S.W.3d 540, 544 (Ky. 2001); Ocana v. Am. Furniture Co., 91 P.3d 58, 69-70 (N.M. 2004); Starner v. Guardian Indus., 758 N.E.2d 270, 283 (Ohio Ct. App. 2001); Parker v. Warren County Util. Dist., 2 S.W.3d 170, 176 (Tenn. 1999); Padilla v. Flying J, Inc., 119 S.W.3d 911, 915 (Tex. Ct. App. 2003); *Sangster*, 991 P.2d at 681. *But see Vitale*, 727 N.Y.S.2d at 219 (declining to consider whether *Faragher* and *Ellerth* defenses apply to New York law).

[350] *See* State Dep't of Health Servs. v. Superior Court, 79 P.3d 556, 561-62 (Cal. 2003) (explaining significant differences between FEHA and Title VII); Pollock v. Wetterau Food Dist. Group, 11 S.W.3d 754, 766-67 (Mo. Ct. App. 2000) (refusing to follow federal standard because state regulations unambiguously established different standard).

[351] *See infra* notes 421-449 and accompanying text (discussing effect of prior precedent on state court interpretations).

response to judicial decisions.[352] However, by articulating and employing a substantive canon of construction in favor of parallel construction, courts may allow the same type of dialogue. This dialogue may in turn influence the legislature to reconsider its prior statutory enactments and to be clearer about its intent if it chooses to "correct" the court's interpretation.[353]

Given the greater interaction between the judiciary and the other branches at the state level, such a result is perhaps more likely at the state level than at the federal level. Although dialogue between the federal legislative and judicial branches concerning the courts' interpretation of federal statutes remains a possibility, it occurs relatively infrequently and usually only in response to decisions by the Supreme Court. In contrast, dialogue between the two branches at the state level is a more common occurrence.[354] It is undoubtedly true that a confrontational judicial interpretation departing from the norm is more likely to generate legislative deliberation than is an interpretation that falls into lockstep with the Supreme Court, but the fact that a state court is reacting to a Supreme Court decision makes it more likely that the reaction will generate notice by a state legislature. Indeed, Supreme Court decisions may, even before commented upon by a state court, generate a response from a state legislature that does not wish to see the particular approach adopted in its state. Such has been the case with several state employment discrimination statutes.[355]

Given the long shadow cast by Supreme Court decisions, adopting a substantive canon of construction in favor of uniform construction would do little to impede, and might encourage, this type of debate.

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[352] Elhauge, *supra* note 310, at 2047-48; Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 504.

[353] Spiropoulos, *supra* note 28, at 919, 946.

[354] *See supra* notes 162-176 and accompanying text.

[355] *See* Minnesota Mining & Mfg. Co. v. State, 289 N.W.2d 396, 399 (Minn. 1979), *superseded by statute* MINN. STAT. § 363.03 (2002), *as recognized in* Nietz v. Schaff Auto Supply, Inc., No. C8-88-40, 1988 WL 36762, at *1 (Minn. Ct. App. Apr. 26, 1988) (noting that Minnesota legislature amended its antidiscrimination statute in response to Supreme Court's decision in *Gilbert* that discrimination on basis of pregnancy was not sex discrimination prior to passage of federal Pregnancy Discrimination Act); Long, *supra* note 11, at 634-35 (discussing California and Rhode Island legislatures' amendments to their human rights acts following Supreme Court's *Sutton* decision); *supra* note 260 and accompanying text (discussing Massachusetts Human Rights Commission's response to *Sutton*).

In the absence of indicia suggesting that a legislature might actually welcome such a debate, however, the interest in conserving legislative resources should make state courts cautious about choosing to create or allow discord between state and federal law. Even though it is easier for a state legislature to "correct" a court's interpretation of a state statute than a court's interpretation of a state constitution, such corrections require legislatures to devote time and energy to correcting the problem. And although state legislatures are more likely to respond to judicial decisions than Congress, the dialogue between the branches is still imperfect. Thus, where the Supreme Court's interpretation of parallel federal law is reasonable and does not represent a dramatic lurch in a particular direction, a general presumption in favor of consistent interpretation may promote legislative efficiency while still fostering informed debate.

3. Judicial Credibility Justifications for Parallel Construction. A final reason supporting a presumption in favor of parallel construction is that such a presumption is the surest means of ensuring the credibility of both the reviewing state court and the Supreme Court. Proponents of the new judicial federalism have been susceptible to the charge that their decisions to depart from Supreme Court precedent amount to results-oriented judging.[356] Such complaints may sometimes be brushed aside when a court construes the meaning of a constitutional provision, which likely contains broad and amorphous language.[357] A certain amount of judicial decisionmaking in such cases may be unavoidable. In contrast, statutory text is often more dense and more concrete. Where it is not, legislative history and agency interpretations often are. Thus, it is often more difficult for a judge who disagrees with the Supreme Court's interpretation of a federal statute to overcome the obstacles blocking a contrary interpretation.

In short, charges of results-oriented judging are more easily made and proved in the case of statutory interpretation than in that of constitutional interpretation. As such, the canon can preserve the

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[356] *See supra* notes 57-58 and accompanying text.

[357] *See, e.g.*, Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1185 (2004) (contrasting "broad words or broad categories" used in Constitution with "detailed specificity of a statute").

public's perception of judicial legitimacy in much the same way adherence to the principle of stare decisis is said to.[358] By announcing and employing a canon of construction favoring parallel interpretation, state courts can insulate themselves from charges of judicial activism without abdicating their adjudicative duties or engaging in "Pavlovian responses" to federal decisional law.[359]

At the same time, such a presumption preserves the credibility and moral authority of the Supreme Court on matters of individual rights. In the words of New Jersey Supreme Court Justice Daniel J. O'Hern, where courts needlessly call into question the objectivity or competence of the Supreme Court, "we vindicate the worst fears of the critics of judicial activism."[360] When a question of individual rights remains open at the federal level, state courts should not hesitate to partake in the dialogue. When state law differs in some meaningful way from federal law, state courts have no choice but to fulfill their duties and interpret their state's statute accordingly. When, in those rare cases, it can be said in good faith that the Supreme Court decided a matter of interpretation incorrectly, the same rule applies. But where the choice amounts to a decision between reasonable interpretations of the same or similar language, deference to the Supreme Court's interpretation preserves the moral authority of the Court while allowing for the possibility of a meaningful dialogue with the legislature.

