FIRING EMPLOYMENT AT WILL AND DISCHARGING TERMINATION CLAIMS FROM EMPLOYMENT DISCRIMINATION: A COOPERATIVE FEDERALISM APPROACH TO IMPROVE EMPLOYMENT LAW

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INTRODUCTION

On the whole, the labor and employment law of the United States[1] is not, in a global comparative sense, very protective of employees and restrictive of employers.[2] United States law does not compare favorably[3] with that of other countries in what generally may be termed "employment protection."[4] To be fair, the substantive law "on the books" is only one measure of how protective a legal system is, and

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1 Because this Article addresses the most exceptional aspect of United States labor and employment law, employment at will, it is worth noting another exceptionality early on—a matter of terminology. *See generally* Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394 (1971). In United States law, there is a dichotomy between law pertaining to organized labor and collective bargaining, which U.S. lawyers refer to as "labor law," and law regarding individual employment rights law, which we refer to as "employment law" and "employment discrimination." IB INTERNATIONAL LABOR & EMPLOYMENT LAWS 33a-1 to a-2 (William L. Keller & Timothy J. Darby eds., 4th ed. 2015); Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163 (2007); Eugene Scalia, *Ending Our Anti-Union Federal Employment Policy*, 24 HARV. J.L. & PUB. POL'Y 489, 489 (2001). Thus, to designate the whole of this area of the law in the United States, we often refer to "labor and employment law." In the rest of the world, the term "labour law" is understood to encompass both collective and individual rights law. *See* IA INTERNATIONAL LABOR AND EMPLOYMENT LAWS, *supra*, at 1-4. Consider, for example, the International Labour Organization, an agency within the United Nations, with 187 member nations, including the United States, which develops international labour standards. *About the ILO*, INT'L LAB. ORG., https://ilo.org/global/about-the-ilo/lang—en/index.htm [https://perma.cc/6G6D-RUCD]. Within the ILO, the term "labour" refers to both collective and individual rights. *See id.*

2 *See generally* Stephen F. Befort, *The Declining Fortunes of American Workers: Six Dimensions and an Agenda for Reform*, 70 FLA. L. REV. 189 (2018). Professor Befort cites the following areas in which the United States provides less protection than most developed nations: workforce attachment, union-management relations, employment security, income inequality, balancing work and family, and retirement security. *Id.* at 191. As a very rough measure of this proposition, consider that the United States has ratified only 14 out of 190 Conventions of the International Labour Organization, of which 12 are in force, and only 2 of the 8 fundamental conventions. David Weissbrodt & Matthew Mason, *Compliance of the United States with International Labor Law*, 98 MINN. L. REV. 1842 (2014); *Ratifications for United States of America*, INT'L LAB. ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871 [https://perma.cc/NC8G-ZU2P]. If we consider only the eight fundamental conventions, the United States is tied for last place in ratifications among the ILO member nations. *Ratifications of Fundamental Conventions by Country*, INT'L LAB. ORG., https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:::NO:10011:P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F [https://perma.cc/3JNU-ZR3M].

3 This assumes one considers employment protection to be good.

4 The Organisation for Economic Co-operation and Development considers the procedures and costs involved in dismissing individuals or groups of workers and the procedures involved in hiring workers on fixed-term or temporary work agency contracts. *See generally OECD Indicators of Employment Protection*, ORG. FOR ECON. COOP. & DEV., https://www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection.htm [https://perma.cc/GE4Y-6QEM].

compliance, coverage, enforcement, and other issues also are important.[5] Nonetheless, U.S. employment law is among the least protective of employees among developed nations.[6] Indeed, a German scholar described U.S. labor and employment law as resembling that of a developing country.[7] In no area is this lack of protection more salient than the law regarding employment termination or discharge.

Employment at will is the default rule[8] regarding employment termination in forty-nine of the fifty U.S. states, permitting employers to terminate employees without a job-related reason and without following any procedures, giving any notice, or providing any severance pay.[9] In terms of comparative law, employment at will is the most

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5 Consider, for example, that the United States achieves a high score for coverage of employees by labor laws (relatively low level of exclusions from coverage). *See*, INT'L LAB. ORG., EMPLOYMENT PROTECTION LEGISLATION: NEW APPROACHES TO MEASURING THE INSTITUTION, INWORK ISSUE BRIEF NO. 8, 9 (2016), https://www.ilo.org/wcmsp5/groups/public/—-ed_protect/—-protrav/—-travail/documents/publication/wcms_442672.pdf [https://perma.cc/F252-D794]. Additionally, the United States generally does have structures in place to enforce the labor protections that it provides, so the nation can be considered a fairly strong enforcer of the laws it has. *See, e.g.*, Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343, 355–56 (2014). Additionally, the United States, the fifty states, and many local governments, have a vast array of laws conferring employment rights on employees and restrictions on employers. *Id.*

6 *See, e.g.*, Peter Gahan, Richard Mitchell, Sean Cooney, Andrew Stewart, & Brian Cooper, *Economic Globalization and Convergence in Labor Market Regulation: An Empirical Assessment*, 60 AM. J. COMPAR. L. 703, 718 (2012) (stating that "the protective strength of labor law in the United States remains largely static and well below that of other countries").

7 Michael Kittner & Thomas C. Kohler, *Conditioning Expectations: The Protection of the Employment Bond in German and American Law*, 21 COMPAR. LAB. L. & POL'Y J. 263, 270 (2000) (citing Dieter Reuter, *Gibt es eine Arbeitsrechtliche Methode?: Ein Pläydoyer für die Einheit der Rechtsordnung [Is There a Labor Law Method?: A Plea for the Unity of the Legal Order]*, *in* FESTSCHRIFT FÜR MARIE LUISE HILGER UND HERMANN STUMPF [FESTIVAL FOR MARIE LUISE HILGER AND HERMANN STUMPF] 586 (1983)).

8 As a default rule, it also functions in litigation as a rebuttable presumption. Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment At-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223, 233–36 (2017). The Restatement of Employment Law labels employment at will as a default rule of contract law and a rebuttable presumption. *See* RESTATEMENT OF EMPLOYMENT LAW § 2.01 cmt. b (AM. L. INST. 2015). *See also* David J. Walsh & Joshua L. Schwarz, *State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales*, 33 AM. BUS. L.J. 645, 668–69 (1996). In theory, at least, applicants or employees can bargain for a variation of employment at will, but in reality, few applicants or employees are successful in negotiating out of employment at will. Bodie, *supra* at 235–37 (exploring reasons why employment at will is a very "sticky" default rule). Courts in most states apply such a strong version of the presumption that it approaches a rule of substantive law. *See, e.g.*, J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 IOWA L. REV. 347, 349–52, 350 n.6 (1995) (citing cases illustrating the denial of contract and tort remedies).

9 *See, e.g.*, Rachel Arnow-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 FLA. L. REV. 1513, 1522 (2014)

exceptional aspect of U.S. labor and employment law. Many scholars and students of employment law have advocated for the replacement of employment at will with a wrongful discharge statute that imposes a requirement of good or just cause for firing an employee and procedural protections.[10] Such a change would bring U.S. employment termination law in line with that of all other nations with developed legal systems.[11]

In contrast to U.S. employment termination law, the nation's employment discrimination law[12] is one of its greatest achievements in employment law and civil rights.[13] The United States was a pioneer in the world in this area of law, and its laws were the exemplar for the employment discrimination laws of other nations.[14] Yet, more than half a century since the enactment of Title VII, U.S. employment discrimination law has not kept pace with the developing law of other nations.[15] After early years of creativity and innovation in employment discrimination doctrine, the Supreme Court and the lower courts have developed doctrine under the statutes that is, on the whole, less protective of employees and weaker than most scholars and civil rights advocates think is needed to address the persistent problem of invidious discrimination in employment.[16]

Employment at will and employment discrimination law have an interesting relationship. Each imposes significant limitations on the other. It is well known that the employment discrimination laws are the most substantial and significant restriction in U.S. law on at-will termination. Although employers generally do not have to defend terminations of at-will employees by pleading and proving job-related

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(stating that "[a]lthough it is generally thought of and treated as a single rule, employment at will is a multipart doctrine from which three distinct principles can be derived: (1) a presumption that employment is of indefinite duration . . . ; (2) a presumption that employers may terminate for any or no reason . . . ; and (3) a presumption that employers may terminate without notice or warning").

10 *See infra* Section I.A.2.

11 *See infra* note 45 and accompanying text.

12 Of course, a more accurate name may be "employment anti-discrimination" law. However, I am opting to use "employment discrimination" law, believing that we can agree upon and understand the "anti-" part. Generally, I use "employment discrimination law" to denote the federal statutes and the case law or doctrine developed thereunder.

13 *See, e.g.*, Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 488–89 (2000) (discussing the transformative legal regime of Title VII that grew out of the civil rights movement); *cf.* Pauline T. Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace*, 96 NW. U. L. REV. 1497, 1524–25 (2002) (discussing early successes of Title VII—how it "effectuated a change in norms"—but recognizing that the impact has diminished over time).

14 *See infra* notes 49–50 and accompanying text.

15 *See infra* note 52 and accompanying text.

16 *See infra* Section I.B.3.

reasons, they must defend terminations that are alleged to be for prohibited discriminatory reasons. On the other hand, employment discrimination law is limited and weakened by its interaction with employment at will in two significant ways. First, employment discrimination law is sometimes perceived to be largely a body of wrongful discharge law that is principally protective of members of groups with histories of employment discrimination—sometimes erroneously referred to as "protected classes."[17] This perception detracts from the important public policy goal of the law—deterring and eradicating invidious discrimination. Not so obvious is the other negative impact of the interaction. Courts' solicitude for preserving employment at will has led them to develop employment discrimination doctrine that is less robust than it otherwise might be. Thus, for employment at will and employment discrimination law, each tends to restrict or weaken the other.

A veritable library of scholarship and numerous law reform efforts have been directed at abrogating employment at will[18] and strengthening employment discrimination doctrine and case law.[19] Yet, progress on both fronts has been elusive, slow (if ever achieved),[20] disappointing, and sometimes fleeting.[21] A proposal that could ameliorate the state of U.S. employment law and render it more like the more employee-protective laws of other nations[22] may be embedded in

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17 *See infra* Section I.B.3. "Protected classes" is improper in referring to groups or classes covered by Title VII because Title VII covers discrimination based on color, race, sex, religion, and national origin. Everyone has a color, a race, a sex, and a national origin. Given the broad definition of religion developed under Title VII, most people have some religious beliefs. *See* 29 C.F.R. § 1605.1 (2021).

18 *See infra* Section I.A.2.

19 *See infra* Section I.B.2.

20 As discussed in detail below, there have been almost innumerable proposals to modify or abolish employment at will.

21 Employment discrimination law is a big tent of statutes and case law, and the law has changed a great deal since the Civil Rights Act of 1964 was enacted in 1964 and became effective in 1965. The Civil Rights Act of 1991 was a "success" in many ways in reforming employment discrimination law gone awry in the courts. The Act abrogated ten decisions of the Supreme Court that narrowly interpreted Title VII and the Americans with Disabilities Act. H.R. Rep. No. 102-40, pt. 2, at 1 (1991). However, many of the Supreme Court's and lower federal courts' interpretations of the 1991 reform Act have not moved the discrimination law in an expansive and protective direction, consistent with the general legislative intent of the 1991 Act. *See, e.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009). *See generally* William R. Corbett, *Intolerable Asymmetry and Uncertainty: Congress Should Right the Wrongs of the Civil Rights Act of 1991*, 73 OKLA. L. REV. 419 (2021).

22 I do not propose a reform in U.S. law merely to make it less exceptional—more like the laws of other nations. I realize first that it is laudable to be proud of some aspects of American exceptionalism. *See, e.g.*, ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Henry Reeve

the relationship between employment at will and employment discrimination law. I have an unconventional proposal—a trade of sorts.

State legislatures should "fire" employment at will and replace it with wrongful discharge statutes requiring good cause[23] for

trans., 1899) (1835). However, when a nation is the only one in the world with a particular law, I think it merits examination. Moreover, I realize that laws should not be viewed in a vacuum. They are products of the history, culture, and politics of the societies in which they develop and are not necessarily readily transplantable. *See, e.g.*, Christopher J. Whelan, *Labor Law and Comparative Law*, 63 TEX. L. REV. 1425, 1433 (1985) (discussing the views of the great legal comparativist Sir Otto Kahn-Freund). On the second point, the "rugged individualism" value of the United States could be seen to support a termination law like employment at will. *See, e.g.*, William L. Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 201, 202 (1985). However, the movement of U.S. employment law over time has been to riddle employment at will with exceptions, discussed *infra*, while leaving the increasingly ineffectual general principle in place. Thus, I propose a change not for the sole or primary purpose of lessening the exceptionalism of U.S. law in this area, but because I think it would solve some problems in U.S. employment law and improve it. It also would make the termination law more consistent with a majority of the American people's values. *See, e.g.*, James A. Gross, *The Broken Promises of the National Labor Relations Act and the Occupational Safety and Health Act: Conflicting Values and Conceptions of Rights and Justice*, 73 CHI.-KENT L. REV. 351, 383 (1998) (asserting that "employment at will . . . is an American practice that violates . . . democratic values in a most fundamental way [and i]t is a classic example of autocracy at the workplace").

23 Although the United States has adhered to employment at will for a long time, "good" or "just" cause is not difficult to define. Either "good cause" or "just cause" is defined in many sources, including the Model Employment Termination Act, the Montana Wrongful Discharge from Employment Act of 1987, the laws of almost every other nation, and Convention No. 158 and Recommendation No. 119 of the International Labour Organization. *See* MODEL EMP. TERMINATION ACT § 1(4) (UNIF. LAW COMM'N 1991) (defining "good cause"); Wrongful Discharge from Employment Act, 1987 Mont. Laws ch. 641 § 3 (codified as amended at MONT. CODE ANN. § 39-2-903(5)) (defining "good cause"); Int'l Lab. Org. [ILO], *Termination of Employment Convention*, C158 (June 2, 1982), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158 [https://perma.cc/6VYZ-WNZ7]; Int'l Lab. Org.[ILO], *Termination of Employment Recommendation*, R119 (June 5, 1963), https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:1625583948619::NO::P12100_SHOW_TEXT:Y: [https://perma.cc/YS6A-QXJD]. Even in the United States, there are substantial bodies of law regarding interpretation and application of such a standard—particularly regarding collective bargaining and civil service employment. First, almost all collective bargaining agreements negotiated by unions vary employment at will and provide good-cause protection. *See, e.g.*, Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 594–95 (stating that "[v]irtually every collective bargaining agreement contains some such limitations" and "[t]his requirement is so well accepted that often it is found to be implicit in the collective agreement, even when there is no stated limitation on the employer's power to discipline"); Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 22 n.111 (stating that "[m]ost collective agreements require 'cause' or 'just cause' for discharge or discipline. Even in the absence of an express 'just cause' limitation, arbitrators will imply such a limitation on discharge") (citing F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 652 (4th ed. 1985)). Thus, arbitrators have a wealth of experience in interpreting and applying for-cause termination restrictions. Second, there are other employees in the United States who can only be fired for job-related cause, such as

termination. My proposal so far is not novel, as I am only the latest in a long line of commentators calling for legislative abrogation at the state level of employment at will. But there is more to my proposal, and that "more" is the unconventional part—and that is the part that may make it work. State legislatures should pass wrongful discharge statutes that abrogate employment at will in response to federal legislation that exempts discharge claims from coverage under the federal employment discrimination laws in states that enact such laws. Proposals heretofore have been for either individual states or Congress to pass a wrongful discharge statute. Only one state, Montana, has passed such a statute, and that was in 1987.[24] Congress will never impose a general wrongful discharge regime on the states. The federal government is not going to be that intrusive in an area in which the states historically have regulated.[25] However, Congress might induce states to enact such statutes under an approach that is based on cooperative federalism.[26] Congress could permit states that enact wrongful discharge statutes that conform to specified minimum requirements to opt out of the federal employment discrimination statutes' coverage of termination claims.

This Article develops the rationale for such a proposal, sketches the basics of a wrongful discharge statute that would satisfy the requirements for opt out, and addresses some objections that are likely to be raised to this proposal. I do not attempt in this Article to work out all the specifics of the ideal wrongful discharge law. A staggering volume

governmental classified civil service employees. *See, e.g.*, Seymour Moskowitz, *Employment-at-Will and Codes of Ethics: The Professional's Dilemma*, 23 VAL. U. L. REV. 33, 46 (1988). Thus, civil service commissions have experience determining good cause for termination under statutes.

24 Montana Wrongful Discharge from Employment Act of 1987, 1987 MONT. LAWS ch. 641, (codified as amended at MONT. CODE ANN. §§ 39-2-901 to 39-2-914). Beyond states, Puerto Rico and the U.S. Virgin Islands also do not follow employment at will. *See generally* Jorge M. Farinacci-Férnós, *The Search for a Wrongful Dismissal Statute: A Look at Puerto Rico's Act No. 80 as a Potential Starting Point*, 17 EMP. RTS. & EMP. POL'Y J. 125 (2013).

25 This is my opinion, of course. I admit there are some areas in which the federal government runs roughshod over state regulation. The U.S. Supreme Court has permitted mandatory arbitration under the Federal Arbitration Act to displace the effect of every other law, including state laws. For example, the Court held that California law that would have interpreted a mandatory arbitration clause to permit class arbitration was pre-empted by the Federal Arbitration Act in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019). However, it was the Supreme Court, the judicial branch, that found pre-emption in that case. The question of moment here is whether Congress would pass, and the President would sign, a federal wrongful discharge statute that pre-empts states' employment termination law—employment at will. That has not happened, and I am quite certain it will not. One may counter that Congress has passed, and the President has signed, many laws that prohibit terminations for specified reasons—the federal employment discrimination laws and every federal employment law with an anti-retaliation provision in it. All true, but the step Congress has not taken and will not take is enactment of a general wrongful discharge statute. This is discussed further *infra* Section III.A.

26 *See infra* Part II.

of scholarship has been written on that subject.[27] My purpose is to demonstrate that the trade-off under a cooperative federal-state arrangement would be good for U.S. law and society, and it should be palatable to both employers on the one hand and discrimination victims and civil rights advocates on the other, thus creating incentives for states to enact the laws. Part II discusses the twin pillars of U.S. employment law—employment at will and employment discrimination law—and explores how each encroaches upon and weakens the other. Part III sketches a federal-state cooperative approach to "firing" employment at will and discharging termination claims from the federal employment discrimination laws. Finally, Part IV addresses some likely objections to this unconventional proposal.

