

Fashioning a General Common Law for Employment in an Age of Statutes

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The clarion yet careful pronouncement of Erie, “There is no federal general common law,” opened the way to what, for want of a better term, we may call specialized federal common law.”

Henry Friendly, In Praise of *Erie* -- and of the New Federal Common Law, 39 N.Y.U. L. Rev. 382, 405 (1964)

[W]hen we have concluded that Congress intended terms ... to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms.

Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989) (Marshall, J., for a unanimous Court)

In “cases of division of opinion a choice had to be made and naturally we chose the view we thought was right”. In judging what was “right”, a preponderating balance of authority would normally be given weight, as it no doubt would generally weigh with courts, but is has not been thought to be conclusive.

Herbert Wechsler, 1966 Annual Report of the Director, American Law Institute

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I.

Introduction

Judge Friendly's eloquent and cogent defense of Justice Brandeis's opinion in *Erie Railroad Co. v. Tompkins*² highlighted the post-*Erie* flowering of a new Court-crafted federal common law, "truly uniform," and, unlike the rejected federal general common law of Justice Story,³ "binding in every forum" and "therefore ... predictable and useful as its predecessor ... was not."⁴ In the half century since Judge Friendly's praise, this specialized and binding federal common law has blossomed further with expanding federal legislation and corresponding additional praise.⁵ Neither Justice Brandeis nor his former clerk Judge Friendly nor other subsequent commentators, however, seem to have fully appreciated the continuing post-*Erie* role of the Court in the multi-jurisdictional enterprise of developing, if not discovering,⁶ a best or most enlightened general common law for all in an age of statutes. This post-*Erie* role derives

² 304 U.S. 64 (1938).

³ In *Swift v. Tyson*, 41 U.S. (Pet. 16) 1 (1842), Justice Story embraced the existence of a "true" general commercial law, by holding that federal courts should apply their own understanding of this general commercial law rather than the understanding expressed in state court decisions in applicable jurisdictions. *Id.* at 19-20.

⁴ Henry Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 382, 405 (1964).

⁵ See, e.g., Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 Nw. U. L. Rev. 585 (2006); Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881 (1986); Thomas Merrill, *The Common Law Powers of Federal Courts.*, 52 U. Chi. L. Rev. 1 (1985); Paul J. Mishkin, *Some Further Last Words on Erie - the Thread*, 87 Harv. L. Rev. 1682 (1974).

⁶ "[I]t will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws." *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842) (Story, J., for the Court). For Justice Story, there surely was at least "true" law "governing negotiable instruments" to be discovered, rather than created for particular times and nations. In his opinion in *Swift*, *id.* at 9, Justice Story quotes Cicero: "*Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore una eadeque lex obtinebit.*" ("There will not be one law of Rome and another of Athens; there will not be one law now and another after this; but among all nations, and in every time, one and the same law will hold.")

The notion of a true general common law, distinct from local law, for all courts, including federal courts, to labor to determine, was only of Justice Story's time, or even of an earlier time, not of Story's creation. The *Swift* decision "summed up prior attitudes and expressions in cases that had come before this court and lower federal courts for at least thirty years, at law as well as in equity. The short of it is that the doctrine was congenial to the jurisprudential climate of the time." *Guaranty Trust Co. v. New York*, 326 U.S. 99, 102-03 (1945). See generally William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513 (1984). For a thorough presentation of the historical context, see Stewart Jay, *Origins of Federal Common Law: Part One and Part Two*, 133 U. PA. L. REV. 1003 and 1231 (1985).

Justice Story's "classical English view" of judicial decisions as only the evidence of a true common law for judges to discover or determine was being rejected by many even during the period in which *Swift* was decided and would lose further support over the course of the nineteenth century. See Kempin, *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 Am. J. Legal Hist. 28, 31-32, 36 (1959). See also, Morton Horowitz, *The Transformation of American Law 1780-1860*, at 1-30 (1977).

in large part from the Court's delegated authority to make law by filling gaps in federal statutes. This law making authority, though confined by the words, structure, and purposes of the statutes, rather than just by precedent, both draws on and potentially influences state common law. It thus enables the Court not only to render statutory constructions that *command* all courts, but also to participate in a general common law making process of *persuasion*, not unlike that in which the federal courts participated during the *Swift v. Tyson* regime.

The Court's potential participation in the general common law making process generally has been ignored by legal commentators, perhaps because of a resistance to the recognition of statutory construction as akin to the law making of common law judges. The Court, however, has understood fully the relevance of the general common law to its law making under federal statutes. For instance, in a series of decisions interpreting the scope of the employment relationship reached by various federal regulatory statutes, including the federal Copyright Act treated in *Community for Creative Non-Violence v. Reid*,⁷ the Court has explicitly acknowledged its participation in the general common law making process.⁸ In this series of decisions, the Court has claimed to base its interpretation of the scope of the employment relationship on a general common law of agency, drawn in part from the Restatement Second of Agency of the American Law Institute (ALI), rather than the law set by a particular state.⁹ The Court's interpretations set law binding in state courts for the meaning of the federal statutes; but like the federal general common law of the *Swift* era, the Court's interpretations also can persuade, though not command, state courts to adjust their own particular understandings of the common law of agency.

The Court's capacity to participate in the general common law making process of course is not confined to cases defining the employment relationship under the general law of agency. The Court generally assumes that when a statute uses without the inclusion of any meaningful definition terms and phrases drawn from the common law, Congress intended that these terms

⁷ 490 U.S. 730 (1989).

⁸ See, e.g., *Clackamas Gastroenterology Associates, P. C. v. Wells*, 538 U.S. 440, 444-445 (2003); *National Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992); *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-323 (1974); *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968).

⁹ See TAN xxx infra.

and phrases be interpreted in accord with that law.¹⁰ The determination of the common law to be incorporated into such statutes affords the Court the opportunity to influence the development of the general common law.¹¹ Moreover, some common law-type issues may be presented by federal statutes even in the absence of the express use of common law terminology.¹² How state courts resolve such issues under their common law could be influenced by the Court's resolution of the analogous issues under the federal statutes.¹³

¹⁰ See, e.g., *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 402 (2003) ("Absent contrary direction from Congress, we begin our interpretation of statutory language with the general presumption that a statutory term has its common law meaning."); *Evan v. United States*, 504 U.S. 255, 259 (1991) ("It is a familiar 'maxim that a statutory term is general presumed to have its common-law meaning.'" (quoting *Taylor v. United States*, 495 U.S. 575, 592 (1990))); *United States v. Turley*, 352 U.S. 407, 411 (1957) ("where a federal criminal statute uses a common law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning") (dicta).

¹¹ For instance, the Court in *Scheidler*, supra, based in part on its understanding of the common law's definition of extortion, interpreted the federal Hobbs Act, 18 U.S.C. § 1951, to apply only when an actor through coercion acquires, rather than merely deprives another of a property right. 537 U.S. at 402-404. In *Scheidler*, therefore, the Court held that anti-abortion protestors did not violate the Hobbs Act by coercively closing an abortion clinic. *Id.* at 397. This interpretation of the common law definition of extortion could discourage judicial acceptance of a more expansive common law definition. Cf. *People v. Robey*, 2009 WL 3208689 (Cal. Ct. App. 6th Dist. 2009) (citing *Scheidler* in explanation of California's statutory requirement that property be exchanged as an element of crime of extortion); Matthew T. Grady, *Extortion May No Longer Mean Extortion After Scheidler v. National Organization for Women, Inc.*, 81 N.D. L. Rev. 33 (2005) (contending that the *Scheidler* decision weakens the intended force of the Hobbs Act).

In *Evan*, supra, the Court held that an affirmative act of inducement by a public official is not an element of extortion "under color of official right," as prohibited by the Hobbs Act. *Id.* at 256. The holding was based in part on the Court's determination that a demand or request by the public official "was not an element of the offense" at common law. *Id.* at 259. Justice Thomas in dissent contended that the majority misstated the common law by failing to require the taking to be under a false pretense of official right. *Id.* at 278, 279-280. He claimed the majority thereby conflated the common law crimes of extortion and bribery. *Id.* at 283-284. Whether or not Justice Thomas was correct, the majority's interpretation of the relevant common law definition clearly could influence how states apply their own law.

¹² See, e.g., *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424, 438-443 (1997) (holding that an employee alleging negligent infliction of emotional distress cannot recover under the Federal Employers' Liability Act (FELA) for pre-symptomatic medical monitoring costs); *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) (setting conditions for an employee's claim of negligent infliction of emotional distress under the FELA); *Smith v. Wade*, 461 U.S. 30, 34 (1983) (setting culpability standards for punitive damages in an action under § 1983). See also *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (setting conditions for the issuance of permanent injunctions under the Patent Act).

¹³ *Buckley*, supra, provides a good example, as several state supreme courts seem to have been influenced by its holding and reasoning. See, e.g., *Hinton ex rel. Hinton v. Monsanto Co.*, 813 So.2d 827, 830-32 (Ala. 2001); *Menry v. Dow Chem. Co.*, 701 N.W.2d 684, 696 (Mich.2005); see also Victor E. Schwartz, Cary Silverman, and Christopher E. Appel, *The Supreme Court's Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law*, 60 S.C. L. Rev. 881, 883, 912-914 (2009). *eBay*, supra, ultimately may provide another example. See Mark P. Gergen, John M. Golden, Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 Colum. L. Rev. 203, 207-215 and n.51 (2012) (contending that the Court's formulation of conditions for the issuance of permanent injunctions departed significantly from traditional

Federal General Common Law of Employment

Furthermore, the federal courts' authority to make "specialized federal common law" binding on all courts within defined domains, such as maritime law,¹⁴ the law governing controversies between states,¹⁵ or the law governing the interpretation of collective bargaining agreements,¹⁶ also enables the Court concomitantly to suggest or support general doctrinal developments that potentially could be used by state courts in their discretion to formulate their own common law.¹⁷

equitable principles and has started to affect the issuance of injunctions in state as well as federal courts).

On the other hand, thus far neither *Gottshall* nor *Smith* seem to have influenced state courts significantly. But cf. *AALAR, Ltd., Inc. v. Francis*, 716 So. 2d 1141, 1147 (Ala. 1998) (noting "current state of Alabama law is consistent with the "zone of danger" test discussed in *Gottshall*"); *Winters v. Greeley*, 189 Ill. App. 3d 590, 596, 545 N.E.2d 422, 426 (1989) (citing *Smith* for the proposition that punitive damages can be awarded on the same threshold culpability standard set for compensatory damages).

¹⁴ The federal courts' authority to develop a specialized federal maritime common law derives from the grant of jurisdiction over "admiralty and maritime" cases in Article III, section 2, U.S. Constitution. See, e.g., *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-361 (1959) (the constitutional grant empowers the federal courts to continue the development of maritime law).

¹⁵ On the same day it decided *Erie* the Court announced, in another opinion by Justice Brandeis, that "federal common law" would continue to govern interstate disputes such as the equitable apportionment of interstate waters or interstate boundaries. See *Hinderlider v. La Plata & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). This federal common law was originally developed in suits between states under the original jurisdiction of the Court. See, e.g., *Wyoming v. Colorado*, 259 U.S. 496 (1922).

¹⁶ See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (inferring authority to fashion federal common law to govern collective bargaining agreements from grant of jurisdiction in § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, over suits governed by such agreements).

¹⁷ For instance, the Court's decision in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), establishing an upper limit of a 1:1 ratio of compensatory to punitive damages for maritime cases governed by federal common law, could influence the development of state common law on punitive damages. See Victor E. Schwartz, Cary Silverman, and Christopher E. Appel, *The Supreme Court's Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law*, 60 S.C. L. Rev. 881, 883, 914-915 (2009) (advocating state courts being influenced by *Exxon Shipping*).

Similarly, had Congress not passed comprehensive regulation of water pollution, the Court might have influenced the common law of nuisance by use of its authority, as asserted in *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972), to develop a federal common law to govern interstate water pollution disputes. But cf. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317-319 (1981) (comprehensive federal legislation displaces federal common law governing interstate water pollution); cf. also *American Elec. Power Co., Inc. v. Conn.*, 131 S. Ct. 2527, 2537 (2011) (federal statutes displace any federal common law right to seek abatement of interstate pollution from carbon dioxide emissions).

Even federal common law cases encouraging the enforcement of arbitration provisions in collective bargaining agreements, e.g. *Lincoln Mills*, *supra*, (specifically enforcing agreement to arbitrate); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (arbitration awards interpreting and applying terms of collective agreements not subject to review on the merits), *supra* note xx, eventually might have encouraged the use of arbitration in cases governed by state common law had the Court not obviated such influence by interpreting the Federal Arbitration Act, 9 U.S.C. § 1 et seq., to preempt state law restrictions on agreements to arbitrate. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding preempted a state law requiring claims brought under it to have judicial consideration).

The Court's current potential role in the general common law making process is fully consistent with our contemporary positivist assumptions about the nature of law. It is not premised, as apparently was Justice Story's opinion in *Swift v. Tyson*,¹⁸ on the assumption that something called law exists independently of rules set by human agents through sovereign authority.¹⁹ The Court's potential role in the modern general common law making process is like that of state supreme courts, which accept their participation in an ongoing interactive process of development and refinement in response both to better understanding and analysis of the impact of current doctrine and also to social and political change.²⁰

The Court's continuing role in general common law making is reason for another round of praise, beyond that offered by Judge Friendly, for the three quarter century-old decision in *Erie*. Not only does *Erie* ensure the application of uniform substantive law between federal and state courts in the same jurisdiction, but it does so without restricting Congress from empowering, through statutory delegation, an elite federal judiciary's participation in the process of developing a common law, which may, but does not have to, become more uniform between jurisdictions²¹ as it becomes more refined and adapted to an increasingly integrated national society and polity.

Further examples of the potential influence of specialized federal common law on state common law could be drawn from specialized federal common law fashioned to protect the rights and obligations of the United States. See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943) ("The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law."); *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947) (federal common law to be used to construe federal government contracts; it "is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law").

¹⁸ See note x supra.

¹⁹ "But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. . . The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938). Or as famously expressed more colorfully by Justice Holmes, "[t]he common law is not some brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917).

²⁰ For what remains in my view, a classic description of judicial law making, see Edward H. Levi, *An Introduction To Legal Reasoning*, 15 U. Chi. L. Rev. 501 (1948). See also Melvin Aron Eisenberg, *The Nature of the Common Law*, (Harvard 1988), especially chapters 4 and 7 for how common law develops in response to social change.

²¹ As stated by Chief Justice Marshall, "even in cases where the decisions of the Supreme Court are not to be considered an authority except in the courts of the United States, some advantage may be derived from their

The Court's participation in the general common law making process can proceed in at least as many directions as those that can be taken by any common law making court. For instance, the Court can confirm as general common law the unanimous, nearly unanimous, or predominant majority rule laid down by the various states. Alternatively, the Court can purport to follow such a rule as the general common law rule, even as it subtly, or perhaps not so subtly, refines or modifies that rule in its restatement for federal law.²² As modern lawyers, we should understand that any application of legal doctrine to the particular facts of a case affects the meaning of that doctrine, if only to an imperceptible and marginal extent.²³ More significantly, the Court can consider and expressly reject the adequacy of general common law doctrine, and then offer in its place alternative doctrine to fill the interstices and advance the purposes of the federal statute it is interpreting. While this alternative doctrine is unlikely to influence state common law immediately, it nonetheless can plant a seed that if sufficiently hardy may result eventually in spreading vines throughout the common law. Finally, the Court potentially may influence common law developments by treating without any direct reference to the common law an issue under a federal statute that is analogous to a common law issue.

However the Court proceeds, its participation in this general common law making promises the benefits of federalism without the costs of centralization. State courts when fashioning their own responses to common law issues do not have to follow the Court's lead.

being known. It is certainly to be wished that independent tribunals having concurrent jurisdiction over the same subject should concur in the principles on which they determine the cases coming before them. This concurrence can be obtained ... by that mutual respect which will probably be inspired by a knowledge of the grounds on which their judgments respectively stand." Letter to Congress Feb. 7, 1817, reprinted in 2 W. Crosskey, *Politics and the Constitution in the History of the United States* 1246 (1953). For discussions of how American law became more uniform in the era of *Swift* during the pre-Civil War period, see e.g., Randall Bridwell & Ralph U. Whitten, *The Constitution and the Common Law* 87-97 (1977) (discussing coexistence of local and a more uniform general commercial law); William Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 *HARV.L.REV.* 1513 (1984) (demonstrating how federal and state courts created a uniform body of marine insurance law).

²² Cf., e.g., *McPherson v. Buick Motor Co.*, 217 N.Y.382, 111 N.E. 1050 (1916) (modifying, without direct acknowledgement, the rule of negligence to apply to manufacturers without privity with an injured purchaser).

