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NOTE

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INTRODUCTION

Nathan Fields, an African-American employee at the New York State Office of Mental Retardation and Developmental Disabilities ("OMRDD"), was in many ways the typical Title VII[1] employment discrimination plaintiff, with a case that, on its face, suggested both discriminatory and benign actions by his employer.[2] For six years,[3]

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994), prohibits discrimination on the basis of race, color, religion, sex, and national origin by private and public employers, labor organizations, and employment agencies. 1 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 1.01 (2d ed. 2001). The statute reaches decisions related to hiring, firing, promoting, classifying, and compensating employees, as well as employment conditions. *Id.*

2. Fields v. N.Y. State Office of Mental Retardation & Developmental Disabilities, 115 F.3d 116 (2d Cir. 1997).

Fields worked as a maintenance assistant in the electrical shop at OMRDD's Oswald D. Heck Developmental Center ("Heck"). During that time, he twice applied for a promotion, and on each occasion, Heck selected white employees for the position.[4] In addition, Fields claimed that he was discriminatorily singled out for disciplinary treatment, that he was assigned to a disfavored work shift, and that he received fewer opportunities for overtime work than his white co-workers.[5] Fields offered statistical evidence indicating that Heck disproportionately assigned the tedious and difficult "ballast" work to the minority employees of the electrical shop.[6] Fields's statistics also revealed that Heck did not randomly assign job pairings in the electrical shop; rather, Heck tended to assign minorities to work with other minorities, while disparately matching white workers with other whites.[7] Finally, Fields testified that on two or three occasions he heard white employees make racial jokes or slurs about minority co-workers.[8]

As is the case in many employment discrimination "disparate treatment" claims,[9] however, other facts — including Fields's spotty employment record and Heck's ability to articulate legitimate, nondiscriminatory reasons for many of its actions — complicated the plaintiff's claims. Fields himself acknowledged, for example, that he was poorly qualified for the promotions, and that he had accumulated

3. Heck hired Fields as a Grade 8 maintenance assistant in 1985 and promoted him to Grade 9 in 1986. *Id.* at 117. In 1989, Fields joined the Navy and went on military leave without pay from Heck. *Id.* Fields rejoined Heck's workforce in 1992, and he filed suit against his employer in May 1994. *Id.* at 117, 119. Fields's lawsuit related only to actions taken by his employer after Fields's 1992 reinstatement. *Id.* at 117.

4. *Id.* at 118.

5. *Id.*

6. *Id.*

7. *Id.* at 119.

8. *Id.*

9. This Note deals solely with the type of employment discrimination cases commonly termed "disparate treatment" claims, which are distinguished from "disparate impact" cases. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) (employing terminology of "disparate treatment" and "disparate impact"); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 581-82 (1978) (Marshall, J., concurring) (same). In a disparate treatment claim, an individual plaintiff alleges that she was specifically injured by the defendant employer's discriminatory conduct. *See generally* 1 LARSON, *supra* note 1, at § 1.09[1]. Disparate impact claims, by contrast, deal with employers' practices that, while neutral on their face, disproportionately bar members of the plaintiff's class from a particular position or from employment altogether. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See generally* 1 LARSON, *supra*, at § 1.09[1]. If an employment practice or hiring device (such as a seniority system or literacy test) is neither job related nor a business necessity, it may be found discriminatory under a disparate impact analysis. *See Griggs*, 401 U.S. at 431, 436; 1 LARSON, *supra*, at § 1.09. Disparate impact claims often are brought as class actions, and plaintiffs routinely use statistical evidence to show that the challenged employment practice has a disparate effect on members of the protected class. *See generally* 1 LARSON, *supra*, at §§ 1.09[1], 8.01[2].

negative time, attendance, and performance records while at Heck.[10] In addition, Heck demonstrated that it assigned the tasks protested by Fields largely on the basis of the different levels of experience and expertise of each of its workers — not on the basis of the employees' races.[11] The jury agreed with the defendant's explanation, returning a verdict in favor of Heck on all of Fields's claims, and the Second Circuit affirmed the jury's verdict on appeal.[12]

An examination of *Fields* illustrates the many problems with the current state of Title VII claims and the extent to which the Supreme Court's artificial distinctions between different standards in this context have broken down. The trial judge in the case offered jury instructions that were, according to the appellate court, "needlessly confusing."[13] The judge informed the jury that the plaintiff could prevail either (1) by proving that the defendant was animated by a "discriminatory motive," or (2) by proving both that Heck's stated reasons for its actions were pretextual and that its real reasons were discriminatory.[14] These separate prongs derive from two distinct strains of disparate treatment law — what are termed "mixed-motive" and "pretext" claims. Although the trial court's instructions were not completely accurate, the Second Circuit complicated the analysis even further by blurring the lower court's two prongs. In order to understand how the appellate court collapsed the two prongs, it is important first to examine the source of the trial court's distinction.

The second half of the trial court's instruction in *Fields* derives from the burden-shifting framework laid out by the Supreme Court in *McDonnell Douglas Corp. v. Green*.[15] In an ordinary *McDonnell Douglas-Burdine* case,[16] the plaintiff first must make out a prima facie case by showing that: (1) she is a member of a protected class; (2) she was qualified for a job or promotion for which she applied; (3) she was rejected; and (4) the position remained open or was filled by another applicant.[17] Once the plaintiff has established this prima facie case, the burden shifts to the employer, who must articulate a legitimate, non-

10. *Fields*, 113 F.3d at 118.

11. *Id.* at 118-19.

12. *Id.* at 117, 119.

13. *Id.* at 121.

14. *Id.*

15. 411 U.S. 792 (1973).

16. The Supreme Court reiterated the *McDonnell Douglas* prima facie case in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), leading some courts and scholars to refer to the burden-shifting scheme as the *McDonnell Douglas-Burdine* framework. *E.g.*, Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2232 (1995). This Note follows commentators like Malamud in referring to the common framework for pretext claims as *McDonnell Douglas-Burdine*.

17. *See Burdine*, 450 U.S. at 252-53; *see also McDonnell Douglas*, 411 U.S. at 802.

discriminatory reason for the employment action.[18] If the defendant satisfies this burden, the plaintiff then must demonstrate that the defendant's proffered reason is pretextual, and that the actual motive for its actions was discriminatory.[19] The Court recently indicated that, where the plaintiff has demonstrated pretext, the prima facie case itself may be sufficient evidence from which the jury can infer that the defendant's actual motivation was discriminatory.[20]

After the Court handed down its decision in 1973, *McDonnell Douglas-Burdine*'s burden-shifting framework dominated the landscape of employment discrimination claims. In the 1980s, however, a different form of analysis emerged, as lower courts held that discrimination plaintiffs could establish a violation of Title VII by proving that an unlawful motive had played some role in an employment decision.[21] This analysis allowed plaintiffs to establish a prima facie case by pointing to naked instances of discrimination without satisfying each of the four prongs required to show pretext under *McDonnell Douglas-Burdine.* When the circuits began to disagree over this new proof structure, the Supreme Court sought to resolve the issue in *Price Waterhouse v. Hopkins*[22] — one of several notable Title VII cases during the 1989 term.[23]

Price Waterhouse is central to this Note for two important reasons. The decision not only recognized mixed-motive claims as a strand of disparate treatment analysis separate from *McDonnell Douglas-Burdine*, but a concurring opinion also introduced the "direct evidence" requirement that has created considerable confusion ever since. In *Price Waterhouse*, the Supreme Court faced a case in which the employer had "mixed motives" for its challenged action — where, in other words, both legitimate and discriminatory rationales moti-

18. *See Burdine*, 450 U.S. at 252-53.

19. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

20. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000). The Court continued, however, to cite *Hicks*'s focus on the ultimate question of discrimination, suggesting that plaintiffs should make an additional showing of discriminatory motives — or at least rebut the defendant's legitimate, nondiscriminatory explanation — rather than simply rest on their prima facie case. *See id.*

21. *See, e.g.*, Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985).

22. 490 U.S. 228 (1989)

23. *See* Martin v. Wilks, 490 U.S. 755 (1989) (holding that majority employees who were not parties to a consent decree between an employer and minority employees are not barred by res judicata effects from challenging employment decisions made under the consent decree); Lorance v. AT&T Techs. Inc., 490 U.S. 900 (1989) (holding that the triggering event for a Title VII claim occurs when the employer engages in the allegedly discriminatory act, not when an employee first feels its effect); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (holding that the burden of persuasion in a disparate impact claim rests always with the plaintiff); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (holding that § 1981 protects against discrimination only in the making and enforcement, not the performance, of contracts).

vated its decision.[24] In Justice Brennan's plurality opinion, the Court held that the plaintiff bore the initial burden of showing that a discriminatory reason was a substantial or motivating factor in the employment decision.[25] If the plaintiff made this showing, the burden then shifted to the employer to prove by a preponderance of the evidence that it would have made the same decision even if it had not relied on the unlawful factor (the so-called "same-decision" defense).[26] Thus, simply stated, *Price Waterhouse* centrally held that the defendant in a mixed-motive case can avoid liability by prevailing on the same-decision defense.

In retrospect, a concurring opinion in *Price Waterhouse* is perhaps more notable than the plurality's holding. In her concurrence, Justice O'Connor stated that plaintiffs in mixed-motive cases must present "direct evidence" that the employer placed "substantial negative reliance on an illegitimate criterion" in reaching its decision.[27] The lower courts quickly latched on to Justice O'Connor's wording, and, despite the fact that she offered little explanation of her terminology, the direct evidence standard became the touchstone of mixed-motive cases.[28]

In the Civil Rights Act of 1991 ("CRA"),[29] Congress responded to a handful of decisions from the Supreme Court's 1989 term, including *Price Waterhouse*, that many advocates viewed as hostile to civil rights — and specifically to victims of employment discrimination.[30] Most important for the purposes of this Note, the CRA states that any employment decision in which a protected characteristic is a "motivating

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24. 490 U.S. at 236-37. For a fuller discussion of *Price Waterhouse*, see *infra* Section I.A.

25. *Id.* at 241.

26. *Id.* at 242.

27. *Id.* at 276-77 ("In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision."). Justice O'Connor offered only the following explanation in defining her direct evidence requirement:

> [S]tray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard.

Id. at 277 (internal citation omitted).

28. *See* Fernandes v. Costa Bros. Masonry, 199 F.3d 572, 581-82 (1st Cir. 1999) (compiling cases).

29. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered subsections of 42 U.S.C. § 2000e-2 (1994)). Among other amendments, the CRA added §§ 703(m) and 706(g)(2)(B) to Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended principally at 42 U.S.C. §§ 2000e-17 (1994)).

30. *See supra* note 23 (listing cases and summarizing holdings); *see also infra* notes 89-92 and accompanying text (discussing cases).

factor" constitutes a violation of Title VII.[31] In contrast to *Price Waterhouse*, the CRA does not exempt from liability employers who succeed on the same-decision defense; it merely limits the damages that can be levied against them.[32] The legislators failed to specify, however, whether they intended the CRA to embrace or abandon Justice O'Connor's direct evidence standard for mixed-motive cases.[33]

The lower courts responded to the ambiguities of Justice O'Connor's *Price Waterhouse* concurrence and the CRA by fixating on the direct evidence standard. Although only Justice O'Connor and the three dissenters agreed that plaintiffs must adduce direct evidence in order to establish a mixed-motive claim, most circuits have followed the minority in requiring direct evidence as a threshold for mixed-motive claims.[34] Since embracing this standard with near uniformity, however, the courts have struggled to reach a common understanding of direct evidence in assessing mixed-motive claims.

The circuit courts currently fall into three general schools of thought with respect to the meaning of "direct evidence."[35] The difference among the separate camps is measured by the degree of circum-

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31. 42 U.S.C. § 2000e-2(m) (1994). This portion of the statute provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Id.

32. Under 42 U.S.C. § 2000e-5(g)(2)(B) (1994), a defendant found liable under § 2000e-2(m) can limit its damages by showing that it would have made the same decision absent the impermissible consideration. *See infra* notes 99-104 and accompanying text (providing the text of the provisions and explaining the parties' burdens under the CRA).

33. *See infra* Section I.C.1 (discussing legislative history).

34. The Second Circuit noted the incongruity of adopting a requirement that a majority of the *Price Waterhouse* Court did not endorse. Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1183 (2d Cir. 1992) ("Despite the inarguable fact that only four justices in *Price Waterhouse* would have imposed a 'direct evidence' requirement for 'mixed-motives' cases, most circuits have engrafted this requirement into caselaw."). Nonetheless, "when no single rationale commands a majority, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.' " City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 765 n.9 (1988) (internal citation omitted). In *Price Waterhouse*, Justice O'Connor concurred on narrower grounds than Justice White, and her opinion therefore controls.