I. THE TWIN PILLARS OF U.S. EMPLOYMENT LAW AND THEIR RELATIONSHIP: PROBLEMS AND A WAY FORWARD

Employment at will and employment discrimination law are, to my thinking, the twin pillars of U.S. employment law. Employment at will is the principal source of permitting employers to terminate employees with little government regulation, and employment discrimination law is the principal government regulation of termination.[28]

The United States is considered, from an international perspective, to be a hire-and-fire society—a nation with employment termination law almost devoid of government regulation and unlike that of any other developed nation in the world.[29] The default law regarding termination in forty-nine of the fifty states is employment at will, which provides that employers may discharge employees "for a 'good reason,

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[27] In an article published in 2004, Professor Bird observed that since 1985, at least two hundred articles had been published that critiqued some aspect of employment at will. Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 517, 518 (2004) [hereinafter Bird, *Rethinking*]. He observed that no significant changes had occurred and characterized this as "an area of employment law scholarship virtually saturated with research that does not sufficiently impact current doctrine." *Id.* The volume of scholarship on the topic since Professor Bird's 2004 article also has been substantial.

[28] Of course, terminations are not the only adverse actions prohibited by employment discrimination laws. In addition to terminations, most such statutes prohibit other employment actions classified as adverse employment actions. They do not necessarily reach all negative job actions, as some are considered too de minimis to merit protection. *See, e.g.*, Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998).

[29] Thomas C. Kohler, *The Employment Relation and Its Ordering at Century's End: Reflections on Emerging Trends in the United States*, 41 B.C. L. REV. 103, 103–04 (1999). That view of termination law in the United States, however, actually is hyperbolic and lacks nuance. *See infra* note 47.

bad reason, or no reason at all.'"[30] However, there are many reasons under U.S. employment law for which employers cannot terminate employees without being subject to liability. While termination law in the United States[31] is not so simple and unregulated as appears at first blush,[32] it is a remarkable fact that U.S. law does not generally prohibit firing without good cause. Thus, the United States provides less protection than almost all other nations against the most extreme adverse employment action, which ends one of the most important statuses and relationships in American society—one that is central to full participation as a citizen.

Employment is a status and relationship that makes available many of the attributes of U.S. citizenship.[33] Termination ends gainful employment and potentially diminishes future income,[34] jeopardizes

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30 *See, e.g.*, Engquist v. Or. Dep't of Agric., 553 U.S. 591, 606 (2008); Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 519–20 (Tenn. 1884), *overruled on other grounds in* Hutton v. Watters, 179 S.W. 134 (Tenn. 1915). Many sources are cited for this famous or infamous statement of employment at will.

31 Some of the misperception regarding U.S. termination law stems from the fact that, in the U.S. federal system, some of the law is federal legislation and case law thereunder, but a great deal of the termination law is state or local law, and it varies from state to state and even from city to city. *See, e.g.*, Kittner & Kohler, *supra* note 7, at 269.

32 *See generally* Kittner & Kohler, *supra* note 7, *passim*; Estreicher & Hirsch, *supra* note 5, at 355–56.

33 It is not an overstatement to say that termination from employment places in jeopardy many of the key elements of an American's citizenship. *See generally* MATTHEW W. FINKIN, AMERICAN LABOR AND THE LAW: DORMANT, RESURGENT, AND EMERGENT PROBLEMS (Frank Hendrickx & Roger Blanpain eds., 2019). Professor Finkin joins others in arguing that holding a job is a crucial attribute of economic citizenship. *Id.* at 97. It was the idea that employers possess the power to end this crucial attribute of citizenship that prompted Professor Lawrence Blades to propose the tort of abusive discharge in his influential article in 1967. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404 (1967) (discussing the "threat to individual freedom posed by employer power"). Termination ends gainful employment and potentially diminishes future income, jeopardizes standard of living and financial security, and sometimes ruins careers. Termination deprives a person of one job and generally makes it more difficult to get another job. *See, e.g.*, J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. CHI. L. REV. 115, 147 (1998) (stating that "[s]carring occurs when employers rely on labor market signals, such as prior employment history or employment references, to deny a job to someone who could be profitably employed"). For example, consider the issue of discrimination against the unemployed—the view that one must have a job in order to be considered for a job vacancy. *See, e.g.*, Hope Delaney Skibitsky, Note, *Jobless in America: Discrimination Against the Unemployed and the Efficacy of State and Federal Protected Class Legislation*, 66 RUTGERS L. REV. 209 (2013). The Equal Employment Opportunity Commission has conducted hearings on the issue of discrimination against the unemployed. *See* Press Release, *EEOC to Examine Treatment of Unemployed Job Seekers*, EEOC (Feb. 14, 2011), https://www.eeoc.gov/eeoc/newsroom/release/2-14-11a.cfm [https://perma.cc/X5FC-75SU].

34 *See, e.g.*, Estreicher & Hirsch, *supra* note 5, at 346 n.1 (citing sources regarding the estimated lifetime loss of earnings caused by termination).

standard of living and financial security, and sometimes ruins careers. The financial benefits of employment in the United States are not limited to salary or wages. Health care coverage and retirement plans often are linked to one's job; thus, a person without a steady job may face difficulties in obtaining and maintaining adequate health insurance,[35] and/or an adequately funded retirement savings plan.[36] Because of employees' dependence on employers for such benefits, "the risk of losing a job is significant over and above the loss of a paycheck."[37] Termination deprives a person of one job and generally makes it more difficult to get another job.[38] Emphasizing what is at stake in termination of employment, the New Jersey Supreme Court explained job security as follows: "[T]he assurance that one's livelihood, one's family's future, will not be destroyed arbitrarily; it can be cut off only 'for good cause,' fairly determined."[39] This extensive degree of financial dependence of employees on their employers does not exist in nations that have free-standing safety nets and coverage plans.[40]

Beyond the multi-faceted financial difficulties created by job loss, discharge from employment can damage the physical and mental health of the person who loses a job.[41] Indeed, life in the United States has

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35 *See generally* Richard L. Kaplan, *Who's Afraid of Personal Responsibility? Health Savings Accounts and the Future of American Health Care*, 36 MCGEORGE L. REV. 535, 540 (2005); Michael J. Zimmer, *Inequality, Individualized Risk, and Insecurity*, 2013 WIS. L. REV. 1, 20–24 (2013).

36 *See* Zimmer, *supra* note 35, at 21–24.

37 *Id.* at 24.

38 It is common practice for prospective employers to ask for employment history on applications and to ask applicants to explain reasons for separation from prior jobs. On the phenomenon of "scarring," see Verkerke, *supra* note 33, at 147 ("Scarring occurs when employers rely on labor market signals, such as prior employment history or employment references, to deny a job to someone who could be profitably employed."). For example, consider the issue of discrimination against the unemployed—the view that one must have a job in order to be considered for a job vacancy. *See, e.g.*, Skibitsky, *supra* note 33. The Equal Employment Opportunity Commission has conducted hearings on the issue of discrimination against the unemployed. *See* Press Release, *EEOC to Examine Treatment of Unemployed Job Seekers*, *supra* note 33.

39 Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1266 (N.J. 1985), *modified by* 499 A.2d 515 (N.J. 1985).

40 *See, e.g.*, Brendan S. Maher & Peter K. Stris, *ERISA & Uncertainty*, 88 WASH. U. L. REV. 433, 434 (2010) (stating that "[m]ore than other developed nations, the United States relies on *private* promises to assure health and retirement security. These promises involve 'employee benefits'" (emphasis in original)).

41 *See, e.g.*, Kenneth A. Sprang, *After-Acquired Evidence: Tonic for an Employer's Cognitive Dissonance*, 60 MO. L. REV. 89, 134, n.187 (1995). A pithy quote makes the point about the devastating effects of being fired: "It's a recession when your neighbor loses his job; it's a depression when you lose yours." The original source of the quote is a bit murky; it has been called an economists' joke and attributed to President Harry Truman. Harry S. Truman, in

become so "work-centered" that one's dignity and sense of worth are dependent upon one's having a job because many Americans identify so closely with their jobs.[42] Additionally, termination can sever important relationships with coworkers, imposing a significant relational harm on fired workers.[43]

In view of the various losses that fired workers suffer, it is not an overstatement to say that termination from employment places in jeopardy many of the key elements of an American's citizenship,[44] and seen in this way, terminations can injure society at large.[45]

In short, almost all the academic criticisms of employment at will share the overarching concern that "the at-will rule essentially gives employers an unchecked right to impose devastating economic and personal harms on undeserving individuals."[46] Termination of employment, then, would seem to be a matter of no small moment to a nation with a representative democracy form of government that depends upon the engagement of its citizens. Yet, employment at will is

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Observer, April 13, 1958; Richard A. Posner, *When Does a Depression or a Recession End?*, ATLANTIC (Aug. 1, 2009), https://www.theatlantic.com/business/archive/2009/08/when-does-a-depression-or-a-recession-end/22544 [https://perma.cc/WTM7-6BDV]. Although the quote often is attributed to President Ronald Reagan, he actually borrowed and modified the quote to make a different point to his political advantage: "A recession is when your neighbor loses his job. A depression is when you lose yours. And recovery is when Jimmy Carter loses his." Jessica Ramirez, *Economy: Are We in a Recession or Depression?*, NEWSWEEK (Oct. 15, 2008, 8:00 PM), https://www.newsweek.com/economy-are-we-recession-or-depression-91637 [https://perma.cc/47ZL-5DHE].

42 *See, e.g.*, FINKIN, *supra* note 33, at 97; PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 49 (1990) (positing that a person's job "is valuable both because it generates the earnings which probably constitute the major financial support for the worker and his family, and because work is so important to the personal identity and sense of self-worth of the employee"); Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH L. REV. 719, 719 (1991) (observing that Americans are often said to "describe themselves in terms of the jobs they hold"); Michael S. Knoll, *Perchance to Dream: The Global Economy and the American Dream*, 66 S. CAL. L. REV. 1599, 1608 (1993) ("For many Americans much of their identity is tied to their jobs and to their ability to provide for their families.").

43 *See* Naomi Schoenbaum, *Towards a Law of Coworkers*, 68 ALA. L. REV. 605, 641–43 (2017).

44 *See* FINKIN, *supra* note 33, at 3–15.

45 Professor Blades, in proposing the tort of abusive discharge, noted the constitutional limitations imposed on governmental employers, such as restrictions on firing employees for exercising their rights under the First Amendment. *See* Blades, *supra* note 33, at 1431–32. Professor Frank Cavico advocates for the tort of wrongful discharge in violation of public policy, arguing that the public policy rationale is subordinate to the goal of reining in the "lawless" doctrine of employment at will "which sanctions conduct inimical to societal welfare." Frank J. Cavico, *Employment at Will and Public Policy*, 25 AKRON L. REV. 497, 504 (1992).

46 Daniel J. Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, 27 BERKELEY J. EMPL. & LAB. L. 111, 123 (2006).

the default termination law of the United States and of no other nation with a developed labor and employment law regime.[47]

In contrast to U.S. termination law, the body of employment discrimination law is one of the great employee-protection and civil-rights achievements of the nation.[48] The employment discrimination law of the United States, beginning with the enactment of Title VII of the Civil Rights Act of 1964,[49] was groundbreaking and established a model emulated by the European Union and many of its members,

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47 *See, e.g.*, Estreicher & Hirsch, *supra* note 5, at 347 & 348 n.7 (stating that the at-will rule places the United States "in a singular position among most other developed countries" and citing numerous other sources); *see also* Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C .L. REV. 351, 404 (2002) [hereinafter, Befort, *Millennium*] (stating that "[t]he United States stands virtually alone among industrialized nations in failing to provide general statutory protection against unjust dismissals"); Peck, *supra* note 42, at 727 & n.48. While this statement is accurate, a more nuanced examination reveals that some nations have laws that, while not fully at-will, approach the U.S. law. Israeli termination law is characterized as at-will. *See, e.g.*, Guy Davidov, *The Principle of Proportionality in Labor Law and Its Impact on Precarious Workers*, 34 COMPAR. LAB. L. & POL'Y J. 63, 73 (2012). In Israeli law, however, the judicial recognition of good faith duties regarding procedures makes it distinct from employment at will in the United States. *See* Sharon Rabin Margalioth, *Good Faith and Fair Dealing in the Individual Employment Relationship: Regulating Individual Employment Contracts Through Good Faith Duties*, 32 COMPAR. LAB. L. & POL'Y J 663 (2011); *see also* II.B WILLIAM L. KELLER & TIMOTHY J. DARBY, ABA SEC. OF LAB. & EMP. L., INT'L LAB. & EMP. LAWS, 65-32 (4th ed. 2013). Canadian law requires employers that terminate without good cause to provide a notice period or severance pay in lieu of notice. *See, e.g.*, Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1 (2010). Thus, employers in Canada may fire without good cause, but they may not do it without following any legal prerequisites. Of the twelve nations surveyed by Estreicher and Hirsch, they note that the United States and Canada are the only nations lacking national unjust dismissal legislation. Estreicher & Hirsch, *supra* note 5, at 445.

The International Labour Organization, of which the United States is a member, along with 186 other nations, has labor standards on termination that prohibit discharge without "a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service" and that require procedural prerequisites. *See* Int'l Lab. Org. [ILO], *Termination of Employment Convention*, C158 (June 2, 1982), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158 [https://perma.cc/6VYZ-WNZ7]. Convention No. 158 is supplemented by Recommendation No. 166, Termination of Employment. *See* Int'l Lab. Org. [ILO], *Termination of Employment Recommendation*, R166 (June 2, 1982), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R166 [https://perma.cc/X86C-WTJC].

48 *See, e.g.*, Kittner & Kohler, *supra* note 7, at 276 (referring to the enactment of the Civil Rights Act of 1964 as a "watershed event[]").

49 Title VII was enacted in 1964, but its effective date was July 2, 1965. Civil Rights Act of 1964, Pub. L. No. 88-352, § 716, 78 Stat. 241, 266 (1964) (stating that the effective date shall be one year after the date of enactment).

Canada, and other nations.[50] Moreover, the U.S. courts' interpretations of the discrimination laws have been influential on the tribunals of other nations.[51] Indeed, the laws of many nations have been influenced by U.S. employment discrimination law, particularly with respect to race and sex discrimination.[52] Despite its initial innovation, however, U.S. employment discrimination law has become languid and not kept pace with the developments in some other nations.[53]

An interesting relationship has developed over the decades between these two pillars of U.S. employment law—employment at will and employment discrimination law. While both are predominant and influential overarching concepts in U.S. employment law,[54] each also significantly weakens the other. First, employment discrimination law has emerged as the most significant and vexatious (to employers) restriction on the employer's prerogative under employment at will.[55] Termination is one of the adverse actions that employers cannot take for discriminatory reasons.[56] Ironically, then, despite employment at

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50 *See, e.g.*, Gráinne de Búrca, *The Trajectories of European and American Antidiscrimination Law*, 60 AM. J. COMPAR. L. 1, 4–5 & 11–13 (2012); Gerard Quinn & Eilionóir Flynn, *Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability*, 60 AM. J. COMPAR. L. 23 (2012).

51 *See* Kittner & Kohler, *supra* note 7, at 276 (noting that "tribunals of other nations frequently discuss United States Supreme Court opinions interpreting [the Civil Rights Act of 1964]").

52 *See, e.g.*, Susan Bisom-Rapp, *Exceeding Our Boundaries: Transnational Employment Law Practice and the Export of American Lawyering Styles to the Global Worksite*, 25 COMPAR. LAB. L. & POL'Y J. 257, 310–13 (2004).

53 Búrca, *supra* note 50, at 3 (positing that "[t]he socially transformative energy of the U.S. civil rights movement of the 1960s seems to have been drained and the powerful corpus of constitutional and federal antidiscrimination law that it brought with it has been significantly weakened following decades of political and legal backlash"). To take one example, the United Kingdom undertook a comprehensive revision and consolidation of its various discrimination laws in the Equality Act of 2010. *Equality Act FAQs*, EQUAL. AND HUM. RTS. COMM'N, https://www.equalityhumanrights.com/en/equality-act/equality-act-faqs [https://perma.cc/ZV86-LA29].

54 While it is obvious that employment discrimination law is a large and complex set of tenets and theories, employment at will may appear to be a single principle; nevertheless, it is multi-faceted. As will be discussed below, there are several tenets associated with employment at will. *See infra* Section I.A.1. Moreover, employment at will exerts influence over much of the contract and tort law applicable to employment termination. *See, e.g.*, William R. Corbett, "*You're Fired!": The Common Law Should Respond with the Refashioned Tort of Abusive Discharge*, 41 BERKELEY J. EMP. & LAB. L. 63 (2020).

55 Kittner & Kohler, *supra* note 7, at 270 (explaining that federal and state employment discrimination law has enormous influence on nearly every aspect of employment); Fischl, *supra* note 1, at 200–01. Professor Fischl has explored the important interplay between employment at will and employment discrimination law. He states that by the late 1990s thousands of discrimination cases challenged employers' termination decisions and "[i]ndividual discrimination suits . . . focus overwhelmingly on discharge." *Id.* at 200.

56 Other adverse actions also are prohibited for discriminatory reasons. *See supra* note 28.

will being the "law on the books," U.S. employers generally function as though there is a wrongful discharge law that requires a good cause defense for terminations.[57] Thus, employment at will has less real value to employers than appears from a mere statement of the law due in large part to the employment discrimination laws.[58]

A second aspect of the relationship between these two foundations of U.S. employment law is that there are numerous ways in which employment at will weakens employment discrimination law.[59] Although this interaction may be less obvious than the encroachment of employment discrimination law on employment at will, it is demonstrable and well known to students of employment discrimination law. Generally, plaintiffs find it quite difficult to prevail on employment discrimination claims. Most charges filed with the Equal Employment Opportunity Commission (EEOC) do not result in a favorable outcome for the claimant.[60] Furthermore, plaintiffs in employment discrimination lawsuits have a notoriously low win rate in

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57 Kittner & Kohler, *supra* note 7, at 327 (positing that "[t]his produces a situation in current personnel departments and in court, which is comparable to the burden of proof demanded of employers by German law").

An additional consideration for employers in termination of employees is unemployment insurance and benefits. *See generally* Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335 (2001). I thank Professor Sandra Sperino for suggesting consideration of this point. Because terminations that result in benefits payments negatively affect the experience rating of employers, increasing employers' tax rates, employers should be incentivized not to lay off workers. *Id.* at 344–45 (stating that "[s]tates use a number of different techniques for experience rating, but the common goal is to tax each employer in a manner proportionate to the costs it imposes on the insurance pool"). The relationship between employment termination and unemployment insurance and benefits is complex, and a complete exploration of that topic is beyond the scope of this Article. Several points, however, are noteworthy. First, it is not clear how effective unemployment insurance is as a disincentive to employers terminating employees, as the cost of experience rating and higher rates can be forward shifted to consumers and backward shifted to employees. *See id.* at 378–83. Second, unemployment insurance does not provide adequate income security for most terminated employees. *See, e.g.*, Gary Minda & Katie R. Raab, *Time for an Unjust Dismissal Statute in New York*, 54 BROOK. L. REV. 1137, 1180 (1989). Third, partial income replacement for a period of time does not address all of the harms caused by employment termination. *See supra* notes 33–47 and accompanying text. Finally, it is arguable that employment at will places unnecessary strain on the unemployment insurance system. *See, e.g.*, Todd H. Girshon, Comment, *Wrongful Discharge Reform in the United States: International and Domestic Perspectives on the Model Employment Termination Act*, 6 EMORY INT'L L. REV. 635, 704 (1992).