²³ See, e.g., *Levi*, *supra*, 502-503 ("the determination of similarity or difference is the function of each judge. Where case law is considered, and there is no statute, he is not bound by the statement of the rule of law made by the prior judge even in the controlling case. . . . The rules change as the rules are applied. More important, the rules arise out of a process which, while comparing fact situations, creates the rules and then applies them.") At least we are realistic enough to recognize that courts act as lawmakers within set doctrinal boundaries. See, e.g. Joseph Raz, *The Authority of Law* 197 (1979) ("within the admitted boundaries of their lawmaking powers courts act and should act just as legislators do, namely, they should adopt those rules which they judge best").

They have no incentive to do so beyond the persuasiveness of the Court's resolution of issues. State court judges can still distinguish themselves and their states with different creative responses that better express their states' values.

The Court's potential contemporary role in the general common law making process can be well highlighted through examination of the Court's treatment of several common law issues on which the Court has or could make important contributions to employment law. The richness of employment law as a source of examples of types of federal influence on the general common law should not be surprising. Employment law consists of a mosaic of federal and non-preempted state statutes laid over a range of common law agency, tort, and contract doctrine relevant to the employment relationship.

In each of the examples I present, ALI Restatements, and especially the Restatement Third of Employment Law (RTEL), play a prominent role. This is not a coincidence. First, Restatements provide an alternative basis from which to commence a search for a better common law in an age shorn of Justice Story's nineteenth century belief that there is some true law that judicial and other sovereign decisions only evidence. As Herbert Wechsler stated almost a half century ago, Restatements do so not only by purporting to aggregate and classify the variant doctrinal choices of the states, but also by determining which of those choices is "right" or best for the issues it addresses.²⁴ Thus, while Restatements do not represent an attempt to state the *true* general common law, they do represent an attempt to state the *best* common law, considering the collective efforts of many decision-makers in many jurisdictions.

Second, all of the examples of federal participation in the general common law making process highlighted in this article are at least cited and in some cases relied upon in the Restatement Third of Employment Law. The Restatement Third of Employment Law's partial reliance on federal decisions itself illustrates how such decisions can play a role in the development of general common law.²⁵

²⁴ See the quote from Professor Wechsler's annual director's report on page x supra.

²⁵ As stated in the opening footnote, the author served as one of the Reporters for the Restatement Third of Employment Law (RTEL). He was the principal author of two Chapters of the RTEL relevant to this article, Chapter

I begin in Part II with consideration of the Court's decisions that invoke and formulate the general common law of agency to define the scope of the employment relationships for various federal regulatory statutes. This Part has two sections. In the first, I describe the Court's participation in the formulation of common law doctrine distinguishing employees from independent contractors, and stress how the Court might sharpen that doctrine, without overruling its prior decisions, by adoption of doctrinal refinements suggested by the Restatement Third of Employment Law.²⁶ Such adoption, I suggest, might occur through review of decisions of a federal agency, the National Labor Relations Board (NLRB), which itself participates in the general common law making process through its judicially reviewed law making authority.²⁷

In the second section of Part II, I consider the Court's treatment, through review of an Equal Employment Opportunity Commission (EEOC) guideline, of another limitation on the scope of the employment relationship, that which excludes controlling owners of employing entities from the class of employees protected by employment regulatory statutes. I contend that this treatment, though purportedly based on traditional common law doctrine, is actually both a departure and also a clarifying enhancement of that doctrine – an enhancement that could be adopted by the states for purposes beyond anti-discrimination law.

In Part III, I turn to an example of how the general common law making process also can be enhanced by the Court's consideration and rejection of general common law doctrine in favor of new common law-type doctrine as the basis for interpretation of a federal statute.²⁸ The example is the Court's formulation of a new rule of limited vicarious liability to govern employer responsibility for the harassment of employees by their supervisors. The new rule, which the Court adopted after finding current common law principles inadequate, is binding only for federal anti-discrimination statutes; it could, however, be usefully adapted by state courts as the basis for a compromise resolution of liability issues under the common law.

One, which defines the employment relationship, and Chapter Four, which sets out general principles for employer liability for harm to their employees.

²⁶ See TAN xxx-xxx *infra*.

²⁷ See TAN xxx-xxx *infra*.

²⁸ See TAN xxx-xxx *infra*.

Part IV presents an example of how the Court's articulation of doctrine to govern a federal statute, even without reference to general common law precedent, may provide support for state judicial, as well as statutory, doctrinal innovations on common law issues.²⁹ The example is the Court's definition of the employer actions that may constitute prohibited retaliation under the federal anti-discrimination in employment laws. State courts, though of course not compelled to adopt this doctrine for law protecting employees asserting state-based rights or discharging public duties, might sensibly borrow the doctrine in the development of their common law.

Finally in Part V, through another example of the Court's overt modification of a common law rule, I highlight a limitation on the role of statutory interpretation in the general common law making process. The example is the Court's interpretation of Title VII to modify what it considered to be the common law rule for the imputation to an employer of vicarious liability for punitive damages for the acts of an agent. I argue that the Court's modification cannot provide a general common law principle because rules for the imputation of punitive damages must vary with the policy balance made for various statutory and common law cause of actions.

In a brief conclusion I note how the current general common lawmaking process can be an interactive one that not only enables federal default rules to influence state common law, but also allows state law developments to influence modifications in federal common law default rules.

²⁹ See TAN xxx-xxx *infra*.

II.

The General Common Law Definition of Employee

A. Distinguishing independent contractors –

In *Community for Creative Non-Violence v. Reid*³⁰ the Court considered competing claims to ownership of a copyright for a sculpture from the sculptor and from the nonprofit unincorporated association that had commissioned the sculpture.³¹ Ownership under the Copyright Act of 1976³² turned on whether the sculpture was among those “works made for hire”³³ “prepared by an employee within the scope of his or her employment”³⁴ or rather was made by a commissioned independent contractor. After noting the Copyright Act “nowhere defines the terms “employee” or “scope of employment,”” the Court concluded that Congress intended these terms to be defined by common law agency doctrine.³⁵ The Court based this conclusion primarily on what it described as a “well established” rule that “w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.”³⁶ The Court cited several of its past decisions³⁷ that had used the common law of agency to define an employment relationship for purposes of determining liability under the Federal Employers’ Liability Act (FELA),³⁸ which requires a plaintiff to be employed by a railroad from which he or she seeks recovery.³⁹ Referring to these cases, the

³⁰ 490 U.S. 730 (1989).

³¹ The Community for Creative Non-Violence was primarily concerned with reducing homelessness and orally commissioned the statute to “dramatize the plight of the homeless.” *Id.* at 732.

³² 17 U.S.C. §§ 101 et seq.

³³ 17 U.S.C. § 201(b).

³⁴ 17 U.S.C. § 101(1).

³⁵ 490 U.S. at 738.

³⁶ *Id.* at 739, quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). The Court in *Amax Coal* treated the regulation of union welfare funds as trusts under the Labor Management Relations Act (LMRA), 29 U.S.C. §§ 141-197. The Court held that Congress must have intended to incorporate into the LMRA commonly accepted equitable principles, including the proposition that trustees owe complete duties of loyalty to the beneficiaries of trusts. *Id.* To support this as a well-established principle of equity, the Court relied in part on the Restatement Second of Trusts. *Id.*

³⁷ *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-323 (1974); *Baker v. Texas & Pacific Co.*, 359 U.S. 227, 228 (1959); *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94 (1915).

³⁸ 45 U.S.C. §§ 51-60.

³⁹ 45 U.S.C. § 51.

Court stated that “when we have concluded that Congress intended terms such as “employee,” “employer,” and “scope of employment to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms Establishment of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the Act’s express objective of creating national, uniform copyright law by broadly pre-empting state statutory and common law copyright protection.”⁴⁰

After confirming through analysis of the structure and history of the Copyright Act that Congress intended the use of the common law of agency to define “employee” under the Act,⁴¹ the Court proceeded to define federal agency common law by consideration of “the general common law of agency” as expressed in the Restatement Second of Agency and in prior Supreme Court and Court of Appeals decisions defining the employment relationship for purposes of numerous federal statutes, including the FELA.⁴² In its description of the common law, the Court seemed to accept the structure of § 220 of the Restatement Second of Agency, which defines in its first section an employee⁴³ as “a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control,” but then in its second section lists ten “matters of fact, among others” which are to be “considered” in “determining whether one acting for another is a servant [employee] or an independent contractor.”⁴⁴ Similarly, the Court

⁴⁰ 490 U.S at 740.

⁴¹ Id. at 741-50.

⁴² Id. at 751.

⁴³ Section 220 uses the traditional common law terminology of servant and master, rather than the current employee and employer terms used by both the Restatement Third of Agency and the Restatement Third of Employment Law.

⁴⁴ The ten § 220(2) “matters of fact” to be “considered” are:

- “(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;

stated that in determining employee status under the common law of agency, it would “consider the hiring party’s right to control the manner and means by which the product is accomplished,” but then listed “other factors relevant to this inquiry.”⁴⁵ The Court drew a list of twelve other factors, not only from the second subsection of § 220, but also from prior federal cases; and just as its statement of the primary test differed somewhat from that of § 220, so did its list of relevant factors.⁴⁶

Both the Court’s reliance on and also its refinement of § 220 of the Restatement Second of Agency are significant. Together they reflect the Court’s active participation in the general common law-making process. The Court’s refinement potentially could influence the development of the common law in state courts, even as it set uniform law for purposes of the federal Copyright Act. Most significantly, the Court expanded on the second factor in § 220(2) - “whether or not the one employed is engaged in a distinct occupation or business” – with several additional factors relevant to determining whether the putative employee performed the disputed work as part of an independent business. The additional factors include: “the location of the work;” “whether the hiring party has the right to assign additional projects to the hired party;” “the extent of the hired party’s discretion over when and how long to work;”

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- (e) whether the employer or the workman supplies the instrumentalities, tools, and the places of work for the person doing work;
 - (f) the length of time for which the person is employed;
 - (g) the method of payment, whether by the time or by the job;
 - (h) whether or not the work is a part of the regular business of the employer;
 - (i) whether or not the parties believe they are creating the relation of master and servant; and
 - (j) whether the principal is or is not in business.”

⁴⁵ 490 U.S. at 751-752.

⁴⁶ The Court’s list included: “the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.” *Id.*

and “the hired party’s role in hiring and paying assistants.”⁴⁷ These factors, in addition to one repeating a consideration listed in § 220 (2) – whether the hiring party or the hired party is the source of the instrumentalities or tools – are all directly relevant to the question of whether the work was performed as part of an independent business through which the hired party could enhance his or her returns without proportionately enhancing those of the employer. Consideration of these factors can indicate that there is an employment relationship in the absence of the hiring party’s control over the details of the hired party’s work, on the one hand, or that there is not an employment relationship even when the hiring party does have a right to control some of the details of the work-product, on the other hand.

Indeed, the Court’s application of its multi-factor test in *Community for Creative Non-Violence* itself illustrated how the Court’s list of factors shifted the focus from the hiring party’s right to control the details of the hired party’s work to whether the hired party did the work as part of an independent business. The Court noted that members of the Community for Creative Non-Violence (CCNV) “directed enough of Reid’s work to ensure that he produced a sculpture that met their specifications. But the extent of control the hiring party exercises over the details of the product is not dispositive.”⁴⁸ Instead, the Court stated, other factors indicate the sculptor, Reid, was an independent contractor. Those factors included his supply of “his own tools,” his use of “his own studio,” his “absolute freedom to decide when and how long to work” and to decide whether to do other projects for CCNV, and “his total discretion in hiring and paying assistants.”⁴⁹ All of these considerations indicated how Reid could enhance earnings from his work by making independent business decisions about the use and allocation of his human capital, the labor of others, and other resources, like tools and his studio, in which he had invested.

The Court’s decision in *Community for Creative Non-Violence* could have been influenced by the equitable appeal of the sculptor’s claim of copyright ownership; under intellectual property law, unlike under most employment law, employment status is not

⁴⁷ Id.

⁴⁸ Id. at 752.

⁴⁹ Id. at 752-753.

generally sought by workers.⁵⁰ A few terms later, in *Nationwide Mutual Insurance Company v. Darden*,⁵¹ however, the Court confirmed that it had reformulated common law doctrine to serve as a federal general common law or default principle for distinguishing independent contractors from employees. *Darden* presented the question of whether an insurance salesman who had pledged to sell only Nationwide policies had been an employee of Nationwide under the Employee Retirement Income Security Act (ERISA). If Darden, the salesman, had been an employee, he would have been able to enforce the provisions of ERISA to protect his accrued benefits in Nationwide's deferred compensation plans made available to him while he represented Nationwide. If he had been an independent contractor, he would not have been able to invoke ERISA. The Court noted that ERISA's definition of "employee" as "any individual employed by an employer" is "completely circular and explains nothing."⁵² Without any further direction from Congress, the Court concluded it should follow the direction it took in *Community for Creative Non-Violence*: "adopt a common law test for determining who qualifies as an "employee"."⁵³ The *Darden* Court then quoted the passage from *Community for Creative Non-Violence* setting out this test, followed by a comparative citation to § 202(2) and to an Internal Revenue Service Ruling "setting forth 20 factors as guides in determining whether an individual qualifies as a common law "employee" in various tax law contexts."⁵⁴

The *Darden* Court, however, did not further refine its federal common law default test by applying it to the facts of the case, choosing instead to remand the case to the Court of Appeals to do so.⁵⁵ The Court in *Darden* also declined to sharpen its formulation of the

⁵⁰ This also may be true when a worker seeks to bring a tort action for an injury free of a workers' compensation system that provides an exclusive remedy against the worker's employer.

⁵¹ 503 U.S. 318 (1992).

⁵² *Id.* at 323.

⁵³ *Id.*

⁵⁴ *Id.* at 323-24. The Court cited Rev. Rul. 87-41, 1987-1 Cum. Bull. 296, 298-299.

⁵⁵ 503 U.S. at 328. The Court noted that the Court of Appeals had stated in dicta that "Darden most probably would not qualify as an employee" under traditional agency law principles." *Darden v. Nationwide Mut. Ins. Co.*, 796 F.2d 701, 705 (1986). In reaching its tentative judgment, the Court of Appeals relied on factors that would be relevant to determining whether Darden operated an independent business despite his exclusive representation of Nationwide. These factors included his freedom "to exercise his independent judgment as to the time, place, and manner of selling insurance and servicing policy holders," and to hire and fire clerical employees without securing Nationwide's approval, as well as his ownership of his building, his furniture and his automobile used for sales, and his payment of his clerical staff and other expenses out of his commissions. *Id.*

Community for Creative Non-Violence federal common law default test, instead quoting from an earlier decision determining the existence of an employment relationship under the National Labor Relations Act (NLRA),⁵⁶ which unhelpfully stated “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.”⁵⁷

The *Community for Creative Non-Violence* multi-factor formulation of the common law distinction of employees from independent contractors has been cited not only in cases applying the Copyright Act, where it *commands* other courts, but also in numerous decisions applying state law, where it can only *persuade* state courts, in the manner of federal decisions in the era of *Swift v. Tyson*.⁵⁸ The citations in decisions applying state law demonstrate the Court’s participation in the general common law making process even though the effect on the outcome of the decisions is not clear. The fact that courts applying state law consider the *Community for Creative Non-Violence* federal common law formulation relevant itself indicates that these courts could be persuaded by federal law decisions.

There are two interrelated reasons why it is difficult to determine whether state law decisions have been affected by any differences between the *Community for Creative Non-Violence* Court’s federal common law formulation and that of § 220(2), including the greater focus of the former on the hired party’s discretion to exercise independent business control. First, precisely because they are multi-factor tests that are not clearly tied to an ultimate standard, neither the federal common law formulation nor the § 220(b) formulation constrain or guide decision makers in difficult cases. Neither test, at least on its face, states the relative weight that should be given to any factor or even why any particular factor is relevant. This would not be the case if the formulations subordinated the residual factors as ways to determine whether the hiring party had some sort of right to control the physical details or

⁵⁶ NLRB v. United Ins. Co. of America, 390 U.S. 254 (1968).

⁵⁷ Id. at 258, quoted at 503 U.S. at 324. For discussion of the definition of the employment relationship under the NLRA, see TAN xx-xx infra.