C. EXAMPLES OF THE CANON IN ACTION

1. Issues of First Impression. The presumption in favor of a legislative intent anticipating consistent interpretations applies most strongly where there is no existing state court precedent on point. The risks to the moral authority of the Supreme Court and the judicial prestige of the reviewing state court stemming from charges of judicial activism are greater in this context than where a state court interprets its own antidiscrimination statute against the

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[358] Nelson, *supra* note 275, at 68-69.

[359] *See* Spiropoulos, *supra* note 28, at 962 (noting that reliance on substantive canons of construction may preserve judicial legitimacy).

[360] State v. Hempele, 576 A.2d 793, 816 (N.J. 1990) (O'Hern, J., concurring in part and dissenting in part).

backdrop of state and federal precedent. Also, in such situations, application of the canon will most likely further the legislature's preference.

For example, in 2000 the Washington Supreme Court chose not to use the ADA's definition of disability when attempting to fill a gap in Washington's disability discrimination statute.[361] In *Pulcino v. Federal Express Corp.*, the court addressed the claim of an employee with lumbar strain and a broken foot who alleged that her employer violated Washington's Law Against Discrimination[362] by failing to reasonably accommodate her during her periods of temporary disability.[363] Because the statute failed to define the term "disability," the most natural place to look for a definition was the administrative rules promulgated by the Washington State Human Rights Commission.[364] However, because the Commission defined "disability" in a somewhat circular fashion, the Commission's definition was unworkable in practice, according to the court.[365]

Having reasonably rejected the Commission's definition, the next most logical sources for a workable definition would have been the ADA's definition or any other definitions of "disability" contained in Washington statutory law. In this case, these sources would have yielded the same result: As part of its statutory regulation of housing discrimination, a Washington statute required that the term "handicap" be defined as under the federal Fair Housing Amendments Act of 1988 (FHAA).[366] The FHAA employs the same definition found in the ADA.[367] According to the majority, however, to adopt the federal definition "would be to undertake a task more appropriate for the Legislature."[368] Instead, the court devised its own definition: An accommodation plaintiff must prove that "(1) he or she has/had a sensory, mental, or physical abnormality and (2) such abnormality has/had a substantially limiting effect upon the

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[361] Pulcino v. Fed. Express Corp., 9 P.3d 787, 794 n.3 (Wash. 2000).
[362] WASH. REV. CODE ANN. § 49.60.180 (West 2003).
[363] *Pulcino*, 9 P.3d at 790-91.
[364] WASH. REV. CODE ANN. § 49.60.180 (West 2003); *Pulcino,* 9 P.3d at 793.
[365] *See Pulcino*, 9 P.3d at 793 (acknowledging difficulty with basing definition on established precedent).
[366] WASH. REV. CODE ANN. § 35A.63.240 (West 2003).
[367] 42 U.S.C. § 3602(h) (2000).
[368] *Pulcino*, 9 P.3d at 794.

individual's ability to perform his or her job."[369] Based on this definition, the court concluded that the plaintiff had a disability.[370]

Pulcino is significant because, if applied outside the specific context of failure to accommodate cases,[371] the decision opens the door to the uncertainty and forum shopping that uniform construction helps to prevent. More significant is the Washington Supreme Court's apparent discomfort with the federal standard. It is difficult to see why devising an entirely new definition of disability is any less an act of judicial lawmaking than engrafting a definition already in use in a state's antidiscrimination framework. While the Supreme Court's interpretations of the ADA's definition of disability have generated controversy and are subject to question, the Washington legislature's past *insistence* that the term "disability" be defined in accordance with federal law provides a fairly strong indication that, given the dilemma confronted by the Washington Supreme Court, the Washington legislature would have preferred the federal standard.

Also lurking within the *Pulcino* opinion is the not-too-subtle implication that there is something flawed about the Supreme Court's interpretation of the ADA. The lengths to which the court went to avoid adopting the federal definition, which happens to be the definition employed by the vast majority of states,[372] leads one to the conclusion that the court simply substituted its own policy views for those of the Supreme Court. Had the court been concerned about the Supreme Court's conclusion that the ADA's definition requires the impact of an impairment to be permanent or long-term[373] (a rule that would have excluded the *Pulcino* plaintiff from coverage), it could have decided the case on more restrictive grounds or rejected this specific rule, rather than abandoning the more general definition that logically should have been applied.

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[369] *Id.*

[370] *See id.* at 795 (noting Act applies to temporary as well as permanent disabilities).

[371] The Washington intermediate appellate courts are currently split as to whether the *Pulcino* standard applies to traditional disparate treatment cases as well as failure to accommodate cases. *See* McClarty v. Totem Elec., 81 P.3d 901, 910 (Wash. Ct. App. 2003) (concluding *Pulcino* definition does not apply in such cases); Roeber v. Dowty Aerospace Yakima, 64 P.3d 691, 696 (Wash. Ct. App. 2003) (finding *Pulcino* definition applicable).

[372] Long, *supra* note 11, at 628-29.

[373] *See supra* note 284 and accompanying text.

An even clearer example of the dangers posed to judicial integrity, legislative purpose, and legislative efficiency by state court refusal to adopt the federal courts' interpretation of a parallel antidiscrimination statute can be seen in state courts' handling of the ADA's "single-job rule" announced in *Sutton v. United Air Lines, Inc.* One issue confronting the *Sutton* Court was whether the petitioners, regardless of the existence of an actual disability, had adequately alleged that United Air Lines regarded them as being substantially limited in the major life activity of working.[374] The Court's resolution of the issue illustrates how the ADA's definition of disability has limited the reach of the statute. In cases brought under the "actual disability" prong, the EEOC had concluded that in order to be substantially limited in the major life activity of working, it is not sufficient that an impairment limits an individual's ability to perform a particular job. Instead, an individual must be precluded from a class of jobs or a broad range of jobs.[375] The difficulty for an ADA plaintiff alleging that an employer regarded the plaintiff as having a disability is that the definition refers a court back to the "actual disability" prong: For a plaintiff to fit within the "regarded as" definition, the defendant must regard the plaintiff as having "such an impairment," i.e., an impairment that substantially limits a major life activity. Read in this fashion, an ADA plaintiff alleging that an employer regarded the plaintiff as being substantially limited in the major life activity of working must therefore establish that the employer regarded the plaintiff as having an impairment that precluded him not just from the job in question, but from a class of jobs or a broad range of jobs.