Enactment of state wrongful discharge statutes likely would make adjustment of state unemployment insurance laws both practicable and advisable. The scope and specifics of those revisions are beyond the scope of this Article.

58 *See infra* Section I.A.3.

59 *See infra* Section I.B.2; *see, e.g.*, Fischl, *supra* note 1, at 201.

60 *See* Deborah L. Rhode, *Litigating Discrimination: Lessons from the Front Lines*, 20 J.L. & POL'Y 325, 326 (2012).

the courts.[61] This fact comes as no surprise in light of the substantive law which, on the whole, is not particularly favorable to plaintiffs.[62] Although it is by no means the only thing,[63] one matter that has caused the U.S. Supreme Court and the lower courts to interpret the discrimination statutes so grudgingly toward plaintiffs is the employment-at-will doctrine. Solicitous of preserving as much of the employer's prerogative under employment at will as possible, courts have interpreted the discrimination statutes in ways that make them less effective for discrimination plaintiffs. The examples are numerous, and some are discussed below.[64]

Thus, it is an interesting state of the law that each of these pillars of U.S. employment law is the most significant fissure in the other. Employment at will is less valuable and useful for employers because of employment discrimination law. Conversely, employment discrimination law is less valuable and useful for employees who believe they are victims of invidious discrimination because of the influence of employment at will on employment discrimination doctrine.

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61 *See, e.g.*, Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001); Julie C. Suk, *Race Without Cards*, 5 STAN. J. C.R. & C.L. 111, 119 n.45 (2009).

62 This is true generally of employment discrimination law. Consider, for example, that Congress enacted the Civil Rights Act of 1991, in part, to legislatively change the law articulated in several Supreme Court opinions, all of which were unfavorable to plaintiffs. *See* H.R. REP. NO. 102-40, at 2–4 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 694, 694–96. Of course, this varies depending on the subset of discrimination law. The law under the Age Discrimination Act has been particularly bad for plaintiffs. *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009) (holding that the "motivating factor" standard codified by the Civil Rights Act of 1991 does not apply to the ADEA, and plaintiffs must establish but-for causation); Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 584 (2004) (holding that reverse age discrimination claims are not actionable under the ADEA). The court-developed doctrine was so unfavorable for plaintiffs under the Americans with Disabilities Act that Congress enacted the Americans with Disabilities Act Amendments Act of 2008 to change court interpretations of the ADA. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553–54 (codified as amended at 42 U.S.C. § 12101).

63 Professor Selmi suggests a number of reasons for such judicial interpretations, including the misperception fueled by conservative interest group propaganda that depicts discrimination cases as easy to win. *See* Selmi, *supra* note 61, at 556. Additionally, he posits that a number of biases of the courts, such as a concern with the potential overbreadth of the ADA and the idea that many race discrimination cases lack merit, cause the courts to develop law that is unfavorable to the plaintiffs. *Id.* at 556–57. To give a specific example, Professor Deborah Calloway opined that the Supreme Court interpreted the *McDonell Douglas Corp. v. Green*, 411 U.S. 792 (1973) pretext analysis as it did in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), because a majority of the Court did not believe the basic assumption on which the prima facie case is based—that "absent explanation, adverse treatment of statutorily protected groups is more likely than not the result of discrimination." Deborah A. Calloway, St. Mary's Honor Center v. Hicks: *Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 997–98 (1994).

64 *See infra* Section I.B.2.

A. *Fire at Will*

1. Origins and Proliferation

The genesis of employment at will in the United States has been fertile ground for discussion and debate among scholars. Rather than going into extensive detail in attempting to clarify the origins of the doctrine, I offer a few observations. Poor, beleaguered Horace Gay Wood, a lawyer and treatise writer, who has become the Aaron Burr of employment law, being known for one thing,[65] bears the brunt of criticism from employment-at-will detractors for declaring employment at will to be the law of the land in his treatise on master and servant in 1877 and citing authority that did not clearly support the rule.[66] While Mr. Wood undeniably wrote in his treatise that employment at will was the American rule, blaming (or crediting) that statement as the genesis of employment at will goes too far.[67] It is certainly true that Wood's treatise was cited as authority for the proposition,[68] but it is hyperbole to brand it the origin of the rule.[69] Beyond its origin, Professor Andrew Morriss has chronicled the progression of adoption of employment at will by the states.[70]

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65 *See, e.g.*, Theodore J. St. Antoine, *You're Fired!*, 10 HUM. RTS. 32, 33 (1982) (describing the at-will rule as having "spr[u]ng full-blown . . . from [Horace Gay Wood's] busy and perhaps careless pen").

66 For scholars criticizing the work of Wood, see for example, Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 485 (1976) [hereinafter Summers, *Individual Protection*]; J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 (1974). There also are defenses of Wood, such as Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551, 554 (1990). Wood's statement of the rule was as follows:

> With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . [I]t is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.

H. G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272 (1877).

67 *See, e.g.*, Peck, *supra* note 42, at 722.

68 *See, e.g.*, Clyde W. Summers, *The Rights of Individual Workers: The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1084 (1984).

69 *See, e.g.*, Peck, *supra* note 42, at 722. Professor Peck points out that the New York "Field Code" and other sources stated the rule of employment at will. *Id.*

70 *See* Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679 (1994). Professor Richard Bales, considering the state adoption progression described by Morriss, opined that,

Regardless of the origin of the doctrine or the reasons for its adoption in every U.S. state, employment at will is now the default rule in forty-nine states, with only Montana diverging and enacting a state wrongful discharge law in 1987.[71] Puerto Rico and the U.S Virgin Islands also do not follow employment at will.[72] Furthermore, the U.S. Supreme Court has stated that federal government employment is at will in the absence of contrary legislation,[73] although many positions in public employment, both federal and state, do have procedural prerequisites and/or good cause protection.[74]

2. Statutory Abrogation: Proposals and a Record of Futility

Employment at will is a foundational tenet of U.S. employment law and has prevailed in all but one state for over a century. It is also the most reviled principle among employment law scholars. Professor Clyde Summers sardonically referred to it as the "divine right of employers."[75] The academic commentary calling for its abrogation is voluminous.[76] Employment at will does, however, have its defenders, even among academics.[77] Furthermore, courts sometimes defend

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> once the first underindustrialized states adopted the rule, other underindustrialized states would have been compelled to follow suit to remain economically competitive with the early adopters. Industrialized states would then have been compelled to adopt the rule, as well, to maintain their competitive advantage in the labor market. The adoption of the at-will rule by a handful of underindustrialized states, therefore, precipitated an interjurisdictional race to the bottom . . . .

Richard A. Bales, *Explaining the Spread of At-Will Employment as an Interjurisdictional Race to the Bottom of Employment Standards*, 75 TENN. L. REV. 453, 455 (2008).

71 MONT. CODE ANN. §§ 39-2-901 to 39-2-914 (2021).

72 *See generally* Farinacci-Férnós *supra* note 24.

73 Engquist v. Or. Dep't of Agric., 553 U.S. 591, 606 (2008).

74 *See supra* note 23. *See generally* Joseph E. Slater, *The "American Rule" That Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53, 83 (2007).

75 Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000) [hereinafter Summers, *Divine Right*].

76 *See, e.g.*, Summers, *Individual Protection*, *supra* note 66, at 485; Arnow-Richman, *supra* note 9, at 1522.

77 The most cited and discussed academic defense of employment at will is Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984). *See* Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 409 (1986) (calling Epstein "the most prominent academic defender of economic libertarianism"). Professor Epstein's defense of the doctrine is based principally on a libertarian freedom-of-contract rationale with some law-and-economics rationale blended in. Epstein argues, essentially, that the freedom of contract afforded by the at-will rule is mutually beneficial to employers and employees; "the employer is the full owner of his capital and the

employment at will in terms suggesting that the nation's free-market economy would be jeopardized without it.[78] One may question whether employment at will is so crucial to a robustly performing market-based economy. The United States is the only nation that adheres to at-will employment,[79] and there are numerous nations that have generally good economic performance without employment at will, such as Germany.[80] Having noted the prodigious debate, I will put aside for the moment the question of whether employment at will should be statutorily abrogated and examine the record of futile attempts to accomplish that feat.

Legion are the proposals to bring the United States into conformity with the rest of the world by enacting statutes that require good or just cause for termination.[81] As one commentator expressed it, wrongful discharge statutes have been viewed at various times by commentators as the "*deus ex machina* of employment law."[82] Regardless of the merits of that position, no other state is going to join Montana in enacting a wrongful discharge statute in the foreseeable future.[83] I will support that prediction with evidence from the historical record and brief consideration of why that record is as it is. Moreover, the limited experience in the United States with states that have enacted statutory schemes affecting employment at will demonstrates that the statutes do not clearly give employees more protection or redress than the common law schemes that they replace.

Most proposals to statutorily displace employment at will have been proposals for states to enact laws, such as the Uniform Law

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employee is the full owner of his labor, the two are free to exchange on whatever terms and conditions they see fit." Epstein, *supra*, at 955. As part of Epstein's broader libertarian and law-and-economics agenda, generally government regulation should be limited and market forces should be left in play.

78 Bammert v. Don's Super Valu, Inc., 646 N.W.2d 365, 369 (Wis. 2002) (stating that employment at will "is central to the free market economy and 'serves the interests of employees as well as employers' by maximizing the freedom of both").

79 *See supra* note 47 and accompanying text.

80 *See, e.g.*, Kittner & Kohler, *supra* note 7. However, as comparative law scholars, such as Otto Kahn-Freund, have cautioned, one must be cautious in asserting that law which functions well in one society can be transplanted to another society where it also will function well. *See, e.g.*, Christopher J. Whelan, *Labor Law and Comparative Law*, 63 TEX. L. REV. 1425, 1433–37 (1985).

81 *See, e.g.*, Bird, *Rethinking*, *supra* note 27, at 517–18 (describing the prodigious scholarship on employment at will).

82 Parker, *supra* note 8, at 370.

83 *See* Bird, *Rethinking*, *supra* note 27, at 523 (positing that no change will occur because it "would require an immense transformation of well-settled statutory and common law").

Commission's Model Employment Termination Act.[84] Some, however, have been proposals for Congress to abrogate employment at will by federal legislation.[85] It is almost a certainty that any legislative change in employment at will would have to occur at the state level. Employment at will, as followed by forty-nine states, is not federal law; it is state law. Despite ambitious proposals for Congress to pass federal legislation abrogating employment at will, that is not going to happen. This is not a matter of Congressional authority, but Congressional will and restraint. As a matter of respect for federalism, Congress is not going to invade that area of state regulation.[86]

Turning then to the states, only Montana, has enacted a statutory scheme abrogating employment at will, and that occurred in 1987.[87] It is worth noting about the Montana experience both the conditions that prompted the adoption of the statute and the effect that it has had on the law of termination. Employers and their insurers were the principal proponents who lobbied the state legislature to enact the legislation, and they did so because employers were losing termination cases under common law theories, principally a "double-barreled tort" theory of wrongful discharge in violation of public policy and breach of an implied covenant of good faith, and facing large and unpredictable awards.[88]

We are decades past the vibrant period of the 1970s and 1980s when courts throughout the nation aggressively engaged in the development of common law contract and tort theories that restricted employment at will.[89] During that time period, numerous state courts recognized one or more of the following common law theories that

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84 *See, e.g.*, Robert C. Bird, *Do Wrongful-Discharge Laws Impair Firm Performance*?, 52 J.L. & ECON. 197, 197 n.1 (2009).

85 *See* sources cited *infra* note *230*.

86 *See* Bird, *Rethinking*, *supra* note 27, at 524 (stating that "[p]erhaps only sweeping congressional action, an extremely unlikely possibility given the long entrenchment of employment at will, could enact just cause reform").

87 MONT. CODE ANN. §§ 39-2-901 to 39-2-914 (2021).

88 *See, e.g.*, Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631, 664–68 (1988); Marc Jarsulic, *Protecting Workers from Wrongful Discharge: Montana's Experience With Tort and Statutory Regimes*, 3 EMP. RTS. & EMP. POL'Y J. 105 (1999).

89 *See, e.g.*, Bird, *Rethinking*, *supra* note 27, at 521–22; Peck, *supra* note 42, at 725–34; Cavico, *supra* note 45, at 497 (describing the "erosion of the conventional employment at will doctrine and the concomitant creation of statutory and common law exceptions to its dictate"); Leonard, *supra* note 88, at 647 ("Over the past two decades judicial development of common-law exceptions to the presumption of at will employment has been extraordinary . . . ."); Theodore J. St. Antoine, *ADR in Labor and Employment Law During the Past Quarter Century*, 25 A.B.A. J. LAB. & EMP. L. 411, 412 (2010) (stating that "beginning in 1980, came a flood of court decisions that ultimately reached every state except Florida, Louisiana, and Rhode Island and imposed at least some limitations on the absolutist reign of at-will employment").

narrowed the scope and impact of employment at will: implied contract, contracts based on handbooks and policy manuals, breach of the covenant of good faith and fair dealing, and wrongful discharge in violation of public policy.[90] So vigorous were the courts in some states in creatively developing the common law at that time that it has been described as an attack or assault on employment at will.[91] So significant were the common law developments that, when combined with statutory efforts such as the Montana Wrongful Discharge Act and the ultimately moribund Model Employment Termination Act, several commentators predicted the imminent demise of employment at will.[92] From today's perspective, those predictions appear recklessly bold, as it

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90 Timothy J. Coley, *Contracts, Custom, and the Common Law: Towards a Renewed Prominence for Contract Law in American Wrongful Discharge Jurisprudence*, 24 BYU J. PUB. L. 193, 195–96 (2010); David J. Walsh & Joshua L. Schwarz, *State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales*, 33 AM. BUS. L.J. 645, 646 (1996).

91 Indeed, Walter Olson characterized Professor Lawrence Blades's important article proposing the tort of abusive discharge as having launched an academic assault on employment at will. Walter Olson, *The Trouble with Employment Law*, 8 KAN. J.L. & PUB. POL'Y 32, 32 (1999) ("Lawrence Blades . . . kicked off the modern revolution in state employment law with his article in the *Columbia Law Review* in 1967 launching the attack on employment at will. The resulting intellectual insurgency, which soon spread to pretty much every law faculty, was to transform American employment law quite dramatically.").

It is difficult in looking back on that period to discern what confluence of events, conditions, and forces caused such a creative thrust by the courts. Some have posited that the courts acted because collective bargaining had collapsed as a regime for regulating the American workplace. *See, e.g.*, Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 459–60 (1992) [hereinafter Summers, *Effective Remedies*]. However, the decline in union representation and collective bargaining had been occurring for years before. *See, e.g.*, Robert J. Flanagan, *NLRA Litigation and Union Representations*, 38 STAN. L. REV. 957, 981–82 (1986). However, it is plausible that the Wagner Act regime had reached a level of demise by 1980 that prompted the courts to act. In 1980, union density was down to about eighteen percent in the overall workforce (public and private). *Id.* at 981. It also is possible that the flurry of legislative enactments, beginning with the Equal Pay Act in 1963 and Title VII in 1964 and continuing for over a couple of decades, emboldened the courts. *See generally* Summers, *Effective Remedies*, *supra*, at 458 ("The trend did not begin with the employment at will cases but can be traced back at least to the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964 (Title VII), the Pregnancy Discrimination Act of 1978 (PDA) and the Age Discrimination in Employment Act of 1967 (ADEA). Other acts building upon this statutory trend included the Occupational Safety and Health Act of 1970 (OSH), and the Employment Retirement Income Security Act of 1974 (ERISA)."). *See also* MARK A. ROTHSTEIN, CHARLES B. CRAVER, ELINOR P. SHROEDER, ELAINE W. SHOBEN, & L. CAMILLE HÉBERT, EMPLOYMENT LAW 728 (5th ed. 2015) (stating that enactment of civil rights laws in the 1960s "gave further support to the concept that unchallenged employer prerogative in hiring and firing decisions had to give way to other social interests").

92 Consider, for example, the following prediction from 2000: "The future of employment-at-will, then, is that it has no future." Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 687 (2000); *see also* Cavico, *supra* note 45, at 497 (explaining that the growing momentum of court development of the public policy tort exception "point[s] to the eventual demise of the employment at will doctrine").

has been clear for a couple of decades now that the common law "assault" on employment at will subsided around 1990.[93] Employment at will is stronger now than it was thirty years ago,[94] as many of the common law developments have been diluted or overturned.[95] For all the common law developments of the 1970s and 1980s, the decades after that were marked by substantial retrenchment.[96] Now it is hard to imagine circumstances that would prompt the powerful political actors to advocate for enactment of such a statute in any state today.[97] Moreover, advocates of such laws should consider that the Montana experience has not, by some accounts, produced better recoveries for plaintiff employees.[98] Although the only state general wrongful

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93 *See, e.g.*, Cynthia L. Estlund, *The Changing Workplace: Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1688 (1996) [hereinafter Estlund, *The Changing Workplace*] ("The argument that wrongful discharge law has eviscerated employment at will is simply overstated."); Donald C. Dowling, Jr., *The Practice of International Labor & Employment Law: Escort Your Labor/Employment Clients into the Global Millennium*, 17 LAB. LAW. 1, 13–14 (2001) ("U.S. employment lawyers say that America's employment at will has eroded away, but theirs is a historical, not an international perspective. By comparison to other countries, employment at will is alive and well in the U.S.").

94 *Cf.* Libenson, *supra* note 46, at 127 (stating that, despite the exceptions, "a powerful ghost still looms").

95 *See, e.g.*, Rowe v. Montgomery Ward & Co., 473 N.W.2d 268, 273–75 (Mich. 1991) (distinguishing Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880 (Mich. 1980)); Guz v. Bechtel Nat'l, Inc. 8 P.3d 1089 (Cal. 2000) (limiting the effect of Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917 (Cal. App. Dep't Super. Ct. 1981)); Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671, 680 (1996) ("Despite the many calls for reform, the at-will rule has retained its vitality and, if anything, has been regaining strength in recent years."); Summers, *Divine Right*, *supra* note 75, at 85 ("[T]he trend in the last ten years has been toward more employer dominance."); *see also* Parker, *supra* note 8, at 350–51 (discussing the scrutiny of employment at will during the 1970s and 1980s, but concluding that courts have not developed coherent tort and contract law regarding the doctrine).