⁵⁸ See, e.g., Estrada v. City of Los Angeles, 218 Cal. Ap.. 4th 143, 150, 159 Cal. Rptr.3d 843, 48 (2013) (for definition of employee under California Fair Employment and Housing Act); Bredesen v. Tennessee Judicial Selection Comm’n, 214 S.W.3d 419, 431 (Tenn. 2007) (for definition of employee under Tennessee Human Rights Act); Mortgage Consultants, Inc. v. Mahaney, 655 N.E.2d 493, 496 (Ind. 1995) (for definition of employee under Indiana wage payment statute).

manner and means of the hired party's work, the factor generally stated in § 220(1) and stated first in the *Community for Creative Non-Violence* formulation. As explained above,⁵⁹ however, the *Community for Creative Non-Violence* Court expressly rejected such subordination on the facts of that case; and even the comments to § 220 acknowledge that employers may have "very attenuated" control over their employees, providing such cogent examples as chefs in restaurants, "ship captains and managers of great corporations," and "skilled artisans."⁶⁰

The second reason it is difficult to trace the effect of the Court's participation in the general common law making process on the distinction of employees from independent contractors is that the Court's formulation of the federal default rule, at least to the extent it highlights whether the hired party is operating an independent business, may better capture than does § 220(2) how state courts actually decided many cases even before *Community for Creative Non-Violence*. This may be particularly true for state court decisions considering whether a hired party is an employee, not for purposes of vicarious liability, but for purposes of state statutes and common law fashioned, like much federal legislation, to protect employees.⁶¹ The "right-to-control" test stated in § 220(1) was developed to determine whether hiring parties should be liable for the torts of those they hire to do work for their benefit; the incentive-based rationale for making that determination based on the hiring party's right to control the hired parties work is obvious.⁶² The modern employment relationship, however, is governed by a matrix of sometimes overlapping federal and state statutes, and state common law doctrine, which provide greater protection to employees than to independent contractors. It would not be surprising if the common law making process on the state as well as the federal level has taken into account this modern reason for distinguishing employees from independent contractors. If so, that state common law making process, even

⁵⁹ See supra TAN xx.

⁶⁰ § 220, comment d.

⁶¹ See, e.g., *Estrada v. FedEx Ground Package System, Inc.*, 154 Cal. App. 4th 1, 64 Cal. Rptr. 3d 327 (definition of employee determined by California Labor Code and state common law); *Whittenberg v. Graves Oil and Butane Co., Inc.*, 827 P.2d 838, 844 (N.M. App. 1991) (definition of employee determined by state workers' compensation act); *S. G. Borello & Sons, Inc. v. Dept. of Indus. Rel.*, 769 P.2d 399, 404 (Cal. 1989) (California common law determines test for employee status).

⁶² For the historical derivation of the right-to-control test, see, e.g., Marc Linder, *The Employment Relationship in Anglo-American Law: A Historical Perspective*, Ch. 4 (1989); Richard Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 *Berk. J. Emp. & Lab. L.* 295 (2001).

independently of the federal process, could have begun to stress factors relevant to whether the hired party retains discretion to operate an independent business, with attendant risks and rewards. Such discretion, much more than the level of the principal's control of the physical details of work, is relevant to the extent to which the hired party needs the protections offered by modern regulation of the employment relationship.⁶³

The Court could play a salutary role in accelerating this process by adopting a more explicit reformulation of the general common law, one that is more predictable and more constraining because it explains the ultimate purposes of the many factors listed not only in *Community for Creative Non-Violence*, but also in § 220(2), in the IRS Ruling cited in *Darden*, and in other multi-factor formulations. It could do so by purporting to state how the best decisions applying the common law in both federal and state tribunals actually have decided cases, how they have made relevant and organized at least the most important factors in the various lists.

Such a reformulation has in fact been offered in § 1.01 of the Restatement Third of Employment Law. That section states that an individual renders services not as an employee but "as an independent businessperson when the individual in his or her own interest exercises entrepreneurial control over important business decisions, including whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to serve other customers."⁶⁴ This formulation explains why most of the factors listed in

⁶³ Actually a strong case can be made that the traditional right-to-control test for vicarious liability itself was used as a factor to determine whether the hired party was operating an independent business. See Reporters' Notes to Comment a., § 1.01, Restatement Third of Employment Law., citing, inter alia, *Singer Mfg. Co. v. Rahn*, 132 U.S. 518 (1889) ; *Sproul v. Hemmingway*, 31 Mass. 1, 14 Pick. 1 (1833).

⁶⁴ Section 1.01 states in full:

§ 1.01 General Conditions for Existence of Employment Relationship

- (1) Subject to § 1.02 and § 1.03, an individual renders services as an employee of an employer if
 - (a) the individual acts, at least in part, to serve the interests of the employer,
 - (b) the employer consents to receive the individual's services, and
 - (c) the employer controls the manner and means by which the individual renders his or her services or otherwise effectively prevents the individual from rendering the services as an independent businessperson.
- (2) An individual renders services as an independent businessperson when the individual in his or her own interest exercises entrepreneurial control over important business decisions, including whether to hire and where to assign

multi-factor tests, including control over the manner and means of work performance, are relevant to the distinction of employees from independent contractors, at least for purposes of regulatory and employee-protection laws. The factors are relevant to whether the hired individual retains discretion to make business decisions in the individual's independent interests rather than in the interests of the hiring party. Individuals who retain such discretion may be less needful of legal protection. Although policy makers may wish to protect such individuals as they protect employees who do not retain entrepreneurial discretion, whether to do so presents a separate policy issue.

As suggested above,⁶⁵ the Court's application of its federal common law formulation in *Community for Creative Non-Violence* fits well the "entrepreneurial control" approach taken by § 1.01 because of its emphasis on the sculptor's retention of discretion to produce the commissioned sculpture at a time and in a manner that served his independent interests. The Court could provide further support by for this approach by joining the several Courts of Appeals⁶⁶ that have accepted the National Labor Relations Board's stress on the presence or absence of "entrepreneurial opportunity" in determining employee status⁶⁷ under the National Labor Relations Act.⁶⁸ The NLRA offers protection to engage or refrain from engaging in collective bargaining or other concerted activity only to employees.⁶⁹ It does not define affirmatively employee, but expressly excludes from protection as an employee "any individual

assistants, whether to purchase and where to deploy equipment, and whether and when to serve other customers.

⁶⁵ See TAN xx supra.

⁶⁶ See, e.g., *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1098 (9th Cir. 2008) ("The ability to operate an independent business and develop entrepreneurial opportunities is significant in any analysis of whether an individual is an "employee" or an "independent contractor" under the common law agency test."); *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. 2002) (upholding the "Board's decision . . . to focus not upon the employer's control of the means and manner of the work but instead upon whether the punitive independent contractors have a "significant entrepreneurial opportunity for gain or loss," quoting *Corp. Express Delivery Sys.*, 332 N.L.R.B. 1522 (2000)).

⁶⁷ The seminal Board cases setting forth this doctrine are *Dial-A-Mattress Operating Co.*, 326 N.L.R.B. 884 (1998) (finding independent contractor status) and *Roadway Package Sys., Inc.*, 326 N.L.R.B. 842 (1998) (finding employee status). See also, e.g., *St. Joseph News-Press*, 345 N.L.R.B. No. 31 (2005) (newspaper deliverers were like drivers in *Dial-A-Mattress* who could "impact their own income, thereby demonstrating the entrepreneurial nature of their employment"); *Corp. Express Delivery Sys.*, 332 N.L.R.B. 1522 ("owner-operator drivers are employees as they have no "significant opportunity for entrepreneurial gain or loss").

⁶⁸ 29 U.S.C. §§ 151-169.

⁶⁹ See 29 U.S.C. § 157.

having the status of an independent contractor,”⁷⁰ a phrase it also does not define. Congress added the express exclusion of independent contractors “to demonstrate that the usual common law principles were the keys to [the] meaning” of employee,⁷¹ after the Court had first defined employee more broadly “in the light of the mischief to be corrected and the end to be attained” by the NLRA.⁷² Since the addition of the exclusion, therefore, the general federal common law distinction of employees from independent contractors is to apply to the NLRA.⁷³ The Labor Board, whose administrative decisions are reviewed by the Courts of Appeals,⁷⁴ serves the role of a lower adjudicatory tribunal in the common law making process. As part of the federal general common law making process, the Supreme Court and the Courts of Appeals may consider the Board’s rationale for treating hired parties as included employees or excluded independent contractors.⁷⁵

A decision of a panel of the Court of Appeals for the District of Columbia Circuit reviewing the Labor Board’s treatment of FedEx delivery drivers as employees⁷⁶ demonstrates how a federal court, and ultimately the Supreme Court, could influence the general common law distinction of independent contractors. The majority on the panel lauded the Board’s shift of emphasis “away from the unwieldy control inquiry in favor of a more accurate proxy” of

⁷⁰ 29 U.S.C. § 152(3).

⁷¹ *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 325 (1992).

⁷² *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944).

⁷³ The Court accepted this application in *NLRB v. United Ins. Co. of America*, 390 U.S. 254 (1968).

⁷⁴ See 29 U.S.C. § 160 (e) and (f).

⁷⁵ Courts are to review Labor Board law making in formal adjudicatory decisions under the deferential standards set forth in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). See generally Michael C. Harper, *Judicial Control of the National Labor Relations Board’s Lawmaking in the Age of Chevron and Brand X*, 89 B.U.L.Rev. 189 (2009). However, the Court’s determination in *NLRB v. United Insurance Co.*, 331 U.S. at 256, that Congress intended the Board to “apply general agency principles in distinguishing between employees and independent contractors,” places the distinction of independent contractors outside the Board’s discretion and expertise. See

NLRB v. Friendly Cab Co., Inc., *supra*, at 1096 (“the NLRB’s decision cannot be upheld if its “application of the law to the facts overlooked accepted principles of the law of agency This is because “a determination of pure agency law involve[s] no special administrative expertise that a court does not possess”,” quoting *United Ins. Co.*, 390 U.S. at 260)). Further, the Court’s suggestion in *Community for Creative Non-Violence and Darden* that a general federal common law default rule should govern the definition of employee under all federal statutes seems to indicate that Board doctrine that accurately captures this definition for the NLRA should also capture the doctrine for other federal laws.

⁷⁶ *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

whether there is “significant entrepreneurial opportunity for gain or loss.”⁷⁷ The court asserted that “while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism.”⁷⁸ The court proceeded with that evaluation, finding the drivers’ entrepreneurial status to be supported by their right to assign their routes to others without FedEx approval, by their ownership of and authority to use their trucks for other purposes when not required to be in use for FedEx, by FedEx’s allowance of multiple routes, and by the drivers’ authority to hire and negotiate the pay and benefits of subordinate and substitute drivers.⁷⁹

The court’s conclusion that the FedEx drivers did retain significant entrepreneurial opportunities may have confused the drivers’ theoretical opportunities with the actual reality of their status. The court’s conclusion conflicted with the factual findings of the Board’s Regional Director that the drivers actually had little opportunity to influence their income from FedEx through entrepreneurial ingenuity because the terminal manager determined how many deliveries they made, because FedEx could reconfigure their routes unilaterally, and because FedEx shielded the drivers from loss from unexpected expenses such as truck repairs and fuel price increases by means of special payments.⁸⁰ Moreover, the Regional Director had excluded the few multi-route drivers from coverage, no drivers seemed to use their trucks, which had to carry large FedEx logos, for other business purposes, few seemed ever to hire their own substitute drivers, and none seemed to have been able to sell routes for a profit given FedEx’s reconfiguration of old routes and grant of new routes without charge.⁸¹ Right or wrong, however, the decision turned on the entrepreneurial opportunity formulation of the common

⁷⁷ Id. at 497.

⁷⁸ Id. See also the court’s assertion that it has “retained the common law test (as is required by the Court’s decision in *United Insurance*), but merely “shift[ed our] emphasis to entrepreneurialism,” using this “emphasis” to evaluate common law factors such as whether the contractor “supplies his own equipment.”” Id. at 503.

⁷⁹ Id. at 498-500.

⁸⁰ Regional Director’s Decision at 37, 2006 NLRB Reg. Dir. Dec. LEXIS 264 at *56-*57.

⁸¹ 563 at 504, 510-516 (dissenting opinion of Judge Garland).

law test. As Judge Garland argued in his dissent,⁸² applying a traditionally framed right-to-control common law test would have required the court to take into account facts reflecting the company's close control of the drivers' actual service, and thus would have supported a finding of employee status.⁸³ The panel's embrace of the Board's entrepreneurial opportunity emphasis, even in a decision reversing the Board, demonstrates how reformulation of federal common law doctrine potentially could influence the general development of the common law of agency.

The Court's willingness to participate in the general common law making process on the independent contractor issue suggests that such a reformulation, perhaps through adoption of a test like that articulated in § 1.01 of the Restatement Third of Employment Law, is possible. Supreme Court acceptance of an entrepreneurial control test as a refinement of the default federal common law test for distinguishing employees from independent contractors of course would not dictate a change in the common law test chosen by the various states. However, it could influence state courts that viewed the entrepreneurial control test as more suited for employment regulation and more predictable than the open-ended, multi-factor right-to-control tests currently cited.⁸⁴

B. Distinguishing employer-agents –

The Court already has approved, apparently as general federal common law, a sharper doctrinal departure from the traditional common law of agency governing vicarious liability than is the entrepreneurial control or opportunities test for independent contractors. Citing

⁸² Id. at 510-512.

⁸³ Judge Garland noted that "the court reject[ed] the import of the following requirements imposed by FedEx: that drivers wear a recognizable uniform; that vehicles be of a particular color and size range; that trucks display the Fed Ex logo in a size larger than Department of Transportation regulations require; that drivers complete a driving course if they do not have prior training; that drivers submit to two customer service rides per year to audit their performance; and that a truck and driver be available for deliveries every Tuesday through Saturday." Id. at 511.

⁸⁴ At least one state court has directly considered the Board's "entrepreneurial opportunity" test in making a determination of whether delivery drivers were employees or rather independent contractors under a state employment regulatory statute. See *Estrada v. FedEx Ground Package System, Inc.*, 154 Cal.App.4th 1, 12, 64 Cal.Rptr.3d 327, 337 (2007) (drivers were employees in part because they were "not engaged in a separate profession or business" and were not given a "true entrepreneurial opportunity"). The *Estrada* court seems to have assumed California state law and federal law were both relevant to a general common law definition of employee, as it took into account and distinguished federal cases, including those reviewing Labor Board decisions, see id. at 13 n.11,

Darden for a presumption that Congress intended a common law test to govern the meaning of employee under federal statutes, the Court, in *Clackamas Gastroenterology Associates, P.C. v. Wells*,⁸⁵ held it was “persuaded by the [Equal Employment Opportunity Commission] EEOC’s focus on the common law touchstone of control” to determine “whether a shareholder-director is an employee”⁸⁶ or rather an employer for purposes of the Americans with Disabilities Act of 1990 (ADA).⁸⁷ The shareholder-directors in *Clackamas* were “four physicians actively engaged in medical practice” in a “professional corporation.”⁸⁸ If the physicians were not employees of the corporation, not only would they not be protected by the ADA, but also their professional corporation would not employ the minimum number of employees necessary to satisfy the conditions for ADA coverage,⁸⁹ and a discharged bookkeeper could not make her ADA claim of disability discrimination.

Agreeing with the approach taken in the EEOC’s Compliance Manual, the Court asserted that the common law right-to-control test for distinguishing independent contractors also should be the basis for answering the “question of when partners, officers, members of boards of directors, and major shareholders qualify as employees.”⁹⁰ The Court also expressed agreement with six specific factors listed in the EEOC’s Compliance Manual. Each of these factors is relevant to whether the disputed individuals have sufficient control of the business or part of the business to make decisions in their own economic interests free of control or

⁸⁵ 538 U.S. 440, 444-447 (2003).

⁸⁶ *Id.* at 449.

⁸⁷ 42 U.S.C. § 12101. The definition of the term employee in the ADA, like the definition in ERISA, is circular: an “employee” under the ADA is “an individual employed by an employer.” 42 U.S.C. § 12111(4).

⁸⁸ 538 U.S. at 441.

⁸⁹ Section 101(5) of the ADA, 42 U.S.C. § 12111(5), defines a covered employer as “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.” The ADA’s definition of employee is typically circular: “An individual employed by an employer.” 42 U.S.C. § 12111(5).

⁹⁰ 538 U.S. at 448. The Court did not give deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the EEOC’s Compliance Manual. The Court’s failure to cite *Chevron* was consistent with the Court’s later explanation that “[d]eference in accordance with *Chevron* ... is warranted only ‘when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law.’” *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001).) Although the EEOC does have authority to promulgate formal legislative rules interpreting the ADA, see 42 U.S.C. § 12116, the Compliance Manual was not promulgated pursuant to that authority. In review of the Manual, the *Clackamas* Court thus instead relied on *Skidmore v. Swift*, 323 U.S. 323 (1944), see 538 U.S. at 449, an older precedent requiring only consideration of the agency’s “power to persuade.” 323 U.S. at 340.

supervision of others.⁹¹ After briefly discussing the facts of the case, the Court remanded for application of the EEOC's standard.⁹²

The EEOC approach approved by the Court in *Clackamas* is not that taken by the traditional common law to determine corporate liability for the torts of major shareholders serving in executive positions. There is no common law doctrine exempting corporate employers from liability for the torts of such shareholders if the torts are committed in the course of their service and within the terms of their service to the corporation.⁹³ The Restatement Second of Agency states that "fully employed but highly placed employees of a corporation, such as presidents and general managers, are not less servants because they are not controlled in their day-to-day work by other human beings. Their physical activities are controlled by their sense of obligation to devote their time and energies to the interests of the enterprise."⁹⁴ Modern partnership law also imposes liability on the partnership for the torts of any partner committed

⁹¹ The six factors are:

"Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work

"Whether and, if so, to what extent the organization supervises the individual's work

"Whether the individual reports to someone higher in the organization

"Whether and, if so, to what extent the individual is able to influence the organization

"Whether the parties intended that the individual is able to influence the organization

"Whether the individual shares in the profits, losses, and liabilities of the organization."