35. Fernandes v. Costa Bros. Masonry, 199 F.3d 572, 581-83 (1st Cir. 1999) (defining the three camps and identifying the circuits that adopt each position). Michael A. Zubrensky was the first commentator to note that the circuits generally fall into three camps on this issue. *See* Michael A. Zubrensky, Note, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After* Price Waterhouse v. Hopkins, 46 STAN. L. REV. 959 (1994). Since Zubrensky examined the problem in 1994, the three-way split has remained substantially the same, but the landscape has shifted, with circuit courts jumping routinely from one position to another. Although this Note offers a brief summary of the split as it currently stands, the lesson to be drawn from the circuit split is not the different approaches that the courts have adopted, but simply the degree to which the mixed-motive doctrine has created confusion among the lower courts.

stantial evidence that the courts allow to satisfy the direct evidence requirement. The first school, sometimes termed the "classic" position, is the strictest in its definition of direct evidence.[36] These courts require mixed-motive plaintiffs to present evidence that suffices to prove, without inference, presumption, or consideration of other evidence, that a discriminatory animus motivated the defendant employer in the challenged employment decision.[37] The second camp, called the "animus plus" position, is somewhat more generous to plaintiffs. These courts hold that direct evidence includes statements or conduct by the employer that directly reflect the alleged discriminatory animus, and that relate precisely to the employment decision at issue.[38] Under this approach, the required evidence may be either direct or circumstantial.[39] Finally, the third school, or "animus" position, requires only direct or circumstantial evidence that shows a discriminatory animus.[40] Unlike the animus-plus school, this approach does not require that the evidence bear squarely on the particular employment decision at issue.[41]

The distinction between pretext claims — those that ask the jury to infer discrimination through the *McDonnell Douglas-Burdine* framework — and mixed-motive claims — those that invoke *Price Waterhouse* by presenting direct evidence of discrimination — only exacerbates the confusion regarding the direct evidence requirement. Because plaintiffs are unsure whether the evidence they have produced is "direct" enough to satisfy the particular court, they often seek

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36. *Fernandes*, 199 F.3d at 582.

37. *Id.* The Fifth Circuit adopts this view, *see, e.g.*, Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1217 (5th Cir. 1995); Brown v. E. Miss. Elec. Power Ass'n, 989 F.2d 858, 861 (5th Cir. 1993), as do the Tenth, *see, e.g.*, Shorter v. ICG Holdings, Inc., 188 F.3d 1204, 1207 (10th Cir. 1999); EEOC v. Wiltel, Inc., 81 F.3d 1508, 1514 (10th Cir. 1996), and Eleventh Circuits, *see, e.g.*, Carter v. Three Springs Residential Treatment, 132 F.3d 635, 641 (11th Cir. 1998); Merritt v. Dillard Paper Co., 120 F.3d 1181, 1189 (11th Cir. 1997). *But see* Wright v. Southland Corp., 187 F.3d 1287, 1303-04 (11th Cir. 1999) (permitting inference).

38. *Fernandes*, 199 F.3d at 582.

39. *Id.* The Third, *see, e.g.*, Walden v. Georgia-Pacific Corp., 126 F.3d 506, 513 (3d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998), Fourth, *see, e.g.*, Taylor v. Va. Union Univ., 193 F.3d 219, 232 (4th Cir. 1999) (en banc), Seventh, *see, e.g.*, Sheehan v. Donlen Corp., 173 F.3d 1039, 1044 (7th Cir. 1999), Eighth, *see, e.g.*, Deneed v. Northwest Airlines, Inc., 132 F.3d 431, 436 (8th Cir. 1998); Thomas v. First Nat'l Bank of Wynne, 111 F.3d 64, 66 (8th Cir. 1997), and District of Columbia Circuits, *see, e.g.*, Thomas v. Nat'l Football League Players Ass'n, 131 F.3d 198, 204 (D.C. Cir. 1997), all at one point have endorsed the animus-plus position.

40. *Fernandes*, 199 F.3d at 582.

41. *Id.* The Second Circuit falls in this category, *see, e.g.*, Lightfoot v. Union Carbide Corp., 110 F.3d 898, 913 (2d Cir. 1997); Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992), and the Seventh, *see, e.g.*, Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1348-50 (7th Cir. 1995), and Eleventh Circuits, *see, e.g.*, *Wright*, 187 F.3d at 1303-04, have also shown intermittent approval of this approach.

to instruct the jury on both pretext and mixed-motive claims.[42] In this way, if the evidence is held to be indirect, the plaintiff can still fall back on the *McDonnell Douglas-Burdine* analysis. These dual instructions, however, are complex, and they serve only to confuse the jury. Thus, because of the pretext/mixed-motive distinction — and because of the direct evidence muddle — the law of disparate treatment claims has become, as one commentator aptly stated, a "swamp" that makes little sense to plaintiffs, employers, academics, or the courts.[43]

The Second Circuit's opinion in *Fields* illustrates the depth of this quagmire. After losing on his race discrimination claim against Heck at the trial court level, Fields appealed the court's jury instructions, arguing that the CRA had abolished the distinction between pretext and mixed-motive instructions.[44] The Second Circuit, however, rejected this contention, holding that the legislative history did not support Fields's interpretation.[45] In a footnote, the court stated that mixed-motive instructions, which it termed "dual motivation" charges, differ from pretext instructions, or "substantial motivation" charges, only in one respect: the defendant's affirmative defense that it would have made the same decision absent the impermissible consideration.[46] In other words, under both *McDonnell Douglas-Burdine* and the CRA, the jury determines whether a discriminatory rationale was a motivating factor in the employer's adverse employment action.[47] A mixed-motive plaintiff then faces the additional hurdle of the defendant's same-decision defense. Requesting a mixed-motive instruction is sim-

42. *See* Rose v. N.Y. City Bd. of Educ., No. 00-7599, 2001 U.S. App. LEXIS 15794, at *17 (2d Cir. July 16, 2001) ("[A] plaintiff may request a *Price Waterhouse* charge based on evidence of a forbidden motive even when she attempts to show that all of the employer's non-discriminatory explanations are pretextual."); *Thomas*, 131 F.3d at 202 ("The plaintiff often will — quite reasonably — argue both alternatives."); HAROLD S. LEWIS, JR., CIVIL RIGHTS & EMPLOYMENT DISCRIMINATION LAW 243 (1997); *cf.* George Rutherglen, *Reconsidering Burdens of Proof: Ideology, Evidence, and Intent in Individual Claims of Employment Discrimination*, 1 VA. J. SOC. POL'Y & L. 43, 65 (1993) (explaining that the issues in pretext and mixed motivation cases are so similar that "it is difficult to imagine a case that presents one but not the other"; in such cases, "there is little in the way of legal doctrine that saves the jury from confusing instructions on the arcane distinction between pretext and mixed motivation"); Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 603-04 (1996) (stating that, if the dichotomy continues to exist, "judges will be hard pressed to create jury instructions that make sense") (hereinafter Zimmer, *Emerging Uniform Structure*).

43. Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651 (2000).

44. Fields v. N.Y. State Office of Mental Retardation & Developmental Disabilities, 115 F.3d 116, 123 (2d Cir. 1997).

45. *Id.* at 124.

46. *Id.* at 124 n.4.

47. *See id.*

ply "shorthand," the court said, for requesting an additional instruction concerning the same-decision defense.[48]

As the following discussion illustrates, Congress and the *Price Waterhouse* Court thought they lowered the *McDonnell Douglas-Burdine* bar by allowing a class of discrimination plaintiffs to bypass the complex burden-shifting scheme and jump straight to the "motivating factor" test. Stated differently, where a plaintiff could demonstrate discriminatory animus without relying on an inference from pretext, Congress intended to enable her to establish the defendant's liability simply by showing that the animus was a motivating factor in the employer's decision. *Fields* frustrates this effort by compressing the complex *McDonnell Douglas-Burdine* scheme into a simple motivating factor test[49] while leaving an additional obstacle — the same-decision defense — in the path of mixed-motive plaintiffs. The result is a paradox that directly contradicts congressional intent.

Even as it insists that the CRA did not erase the distinction between pretext and mixed-motive claims, the *Fields* court nonetheless uses the motivating factor analysis to inform its understanding of — indeed, to simplify — *McDonnell Douglas-Burdine* pretext claims. With pretext and mixed-motive claims now measured in the Second Circuit by the same motivating factor standard, *Fields* concludes that only mixed-motive plaintiffs, not pretext plaintiffs, must overcome a same-decision showing by the defendant. Thus, although Congress intended to use the motivating factor test to make discrimination claims easier for mixed-motive plaintiffs,[50] *Fields* actually makes it easier for plaintiffs to succeed in pretext cases than in mixed-motive cases. The Second Circuit is hardly to blame for this absurd development, since it was merely trapped on the tortuous path forged by the Court, by Congress, and by other lower courts. Thus far, the Court has made no effort to clear the muddle, leaving parties, attorneys, judges, and juries hopelessly confused.[51]

This Note argues that courts should jettison their efforts to understand the arcane pretext/mixed-motive distinction and should focus in-

48. *Id.*

49. According to the *Fields* court, a pretext instruction simply asks the jury whether an impermissible reason was a motivating factor in the employment decision. *See supra* text accompanying notes 46-47.

50. *See infra* text accompanying note 94; *cf.* Christopher Y. Chen, Note, *Rethinking the Direct Evidence Requirement: A Suggested Approach in Analyzing Mixed-Motives Discrimination Claims*, 86 CORNELL L. REV. 899, 907 (2001) ("*Price Waterhouse* is significant . . . because it potentially affords plaintiffs more favorable standards of liability." (internal footnote omitted)).

51. *See* Kaighn Smith, *How Do We Work This? Making Sense of the Liability Standard in "Disparate Treatment" Employment Discrimination Cases*, MAINE BAR J., Jan. 1999, 34, 37 ("If all this seems unwieldy to lawyers, consider the problems in fashioning comprehensible instructions for juries. As the courts struggle to make the law coherent, appellate challenges to jury instructions have become commonplace.").

stead on the question at the heart of every discrimination case: the motives of the employer.[52] Part I discusses the Court's decision in *Price Waterhouse*, then turns to the plain language of the CRA to argue that the statute's text requires abandoning the pretext/mixed-motive distinction. Part I also examines the legislative history of the CRA and concludes that, because Congress's intent is highly ambiguous, the text of the statute best guides courts' understandings of the Act. Part II proposes a set of jury instructions consistent with the spirit of *McDonnell Douglas-Burdine* and the text of the CRA. These instructions clear the mixed-motive muddle for juries and make the parties' task in employment discrimination cases more apparent from the outset. Part II explains that these instructions are grounded in the text of Title VII, and that they represent an extension of efforts by courts and scholars to simplify this area of the law. By making this inquiry the touchstone for analyzing individual disparate treatment claims, courts can devise a simple standard that allows parties on both sides of the employment relationship to conform their behavior with the law.

I. MAKING (NON)SENSE OF IT ALL: *PRICE WATERHOUSE* AND THE CIVIL RIGHTS ACT OF 1991

The ordered chaos that surrounds mixed-motive claims and individual disparate treatment law in general is in large part attributable to the ambiguous language of the Supreme Court and Congress. Section I.A examines the Supreme Court's splintered opinion in *Price Waterhouse v. Hopkins*,[53] with particular attention to the plurality opinion by Justice Brennan and Justice O'Connor's concurrence. Section I.B then considers Congress's reaction to the decision in the CRA, looking first to the plain language of the statute for guidance in understanding its meaning. Section I.B argues that fidelity to the text of the CRA commands abandoning the obscure pretext/mixed-motive

52. Many commentators have grappled with the direct evidence requirement, the pretext/mixed-motive distinction, and the difficulties of instructing a jury given the confused state of employment law. *See, e.g.*, Belton, *supra* note 43; Susan Bisom-Rapp, *Of Motives and Maleness: A Critical View of Mixed Motive Doctrine in Title VII Sex Discrimination Cases*, 1995 UTAH L. REV. 1029 (1995); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703 (1995); Rutherglen, *supra* note 42; Smith, *supra* note 51, at 34; Michael J. Zimmer, *Pretext and Mixed Motive After the 1991 Act*, N.J. L.J., Dec. 5, 1994, at 11 [hereinafter Zimmer, *Pretext and Mixed Motive*]; Chen, *supra* note 50; Kelley E. Dowd, Casenote, *The Correct Application of the Evidentiary Standard in Title VII Mixed-Motive Cases*: Stacks v. Southwestern Bell Yellow Pages, Inc., 28 CREIGHTON L. REV. 1095 (1995); Steven M. Tindall, Note, *Do as She Does, Not as She Says: The Shortcomings of Justice O'Connor's Direct Evidence Requirement in* Price Waterhouse v. Hopkins, 17 BERKELEY J. EMP. & LAB. L. 332 (1996); Joseph J. Ward, Note, *A Call for Price Waterhouse II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 ALB. L. REV. 627 (1997); Zubrensky, *supra* note 35.

53. 490 U.S. 228 (1989).

distinction in favor of the test laid out by the statute. Finally, Section I.C searches the legislative history of the 1991 Act for some expression of Congress's intent, ultimately finding no clear legislative intention. Part I concludes that, in the absence of an unambiguous legislative intent to the contrary, the controlling test in this area should derive from the statute's plain language.