96 However, it also is true that many of the common law theories, such as wrongful discharge in violation of public policy, are still recognized in most states, even if not applied with the same employee-friendly fervor of that period. Perhaps the most significant and lasting erosion of that period has been the enactment of many whistleblower statutes at both the federal and state level. *See, e.g.*, Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99 (2000).

97 Alan B. Krueger, *The Evolution of Unjust-Dismissal Legislation in the United States*, 44 INDUS. & LAB. RELS. REV. 644, 659 (1991) (stating that "the prospects for passage of unjust-dismissal legislation are linked to the erosion of the common law employment-at-will doctrine"); Parker, *supra* note 8, at 373; Blades, *supra* note 33, at 1434 ("Suffice it to say that general statutory limitations on the employer's right of discharge are unlikely to be enacted so long as there is no strong lobby to promote them.").

98 *See, e.g.*, Parker, *supra* note 8, at 371–72 (stating that "[t]he Montana statute has essentially gutted fundamental common law protections and theories of recovery"). Although the Montana Wrongful Discharge from Employment Act is the only state wrongful discharge law enacted, other state laws have been enacted that affected recovery under common law theories. Consider the euphemistically named Arizona Employment Protection Act. ARIZ. REV. STAT. § 23-1501

discharge law in the United States may have, on balance, produced a better regime than the one it replaced,[99] the experience also suggests a need for ensuring certain protections in a state statute that takes from employees other rights, such as the proposal in this Article.

The Uniform Law Commission's Model Employment Termination Act (META), which was promulgated in 1991, has not been adopted by a single state.[100] One commentator noted that between 1980 and 1992, bills that were variants of the META were introduced in forty-two state legislatures.[101] Professor Befort observes that the fundamental impediment to adoption of the META is that it does not offer employers "an adequate trade-off for their loss of the at-will prerogative."[102]

In short, no other state in the nation is going to abrogate employment at will unless conditions arise similar to those in Montana in 1987 to cause businesses to lobby a state legislature for such a change. Employees do not have an organized and powerful lobby to promote such legislation.[103] The conditions that existed in Montana seem unlikely to emerge in the current legal landscape given the retrenchment of state courts on the common law contract and tort theories impinging on employment at will. Moreover, courts adjudicate fewer discharge and other employment claims than in the past because of the prevalent use of mandatory arbitration agreements by employers and the Supreme Court's enforcement of such clauses in the face of any

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(2021). *See generally* Marzetta Jones, Note, *The 1996 Arizona Employment Protection Act: A Return to the Employment-At-Will Doctrine*, 39 ARIZ. L. REV. 1139 (1997) (describing the act as the Legislature's response to the trend away from employment-at-will that began in the mid-1980s). The Arizona Act was enacted by the state legislature, in part, to contain the state supreme court's expansion of the WDVPP tort after the court decided *Wagenseller v. Scottsdale Memorial Hospital*, 710 P.2d 1025 (Ariz. 1985). The Arizona Act, despite its name, appears to have done more to benefit employers than employees, although it is unclear whether it was very detrimental to employees. S*ee generally* Steven E. Abraham, *The Arizona Employment Protection Act: Another "Wrongful Discharge Statute" That Benefits Employers?*, 12 EMP. RTS. & EMP. POL'Y J. 105 (2008); Jenny Clevenger, Comment, *Arizona's Employment Protection Act: Drawing a Line in the Sand Between the Court and the Legislature*, 29 ARIZ. ST. L.J. 605, 605 (1997) (stating that the act "effected dramatic changes . . . halting, and, in some instances, reversing the expansion of employee rights in Arizona and severely limiting recovery in tort where those rights are violated").

99 *See* Donald C. Robinson, *The First Decade of Judicial Interpretation of the Montana Wrongful Discharge from Employment Act (WDEA)*, 57 MONT. L. REV. 375, 422 (1996) (concluding that "the Montana WDEA has in fact resulted in a workable scheme that is understandable and predictable").

100 *See* Befort, *Millennium*, *supra* note 47, at 426.

101 *See* Jarsulic, *supra* note 88, at 105.

102 Befort, *Millennium, supra* note 47, at 427; *see also* Bird, *supra* note 86, at 197 n.1; Libenson *supra* note, 46, at 113–14.

103 *See supra* note 97.

challenge.[104] In short, the conditions conducive to a state's enacting wrongful discharge legislation are unlikely to arise again as they did in the 1980s in Montana.

3. Weakened by Employment Discrimination Law

I devote little argument in this Article to persuading that employers should be deprived of their "divine right," as Professor Summers put it, of terminating employees without good cause. The case for why the United States should not cling to a principle followed by no other nation with a developed system of employment law has been made many times over.[105] Instead, I add to those arguments the point that employment at will has become so riddled with exceptions that it is a divine right of far less earthly value than is often assumed. Employers in the United States do not function in making termination decisions as if employment at will is the law, although employment at will remains a powerful tool for employers in litigation.[106] Employment discrimination law was the first major limitation of employment at will, and it led to many others.[107]

Given that employment at will is the default termination law in forty-nine states, it should be expected that employers in those states should be able to fire at-will employees without giving any thought to stating reasons for the terminations or any concern to the prospects for litigation. But that is not the way employment law in the United States works as a practical matter; reasonably risk-averse employers cannot function in that way. The employment discrimination laws are the most significant limitation on employer prerogative to terminate.[108]

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104 *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

105 *See supra* text accompanying notes 29–47.

106 I thank Professor Sullivan for pointing out the importance of making the distinction between the value of employment at will to employers ex ante and ex post in relation to termination decisions.

107 Befort, *Millennium*, *supra* note 47, at 391–92.

108 *See, e.g.*, Kittner & Kohler, *supra* note 7, at 266–67; Fabio Pantano, *Anti-Discrimination Law and Limits of the Power of Dismissal: A Comparative Analysis of the Legislation and Case Law in the United States and Italy*, *in* 46 IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE: GENERAL PRINCIPLES OF LAW - THE ROLE OF THE JUDICIARY 193, 194 (Laura Pineschi, ed., 2015) ("Within American law, the dialectic between the common law 'employment at will' doctrine and statutory anti-discrimination provisions constitutes the core of American jurisprudence on the limits to the employers' power to terminate the employment relationship."). Of course, employment discrimination law is not limited to terminations, but covers other adverse employment actions.

Although this interaction has existed since the effective date of Title VII in 1965, the limitation has become more pervasive and salient in recent decades. Most discrimination claims in the early years of discrimination law were not discharge claims, but now, and in the last three decades, a majority of claims include termination as at least one of the adverse employment actions on which the claim is based.[109] The shift from a preponderance of refusal-to-hire claims to a preponderance of termination claims occurred as the law progressively achieved a purpose of opening employment opportunities to those to whom they had been discriminatorily denied,[110] although discrimination in hiring certainly persists. The prevalence of discharge claims in employment discrimination has led to an understanding that employment discrimination law is the most significant wrongful discharge law in the United States.[111] The increasing use of employment discrimination law as a vehicle to seek redress for terminations is a significant reason that employers do not enjoy the freedom and unbridled discretion that the employment-at-will rule suggests.[112]

Employers with any knowledge of the law or any inclination to consult an attorney before terminating an employee[113] would not think it prudent to proceed with the termination without first confirming that

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There are, of course, reasons beyond legal limitations for employers not to fire employees, including replacement costs and the unpleasantry of firing. Nonetheless, other nations have considered government regulation necessary.

109 *See, e.g.*, *Bases by Issue (Charges filed with EEOC) FY 2010–FY 2020*, EEOC https://www.eeoc.gov/eeoc/statistics/enforcement/bases_by_issue.cfm [https://perma.cc/EC96-YXSL]. *See generally* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991) (noting that "[h]iring charges outnumbered termination charges by 50 percent in 1966, but by 1985, the ratio had reversed by more than 6 to 1"); Kittner & Kohler, *supra* note 7, at 278; Laura Beth Nielsen, Robert L. Nelson, & Ryon Lancaster, *Individual Justice or Collective Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 177–80 (2010).

110 *See* Donohue & Siegelman, *supra* note 109, at 1015 (observing that "[a]ssuming that concrete improvements have occurred, one might expect to see a significant shift in the nature of employment discrimination cases as minorities and women no longer need to complain about blanket exclusions from good jobs—that battle has, by now, largely been won—but now complain more commonly of being fired from these better jobs").

111 *See, e.g.*, George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 504 (1995) (stating that "the increase in claims of discriminatory discharge, to about 86 percent of charges filed with the EEOC, has made all of employment discrimination law look more like the law of wrongful discharge"); *see also* Kittner & Kohler, *supra* note 7, at 281 (stating that "[i]t may be that Title VII and its adjuncts have become the functional equivalents of wrongful discharge legislation").

112 *See, e.g.*, Kittner & Kohler, *supra* note 7, at 327.

113 As Professor Fischl suggests, a great headache of management-side attorneys is that many of their clients call them after, not before, discharging an employee. *See* Fischl, *supra* note 1, at 187.

there was a job—or business—related reason and ensuring that the reason could be substantiated in the event of litigation.[114] Consider a hypothetical in which someone at a business calls the firm's employment lawyer and says, "I have a supervisor who wants to fire an employee named Pat. Should I be concerned about a lawsuit?" The attorney could answer, "No, you may fire Pat with little or no concern about liability because this is an employment-at-will state." However, no knowledgeable and prudent attorney would give such an answer. Assuming the employee to be at will, which describes most employees in the United States, the attorney would begin asking questions about Pat,[115] inquiring about, race, color, sex, national origin, religion, age, disabilities, and maybe even protected genetic information. After addressing the characteristics covered by the federal employment discrimination laws, the attorney might need to address other characteristics covered by the particular state or local employment discrimination law. If the attorney learns that Pat is in a group against which there is a history of discrimination, for example, if Pat is African American or female, the attorney will caution about the risk of a race or sex discrimination claim. Of course, Title VII of the Civil Rights Act of 1964 does not cover only one race or one sex,[116] but what have been labeled "reverse discrimination" claims, in which the plaintiff is not a member of a historically discriminated against group,[117] sometimes are more difficult to win than "traditional discrimination" claims.[118]

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114 Kittner & Kohler, *supra* note 7, at 327.

115 A different way for the attorney to address the client's question would be simply to ask why the employer wanted to fire Pat. That, however, is not a question closely tied to the law. Under the employment-at-will doctrine, an employer is not required to state or defend reasons for a termination unless there is some evidence that the reason is one that is expressly and specifically prohibited by law. Thus, asking questions about Pat explores *whether* the employer is likely to be required to state and defend a reason for termination.

116 *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

117 *See* Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1035–36 (2004).

118 For example, some courts impose additional requirements to the *McDonnell Douglas* prima facie case, requiring proof of background circumstances that suggest discrimination was likely. *See, e.g.*, Duffy v. Wolle, 123 F.3d 1026, 1036 (8th Cir. 1997), *abrogated by* Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011); Parker v. Balt. & Ohio R.R., 652 F.2d 1012, 1017 (D.C. Cir. 1981). *See generally* Donald T. Kramer, Annotation, *What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes—Private Employment Cases*, 150 A.L.R. FED. 1 (1998); Sullivan, *supra* note 117, at 1065–71 (discussing courts' opinions and logic surrounding background circumstances and noting that the jurisprudence is "amorphous"); Timothy K. Giordano, Comment, *Different Treatment for Non-Minority Plaintiffs Under Title VII: A Call for Modification of the Background Circumstances Test to Ensure That Separate is Equal*, 49 EMORY L.J. 993, 1001–11 (2000).

Employment discrimination law necessarily must impinge on employment at will to some extent.[119] An employer cannot fire an employee (or take other adverse employment actions) for a bad reason listed in the statutes without potentially incurring liability.[120] Thus, federal employment discrimination law "operate[s] against the presumed backdrop of at-will employment."[121] Although discrimination law makes only a limited *formal* incursion on employment at will, it arguably impinges more significantly in numerous *informal* ways. Employers who are sued under a federal employment discrimination statute have their best chance of winning if they can offer good (job-related) reasons for their adverse employment actions.[122] For example, the most important proof structure in employment discrimination law is the pretext framework developed by the Supreme Court in *McDonnell Douglas Corp. v. Green*.[123] In that proof structure, after a plaintiff establishes a prima facie case of discrimination, the burden of production shifts to the defendant employer to present evidence of a legitimate, nondiscriminatory reason for the adverse employment action that it took.[124] Thus, in a termination case, an employer may not stand upon employment at will and contend that it does not have to give a reason to justify its decision to discharge the plaintiff employee. An employer's insistence upon its prerogative to discharge at will at stage two of the pretext analysis will result in an unrebutted prima facie case of discrimination and judgment for the

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119 Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 71 (1990); Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1196 (2003) (discussing the tension between camps of legislators, during debate on the Civil Rights Act of 1964, over the role of Title VII in a legal regime in which employment at will was the dominant law regarding terminations).

120 Blumoff & Lewis, *supra* note 119, at 70.

121 Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1233 (3d Cir. 1994), *cert. granted*, *vacated*, *remanded*, 514 U.S. 1034 (1995); *see also* Kenneth G. Parker, Note, *After-Acquired Evidence in Employment Discrimination Cases: A State of Disarray*, 72 TEX. L. REV. 403, 430 (asserting Congress intended for Title VII to alter employment at will only "slightly").

122 Blumoff & Lewis, *supra* note 119, at 70–71 (stating "[Title VII] creates caution where none was necessary before"); Kittner & Kohler, *supra* note 7, at 281 (observing that "the effective avoidance of liability encourages employers to meet discharge complaints with a comprehensive justification of the grounds that legitimate an employee's dismissal").

123 McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The *McDonnell Douglas* pretext framework is one of two applied under Title VII, the other being the statutory mixed-motives framework, adapted by Congress from the analysis articulated by the Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See infra* Section I.B.1. However, the pretext framework was the first developed by the Court, and it has been used more often than the other. Furthermore, mixed motives is not applicable under the Age Discrimination Act, and it may not be applicable under the Americans With Disabilities Act.

124 Tex. Dept. of Cmty. Affs. v. Burdine, 450 U.S. 248 (1981).

plaintiff.[125] Commentators have noted the incursion on employment at will represented by the *McDonnell Douglas* pretext framework.[126] Professor Fischl has argued that the at-will mindset has been the impetus for the courts and agencies to develop these proof frameworks that "rest on a series of highly contestable assumptions" and depict complex employer decision making as simpler and sometimes more nefarious processes.[127]

B. *Employment Discrimination Law*

1. The Statutes, Theories of Discrimination, and Proof Frameworks

The body of federal employment discrimination law in the United States is now about fifty-five years old, with most law emanating from Title VII of the Civil Rights Act of 1964.[128] The doctrine of employment discrimination law has been developed in a voluminous body of case law interpreting the lean statutory language of Title VII and the later-enacted laws, with the Supreme Court building a doctrinal core. Three laws form the principal statutory bases of employment discrimination law:[129] Title VII of the Civil Rights Act of 1964,[130] the Age

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125 *See, e.g.*, Figueroa v. Pompeo, 923 F. 3d 1078, 1095 (D.C. Cir. 2019).

126 *See* Derum & Engle, *supra* note 119, at 1193 (stating that "we find ourselves in agreement with Richard Epstein, who has argued that the *McDonnell Douglas* standard significantly eroded employment at will by requiring employers to articulate a legitimate nondiscriminatory reason for their actions").

127 *See* Fischl, *supra* note 1, at 183–84.

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

129 Congress enacted the Genetic Information Nondiscrimination Act in 2008. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified as amended in scattered sections of 26, 29, & 42 U.S.C.). The volume of charges filed under the Act has been small, and there are few reported cases discussing the Act. Regarding number of charges filed, see *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2019*, EEOC, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm [http://perma.cc/T8H4-TK4A].

130 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 66 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-15). Race discrimination claims also can be asserted under § 1981. 42 U.S.C. § 1981). The analysis of race claims under § 1981 is not separate from or different than the analysis of such claims under Title VII. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989). The Civil Rights Act of 1991 amended Title VII and created a freestanding § 1981a claim. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76 (1991) (codified at 42 U.S.C. § 1981a).

Discrimination in Employment Act (ADEA),[131] and the Americans with Disabilities Act (ADA).[132] The key language of each of the two earliest laws, Title VII and the ADEA, declares it an "unlawful employment practice" for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against" an employee regarding terms and conditions of employment "because of . . . [the protected characteristic]."[133] "Discriminate," which serves as the catchall term to cover other adverse employment actions, has become the salient term to identify this area of the law. Title VII and the ADEA do not include a definition of discrimination.[134] At the time of the enactment of Title VII, discrimination in common parlance[135] would have been understood to mean "distinguish[ing] unjustly."[136] The wording of the ADA prohibition, as amended by the ADA Amendments Act of 2008, is different, declaring that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability."[137] The ADA, incorporating the doctrinal developments under the earlier discrimination laws, then lists seven acts that constitute such discrimination.[138]

Given the lean prohibitory language of Title VII and the ADEA, the courts developed through case law the concepts and principles for proving and analyzing claims of discrimination. Working from two statutory subsections in Title VII,[139] the Court developed two principal

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

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

133 42 U.S.C. § 2000e-2(a). In a minor variation in language, the ADEA provision states that "[i]t shall be unlawful for an employer" rather than declaring as Title VII does that "[i]t shall be an unlawful employment practice." *Compare* 29 U.S.C. § 623(a) *with* § 2000e-2(a). In another inconsequential variation, the ADEA omits the word "to" before "discriminate." § 623(a).

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

135 FDIC v. Meyer, 510 U.S. 471, 476 (1994) (stating that "[i]n the absence of . . . a definition, we construe a statutory term in accordance with its ordinary or natural meaning").

136 Gold, *supra* note 134, at 176.

137 42 U.S.C. § 12112(a).

138 *Id.* § 12112(b).

139 It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment

theories of discrimination—disparate treatment (intentional discrimination)[140] and disparate impact (unintentional discrimination).[141] Under individual disparate treatment, the Supreme Court developed two proof structures for proving and analyzing intentional discrimination: the pretext framework first announced in *McDonnell Douglas Corp. v. Green*[142] and the mixed-motives framework articulated by the Court in *Price Waterhouse v. Hopkins*,[143] which was revised and codified by Congress for Title VII[144] in the Civil Rights Act of 1991.[145] This dichotomy of proof structures is of great importance in employment discrimination law because the overwhelming majority of claims are individual disparate treatment claims.[146] Because the proof

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> opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

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

141 The Court has declared that disparate treatment is manifested in Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (codified as amended at§ 2000e-2(a)(1)), and disparate impact is embodied in § 703(a)(2), 78 Stat. at 255 (codified as amended at§ 2000e-2(a)(2)). *See* Smith v. City of Jackson, 544 U.S. 228, 235–36 (2005). It is now accepted that the Court grounded disparate impact in § 703(a)(2) when it recognized the theory in *Griggs v. Duke Power Co*., 401 U.S. 424 (1971). The Court did not expressly state that, however, until its decision eleven years after *Griggs* in *Connecticut v. Teal*, 457 U.S. 440, 448 (1982). *See* Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 454 (2005).