EEOC Compliance Manual § 605:0009.

Citing its earlier quotation of *United Insurance in Darden*, see note xx supra, the Court also iterated that the line dividing employees from employers, like the line dividing independent contractors, cannot be drawn by the use of a formula or a single set of factors, and thus agreed with the EEOC that the six factors need not "be treated as "exhaustive"." 538 U.S. at 455 n.10.

⁹² 538 U.S. at 451. The Court cited as apparently supportive of employer status District Court findings that the doctor-shareholders "control the operation of their clinic, they share the profits, and they are personally liable for malpractice claims." *Id.* In a footnote, however, the Court also noted that "the record indicates that the four director-shareholders receive salaries, that they must comply with the standards established by the clinic, and that they report to a personnel manager." *Id.* at n.11.

⁹³ Indeed, modern decisions finding no preclusion by a workers' compensation law hold corporate employers directly liable for the torts of controlling owners as alter egos of the corporation, even when the torts are for unauthorized actions outside the scope of employment. See, e.g., *Randall v. Tod-Nik Audiology, Inc.*, 270 A.D.2d 38, 39, 704 N.Y.S.2d 228, 230 (Sup. Ct. App. Div. 1st Dept. 2000) (claims for sexual assault, battery, and intentional infliction of emotional distress may proceed against corporate employer when committed by "proxy" who was President and 50 percent owner along with wife who owned other 50 percent); *Sutton v. Overcash*, 251 Ill. App. 3d 737, 623 N.E.2d 820 (1993) (co-owner's sexual harassment could subject employer to tort liability); *Woodson v. rowalnd*, 329 N.C. 330, 337, 407 S.E.2d 222, 226 (1991) (employer's chief executive and sole shareholder's intentional tort can subject employer to liability).

⁹⁴ Restatement Second Agency, Ch. 7, topic 2, title B, Intro. Note at 479. See also Restatement Third of Agency § 7.07, Illustration 15.

within the scope of the partner's service to the corporation, regardless of the partner's ownership share or control of the partnership.⁹⁵ The Restatement Second of Agency states that "[w]hen one of the partners is in active management of the business or is otherwise regularly employed in the business, he is a servant of the partnership."⁹⁶

The Court, through its approval of the EEOC's approach, thus endorsed a new test for distinguishing employers from employees as a default rule for federal employment regulatory law. It did so in the manner of common law courts which may depart creatively from prior doctrine without open acknowledgement.⁹⁷ The *Clackamas* decision, moreover, because it draws a sensible line, potentially can be influential in jurisdictions other than the federal jurisdiction it controls. The independent contractor "right-to-control" test, especially if refined to an entrepreneurial control or opportunities test, can be effectively adapted to a test for distinguishing employers from employees. Individuals who can exercise entrepreneurial control over all or part of an enterprise in their own interest are not in the same need of regulatory protection as are the employees treated as "servants" under the common law. Both shareholders with controlling interests in corporations and partners who control at least part of the operations of a partnership have such discretion. Rather than ultimately being controlled, they exercise control.

The Restatement Third of Employment Law also could support the proliferation of the *Clackamas*-EEOC approach. Section 1.03 of this Restatement states that "[u]nless otherwise provided by law, an individual is not an employee of an enterprise if the individual through an ownership interest controls all or a significant part of the enterprise."⁹⁸ This section, like § 1.01's definition of the line distinguishing independent contractors, provides an ultimate focus

⁹⁵ See, e.g., *Wallan v. Rankin*, 173 F.2d 488 (9th Cir. 1948) (applying Oregon law); *In re Georgou*, 145 B.R. 36 (Bankr. N.D. Ill. 1992) (applying Illinois Partnership Act); *Wolf v. Harms*, 413 S.W. 2d 204 (Mo. 1967); *Eule v. Eule Motor Sales*, 34 N.J. 537, 170 A.2d 241 (1961); *Treon v. Shipman & Son*, 275 Pa. 246, 119 A. 74 (1992).

⁹⁶ Restatement Second of Agency § 14A. See also Restatement Third of Agency § 3.16, Comment *b.*, which states that [p]artnership legislation providing for joint and several liability for partnership obligations is based on "each partner [being] an agent of the partnership for the purpose of its business." The comment cites § 301 of the Revised Uniform Partnership Act.

⁹⁷ K. Llewellyn, *The Bramble Bush on Our Law and Its Study* 72 (1960); Edward H. Levi, *An Introduction To Legal Reasoning*, 15 U. Chi. L.Rev. 501, 501 (1948); Melvin Aron Eisenberg, *The Nature of the Common Law* 4-7 (Harvard 1988).

⁹⁸ Restatement Third of Employment § 1.03.

for a multi-factor test. Elaborating the *Clackamas*-EEOC approach, § 1.03 requires the exclusion of individuals as employers to be based on the individuals' ownership of the employing enterprise.⁹⁹ Even a chief executive of a publicly held corporation is a protected employee of that corporation, subject to the control of the owners through a Board of Directors, unless the chief executive is herself a controlling owner. Section 1.03 also clarifies that having a non-controlling equitable stake in an enterprise, even one that includes a minority vote, does not exclude an individual who provides remunerated service to an enterprise from the class of employees protected by economic regulatory laws. To be excluded as a controlling owner, whether as a corporate shareholder or as a partner, an individual must have sufficient ownership to control a significant part of the enterprise. Section 1.03 thus clarifies that the *Clackamas* doctors would be excluded employers, rather than employees of their professional corporation, if each of the four, free of the control of the other three or their managerial delegate, could make significant decisions about his own practice, such as the allocation of his time, the hiring or use of assistants, and the identity of patients, which would determine his ultimate remuneration. The *Clackamas* doctors, however, all would be employees if each were subject to the control of a manager or a specific set of guidelines that constrained their making independent business decisions about their own practice that could ultimately determine their remuneration.

Not surprisingly, the *Clackamas* decision already has proved influential, not only in federal courts interpreting federal statutes, but also in courts interpreting state statutes. Federal courts have applied the *Clackamas*-EEOC method for distinguishing employers from the employees covered by the other federal employment anti-discrimination statutes under the aegis of the EEOC.¹⁰⁰ Federal courts also cite it as relevant precedent for determining employee status

⁹⁹ The EEOC Compliance Manual, see note xxx supra, does not directly require that anyone excluded from employee status as an employer exercise control through ownership. Only the sixth factor directly focuses on ownership rather than control. However, anyone who is not a controlling owner is at least potentially subject to being terminated and constrained by corporate rules and regulations, as highlighted by the first of the factors.

¹⁰⁰ See, e.g., *Mariotti v. Mariotti Bldg. Products, Inc.*, 714 F.3d 761, 768 (3d Cir. 2013) (religious discrimination under Title VII of the 1964 Civil Rights Act); *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 2010 WL 2780927 (3d Cir. 2010) (sex discrimination under Title VII and Equal Pay Act); *Smith v. Castaways Family Diner*, 453 F.3d 971 (7th Cir. 2006) *Solon v. Kaplan*, 398 F.3d 629, 633 (7th Cir. 2005) (retaliation under Title VII); *Bowers v. Ophthalmology Group, LLP*, 2012 WL 3637529 (W.D. Ky. 2012) (sex discrimination under Title VII); *Simms v. Center for Correctional*

under other federal statutes;¹⁰¹ in at least one case a court did so to exclude an individual from coverage under the EEOC test.¹⁰² Several state courts also have found *Clackamas* to be relevant as a common law precedent for the interpretation of state anti-discrimination or other employee-protection statutes.¹⁰³

One of these state court decisions, *Feldman v. Hunterdon Radiological Associates*,¹⁰⁴ rendered by the Supreme Court of New Jersey, highlights how the Supreme Court currently may play the same role of persuasion and influence over state law that was envisaged for federal courts in the *Swift v. Tyson* era. The issue in *Feldman* was whether a physician-radiologist and shareholder-director of a professional corporation was an employee protected by the state's Conscientious Employee Protection Act (CEPA).¹⁰⁵ As explained by the court, "CEPA was enacted in 1986 in response" to one of the New Jersey Supreme Court's prior decisions¹⁰⁶ which had recognized "a common law cause of action for at-will "employees" for wrongful discharge when the discharge is contrary to a clear mandate of public policy."¹⁰⁷ CEPA codified that cause of action, in part by providing specific definitions of employee actions protected from employer retaliation, including objection to the "improper quality of patient

Health and Policy Studies, 794 F.Supp.2d 173, 190 (D.D.C. 2011) (sexual harassment under Title VII); Puckett v. McPhillips Shambaum, 2010 WL 17929104 (M.D. Ala. 2010) (Age Discrimination in Employment Act).

¹⁰¹ See, e.g., Trustees of N.E.C.A.—IBEW Local 176 Health, Welfare, Pension, Vacation, and Training Trust Funds v. CM Management Services Co., 2009 WL 590310 (N.D.Ill. 2009) (finding employee status for protection by the Employment Retirement Income Security Act). Steelman v. Hirsch, 473 F.3d 124 (4th Cir. 2007) (plaintiff not an employee under the Fair Labor Standards Act because she worked to share in the future success of business rather than for current compensation); Bell v. Atlantic Trucking Co. 108 Fair Empl. Prac. Cas. (BNA) 74 (M.D. Fla. 2009) (citing *Clackamas* as common law precedent for employee status under exemption from Federal Arbitration Act); Nichols v. All Points Transportation Corp. of Mich., Inc., 364 F. Supp.2d 621 (E.D. Mich. 2005) (citing *Clackamas* as common law precedent for employee status under Family Medical Leave Act).

¹⁰² See Pearl v. Monarch Life Insurance Co., 289 F. Supp.2d 324, 328 (E.D.N.Y. 2003) (plaintiff surgeon who supervised own work, reported to no supervisor, and was co-equal owner of enterprise with two other doctors was not an employee under Employment Retirement Income Security Act).

¹⁰³ See, e.g., Kirleis, supra note xx (Pennsylvania antidiscrimination statute); Madigan v. Webber Hosp. Assoc., 2012 WL 451098 (D. Me. 2012) (Maine antidiscrimination statute); Williams v. Kuramo Capital Management, LLC, 2012 WL 2942595 (N.Y. Sup. 2012) (New York state and city antidiscrimination statutes); Hopkins v. Duckett, 2012 WL 124842 (N.J. Super. A.D. 2012) (New Jersey antidiscrimination statute); Imperator v. Southern California Permanente Medical Group, 2007 WL 1979041 (Ct. of App., 2d Dist., Div. 1) (Cal. Fair Employment and Housing Act); Theroux v. Stephen Singer, DDS, PC, 21 Mass. L. Rptr. 187 (2006) (Massachusetts employment discrimination law).

¹⁰⁴ 187 N.J. 228, 901 A.2d 322 (2006).

¹⁰⁵ N.J.S.A. 34:19-1 to -8.

¹⁰⁶ Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980).

¹⁰⁷ 187 N.J. at 237.

care” of a “licensed ... health care professional.”¹⁰⁸ Dr. Feldman claimed she was constructively discharged by hostility from the other shareholder-directors because of her strong objections to the “deficiencies” in the care provided by one of these fellow shareholder-director-doctors.¹⁰⁹ The court held, however, that her claim stated a cause of action under CEPA only if she was an employee of the professional corporation; and to determine whether she was it would “adopt the approach formulated by the United States Supreme Court in *Clackamas*.”¹¹⁰ The *Feldman* court recognized that the Court in *Clackamas* for purposes of considering controlling shareholder-directors had “ultimately modulated” the common law test “drawn from section 220 of the Restatement (Second) of Agency” for independent contractors.¹¹¹ Nonetheless, the *Feldman* court embraced this “holistic approach to the question of a shareholder-director’s employee status” for the CEPA,¹¹² and finding Feldman’s position and power on the professional corporation’s Board of Directors to be “at least equal to that of the other shareholders-directors,”¹¹³ held she was not a protected employee.¹¹⁴

The *Feldman* court’s adoption of the *Clackamas* “approach” did not dictate the result in the case. Given the *Clackamas*’s Court’s decision to remand rather than itself apply the EEOC factors,¹¹⁵ *Clackamas* can be read, more in line with the Restatement Third of Employment, to make critical, not whether a shareholder-director (or partner) has at least equal influence as any other shareholder-director (or partner), but rather whether any shareholder-director has independent discretion to operate at least part of the business in her own economic interest free of the collective control of the others. Dr. Feldman apparently did not retain such discretion; each doctor had to practice medicine only for the corporation and only under the rules and regulations of the corporation, including those determining the patients to be served and the fees to be charged and exclusively assigned to the corporation.¹¹⁶ Any influence Dr.

¹⁰⁸ N.J.S.A. 34:19-3c(1).

¹⁰⁹ 187 N.J. at 231.

¹¹⁰ *Id.* at 232.

¹¹¹ *Id.* 242-43.

¹¹² *Id.* at 246.

¹¹³ *Id.* at 249.

¹¹⁴ *Id.* at 250.

¹¹⁵ 538 U.S. at 451.

¹¹⁶ 187 N.J. at 233-34.

Feldman had over the corporation depended upon her influence over the collectivity of the other doctors, and, like each of the other doctors, she was subject in all respects to the collectivity's authority.¹¹⁷ If out of favor because of protected whistleblowing activity, Dr. Feldman was as vulnerable to discharge and other mistreatment by that collectivity as would be any senior manager by the collective power of a supervisory board.

Nevertheless, the *Feldman* court's acceptance of the *Clackamas* decision as the guiding light for purposes of its formulation of the coverage of New Jersey's wrongful discharge law demonstrates well how the Supreme Court's federal law making authority can contribute to the development of a general common law in the age of *Erie* and a matrix of federal and state statutes.¹¹⁸ Indeed, the application of the *Clackamas* approach to a state statute intended to codify a development in the state's common law suggests that the *Clackamas* "modulation" of common law also could directly influence a state's non-codified common law as well. A creative adaption of common law doctrine for purposes of serving the goals and balance of a

¹¹⁷ *Id.* at 249.

¹¹⁸ *Clackamas*, especially as refined in § 1.03 of the Restatement Third of Employment Law, also might assist state courts in their interpretation of their jurisdiction's workers' compensation statute. Such statutes often exempt from their exclusive coverage assaults and other intentional torts committed directly by a human employer or by an "alter ego" of a legal-entity employer, such as a corporation. See Larson's Workers Compensation Law, Vol. 6, § 103.01, and cases cited therein. The controlling owner formulation of § 1.03 could provide a meaningful standard to capture how the states generally have defined and reasonably should define "alter ego." Compare, e.g., *Randall v. Tod-Nik Audiology, Inc.*, 270 A.D.2d 38, 704 N.Y.S.2d 228 (Sup. Ct. App. Div. 1st Dept. 2000) (claims for sexual assault, battery, and intentional infliction of emotional distress may proceed against corporate employer when committed by possible "proxy" who was President and 50% owner along with wife who owned other 50%); *Woodson v. Rowland*, 329 N.C. 330, 337, 407 S.E.2d 22 (N.C. S. Ct. 1991) (conduct of employer's chief executive and sole shareholder that is "tantamount to an intentional tort" can subject employer to liability); *Magiliulo v. Superior Court*, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (Cal. Ct. App. 1975) (workers' compensation remedy not exclusive of tort claim where assaulter of injured employee was co-owner and partner), with, e.g., *Eichstadt v. Frisch's Restaurants, Inc.*, 879 N.E.2d 1207, 1211 (Ind. Ct. App. 2008) (employee must show that both ownership and control of the corporation are in the hands of the tortfeasor); *McClain v. Pactiv Corp.*, 360 S.C. 480, 602 S.E.2d 87 (2004) (managers who were not "dominant" corporate owners or officers are not alter egos of corporate employer); *Benson v. Goble*, 1999 S.D. 38, 593 N.W.2d 402, 406 (1999) (to qualify as alter ego, employee must be "so dominant in the corporation that he could be deemed" to be the employer under the general standard for disregarding corporate entity); *Peterson v. Rtm Mid-America, Inc.*, 209 Ga. App. 691, 434 S.E.2d 521 (1993) (manager of restaurant not an alter ego because not in a position of ownership or control); *Daniels v. Swofford*, 286 S.E.2d 582 (1982) (company president who kicked employee in leg not an alter ego). See also § 4.01, comment b., Restatement Third of Employment.

federal statute also can provide a persuasive model for developments in the common law of state jurisdictions.¹¹⁹

III.