A. Price Waterhouse, *Mixed Motives, and the Direct Evidence Requirement*

The Supreme Court's decision in *Price Waterhouse* crystallized the distinction between pretext and mixed-motive claims under Title VII. Section I.A examines the decision and provides a context for Congress's reaction to the case two years later in the CRA. This Section reveals that a majority of the Court did not agree that direct evidence should be the touchstone in mixed-motive cases, and that the opinion provides little guidance for the lower courts.

The facts of *Price Waterhouse* illustrate the dual motivations that typically exist in mixed-motive claims. Ann Hopkins had worked for five years at Price Waterhouse's Office of Government Services when she was nominated for partnership.[54] Hopkins was highly qualified for the position: other partners in the office described her as "an outstanding professional" with "strong character, independence, and integrity," and they praised her "key role" in landing a multimillion dollar contract with the State Department.[55] But Hopkins's co-workers sometimes perceived her aggressive style as abrasive and brusque, and even the partners who supported her candidacy admitted that she was sometimes impatient and unduly harsh.[56]

As the *Price Waterhouse* plurality noted, however, there were signs that some partners reacted negatively to Hopkins's aggressive personality because she was a woman.[57] Some of the partners, for example, felt that she "overcompensated for being a woman" by acting "macho," and that she needed to take "a course at charm school."[58] As a result, the Policy Board placed Hopkins's candidacy on hold, advising her that to improve her chances she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[59]

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54. *Price Waterhouse*, 490 U.S. at 233.

55. *Id.* at 234.

56. *Id.* at 234-35.

57. *Id.* at 235; *cf.* Bisom-Rapp, *supra* note 52, at 1041-42.

58. *Price Waterhouse*, 490 U.S. at 235.

59. *Id.*

In assessing Hopkins's discrimination claim, Justice Brennan, writing for the four-justice plurality, began by examining the language of Title VII, which prohibits employers from discriminating against any individual "because of" his or her race, color, religion, sex, or national origin.[60] Justice Brennan concluded that the "because of" language means that sex "must be irrelevant to employment decisions."[61] In other words, Title VII condemns even those employment decisions that are based on *legitimate* considerations *if an impermissible factor was also considered*.[62]

Given that a Title VII violation exists whenever the employer has considered a protected characteristic, the plurality then laid out its two-part mixed-motive analysis. First, the plaintiff must show that the protected characteristic — in *Price Waterhouse*, sex — "played a motivating part" in the challenged employment decision.[63] Once the plaintiff discharges this burden, the employer can present an affirmative defense and "avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role."[64] Thus, this affirmative defense, which has come to be called the "same-decision defense,"[65] allows the employer to escape liability altogether by showing that leaving the unlawful variable out of the equation would not have changed the final outcome.

The plurality opinion made clear that plaintiffs retain a degree of flexibility in bringing mixed-motive claims. Justice Brennan stated in a footnote that a plaintiff's case need not be pigeonholed from the beginning as either a pretext or a mixed-motives case.[66] Rather, the district court can wait until some point after discovery before it decides, based on all the evidence presented, whether the case involves mixed motives.[67] Justice Brennan also indicated that he saw no meaningful

60. *Id.* at 239; *see also* 42 U.S.C. § 2000e-2(a) (1994).

61. *Price Waterhouse*, 490 U.S. at 240.

62. *Id.* at 241.

63. *Id.* at 244.

64. *Id.* at 244-45. The plurality borrowed this framework from *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 286-87 (1977), where the Court held that once a plaintiff has shown that an exercise of a First Amendment liberty was a "substantial" or "motivating factor" in an adverse employment decision, the employer must prove by a preponderance of the evidence that it would have reached the same decision in the absence of such protected conduct. This framework has also been employed by the Court in the context of protected labor conduct, *see* NLRB v. Transp. Mgmt. Corp., 462 U.S. 393 (1983), and where unconstitutional motives allegedly contributed to the enactment of legislation, *see* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977). Pointing to these previous cases, Justice Brennan concluded that mixed-motive analysis constitutes "a well-worn path." *Price Waterhouse*, 490 U.S. at 250.

65. *See infra* note 103 and accompanying text.

66. *Price Waterhouse*, 490 U.S. at 247 n.12.

67. *Id.*

difference between the level of proof required by the plurality and that required by Justice O'Connor.[68] Responding to Justice O'Connor's concurrence, which required direct evidence of discrimination to trigger the mixed-motive analysis, the plurality noted that it was not suggesting "a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision."[69] Justice Brennan also refrained from deciding "which specific facts, 'standing alone,' would or would not establish a plaintiff's case . . . ."[70] In other words, the plurality declined to limit the nature of proof required in mixed-motive cases to "direct evidence," but instead left available to plaintiffs a range of evidence that could be adduced to support an employee's case.

Justice White's concurrence[71] reveals that a majority of the *Price Waterhouse* Court — the four-justice plurality and Justice White — did not require direct evidence in order to trigger mixed-motive analysis.[72] In Justice White's view, the Court should simply look to *Mt. Healthy City Board of Education v. Doyle*,[73] which employed a "substantial" or "motivating factor" test, in devising a mixed-motive test for the employment context. His concurrence made no reference to the nature of evidence required of the plaintiff. Justice White did, however, state that a broad range of evidence could be introduced by the defendant in proving the same-decision defense, indicating that he did not wish to restrict parties in employment discrimination cases to certain types of evidence.[74]

Like Justice White, Justice O'Connor agreed with the plurality that the burden of persuasion should shift to the employer to make out a same-decision defense.[75] Justice O'Connor noted that the mixed-

68. *Id.* at 250 n.13.

69. *Id.* at 251-52.

70. *Id.* at 252.

71. *Id.* at 258-61 (White, J., concurring).

72. *See* Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1183 (2d Cir. 1992) ("The requirement of 'direct evidence' was not . . . adopted either by the plurality of four or by Justice White, so there was not majority support for this proposition."). *But see supra* note 34.

73. 429 U.S. 247, 287 (1977). *Mt. Healthy* applied the mixed-motive framework to employment decisions motivated by an employee's exercise of his or her First Amendment rights. *See supra* note 64 (explaining the application of the mixed-motive analysis in various contexts).

74. *Price Waterhouse*, 490 U.S. at 260-61 (White, J., concurring).

75. *Id.* at 261 (O'Connor, J., concurring). This Note does not aim to provide a detailed analysis of Justice O'Connor's concurrence; other commentators have exhaustively completed this task. For the most thorough account, see Tindall, *supra* note 52. *See also* Ward, *supra* note 52; Zubrensky, *supra* note 35. Rather, this Note briefly summarizes Justice O'Connor's concurrence in order to shed light on the fact that the lower courts have incorrectly applied the direct evidence requirement, converting mixed-motive analysis into a quagmire that most plaintiffs opt to circumvent.

motive framework laid out by the Court should be considered a "supplement" to the *McDonnell Douglas-Burdine* burden-shifting scheme.[76] Employing slightly different rhetoric from the plurality, Justice O'Connor stated that once the plaintiff has established that a discriminatory animus was a "substantial factor" in its decision, the defendant may be required to show that "despite the smoke, there is no fire."[77] In other words, the plaintiff cannot simply infer a discriminatory animus from "discrimination in the air."[78] Instead, the plaintiff must, as in a tort case, show causation — that the defendant's impermissible consideration of a protected characteristic proximately caused the adverse employment decision.[79]

Justice O'Connor departed from the plurality, however, in requiring a specific nature of evidence in mixed-motive cases. In her view, the plaintiff must present "direct evidence" that an impermissible consideration was a substantial factor in the employer's decision in order to shift the burden to the defendant.[80] Justice O'Connor explained that the "strong showing of illicit motivation" she would require could not consist merely of "stray remarks in the workplace" or "statements by decisionmakers unrelated to the decisional process itself."[81] Beyond this negative definition, however, Justice O'Connor offered no precise delineation of her "direct evidence" terminology.

The direct evidence requirement perplexes the lower courts, who inconsistently apply it.[82] Few can decipher precisely what Justice O'Connor meant by "direct evidence," and a handful are not certain that such a requirement should exist at all.[83] Some commentators have suggested, after closely examining the facts in *Price Waterhouse*, that

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76. *Id.* Thus, a majority of the Court agreed in *Price Waterhouse* that the mixed-motive analysis was distinct from the more familiar *McDonnell Douglas-Burdine* framework.

77. *Id.* at 266.

78. *Id.* at 251 (plurality opinion) (quoting an expression used by the petitioner, Price Waterhouse).

79. *Id.* at 266 (O'Connor, J., concurring).

80. *Id.* at 276.

81. *Id.* at 276, 277.

82. Justice Kennedy, in a dissent joined by Chief Justice Rehnquist and Justice Scalia, presciently predicted, "[t]oday the Court manipulates existing and complex rules for employment discrimination cases in a way certain to result in confusion." *Price Waterhouse*, 490 U.S. 228, 279 (1989) (Kennedy, J., dissenting). He added: "Courts will also be required to make the often subtle and difficult distinction between 'direct' and 'indirect' or 'circumstantial evidence. Lower courts long have had difficulty applying *McDonnell Douglas* and *Burdine*. Addition of a second burden-shifting mechanism . . . is not likely to lend clarity to the process." *Id.* at 291. The dissenters argued that the existing *McDonnell Douglas* framework could adequately accommodate mixed-motive claims such as Hopkins's without creating a new burden-shifting structure. *See id.* at 286-87.

83. *See, e.g.*, Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1183 (2d Cir. 1992) ("The requirement of 'direct evidence' was not . . . adopted either by the plurality or by Justice White, so there was not majority support for this proposition."). *But see supra* note 34.

Justice O'Connor did not mean "direct evidence" in the traditional, strict meaning of the term,[84] but rather implied a broader connotation of the term that includes circumstantial evidence tied closely to the actual employment decision in question.[85] Regardless of what Justice O'Connor meant by "direct evidence," *Price Waterhouse* remains rife with ambiguity.[86] Thus, Section I.B proposes abandoning the decision's unclear language in favor of a more straightforward text — the CRA.

B. *The Plain Language of the Civil Rights Act*

This Section recommends avoiding the muddle created in *Price Waterhouse* by adhering to Congress's plain language. It begins by describing the events that prompted enactment of the CRA and then analyzes the text itself.[87] It concludes by offering the CRA's legislative history as a justification for textual fidelity.

1. *The 1991 Act: Congress Responds to the Supreme Court*

The Civil Rights Act of 1991 was largely Congress's response to a handful of 1989 Supreme Court decisions that the civil rights community viewed as hostile to employment discrimination plaintiffs.[88] In *Wards Cove Packing Co. v. Atonio*,[89] for example, the Court altered disparate impact analysis and retreated from the "business necessity" requirement.[90] And in *Patterson v. McLean Credit Union*,[91] the Court

84. *See* BLACK'S LAW DICTIONARY 577 (7th ed. 1999) ("Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption."). *But see* JOHN H. WIGMORE, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE 40 (1935) (explaining that the term "has no utility" because it is "sometimes used to mean testimonial evidence in general, but sometimes also limited to apply only to testimony directly asserting the fact-in-issue").

85. *See* Tindall, *supra* note 52, at 354 ("From the clues in her opinion, it seems that when Justice O'Connor required direct evidence she meant evidence of a decisionmaker's words that show animus toward the plaintiff's protected class which is related to the adverse employment decision."). This comports more with the reading adopted by the courts in the animus-plus camp than with the classic view. *See supra* notes 35-41 and accompanying text.

86. *Cf.* Thomas v. Nat'l Football League Players Ass'n, 131 F.3d 198, 203 (D.C. Cir. 1997) ("As an initial matter, it should be noted that Justice O'Connor's concurrence was one of six votes supporting the Court's judgment . . . so that it is far from clear that Justice O'Connor's opinion, in which no other Justice joined, should be taken as establishing precedent. Justice White's concurring opinion makes no mention of 'direct' evidence, nor does the plurality opinion written by Justice Brennan." (citations omitted)).

87. *See generally* William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 621 (1990) ("The statute's text is the most important consideration in statutory interpretation, and a clear text ought to be given effect.").

88. *See supra* note 23 (citing cases and stating holdings).

89. 490 U.S. 642 (1989).

90. Prior to *Wards Cove*, the burden of persuasion in disparate impact cases, *see supra* note 9, rested initially with the plaintiff. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Once the plaintiff proved that a disparate impact was caused by a facially neutral

held that § 1981, which protects against racial discrimination in the making and enforcement of contracts, does not bar discrimination in the *performance* of contracts.[92]

Congress reacted quickly to these decisions. Within a year, legislators introduced the Civil Rights Act of 1990, which they termed an "omnibus legislative response to judicial interpretations of Title VII."[93] One of the Act's chief purposes was to "respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions."[94] With these statements, Congress expressly declared that *Price Waterhouse* and its companion decisions motivated the legislation.