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

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

144 The Court explained that the mixed-motives framework does not apply under the ADEA in *Gross v. FBL Fin. Servs., Inc*., 557 U.S. 167, 180 (2009). The Court later held that mixed-motives is not applicable under the antiretaliation provision of Title VII in *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013). It probably does not apply under the ADA, but the Supreme Court has not decided the issue, and there is a circuit split on the issue. *See* Gentry v. E. W. Partners Club Mgmt. Co., 816 F.3d 228, 234 (4th Cir. 2016) (joining the Sixth and Seventh Circuits in applying but-for causation); Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 321 (6th Cir. 2012) (holding mixed-motives analysis is not applicable to the ADA based on *Gross*); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 963–64 (7th Cir. 2010) (same). *But see* Hoffman v. Baylor Health Care Sys., 597 F. App'x 231, 235 n.12 (5th Cir. 2015) (stating that standard of causation under the ADA is "motivating factor"), *cert. denied*, 577 U.S. 818 (2015); Siring v. Or. State Bd. of Higher Educ., 977 F. Supp. 2d 1058, 1063 (D. Or. 2013) (same).

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

146 *See* Donohue & Siegelman, *supra* note 109, at 988–89 (stating that only 101 of 7,613 employment discrimination claims in 1989 alleged disparate impact); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 1251, 1302 (1998) ("[B]y the end of the [1980s] the overwhelming majority of Title VII suits involved

structures are used to analyze claims and decide dispositive motions in the trial courts, this dichotomy of frameworks has immense practical significance.[147]

2. Weakened by Employment at Will

As discussed above, employment discrimination law necessarily must limit employment at will to some extent.[148] The crucial question is to what extent employment discrimination law impinges on employer prerogative to terminate at will. If the employment discrimination laws are to have any practical significance, they must displace employment at will to the extent necessary to effectuate the goals of the laws.[149] The Supreme Court has recognized "Title VII's balance between employee rights and employer prerogatives."[150] Progressively over the years, the Supreme Court and lower courts have pronounced weaker versions of discrimination doctrine than they otherwise might have out of solicitude for preserving employer prerogative under employment at

individual claims of disparate treatment discrimination brought by individual private litigants."); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 198 (2009) [hereinafter Sullivan, *The Phoenix*] (stating that "the vast majority of discrimination claims in federal court" are disparate treatment cases). It seems likely that the predominance of disparate treatment claims has increased since the enactment of the Civil Rights Act of 1991, which made compensatory and punitive damages and jury trials available in intentional discrimination cases, but not disparate impact cases.

147 I am not addressing in detail the proof frameworks associated with systemic disparate treatment and disparate impact claims. The Court announced a much less formal and stylized approach to proving and assessing systemic disparate treatment claims in *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). The Court set forth the disparate impact theory and a rough version of the affiliated proof framework in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Congress revised and codified that framework for Title VII, but not the ADEA and the ADA, in the Civil Rights Act of 1991. The framework is at 42 U.S.C. § 2000e-2(k). The Supreme Court explained that the statutory version of the disparate impact framework does not apply to the ADEA in *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005).

148 *See supra* Section I.A.3.

149 The most overarching goal is to eradicate employment discrimination based on specified characteristics. H.R. REP. NO. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2391–94 (stating purpose and reasoning behind Civil Rights Act of 1964); *see also* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357–59 (1995) (noting common purpose of ADEA and Title VII of eliminating workplace discrimination); Robert Brookins, *Hicks, Lies, and Ideology: The Wages of Sin Is Now Exculpation*, 28 CREIGHTON L. REV. 939, 940 n.4 (1995) (citing sources stating goal of Title VII). At an operational level the Supreme Court breaks that goal down into deterring discriminatory conduct and making whole the victims of discrimination. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 416–19 (1975).

150 Price Waterhouse v. Hopkins, 490 U.S. 228, 243 (1989).

will.[151] While *McDonnell Douglas*, announcing the pretext framework, and *Griggs v. Duke Power Co.*,[152] adopting the disparate impact analysis, indicated early in the life of the law that employment discrimination law might be granted a wide berth in displacing employment at will, the Supreme Court shifted to more restrictive interpretations of discrimination law, and it is evident in some of the cases that a principal concern is preservation of employment at will.[153]

The development of the *McDonnell Douglas* pretext analysis stands as both a reminder of the incursion of employment discrimination law on the at-will principle and a reminder that the courts have guarded against too much incursion. As noted above, the announcement of the framework in 1973 declared that employers will be required to give reasons for terminations (and other adverse actions) when they are charged with discrimination if plaintiffs are able to establish a prima facie case of discrimination, which is easily satisfied;[154] it would no longer be acceptable to stand on the "no reason" principle of employment at will.[155] However, the explanation and development of the stages of the pretext analysis in post-*McDonnell Douglas* cases demonstrate the courts' solicitude for preserving a robust at-will prerogative. The Supreme Court's decision in *St. Mary's Honor Center v. Hicks*,[156] holding that a plaintiff does not necessarily win judgment as a matter of law by proving that the employer's proffered legitimate, nondiscriminatory reason is pretextual, has been cited as evidence of the Court's predilection.[157] The Court did reinvigorate the pretext analysis to some extent in *Reeves v. Sanderson Plumbing Products, Inc.*,[158] but that decision was necessary only because of some lower courts' interpretations of *St. Mary's Honor Center*.

While the holding of *St. Mary's Honor Center* was about the procedural significance of a plaintiff proving pretext at stage three of the analysis, there is another principle embedded in the case that demonstrates a way in which employment at will constrains discrimination doctrine. The trial judge in the bench trial stated that he did not believe the legitimate, nondiscriminatory reasons put forward

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151 *See generally* William R. Corbett, *The "Fall" of* Summers*, the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305 (1996) [hereinafter Corbett, *The "Fall"*].

152 Griggs v. Duke Power Co., 401 U.S. 424 (1971).

153 *See, e.g.*, Corbett, *"The Fall," supra* note 151; Derum & Engle, *supra* note 119, at 1182.

154 *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2245–50 (1995).

155 *See supra* notes 123–26 and accompanying text.

156 *St. Mary's Honor Ctr.*, 509 U.S. 502.

157 *See, e.g.*, Derum & Engle, *supra* note 119, *passim*.

158 Reeves v. Sanderson Plumbing Prods., Inc, 530 U.S. 133 (2000).

by the employer for terminating the plaintiff—that he had severe and accumulated rules violations.[159] However, the judge stated that he believed the reason was not racial discrimination, but instead was plaintiff's supervisor's personal animosity toward plaintiff.[160] Because personal animosity is not discriminatory on a basis protected by Title VII, the judge entered judgment for the defendant. Thus, the court disbelieved the reasons given by the employer and substituted a nondiscriminatory reason, not argued for by the employer, that it did believe. Commentators have argued that this falls in the line of cases adopting a "personal animosity" presumption.[161] They also explain that this presumption revives the no-cause or no-reason part of employment at will notwithstanding the requirement at the second part of the pretext analysis that an employer must prove a legitimate, nondiscriminatory reason for its adverse employment action.[162] More precisely, courts accept that there are situations in which employers do not want to state and are not required to state the reason for their adverse employment actions.[163] Thus, the pretext analysis becomes a much less useful tool for plaintiffs because of the interpretation of both the second and third parts of the framework. Although the Court's decision in *St. Mary's Honor Center* is a defensible interpretation of the pretext framework,[164] it renders the framework less helpful for discrimination plaintiffs than it could have been.[165]

Yet another example of the restrictive influence of employment at will on discrimination doctrine also relates to interpretation of the *McDonnell Douglas* pretext analysis—the "honest belief rule."[166] Some circuit courts subscribe to the view that if an employer produces sufficient evidence of a legitimate, nondiscriminatory reason, and the plaintiff employee establishes that the employer's reason is factually

159 *St. Mary's Honor Ctr.*, 509 U.S. at 507.

160 *Id.* at 508 (noting the district court concluded that the crusade to terminate plaintiff was personally rather than racially motivated).

161 Derum & Engle, *supra* note 119, at 1226.

162 *Id.* at 1240–41.

163 *Id.* at 1240.

164 The decision is *St. Mary's Honor Center* addressed the effect of proving pretext on the burden of persuasion. The question that plaintiffs ultimately must prove by a preponderance of the evidence is whether the employer discriminated because of race, or sex, etc. Thus, it is feasible that a plaintiff could call into doubt the employer's proffered reason without persuading the fact finder on the ultimate question of discrimination. The effect of proving pretext on the burden of production, rather than the burden of persuasion, was later addressed by the Court in *Reeves v. Sanderson Plumbing Products., Inc.*, 530 U.S. 133 (2000).

165 *See, e.g.*, Calloway, *supra* note 63, *passim*.

166 *See, e.g.*, Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313 (2010); Rebecca Michaels, Note, *Legitimate Reasons for Firing: Must They Honestly Be Reasonable?*, 71 FORDHAM L. REV. 2643 (2003).

wrong, the plaintiff has not proved discrimination. Although this approach to the second and third stages of the *McDonnell Douglas* analysis again is not unreasonable, it is yet another demonstration of the courts' resolve to limit the incursion of employment discrimination law on the employer autonomy embodied in employment at will.[167]

There are numerous other examples of the Court or courts rendering restrictive discrimination doctrine out of concern for preservation of employment at will. In *McKennon v. Nashville Banner Publishing Co.*,[168] the Court decided that evidence of employee wrongdoing discovered after a discriminatory discharge could not be used to avoid liability for discrimination, but it could be used by the employer to reduce the plaintiff's recovery and to avoid the remedy of reinstatement. The Court's rationale for permitting an employer to use after-acquired evidence to limit the remedy for proven discrimination is the Court's concern for employers' prerogative under employment at will.[169] As with *St. Mary's Honor Center v. Hicks*, the point here is not that *McKennon* was a wrong or bad decision, but it demonstrates a concern for preserving a significant degree of employer prerogative regarding termination, even when illegal discrimination is proven.

In a most unusual Supreme Court opinion, the Court evinced a preoccupation with the incursion of employment discrimination law on employment at will. In *University of Texas Southwestern Medical Center v. Nassar,*[170] the Court addressed the issue of whether but-for causation is required for proof of retaliation under Title VII. By way of background, in the Civil Rights Act of 1991, Congress amended Title VII to expressly include a relaxed or lower[171] standard of causation in Title VII—"motivating factor,"[172] taken by Congress from the plurality opinion in *Price Waterhouse v. Hopkins*.[173] In *Gross v. FBL Financial Services, Inc.*, the Court decided that because Congress did not amend the ADEA with the "motivating factor" language, the ADEA requires the higher standard of but-for causation.[174] It was not clear, however, that the Court would extend the *Gross* reasoning to the anti-retaliation

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167 *See, e.g.*, Smith v. Chrysler Corp., 155 F.3d 799, 807 (6th Cir. 1998); Martin, *supra* note 166, at 352 (positing that "[t]his rule evolved as a result of courts' efforts to balance the employer's right to operate with autonomy and the worker's right to be free from discrimination in the workplace").

168 McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995).

169 *See* Corbett, *The "Fall," supra* note 151, at 374–75.

170 Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013).

171 The Supreme Court has stated that the "motivating factor" standard is a relaxed standard of causation. EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 772–73 (2015).

172 42 U.S.C. § 2000e-2(m).

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

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

provision of Title VII.[175] The Court did that in *Nassar*, and the holding was a surprise from a couple of perspectives. First, one might have expected that the Court would have interpreted the anti-retaliation provision of Title VII consistently with Title VII's anti-discrimination provision,[176] which was amended by the Civil Rights Act of 1991 to include the "motivating factor" standard. Second, although many Supreme Court opinions in recent years had not been favorable for civil rights plaintiffs and advocates, retaliation cases had been a notable exception.[177] The *Nassar* majority opinion focuses on the statutory language of the anti-retaliation provision and the 1991 amendment to demonstrate that Congress intended to include the motivating factor standard in only the anti-discrimination and not the anti-retaliation provision.[178] The Court then explains that recognizing a less stringent standard of causation for retaliation claims would incentivize the filing of frivolous claims.[179]

In a bizarre twist in the opinion, the Court discussed a hypothetical situation, raised by counsel in oral argument of the case,[180] in which an employee who was about to be fired or suffer other adverse employment action might file a frivolous discrimination charge and then, when the adverse action occurred, he would file a retaliation charge.[181] The Court concluded that employers would be put to greater costs in defending retaliation claims because they would be unlikely to win on summary judgment if the standard of causation were a motivating factor.[182] It is striking that the hypothetical posed by counsel at oral argument played a significant part in the rationale of the Court, and many inferences may flow from this fact. One is that the Court wanted to avoid use of the anti-retaliation provision to impose liability on employers for what are really nondiscriminatory terminations but are brought as retaliation claims.[183]

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175 42 U.S.C. § 2000e-3(a).

176 *Id.* at § 2000e-2(m).

177 *See* Alex B. Long, *Retaliation Backlash*, 93 WASH. L. REV. 715, 717 (2018).

178 Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352–55 (2013).

179 *Id.* at 358.

180 *See, e.g.*, Michael J. Zimmer, *Hiding the Statute in Plain View:* University of Texas Southwestern Medical Center v. Nassar, 14 NEV. L.J. 705 (2014); Michael J. Zimmer, *Title VII's Last Hurrah: Can Discrimination Be Plausibly Pled?*, 2014 U. CHI. LEGAL F. 19, 65 n.203 (2014).

181 *Nassar*, 570 U.S. at 358–59. For a useful discussion of this unusual aspect of the *Nassar* opinion, see Sandra F. Sperino & Suja A. Thomas, *Fakers and Floodgates*, 10 STAN. J. C.R. & C.L. 223 (2014).

182 *Nassar*, 570 U.S. at 358–59.

183 Crucial to this concern is the principle that an employer could retaliate against someone who could succeed on the retaliation claim, regardless of the merits of the underlying

As a final example of the courts rendering weak discrimination doctrine out of concern for preservation of a powerful employment-at-will principle, courts often state some version of the proposition that federal employment discrimination statutes do not confer on them "the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination."[184] While this adage can, and does, apply to any adverse employment decisions, it seems particularly relevant to terminations, given the preponderance of discrimination claims that involve terminations.[185] This leads to what I consider one of the most restrictive doctrines in employment discrimination law—comparators. Plaintiff employees often argue in discrimination cases that even if they did something for which the employer might discipline them, they were treated differently than were other employees who engaged in similar conduct. Many courts have imposed such stringent standards for the similarity of comparators that they make it virtually impossible for a plaintiff to identify an acceptable comparator.[186]

The foregoing are just some of the more salient examples of the Supreme Court and other courts announcing employment discrimination doctrine that does not go as far as it might to achieve the goals of the discrimination laws out of concern for the preservation of a potent employment-at-will doctrine. Sometimes the courts state this concern, and sometimes one can see it lurking beneath the announcement of the restrictive doctrine. If courts were no longer concerned with employment discrimination law impinging on employment at will, they would be freer to develop broader and more efficacious discrimination doctrine.

3. Deleterious Effects of Employment Discrimination Law's Functioning as Wrongful Discharge Law

The facts that the preponderance of discrimination claims assert discriminatory discharge and that there is no general wrongful

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discrimination claim, because the employee could have a reasonable belief that discrimination had occurred. *See, e.g.*, Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1140 (5th Cir. 1981).

184 Brekke v. City of Blackduck, 984 F. Supp. 1209, 1229–30 (D. Minn. 1997) (quoting Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 781 (8th Cir. 1995)); *see also* sources cited in Derum & Engle, *supra* note 119, at 1238 n.295.

185 *See supra* notes 109–10 and accompanying text.

186 *See, e.g.*, Lewis v. City of Union City, 918 F.3d 1213 (11th Cir. 2019); *see also* Sullivan, *The Phoenix, supra* note 146, at 213–23 (discussing the courts' standards).

discharge law make employment discrimination law look like the U.S. approximation of wrongful discharge law.[187] This appearance is detrimental to the law and harmful to society. Professor Fischl poignantly identifies some of what he terms the "multiple pathologies" produced by this interplay of employment at will and employment discrimination law:[188] "unsalutary effects on litigation strategy (the 'square peg/round hole' problem),[189] on employer EEO practices,[190] on judicial understandings of the stakes in discharge cases,[191] and on the availability of reinstatement as an effective remedy for wrongfully discharged employees."[192]

I think having employment discrimination law function in this role can have several deleterious effects on both the law and society. My concerns are similar, but not identical, to those noted by Professor Fischl. First, there is a perception that the law makes wrongful discharge protection available to only "protected classes"—members of groups against whom there is a history of employment discrimination. Second, having few other arguably applicable laws providing recourse for wrongful discharge, discharged employees will pursue their claims under employment discrimination law, even if the facts suggest a bad or poor reason for discharge that nonetheless is not discriminatory under the laws.[193] Finally, employers challenged for discriminatory discharges usually perceive the former employees to be accursing them of racism, sexism, or other reprehensible animus, giving rise to stronger

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187 *See, e.g.*, Kittner & Kohler, *supra* note 7, at 279 (quoting Rutherglen, *supra* note 111, at 504).

188 *See* Fischl, *supra* note 1, at 201.

189 By this, Professor Fischl refers to employees who have compelling claims of unfair, but not discriminatory, discharge bringing those claims as employment discrimination claims because of the absence of wrongful discharge legal remedies. Fischl, *supra* note 1, at 181–82.

190 Professor Fischl, citing Professor Cynthia Estlund, notes the incentives created for employers to discriminate against minorities in hiring, but to "bend over backwards" to avoid litigation with them once they are employed, thus depriving them of honest feedback and career-development opportunities and engendering resentment among nonminority colleagues. *Id.* at 183 (citing Estlund, *The Changing Workplace*, *supra* note 93, at 1678–82).

191 Professor Fischl means that the judicial mindset, steeped in the broad employer prerogative of at-will employment, is biased against believing discharges are discriminatory, and this interaction between legal tenets has spawned the employment discrimination proof frameworks that poorly replicate the employer's decision-making process. *Id.* at 183–84.

192 Professor Fischl argues that an employee reinstated without the just cause protection of a collective bargaining agreement is in a particularly precarious position because, if an adverse action is taken and she sues, she will have the burden of establishing a retaliatory motive rather than a simply unfair action. *Id.* at 201.