The Supreme Court adopted precisely this interpretation in *Sutton*. In *Sutton*, the petitioners merely alleged that United Air Lines regarded them as being unable to perform the job of a global airline pilot.[376] Therefore, at best, they alleged that United regarded them as being unable to perform a single job.[377] As such, they had not alleged that they had a disability within the meaning of the ADA. The same day it decided *Sutton*, the Court handed down its

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[374] Sutton v. United Air Lines, Inc., 527 U.S. 471, 490 (1999).
[375] 29 C.F.R. § 1630.2(j)(3)(I) (1999); 29 C.F.R. app. § 1630.2(j) (1998).
[376] *Sutton*, 527 U.S. at 492-93.
[377] *Id.*

decision in *Murphy v. United Parcel Service, Inc.*[378] In *Murphy*, the Court applied the reasoning of *Sutton* to conclude that an individual with hypertension that was controlled by medication did not have an actual disability and that his employer did not regard him as being substantially limited in the major life activity of working because it only viewed him as being precluded from working at a particular job.[379]

As was the case with the Court's mitigating measures rule,[380] the single-job rule has been repeatedly criticized for narrowing the ADA's protective scope.[381] In favor of the Court's interpretation is the text of the ADA, the EEOC's Interpretive Guidance,[382] the fact that virtually every federal appellate court had reached the same conclusion,[383] the fact that several pre-ADA Rehabilitation Act cases had adopted the same view,[384] and some decent policy arguments.[385] Even prior to *Sutton* and *Murphy*, several state appellate courts had adopted the single-job rule, based almost entirely on federal precedent,[386] and at least four state appellate courts had adopted the rule prior to the ADA's effective date, often through resort to Rehabilitation Act case law.[387] In short, although the Supreme

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[378] 527 U.S. 516 (1999).

[379] *Id.* at 521, 524.

[380] *See supra* notes 232-245 and accompanying text.

[381] *See, e.g.*, Arlene Mayerson & Matthew Diller, *The Supreme Court's Nearsighted View of the ADA*, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 125 (Leslie Pickering Francis & Anita Silvers eds., 2000).

[382] 29 C.F.R. app. § 1630.2(j) (1998).

[383] *See infra* note 408 and accompanying text.

[384] Forrisi v. Bowen, 794 F.2d 931, 935 (4th Cir. 1986); de la Torres v. Bolger, 610 F. Supp. 593, 596-97 (N.D. Tex. 1985); Tudyman v. United Airlines, 608 F. Supp. 739, 746 (C.D. Cal. 1984); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1101-02 (D. Haw. 1980).

[385] *See* Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 978 (2003) (arguing that if ADA is viewed "as an effort to reduce social costs by moving people from disability benefits rolls into the workforce," single-job rule would be justified).

[386] Bearshield v. John Morrell & Co., 570 N.W.2d 915, 920-21 (Iowa 1997); Sigurdson v. Carl Bolander & Sons Co., 532 N.W.2d 225, 228-29 (Minn. 1995); Walker v. Montana Power Co., 924 P.2d 1339, 1342 (Mont. 1996); Engel v. Mont. Dakota Utils. Co., 595 N.W.2d 319, 322 (N.D. 1999); Potvin v. Champlain Cable Corp., 687 A.2d 95, 99-100 (Vt. 1996).

[387] Probasco v. Iowa Civil Rights Comm'n, 420 N.W.2d 432, 436 (Iowa 1988); Minnesota v. Hennepin County, 425 N.W.2d 278, 285 (Minn. Ct. App. 1988); Cecil v. Gibson, 820 S.W.2d 361, 365 (Tenn. Ct. App. 1991); Salt Lake City Corp. v. Confer, 674 P.2d 632, 636 (Utah 1983). At least one state appellate court had reached the opposite conclusion based on administrative regulations. Pa. State Police Dep't v. Pa. Human Relations Comm'n, 457 A.2d 584, 589-90 n.12

Court's decisions became controversial once announced, the Court's ultimate position was already well established in the courts and supported by the text of the Act and by administrative interpretations. The only factors cutting against the Court's interpretation are some legislative history, which is decidedly unclear about the issue, and some strong policy arguments based on congressional purpose.[388] At a minimum, then, the Court's reading of the ADA in this respect was reasonable, even if flawed from a policy standpoint.

The Supreme Court's decisions in *Sutton* and *Murphy* prompted an even greater number of state appellate courts to adopt the single-job rule, at least in the context of an "actual disability" claim.[389] To date, only the West Virginia Supreme Court of Appeals has rejected the single-job rule when interpreting an identically or similarly worded state antidiscrimination statute. In *Stone v. St. Joseph's Hospital of Parkersburg*, the defendant-employer argued that the plaintiff failed to present evidence sufficient for a jury to conclude that the plaintiff had a disability within the meaning of West Virginia's Human Rights Act.[390] Specifically, the employer argued that, at most, it "suspected" the plaintiff of being unable to perform a single job.[391] Because it did not regard the plaintiff as being precluded from a *class of jobs*, the employer argued, it did not regard the plaintiff as being substantially limited in the major life activity of working.[392]

(Pa. Commw. Ct. 1983).

[388] Bagenstos, *supra* note 385, at 977 ("If taken seriously, [the Court's] statements would shield the employer who harbors the most extreme prejudices or acts on the most idiosyncratic stereotypes."); Mayerson & Diller, *supra* note 381, at 125 ("Imagine this logic in any other area of civil rights and it does not pass even the laugh test. 'No we don't hire women, Jews (fill in the blank) but you can get a job somewhere else, so what's the beef?' ").

[389] Seaman Unified Sch. Dist. No. 345 v. Kansas Comm'n on Human Rights, 990 P.2d 155, 158-59 (Kan. Ct. App. 1999); Delaney v. City of Alexandria, 800 So. 2d 806, 809 (La. 2001); Gasaway v. Gen. Motors Corp., No. 215465, 2000 WL 33391090, *2 (Mich. App. Ct. 2000); Butterfield v. Sidney Pub. Schs., 32 P.3d 1243, 1246 (Mont. 2001); Garcia v. Allen, 28 S.W.3d 587, 599 (Tex. Ct. App. 2000).