Despite its rapid start, the proposed bill quickly became controversial, and passage proved difficult.[95] The business community in particular launched a stiff resistance to the legislation, and President Bush vetoed the first 1990 version of the bill.[96] After Congress incorporated the compromise provisions demanded by the White House,[97] President Bush signed the legislation, which went into effect in 1991.[98]

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employment device, the burden shifted to the defendant to show that the challenged practice was both job related and a business necessity — i.e., that the device was essential for the employer to be able to identify qualified employees. *Id. Wards Cove* altered this analysis by holding that the burden of persuasion remains at all times with the plaintiff. 490 U.S. at 659. *Wards Cove* also weakened the business necessity requirement, stating that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business to pass muster." *Id.* Congress abrogated *Wards Cove* and reinstated the *Griggs* standard in the CRA. *See* 42 U.S.C. § 2000e-2(k)(1)(A) (1994).

91. 491 U.S. 164 (1989).

92. *See id.* at 171. Section 1981, 42 U.S.C. § 1981 (1994), protects the right to make and enforce contracts without discrimination on the basis of race or ancestry. *See* LARSON, *supra* note 1, at § 101.01. Civil rights activists viewed *Patterson* as particularly pernicious because of the effect it had among the lower courts, which interpreted the decision to mean that *any* conduct by the employer after the formation of the contract — including termination and retaliation — could not be covered by § 1981. *See, e.g.*, McCarthy v. Kemper Life Ins. Co., 924 F.2d 683, 688 (7th Cir. 1991); Hayes v. Cmty. Gen. Osteopathic Hosp., 940 F.2d 54, 56 (3d Cir. 1991), *cert. denied*, 502 U.S. 1060 (1992); *see also* LARSON, *supra* note 1, at § 101.01[4].

93. CHARLES DALE, LEGAL ANALYSIS OF S.2104 AND H.R. 4000: THE 'CIVIL RIGHTS ACT OF 1990' (1990).

94. H.R. CONF. REP. NO. 101-856, at 1 (1990).

95. *See* DAVID A. CATHCART ET AL., THE CIVIL RIGHTS ACT OF 1991 2 (1993).

96. 136 CONG. REC. 31,827-28 (1990) (reprinting President Bush's veto message, which cited concerns about hiring quotas as the primary reason for vetoing the legislation).

97. CATHCART ET AL., *supra* note 95, at 14-15, state that the chief area of compromise in the 1991 Act was the provisions related to disparate impact claims and *Wards Cove*.

98. *See* THE CIVIL RIGHTS OF 1991: LEGISLATIVE HISTORY i (Douglas S. McDowell ed., 1992). Because much of the text of the proposed 1990 Act remained intact in the enacted CRA of 1991 — and because the debate over the two bills encompassed many of the same issues — this Note treats the legislative history of the 1990 Act as relevant to, and indeed part of, the history of the 1991 Act. *See* CHARLES DALE, H.R.1, THE 'CIVIL RIGHTS ACT OF 1991,' THE ADMINISTRATION'S CIVIL RIGHTS BILL (H.R. 1375 AND S.611), AND

The CRA instituted a number of major reforms in employment discrimination law. Most notably, the Act made jury trials and compensatory and punitive damages available for claims of alleged intentional discrimination under Title VII and the Americans with Disabilities Act.[99] The Act also overturned *Wards Cove*, establishing that when a plaintiff proves that an employment practice has a disparate impact on a protected class, the employer must show that the practice is both job related and a business necessity.[100] The CRA also overturned *Patterson* by amending § 1981 to prohibit racial discrimination in the performance of contracts.[101] Congress responded to *Price Waterhouse* in two principal portions of the CRA, which the following Section examines.

2. *The Text*

Two provisions of the 1991 Act stand at the center of this Note. First, § 2000e-2(m) (the "motivating factor provision") codifies the motivating factor test that a majority of the *Price Waterhouse* Court endorsed:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.[102]

This section of the statute makes clear that an employer violates Title VII whenever it considers an illicit reason in its decision process, irrespective of whether it would have made the same decision absent the illegal consideration. In this respect, the CRA substantially comports with *Price Waterhouse*'s holding.

The Act goes on, however, to depart from *Price Waterhouse* in not allowing employers to escape entirely from liability by explaining that they would have made the same decision absent the impermissible consideration. Under § 2000e-5(g)(2)(B) (the "same-decision provision"),[103] if the defendant succeeds on the same-decision defense, the

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THE FINAL CONFERENCE VERSION OF S.2104 OF THE 101ST CONGRESS: A LEGAL ANALYSIS AND COMPARISON (1991).

99. 42 U.S.C. § 1981(b)-(c) (1994). Such relief had previously been available only to victims of racial and ethnic discrimination under § 1981. Thus, prior to the CRA, Title VII afforded victims of sex discrimination only equitable relief. *See* CATHCART ET AL., *supra* note 95, at 2.

100. 42 U.S.C. § 2000e-2(k) (1994).

101. 42 U.S.C. § 1981(b) (proscribing discrimination in the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship").

102. 42 U.S.C. § 2000e-2(m) (1994).

103. The same-decision provision provides:

plaintiff is not entitled to reinstatement, back pay, or compensatory or punitive damages. A plaintiff who has successfully shown liability under the motivating factor provision, however, does receive declaratory and injunctive relief, as well as attorneys' fees and costs, regardless of the defendant's success on the same-decision defense.[104] Thus, while Congress essentially ratified *Price Waterhouse*'s structure with respect to the plaintiff's burden in establishing the defendant's liability, it overturned the decision to the extent that it allowed employers completely to escape liability with the affirmative defense.

In the task of statutory construction, many judges and scholars hold that the text, not the illusory intent of the legislature, controls interpretation.[105] At its broadest level, the "textualist" approach follows the maxim of Oliver Wendell Holmes, who wrote, "[w]e do not inquire what the legislature meant; we ask only what the statute means."[106] Although this quotable passage expresses the sentiment of textualists generally, it does not accurately reflect the views of all who claim that a statute's text is paramount in its interpretation.

Long before Justice Antonin Scalia's views rose to prominence, courts practiced a fidelity to statutes' language that some scholars now term "traditional" textualism.[107] Under the traditional approach, a statute's "plain meaning" governed "its interpretation, unless negated by strongly contradictory legislative history."[108] In other words, where a statute was unambiguous, the court followed its plain meaning. In the event of ambiguous language, however, legislative history could control the decision.[109] Indeed, legislative history could even trump statutory language that appeared on its face to be plainly to the contrary.[110]

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court —
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment . . . .

42 U.S.C. § 2000e-5(g)(2)(B).

104. *Id.*; *see also* CATHCART ET AL., *supra* note 95, at 31 (1993).

105. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 14-41 (1997). *See generally* Eskridge, *supra* note 87 (discussing the textualist approach).

106. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

107. *See, e.g.*, Eskridge, *supra* note 87, at 624.

108. *Id.*

109. *Id.*

110. *Id.* at 624, 628.

Justice Scalia's views on statutory interpretation largely supplanted the traditional textualist approach with his elevation to the Supreme Court in the late 1980s. Professor Eskridge, who charts Justice Scalia's rejection of the "old" textualism in the Justice's early Supreme Court opinions, terms the nascent approach "new textualism."[111] The new textualism begins with the premise that "[t]he text is the law, and it is the text that must be observed."[112] In Justice Scalia's view, the putative legislative intent is not as important as what the statutory language itself means.[113] A statute's legislative history, he claims, should not be the dispositive signal of the statute's meaning, because the legislature is a body of individual lawmakers who cannot share a collective intent.[114] Indeed, in most instances, no legislative intent exists at all, because few of the legislators gave any thought to the particular issue in question.[115]

Instead of attempting to divine meaning from the actions of independently minded legislators, then, the new textualists maintain that the interpreter of a statute should focus on the context of the legislation and the meaning that the statute's language carried at the time it was enacted.[116] The new textualists also strive to accord their reading of a statute with the surrounding body of law in which it is located.[117] The new textualists deviate from the statutory language only when "literally" interpreting the statute would produce "an absurd, and perhaps unconstitutional, result."[118] Stated differently, the new textu-

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111. *Id.* at 623.

112. SCALIA, *supra* note 105, at 22.

113. *See id.* at 23.

114. *See id.* at 29-30, 32; *see also* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988) ("Congress votes on the bill, not on the reports. No one can vote against a report, and the President cannot veto the language of a report."); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 438 (1996) ("Consider that each legislator possesses a complex mix of hopes, expectations, beliefs, and attitudes. It is not obvious which of these mental states, or combination of them, constitutes her essential intent for legislation.").

115. SCALIA, *supra* note 105, at 32 ("[W]ith respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent," because, "[f]or a virtual certainty, the majority was blissfully unaware of the *existence* of the issue, much less had any preference as to how it should be resolved.").

116. *See* SCALIA, *supra* note 105, at 37; *see also* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

117. *Green*, 490 U.S. at 528; *see also* Jeffrey O. Cooper, *Interpreting the Americans with Disabilities Act: The Trials of Textualism and the Practical Limits of Practical Reason*, 74 TUL. L. REV. 1207, 1212 (2000) ("[T]he statutory text itself may contain inconsistencies and ambiguities that require resolution. But for the textualist, such difficulties are resolved through careful consideration of the statutory structure as a whole and the relationship between the particular statutory provision and the rest of the legislatively enacted code." (internal citations omitted)).

118. *Green*, 490 U.S. at 527 (Scalia, J., concurring).

alists look to a statute's legislative history only when its plain language suggests a strangled meaning that the legislature could not have meant, either as a matter of common sense or as a matter of constitutional principles.[119]

This Note argues that both modes of interpretation — the traditional and the new textualism — command an approach to disparate treatment claims that the courts have not followed. The new textualists, of course, would look to the CRA's text and no further, unless the resulting understanding of the statute was preposterous or unconstitutional. According to the plain language of the motivating factor provision, an employer violates Title VII anytime it allows a protected characteristic to serve as a "motivating factor" in an employment decision. The text draws no distinction between direct and circumstantial evidence, or between pretext and mixed-motive claims. Rather, it speaks in plain terms, suggesting that a motivating factor test controls all discrimination claims. Thus, reading the CRA's provisions as creating a uniform approach to disparate treatment claims — a motivating factor test — is neither absurd nor unconstitutional.

At least one court to have contemplated the possibility that the text of the CRA erases the pretext/mixed-motive distinction, however, disagrees with this conclusion. In *Watson v. Southeastern Pennsylvania Transportation Authority*,[120] the Third Circuit considered both the text and the legislative history of the 1991 Act and concluded that the Act did not erase the pretext/mixed-motive distinction. The *Watson* court began its analysis by examining the text of the motivating factor provision, which it read as a reaction to *Price Waterhouse*.[121] The court noted that the section prohibits any employment decision in which a protected characteristic was a motivating factor, "even though other factors also motivated this practice."[122] The quoted language, the *Watson* court stated, suggests that Congress intended to target specifically those cases in which multiple factors motivated the defendant

119. *Cf.* Stephen M. Gill, Comment, *The Perfect Textualist Statute: Interpreting the Permanent Resident Alien Provision of 28 U.S.C. § 1332*, 75 TUL. L. REV. 481, 500-01 (2000).

To be sure, the textualist approach is not without its critics. *See generally* Ronald Dworkin, *Comment*, *in* SCALIA, *supra* note 105, at 115; Mary Ann Glendon, *Comment*, *in* SCALIA, *supra* note 105, at 95; Laurence H. Tribe, *Comment*, *in* SCALIA, *supra* note 105, at 65. Some empirical evidence suggests that the new textualism simply does not work as promised. *See, e.g.*, James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1, 39-109 (1994); George H. Taylor, *Textualism at Work*, 44 DEPAUL L. REV. 259, 319-80 (1995). Others simply suggest that the notion of a textualist approach is conceptually impossible. *See* Paul E. McGreal, *There is No Such Thing as Textualism: A Case Study in Constitutional Method*, 69 FORDHAM L. REV. 2393 (2001). Although this Note recognizes the force of these criticisms, it nonetheless adheres to the text of the CRA for the reasons articulated above.

120. 207 F.3d 207 (3d Cir. 2000).

121. *Watson*, 207 F.3d at 217.

122. 41 U.S.C. § 2000e-2(m) (1994).

(i.e., mixed-motive cases); otherwise, it simply would have spoken in broad terms without bothering to insert the superfluous language.[123] The court also stated that the use of the term "demonstrates" in the motivating factor provision correlates with Justice O'Connor's use of the same term in her *Price Waterhouse* concurrence — a correlation too close to be coincidental.[124]

The *Watson* court offered further support for its conclusion that the pretext/mixed-motive distinction remains intact after the CRA. Section 2000e-5(g)(2)(B) (the same-decision provision) limits the damages available against a defendant that, though liable under the motivating factor provision, can show it would have reached the same decision absent the impermissible consideration.[125] The Third Circuit in *Watson* noted that § 2000e-5(g)(2)(B)'s affirmative defense is available only where the defendant is liable under the motivating factor provision — not under § 2000e-2(a), the general disparate treatment provision that defines unlawful employment practices by employers.[126] If Congress intended to create a new standard of causation for all individual disparate claims, the court reasoned, it would have drafted the same-decision provision to apply to all such cases, not simply those under the motivating factor provision.[127] Thus, because claims under the motivating factor provision entail their own special defense, they must differ inherently from claims under the general disparate treatment provision.