193 *See, e.g.*, Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89, 143 (2008) (observing that "employees . . . may file discrimination claims even though no discrimination actually occurred).

emotional reactions than might otherwise be warranted to allegations of a discharge that is unsupported by job-related reasons.

There is a misperception that because the employment discrimination laws have become the most significant wrongful discharge laws in the United States, employees who are members of "protected classes" are not subject to employment at will.[194] That is, the perception is that employers will incur liability if they terminate employees who are members of historically discriminated against groups without documented job-related reasons. This misperception likely is fed by the goal of the discrimination laws to open employment opportunities for members of groups against whom there is a history of discrimination. Consider, for example, that the Supreme Court, in stating the elements of the prima facie case of the pretext framework in *McDonnell Douglas Corp. v. Green*, stated that the first element of the prima facie case is that the claimant must prove that "he belongs to a racial minority."[195] The Court would later explain in *McDonald v. Santa Fe Trail Transportation Co.*,[196] a reverse discrimination case, the reference to "racial minority" in *McDonnell Douglas*: "Requirement (i) of this sample pattern of proof was set out only to demonstrate how the racial character of the discrimination could be established in the most common sort of case, and not as an indication of any substantive limitation of Title VII's prohibition of racial discrimination."[197] Everyone who is knowledgeable about employment discrimination law understands that Caucasians, men, and members of other groups that historically were not commonly victims of employment discrimination are covered by Title VII.[198] Yet, the Court's somewhat clumsy statement in *McDonnell Douglas* evinces both an understanding of the principal purpose of Title VII and what is a fairly common misperception that the laws cover only those who are members of historically discriminated against groups.

Beyond the misperception about coverage of the discrimination laws, it is true that the discrimination laws do not uniformly cover Caucasians and men equally or in exactly the same way as they cover members of historically discriminated against groups. As is well known, the *McDonnell Douglas* prima facie case is very easily satisfied[199] and

194 *See infra* notes 207–11 and accompanying text.

195 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

196 McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

197 *Id.* at 279 n.6.

198 Curiously, the Court declined to find reverse discrimination claims actionable under the ADEA. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).

199 *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) (referring to the "minimal requirements" of the prima facie case).

creates a rebuttable presumption of discrimination. However, some courts, recognizing that the assumptions on which the prima facie case is based are not equally valid when the plaintiff is not a member of a group that has been historically discriminated against, have imposed an additional requirement in reverse discrimination cases that the plaintiff must prove something additional to establish a prima facie case—"background circumstances" showing that the employer at issue is one which would be likely to engage in this historically uncommon type of discrimination.[200] However, other courts object to imposing the additional requirement in the prima facie case,[201] reasoning that to do so would violate an important theoretical foundation of employment discrimination law—equal treatment of similarly situated persons.[202] The different treatment is not limited to the pretext framework used to analyze individual disparate treatment claims. An appellate court rejected a disparate impact claim of a tall, male plaintiff in *Livingston v. Roadway Express*.[203] It appeared in the case that a tall man presented sufficient evidence to demonstrate that a height maximum imposed as a condition of employment by a trucking company disproportionately screened out men, but the court rejected the claim. The court stated that no disparity was manifested in the employer's workforce and that the plaintiff had not established background circumstances.[204] The rationale is surprising in that there is no other decision of which I am aware that suggests that the background circumstances requirement applies to disparate impact cases.[205]

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200 *See, e.g.*, Duffy v. Wolle, 123 F.3d 1026, 1036 (8th Cir. 1997) (noting that being a minority is enough to suggest discrimination, but being a historically non-discriminated-against person requires more); Parker v. Balt. & Ohio R.R., 652 F.2d 1012, 1017 (D.C. Cir. 1981) (finding that it makes no sense in contemporary society to infer majority discrimination in the same manner as minority discrimination). *See generally* Angela Onwuachi-Willig, *When Different Means the Same: Applying a Different Standard of Proof to White Plaintiffs Under the* McDonnell Douglas *Prima Facie Case Test*, 50 CASE W. RSRV. L. REV. 53 (1999) (advocating for a modified first prong of the prima facie case for white plaintiffs).

201 *See, e.g.*, Iadimarco v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999) (rejecting the background circumstances factor because all that is required is a showing that "the employer is treating some people less favorably than others based upon a trait that is protected under Title VII"); Lind v. City of Battle Creek, 681 N.W.2d 334, 335 (Mich. 2004) (overruling a prior decision that used the background circumstances requirement because it clearly conflicted with the state's civil rights laws).

202 *See, e.g.*, Clements v. Barden Miss. Gaming, LLC, 373 F. Supp. 2d 653, 667–68 (N.D. Miss. 2004) (calling the background circumstances requirement "illogical and even dangerous"); *Lind*, 681 N.W.2d at 335 (stating that "'individual' means 'individual'").

203 Livingston v. Roadway Express, Inc., 802 F.2d 1250 (10th Cir. 1986).

204 *Id.* at 1252–53.

205 The *Livingston* case also hints at a more dramatic difference in treatment: perhaps the disparate impact theory should not even be available in reverse discrimination cases. *See, e.g.*,

As discussed above, a majority of employment discrimination claims now include termination claims.[206] Given both the realities of law, such as background circumstances, and some misperceptions regarding who is covered by the discrimination laws, discord can be sown in society when the discrimination statutes become the principal wrongful discharge laws. For example, Professor Stephen Befort posits that "[m]any white men perceive Title VII as establishing special protective rules for women and minorities."[207] Many commentators have noted the backlash against discrimination laws prompted by those who were not historically discriminated against, believing that special rules protect others.[208] Professor Estlund described the effect this way:

> However ineffectual existing remedies for discrimination may be for most employees, their availability to some may foster resentment by others. Employees who are not "protected" by those laws may perceive fairness itself as a special privilege from which they are excluded. The claim of "reverse discrimination" is a tempting response that mirrors the victim-orientation of wrongful discharge law and aggravates the dynamic of fragmentation and polarization.[209]

Thus, scholars have noted the concern that white and male at-will employees may see the discrimination statutes as bestowing special protections regarding the vitally important issue of job security on African American and female employees. Professor McGinley speculated that this backlash could influence judges to interpret the discrimination statutes restrictively.[210] Although the perception of special protection of "protected classes" regarding any employment actions could be polarizing and divisive, it seems that this sentiment must be exacerbated when the employment action at issue is termination—the "capital punishment"[211] of employment actions.

Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505 (2004). No court has held that disparate impact is so limited, and none is likely to do so, as doing so would render the disparate impact theory constitutionally infirm. *Id.* at 1512 (positing that such an interpretation could not survive an equal protection challenge).

206 *See supra* notes 109–11.

207 Befort, *Millennium*, *supra* note 47, at 409.

208 *See id.*; Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1489–91 (1996); Hirsch, *supra* note 193, at 106–07, 140.

209 Estlund, *The Changing Workplace, supra* note 93, at 1681.

210 *See* McGinley, *supra* note 208, at 1490.

211 *See, e.g.*, Cynthia E. Nance, *Why Labor and Employment Ethics?*, 33 N. KY. L. REV. 201, 201 (2006) (citing Dick Grote, *Public Sector Organizations: Today's Innovative Leaders in Performance Management*, PUB. PERS. MGMT., Spring 2000, at 13.

If a backlash effect based on inaccurate understanding of employment discrimination law has been a concern over the years, how much more pronounced might that concern have become by 2020? Blatantly divisive rhetoric and mischaracterization of many matters regarding discrimination have become commonplace in recent years in an increasingly polarized[212] society in the United States.

Discharged employees looking for a vehicle to assert their claims for "wrongful" or "unfair" discharge often assert their claims under the employment discrimination laws.[213] If that is so, it seems likely that a not insignificant number of cases are cases of discharges without job-related reasons masquerading as discrimination claims. This phenomenon likely plays a role in the perception that a large percentage of employment discrimination claims are without merit and perhaps frivolous.[214] Indeed, the Supreme Court's hypothetical in its decision in *Texas Southwestern Medical Center v. Nassar*[215] evinces this concern—employees who are about to be fired will file meritless discrimination claims followed by retaliation claims to provide them a means of legal recourse. Discharged employees assert unfair discharge claims as discrimination claims, courts become more skeptical of discrimination claims, and this skepticism results in the courts rendering weaker-than-needed discrimination law. The most obvious example of this is probably the Court's interpretation of the pretext prong of the *McDonnell Douglas* analysis in *St. Mary's Honor Center v. Hicks*.[216]

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212 *See, e.g.*, *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life*, PEW RSCH. CTR. (June 12, 2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public [https://perma.cc/72NN-WMH9].

It is worth noting that the preceding study was published in 2014. It seems likely that polarization has increased since that time. *See, e.g.*, John Gramlich, *20 Striking Findings From 2020*, PEW RSCH. CTR. (Dec. 11, 2020), https://www.pewresearch.org/fact-tank/2020/12/11/20-striking-findings-from-2020 [https://perma.cc/VJQ2-MA5L] (several of the twenty findings highlight the increasing polarization in the United States).

213 *See, e.g.*, Hirsch, *supra* note 193, at 142.

214 Fischl, *supra* note 1, at 183–84; Hirsch, *supra* note 193, at 142 ("This search for an explanation results in unmeritorious claims that give employees false hope, impose unnecessary litigation costs on employers, waste judicial resources, and often overshadow valid discrimination claims by making judges suspicious of all such cases."); *cf.* Lee Reeves, *Pragmatism Over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 556 (2008) ("[T]he consistently high volume of employment discrimination claims has outstripped even the most aggressive estimates of employment discrimination that remains. Under any analysis, it necessarily follows that a considerable number of employment discrimination claims are meritless, if not frivolous.").

215 Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 354 (2013). *See* discussion *supra* notes170–83.

216 St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); *see* discussion *supra* notes 156–65 and accompanying text.

Although *St. Mary's Honor Center* is a defensible interpretation of the pretext prong and one with which I agree, one also can see in it a waning acceptance of a "basic assumption," as Professor Calloway expressed it, on which the framework was built.[217] The frameworks for individual disparate treatment theory[218] and systemic discrimination theory[219] are built on assumptions about the likelihood and prevalence of employment discrimination. When these assumptions are less accepted by courts, the employment discrimination doctrine they fashion will become less robust.

Furthermore, the role of the employment discrimination laws as the most efficacious wrongful discharge law available[220] creates greater animosity between former employers and former employees in litigation of discharge cases than would seem warranted.[221] Most attorneys who have practiced labor and employment law are familiar with the heightened emotion with which some employers approach claims by former employees. Employers seem to feel a sense of ingratitude and betrayal that someone to whom they provided a job would contest and seek to hold them liable for a termination decision.[222]

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217 *See* Calloway, *supra* note 63.

218 The *McDonnell Douglas* pretext framework begins with the prima facie case, which rests upon the assumption that if the two most common reasons for adverse employment actions, lack of a vacancy and lack of qualifications, are eliminated as explanations, then discrimination is a likely explanation for the decision. As the Court explained:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (emphasis in original) (internal citation omitted); *see also* Calloway, *supra* note 63.

219 *See, e.g.*, Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977) ("Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.").

220 *See supra* note 108 and accompanying text.

221 *See, e.g.*, Fischl, *supra* note 1, at 182.

222 In my personal experience, I shall never forget the president of a company that I represented in a lawsuit by a terminated employee. The former employee sued under several theories, including breach of contract and age and race discrimination. The case probably could have been settled for a relatively modest sum. When we met with the president, however, he told us to crush the former employee, no matter how much it cost.

The emotional response can be exacerbated exponentially when the former employee seemingly accuses the employer of being a racist, a sexist, or an ageist. Although the employment discrimination statutes cover discrimination that is not animus-based and not so morally reprehensible, such as discrimination based on stereotypes and disparate impact, employers often perceive that they are being accused of virulent hate based on race, sex, age, etc.[223]

The negative effects of this unhealthy symbiosis between employment at will and employment discrimination law could be ameliorated by providing for general wrongful discharge laws and taking termination claims out of the coverage of the discrimination laws. However, individual states will not do it, and Congress will not impose it on them. We have to break out of that dichotomy to find a solution. An unexplored way out of this dilemma may be embedded in the relationship between states' employment-at-will law and federal employment discrimination law and the ability of Congress to work with the states.

C. *The Way Forward: A Big Trade*

The twin pillars of U.S. employment law have put us in an interesting position. Employment at will, notwithstanding its iconic status, does not have great practical value to employers. It would seem to be a divine prerogative of inestimable value, but that is seen as illusion when viewed in light of the employment discrimination laws and the many other exceptions under federal and state laws. As Professors Kittner and Kohler aptly characterize it, U.S. employers already are functioning as though they are regulated in terminations by a wrongful discharge law.[224] On the other hand, the employment discrimination laws are burdened with their role of being the most significant exception to employment at will, and courts, solicitous of protecting the seemingly important "divine right" of employers, develop employment discrimination doctrine that is more restrictive than what is needed to address the persistent problem of invidious employment discrimination.

Kittner and Kohler speculate that "[i]f the United States had a system requiring fundamental justification of a termination in accordance with a good cause concept, discrimination rulings in

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223 *See, e.g.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1163 (1995) (describing an unpleasant interview with a manger who fumed at "being called a bigot").

224 Kittner & Kohler, *supra* note 7, at 327.

relation to termination [claims] would lose their practical significance."[225] They base this supposition on the employment law of Germany. Because Germany has a federal discharge statute and employment discrimination laws, the issue of discrimination rarely plays any role in unfair dismissal claims.[226] These thoughts suggest to me a way for the United States to improve its termination law and employment discrimination law and thus the nation's overall employment law and society's view of that law—a trade of sorts. I propose that employment at will be replaced with state wrongful discharge laws and termination claims be removed from the realm of federal employment discrimination law.

Employers actually would not lose a right that is as valuable as it is perceived to be because under current law they rarely feel free to function as though employment at will is the law.[227] Wrongful discharge laws would put them in the position of defending that they have good or just cause (job-related reasons) for firing employees—something most employers already are prepared to do. They would not be accused of being discriminators, however, which most understand to be accusations of bigotry, misogyny, or other reprehensible animus.[228] Victims of discriminatory terminations would still have legal recourse, but it would not come under the employment discrimination laws.

How can this be done? Congress enacted the employment discrimination laws, and it can amend those laws. Similarly, state legislatures have the authority to enact state wrongful discharge statutes that displace employment at will, as the Montana legislature did decades ago. Congress must be willing to exempt termination claims from coverage under federal discrimination law in exchange for states enacting wrongful discharge laws.

II. A COOPERATIVE FEDERALISM APPROACH TO WRONGFUL DISCHARGE LAW

A. *Cooperative Federalism Rather Than Federal Wrongful Discharge Law*

How could the exchange that I propose be implemented? Congress is not going to enact a federal wrongful discharge law that displaces state

225 *Id.* at 330.

226 *Id.* at 315.

227 *See supra* notes 108–118 and accompanying text.

228 *See supra* notes 221–23.

discharge law. A single, federal statute governing termination, which would preempt any state law regarding termination, has obvious advantages, including clarity and simplicity,[229] and such is the approach of other nations. Cogent arguments have been made for such a federal law in the United States.[230] I agree that it is the best solution, but it will not happen. While possible in terms of Congressional power, politically, it is not feasible in this nation.

For over a century and a half,[231] states have regulated employment termination through state law, subject to congressionally mandated exceptions. When a compelling public policy case can be made for an exception, such as the federal employment discrimination laws or the various anti-retaliation provisions in federal employment laws, Congress is responsive and up to the task. While the exceptions have proliferated, it is one thing for the federal government to impose exceptions on the states and quite another to displace state law altogether on a matter as fundamental as employer prerogative regarding employee discharge. The cavalcade of federal exceptions to employment at will has not moved Congress to displace the basic state law on employment termination. Although one may argue that the political winds shifted with the 2020 presidential election, no such federal legislation was even a serious consideration under recent Democratic presidents.[232] The historical record evinces Congress's unwillingness to arrogate to the federal government general regulation

229 *See, e.g.*, Hirsch, *supra* note. 193, at 91.

230 *See, e.g.*, *id. passim*; Befort, *Millennium*, *supra* note 47, at 424; McGinley, *supra* note 208.

231 Employment termination law did not become a significant legal issue until roughly the mid-1800s. *See* Morriss, *supra* note 70, at 681–82 (discussing the chronology of states' adoption of employment at will).

232 Neither President Clinton nor President Obama and the Congresses during their terms took any such action, and the employment laws they enacted could not be characterized as revolutionary or transformative. On the general reluctance of Congress to substantially change U.S. employment law no matter who is in power, see generally William R. Corbett, "*The More Things Change, . . .*": *Reflections on the Stasis of Labor Law in the United States*, 56 VILL. L. REV. 227 (2011). Although Congress does not radically change U.S. employment law when political power shifts, federal agencies do. The National Labor Relations Board often reverses a large number of Board precedents when there is a change in the presidency. For example, the Board, with the substantial influence of the General Counsel, during the Trump Administration reversed an unusually large number of precedents. *See, e.g.*, Robert Iafolla, *Top Trump Labor Lawyer Extends Campaign to Remake Workplace Law*, BLOOMBERG L.: DAILY LAB. REP. (June 5, 2019, 6:05 AM), https://news.bloomberglaw.com/daily-labor-report/top-trump-labor-lawyer-extends-campaign-to-remake-workplace-law [https://perma.cc/ST45-GM4V]. However, federal agencies cannot, of course, enact federal legislation.

of termination,[233] and I perceive nothing that suggests an impending change.[234]

I suggest that we not try to persuade Congress to do what it has not done and will not do. Instead, I propose an approach of cooperative federalism. Although full exposition of that topic is beyond the scope of this Article, I mean by that term an approach in which Congress achieves an objective of the federal government by inducing or inviting the states to act consistent with that objective.[235] Although displacing employment at will has not clearly been an objective of the federal government, I have argued that it should be in order to improve both the employment law of the nation and our society generally.

Cooperative federalism has been employed in many areas of law, such as environmental and natural resource law, education, welfare, and crime control.[236] The Affordable Care Act[237] has elements of cooperative federalism, such as the state-run healthcare exchanges subject to federal standards.[238] Perhaps most relevant to the proposal described herein is the unemployment insurance joint project of the federal and state governments from the New Deal era.[239] Briefly rendered, the federal government made tax credits for the federal unemployment tax available to employers in states that developed

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233 Consider, for example, the struggle to enact Title VII and the forces that had to converge to make that monumental change come to fruition. *See, e.g.*, Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253 (2005).

234 Indeed, Professor Hirsch, who set forth an impressive proposal of a federal termination law, concluded his article by noting that "it is unlikely that a proposal this ambitious would ever be fully adopted." Hirsch, *supra* note 193, at 158.