Vicarious Employer Liability for the Torts of Supervisors

The Court in *Clackamas* did not acknowledge that its adoption of common law doctrine was a departure from the traditional general common law. In other significant employment law decisions, however, the Court has acknowledged openly its creative reformulation of the general common law of agency after assuming Congress intended common law to guide the interpretation of a statute. Most significantly, in two separate decisions released the same day¹²⁰ and pronouncing the exact same paragraph-long “holding,”¹²¹ the Court announced new doctrine to determine employer liability under Title VII of the 1964 Civil Rights Act¹²² for discriminatory harassment of employees by supervisors.¹²³ This new doctrine, although controlling only for Title VII and presumably other federal anti-employment discrimination

¹¹⁹ For other examples outside employment law of Supreme Court decisions that could influence state common law doctrine through what arguably were “modulations” of the common law in its application to the interpretation of a federal statute, see the Court’s decisions in *Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 402 (2003) and *Evans v. United States*, 504 U.S. 255, 259 (1991), both discussed in note 10 supra.

¹²⁰ See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

¹²¹ 524 U.S. at 807; 524 U.S. at 765.

¹²² 42 U.S.C. § 2000e et seq.

¹²³ “An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8 (c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer’s burden under the second element of the defense. No affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.” 524 U.S. at 807; 524 U.S. at 765.

statutes,¹²⁴ potentially could have a significant and salutary effect on how states resolve a range of vicarious liability issues under their common law. The same policy arguments that supported the Court's articulation of new doctrine for Title VII can apply to determining when employers should be liable for the common law torts of employees committed outside the scope of employment but through the use of special opportunities provided to the wrong-doing employee by the employer.¹²⁵

The Court's two path-breaking decisions on employer liability under Title VII, *Burlington Industries, Inc. v. Ellerth*,¹²⁶ and *Faragher v. City of Boca Raton*,¹²⁷ followed an earlier decision, *Meritor Savings Bank, FSB v. Vinson*,¹²⁸ which had stated "Congress wanted courts to look to agency principles for guidance in this area."¹²⁹ Twelve years later the Court considered that guidance in the *Ellerth* and *Faragher* opinions. The two cases were not treated as companions, but were instead argued separately and were assigned after argument to two different Justices for majority opinions. The reason for the separate argument and opinions was that the Court did not grant certiorari in *Ellerth* on the issue of employer liability for supervisory "hostile work environment" harassment like the sexual propositions, comments, and touching proven in

¹²⁴ The lower courts and the EEOC have interpreted the decisions to apply to all forms of discriminatory harassment covered by Title VII, not just the sexual harassment at issue in those cases. See, e.g., *Kang v. U. Lim America, Inc.*, 296 F.3d 810, 817 (9th Cir. 2002) (national origin discrimination); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir. 1998) (race). See also EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999) (*Ellerth* and *Faragher* apply to all forms of Title VII-proscribed discriminatory harassment). The lower courts and the EEOC also have applied the decisions to anti-discrimination statutes other than Title VII. See, e.g., *Williams v. U.S. Dept. of Lab., Williams v. Administrative Review Board*, 376 F.3d 471 (5th Cir. 2004) (whistleblower protection provision of Energy Reorganization Act of 1974); *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 75 (2^d Cir. 2000) (§ 1981 racial harassment claim); *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1158 (8th Cir. 1999) (Age Discrimination in Employment Act (ADEA) claim as well as sex discrimination claim); *Wallin v. Minnesota Dept. of Corrections*, 153 F.3d 681, 688 n.7 (8th Cir. 1998) (Americans with Disabilities Act (ADA)) (dicta); EEOC Enforcement Guidance, *supra*, (holding applies to harassment based on age under ADEA and disability under ADA as well as Title VII claims).

¹²⁵ See TAN xxx-xxx *infra*.

¹²⁶ 524 U.S. 742 (1998).

¹²⁷ 524 U.S. 777 (1998).

¹²⁸ 477 U.S. 57 (1986).

¹²⁹ *Id.* at 63. The Court also stated that "[w]hile such principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.*

Faragher;¹³⁰ but did so rather to decide whether the harassment alleged in *Ellerth*, unfulfilled threats by a supervisor to take retaliatory action against a subordinate who did not respond to sexual overtures,¹³¹ should be classified as “*quid pro quo*” rather than “hostile work environment” harassment.¹³² That may have seemed an important issue because the *per curiam en banc* Seventh Circuit Court of Appeals decision appealed in *Ellerth*¹³³ accepted the liability doctrine that had been adopted post-*Meritor* in most circuits – employers are vicariously liable for *quid pro quo* harassment, but are liable for hostile work environment harassment, including that of supervisors, only if they are negligent in their control of the work place.¹³⁴

Justice Kennedy’s opinion for the Court in *Ellerth*, however, recognizes that the distinction of *quid pro quo* from hostile work environment harassment is not expressed in the statute¹³⁵ and, more importantly, the ultimate relevance of any possible distinction depends on the rules governing employer liability: “The question presented on certiorari is whether *Ellerth* can state a claim of *quid pro quo* harassment, but the issue of real concern to the parties is whether Burlington has vicarious liability for [the supervisor’s] alleged misconduct, rather than liability limited to its own negligence.”¹³⁶ Thus, it must have been clear both to Justice Kennedy and to Justice Souter, who wrote the majority opinion in *Faragher*, that the same rules on employer liability must govern both cases, whether or not these rules generate the same

¹³⁰ For a recounting of the tawdry facts found by the court after a bench trial in *Faragher*, see 524 U.S. at 780-783.

¹³¹ For the alleged facts considered on a motion for summary judgment in *Ellerth*, see 524 U.S. 747-749.

¹³² The precise question on which certiorari was granted was: “May claim of *quid pro quo* sexual harassment be stated under title VII when plaintiff employee has neither submitted to sexual advances of alleged harasser nor suffered any tangible effects of compensation, terms, conditions, or privileges of employment as consequence of refusal to submit to those advances?” See 522 U.S. 1086 (1998). As stated by the Court in *Ellerth*, cases based on “carried out” threats to retaliate if “sexual liberties’ are “denied” “are referred to often as *quid pro quo* cases.” 524 U.S. at 751.

¹³³ *Jansen v. Packaging Corp. of America*, 123 F.3d 490 (7th Cir. 1997) (en banc). The *Ellerth* case was consolidated with another case involving unfulfilled threats for purposes of *en banc* consideration.

¹³⁴ *Id.* at 495.

¹³⁵ 524 U.S. at 752. Justice Kennedy allowed that the Court in *Meritor* had “distinguished between *quid pro quo* claims and hostile environment claims”, but asserted it did so “to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive.” *Id.*

¹³⁶ *Id.* at 753.

results.¹³⁷ Because neither Justice apparently wanted to defer to the other's opinion, we have two separate analyses of the general common law of agency leading to the same reformulation of that law to govern employer vicarious liability for discriminatory harassment actionable under Title VII.

The analysis of employer liability in each opinion attempts to reach its conclusion through an interpretation of general common law as expressed in § 219 of the Restatement Second of Agency. Revealingly, neither opinion directly acknowledges the suggestion of Judge Easterbrook, set forth in his dissent from the Court of Appeals decision reviewed in *Ellerth*,¹³⁸ that the agency law of the state where the harassment occurred, not some constructed general common law, should govern.¹³⁹ Justice Kennedy, quoting *Reid*, instead stated that the Court must “rely “on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms,”¹⁴⁰ and focused on the Restatement Second of Agency as “a useful beginning point for a discussion of general agency principles.”¹⁴¹

Justice Souter began his analysis in his *Faragher* opinion by parsing the language of § 219 of the Second Restatement of Agency,¹⁴² and considered the precedents citing that language as if he were engaged in an endeavor, jointly with other courts, to find meaning in that section's general statement of the law.¹⁴³ Justice Souter considered whether the principal, as expressed in § 219(1), that an employer or “master” is “subject to liability for the torts of his servants while acting in the scope of their employment” might be interpreted free of the traditional limitation, expressed in § 228(1), that to be within the scope of employment, the

¹³⁷ For a fuller account of the background of the two cases, including the oral arguments, see Michael C. Harper & Joan Flynn, *The Story of Burlington Industries v. Ellerth and Faragher v. City of Boca Raton: Federal Common Lawmaking for the Modern Age*, in *Employment Discrimination Stories*, 225 (J.W. Friedman, ed.) (2006).

¹³⁸ 123 F.3d at 552.

¹³⁹ *Id.* at 556. In her own concurring opinion, Judge Wood also advocated the use of the use of state common law of agency, in part because of the concerns with vertical uniformity underlying the *Erie* court's rejection of federal common law. See *id.* at 565, 571.

¹⁴⁰ 524 U.S. at 754, quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989). Justice Kennedy also was careful to acknowledge that “[t]his is not federal common law in “the strictest sense” ... that amounts, not simply to an interpretation of a federal statute ... , but, rather to the judicial ‘creation’ of a special federal rule of decision,” quoting *Atherton v. FDIC*, 519 U.S. 213, 218 (1997).

¹⁴¹ *Id.* at 755.

¹⁴² Restatement Second of Agency § 219(1) (1957).

¹⁴³ See 524 U.S. at 793-796.

tort must be “actuated, at least in part, by a purpose to serve the master.”¹⁴⁴ This was significant because in *Faragher* the apparent supervisors’ pervasive sexual propositions, posturing, and touching clearly were not “actuated” to serve the City of Boca Raton.¹⁴⁵ Justice Souter’s consideration included a citation of numerous decisions from various jurisdictions applying common law to treat within the scope of employment reasonably foreseeable activity related to employment duties even when not motivated to serve the employer.¹⁴⁶ Though he ultimately declined to rest his analysis on a broad interpretation of “scope of employment,” in part because doing so would also create vicarious employer liability for co-worker harassment,¹⁴⁷ Justice Souter suggested that these common law cases might justify making non-negligent employers liable for actionable discriminatory harassment “as one of the costs of doing business, to be charged to the enterprise rather than the victim.”¹⁴⁸

Justice Kennedy in his *Ellerth* opinion also considered § 219(1) and acknowledged “instances ... where a supervisor engages in unlawful discrimination with the purpose, mistaken or otherwise, to serve the employer;”¹⁴⁹ and he recognized that the “concept of scope of employment has not always been construed to require a motive to serve the employer.”¹⁵⁰ Nonetheless, Justice Kennedy quickly dismissed the concept as a basis for a Title VII liability rule¹⁵¹ in favor of an attempt to formulate a new rule based on § 219(2)(d).¹⁵² This latter section provides for employer vicarious liability where the “employee purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was

¹⁴⁴ Restatement Second of Agency § 228(1) (1957) See 524 U.S. at 793.

¹⁴⁵ The supervisors who harassed Faragher could not have thought that any of their harassment, see 524 U.S. at 780-783, advanced the interests of the City of Boca Raton.

¹⁴⁶ Id. at 794-795. These cases included Judge Friendly’s often cited, but questionable, decision in *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968), finding the government vicariously liable for the damage caused by a drunken sailor’s flooding of a dry dock by opening valves for no possible constructive purpose.

¹⁴⁷ Id. at 799. Justice Souter stressed that the lower courts had “uniformly” judged “employer liability for co-worker harassment under a negligence standard.” Id. Justice Souter also allowed “there is no reason to suppose that Congress wished courts to ignore the traditional distinction between acts falling within the scope and acts amounting to what the older law called frolics or detours from the course of employment.” Id. at 798.

¹⁴⁸ Id.

¹⁴⁹ 524 U.S. at 757.

¹⁵⁰ Id.

¹⁵¹ “The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.” Id.

¹⁵² Id. at 758-759.

aided in accomplishing the tort by the existence of the agency relation.”¹⁵³ Justice Kennedy interpreted the phrase after the comma to stand independent of the phrase before “and,” so that the phrase could apply to the use of an “agency relation” in the absence of a supervisor purporting to act on behalf of an employer.¹⁵⁴ He then limited this broad interpretation by asserting it requires something more than an employment relationship that affords the “[p]roximity and regular contact” of a co-worker.¹⁵⁵ Justice Kennedy further pressed his interpretation of the last phrase in § 219(2)(d) by asserting, without any direct precedential support, that the phrase is the basis for finding employers liable – presumably not only under Title VII, but also under other law -- for supervisors taking what he called “tangible” employment actions, such as a discharge or denial of a raise or a promotion, against subordinates.¹⁵⁶ Justice Kennedy offered two, not fully consistent, ways of defining “tangible,” one resting on whether it entails a “significant change in employment status”¹⁵⁷ and the other requiring “an official act of the enterprise, a company act,” which “in most cases is documented in official company records, and may be subject to review by higher level supervisors.”¹⁵⁸

¹⁵³ Restatement Second of Agency § 219(2)(d) (1957).

¹⁵⁴ 524 U.S. at 759-760. This may have misconstrued what § 219(2)(d) was intended to mean. The interpretation renders the scope of employment limitation largely nugatory, or at least superfluous, because almost all torts resulting from the employment relationship are “aided” by the existence of that relationship, regardless of the tortfeasor’s independent course of conduct and motivation for committing the torts. The Illustrations in comment e. to § 219 clarify that the “aided . . . by the existence of the agency relationship” clause, like the apparent authority clause, was meant to qualify “purported to act or to speak on behalf of the principal.” Those Illustrations indicate that the tortfeasoring employee must claim to be speaking or acting with authority delegated from some principal. In comment a. to § 228 of the Restatement Second of Agency, the placement of the comma after “principal” makes this intent more clear: “a master may be liable if a servant speaks or acts, purporting to do so on behalf of his principal, and there is reliance upon his apparent authority or he is aided in accomplishing the tort by the existence of the agency relation.” See Paula J. Dailey, *All in a Day’s Work: Employers’ Vicarious Liability for Sexual Harassment*, 104 W. Va. L. Rev. 517, 550 (2002).

¹⁵⁵ 524 U.S. at 760.

¹⁵⁶ *Id.* This new interpretation of the “aided in the agency relation” phrase was unnecessary to explain why employers are always liable for formal employment decisions, such as discharges and demotions, made by agents with delegated authority to make those decisions in behalf of the employer. Most employers in the modern economy are legal entities, such as corporations, that act only through human agents with delegated authority to act for the entity. As reiterated in § 7.04 of the Restatement Third of Agency, the common law has provided that a “principal is subject to liability to a third party harmed by an agent’s [tortious] conduct when the agent’s conduct is within the scope of the agent’s actual authority.” Cf. note xxx *infra*. Furthermore, most discriminatory or retaliatory formal employment decisions also are made within the scope of the decision maker’s employment in part to serve the employer.

¹⁵⁷ 524 U.S. at 761.

¹⁵⁸ *Id.* at 762. The Court effectively adopted the second definition in its later opinion in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004). In *Suders*, the Court held that the *Faragher- Ellerth* affirmative defense is available in

Justice Kennedy, however, was not able to explain how the “aided in the agency relation standard” derived from the general common law expressed in § 219(2)(d) could determine whether there should be employer liability in cases that do not include tangible employment actions.¹⁵⁹

After setting aside a broad interpretation of the scope of employment standard in his *Faragher* opinion, Justice Souter agreed with Justice Kennedy’s treatment of the last phrase in § 219(2)(d) as an independent standard that “provides an appropriate starting point for determining liability” for discriminatory harassment.¹⁶⁰ Justice Souter, however, also did not find the standard to be satisfactory standing alone to determine employer liability under Title VII for a supervisor’s misuse of authority. Justice Souter asserted that while a harassing supervisor may always be assisted in his misconduct to some degree by his authority over subordinates,¹⁶¹ imposing vicarious liability for all actionable supervisory harassment would be inconsistent with language in *Meritor* stating the Court of Appeals in that case had “erred in concluding that the employers are always automatically liable for harassment by their supervisors.”¹⁶²

Both Justices thus felt it necessary to frame a standard for liability that took into account not only what they could derive from the general common law of agency as expressed

cases where a supervisor’s harassment does not include an official act and is not significant or severe enough to satisfy the high standard for constructive discharge, a showing of working conditions so intolerable to warrant a reasonable employee’s resignation. Quoting from *Ellerth*, the *Suders* Court stressed that whether a decision is tangible turns not on severity, but rather on whether it is “an official act of the enterprise, a company act.” “[T]angible employment actions “fall within the special province of the supervisor,” who “has been empowered by the company as ... [an] agent to make economic decisions affecting other employees under his or her control.”” *Id.* at 144-145, quoting *Ellerth*, 524 U.S. at 762. This definition encompasses precisely those acts of the agent that are within the agent’s scope of authority. See note xxx supra.