The conclusions in *Watson*, though insightful, do not undermine the new textualist reasoning this Note adopts. The *Watson* court suggested that Congress intended in the CRA to address only those cases in which multiple factors, not just a discriminatory animus, motivated the employer, suggesting that the bulk of cases would still fall under the general disparate treatment provision (§ 2000e-2(a)). In the modern workplace, however, an employer is rarely motivated solely by a discriminatory impulse. Rather, an amalgam of factors, both conscious

123. *Watson*, 207 F.3d at 217.

124. *Id.* Justice O'Connor used the word "demonstrates" throughout her opinion. *E.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 275 (1989) (O'Connor, J., concurring) (characterizing case as one in which "the employee has demonstrated by direct evidence that an illegitimate factor played a substantial role"); *id.* at 276-77 ("[The employer] must demonstrate that with the illegitimate factor removed from the calculus, sufficient business reasons would have induced it to take the same employment action."). The *Watson* court called these passages "key portions" of Justice O'Connor's opinion, *Watson*, 207 F.3d at 217, but in the places where she stated her central holding, Justice O'Connor used different terminology. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 278 (O'Connor, J., concurring) ("Under my approach, the plaintiff must produce evidence sufficient *to show* that an illegitimate criterion was a substantial factor . . . ." (emphasis added)). Thus, the Third Circuit's analysis is strained.

125. *See supra* note 103 (quoting the text of § 2000e-5(g)(2)(B)).

126. *Watson*, 207 F.3d at 218.

127. *Id.*

and unconscious, often explains a discriminatory employment decision.[128] The CRA may simply recognize that it is increasingly difficult for plaintiffs to show that a discriminatory animus was the singular reason for their dismissal (or nonpromotion, etc.). Rather than supplanting the general disparate treatment provision, then, Congress supplemented that provision with one that recognizes the evolving nature of discrimination cases. The old provision remains available for plaintiffs who choose to use it, but the new one can be used by both "pretext" and "mixed-motive" plaintiffs.

From the new textualist perspective, the principal problem with *Watson* is that the court attempted to discern Congress's *intent* from the language it used rather than examining the language on its own terms. On its face, the motivating factor provision does not limit itself to mixed-motive cases; it simply includes cases where multiple factors motivated the employer.[129] And although new textualists look to the structure of a statute to determine whether a reading of its language is excessively strained, the *Watson* court's structural arguments do not defeat this Note's textualist reading. The fact that the same-decision defense is attached only to the motivating factor provision and not to the general disparate treatment provision means nothing. If Congress anticipated that the motivating factor provision would be used principally by mixed-motive plaintiffs, then it logically would have attached the same-decision defense only to that provision, rather than also altering the general disparate treatment provision. That legislative decision by no means requires that § 2000e-2(m) be used *exclusively* by mixed-motive plaintiffs. Thus, the *Watson* court's arguments do not sufficiently demonstrate that reading the CRA as creating a uniform motivating factor standard for all disparate treatment claims is somehow absurd or unconstitutional.

This Note does not stop, however, with a new textualist interpretation. Good sense counsels that, in addition to the plain text, a glance at

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128. *See, e.g.*, Bisom-Rapp, *supra* note 52, at 1039 (recognizing "the causal relationship between the legitimate and discriminatory motives" and explaining that "fact finders may have difficulty seeing that the discriminatory motive may indeed have directly contributed to the 'legitimate' motive, where the latter is, for example, the deterioration of the plaintiff's performance"). Some scholars, including Bisom-Rapp, have suggested that the causal relationship between "legitimate" and "discriminatory" motives merits jettisoning an intent-based approach to discrimination claims. Bisom-Rapp, *supra*, at 1040 (recommending the abandonment of the same-decision text in favor of an approach that examines overall evidence of discrimination, irrespective of employer claims); *see also* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1161-65 (1995) (arguing that current disparate treatment theory is inadequate because it assumes that discrimination is motivational, rather than cognitive, in origin).

129. For the language of the motivating factor provision, see *supra* text accompanying note 102.

legislative history may occasionally be merited.[130] Thus, this Note also employs the methods of traditional textualism, considering the language of the CRA in light of its history in order to determine, if possible, Congress's intentions in enacting the statute. As the following Section indicates, the ambiguity of this legislative history provides additional support for abiding by the plain language of the CRA.

C. *Legislative History of the Civil Rights Act*

According to the traditional textualist approach, unless the history of the CRA points in another direction, the text of the statute sets forth a simple motivating factor test that controls all Title VII individual disparate treatment claims. This Section turns to that history in order to determine the changes Congress intended to effect in enacting the motivating factor provision. In light of the decidedly ambiguous legislative history, this Section concludes that the textualist reading outlined above, which does not include the direct evidence requirement, is not inconsistent with Congress's intent. The Section next considers Congress's intentions with respect to the continued distinction between pretext and mixed-motive claims, again concluding that the vague statutory history does not preclude elimination of the distinction.

1. *Legislative History of the Direct Evidence Requirement*

An examination of the legislative history of the CRA reveals that Congress was largely silent regarding Justice O'Connor's direct evidence requirement. That silence, however, is not the only puzzling aspect of the statute's history. Although the CRA headlined the legislative agenda in 1990 and 1991, little traditional legislative history accompanies the Act.[131] As was the case with the original passage of Title VII in 1964, the 1991 Act was a quickly adopted compromise that followed extended debate over prior drafts, with few committee hearings or reports and little floor debate on the final version.[132]

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130. *See, e.g.*, Lynch v. Overholser, 369 U.S. 705, 710 (1962) ("The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, for 'literalness may strangle meaning.' " (citations omitted)).

131. *See* CATHCART ET AL., *supra* note 95, at 7.

132. *See id.* Cathcart explains that three primary sources of legislative history exist for the CRA: (1) the CRA of 1990; (2) various interpretative memoranda entered into the Congressional Record by Senators and Representatives; and (3) a three-paragraph Interpretive Memorandum entered by Senator Danforth, providing, "[n]o statements other than the interpretive memorandum . . . shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to *Wards Cove* — Business necessity/cumulation/alternative practice." *Id.* at 7-8 (quoting 137 CONG. REC. S15276 (Oct. 25, 1991) (Interpretive Memorandum)).

Moreover, the legislative history that does exist focuses heavily on provisions of the Act not pertinent to this Note, with less attention paid to *Price Waterhouse* and the provision that affects it — § 2000e-2(m). In those areas in which the legislators discuss mixed-motive analysis, they mention a requirement of direct evidence only once, and that cursory remark is hardly dispositive. As a result, combing the legislative history to discern Congress's intent regarding direct evidence becomes largely a task of inference from silence.[133]

Although the legislators failed to articulate precisely what kind of evidence they would require of mixed-motive plaintiffs, the legislative history suggests that they did not intend for the requirement to be as stringent as some circuits have demanded. In the Conference Report accompanying the 1990 Act, the Conferees expressed their intention "to restore the rule applied by the majority of circuits prior to the *Price Waterhouse* decision that any discrimination that is actually shown to play a role in a contested employment decision may be the subject of liability."[134] The Conferees went on to state:

> Conduct or statements are relevant under this test only if the plaintiff shows a nexus between the conduct or statements and the employment decision at issue. For example, isolated or stray remarks not shown, under the standards generally applied for weighing the sufficiency of evidence, to have motivated the employment decision at issue are not sufficient.[135]

This "stray remarks" language seems to mirror Justice O'Connor's negative definition of direct evidence,[136] indicating that Congress may have intended to codify such a requirement in the motivating factor provision. Some courts, however, also hold that stray remarks are insufficient proof of discrimination under the *McDonnell Douglas-Burdine* model.[137] Thus, the Conferees may simply have intended to require the same nature of proof in all employment discrimination cases, without setting a higher standard in cases under the motivating factor provision than existed under *McDonnell Douglas-Burdine.*

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133. Other commentators have noted Congress's silence — or at least its ambiguity — regarding the direct evidence requirement under the CRA. *See, e.g.*, Davis, *supra* note 52, at 750-51 ("Nothing in the statute or its legislative history suggests that a plaintiff cannot rely on circumstantial evidence to show that discrimination motivated the employer. A plaintiff may offer all proof of discriminatory intent, whether direct or circumstantial, under the motivating factor test of the Civil Rights Act of 1991.").

134. H.R. CONF. REP. NO. 101-856, at 18-19 (1990).

135. *Id.*

136. Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) ("[S]tray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria." (internal citation omitted)).

137. Malamud, *supra* note 16, at 2324.

Contrary evidence in the record suggests that Congress considered the direct evidence requirement and, in its silence, tacitly incorporated Justice O'Connor's standard. During Senate hearings, Eleanor Holmes Norton — testifying as a Georgetown University law professor and the former chair of the Equal Employment Opportunity Commission — responded to critics of the legislation who claimed the Act would punish employers for mere thoughts. Norton argued that "[t]he notion that title VII ever allowed thoughts as evidence is a surprise .... There must be direct evidence of discrimination .... [A]t least one ... piece of that direct evidence may have been the motivating factor."[138] Following her statement, Norton and the Committee Chair, Senator Edward Kennedy, engaged in the following exchange:

> THE CHAIRMAN: So your reading as well as those of the responses is we're not talking about thoughts, we are talking about motivating factors.
>
> MS. NORTON: There has to be direct evidence of a motivating factor. Thoughts are no more evidence in a mixed-motive case than they are in a single-motive case.
>
> THE CHAIRMAN: All right.[139]

As opaque as this passage appears, one could argue that Norton's testimony at least provided notice to the legislators that plaintiffs bringing suit under the new statute would be required to adduce direct evidence.

For a variety of reasons, however, Norton's statements do not indicate a congressional intent to codify Justice O'Connor's direct evidence requirement. First, it is not at all clear from her remarks what Norton meant by "direct evidence," because she, like Justice O'Connor, failed to define the term. Indeed, it is probable that the Professor, like the lower courts, had no clear understanding of Justice O'Connor's terminology, and that she was merely invoking the parlance that had gained favor among the lower courts.[140] Second, Senator Kennedy's apparent acquiescence to Norton's explanation of the direct evidence requirement does not indicate that he understood what the requirement meant — much less that he intended to codify it into law. Rather, taken in context, Senator Kennedy's response is best un-

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138. *Civil Rights Act of 1990: Hearings on S. 2104 Before the Committee on Labor and Human Resources*, 101st Cong. 251, 171 (1990) [hereinafter *Hearings*] (statement of Professor Eleanor Holmes Norton).

139. *Id.* at 172.

140. It is worth noting that Norton's testimony — and the Senate Hearings in general — followed soon after *Price Waterhouse* was handed down. It may be safe to assume that at this time the lower courts had not had sufficient opportunity to engraft the direct evidence requirement into case law. Rather, Norton was likely referring to the direct evidence standard that some courts had required in mixed-motive cases before *Price Waterhouse* was decided. *E.g.*, Terbovitz v. Fiscal Ct. of Adair County, Ky., 825 F.2d 111, 115-16 (6th Cir. 1987).

derstood as signaling satisfaction with Norton's rebuttal of the argument that the statute would police thoughts. The Chairman's own comments in separate portions of the legislative history give no hint that he — or, for that matter, any of his colleagues — intended to codify the direct evidence requirement.[141] Professor Norton's remarks thus provide little support for any finding of congressional intent.

Several factors may explain Congress's failure explicitly to address the nature of proof that plaintiffs must adduce to trigger the motivating factor provision. First, although *Price Waterhouse* was one of the major cases of the Supreme Court's 1989 term that Congress targeted in the CRA, the legislators devoted more of their energies to other portions of the statute.[142] It is entirely feasible that the legislators chose to allocate more of their time and political resources to the amendments related, for example, to the availability of jury trials under Title VII[143] or the burdens of proof in disparate treatment cases[144] than to obscure language in Justice O'Connor's concurrence.

A second possible explanation for the congressional silence on the issue of direct evidence is that the legislators were more concerned with the allocation of liability under *Price Waterhouse* than they were with methods of proof. Congress's primary aim in overturning the Court's decision was to ensure that remedies remain available to plaintiffs even where the employer succeeds on the same-decision defense.[145] In other words, Congress had no desire to tamper with the burden-shifting structure of mixed-motive claims made available by *Price Waterhouse*; it simply wanted to expand the availability of relief. Because the plurality's decision with respect to shifting burdens satisfied the legislators, they saw no need to address the nature-of-proof requirement.

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141. In his opening statement, for example, Senator Kennedy remarked that an employee is entitled to relief when he or she "demonstrates that prejudice actually motivated an employment decision." *Hearings*, *supra* note 138, at 102. The Senator later added that:

> the burden falls on the plaintiff to show that a discriminatory motivation actually contributed — was a motivating factor — in the decision, and has to demonstrate that and has to prove it. If they aren't able to prove it, then we are not dealing with what this particular provision provided. They have to prove it.