235 *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289 (1981); Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENV'T. L.J. 179, 180 (2005); Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 558 (2000); Erwin Chemerinsky, Jolene Forman, Allen Hopper, & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 116 (2015) (describing cooperative federalism as "a partnership between the States and the Federal Government, animated by a shared objective") (quoting Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992)). Professor Philip Weiser characterizes cooperative federalism as "a middle ground solution between the extremes of dual federalism and preemptive federalism." Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 666 (2001).

236 *See, e.g.*, Greve, *supra* note 235, at 558.

237 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of titles 5, 18, 20, 21, 25, 26, 28-31, 35, 36, and 42 of the U.S.C.).

238 *See, e.g.*, Chemerinsky et al., *supra* note 235, at 118; Heather K. Gerken, *The Federalis(m) Society*, 36 HARV. J.L. & PUB. POL'Y 941, 942 (2013); Saby Ghoshray, *Brandeisian Experiment Meets Federal Preemption: Is Cooperative Federalism a Panacea for Marijuana Regulation?*, 35 N. ILL. U. L. REV. 511, 529 (2015);
Sarah E. Light, *Advisory Nonpreemption*, 95 WASH. U. L. REV. 325, 340–41 (2017).

239 *See* Weiser, *supra* note 235, at 669 (citing unemployment insurance and other New Deal programs that called for state implementation of federal programs).

unemployment insurance programs that conformed with federal standards.[240]

The cooperative federalism approach seems well-suited to a federally brokered trade-off between state employment at will and federal employment discrimination law, in light of the problems created by the interplay between these two pillars of U.S. employment law and the respective spheres of regulation of Congress and the state legislatures.

I do not favor a hard or coercive version of federalism in which states are denied funds unless they accede to and administer federal standards.[241] Instead, I propose that Congress enact legislation that gives states the option of having employment termination claims removed from coverage under the employment discrimination statutes if a state enacts an acceptable wrongful discharge statute requiring good or just (job or business related) cause for termination.

The Uniform Law Commission has made it a priority to encourage cooperative federalism approaches in various contexts to accomplish the twin goals of implementing needed laws and maintaining the healthy balance between federal and state authority.[242] Significantly, the Commission also promulgated the META.[243] However, no state enacted a version of the META because it did not garner support of employers or gain significant political leverage to cause states to act. Under a cooperative federalism approach, perhaps employers and/or other interest groups would spur states to act.

B. *The Proposal*

Under this proposal, Congress would pass legislation that would permit states to opt out of the coverage of discharge claims[244] by the federal employment discrimination laws if they enact state wrongful

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240 *See, e.g.*, Lester, *supra* note 57, at 340.

241 *See, e.g.*, Patricia E. Salkin, *The Quiet Revolution and Federalism: Into the Future*, 45 J. MARSHALL L. REV. 253, 261–62 (2012); Adam Babich, *The Supremacy Clause, Cooperative Federalism, and the Full Federal Regulatory Purpose*, 64 ADMIN. L. REV. 1, 24 (2012).

242 *See, e.g.*, David C. McBride & Raymond P. Pepe, *Federalism, Liberty and Preemption: The Patient Protection and Affordable Care Act*, 29 DEL. LAW. 22, 26–27 (2012); William H. Henning, *The Uniform Law Commission and Cooperative Federalism: Implementing Private International Law Conventions Through Uniform State Laws*, 2 ELON L. REV. 39, 44–45 (2011).

243 *See infra* notes 252–54 and accompanying text.

244 I propose that all discharge claims be removed from coverage of the employment discrimination statutes, including retaliation claims and constructive discharge claims, and placed under state wrongful discharge laws. The EEOC would retain jurisdiction over all types of adverse employment actions other than terminations.

discharge laws that abrogate employment at will and meet minimum federal standards. I do not undertake in this Article to work out all the details of what the minimum federal standards should be.[245] My principal purpose is to initiate a discussion about a different type of approach, based on cooperative federalism, to displacing employment at will and removing that significant impediment to the courts' development of more robust employment discrimination law doctrine. If my proposal were to gain traction, there would be time enough to develop the details of the required federal minimum standards. Moreover, there have been numerous proposals[246] and some existing laws[247] that offer models from which to craft an acceptable statute.[248]

I will, however, take a "first stab" at some basics that emanate from the trade-off that I propose. A qualifying state statute should have a number of required elements and, beyond those, some flexibility for

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245 Sadly, I am not so naïve as to believe that soon after publication of this Article Congress will adopt my proposal, although I think it should. *See, e.g.*, Hirsch, *supra* note 193, at 158–59. Professor Hirsch acknowledges that his proposal for a single federal termination law likely is too ambitious to be fully adopted, but he argues that such an ambitious proposal could prompt "limited pragmatic reforms" that would be positive steps in the development of the law. *Id.* Assuming the approach I propose gains traction in Congress, the minimum requirements of an acceptable termination law could be debated and determined based on a substantial body of scholarship.

246 *See supra* Section I.A.2.

247 Montana, Puerto Rico, and the U.S. Virgin Islands have such laws. *See supra* notes 71–72 and accompanying text. Almost all other nations have wrongful discharge laws. International Labour Organization [ILO] Convention No. 158 and Recommendation No. 166 provide a useful model approved by an international organization. *See* Int'l Lab. Org. [ILO], *Termination of Employment Convention*, C158 (June 2, 1982), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158 [https://perma.cc/6VYZ-WNZ7]; Int'l Lab. Org. [ILO], *Termination of Employment Recommendation*, R166 (June 2, 1982), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R166 [https://perma.cc/X86C-WTJC].

248 One matter that is frequently discussed is how to define "good cause" or "just cause." This simply is not a difficult issue. The ILO Convention and Recommendation, the META and Montana Act, and the laws of most nations in the world provide suitable definitions. *See* sources cited *supra* note 23. Moreover, we have a substantial body of arbitral decisions defining good cause in the context of employees entitled to good cause protection under collective bargaining agreements. *See supra* note 23. It will suffice here to say that the types of reasons that qualify as good cause are "personal" reasons, meaning related to the work performance or conduct of the worker, and "business" reasons, meaning based on the operational requirements of the undertaking, establishment, or service. *See, e.g.*, Int'l Lab. Org. [ILO], *Termination of Employment Convention*, C158 art. 4 (June 2, 1982), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:: NO::P12100_ILO_CODE:C158 [https://perma.cc/6VYZ-WNZ7].

state variations.[249] I do not think complete uniformity should be the goal so long as certain minimum protections are required.[250]

Two overarching considerations must be taken into account regarding specification of the minimum requirements. First, terminated employees would not be able to pursue termination claims under the federal employment discrimination laws, so an acceptable wrongful discharge law should have remedies, procedures, and a forum for adjudicating claims that are comparable to what exists now under the federal discrimination laws. Second, in order for states to be interested in opting to enact wrongful discharge laws, it seems likely that employer support would be needed, or at least employer opposition would need to be minimized. To achieve either support or suppression of opposition, employers would need to believe that they were receiving some advantages in the trade. Professor Befort posited that the META was not enacted by any state because it did not provide adequate trade-offs for the loss of employment at will.[251] Developing an approved statute that balances those two objectives is no easy task.

The META provides a useful starting point. It was promulgated by the Uniform Law Commission a few years after the Montana Act was enacted, so the Commission promulgated the META with the Montana law as background. Furthermore, the META has been extensively critiqued.[252] The META thus provides a useful starting point, but because no state enacted a version of the META, the second overarching consideration needs to be addressed—adequate trade-offs for employers. Professor Befort made several points about the inadequate trade-offs provided to employers. One of those points in particular merits consideration in my proposal. He pointed out that the META would have added claims against employers rather than supplanting any claims.[253] He recommended that the discharge law should displace all termination claims except those arising under a collective bargaining

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249 The Uniform Law Commission, for example, promulgates both uniform and model acts. Model acts are promulgated when uniformity may be a desirable objective, but it is not the principal objective. *See What is a Model Act?*, UNIF. L. COMM'N, https://www.uniformlaws.org/acts/overview/modelacts [https://perma.cc/5Q2D-ZEB2]. Notably, the Commission developed a model, not uniform, act for termination. *See* MODEL EMP. TERMINATION ACT (UNIF. LAW COMM'N 1991).

250 Professor Hirsch argues for adoption of a federal termination law because "[i]t is virtually impossible to get all states to implement the same termination rules." Hirsch, *supra* note 193, at 99.

251 *See* Befort, *Millennium*, *supra* note 47, at 427.

252 Professor St. Antoine served as the reporter or principal draftsperson of the META. He provides a useful overview of the META in Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361 (1994) [hereinafter St. Antoine, *The Making of the Model*].

253 Befort, *Millennium*, *supra* note 47, at 428.

agreement.[254] Under my proposal, the federally approved state wrongful discharge law would supersede only termination claims under the federal employment discrimination laws. There is a point regarding the discrimination laws on which Professor Befort and I disagree. Recognizing the important public policy undergirding the federal employment discrimination laws, Professor Befort felt some discomfort with displacing the claims under the discrimination laws and sought to assuage that concern by recommending that the adjudicators be vested with the authority to award double or treble damage awards to preserve the deterrent functions of the discrimination laws.[255] Although I, too, understand and support the importance of deterring and punishing discrimination, I do not subscribe to enhanced-damages-for-discrimination as part of the discharge law remedies because it would maintain the incentive to pursue discrimination claims and litigate the issue of discrimination. I have discussed why I think this is harmful to both discrimination law and society.[256] On this point, Professor Hirsch and I agree that a termination law must displace termination claims under the federal discrimination laws.[257] Moreover, the core of the trade-off that I propose is the elimination of termination claims under the employment discrimination laws, and the enhanced damages largely would eviscerate the benefit to employers in that trade-off. Thus, for those reasons I would not favor enhanced damages for proof of discriminatory dismissal.

Professor Befort's second point about the inadequacy of trade-off under the META is that the remedies are too generous to employees, exceeding those available under the laws of most other nations.[258] He recommended several downward adjustments of the remedies: generally deleting reinstatement (unless it served the public policy of eliminating discrimination); capping front pay awards at a maximum of one year's pay; and reducing the cost of a waiver in the form of guaranteed severance pay.[259] The last adjustment requires further explanation. The META provides that employers and employees may by express written agreement waive the good-cause requirement for termination if the employer agrees to severance pay of at least one month's pay for each year of service up to a maximum of thirty months'

254 *Id.*

255 *Id.* at 430.

256 *See supra* Section I.B.3.

257 *See* Hirsch, *supra* note 193, at 106 (arguing that, under Befort's proposal, "[a]lthough employees would no longer be able to bring claims under a specific antidiscrimination statute, they would be able to make the same arguments").

258 Befort, *Millennium*, *supra* note 47, at 431.

259 *Id.*

pay.[260] The issue of the remedies available under a federally approved statute is critical to my proposal because one of my overarching considerations is that the approved law must offer remedies roughly comparable to the federal employment discrimination laws that it is displacing with respect to termination claims. A beginning point thus would seem to be the remedies available under the discrimination laws:[261] backpay, injunctive relief, including possible reinstatement, and capped compensatory and punitive damages,[262] as under Title VII and the ADA,[263] although the caps of Section 1981(a) do not apply to race discrimination claims under Section 1981.[264] Punitive damages could be limited, as under the discrimination laws, to claims that satisfy a standard such as "with malice or with reckless indifference to the federally protected rights of an aggrieved individual"[265] to the right to be discharged only for good cause. Although I think this proposal must begin with the remedies available under Title VII and the ADA because those are the rights and claims being displaced, the problem is that making the remedies available under the discrimination laws available to all wrongfully discharged employees does not offer an attractive trade-off to employers, thus, replicating the problem Professor Befort noted with the META. However, the META's agreed-upon-waiver-for-a-severance-package may provide an interesting provision that would make the legislation more attractive to employers. The META contemplates such agreed-upon waivers being negotiated at the beginning of the employment relationship rather than at the time of termination. Thus, by mutual agreement, an employer and employee opt out of the good-cause regime in exchange for a guaranteed severance package. Many employers today at the time of termination seek to obtain waivers in exchange for a lump sum payment. Thus, the META buyout is like current practice, except in timing. Although many would object to employers being able to opt out of employment discrimination claims at the beginning of the employment relationship,

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260 MODEL EMP. TERMINATION ACT § 4(c) (UNIF. L. COMM'N 1991).

261 The remedies available under the ADEA are different from those available under Title VII and the ADA. The ADEA incorporates the remedies under the Fair Labor Standards Act: "[a]mounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation," but liquidated damages are due only upon proof by the plaintiff of a willful violation. 29 U.S.C. § 626(b).

262 Although the META expressly excluded compensatory and punitive damages, MODEL EMP. TERMINATION ACT § 7(d), the META did not displace rights or claims under the discrimination laws. MODEL EMP. TERMINATION ACT § 2(e).

263 The remedies under the ADEA are different, as the ADEA incorporates the remedial provisions of the Fair Labor Standards Act. 29 U.S.C. § 626.

264 42 U.S.C. § 1981.

265 42 U.S.C. §§ 1981a–1981(b)(1).

it is important to remember that the issue is not opting out of employment discrimination law,[266] as only termination claims would be affected by this proposal, with all other adverse employment actions remaining covered. What the employer and employee would be opting out of is only good cause protection against termination. Still, I think the better practice is to require state laws that do not permit the employer to insulate itself at the beginning of the relationship through a waiver, but instead make the option available at the point of termination when both parties can assess the strength of the employer's good-cause case, which is what is done, with substantial procedural protections for the employee under the Older Workers Benefit Protection Act (OWBPA).[267] Although the OWBPA is not roundly applauded, as it does represent a compromise on the prohibition against discrimination,[268] the use of waivers at the time of termination could be a compromise that would make this tradeoff work. Even antidiscrimination goals may be compromised in pursuit of other social goals.[269] The compromise may be worthwhile to achieve the abrogation of employment at will and the liberation of the employment discrimination laws from the baggage of termination claims.

An existing statute that provides for a different set of remedies than the META or the Montana Act is Puerto Rico's Act No. 80 or Wrongful Discharge Act.[270] As one commentator has noted, few scholars who propose enactment of wrongful discharge law in the United States examine Puerto Rico's law in much depth.[271] Puerto Rico's Act No. 80 establishes a remedial scheme of indemnities based on length of service if the employer cannot satisfy its burden to prove just cause under a narrow statutory definition,[272] but reinstatement is not available as a remedy. Because these remedies are quite different from what is available under the employment discrimination statutes, I would not

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266 I am grateful to Professor Rebecca White for highlighting the compelling civil rights public policy interest in an employer's not being able to opt of discrimination coverage at the beginning of the employment relationship.

267 29 U.S.C. § 626(f)(1). The Older Workers Benefit Protection Act expressly states that the employee does not waive any rights or claims that may arise after the waiver is executed. 29 U.S.C. § 626(f)(1)(C); *see, e.g.*, Maurice Wexler, Charles C. Warner, Gary R. Siniscalco, John L. Quinn, & Adam T. Klein, *The Law of Employment Discrimination from 1985 to 2010*, A.B.A. J. LAB. & EMP. L. 349, 378 (2010).

268 *See* Michael C. Harper, *Age-Based Exit Incentives, Coercion, and the Prospective Waiver of ADEA Rights: The Failure of the Older Workers Benefit Protection Act*, 79 VA. L. REV. 1271 (1993).

269 *Id.* at 1342 ("The normative goals of particular laws, including antidiscrimination laws, of course may be compromised to serve other social goals.").

270 P.R. LAWS ANN. tit. 29 §§ 185a-m (2010).

271 Farinacci-Férnós, *supra* note 24, at 127–29.

272 *Id*. at 143–45.

favor such remedies in the federally approved statute. However, the Puerto Rico law provides another existing statute that should be considered in developing the approved law.

I admit that crafting a set of remedies that both holds employment discrimination victims harmless and has some appeal for employers is challenging. It seems to me, however, that the beginning point must be the remedies currently available under the federal discrimination laws.[273] However, some downward variations in the discrimination remedies, such as elimination of punitive damages or caps on front pay, such as proposed by Professor Befort, may be reasonable compromises in view of the fact that improved chances of recovery of lower amounts under a wrongful discharge law could be a more valuable protection than the poor success rates in recovering better remedies under current discrimination law.

The burden of proof, or more precisely, burdens of production and persuasion under the state statutes is a matter that could prove crucial to the balancing of the goals of holding harmless victims of discrimination and simultaneously giving employers something that makes the law palatable. Both the META[274] and the Montana Wrongful Discharge Act[275] place the burden of proving lack of good cause on the plaintiff employee. The employment discrimination statutes and disparate treatment pretext (*McDonnell Douglas*) and mixed-motives proof frameworks place the initial burden of production on the plaintiff employee, but they also have shifting burdens of production for the pretext analysis and persuasion for the mixed-motives framework. Although the individual disparate treatment and disparate impact proof frameworks in the current employment discrimination law function in different ways regarding burdens of production and persuasion, the *McDonnell Douglas* pretext proof structure is by far the predominant framework used in discrimination law.[276] The proof frameworks have been, in the view of many, one of the most significant and unnecessary problems and obsessions of the employment discrimination doctrine.[277] An interwoven question is to what standard of causation must the party with the burden of persuasion satisfy. Although these matters could be

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273 Of course, as noted earlier, the remedies under the Age Discrimination Act are different than the remedies under Title VII and the Americans with Disabilities Act. *See supra* note 261.

274 *See* MODEL EMP. TERMINATION ACT § 6(e) (NAT'L CONF. OF COMM'RS OF UNIF. STATE L. (1991).

275 *See, e.g.*, Parker, *supra* note 8, at 375.

276 Use of the pretext framework imposes a shifting burden of production similar to the "hybrid" scheme proposed by Professor Hirsch. *See* Hirsch, *supra* note 193, at 123.