¹⁵⁹ In *Vance v. Ball State University*, 570 U.S. XXX (2013) (slip op at 18), the Court nonetheless cited the *Ellerth* decision’s distinction of “tangible” employment actions as a basis for limiting the reach of the new vicarious liability it formulated in *Ellerth* and *Faragher*. See note xxx *infra*.

¹⁶⁰ 524 U.S. at 802.

¹⁶¹ *Id.* at 803-04.

¹⁶² 477 U.S. at 72, quoted in *Faragher*, 524 U.S. at 804. Justice Kennedy, like Justice Souter, also treated this statement as a holding of *Meritor*, binding on the Court as *stare decisis*. 524 U.S. at 763-764. For the contrary view that the *Meritor* decision did not bind the Court from announcing a rule of strict employer liability for all supervisory harassment, see Michael C. Harper & Joan Flynn, *The Story of Burlington Industries v. Ellerth and Faragher v. City of Boca Raton: Federal Common Lawmaking for the Modern Age*, in *Employment Discrimination Stories*, 225, 254-256 (J.W. Friedman, ed.) (2006).

in the Restatement Second of Agency, but also Title VII's "basic policies of encouraging forethought by employers and saving action by objecting employees."¹⁶³ The "primary objective" of Title VII, Justice Souter asserted, "like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm."¹⁶⁴ Such avoidance, in Justice Souter's view, could be encouraged by tempering the § 219(2)(d) standard with an affirmative defense for employers who could establish both their own reasonable efforts to avoid discriminatory harassment of the sort suffered by an aggrieved employee and the employee's failure to make reasonable efforts to avoid that harassment.¹⁶⁵ Justice Kennedy agreed that Congress' intention "to encourage the creation of antiharassment policies and effective grievance mechanisms" and Title VII's deterrence goals supported formulation of a two-pronged affirmative defense.¹⁶⁶ Each opinion thereby could agree with the same formulation of doctrine:

"An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. ... No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."¹⁶⁷

¹⁶³ 524 U.S. at 807; 524 U.S. at 765.

¹⁶⁴ 524 U.S. at 806.

¹⁶⁵ *Id.*

¹⁶⁶ 524 U.S. at 764.

¹⁶⁷ 524 U.S. at 807; 524 U.S. at 765. For a fuller statement of the joint "holding" of the cases, see note xxx supra.

The fact that this elaborate doctrine, unlike the federal common law pronounced by the Court in *Reid* and *Clackamas*, was acknowledged to be only under the “guidance”¹⁶⁸ of the general common law and ultimately based on statutory policy, does not render the doctrine of less potential relevance to a general common law making process involving state as well as federal courts. The Court’s formulation of this doctrine was as much an instance of judicial law making as the formulation of any doctrine under a federal common law making authority based on broad jurisdictional grants like that of § 301 of the Labor Management Relations Act¹⁶⁹ or on an open-ended substantive law like that of the Sherman Act.¹⁷⁰ Indeed, the Court’s creative formulation of a new affirmative defense to strict vicarious liability was as much an instance of law making as the promulgation of a federal legislative regulation through the formal rulemaking processes required by § 553 of the Administrative Procedure Act.¹⁷¹ The Court could not and did not pretend it was simply interpreting what Congress had intended by statutory language in Title VII that offered no more guidance than a definition of employer to include “any agent.”¹⁷²

Furthermore, the new federal common law of *Faragher* and *Ellerth* has the same potentially influential but not controlling relation to state law as did the general common law that was pronounced under the regime of *Swift v. Tyson*. Federal anti-discrimination employment law assumes rather than preempts the existence of variant state anti-discrimination law;¹⁷³ federal law allows the state law to vary as long as it does not directly conflict with federal law by requiring that which the federal law prohibits.¹⁷⁴ State anti-

¹⁶⁸ See *Meritor*, 477 U.S. at 63, supra note and TAN xxx.

¹⁶⁹ Labor Management Relations Act of 1947, § 301, codified at 29 U.S.C. § 185 (2000). See, e.g., *Textile Workers Union v. Lincoln Mills of Alabama*, 353 448 (1957) (interpreting jurisdictional grant over suits for violation of contracts between an employer and a labor organization to confer authority to create law governing such suits).

¹⁷⁰ See 15 U.S.C. §§ 1 and 2.

¹⁷¹ 5 U.S.C. § 553.

¹⁷² “The term “employer” means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceeding calendar year, and any agent of such a person” 42 U.S.C. § 2000e(b).

¹⁷³ The assumption of parallel state regulation of employment discrimination is manifest in Title VII’s procedural system, which requires first filing discrimination charges with any state or local authority that has a law covering the alleged discrimination. See 42 U.S.C. § 2000e-5(c).

¹⁷⁴ See *California Federal Savings and Loan Assn. v. Guerra*, 479 U.S. 272 (1987). As the Court in *Guerra* stressed, *id.* at 281-92, § 708 of Title VII provides for the preemption of state laws “only if they actually conflict with federal

discrimination in employment law thus may impose either greater or lesser liability on employers for discriminatory supervisory harassment than that imposed under *Faragher* and *Ellerth*. State antidiscrimination law, however, often tracks federal law, with state courts looking to Supreme Court constructions of federal law for guidance. Thus, numerous state courts have adopted the *Faragher-Ellerth* doctrine for state anti-discrimination law statutes.¹⁷⁵

The influence of *Faragher* and *Ellerth* may derive from a compelling policy rationale for qualified strict liability that was not fully developed by either Justice Souter or Justice Kennedy. The *Faragher-Ellerth* affirmative defense-qualified employer liability for discriminatory supervisory harassment encourages the reduction of such harassment by imposing the costs of the harassment on that party that presumably was in the best position to avoid the harassment at the lowest costs.¹⁷⁶ Doing so provides to that party the incentive to weigh the risk-discounted costs of taking particular avoidance measures against the risk-discounted benefits of those measures. The *Faragher-Ellerth* doctrine reasonably assumes that *in most cases* the costs of avoidance are greater for an employee-victim of her supervisor's harassment than for an employer with authority over that supervisor. The two-pronged affirmative defense that

law" by purporting "to require or permit the doing of any act which would be an unlawful employment practice under" Title VII. 42 U.S.C. § 2000e-7.

¹⁷⁵ See, e.g., *Frieler v. Carlson Marketing Group*, 751 N.W.2d 558, 563 (Minn. S. Ct. 2008) (Minnesota anti-discrimination law); *Ocana v. American Furniture Co.*, 135 N.M. 539, 551, 91 P.2d 58, 70 (2004) (New Mexico anti-discrimination law); *Bank One, Kentucky v. Murphy*, 52 S.W.3d 540, 544 (Ky. 2001) (Kentucky anti-discrimination law); *Brentlinger v. Highlights for Children*, 142 Ohio App. 3d 25, 32 (2001) (Ohio anti-discrimination law); *Parker v. Warren County Utility District*, 2 S.W.3d 170, 174 (Tenn. 1999) (Tennessee anti-discrimination law); see also *Farmland Foods, Inc. v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733, 744 (S.Ct. Iowa 2003) (dicta; Iowa city ordinance); *Boudreaux v. Louisiana Casino Cruises, Inc.*, 762 So. 2d 1200, 1205 (La. App. 2000) (Louisiana's repealed anti-discrimination law); *State Dept. of Health Services v. Superior Court of Sacramento County*, 79 P.3d 556 (Cal. 2003) (adopting variation on *Faragher/Ellerth* as avoidable consequences doctrine under California Fair Employment and Housing Act). But see *Zakrzewska v. New School*, 14 N.Y.3d 469, 479-480, 928 N.E.2d 1035, 1039, 902 N.Y.S.2d 838, 842 (Ct. of App. N.Y. 2010) (*Faragher/Ellerth* affirmative defense not available under Administrative Code of City of New York because statutory language covers all exercises of "managerial or supervisory responsibility"); *Pollock v. Wetterau Food Distribution Group*, 11 S.W.3d 754, 767 (Mo. Ct. of App. 1999) (applying regulation to make employer strictly liable for supervisory harassment under Missouri law); *Myrick v. GTE Main Street Inc.*, 73 F. Supp. 2d 94, 98 (D. Mass. 1999) (relying on *College-Town v. Massachusetts Commission Against Discrimination*, 400 Mass. 156 (1987)) (under Massachusetts anti-discrimination law employer is strictly liable for supervisory harassment without *Faragher/Ellerth* affirmative defense); *Chambers v. Trettco, Inc.*, 463 Mich. 297, 307, 614 N.W.2d 910, 914 (Mich. 2000) (declining to adopt *Faragher/Ellerth* for Michigan anti-discrimination law; plaintiff must prove the employer failed to take prompt and adequate remedial action).

¹⁷⁶ This rationale for strict liability where general deterrence is the primary goal of policy derives from the work of Judge Calabresi. See Guido Calabresi, *The Costs of Accidents* (1970), esp. chs. 7 and 10; Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 Yale L.J. 1055 (1972).

qualifies an employer's strict liability under the *Faragher-Ellerth* doctrine, however, recognizes that this assumption cannot be made when it can be shown both that the employer took reasonable avoidance steps and also that the employee did not.¹⁷⁷ This policy rationale also helps explain the Court's acceptance of a more forgiving negligence standard to govern employer liability to an employee who suffers discriminatory harassment from co-workers without delegated authority to affect her work life;¹⁷⁸ it is not as likely that an employee-victim would incur greater costs than her employer in avoiding or preventing harassment by co-workers whom she can avoid or report on without fear of reprisal.¹⁷⁹

¹⁷⁷ For a fuller development of this rationale, see Michael C. Harper, Employer Liability for Harassment Under Title VII: A Functional Rationale for *Faragher* and *Ellerth*, 6 San Diego L. Rev. 101 (1999). See also J. Hoult Verkerke, Notice Liability in Employment Discrimination Law, 81 Va. L. Rev. 272 (1995).

¹⁷⁸ Although the first prong of the *Faragher-Ellerth* affirmative defense articulates a reasonable care standard for employers to prevent and correct harassment that seems similar to that set by a negligent standard, see 29 C.F.R. § 1604.11(d) (employer is negligent if it knew or should have known of harassment and failed to take corrective action), a negligence standard for employer liability is more forgiving for several reasons. First, the *Faragher-Ellerth* affirmative defense includes a second prong that conditions the avoidance of employer liability for a supervisor's harassment on the employee not taking reasonable avoidance steps, as well as on the employer meeting a reasonable care standard. Therefore, in cases where the employer did not and could not know of the harassment, it could still be liable if the employee herself was not negligent. Second, the *Faragher-Ellerth* doctrine provides an affirmative defense that reverses the burden of proof on to employers. And, third, a negligence approach presumably requires proof of causation, while causation does not seem to be an element of the affirmative defense. Indeed, Justice Thomas's dissent in *Faragher*, which assumed that a negligence standard should be applied for the harassment in that case, was based in part on the majority's failure to consider whether any deficiencies in Boca Raton's anti-harassment policy and practice led to its lack of knowledge of Faragher being harassed. See 524 U.S. at 810-811.

¹⁷⁹ But see Harper, *supra* note xxx, at 82-86.

The rationale, however, does not support the Court's closely divided (5-4) decision in *Vance v. Ball State University*, 570 U.S. xxx (2013). That decision limits an employer's qualified strict vicarious liability to harassment by supervisors whom "the employer has empowered to take tangible employment actions against the victim," i.e., to effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Slip op. at 9 (quoting *Ellerth*, 524 U.S. at 761.) The *Vance* Court rejected the broader reach of the *Faragher-Ellerth* doctrine advocated by the EEOC's Enforcement Guidance, which ties "supervisor status to the ability to exercise significant direction over another's daily work." *Id.*, citing EEOC, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999). Whether or not the *Vance* majority was correct in claiming that its limitation provided a much clearer line for judges and juries to apply than did the EEOC standard, see slip op at 21-24, Justice Ginsburg's dissent in support of the EEOC approach expressed a better understanding of why supervisors should be distinguished from co-workers for purposes of rules defining employer liability:

"Exposed to a fellow employee's harassment, one can walk away or tell the offender to "buzz off." A supervisor's slings and arrows, however, are not so easily avoided. An employee who confronts her harassing supervisor risks, for example, receiving an undesirable or unsafe work assignment or an unwanted transfer. She may be saddled with an excessive workload or with placement on a shift spanning hours disruptive of her family life. ... A supervisor with authority to control subordinates' daily work is no less aided in his harassment than is a supervisor with authority to fire, demote, or transfer."

The same policy rationale indicates why the *Faragher-Ellerth* doctrine could influence the development of state common law just as it has influenced the construction of state anti-discrimination law. In some cases, a supervisor's harassment of subordinate employees may constitute an actionable common law tort¹⁸⁰ that would expose the harassing supervisor to liability.¹⁸¹ Employer liability in such cases, however, poses the same doctrinal challenge as that confronted by the Court in *Faragher* and *Ellerth*. Many state courts, especially before the Civil Rights Act of 1991 first authorized the grant of compensatory damages under Title VII,¹⁸² held employers liable for tortious sexual harassment under a theory of direct liability for negligent supervision, akin to the negligence standard for employer liability for co-worker harassment actionable under Title VII.¹⁸³ This theory provides a basis for direct employer liability for harassment that is not within the scope of employment and thus subject to vicarious liability, and which also may not be subject to the exclusive remedy provided in workers' compensation laws for injuries arising out of as well as within the course of employment.¹⁸⁴ The theory,

Ginsburg, J. dissenting (slip op. at 4, 8).

¹⁸⁰ See, e.g., *Patterson v. Augat Wiring systems, Inc.*, 944 F.Supp. 1509 (M.D. Ala. 1996) (recognizing harassment may constitute torts of assault, battery, outrage, or possibly invasion of privacy under Alabama law); *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605 (Tex. 1999) (recognizing harassment may constitute tort of intentional infliction of emotional distress under Texas law); *Davis v. Utah Power & Light Co.*, 53 FEP Cas. 1039 (D.Utah 1988) (recognizing harassment may constitute torts of intentional infliction of emotional distress, assault, and battery under Utah law).

¹⁸¹ The lower courts have interpreted the word "agent" in the definition of employer in Title VII, see 42 U.S.C. § 2000e(b), to incorporate agency liability principles, but not to render agents subject to direct liability. See, e.g., *Wathen v. General Elec. Co.*, 115 F.3d 400 (6th Cir. 1997); *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995).

¹⁸² See 42 U.S.C. § 1981A. Prior to the Civil Rights Act of 1991, Title VII only authorized equitable relief. See 42 U.S.C. § 2000e-1(g)(1), including back pay and reinstatement. Such equitable relief would not be meaningful to a victim of sexual harassment who suffered abusive working conditions, but not an adverse "tangible" employment decision, such as a discharge, demotion, or pay cut, at least unless the working conditions were sufficiently severe to constitute constructive discharge. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, xxx, xxx (1986) (Marshall, J. concurring). Providing a meaningful remedy for discriminatory abusive working conditions indeed was one of the primary impetuses for the 1991 Act. See Michael C. Harper, *Eliminating the Need for Caps on Title VII Damage Awards: The Shield of Kolstad v. American Dental Association*, 14 N.Y.U.J. of Leg. & Pub. Pol. 477, 481-483 (2011).

¹⁸³ See, e.g., *Patterson v. Augat Wiring Systems, Inc.* 944 F. Supp. 1509 (N.D. Ala. 1996) (applying Alabama law); *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342, 1348 (10th Cir 1990) (applying Oklahoma law; jury found employer knew of sexual harassment, but did not act to stop it); *Kerans v. Porter Paint Co.*, 61 Ohio St.3d 486, 493, 575 N.E.2d 428, 431 (1991) (employer "may be independently liable for failing to take corrective action against an employee who poses a threat of harm to fellow employees"); *Cox v. Brazo*, 165 Ga. App. 888, 889, 303 S.E.2d 71, 73 (1983) (same).