Id. at 116. Nowhere did the Chairman mention the nature of proof that the bill required.

142. *See* CATHCART ET AL., *supra* note 95, at 14-15 (explaining that the section of the statute related to disparate impact and business necessity attracted the bulk of the legislators' attention).

143. *Cf. id.* at 9 (arguing that the CRA's introduction of jury trials is perhaps its "most significant aspect," because it "fundamentally changes the legal model underlying federal employment discrimination laws").

144. *See id.* at 14-15 ("No other section of the Act generated as much controversy and attracted as much attention as that which addresses the Supreme Court's decision in *Wards Cove* . . . . [T]he measures relating to the disparate impact analysis formed the basis for protestations from the Bush Administration." (citations omitted)).

145. *See* H.R. CONF. REP. NO. 101-856, at 18 (1990); *see also Hearings*, *supra* note 138, at 102 (opening statement of Sen. Kennedy).

Finally, it is possible that the direct evidence requirement simply had not gained common currency by the time Congress drafted the motivating factor provision. The motivating factor provision was drafted as part of the doomed Civil Rights Act of 1990, and its language, with only one exception,[146] remained largely intact in the 1991 Act. Thus, the portion of the Act dealing with mixed-motive claims was drafted rather soon after *Price Waterhouse* was handed down in the summer of 1989. At the time, it may not have been foreseeable — except, perhaps, to Professor Norton — that the courts would engraft the direct evidence requirement into the case law.[147]

Given the silence in the legislative history on the matter of direct evidence, Congress likely gave little thought to Justice O'Connor's concurrence. This Note concludes that the legislators assumed that plaintiffs bringing suit under the motivating factor provision would be able to adduce both direct and circumstantial evidence in proving their case.[148] The following Section reveals that, like the legislative history regarding the direct evidence requirement, the record concerning the continued distinction between pretext and mixed-motive claims suffers from a marked vagueness. Both areas of confusion, therefore, should be clarified by reference to the plain language of the statute.

2. *Legislative Intent and the Pretext/Mixed-Motive Distinction*

Although commentators have read some lower court decisions as ruling that the CRA erased the confusing distinction between pretext claims under *McDonnell Douglas-Burdine* and mixed-motive claims,[149]

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146. As drafted, the CRA of 1990 initially prohibited any decision in which a protected characteristic was a "contributing factor." H.R. CONF. REP. NO. 101-755, at 4 (1990). Eventually the legislators replaced "contributing factor" with "motivating factor." H.R. CONF. REP. NO. 101-856, at 4 (1990).

147. *See supra* note 140.

148. Other commentators have reached this conclusion. *See* Davis, *supra* note 52, at 750-51 ("Nothing in the statute or its legislative history suggests that a plaintiff cannot rely on circumstantial evidence to show that discrimination motivated the employer. A plaintiff may offer all proof of discriminatory intent, whether direct or circumstantial, under the motivating factor test of the Civil Rights Act of 1991."); Harold S. Lewis, *The Civil Rights Act of 1991 and the Continued Dominance of the Disparate Treatment Conception of Equality*, 11 ST. LOUIS U. PUB. L. REV. 1, 10 (1992) ("Whether plaintiff's initial proof takes the form of 'direct' anecdotal testimony of discriminatory motive; substantial . . . evidence . . .; or simply the more common 'inferential' formula, the employer must demonstrate 'that it would have taken the same action in the absence of the impermissible motivating factor' . . . ." (citations omitted)).

149. Karen A. Haase, *Mixed Metaphors: Model Civil Jury Instructions for Title VII Disparate Treatment Claims*, 76 NEB. L. REV. 900, 918 (1997), cites *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 761 (9th Cir. 1996), and *Allen v. City of Athens*, 937 F. Supp. 1531 (N.D. Ala. 1996), as holding that the 1991 Act eliminated the pretext/mixed-motive distinction. But a close reading reveals that Haase misapprehends these cases. In the *O'Day* passage cited by Haase, the court makes clear that it is discussing only mixed-motive claims, *O'Day*, 79 F.3d at 760-61, and the *Allen* court separately assessed the plaintiff's evi-

no circuit has clearly and consistently held that the Act had such an effect. This Note argues that the plain language of the statute can be read as having eliminated the division between pretext and mixed-motive — a conclusion that the legislative history does not preclude. Some circuit courts, however, disagree with this assessment.[150] Section I.B.2 above refuted the text-based arguments in *Watson v. Southeastern Pennsylvania Transportation Authority*,[151] which held that the distinction remains intact after the CRA.[152] This Section considers that decision's holding regarding the pretext/mixed-motive distinction and demonstrates that the court's analysis does not mandate the conclusion drawn in that case.

In addition to its textual analysis, the *Watson* court examined the legislative history of the CRA and concluded that Congress intended to preserve the division between pretext and mixed-motive claims. The court cited various portions of the congressional reports and hearings indicating that the motivating factor provision's primary purpose was to overturn *Price Waterhouse*'s liability holding.[153] In support of its interpretation, the court cited dicta in *Landgraf v. USI Film Products*,[154] where the Supreme Court stated that the motivating factor provision responds to *Price Waterhouse* "by setting forth standards applicable in 'mixed motive' cases."[155] Additionally, the *Watson* court concluded that interpreting the CRA as eliminating the confusing distinction would not simplify employment discrimination law,[156] noting that other tests, such as the "determinative factor" standard in Title VII retaliation cases, would continue to exist in different contexts.

The legislative history arguments in *Watson* are weak at best. The court's finding that the motivating factor provision was conceived primarily as a response to *Price Waterhouse* is sound; the legislative history is unambiguous on this point.[157] Simply because Congress intended for the provision to overturn *Price Waterhouse* in the mixed-

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dence under *McDonnell Douglas* and § 2000e-2(m), the motivating factor provision, *Allen*, 937 F. Supp. at 1545.

150. *See, e.g.*, Fields v. N.Y. State Office of Mental Retardation & Developmental Disabilities, 115 F.3d 116, 124 (2d Cir. 1997) ("[T]he distinction between 'dual motivation' and 'substantial motivation' jury instructions survives the 1991 Act."); Fuller v. Phipps, 67 F.3d 1137, 1143 (4th Cir. 1995) ("Section 107 was intended to benefit plaintiffs in mixed-motive cases; it has nothing to say about the analysis in pretext cases such as this one.").

151. 207 F.3d 207 (3d Cir. 2000).

152. *See supra* notes 120-130 and accompanying text.

153. *Watson*, 207 F.3d at 218-19.

154. 511 U.S. 244 (1994).

155. *Id.* at 251.

156. *Watson*, 207 F.3d at 220.

157. *See supra* text accompanying notes 134-135 (citing congressional language expressing an intent to overturn *Price Waterhouse*).

motive context, however, does not mean that it wished for the motivating factor test to be available *only* to mixed-motive plaintiffs. In other words, Congress may have contemplated that the motivating factor provision, while targeted primarily at *Price Waterhouse*, would have broader implications.[158] Moreover, most courts and scholars who have considered the issue disagree with the *Watson* court's conclusion that eliminating the distinction would not simplify employment discrimination law.[159] Juries seem better equipped to apply separate tests for discrete claims — for example, motivating factor for a race discrimination claim and determining factor for an accompanying retaliation claim — than to consider different standards — i.e., *McDonnell Douglas-Burdine* and the motivating factor provision — for the same claim.[160]

By now the irony should be clear: the lower federal courts gleaned a direct evidence requirement from a single concurring opinion in a case that Congress expressly rejected, and they subsequently grafted that requirement onto the very statutory provision that overturned the decision. Based on an analysis of the statute's text and legislative history, this Part concludes that courts should turn to the text of the statute as their touchstone in resolving the considerable confusion surrounding individual employment discrimination claims. Part II carries that textualist analysis a step further in seeking to clarify the current law for practitioners and courts.

II. NAVIGATING THE "SWAMP" IN PRACTICE: TOWARD COMPREHENSIVE — AND COMPREHENSIBLE — JURY INSTRUCTIONS

Individual employment discrimination law currently manifests two heads — pretext and mixed-motive — that emanate from the same body of law — Title VII. This Part returns to that body of law to fashion a set of jury instructions that can be used in all individual disparate treatment cases, regardless of whether the claim would traditionally have been classified as pretext or mixed-motive. Section II.A then explains that the proposed model instructions are supported by the text and spirit of the CRA, and Section II.B locates support for the instructions in court decisions and other commentary.

158. *Cf.* Zimmer, *Emerging Uniform Structure*, *supra* note 42, at 604-05 (arguing that the motivating factor provision has implications beyond mixed-motive claims).

159. *See supra* notes 42, 51, *infra* notes 161-162 and accompanying text (discussing the confusion created by the current division between pretext and mixed-motive cases).

160. *Cf.* Zimmer, *Emerging Uniform Structure*, *supra* note 42, at 603-04 (reaching a similar conclusion).

A. *Proposed Jury Instructions for Disparate Treatment Employment Discrimination Cases*

This Section argues that a single set of instructions for both pretext and mixed-motive claims would greatly clarify this muddled area of the law, and it turns to the language of the CRA for guidance in devising these instructions. The Act provides a valuable starting point in large part because it eschews the direct evidence requirement. Under current law, a discrimination plaintiff reaches the end of trial unsure what "direct evidence" means, or at least uncertain whether she meets the threshold that will satisfy the particular panel she may draw on appeal.[161] Thus faced with the possibility that she will lose her mixed-motive claim for lack of sufficiently direct evidence, the plaintiff requests that the jury be instructed under both the mixed-motive and the *McDonnell Douglas-Burdine* modes of analysis.[162]

This Section proposes resolving the problem of dual instructions by jettisoning the division between pretext and mixed-motive in favor of a single motivating factor test. The Section derives this test largely from the text of the CRA's motivating factor provision, coupled with the Act's same-decision provision. Using the CRA as a model, this Note proposes the following set of instructions for use in disparate treatment cases:

> In light of all of the evidence that has been presented, was the plaintiff's [protected characteristic] a motivating factor in the defendant's [adverse employment] decision?
>
> If the defendant was motivated by the plaintiff's [protected characteristic], would the defendant have made the same decision even if it had not considered the plaintiff's [protected characteristic]?
>
> If you find that the defendant *would* have made the same decision if it had not considered the plaintiff's [protected characteristic], I will decide what kind of relief is equitable to correct the violation of the law. If you find, however, that the defendant *would not* have made the same decision, you must also determine [the amount of damages to award].

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161. *Cf.* Robyn S. Hankins, *Whose Burden Is It, Anyway? The 11th Circuit's Evolving Standard for "Burden-Shifting" in Employment Discrimination Cases*, FLA. BAR J., Mar. 2000, at 58, 62 (concluding, after surveying mixed-motive cases in the Eleventh Circuit, that "[t]he only real difference between these cases is the panel deciding them"). Hankins's examination of the jurisprudence in this area suggests that the direct evidence standard, at least in the Eleventh Circuit, "is really no standard at all, akin to the 'I know it when I see it' standard that has been applied (and misapplied) to pornography for years." *Id.* at 62 (footnote omitted).

162. *See supra* notes 42, 51; *cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 291 (1989) (Kennedy, J., dissenting) ("Courts will also be required to make the often subtle and difficult distinction between 'direct' and 'indirect' or 'circumstantial' evidence. Lower courts long have had difficulty applying *McDonnell Douglas* and *Burdine*. Addition of a second burden-shifting mechanism . . . is not likely to lend clarity to the process.").

These instructions take the form of a special verdict, asking the jury to answer specific questions rather than posing the matter in the legal framework of "liability" and "damages."

The above instructions depart in a number of ways from the way most courts approach disparate treatment claims. First, the instructions assume, contrary to the *Watson* decision,[163] that the ambiguous legislative record does not preclude using the CRA's motivating factor provision — § 2000e-2(m) — as the standard for all disparate treatment claims. The instructions also implement Congress's intent to render liable all employers who consider an impermissible factor,[164] and, for reasons explained below, the instructions abandon the direct evidence requirement. Finally, because the motivating factor provision serves as the touchstone for the instructions, and because Congress attached the same-decision defense to all claims under the motivating factor provision, the instructions make the same-decision defense available in all cases.

These instructions implement a number of changes that would aid jurors in grasping the difficult and complicated issues involved in employment discrimination cases.[165] Adopting the motivating factor provision as a uniform standard reduces the costs to litigants and courts, who would no longer struggle with the vagaries of *McDonnell Douglas-Burdine* and its enigmatic intersection with mixed-motive claims. The pretext analysis of *McDonnell Douglas-Burdine* would remain relevant, but only insofar as the burden-shifting scheme allows plaintiffs to show that an impermissible consideration was a motivating factor.