[390] Stone v. St. Joseph's Hosp. of Parkersburg, 538 S.E.2d 389, 395 (W. Va. 2000).

[391] *Id.* at 406.

[392] *See id.* at 401 (arguing that restrictions on driving, carrying, lifting, and caring for patients only applied to job of paramedic).

The West Virginia Human Rights Act's definition of disability is identical to the ADA's.[393] Thus, the West Virginia Supreme Court of Appeals was confronted with the decision of whether to adopt the single-job rule announced by the United States Supreme Court over a year earlier. The court's official holding largely sidestepped the issue and declared more generally that there was sufficient evidence from which a jury could conclude that, based on the actions of the employer, the employer regarded the plaintiff as being substantially limited in the major life activity of working.[394] Even though the majority never explicitly rejected the single-job rule, the opinion offers only a glimmer of hope for future defendants seeking to invoke the single-job rule in claims brought under the West Virginia Human Rights Act.

In reaching its conclusion, the *Stone* court put the question of the extent to which state courts should defer to federal decisional law decided under a parallel statute front and center. The majority engaged in a lengthy survey of state and federal disability discrimination case law, which it characterized as being in a "state of 'turmoil and diversity' " regarding the question at issue.[395] Putting aside the question of the relevance of some of the state opinions cited,[396] the majority characterized the federal courts as being split in their approaches to the threshold question of whether an individual has a disability for purposes of the ADA.[397] According to the majority, "some"[398] or "several" federal cases[399] followed the

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[393] W. VA. CODE § 5-11-3(m) (1998) (cited in *Stone*, 538 S.E.2d at 399 n.14). In fact, prior to 1989, West Virginia's Human Rights Act did not define an individual with a disability to include one who was regarded as having a disability by the individual's employer. *Stone*, 538 S.E.2d at 398-98. The legislature's amendment of the Act in 1989 appears to have been an attempt to bring West Virginia law into line with the then-existing Rehabilitation Act's definition or the recently introduced, but yet to be enacted, ADA definition.

[394] *See Stone*, 538 S.E.2d at 406 (finding employer's imposed restrictions and limitations sustained jury verdict).

[395] *Id.* at 402. The majority was careful never to state that any of the decisions it cited ever explicitly rejected the single-job rule—the rule at issue in the case. Instead, it juxtaposed several federal decisions that had applied the rule with numerous other decisions which the majority characterized as utilizing a "less restrictive approach," *id.* at 404, or as allowing a plaintiff to go before a jury "to show that by being excluded from a particular job they had been regarded . . . as a person with a substantially limiting impairment." *Id.* at 403.

[396] *See infra* note 407 and accompanying text.

[397] *Stone*, 538 S.E.2d at 402-03.

[398] *Id.* at 402.

[399] *Id.* at 401.

single-job rule in concluding that a plaintiff did not have a disability, while "a number" of other federal cases allowed a plaintiff to reach a jury on the question of whether the plaintiff had a disability by showing "that by being excluded from a particular job they had been regarded . . . as a person with a substantially limiting impairment."[400]

If the majority's holding and characterization of existing federal law are read in a narrow fashion, both are defensible. Indeed, a number of federal decisions have concluded that evidence that an employer regarded an employee as being precluded from a particular job was sufficient to establish that the employee was regarded as being substantially limited in the major life activity of working or some other major life activity.[401] In these cases, however, the employers also perceived the employees' impairments as so substantial that they would have precluded the employee from working not just at the job in question, but in a class of jobs or broad range of jobs.[402] To the extent this represents the actual holding of *Stone*, it is entirely consistent with federal law.

Instead, *Stone* clearly amounted to an implied rejection of the single-job rule articulated in *Sutton* and *Murphy*. The majority opinion took aim at several federal decisions that used the same reasoning found in *Sutton* and *Murphy* to conclude that employers did not regard the plaintiffs as being substantially limited in the major life activity of working and termed them "restrictive."[403] The court then referenced other state and federal decisions that used a "less restrictive approach."[404] Finally, the majority opinion clearly aligned itself with those courts taking the less restrictive approach.[405] Thus, there can be little doubt that the majority opinion represented a de facto, if not de jure, rejection of the single-job rule in the context of a "regarded as" plaintiff.[406]

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[400] *Id.* at 403.

[401] *See, e.g.*, EEOC v. Nw. Airlines, Inc., 246 F. Supp. 2d 916, 925 (W.D. Tenn. 2002) (holding as sufficient evidence that employer thought employee was precluded from job).

[402] *See, e.g.*, *id.* (noting employer's restrictions limited employee from performing many jobs).

[403] *Stone*, 538 S.E.2d at 402.

[404] *Id.* at 403 n.20, 403-04.

[405] *See id.* at 406.

[406] This is certainly how one of the concurring justices read the majority opinion. *See id.*

Perhaps the most unusual aspect of the decision is its categorization of existing law. The majority of state decisions cited by the court as standing for the adoption of a "less restrictive approach" either do not stand for such a proposition or have only marginal relevance to the issue of the applicability of the single-job rule.[407] The accuracy of the majority's description of existing federal law is equally debatable.[408] More troubling are the decisions the

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at 412 (McGraw, J., concurring in part and dissenting in part) ("The Supreme Court has, regrettably, misconstrued Congress's purpose in providing protection for persons 'regarded as' being disabled."); *id.* at 411 ("Let there be no mistaking the fact that [following federal precedent] would have the practical result of drastically limiting the rights of people to bring disability discrimination claims, a result foreshadowed by many recent federal cases.").