¹⁸⁴ Every jurisdiction in the United States has a workers' compensation system that provides compensation without regard to fault for at least physical injuries arising out of and in the course of employment. In all jurisdictions this compensation provides a remedy that precludes other recovery for the same injuries. See 6 Lex K. Larson, *Larson's Workers' Compensation Law* 1 100.01 (Matthew Bender ed. 2011). The tort of negligent supervision, however,

however, requires proof of an employer's managerial negligence, even in cases like *Faragher* and *Ellerth* where the harassment is inflicted on subordinate employees. In order to expand employer liability from a direct-negligence to a vicarious-strict standard,¹⁸⁵ courts had to expand the concept of "scope of employment"¹⁸⁶ or of "aided by agency relationship"¹⁸⁷ beyond that adopted by either the Second or Third Restatement of Agency or by the Court in *Faragher* or *Ellerth*.¹⁸⁸

The *Faragher-Ellerth* doctrine now offers state courts a compromise of qualified vicarious liability with as strong a rationale for tort liability as for liability under statutory antidiscrimination law. The issue of employer liability for its supervisors' actionable torts on employers remains important even after the Civil Rights Act of 1991's authorization of

may subject even employers otherwise covered by workers' compensation to direct liability for the mental or emotional distress caused by harassment outside the scope of employment. See, e.g., *Sisco v. Fabrication Technologies, Inc.*, 350 F.Supp. 2d 932, 943 (D. Wyo. 2004); *Gerber v. Vincent's Men's Hairstyling, Inc.*, 57 So. 3d 935, 937 (Fla. Dist. Ct. App. 2011); *Gasper v. Ruffin Hotel Corp. of Maryland*, 183 Md. App. 211, 230, 960 A.2d 1228, 1239 (Md. Ct. Spec. App. 2008); *Patterson v. Augat Wiring Systems, Inc.*, supra note xxx; *Kerans v. Porter Paint Co.*, supra note xxx; *Hogan v. Forsyth Country Club*, 79 N.C. App. 483, 495, 340 S.E.2d 116, 124 (1986). But see *Peterson v. Arlington Hospitality Staffing, Inc.*, 276 Wis. 2d 746, 752, 689 N.W.2d 61, 64 (2004); *Kostantopoulos v. Westvaco Corp.*, 690 A.2d 936, 937 (Del. 1996); *Fields v. Cummins Employees Fed. Credit Union*, 540 N.E.2d 631, 640 (Ind. Ct. App. 1989) (all finding preclusion of claims for negligent supervision of harassment).

¹⁸⁵ For an explanation of why this is an expansion of employer liability, see note xxx supra.

¹⁸⁶ See, e.g., *State of Arizona v. Schallock*, 189 Ariz. 250, 260, 941 P.2d 1275, 1285 (1997) (sexual assaults by supervisor at work place, even though not to serve the employer, were "foreseeable" because of employer's knowledge and thus within scope of employment). See also TAN xxx-xxx and note xxx supra.

¹⁸⁷ See, e.g., *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559 (11th Cir. 1987) (Title VII liability); *Rauh v. Coyne*, 744 F. Supp. 1186, 1191 (D.D.C. 1990) (employer could be liable for sexual assault by a supervisory manager because assault was aided by the agency relationship). For discussion of why this treatment of "aided by the agency relationship" is expansive, see TAN xx-xx and notes xx and xx supra.

¹⁸⁸ Some courts also found employers directly liable for harassment-based torts through expansion of the agency law concept of ex post authorization or "ratification." See, e.g., *Jones v. B.L. Dev. Corp.*, 940 So.2d 961, 966 (Miss. Ct. App. 2006) (doing nothing to reprimand a known employee-wrongdoer is ratification); *Mardis v. Robbins Tire & Rubber Co.*, 669 So.2d 885, 889-890 (Ala. 1995) (ratification doctrine obviates need to prove employer's negligence caused injury); *Simon v. Morehouse School of Medicine*, 908 F.Supp. 959, 973 (N.D. Ga. 1995) (negligent supervision constitutes ratification under Georgia law). These decisions equated an employer's failure to control known harassment with ratification of that harassment, ignoring the traditional common law requirement that the agent must have "acted or purported to act as an agent" of the ratifying principal. See Restatement Third of Agency § 4.03 ("A person may ratify an act if the actor acted or purported to act as an agent on the person's behalf."). See also, e.g., *Fretland v. County of Humboldt*, 63 Cal. App. 4th 897, 905, 74 Cal. Rptr. 379, 384 (1998) ("Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to someone or all persons, is to treat the act as if originally authorized by him.") Harassers of course do not typically purport to be acting on behalf of their employers, even when they use their delegated power to control their victims.

compensatory damages, not only because those damages are limited by caps,¹⁸⁹ but also because some of those actionable torts may not be discriminatory and thus actionable under an antidiscrimination statute.¹⁹⁰ For instance, a supervisor's harassment or bullying of subordinate employees may be sufficiently "extreme and outrageous" to constitute the tort of intentional infliction of emotional distress under a state's substantive tort law,¹⁹¹ regardless of whether the bullying is in any manner discriminatory.¹⁹² If the bullying is not remedial through an exclusive workers' compensation remedy, either because it was not within the scope of employment¹⁹³ or because the resultant severe distress did not derive primarily from a physical injury,¹⁹⁴ the issue of employer liability must be resolved. The argument for resolution of that issue through the affirmative defense-qualified vicarious liability delineated in *Faragher* and *Ellerth* is as strong as it was for Title VII liability for the discriminatory harassment in those cases. Furthermore, the state's substantive tort law presumably has as strong a deterrent policy as the Title VII policy on which Justices Souter and Kennedy purported to rest their new doctrine of qualified vicarious liability.¹⁹⁵

The potential influence on state common law of the Court's new qualified vicarious liability doctrine, moreover, may extend well beyond cases brought by subordinate employees. The doctrine also is well suited to define employer liability for torts inflicted by employees outside the scope of employment, in part because of the employer's significant augmentation

¹⁸⁹ 42 U.S.C. § 1981A(b)(3) (limiting the sum of compensatory and punitive damages to a sum ranging from \$50,000 to \$300,00, depending on the size of the employer).

¹⁹⁰ Harassment of course is only actionable under Title VII if it is discriminatory. See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80-81 (1998).

¹⁹¹ See, e.g., *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 42 Tex. Sup. Ct. J. 907 (1999) (supervisor intentionally inflicts severe emotional distress by regularly cursing and threatening subordinates with violence).

¹⁹² Courts, on the other hand, have found sexual harassment to be severe or pervasive enough to be actionable under Title VII not sufficiently extreme and outrageous to constitute the intentional infliction of emotional distress. See, e.g., *Miner v. Mid-Am Door Co.*, 68 P.3d 212, 223 (Okla. Civ. App. 2002); *Hoy v. Angleone*, 554 Pa. 134, 152, 720 A.2d 745, 754 (1998).

¹⁹³ See, e.g., *Horodyskyj v. Karanian*, 32 P.3d 470, 474 (Colo. 2001) ("in the usual case, injuries resulting from workplace sexual harassment do not arise out of an employee's employment for purposes of the Workers' Compensation Act" of Colorado); *Byrd v. Richardson-Greenshields Sec., Inc.*, 552 So.2d 1099 n.7 (Fla. 1989) (sexual harassment is not covered by Florida's workers' compensation act because it does not "arise out of employment").

¹⁹⁴ See, e.g., *Sisco v. Fabrication Technologies, Inc.*, 350 F.Supp. 2d 932, 941-942 (D. Wyo. 2004) (workers' compensation law covers only mental injuries caused by compensable physical injuries); *Kerans v. Porter Paint Co.*, 61 Ohio St.3d 486, 489, 575 N.E.2d 428, 431 (1991) ("psychological disturbances arising solely from emotional stress" are not within workers' compensation act's definition of injury).

¹⁹⁵ See TAN xxx-xxx supra.

of the employees' opportunities to commit these torts. Just as employers augment the opportunities of employees to engage in harassment by investing the employees with supervisory authority over subordinate employees, so do employers augment opportunities for intentional torts by the establishment of other subordinate and dependent relationships. These relationships include those of guards and police with prisoners or other citizens subject to their authority and weapons, mental health and other medical employees with their patients, teacher-employees with their students, and clerical-employees with their parishioners.

Not surprisingly, when employees in positions of power because of such relationships have abused that power to commit intentional torts, such as sexual or other assaults, some state courts have fashioned agency doctrine to impose strict vicarious liability on employers.¹⁹⁶ They have done so either by expanding the concept of a scope of employment to include at least "foreseeable" abuses of an employment position¹⁹⁷ or by a broad interpretation of the "aided by the agency relationship" language in § 219(2)(d) of the Restatement Second of Agency.¹⁹⁸ In *Doe v. Forrest*,¹⁹⁹ the Supreme Court of Vermont indeed relied on the Court's interpretation of § 219(2)(d) in *Farragher* and *Ellerth* to hold a sheriff's department liable for a deputy sheriff's sexual assault of a citizen the deputy had used his authority to isolate.²⁰⁰ Although the *Forrest* court did not adopt the *Farragher-Ellerth* affirmative defense compromise, it did openly embrace the Court's role in influencing the development of common law doctrine:

¹⁹⁶ Justice Souter in his *Farragher* opinion, see 524 U.S. at 795-796, cited several of these cases. See, e.g., *Primeaux v. United States*, 102 F.3d 1458, 1462-1463 (8th Cir. 1996) (police officer's sexual assault of stranded motorist); *Mary M. v. Los Angeles*, 54 Cal.3d 202, 216-221, 285 Cal. Rptr. 99, 107-111, 814 P.2d 1341, 1349-1352 (1991) (police officer's rape of motorist under arrest); *Doe v. Samaritan Counseling Ctr.*, 791 P.12d 344, 348-349 (Alaska 1990) (therapist's sexual abuse of patient).

¹⁹⁷ See, e.g., *Plummer v. Center Psychiatrists, Ltd.*, 476 S.E.2d 172, 174-175 (Va. 1996) (psychologist acted within scope of employment when his therapy sessions included sexual intercourse with patient); *Red Elk v. United States*, 62 F.3d 1102, 1107 (8th Cir. 1995) (applying South Carolina law; "it was also foreseeable that a male officer with authority to pick up a teenage girl out alone at night in violation of the curfew might be tempted to violate his trust"); *Samuels v. Southern Baptist Hospital*, 594 So.2d 571, 573 (La. App. 4th Cir. 1992) (hospital vicariously liable for nursing assistant's rape of patient because rape was "reasonably incidental to the performance of his duties").

¹⁹⁸ See, e.g., *Doe v. Forrest*, 176 Vt. 476, 487-500, 853 A.2d 48 (2004) (sexual assault of deputy sheriff on cashier working alone at a convenience store); see also *West v. Waymire*, 114 F.3d 646, 649 (7th Cir. 1997) (for "a male police officer whose employer has invested him with intimidating authority to deal in private with troubled teenage girls, his taking advantage of the opportunity ... to extract sexual favors ... should be sufficiently within the orbit of his employer-conferred powers to bring the doctrine of respondeat superior into play, even though he is not acting to further the employer's goals but instead is on a frolic of his own") (Posner, J.; dicta).

¹⁹⁹ 176 Vt. 476 (2004).

²⁰⁰ *Id.* at 500-504.

It is, of course, the nature of the common law that every appellate decision represents the development of the common law, and nothing in the Supreme Court decisions suggests they are not an integral part of that process. Indeed, the resolution of the dispute over the meaning of § 219(2)(d) in *Faragher* is exactly the kind of decision that best defines and develops the common law. No common-law court engaged in this process, and certainly not the highest court of this country, would expect that a common-law decision on one set of facts would have no influence on future decisions applying the same legal principle to a different factual scenario.²⁰¹

Most courts, however, have resisted the expansion of employer vicarious liability for abuses of power by rogue employees other than police officers and prison guards.²⁰² The *Faragher-Ellerth* doctrine offers a workable compromise for a common law reformulation that recognizes that employers are usually, but not always, in a better position than are third-party victims to control the abuse of power vested in such employees as teachers, clerics, medical professionals, and police and security personnel. The same policies of deterrence and avoidable consequences upon which Justices Souter and Kennedy relied in *Faragher* and *Ellerth* could be invoked by a state court in the adoption of an affirmative defense- qualified vicarious employer liability for torts by their employees on third parties in subordinate or dependent relationships arising out of the employees' employment relationship.

²⁰¹ Id. at 490 n. 3.

²⁰² See *Doe v. Newbury Bible Church*, 182 Vt. 174, 933 A.2d 196 (2007) (distinguishing *Forrest* to decline to apply § 219(2)(d) to pastor's sexual molestation of minor parishioner); *Zsigo v. Hurley Med. Ctr.*, 475 Mich. 215, 716 N.W.2d 220 (2006) (nursing assistant's sexual abuse of restrained psychotic patient not within scope of employment); *Graham v. McGrath*, 363 F. Supp. 2d 1030, 1033-1034 (S.D. Ill. 2005) (applying Illinois law; priest's sexual abuse of young parishioner not within scope of employment); *John R. v. Oakland Unified School Dist.*, 48 Cal. 3d 438, 769 P.2d 948, 956 (1989) (declining to impose vicarious liability on school district for teacher's sexual assault on student because "teacher's authority is different in both degree and kind" from "the authority of a police officer over a motorist").

IV.

Actionable Employer Retaliation

The Supreme Court through the elaboration of the meaning of federal statutes may influence the development of general state law, including state common law, even without purporting to rely on or to modify general common law. It may do so by providing a resolution for a legal issue posed by a statute that is the same as or at least parallel to an issue posed by state law. An excellent example is provided by the Court's interpretation of the anti-retaliation provision in Title VII²⁰³ in *Burlington Northern v. White*.²⁰⁴ In this case the Court defined which actions of an employer or its agents may be violations of Title VII's anti-retaliation provision if taken against an employee because of that employee's involvement in activity protected by the provision. Although the Court's definition was only offered as an interpretation of the particular Title VII provision, the definition provided a possible resolution of a parallel problem posed not only by anti-retaliation provisions in other federal employment statutes, but also by express and implied anti-retaliation provisions in state statutes, and, most significantly for the general common law of employment, by the public policy tort cause of action now recognized in some form in most American jurisdictions.²⁰⁵

The *Burlington Northern* Court interpreted a provision that makes it unlawful "for an employer to discriminate against" an employee or employment applicant "because he has opposed any practice" that is otherwise unlawful under Title VII or "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII.²⁰⁶ The Court stated that the case required it to "characterize how harmful an act of retaliatory discrimination must be in order to fall within [this] provision's

²⁰³ "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

²⁰⁴ 548 U.S. 53 (2006).

²⁰⁵ See TAN and notes xxx-xxx infra.

²⁰⁶ 42 U.S.C. § 2000e-3(a).

scope.”²⁰⁷ It did so by adopting language suggested by two Courts of Appeals: “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, “which in this context means it well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”²⁰⁸ The Court explained that determining whether a reasonable worker would be dissuaded would provide strong protection of Title VII’s rights to press and support charges of discrimination without imposing burdensome regulation of “those petty slights or minor annoyances that often take place at work” and that are not likely to deter an employee’s invocation of his or her protection against discrimination. The Court also stressed that while the reasonable employee standard is necessarily objective, it is sufficiently general to be flexibly applied in the context of variant circumstances, providing the example of an employee who is responsible for the care of young children being subjected to a schedule change.²⁰⁹

The *Burlington Northern* Court’s interpretive law making was fully policy based. It did not purport to express a general common law default rule, as did the Court in *Reid*,²¹⁰ *Darden*,²¹¹ and *Clackamas*.²¹² Nor did the analysis purport to build on or modify the common law, as did the Court in *Faragher* and *Ellerth*.²¹³ Yet the persuasive force of the analysis was as applicable to any protection against employer retaliation as it was to the protection afforded by the Title VII provision at issue in *Burlington Northern*. If the Court’s legal formulation struck the correct policy balance for this provision, it also arguably struck the correct balance for a general common law default rule to be adopted by federal courts for other federal anti-retaliation

²⁰⁷ 548 U.S. at 61.

²⁰⁸ 548 U.S. at 68. The Court quoted language from *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006, which had in turn quoted from *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005).

²⁰⁹ The Court also pronounced in dicta that unlike Title VII’s prohibition of status discrimination, Title VII’s anti-retaliation provision “extends beyond workplace-related or employment-related retaliatory acts and harm.” 548 U.S. at 67. This pronouncement was superfluous dicta because the employer actions found to be retaliatory in the case, the reassignment of the plaintiff from forklift duty to standard track laborer tasks and a 37-day suspension without pay, were both clearly workplace- and employment-related actions. The pronouncement makes a difference in a case like *Rochon*, supra, where the employer was the Federal Bureau of Investigation and its retaliation took the form of the refusal to follow policy in investigating death threats a federal prisoner made against the plaintiff.

²¹⁰ See TAN xx supra.

²¹¹ See TAN xx supra.

²¹² See TAN xxx supra.

²¹³ See TAN xxx supra.

guarantees and by state courts for anti-retaliation guarantees in state law that do not carry specific statutory definitions of proscribed retaliatory acts.