In accordance with the text of the statute and the legislative history, the proposed instructions dispense with Justice O'Connor's direct evidence requirement. First, this requirement is not relevant because the text of the statute makes no reference to "direct evidence." Moreover, it is reasonable to infer from Congress's silence that it did not intend to codify Justice O'Connor's direct evidence requirement in mixed-motive cases. The vast number of Congresspersons in 1991 were almost certainly "blissfully unaware"[166] that direct evidence was

163. *See supra* Sections I.B.2 & I.C.2 (discussing the *Watson* court's dismissal of the possibility that the CRA eliminated the pretext/mixed-motive distinction).

164. *See supra* note 103 and accompanying text (explaining that the Act overturned *Price Waterhouse* to the extent that the decision allowed employers to escape liability altogether by succeeding on the same-decision defense).

165. Studies indicate that special verdicts and the use of plain English aid jurors in understanding the instructions. *See* John L. Breeden, Jr., & William A Bryan, Jr., *Improving Jury Deliberations: Perspectives from the Circuit Court Bench*, 12 S.C. LAW., Sept.-Oct. 2000, at 18, 20, 24 (citing empirical research showing that plain English instructions improve juror comprehension and suggesting that special verdict forms help jurors recognize the applicable law).

166. SCALIA, *supra* note 105, at 32 (stating that, when considering bills, legislators are often "blissfully unaware" of issues that later spring up in litigation).

even an issue in the area of mixed-motive discrimination. Most of the legislators focused their energies on other portions of the Act, and few likely realized that Justice O'Connor's direct evidence requirement had become a prerequisite to mixed-motive claims.[167] Ignorant of the requirement, then, Congress assuredly did not intend to codify it in the statute. Similarly, many legislators — few of whom, if any, were employment law experts — may not have realized the differences between the mixed-motive approach they were enacting and the complex burden-shifting structure of *McDonnell Douglas-Burdine.* The "intent" of the 102nd Congress on this issue, therefore, is opaque at best.

The proposed instructions adhere not only to the CRA's text but also to its spirit and purpose. The stated aim of the legislation was "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."[168] The CRA falls in a line of civil rights laws designed to afford broad protections against discrimination, and courts generally construe such laws in a liberal fashion.[169]

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167. *See supra* notes 140-141 and accompanying text.

168. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071 (1991).

169. Congress itself attempted to codify this canon of liberal construction in the failed Act of 1990. Section 1107(a) of that legislation read: "All Federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies." *See* S. REP. NO. 101-315, pt. I, at 4 (1990). Explaining this provision, a Senate Report stated:

> Departure from the established rules of statutory construction, such as the rule favoring broad construction of civil rights laws, interferes with the ability of Congress to express its will through legislation .... When the terms of such a statute are susceptible to several alternative interpretations, the courts, consistent with the intent of Congress in enacting that law, are to select the construction which most effectively advances the underlying congressional purpose to provide equal opportunity and to provide effective remedies.

S. REP. NO. 101-315, pt. I, at 57-58 (1990).

Although this rule of construction was deleted from the legislation as ultimately enacted, the CRA's broad sweep nonetheless remains clear. *See* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1235 n.23 (3d Cir. 1994), *vacated and remanded*, 115 S. Ct. 1397 (1995), *reaff'd in part, reinstated in part, vacated in part, rem'd*, 65 F.3d 1072 (3d Cir. 1995) ("One overriding lesson the 1991 Act tutors ... is that Congress was unhappy with the increasingly parsimonious constructions of Title VII. Essentially, Congress forcefully reminded courts of the canon that Title VII and ADEA, as remedial statutes, are to be construed liberally to promote their welfare purposes, equality of treatment and employment opportunities."); *see also* Zimmer, *Pretext and Mixed Motive*, *supra* note 52, at 11. Moreover, the failure of the provision in the 1990 Act regarding liberal statutory construction does not diminish the fact that other courts and commentators have employed this canon in construing civil rights laws. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 381 (1977) (Marshall, J., concurring in part and dissenting in part) ("The evils against which [Title VII] is aimed are defined broadly .... Accordingly, under longstanding principles of statutory construction, the Act should 'be given a liberal interpretation ....' "); Powell-Ross v. All Star Radio, Inc., No. 95-1078, 1995 WL 491291, at *5 (E.D. Pa. Aug. 16, 1995) ("[D]efendants' narrow reading contradicts the well-established liberality with which we are directed to construe [Title VII]."); 3A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 74.08 (4th ed. 1992) ("Where employment issues come under the Civil Rights Acts liberal construction is the rule ....").

Viewed within the larger context of Title VII, the motivating factor provision sets a broad standard that affords relief to all victims of discrimination who meet its standard, regardless of the type of evidence they adduce.[170]

Finally, the plain language of the statute in no way suggests that the motivating factor provision is limited to mixed-motive claims. Rather, it states simply that "an unlawful employment practice is established" when the plaintiff shows that his or her protected trait was a "motivating factor" in the employer's decision.[171] Reading the statute on its face and within its broader context, then, the motivating factor provision creates a uniform motivating factor test that applies in all disparate treatment cases.

B. *Other Attempts to Simplify the Jury's Task*

This Note is not the first attempt to reform the pretext/mixed-motive muddle. Courts, practitioners, and other commentators have sought to alleviate the confusion that two separate instructions create, but their suggestions have failed to take hold. This Section examines these efforts and concludes that, while informative, these failed attempts are insufficiently grounded in the text of Title VII.

Many of the most cogent calls for reform and substantive suggestions for improvement hail from the practitioners and courts who deal with the law in the trenches. In his concurrence in *Miller v. Cigna Corp.*,[172] Judge Greenberg bemoaned that employment discrimination law is "cursed with elusive terms like 'mixed motives' and 'pretext,' " and he proposed dispensing with the "unhelpful monikers" altogether.[173] The Judge first examined the Supreme Court's decision in *Hazen Paper Co. v. Biggins*,[174] concluding that *Hazen* had abandoned the notion of an independent category of mixed-motive cases.[175] Judge Greenberg also stated that the *Hazen* Court expressed discomfort with

170. *See* Zimmer, *Emerging Uniform Structure*, *supra* note 42, at 600-01.

171. 42 U.S.C. § 2000e-2(m) (1994).

172. 47 F.3d 586, 599 (3d Cir. 1995) (Greenberg, J., concurring).

173. *Id.*

174. 507 U.S. 604, 610 (1993) ("Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome."). Biggins, a sixty-two-year-old terminated employee, alleged that Hazen Paper had violated both the Age Discrimination in Employment Act ("ADEA") and the Employee Retirement Income Security Act of 1974 ("ERISA") when it fired him in order to prevent his pension benefits from vesting. *See id.* at 606-07. The Court stated that although an employee's age and his or her years of experience may correlate, they are "analytically distinct" characteristics. *Id.* at 611. The Court held that Biggins's benefits were close to vesting because of his years of service, not because of his age, and that the employer's decision to terminate him because of his years of service did not, without more, violate the ADEA. *Id.*

175. *Miller*, 47 F.3d at 603 (Greenberg, J., concurring).

Burdine's shifting burdens and presumptions, and indeed with "pretext" liability in general[176] — a position he said the Court confirmed in *St. Mary's Honor Center v. Hicks*.[177] According to Judge Greenberg, *Hicks* instructed district courts to employ pretext analysis only insofar as it, along with other evidence in the record, sheds light on the ultimate question: whether intentional discrimination occurred.[178] Because the Judge understood *Hazen* as having eliminated a separate category of mixed-motive cases and *Hicks* as having dispensed with a separate class of pretext claims, he concluded that the Court had left itself with one broad category of disparate treatment cases.[179]

Other courts, like Judge Greenberg, have eliminated the distinction between pretext and mixed-motive cases at the jury instruction phase. In *Tyler v. Bethlehem Steel Corp.*,[180] the Second Circuit recognized the difficulties that the ambiguous direct evidence requirement ultimately creates during jury instructions. Dismissing the requirement as an odd fixation by the lower courts on language that was not controlling in *Price Waterhouse*, the *Tyler* court stated that the jury instruction simply must comport with the statute.[181] The court added that although *McDonnell Douglas*, *Burdine*, and *Price Waterhouse* are useful tools for judges deciding motions for summary judgment,[182] they are not appropriate schemas for jury instructions, in part because they were laid down before jury trials were available in Title VII cases.[183] The *Tyler* court thus required the plaintiff to establish by a preponderance of the evidence, either direct or circumstantial, that the pro-

176. *Id.*

177. 509 U.S. 502, 511 (1993) (emphasizing that a Title VII plaintiff bears the ultimate burden of persuasion at all times).

178. *Miller*, 47 F.3d 586, 605 (Greenberg, J., concurring)

179. *Id.* at 605-06. Unfortunately, Judge Greenberg dropped a final footnote that seemingly reinstated the separate category of mixed-motive cases he declared had been abolished. He stated that a "limited category" of *Price Waterhouse* cases remained intact, explaining that such cases exist where the record shows not only that the employer's motives were mixed, but also that the plaintiff's evidence is sufficiently direct to shift the burden of the same-decision defense to the defendant. *Id.* at 606 & n.4. Judge Greenberg did not address the CRA of 1991, nor did he examine the roots of the direct evidence requirement he invoked. It is unclear how his "limited category" of *Price Waterhouse* cases differs from the broader category of mixed-motive claims that he purportedly eliminated.

180. 958 F.2d 1176, 1183-85 (2d Cir. 1992).

181. *Id.* at 1185. The *Tyler* court dealt with New York's Human Rights Law, but the state law's language is similar to Title VII, and courts have construed it consistently with Title VII. *Id.* at 1180.

182. *But see* Malamud, *supra* note 16, at 2279 ("[A]lthough district courts purport to use McDonnell Douglas-Burdine, the proof structure actually does little to aid their analysis of the facts at summary judgment. Indeed, in practice courts are left largely to their own devices when it comes to determining which factual questions are to be addressed at which stage of the proof structure.").

183. *See Tyler*, 958 F.2d at 1185. The CRA first made jury trials available in Title VII cases in 1991. *See supra* note 99 and accompanying text.

tected characteristic was a motivating factor in the employer's decision. If the plaintiff discharges his or her burden, the jury then determines whether the employer prevails on its affirmative same-decision defense.[184]

The *Tyler* court noted that the last step of *McDonnell Douglas-Burdine* — where the plaintiff persuades the trier of fact either that a discriminatory reason actually motivated the employer or that the employer's proffered explanation is unworthy of belief — is functionally equivalent to the plaintiff's initial burden under *Price Waterhouse*.[185] The only difference between the two, the court explained, is that the mixed-motive plaintiff begins by focusing on the discrimination itself, while the pretext plaintiff begins by focusing on his or her qualifications.[186] In other words, the more focused proof of discrimination presented by a mixed-motive plaintiff allows him or her to bypass the bulk of the *McDonnell Douglas-Burdine* analysis, but the two modes of proof ultimately end up in the same place. Since *McDonnell Douglas-Burdine* and *Price Waterhouse* are simply different routes to the same destination, the *Tyler* court stated that the two methods of proof can be boiled down to two central components for the purposes of jury instructions: (1) the motivating factor test and (2) the same-decision defense.[187]

Several circuits explicitly recognize the confusion the pretext/mixed-motive distinction creates for juries and have taken steps to simplify their jury instructions. The Eighth Circuit's Committee on Model Civil Jury Instructions, for example, adopted *Tyler*'s approach for many types of disparate treatment claims.[188] Although the Committee acknowledged the feasibility of separate instructions for pretext and mixed-motive claims, it expressed concern with the difficulty courts face in attempting to classify a given case.[189] As a result,

184. *Tyler*, 958 F.2d at 1185.

185. *Id.*

186. *Id.* Once a *McDonnell Douglas-Burdine* plaintiff establishes that she is a member of a protected class, she first must show that she applied for a position for which she was qualified. *See supra* text accompanying note 17.

187. *Id.* at 1187. Tindall, *supra* note 52, at 367-68, endorses the approach in *Tyler*, but he notes that the test was "short-lived." Indeed, approximately three months after handing down *Tyler*, the Second Circuit moved into the animus-plus camp, *see supra* notes 38-39 and accompanying text, in *Ostrowski v. Atlantic Mutual Insurance Companies*, 968 F.2d 171 (2d Cir. 1992). There the court held that, in order for circumstantial evidence to trigger a mixed-motive instruction, the evidence must be "tied directly to the alleged discriminatory animus." *Ostrowski*, 968 F.2d at 182.

The *Tyler* instructions look markedly similar to the instructions proposed by Professor Michael Zimmer. *See infra* notes 206-210 (summarizing and critiquing Zimmer's proposed instructions).