[407] Of the ten state cases cited by the majority, see *id.* at 405 n.23, three involved statutes with definitions of "disability" that were substantially different than those found in the ADA or the West Virginia Human Rights Act at the time. *See* Am. Nat'l Ins. Co. v. Fair Employment & Hous. Comm'n, 651 P.2d 1151, 1154 (Cal. 1982) (discussing applicable statute); Cisco Trucking Co. v. Human Rights Comm'n, 653 N.E.2d 986, 988 (Ill. App. Ct. 1995) (same); City of Cleveland v. Ohio Civil Rights Comm'n, 648 N.E.2d 516, 518-19 (Ohio Ct. App. 1994) (same). Indeed, with respect to *City of Cleveland*, even though the Ohio state statute was notably different than the ADA, the state supreme court had nonetheless cited the single-job rule approvingly prior to the decision in *Stone*. *See* Columbus Civil Serv. Comm'n v. McGlone, 697 N.E.2d 204, 207 (Ohio 1998) (interpreting Ohio statute by comparison to ADA). Of the remaining cases cited in *Stone*, at least one could actually be read as adopting the single-job rule. *See* Office of Occupational Med. & Safety v. Baltimore Cmty. Relations Comm'n, 594 A.2d 1237, 1242 (1991) (finding sufficient evidence that employer regarded plaintiff as having "future handicap" that would "impair major life activities, e.g., *earning a living*" (emphasis added)). One of the cited cases does not appear to implicate the single-job rule at all, although it is from a court that previously adopted the rule and continues to apply it. *Compare* Howell v. Merritt Co., 585 N.W.2d 278, 280-81 (Iowa 1998) (cited by *Stone* majority), *with* Bearshield v. John Morrell & Co., 570 N.W.2d 915, 920 (Iowa 1997) (announcing the single-job rule), *and* Vincent v. Four M Paper Corp., 589 N.W.2d 55, 61 (Iowa 1999) (restating single-job rule announced in *Bearshield*). Three of the remaining cases were decided prior to the adoption of the ADA, when the single-job rule was not as widely recognized. AT&T Tech., Inc. v. Royston, 772 P.2d 1182 (Colo. Ct. App. 1989); Colo. Civil Rights Comm'n v. N. Wash. Fire Prot. Dist., 772 P.2d 70 (Colo. 1989); City of La Crosse Police & Fire Comm'n v. Labor & Indus. Review Comm'n, 407 N.W.2d 510 (Wis. 1987). One of the decisions could be read as rejecting the single-job rule. *See* Katz v. City Metal Co., 87 F.3d 26, 31-33 (1st Cir. 1996) (applying state and federal law). The major life activities of walking and breathing were also implicated in *Katz*, however, and it is unclear from the court's opinion in which of these major life activities the employer regarded the employee as being substantially limited. *Id.* The remaining case arguably supports the proposition that an employee regarded as being unable to perform a *single* job may proceed under the "regarded as" prong. *See* Turner v. City of Monroe, 634 So. 2d 981, 984 (La. Ct. App. 1994) (examining definition of "regarded as"). After the *Stone* decision, however, that jurisdiction's highest court explicitly adopted the single-job rule articulated in *Sutton* and *Murphy*. Delaney v. City of Alexandria, 800 So. 2d 806, 809 (La. 2001).

[408] *See Stone*, 538 S.E.2d at 403 n.20 (assessing federal case law). Of the ten federal cases discussed and cited in support of this assertion, two, *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d

majority did not cite. Completely lacking from the majority opinion is any mention that whatever "startling[ ] divers[ity]"[409] of approaches may have existed at one point, absolutely no diversity of approaches regarding the single-job rule existed at the federal level when the majority rendered its opinion. Over one year earlier, the Supreme Court had put an end to any dispute through its decisions in *Sutton* and *Murphy*—a fact not mentioned by the majority in *Stone*.[410]

Ostensibly, the majority's lengthy discussion of existing case law established that the court should not be "mechanically tied to federal disability discrimination jurisprudence"[411] and that there was "substantial authority in state disability discrimination law" to

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294, 303-04 (4th Cir. 1998), and *Deane v. Pocono Medical Center*, 142 F.3d 138, 145 (3d Cir. 1998), actually applied the single-job rule in the context of a "regarded as" case, but held that the rule did not prevent the employee from establishing that the employer regarded the employee as precluded from a class of jobs—a fairly common approach in federal decisions. *See supra* note 402 and accompanying text. One applied the single-job rule in the context of an actual disability case, but, like *Cline* and *Deane*, held that the rule did not prevent the employee from establishing that her disability precluded her from a class of jobs or a broad range of jobs. Fjellestad v. Pizza Hut of Am., 188 F.3d 944, 949 (8th Cir. 1999). Another case involved a plaintiff regarded as being substantially limited in the major life activity of speaking, not working. McInnis v. Alamo Cmty. Coll. Dist., 207 F.3d 276, 281-82 (5th Cir. 2000). One case, *Doe v. New York Univ.*, 666 F.2d 761 (2d Cir. 1981), was not an employment case. Another contains language that could easily support the conclusion that the court actually applied the single-job rule in the context of a "regarded as" case. *See* Cook v. State of Rhode Island, 10 F.3d 17, 26 (1st Cir. 1993) ("[T]here is a significant legal distinction between rejection based on a job-specific perception that the applicant is *unable to excel at a narrow trade* and a rejection based on *more generalized perception that the applicant is impaired in such a way as would bar her from a large class of jobs*." (emphasis added)). Four were from circuits that either were already applying the single-job rule at the time of the decision cited, *compare* Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 188 (3d Cir. 1999), *with Deane*, 142 F.3d at 145; *compare also* Heyman v. Queens Vill. Comm. for Mental Health, 198 F.3d 68 (2d Cir. 1999), *with* Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 647 (2d Cir. 1998), or were applying it by the time of the *Stone* decision. *Compare* Olson v. Gen. Elec. Astrospace, 101 F.3d 947, 952 (3d Cir. 1996) (applying single-job rule), *with Deane*, 142 F.3d at 145 (applying single-job rule in "regarded as" case); *compare also* Thornhill v. Marsh, 866 F.2d 1182, 1183-84 (9th Cir. 1989) (not applying rule), *with* Thompson v. Holly Family Hosp., 121 F.3d 537, 541 (9th Cir. 1997) (applying rule).

[409] *Stone*, 538 S.E.2d at 401.

[410] The only hint in the majority opinion that *Sutton* and *Murphy* had ever been decided appears in a citation in a footnote to a law review article that references *Murphy* in its title. *See id.* at 401 n.16 (citing Comment, *Too Disabled or Not Disabled Enough: Between a Rock and a Hard Place After* Murphy v. United Parcel Service, Inc., 39 WASHBURN L.J. 255 (2000)). *Sutton* and *Murphy* were cited in the concurring opinion, but in a disapproving fashion. *Id.* at 411 (McGraw, J., concurring in part and dissenting in part).