277 *See, e.g.*, William R. Corbett, *Breaking Dichotomies at the Core of Employment Discrimination Law*, 45 FLA. ST. U. L. REV. 763 (2018).

left to the states to resolve differently,[278] I think it is important enough that the federal legislation should specify what a qualifying state statute must provide on these issues. Ultimately, the state wrongful discharge statutes are changing the default rule on termination by requiring that employers fire only for good or just cause. It is difficult for plaintiff employees to prove the negative—that the employer did not have good cause, until the employer articulates its good cause reason. Furthermore, plaintiffs generally have less information than employers about the reasons for which employers take adverse employment actions.[279] Still, consistent with the META, the Montana Act, and civil litigation generally, I proposed that plaintiff employees have the initial burdens of production and persuasion. However, in the context of laws that require employers to have good cause, it seems that shifting burdens, as used in the employment discrimination frameworks, would be suitable. Under the shifting burdens of production of the pretext analysis, with which courts are familiar and which they routinely apply in many types of employment cases, the plaintiff would be required to establish a prima facie case that the employer did not have good cause to fire her, and then the *burden of production* would shift to the employer to produce evidence of a good, job-related reason for the discharge. The *burden of production* would then shift to the plaintiff, who would have an opportunity to prove that the reason given by the employer was pretextual. The prima facie case is easily satisfied under current law, thus requiring employers in almost all cases to present evidence of good cause.[280] I am troubled, however, that the ultimate *burden of persuasion* of proving that the employer did not, at the but-for level of causation, fire for good cause remains on the plaintiff employee if the *McDonnell Douglas* pretext analysis is followed. The Supreme Court has been clear that the *burden of persuasion* never shifts and remains on the plaintiff at all stages of the pretext analysis.[281] This concern suggests that the mixed-motives framework originally developed in *Price Waterhouse* and modified by Congress in the Civil Rights Act of 1991 would be more appropriate.[282] Under that framework, the initial burden of proving that the illegal factor was a

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278 It is noteworthy that Professor St. Antoine, in a law review article before he became the reporter on the META, urged that legislation not address burden and quantum of proof. *See* Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 72 (1988) (urging that "[t]he statute should probably remain discreetly silent on such items as the burden and the quantum of proof").

279 *See* Hirsch, *supra* note 193, at 122.

280 *See supra* text accompanying notes 123–27.

281 *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

282 *See supra* notes 143–45 and accompanying text.

"motivating factor" rests on the plaintiff, and if the plaintiff satisfies that burden, there is a violation of Title VII.[283] The *burden of persuasion* then shifts to the defendant employer to prove that, notwithstanding the illegal motivation, it would have taken the same adverse action for a legitimate reason, which does not avoid liability but instead significantly limits remedies.[284] Ultimately, I think the *burden of persuasion* of proving that a good reason was a but-for cause for termination should rest with the employer. That result could be achieved by an adjustment of the mixed-motives framework: the initial burden of production and persuasion at a low level of causation should rest with the plaintiff employee, and if the plaintiff satisfied that burden, the burdens of production and persuasion should shift to the defendant employer to prove, at the level of but-for causation, that it took the adverse action for good cause, which would avoid a violation and liability.

Another critical issue regarding the approved law is the mechanism for adjudication of claims. The META offers several possibilities.[285] The META favors a state-run arbitration system in which a state agency adopts rules for the qualifications, method of selection, and appointment of arbitrators as the adjudicatory mechanism.[286] However, it also permits employers and employees, after a dispute arises, to agree in writing to private arbitration or other alternative dispute resolution[287] or to resolution in the courts.[288] The appendices to the META provide other options, including a state employing full-time civil service or other government personnel as hearing officers[289] or leaving adjudication to the civil courts.[290] The Montana Wrongful Discharge Act favors arbitration through the mechanism of an offer to arbitrate and the incentive that a prevailing employee who made an offer to arbitrate that was accepted is entitled to have the arbitrator's fees and all costs of arbitration paid by the employer.[291] The prevalent use by employers of mandatory arbitration clauses is an issue of great concern. Since 1997, the EEOC maintained an official policy statement opposing the application of mandatory arbitration clauses to federal discrimination claims as a condition of

283 42 U.S.C. § 2000e-2(m).

284 *Id.* § 2000e-5(g)(2)(B).

285 *See generally* St. Antoine, *The Making of the Model*, *supra* note 252, at 376–79.

286 MODEL EMP. TERMINATION ACT §§ 5–6 (Nat'l Conf. COMM'RS UNIF. STATE L. 1991).

287 *Id.* § 4(i).

288 *Id.* § 4(j).

289 *Id.* app. Alternative A.

290 *Id.* app. Alternative B.

291 MONT. CODE ANN. § 39-2-914(4) (1993).

employment,[292] but in 2019, the EEOC, by a divided vote, rescinded that policy statement.[293] On the other hand, bills have been introduced in Congress several times during the last decade that would prohibit pre-dispute mandatory arbitration agreements.[294]

My principal requirement for the federally approved law would be that it provide a vehicle by which employees could assert claims, at least initially, without the necessity of filing lawsuits in the civil courts. I think this is critical both because employees often cannot get representation or afford to pursue claims in court[295] and because the law is taking discriminatory termination claims out of coverage of federal laws that have a federal agency, the EEOC, with which employees must file claims before filing lawsuits. That agency investigates charges and attempts to resolve them without the necessity of litigation in the courts. Ultimately, either the agency or the employee may file a lawsuit in the courts. There are also state and local fair employment practice agencies (FEPAs) in many states, and these agencies handle discrimination claims with the EEOC, usually pursuant to work sharing agreements.[296] The states may be able to retool or repurpose these FEPAs to handle wrongful discharge claims, since presumably their workloads would decrease with the removal of termination claims from federal employment discrimination law. I prefer the vehicle of specialized labor agencies or tribunals at the state level, [297] similar to the Employment Tribunals in the United Kingdom[298] or the Labour Courts of France.[299] In the end, I suppose that states would be given some flexibility regarding fora for the adjudication of claims with a couple of options,

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292 *See* EEOC Notice No. 915.002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (July 10, 1997).

293 *See Commission Votes: December 2019*, EEOC (Dec. 2019), https://www.eeoc.gov/commission-votes-december-2019 [https://perma.cc/TJ4Q-3J6A].

294 The most recent version is the Forced Arbitration Injustice Repeal Act or the "FAIR Act." H.R. 1423, 116th Cong. (2019).

295 *See, e.g.*, Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 372–73 (2004) (explaining that "many employees simply lack the means to enforce their statutory rights"); Ann C. Hodges, *The Limits of Multiple Rights and Remedies: A Call for Revisiting the Law of the Workplace*, 22 HOFSTRA LAB. & EMP. L.J. 601, 609 (2005); Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 57 (2004).

296 *FY 2012 EEOC/FEPA Model Worksharing Agreement*, EEOC https://www.eeoc.gov/fy-2012-eeocfepa-model-worksharing-agreement [https://perma.cc/GEJ9-HMF2].

297 *See, e.g.*, Hirsch, *supra* note 193, at 126.

298 *See, e.g.*, John A. Durkalski, *Fixing Economic Flexibilization: A Role for Flexible Work Laws in the Workplace Policy Agenda*, 30 BERKELEY J. EMP. & LAB. L. 381, 398 (2009); *Employment Tribunal*, GOV.UK https://www.gov.uk/courts-tribunals/employment-tribunal.

299 *See, e.g.*, Pete Burgess, Susan Corby & Paul L. Latreille, *Lay Judges and Labor Courts: A Question of Legitimacy*, 35 COMPAR. LAB. L. & POL'Y J. 191, 195 (2014).

as under the META. I do not, however, favor permitting the option of initial adjudication in the state civil courts for many reasons, including the state courts' lack of experience with wrongful termination cases, the potential for overburdening dockets with a new type of frequently asserted claim, and most significantly, the difficulty for employees to obtain representation.[300]

Two other issues of exclusivity merit attention. First, should discharge claims be removed from coverage under the state employment discrimination laws? Consistent with the objectives of the proposed tradeoff, I think they should be. However, under the cooperative federalism approach that I favor, I think it would be appropriate to leave that decision to the states. A second issue is whether exclusivity of remedy should be expanded by Congress beyond the removal of termination claims from the federal employment discrimination laws.[301] At the federal level, termination claims could be removed from all federal laws, such as the anti-retaliation provisions in other federal employment laws, including the Fair Labor Standards Act[302] and the Family and Medical Leave Act,[303] and an array of federal whistleblower statutes.[304] Both Professor Befort and Professor Hirsch proposed federal wrongful discharge laws that superseded almost all termination claims. Such broader exclusivity would be consistent with the goal of giving employers something of value in the trade to compensate for the loss of employment at will.[305] Although I think that such broader exclusivity would in theory be a good result, it goes beyond the trade-off for which I have argued based on the interaction between employment at will and employment discrimination law, and it is fraught with procedural difficulties. Such a change would divest federal agencies other than the EEOC of their authority over termination claims and shift that authority to the states. The fora that adjudicate the state wrongful discharge claims could be overwhelmed with what were formerly retaliation claims under other federal laws, such as the Fair Labor Standards Act and the Family and Medical Leave Act. Moreover, the broader removal of termination claims from coverage under other federal laws would require attention to the

300 On the other hand, Professor Hirsch considered the courts as the best forum available unless and until specialty courts or tribunals are created. *See* Hirsch, *supra* note 193, at 127.

301 Professor Hirsch proposes a federal termination law that would supersede all termination claims. Hirsch, *supra* note 193.

302 29 U.S.C. § 215(a)(3).

303 29 U.S.C. § 2615(a)(2).

304 *See generally Whistleblower Protection*, U.S. DEP'T OF LAB. https://www.whistleblowers.gov/about-us [https://perma.cc/LA66-ZAJY].

305 Befort, *Millennium*, *supra* note 47, at 427.

remedies and other aspects of those laws to ensure that the state wrongful discharge laws would provide at least roughly equivalent protections to those provided by the federal laws. Ultimately, I do not propose such broad removal from coverage of termination claims.

Regarding which employers must be covered by the state wrongful discharge laws, the floor should be that established by Title VII and the ADA—fifteen or more employees.[306] This again would preserve protections available under the federal employment discrimination laws. States also should be granted the flexibility to cover smaller employers, as some do under state discrimination laws.

As I said, I do not attempt to resolve all the specifics of the minimum standards for a federally approved law because my principal purpose is to initiate discussion about a different and innovative approach to eliminating employment at will and improving employment discrimination law. If this approach gains favor, there are existing laws and proposed laws that should be considered, and there is a large body of scholarship regarding what should be included in a wrongful discharge law. Nonetheless, I have considered some aspects that are important in crafting a law that achieves two objectives: providing comparable protections to the federal employment discrimination laws and providing some benefits to employers from the tradeoff that may minimize employer resistance to the abrogation of employment at will.

III. ANTICIPATING AND RESPONDING TO OBJECTIONS TO A COOPERATIVE FEDERALISM APPROACH

Because I am making an unconventional proposal that involves fundamental changes in the employment law of the United States, I wish to address some likely objections to the proposal.

A. *Sacrificing the Rights and Protections of Discrimination Victims*

The most fervent version of this objection is likely to be that the rights and protections of African Americans, women, and others who have borne the brunt of discrimination historically are being sacrificed or traded in order to achieve good-cause protection for all. There may be milder variations of that objection, but all involve a concern with

306 The ADEA has a higher floor—twenty or more employees. 29 U.S.C. § 630(b).

removing the federal condemnation of discriminatory terminations.[307] I am sensitive to this argument. Indeed, it is the displacing of the discrimination claims for terminations that causes me to insist on state laws that provide remedies and adjudicatory mechanisms that approximate those available under the federal discrimination laws. Professor Hirsch astutely observes that the most controversial effect of eliminating termination claims from the discrimination laws is the symbolic impact of "tak[ing] away some of the advantages that come from a clear statement of policy to root out discrimination in the workplace."[308] While I think the symbolic effect is a significant cost of this proposal, as I explain below, the practical advantages of removing termination claims from discrimination law outweigh the admitted cost.

First, the unavailability of general good cause protection and the availability of protection provided by the discrimination laws has created a legal regime in which numerous plaintiffs who are discharged try to assert their claims under the discrimination laws regardless of the strength of the discrimination claim. The extent of this "square peg-round hole"[309] phenomenon is hard to estimate, but courts seem to have reacted to it by developing weaker-than-needed doctrine under the discrimination statutes. Thus, to the extent the discrimination laws are being used as wrongful discharge laws,[310] the anti-discrimination purpose is being diluted and the discrimination law is being weakened. Relatedly, to the extent that people in the United States believe that members of "protected classes" have protection against termination that others do not, that perception of the discrimination laws can engender a resentment regarding the laws and a friction in society that is antithetical to the goals of the discrimination laws.[311]

Second, the only type of claim that would be removed from coverage under the employment discrimination laws is termination claims. All other adverse employment actions would remain covered by the discrimination laws. Termination is the ultimate adverse employment action, and its consequences can be devastating to a fired

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307 Professor Befort, recognizing the importance of the "societal goal of eradicating discrimination in the workplace," proposes displacing termination claims from coverage under the federal discrimination laws but creating enhanced remedies if a plaintiff proves a discriminatory reason for termination. Befort, *Millennium*, *supra* note 47, at 429. Professor Hirsch, who advocates for adoption of a federal termination law that displaces termination claims under the federal discrimination laws, recognizes that this is one of the most controversial aspects on his proposed federal law. *See* Hirsch, *supra* note 193, at 138.

308 Hirsch, *supra* note 193, at 138.

309 *See supra* note 190 (discussing Professor Fischl's depiction of this phenomenon).

310 *See supra* Section I.B.3.

311 *See supra* Section I.B.3.

employee in many ways, including preventing her from fully participating in the rights and privileges of citizenship.[312] Termination thus inflicts harm on society at large. Because of the significant harm flowing from termination, it is appropriate to deal with this one particular adverse employment action under a law providing equal protection to all.

Third, this is a proposed trade, and the value of what is being given up and what could be gained should be assessed. The success rate of plaintiffs in employment discrimination litigation generally is quite bad.[313] Balanced against the value of an abysmal success rate for plaintiffs in employment discrimination cases is the value of a wrongful discharge claim that would appear to offer a better chance of success on discriminatory termination claims,[314] as well as other termination claims. In addition to victims of discriminatory discharges having better prospects for recovery under a general termination law, the courts, free from concern about weakening employment at will, can develop more robust employment discrimination doctrine for other adverse employment actions once the baggage of termination claims is removed.

In the end, it is true that something with both real and symbolic value is being traded, but what is being gained should offer greater value in terms of increased chance of recovery by plaintiffs, improved discharge law, improved employment discrimination law, and more positive and less divisive societal perception of employment law.

B. *Finding a Line of Demarcation Between Adverse Actions*

The EEOC and state and local FEPAs will be faced with drawing a line between claims that are covered by the employment discrimination laws and termination claims, which will no longer be within their jurisdiction. This line drawing is likely to be particularly necessary regarding claims of hostile environment harassment that end in

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312 *See supra* notes 33–45 and accompanying text.

313 *See supra* note 61; Hirsch, *supra* note 193, at 133–34.

314 As Professor Hirsch explains,

> The law of termination's potential effect on Title VII is deceptively simple. Legally, the proposal would greatly simplify termination claims that allege discrimination. This simplification improves enforcement, but it also alters the perceptions of employers, employees, and judges. This shift promises to alleviate hostility against claims of discrimination and, in turn, make it easier for employees who are truly victims of discriminatory acts to seek redress.

Hirsch, *supra* note 193, at 142.

termination and claims of constructive discharge. This a real and significant issue, but not a unique one. For example, in the United Kingdom, the law recognizes a common law claim for breach of the implied contract term of mutual trust and confidence and a statutory claim for unfair dismissal.[315] Recovery of compensatory and possibly punitive damages for the emotional distress caused by harassment and discriminatory conduct is available under Section 1981(a).[316] Remedies for a discriminatory termination, such as backpay, front pay, and possibly reinstatement would be recoverable under the wrongful discharge law. The necessity of drawing lines between recoveries and specifying the damages recoverable for different claims is a common issue in the law.

C. *Inadequate Incentives for States to Enact Wrongful Discharge Laws*

It is hard to know whether any states would exercise the option under this approach if Congress made it available. One could argue that employers would not support such legislation because they would be subject to liability under general wrongful discharge laws rather than more limited liability under the employment discrimination laws.[317] I have argued, however, that it would be better for employers, employees, the state of the law, and society in general, if employers did not have to defend so many claims of discriminatory termination. Terminations are the most adverse of all adverse employment actions, leading to extreme emotions and antipathy. When that is mixed with allegations of discrimination, which often are understood to be allegations of racism, bigotry, or sexism, it is a volatile mix that results in heated litigation and sometimes scars on relations and tensions in society.[318] Employers may not lobby for such a change, but the public may see it as a change that

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315 Katherine M. Apps, *Good Faith Performance in Employment Contracts: A "Comparative Conversation" Between the U.S. and England*, 8 U. PA. J. LAB. & EMP. L. 883 (2006). The "Johnson exclusion area" is the term applied to the boundary line providing essentially that termination claims must be pursued under the statutory wrongful dismissal cause of action, not the common law cause of action. *Id.* at 937–38. Although this line of demarcation is not as easy to apply as it is to state, the employment tribunals make a distinction.

316 42 U.S.C. § 1981a.

317 As mentioned above, employers would get more out of the trade if termination claims were removed from the coverage of all federal laws, not just the employment discrimination laws. *See supra* notes 301–05 and accompanying text. However, such broader removal is more challenging for the reasons mentioned above.

318 *See supra* Section I.B.3.

is good for both the law and society and may call upon their legislators to make such a change.

Furthermore, as discussed above, employers do not, under current law, function as though they can fire without good cause.[319] Thus, the enactment of state wrongful discharge laws sounds as if it takes from employers their valuable "divine right,"[320] but the right actually does not have great practical value. Most employers would not find it necessary to make drastic changes in their approaches and procedures regarding discharge if states enacted wrongful discharge statutes. States should be willing to deprive employers of a "right" that they may value well beyond its actual worth in order to improve employment law and society.

CONCLUSION

Employment at will is an aberrant approach to employment termination that is unique to the United States. Prodigious are the criticisms of this law and the proposals to replace it with wrongful discharge legislation. Such proposals have called for enactment of either federal or state wrongful discharge statutes. But such laws are not going to be enacted at either level. I propose a different approach: a cooperative federalism approach whereby the federal government creates an incentive for states to enact state laws that comply with specified federal minimum criteria. The trade-off is that termination claims are removed from coverage under the federal employment discrimination laws. This proposal is based on the relationship between employment at will and employment discrimination law in which each is the most significant weakness of the other.

The approach I propose is controversial. Moreover, resolving all the details of such a significant change would be daunting. This approach involves a trade in which things of value are given up for the prospect of producing something better. This is not easy. Yet, a multitude of other proposals over many decades has not produced a change. Consequently, the myth of employment at will persists, and courts continue to render inadequate employment discrimination doctrine. A different approach is needed. When neither Congress nor the states will act, cooperative federalism offers a way to engage both.

I entertain no illusion that Congress will leap to action to implement this proposal. However, I hope to provoke new examinations of the overestimated value of both employment at will to

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319 *See supra* notes 56–58 and accompanying text.

320 *See supra* note 75 and accompanying text.

employers and employment discrimination claims to putative victims of discriminatory terminations. We need to acknowledge that the relationship between employment at will and employment discrimination law results in bad or weak law and detrimental effects on society. Furthermore, I hope to incite discussion of how the federal and state governments might work together to improve the state of law and concomitantly the state of society. Perhaps, if these matters are considered and debated, Congress and state legislatures will decide that the time has come to fire employment at will and to discharge termination claims from employment discrimination law.