188. COMMITTEE ON MODEL CIVIL JURY INSTRUCTIONS, MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT 81-89 (1999).

189. *Id.* at 82.

the Committee devised a special set of interrogatories to elicit findings in borderline pretext/mixed-motive cases.[190] Despite these interrogatories, the distinction remained "cumbersome and potentially confusing," and the Committee decided to endorse a motivating factor/same-decision instruction for all disparate treatment claims arising under the ADEA, § 1981, § 1983, and the motivating factor provision.[191] But in Title VII cases that do not fall under the motivating factor provision — presumably all pretext claims, or cases with insufficiently direct evidence — the Committee retained separate pretext instructions.[192] The Eleventh Circuit adopted a similar set of model jury instructions that employ a motivating factor/same-decision test and special interrogatories,[193] and the Ninth Circuit adopted motivating factor/same-decision instructions that appear to apply in all disparate treatment cases.[194]

Despite the efforts of courts like the Eighth, Ninth, and Eleventh Circuits, the confusing distinctions remain. As a result, practitioners and scholars also have tried their hand at streamlining the multifaceted instructions. Most notably, the American Bar Association's Litigation Section attempted to clarify the morass by drawing a distinction between direct and indirect methods of proof.[195] Under this method of analysis, as in Justice O'Connor's concurrence, the direct method of proof corresponds with mixed-motive claims, while indirect methods of proof are associated with pretext claims. The ABA's Model Instruction 1.02[1] charges:

> To prevail on a claim of intentional discrimination, the plaintiff must prove by a preponderance of the evidence that the defendant had a reason or motive to discriminate against [him/her] in the matter before this court. The plaintiff must prove, either directly or indirectly, that there is evidence of intentional discrimination.[196]

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190. *Id.* at 184-89.

191. *Id.* at 83-84.

192. *Id.* at 192. For criticism of the Eighth Circuit's blurring of the pretext/mixed-motive distinction, see Haase, *supra* note 149.

193. ELEVENTH CIRCUIT COMMITTEE ON PATTERN JURY INSTRUCTIONS, PATTERN JURY INSTRUCTIONS (CIVIL CASES) 86-91 (2000).

194. COMMITTEE ON MODEL CIVIL JURY INSTRUCTIONS, MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 86 (1999).

195. *See* EMPLOYMENT AND LABOR RELATIONS LAW COMMITTEE, AMERICAN BAR ASSOCIATION, MODEL JURY INSTRUCTIONS: EMPLOYMENT LITIGATION 11 (1994) [hereinafter ABA MODEL INSTRUCTIONS].

196. *Id.* The instructions explain that:

> [d]irect evidence would include oral or written statements showing a discriminatory motivation for the defendant's treatment of the plaintiff. Indirect or circumstantial evidence would include proof of a set of circumstances that would allow one to reasonably believe that [race/color/national origin/gender] was a motivating factor in the defendant's treatment of the plaintiff.

This instruction seems to apply regardless of the type of evidence adduced — a standard simpler even than this Note's proposed standard. But then the Model Instructions muddy the water. Where the plaintiff claims her evidence is sufficiently direct, the trial judge reads Instruction 1.02[2], which defines direct evidence as "evidence of remarks or action that, if believed, directly prove that the plaintiff's [membership in a protected class] was a factor in the defendant's decision," explicitly excluding "stray remarks" from the definition.[197] Where indirect evidence is implicated, however, the court reads Instruction 1.02[3], which delineates the familiar prima facie case of *McDonnell Douglas-Burdine*.[198] Thus, although Instruction 1.02[1] appears simply to ask whether the defendant intentionally discriminated, the follow-up instructions quickly cloud matters for the jury. In cases where the plaintiff presents both direct and indirect evidence, the trial court reads *all three* instructions, leaving the jury understandably perplexed. Finally, the instructions ignore the text of Title VII by neglecting the same-decision defense, which is available to defendants under the portion of the statute — the motivating factor provision — from which the ABA borrowed in devising its instructions.

Although the ABA makes a valiant effort, the line between direct and indirect evidence remains fuzzy, and the subtle differences in the approaches, as well as the complexity of the prima facie case, befuddle the jury. Thus, no matter how clearly the court articulates the two standards, the pretext/mixed-motive distinction inevitably creates confusion for the jurors.[199] As a result, numerous practitioners, courts, and

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Id.

197. *Id.* at 13. The ABA cites case law from the Fifth, Sixth, Seventh, and Ninth Circuits supporting its definition. *Id.* (citing Young v. City of Houston, 906 F.2d 177 (5th Cir. 1990); Merrick v. Farmers Ins. Group, 892 F.2d 1434 (9th Cir. 1990); Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309 (6th Cir. 1989); Smith v. Firestone Tire & Rubber Co., 875 F.2d 1325 (7th Cir. 1989)). But as the foregoing discussion of the circuit split reveals, *see supra* notes 35-41 and accompanying text, those circuits do not currently agree on any single formulation of the concept.

198. *See* ABA MODEL INSTRUCTIONS, *supra* note 195, at 17.

199. *See* Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1185 (2d Cir. 1992) (explaining that *McDonnell Douglas*, *Burdine*, and *Price Waterhouse* are "useful analytical constructs," but that they are not appropriate for jury instructions); LEWIS, *supra* note 42, at 243; Smith, *supra* note 51, at 37; *cf.* Davis, *supra* note 52, at 706 & n.17 (stating that *McDonnell Douglas*'s complicated scheme merely "shifts the burden of incomprehensibility to the jury," citing the convoluted jury instructions in Lynch v. Belden & Co., 882 F.2d 262, 265-66 (7th Cir. 1989), as an example).

Some circuits have held that the *McDonnell Douglas-Burdine* scheme, because of its complexity, should not be part of the jury charge at all. *See* Loeb v. Textron, 600 F.2d 1003, 1016 (1st Cir. 1979) ("*McDonnell Douglas* was not written as a prospective jury charge; to read its technical aspects to a jury... will add little to the juror's understanding of the case, and even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination."); Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1137 (4th Cir. 1988) (criticizing, but upholding as harmless error, an "overly complex" *McDonnell Douglas* jury instruction); *see also* 8TH CIR. MODEL INSTRUCTIONS, *supra* note 188, at 86 ("It is unnecessary and inadvisable to instruct

commentators advocate erasing the bewildering distinction, calling for a simplification of jury instructions in individual employment discrimination cases.[200]

Many scholars who have examined the problem propose model jury instructions that would streamline the jury charge and simplify the confusing nexus of pretext and mixed motive. Professor Kenneth Davis, for example, states that the *McDonnell Douglas-Burdine* scheme's formalism creates evidentiary distortions that defy common sense.[201] He argues that *Hicks*, in discarding the pretext-only rule, eliminated any justification for retaining the complex burden-shifting mechanism, and he therefore advocates jettisoning *McDonnell Douglas-Burdine* and replacing it with a motivating factor test.[202] Such a test, he asserts, would allow the parties to focus on the central issues — intentional discrimination and the same-decision defense — without the additional baggage the *McDonnell Douglas-Burdine* scheme carries.[203]

Davis does not provide a sample of his proposed instructions, but it is reasonable to assume that they would resemble current mixed-motive instructions, which are, under the 1991 Act, based on a motivating factor test. One prototype reads:

> You have heard evidence that, in terminating Ms. Harding, Acme Products was motivated by Ms. Harding's gender, by Ms. Harding's failure to get along with her coworkers, and by her contacting a client outside the scope of her responsibilities.
>
> If you find that the fact that Ms. Harding is a woman was a motivating factor in Acme Product's decision, then you must find that Acme Products is liable for discriminating against Ms. Harding.
>
> If you also find, however, that Acme Products, even though it was motivated in part by Ms. Harding's gender, would have terminated Ms. Harding anyway for failure to get along with coworkers and/or by contacting the client, then you may find liability, but you may not award

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the jury regarding the three-step analysis of *McDonnell Douglas* . . . ."); 9TH CIR. MODEL INSTRUCTIONS, *supra* note 194, at 138 ("It is not necessary to instruct the jury regarding the presumptions and burdens of the *McDonnell Douglas* framework for considering indirect evidence of a discriminatory motive."). Indeed, in *Hicks* the Court stated that the complex prima facie case "drops out of the picture" once the employer articulates a legitimate, nondiscriminatory reason for its action. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510 (1993).

200. *See, e.g.*, Miller v. Cigna Corp., 47 F.3d 586, 599 (3d Cir. 1995) (Greenberg, J., concurring); *Tyler*, 958 F.2d at 1185; Zimmer, *Pretext and Mixed Motive*, *supra* note 52, at 11; Rutherglen, *supra* note 42, at 59.

201. Davis, *supra* note 52, at 761.

202. *Id.*

203. *Id.*

> damages. I will decide what kind of relief is equitable to correct the violation of the law.[204]

This example simplifies matters for the jury, focusing its attention on the motivating factor and same-decision tests. And because it is derived from the text of the CRA, the example closely resembles this Note's proposed instructions. But these instructions are designed only for mixed-motive cases, and they do not accommodate pretext plaintiffs who do not offer direct evidence, whatever that may be.

Other proposed instructions attempt to adhere to this formula without entirely jettisoning the distinctions between pretext and mixed-motive claims and direct and circumstantial evidence. Professor Michael Zimmer offers a hybrid method of instructing the jury that draws upon both the ABA's Model Instructions and the motivating factor test common in mixed-motive cases.[205] Where the plaintiff's case involves evidence that could be considered both direct and indirect, Zimmer proposes that the trial court first instruct the jury to decide whether the evidence does indeed constitute direct evidence of the defendant's intent to discriminate.[206] Next the court tells the jury to consider all of the circumstantial evidence presented by either party. The jury then must decide, based on all of the evidence, whether the protected characteristic was a "motivating factor" in the employer's decision.[207] If the jury finds that the protected trait was a motivating factor, the plaintiff has carried her burden of proving a violation, and the defendant is liable even if the jury accepts the defendant's legitimate, nondiscriminatory reason for the adverse action.[208]

Professor Zimmer's approach seems on its face to retain the distinction between direct and indirect evidence while presenting the distinction to the jury in a comprehensible fashion. In the end, however, Zimmer in fact adopts nothing more than the motivating factor test associated with mixed-motive claims under the CRA, which most courts apply only in cases involving direct evidence. The distinction between direct and indirect evidence serves no purpose in Zimmer's scheme, because the essential inquiry for the jury is the ultimate question: whether the plaintiff's protected characteristic was a motivating factor. Whether the evidence is direct or circumstantial ultimately makes no difference, because the jury simply determines, based on all of the evidence, whether the impermissible criterion was a motivating factor. Since the "directness" of the evidence is therefore irrelevant,

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204. 2 HENRY H. PERRITT, JR., CIVIL RIGHTS IN THE WORKPLACE 88 (1995) (footnote omitted).

205. *See* Zimmer, *Pretext and Mixed Motive*, *supra* note 52, at 38.

206. *Id.*

207. *Id.*

208. *Id.*

Zimmer's discussion of the distinction is mere surplusage that only confuses the jury.

Despite its shortcomings, Zimmer's approach improves upon current jury instructions because it focuses on the ultimate question: the motives of the employer. This Note goes a step beyond Zimmer[209] — and a step farther away from case law in the Supreme Court and lower courts — in proposing instructions drawn directly from the text of the CRA.[210] The motivating factor standard employed in this Note is superior to the standards suggested by other scholars not only because of its fidelity to congressional language, but also because it simplifies a complex area of the law that currently puzzles judges, lawyers, juries, and parties alike.

CONCLUSION

This Note demonstrates that the confusion among the lower courts over the direct evidence requirement in mixed-motive employment discrimination cases has infected the entirety of individual disparate treatment law. Faced with a requirement of dubious origins and haphazard application, mixed-motive plaintiffs reach to the complex structure of *McDonnell Douglas-Burdine* in order to cover their bases. But this sweeping approach only passes the buck to jurors, who are far less equipped to make sense of this area of law than plaintiffs' attorneys and the courts. The surest way to clear this mess is not to clarify the meaning of direct evidence, but rather to simplify the system altogether.

This Note suggests that the pretext and mixed-motive methods of proof can be streamlined into a single standard that simply asks whether the plaintiff's protected characteristic was a motivating factor in the defendant's employment decision. If the plaintiff can satisfy his or her motivating factor burden, the defendant is liable under the plain terms of the motivating factor provision. The defendant may then minimize its damages by proving that it would have made the same employment decision absent the impermissible consideration.

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209. Elsewhere Professor Zimmer, like this Note, has urged a straightforward application of the motivating factor provision to all disparate treatment claims brought under Title VII. *See* Zimmer, *Emerging Uniform Structure*, *supra* note 42. But in that article Zimmer did not propose a set of jury instructions, nor did he engage in the rigorous textual and legislative history analysis that is central to this Note.

210. But as *Tyler* illustrates, *see supra* notes 180-187 and accompanying text, the instructions are not entirely without support among the lower courts. In addition, other commentators have suggested simplifying the complexities of disparate treatment law by focusing on the ultimate issue of discrimination, without regard to the distinction between pretext and mixed-motive. For example, Malamud, *supra* note 16, at 2317-18, advocates an open-ended standard that dispenses with *McDonnell Douglas-Burdine* altogether and that focuses instead on whether the plaintiff has proven intentional discrimination by a preponderance of the evidence.

Adopting this proof framework would allow parties to structure their behavior according to a plain, articulable standard, thereby benefiting both sides of employment discrimination suits.