[411] *Id.* at 404 (majority opinion).

justify a "less restrictive approach" to the question of disability status under West Virginia's Human Rights Act.[412] The court offered only two independent justifications for its "less restrictive approach." First, the court noted the truism that an individual's ability to establish the existence of a disability does not ensure that the individual will prevail on a discrimination claim, because the existence of a disability is simply the threshold determination.[413] Second, the court relied on its previous interpretations of the Human Rights Act's definition of disability, which it asserted were more expansive than the federal courts' interpretation of the ADA's parallel definition.[414] Assuming the accuracy of this statement,[415] it

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[412] *Id.* at 406.

[413] *See id.* at 402 (reflecting that establishing protected status does not guarantee successful claim).

[414] *Id.* at 404 n.21.

[415] The majority opinion cited three instances of the West Virginia court supposedly interpreting its own statute more broadly than the ADA had been interpreted by federal courts. *Id.* One of the West Virginia decisions cited, *Haynes v. Rhone-Poulenc, Inc.*, 521 S.E.2d 331 (W. Va. 1999), certainly *could* be read to support the proposition that the West Virginia Supreme Court of Appeals had adopted a more lenient standard than the Supreme Court has articulated in interpreting the ADA. In order to constitute a disability under the ADA, the effects of an impairment must be permanent or long-term. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002). Although *Stone* was decided prior to *Toyota Motor*, a number of federal courts had taken a similar position prior to *Stone*. *See* Burgdorf, *supra* note 292, at 469-70 (discussing temporary disability limitation). In one of the three West Virginia cases cited by the majority, the court held that "[a] 'qualified disabled person' who is protected by the West Virginia Human Rights Act . . . includes a person who has a disability and is temporarily unable to perform the requirements of the person's job due to their disability, with or without accommodation." Syllabus Point 3, Haynes v. Rhone-Poulenc, Inc., 521 S.E.2d 331, 344 (W. Va. 1999). In *Stone*, the majority characterized the decision as holding that "a temporarily totally disabled person may invoke protection under disability discrimination laws." *Stone*, 538 S.E.2d at 404 n.21. If this were the official holding, the decision would arguably have put West Virginia at odds with then-existing federal authority. According to the official syllabus provided by the court, however, this is not what the court held in *Haynes*. Indeed, the defendant in *Haynes* "[did] not contest that the plaintiff's high-risk pregnancy, complicated by medical conditions, met the legal test of a disability." *Haynes*, 521 S.E.2d at 337. Instead, the defendant argued that it was not a reasonable accommodation to hold the employee's position open for six months while the employee was on leave. *Id.* The court's holding in *Haynes*, as articulated in the syllabus, is entirely consistent with federal law—an individual *with a disability* who is temporarily unable to perform her job functions may nonetheless be a qualified individual if some reasonable accommodation, such as a leave of absence, would permit her to perform the essential functions of the position. *See, e.g.*, García-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 647 (1st Cir. 2000) (finding request for additional leave was reasonable accommodation). Of the other two West Virginia decisions cited, one is (and was at the time of the decision) well within the mainstream of federal decisional law. Syllabus Point 4, Skaggs v. Elk Run Coal Co., 479 S.E.2d 561, 569 (W. Va.

hardly explains the court's refusal to consider, let alone mention, the Supreme Court's reasoning in *Sutton* and *Murphy*.

Aside from the obvious concerns over judicial credibility, *Stone* raises several concerns regarding legislative purpose and efficiency. One of the concurring opinions in *Stone* correctly noted that the presumption in favor of uniform construction established by the borrowed statute doctrine did not apply because no "significant body of settled case law interpreting the archetypal statute existed *prior* to the enactment of the [West Virginia Human Rights Act]."[416] Although a *significant* body of settled federal case law under the Rehabilitation Act may not have existed when the West Virginia legislature amended the Human Rights Act in 1989 to adopt the single-job rule in the context of the Act's "regarded as" prong, there was certainly *some* federal case law on the subject.[417] Moreover, the most significant of these cases, *Forrisi v. Bowen*,[418] came from the Fourth Circuit Court of Appeals—the circuit in which the State of West Virginia is located. Thus, if one sought to divine the intent of West Virginia lawmakers in 1989, it might be reasonable to suppose that they were familiar with *Forrisi* and assumed that the West Virginia Human Rights Act would be interpreted consistently with the Rehabilitation Act interpretation of the federal courts in their state. Even if one is unwilling to attribute such a purpose to the West Virginia legislature, the fact that the Supreme Court's 1998 articulation of the single-job rule did not represent a fundamental change in the law as it existed in 1989 should have been sufficient to create a presumption in favor of parallel construction.

1996) (holding reassignment to vacant position can be reasonable accommodation under West Virginia Human Rights Act). The accuracy of the court's description of the third cited case depends upon how one interprets the original court's intent as expressed by the language in its holding. *Compare* Benjamin R. v. Orkin Exterminating Co., 390 S.E.2d 814, 819 (W. Va. 1990) (holding HIV-positive person is person with handicap under West Virginia Human Rights Act), *with* Bragdon v. Abbot, 524 U.S. 624, 641-42 (1998) (concluding that plaintiff's HIV-infection constituted impairment, but declining to address general question of whether HIV-infection is per se disability), *and* Rivera v. Heyman, 157 F.3d 101, 103 (2d Cir. 1998) ("The Supreme Court recently confirmed that HIV infection is a disability under the Americans With Disabilities Act of 1990 . . . .").

[416] *Stone*, 538 S.E.2d at 410-11 (McGraw, J., concurring in part and dissenting in part).

[417] *See supra* notes 383-386 and accompanying text.

[418] 794 F.2d 931 (4th Cir. 1986).

Finally, the manner in which the *Stone* court expressed its views on the applicability of the single-job rule made it harder for the West Virginia legislature to engage in a dialogue with the court about the meaning of the Human Rights Act. Although there is little doubt that the West Virginia Supreme Court of Appeals rejected the Supreme Court's single-job rule,[419] the official syllabus produced by the court does not allude to this fact.[420] Similarly, by omitting any mention in the main text of the majority's rejection of the rule, or even any mention of the fact that the *Sutton* and *Murphy* decisions *existed*, the court was able to partially insulate its decision from legislative review.

2. The Effect of Prior Contrary Precedent. One primary difference between statutory and constitutional interpretation is the extent to which the principle of stare decisis influences a court's decision. This principle generally carries greater weight in interpretation of statutory provisions than in interpretation of constitutional provisions because the legislature is free to overrule a court's interpretation of a statute.[421] In some respects, this greater adherence to the principle of stare decisis in the case of statutory interpretation would seem to be at odds with a general presumption in favor of parallel construction of related statutes where a state court has acted first in interpreting the provision in question. However, the greater weight that the principle of stare decisis normally carries in statutory interpretation should not be sufficient to outweigh the concerns associated with divergent interpretation.

As an example, in 1996 the Supreme Court rejected the approach of several federal courts and held in *O'Connor v. Consolidated Coin Caterers Corp.* that an age discrimination plaintiff need not establish that he was replaced by someone outside the protected class—individuals age 40 or older.[422] Instead, an age discrimination plaintiff must establish that he was replaced by someone "substantially younger than the plaintiff."[423] The logic of the rule is

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[419] *See supra* notes 406-410 and accompanying text.

[420] *See Stone*, 538 S.E.2d at 392 (forgoing discussion of single-job rule in court's syllabus defining Human Rights Act).

[421] Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989).

[422] 517 U.S. 308, 312 (1996).

[423] *Id.* at 313.

largely uncontestable. As the Court explained, "there can be no greater inference of *age* discrimination (as opposed to '40 or over' discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old."[424] The fact that the plaintiff's replacement was substantially younger is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone under forty.[425]

When the Ohio Supreme Court considered the application of *O'Connor* in *Coryell v. Bank One Trust Co.* in 2004,[426] it faced at least one hurdle to adopting the holding: Twenty-one years earlier, it had adopted the rule discredited by the Supreme Court's decision in *O'Connor*.[427] Compounding the problem was the fact that in the interim, the Ohio legislature had amended the relevant statute and left the Ohio Supreme Court's earlier decision untouched.[428] Thus, if one places stock in the notion that silence on the part of the legislature amounts to approval, the Ohio Supreme Court should have been especially hesitant to reverse its prior ruling and fall in line with *O'Connor*.[429] Nonetheless, the court reversed its prior holding and adopted the *O'Connor* rule.[430]

Rather than viewing the court's reversal as a Pavlovian response to federal law or as a usurpation of the legislature's powers, the decision should be viewed as comporting both with common sense and with the best estimate of the legislature's preference. *O'Connor* was a unanimous decision and has been criticized only on the grounds that the meaning of the phrase "substantially younger" is not always obvious.[431] It expands the potential number of plaintiffs, but makes it more difficult for some of those plaintiffs to make out

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[424] *Id.* at 312.

[425] *Id.* at 313.

[426] 803 N.E.2d 781 (Ohio 2004).

[427] Barker v. Scovill, Inc., 451 N.E.2d 807, 809 (Ohio 1983).

[428] *Coryell*, 803 N.E.2d at 789 (Lundberg Stratton, J., dissenting).

[429] *See id.* ("Because the General Assembly has not felt the need to legislatively overrule what this court has historically held, I believe that the law as established in *Barker* . . . is a clear indication of Ohio's public policy.").

[430] *Id.* at 787 (majority opinion).

[431] *See, e.g.*, Beth M. Weber, Note, *The Effect of* O'Connor v. Consolidated Coin Caterers Corp. *on the Requirements for Establishing a Prima Facie Case Under the Age Discrimination in Employment Act*, 29 RUTGERS L.J. 647, 659 (1998) (observing that circuit courts adopting "substantially younger" approach have failed to precisely define that term).

a prima facie case. In short, the Supreme Court did about as good a job it could do under the circumstances. Why then would a state court not adopt what is clearly a better rule? The only argument with any force is the one raised by the dissent in *Coryell*: Because the Ohio legislature had amended the statute over the years without altering the rule, it should be presumed that the legislature incorporated the prior rule.[432] Judges have generally treated the "ratification by silence" theory of statutory interpretation with disfavor.[433] Beyond that fact, it is at least equally valid to presume that a state legislature intends, or at least would prefer, that its own parallel statute be interpreted consistently with federal law where federal law is reasonable and a consistent interpretation would not effect a fundamental change in the state law. There is little reason to believe that incorporating the *O'Connor* rule into Ohio's antidiscrimination tapestry would dramatically upset the balance between employers and employees or otherwise substantially alter the substance of Ohio law.[434]

This presumption would also help insulate courts from charges of judicial activism when confronted with the choice of whether to overrule prior precedent and adopt a federal standard. Departing from stare decisis inevitably raises questions about a court's motives. State courts, however, are at least equally vulnerable to charges of results-oriented judging when they cling to a previously announced rule in the face of a sensible standard articulated by the nation's highest court.

For example, the Supreme Court's decisions in *Faragher*[435] and *Ellerth*[436] were generally seen as a mixed bag for employers and

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[432] *Coryell*, 803 N.E.2d at 789 (Lundberg Stratton, J., dissenting).

[433] *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 292 (2001) (citing Patterson v. McLean Credit Union, 491 U.S. 164, 175 (1989), for proposition that congressional failure to act is not equivalent to affirmative congressional approval of courts' statutory interpretation).

[434] When *Coryell* was decided, it was suggested that the decision was particularly plaintiff-friendly because, unlike the ADEA, Ohio's antidiscrimination statute allows age-discrimination plaintiffs to recover punitive damages. *See* John Byczkowski, *Age Bias Rule Has a New Tenet*, CINCINNATI ENQUIRER, Mar. 6, 2004, at D1 (suggesting that Ohio courts might become forum of choice for ADEA plaintiffs). The ADEA, however, does provide for liquidated damages, which the Supreme Court has held were intended by Congress to be punitive in nature. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985).

[435] 524 U.S. 775 (1998).

[436] 524 U.S. 742 (1998).

employees.[437] The question of an employer's vicarious liability for sexual harassment had rattled around the state and federal courts for years prior to *Faragher* and *Ellerth*, thus giving courts ample opportunity to develop their own approaches. While the federal courts were compelled to fall in line with the Supreme Court's holdings, the only question for state courts that had previously developed different standards was whether they *should* fall in line. The Michigan Supreme Court was one of those that decided against adopting the Supreme Court's vicarious liability standard.[438] The court offered two reasons. First, according to the court's characterization of pre-*Faragher* and *Ellerth* Michigan case law, the standard for vicarious liability was essentially the same as that announced in *Faragher* and *Ellerth*, with one distinction: In Michigan, the burden of proof was on the employee, rather than the employer, to show that the employer failed to take prompt and adequate remedial action upon learning of the hostile environment.[439] Second, unlike Title VII, Michigan's statute specifically defined the concept of sexual harassment and did so in a manner consistent with the concepts of quid pro quo harassment and hostile work environment harassment—concepts that the Supreme Court found to be of limited utility in *Faragher* and *Ellerth*.[440]

It does not take a cynic to conclude that what was really going on in this decision was that the Michigan Supreme Court preferred its own rule over that of the United States Supreme Court. Adopting the federal standard may have required the Michigan Supreme Court to "shift the burden of proof from the employee to the employer regarding whether the employer should be held vicariously liable,"[441] but the issues of whether the plaintiff took reasonable steps to notify the employer of the alleged harassment and whether the employer acted promptly to correct the harassing conduct will

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[437] *See supra* notes 335-338 and accompanying text.

[438] Chambers v. Trettco, Inc., 614 N.W.2d 910, 912 (Mich. 2000); *see also* State Dep't of Health Serv. v. Superior Court, 79 P.3d 556, 561 (Cal. 2003) (holding employer is strictly liable for sexual harassment by its supervisory employees under FEHA).

[439] *Chambers*, 614 N.W.2d at 917.

[440] *Id.*

[441] *Id.*

almost always be at issue in such cases.[442] In short, the disagreement between the Michigan Supreme Court and United States Supreme Court was simply one of degree.

Moreover, the text of Michigan's Civil Rights Act provides more than a hint that the Michigan legislature favored a policy of parallel construction.[443] Even though Michigan's Civil Rights Act, unlike Title VII, actually defines sexual harassment in terms akin to the concepts of quid pro quo and hostile work environment harassment, Michigan's language, adopted in 1980, was clearly borrowed from EEOC regulations in effect at the time.[444] Thus, the Michigan legislature appears to have deliberately set upon a course of parallel construction when it enacted the Michigan Civil Rights Act. It is therefore reasonable to believe that the legislature would have preferred that the two laws remain on the same track absent some strong indication that federal law had somehow gone awry. Furthermore, as a practical matter, it is difficult to see why the fact that Michigan's Civil Rights Act actually defined sexual harassment while Title VII did not should have made any difference in the case at issue. The Supreme Court did not completely abandon reliance on the concepts of quid pro quo and hostile work environment.[445] Further, in describing the different standards for vicarious liability, the court described them in a manner entirely consistent with those concepts.[446]

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[442] *See* Garcez v. Freightliner Corp., 72 P.3d 78, 87 (Or. Ct. App. 2003) ("The sort of evidence that is relevant to the *Faragher/Ellerth* defense—evidence of an employer's complaint procedure or antiharassment policy and whether a plaintiff unreasonably failed to take advantage of such opportunities—necessarily will be relevant to establishing an employer's liability under a negligence standard."); Anne Lawton, *Operating in an Empirical Vacuum: The* Ellerth *and* Faragher *Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 243 (2004) (stating that lower courts have effectively shifted burden of proof on this issue from employer to plaintiff).

[443] MICH. COMP. LAWS §§ 37.2101-.2804 (2004).

[444] Michigan's statutory definition of sexual harassment was enacted in 1980. *Id.* § 37.2103. The EEOC regulations defining sexual harassment at that time were virtually identical. Haynie v. State, 664 N.W.2d 129, 144-45 (Mich. 2003) (quoting 29 C.F.R. § 1604.11(a) (1981)). Michigan's language was apparently added in an attempt to force a reluctant Michigan Department of Civil Rights to pursue sexual harassment claims. *Id.* at 145.

[445] *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 753-54 (1998) (suggesting that terms "quid pro quo" and "hostile work environment" are relevant to threshold question of whether plaintiff can prove discrimination in violation of Title VII).

[446] *Id.*

Of course, if the question of whether the employer exercised reasonable care to correct a supervisor's harassing behavior promptly is always in issue, as a practical matter it may make little difference whether the issue is framed as part of a plaintiff's prima facie case or an employer's affirmative defense. But that is all the more reason for a state court to adopt a federal standard. To arrive at its decision, the Michigan Supreme Court had to (1) suggest that the United States Supreme Court decided *Faragher* and *Ellerth* incorrectly;[447] (2) exaggerate the differences between Michigan's Civil Rights Act and Title VII;[448] and (3) ignore the fact that Michigan's statute, which supposedly was markedly different from federal law, was actually based on EEOC regulations.[449] To arrive at a contrary decision, the Michigan Supreme Court simply had to overrule a prior decision that differed only in degree from the United States Supreme Court's standard. Thus, the question for the Michigan Supreme Court was not one of correct or incorrect interpretation, but one of legislative preference, legislative efficiency, and judicial credibility—both its own and the United States Supreme Court's.

VI. CONCLUSION

The art of statutory interpretation poses special problems for state judges. These problems are especially pronounced where state judges are required to interpret their state's employment discrimination statutes in the shadow of federal precedent. The United State's dual judicial system and the controversial nature of employment discrimination law have generated numerous issues of statutory construction that defy easy resolution. To date, most state courts have chosen the path of least resistance and relied heavily on federal precedent to help resolve these issues. As employment discrimination law becomes more complex and controversial,

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[447] *See* Chambers v. Trettco, Inc., 614 N.W.2d 910, 918 (Mich. 2000) ("We find no statutory basis for singling out sexual harassment cases, as opposed to other classes of prohibited discrimination, for the application of a new rule of vicarious liability.").

[448] *See supra* note 444 and accompanying text.

[449] *Id.*

however, more opportunities arise for state and federal employment discrimination law to part ways.

To deal with these situations effectively, state courts should adopt a substantive canon of construction favoring uniform construction of state and federal statutes employing identical or substantially similar language. Blind adherence to federal precedent is inappropriate. But unless state courts can identify some meaningful difference between state and federal law, some fundamental change in approach at the federal level, or some outright error on the part of the federal courts, divergent interpretation of parallel statutes will generally produce more harm than good in terms of furthering legislative preferences, legislative efficiency, and judicial integrity. Accordingly, state courts should presume uniform construction of parallel employment discrimination statutes.