There are indeed many such federal and state law guarantees. Most modern federal²¹⁴ and state,²¹⁵ and some older,²¹⁶ statutes that provide protections or minimum benefits to employees also include provisions that protect employees from retaliation at least for filing charges or participating in official proceedings to enforce the protections or claim the benefits.²¹⁷ Federal and state legislators seem to have appreciated that the securing of an employee statutory right, like the right to be free of particular forms of status discrimination secured by Title VII, requires the protection from retaliation of a victim's invocation of the right. Furthermore, few anti-retaliation provisions in federal and state employment statutes carry sufficiently limiting definitions of what retaliations might be actionable to obviate the use of a common default rule like that provided by *Burlington Northern*.²¹⁸ Not surprisingly, therefore, *Burlington Northern* has provided such a rule not only for federal statutes,²¹⁹ but also for many

²¹⁴ See, e.g., 29 U.S.C. § 2615(a)(2)(anti-retaliation provision of Family Medical Leave Act of 1993 (FMLA)); 42 U.S.C. § 12203 (anti-retaliation provision of Americans with Disabilities Act of 1990 (ADA)); 29 U.S.C. § 1140 (anti-retaliation provision of Employment Retirement Security Act of 1974); 29 U.S.C. § 660(c) (anti-retaliation provision of Occupational Safety and Health Act of 1970); 29 U.S.C. § 623(d) (anti-retaliation provision of Age Discrimination in Employment Act of 1967 (ADEA)).

²¹⁵ See, e.g., Ariz. Rev. Stat. Ann. § 41-1464 (2010); Cal. Gov't Code Ann. § 12940(g),(h) (West 2014); Tex. Lab. code Ann. § 21.055 (Vern. 2013).

²¹⁶ See, for instance, the anti-retaliation provision of the 1938-enacted Fair Labor Standards Act (FLSA), 29 U.S.C. § 203 et seq. This provision, 29 U.S.C. § 215(a)(3), also covers the Equal Pay Act, 29 U.S.C. § 206(d), which was passed in 1963 as an amendment to the FLSA.

²¹⁷ Unlike the anti-retaliation provision of Title VII, some statutory anti-retaliation provisions by their express terms protect only participation in official proceedings to protect the underlying right. For instance, the FLSA provision, see note xxx supra, states that it is unlawful for any person

To discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or cause dot be instituted any proceedings under or related to this chapter, or has testified or is about to testify in any such proceeding

29 U.S.C. § 215(a)(3). In *Kasten v. Saint-Gobain Performance Plastics*, xxx U.S. xxx, 131 S.Ct. 1325 (2011), the Court held that oral complaints may be protected by this provision, but it left open whether the provision protects a complaint to an employer rather than to the government.

See also the delineated anti-retaliation provision in § 510 of the Employment Retirement Income Security Act of 1974, 42 U.S.C. 1140.

²¹⁸ None of the federal statutes cited in note 214 do so.

²¹⁹ See, e.g, *Millea v. Metro-North*, 658 F.3d 154, 165-166 (2d Cir. 2011) (joining "sister circuits" in applying *Burlington Northern* test to anti-retaliation provision in FMLA); *Mogenhan v. Napolitano*, 613 F.3d 1162, 1166-67 (D.C. Cir. 2010) (applying test to ADA retaliation claim); *Nagle v. Village of Calumet Park*, 554 F.3d 1106, 1121 (7th Cir. 2009) (applying test to ADEA retaliation claim); *Ergo v. Int'l Merchants Services, Inc.*, 519 F.Supp.2d 765 (N.D. Ill. 2007) (applying test to FLSA retaliation claim).

state statutes with express anti-retaliation provisions that do not define prohibited retaliatory acts.²²⁰

Judges interpreting statutes offering benefits or protections to employees without inclusion of an express anti-retaliation guarantee also have appreciated that such a guarantee is necessary to meet statutory purposes. Thus, both the Supreme Court²²¹ and the highest courts of numerous states²²² have found anti-retaliation guarantees to be implicit in general statutory provisions. For instance, relying on several decades of precedent,²²³ the Court in *Gomez-Perez v. Potter*²²⁴ held that the prohibition in § 633a(a) of “discrimination based on age” in personnel actions in the federal government²²⁵ “includes retaliation based on the filing of an age discrimination complaint,” even though the provision does not refer expressly in any way to retaliation.²²⁶ The lack of any explicit reference to retaliation in § 633a(a) obviously renders the

²²⁰ See, e.g., *Gossard v. JP Morgan Chase & Co.*, 612 F.Supp.2d 1242, 1252-1253 (S.D. Fla. 2009) (applying *Burlington Northern* to retaliation claim under Florida Civil Rights Act, Fla. St. §760.10(7)); *Swanson v. Minnesota*, 2008 WL 4375985 (Minn. Dist. Ct. 2008) (applying *Burlington Northern* standard to anti-retaliation provisions of Minnesota Whistleblower and Occupational Safety and Health Acts, Minn. Stat. §§ 181.932, Subd. 1(a) and 12654, Subd. 9); *Montgomery County v. Park*, 246 S.W.3d 610, 614 (Tex. 2007) (“a personnel action is adverse within the meaning the Whistleblower Act [Tex. Gov’t Code § 554.002] if it would be likely to dissuade a reasonable, similarly situated worker from making a report under the Act”); *Secherest v. Lear Siegler Services, Inc.*, 2007 WL 1186597 (M.D. Tenn. 2007) (applying *Burlington Northern* standard to Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-311); *Niu v. Revcor Molded Products Co.*, 206 S.W.3d 723, 731 (Tex. App.- Ft. Worth 2006) (applying *Burlington Northern* to anti-retaliation provision in Texas Labor Code § 21.055 covering employment discrimination). But see *Fincher v. Depository Trust and Clearing Corp.*, 604 F.3d 712, 723 (2d Cir. 2010) (stressing that the New York City Human Rights Law, N.Y.C. Admin. code § 8-107(7), makes it illegal to retaliate “in any manner”); *Ivan v. County of Middlesex*, 595 F.Supp.2d 425, 470-71 (D.N.J. 2009) (declining to apply *Burlington Northern* “because the language of Title VII differs from LAD [New Jersey Law Against Discrimination] as interpreted by New Jersey courts”).

²²¹ See TAN and note xxx infra.

²²² See TAN and note xxx infra.

²²³ The Court relied primarily on *Sullivan v. Little Hunting Park, Inc.*, 326 U.S. 299 (1969) (finding that the prohibition of race discrimination in property transactions in 42 U.S.C. § 1982 makes cognizable a claim for retaliation for opposing race discrimination in housing) and *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (implying protection against retaliation for filing a complaint with the government from the prohibition of gender discrimination in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681). The Court in *Jackson* stated that “when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional discrimination ‘on the basis of sex,’ in violation of Title IX.” *Id.* at 174.

²²⁴ 553 U.S. 474 (2008).

²²⁵ 29 U.S.C.

²²⁶ *Gomez-Perez v. Potter*, 553 U.S. 474, 479 (2008). See also *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008), where the Court held that 42 U.S.C. § 1981’s prohibition of race-based employment discrimination in employment contracts supports a claim of retaliation for opposing such discrimination. Whether the Court’s implication of a remedy for retaliation in *Gomez-Perez*, *CBOCS West*, and *Jackson*, see note xxx supra, in order to ensure fulfillment of statutory purpose, was an appropriate use of judicial power is beyond the scope of this essay. Justices Thomas

implied retaliation prohibition in need of some standard, like that provided by *Burlington Northern*, to define which employer actions could constitute illegal retaliation.

Similarly, in *Kelsay v. Motorola, Inc.*,²²⁷ the Supreme Court of Illinois held that employees must have a cause of action for retaliation to ensure implementation of the purposes of the Illinois's Workmen's Compensation Act:

“the legislature enacted the workmen's compensation law as a comprehensive scheme to provide for efficient and expeditious remedies for injured employees. This scheme would be seriously undermined if employers were permitted to abuse their power to terminate by threatening to discharge employees for seeking compensation under the Act. . . . when faced with such a dilemma many employees, whose common law rights have been supplanted by the Act, would choose to retain their jobs, and thus, in effect, would be left without a remedy either common law or statutory. This result . . . is untenable and is contrary to the public policy as expressed in the Workmen's Compensation Act.”²²⁸

and Scalia, who claim to reject purpose-based statutory interpretations, dissented in all three cases. See 553 U.S. at xxx; 553 U.S. at xxx; 544 U.S. at xxx.

²²⁷ 74 Ill.2d 172, 384 N.E.2d 353 (1978).

²²⁸ 74 Ill.2d at 181-182. It is not clear but makes no real difference whether the *Kelsay* court, in the manner of the Court in *Gomez-Perez*, found the retaliation cause of action to be implied in the Illinois statute or rather purported to exercise its common law making power in the creation of the retaliation cause of action. A state court, however, would have to assert its full common law making power in order to create a right of action against retaliation for asserting a right under a federal law. See, e.g., *Flenker v. Williamette Industries, Inc.*, 266 Kan. 198, 967 P.2d 295 (1998) (holding that the remedy for retaliation for asserting a right under the federal Occupational Safety and Health Act does not preclude a state common law cause of action for wrongful discharge for asserting the right). For a decision more clearly relying on a workers' compensation statute, rather than general common law making authority, to imply a cause of action for retaliatory termination, see *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 252, 297 N.E.2d 425 (1973) (noting statute states that no “device shall . . . relieve any employer . . . of any obligation created by this act”). For decisions in other jurisdictions creating or implying a cause of action for retaliatory termination for the exercise of rights under a worker's compensation statute, see, e.g., *Shick v. Shirey*, 716 A.2d 1231 (Pa. 1998); *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793 (N.D. 1987); *Griess v. Consol. Freightways*, 776 P.2d 752 (Wyo. 1989); *Clanton v. Claim-Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984); *Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984); *Firestone Textile Co. v. Meadows*, 666 S.W.2d 730 (Ky. 1983). State courts also have implied rights of action against retaliation for asserting rights under other kinds of employee protection or benefit statutes. See, e.g., *Highhouse v. Avery Transp.*, 443 Pa. Super. 120, 127, 660 A.2d 1374, 1378 (Pa. Super. Ct. 1995) (right of action against discharge for claiming unemployment compensation); *Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994) (right of action against discharge for filing partial unemployment compensation claim).

Like the Supreme Court's implication of a prohibition of retaliation in an anti-discrimination provision in cases like *Gomez-Perez*, a state court's creation of a cause of action for unlawful termination in cases like *Kelsay* without the guidance of any specific statutory directives requires asking a policy question that was answered generally in *Burlington Northern*: If protections against termination are necessary to ensure underlying statutory rights, which employer actions are sufficiently significant to warrant a cognizable claim?²²⁹

Indeed, the potential utility of the general lawmaking in *Burlington Northern* for state law is even more significant because of other modifications over the past several decades in the common law employment-at-will default principle. That principle of course generally construes employment for an indefinite term as terminable at the will of either party for any reason.²³⁰ It has been qualified by anti-discrimination and other statutes and by the implication of causes of action like those described above to ensure the protection of employee rights.²³¹ It also has been qualified in the current era by the creation of other actions for wrongful discharge in violation of public policy. Some of this law making has been fashioned by state legislatures in statutes protective of whistleblowers.²³²

²²⁹ Although the Illinois Supreme Court declined to extend the retaliatory discharge cause of action it recognized in *Kelsay* to a case of retaliatory demotion, see *Zimmerman v. Buchheit of Sparta*, 164 Ill.2d 29, 206 Ill. Dec. 625, 645 N.E.2d 877 (1994), courts in other jurisdictions have expanded the protection of workers' compensation claimants to cover other forms of retaliation. For instance, in *Trosper v. Bar "N Save*, 273 Neb. 855, 734 N.W.2d 704 (2007), the Supreme Court of Nebraska held that a cause of action for retaliatory demotion exists against an employer that demotes an employee for filing a workers' compensation claim. In his concurring opinion, Judge Gerrard explained that "undue interference with the employment relationship" could be avoided by delimiting the cause of action based on the *Burlington Northern* definition of materially adverse. *Id.* at 871. See also, e.g., *Robel v. Roundup Corp.*, 148 Wn.2d 35, 49-50, 59 P.3d 611 (2002) (Washington statute that states an employer may not "discriminate" against an employer for filing a compensation claim may cover retaliatory verbal harassment); *Brigham v. Dillon Companies, Inc.*, 262 Kan. 12, 20, 935 P.2d 1054 (1997) ("cause of action for retaliatory demotion is a necessary and logical extension of the cause of action for retaliatory discharge"). *Brigham* is discussed further at TAN xxx infra.

²³⁰ The employment-at-will default rule is recognized in all American jurisdictions, except Montana which has enacted a statute requiring a showing of "good cause" for all terminations of an employee's employment after the employee's completion of a probationary period. See Montana Wrongful Discharge of Employment Act. Mont. Code §§ 39-2-901 to 914. For a history of the origin of the rule, see Jay M. Feinman, *The Development of the Employment At Will Rule*, 20 *Amer. J. of Legal Hist.* 118 (1976).

²³¹ See TAN xxx-xxx supra.

²³² See, e.g., Cal.Labor Code § 1102.5; Fla. Stat. § 448.102; Ill. Stat. 430/15-10; Mich. Comp. Laws §§ 15.361-15.368; Minn. Stat. § 181.932; N.J. Stat. §§ 34:19-1 to §9-8; N. Y. Labor Law art. 20-C § 740; 43 Pa. Stat. Ann. §§ 1421-28.

The primary impetus for the wrongful discharge in violation of public policy cause of action, however, has come from the judiciary. State courts have exercised their common law making authority to recognize such actions not only to secure employee rights, as in *Kelsay*, but also to serve broader public purposes in cases where a discharged employee is terminated for performing a public duty defined by law,²³³ for refusing to commit an act that violates some law or perhaps code of professional or occupational conduct,²³⁴ or for reporting or inquiring about illegal employer conduct.²³⁵

State courts have created such actions for wrongful discharge to serve public policy defined by other authoritative law or code making bodies.²³⁶ They have done so recognizing that such public policy may be undermined if employees are discouraged by the threat of discharge from acting in conformity with or to advance the rules set by that policy. Such recognition, however, poses the question of whether employees should be protected from retaliation through other forms of discipline, short of termination. If employees can be discouraged from serving a public interest by the threat of termination, could they also not be discouraged by a demotion or suspension or pay cut? If a state recognizes some public policy as sufficiently strong to compromise an employer's right to define the bounds of the employment relationship, why not recognize is as sufficiently strong to qualify an employer's discretion over discipline short of termination?

²³³ See, e.g., *Texler v. Norfolk S. Ry.*, 957 F. Supp. 772 (M.D.N.C. 1997) (testifying truthfully at deposition; applying North Carolina law); *Parada v. City of Colon*, 29 Cal. Rptr.2d 309 (Cal. Ct. App. 1994) (issuing stop orders against construction projects failing to satisfy permit requirements); *Nees v. Hock*, 536 P.2d 512 (Or. 1975) (performance of jury duty)

²³⁴ See, e.g., *Hobson v. McLean Hosp. Corp.*, 522 N.E.2d 975 (Mass. 1988) (refusing to allow supervised nurses to violate state law in checking patients); *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569 (Minn. 1987) (refusing to pump leaded gas into car built for unleaded gas in violation of federal law); *Kalman v. Grand Union Co.*, 443 A.2d 728 (N.J. Super. Ct. App. Div. 1982) (refusing to close pharmacy in violation of state law).

²³⁵ See, e.g. *Kanagy v. Fiesta Salons, Inc.*, 541 S.E.2d 616 (W.Va. 2000) (reporting unlicensed practice of cosmetology to regulating board); *Green v. Ralee Eng'g Co.*, 960 P.2d 1046 (Cal. 1998) (reporting to management about aircraft parts that the employee reasonably believed was illegal); *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876 (Ill. 1981) (supplying information about employee theft to law enforcement officers).

²³⁶ Some courts have recognized established principles of professional or occupational conduct that have received judicial or other public sanction as a source of public policy for the wrongful discharge in violation of public policy tort. See, e.g., *LoPresti v. Rutland Regional Health Services, Inc.*, 865 A.2d 1102 (Vt. 2004) (medical ethical code may be source of public policy); *Rocky Mountain Hosp. and Med. Serv. V. Mariani*, 916 P.2d 519 (Colo. 1996) (public policy set by Colorado State Board of Accountancy Rules of Professional Conduct); *Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578 (Del. Ch. 1994) (attorney's duty to report wrongdoing of employer under code of ethics is a basis for public policy).

A few state courts indeed have understood that recognition of a tort of wrongful discipline is a logical corollary to the tort of wrongful discharge in violation of public policy. As explained by the Supreme Court of Kansas in *Brigham v. Dillon Companies*:

To conclude otherwise would be to repudiate this court's recognition of a cause of action for retaliatory discharge. The obvious message would be for employers to demote rather than discharge employees in retaliation for filing a workers compensation claim or whistleblowing. Thus employers could negate this court's decisions recognizing wrongful or retaliatory discharge by taking action falling short of actual discharge.²³⁷

This recognition, however, like the recognition of any action for retaliation, begs the question of scope for which the *Burlington Northern* holding supplies a sensible default answer.

This question of scope for a wrongful discipline cause of action was considered in the drafting of the Restatement Third of Employment Law. Citing decisions like *Brigham* and noting that there are "few reported cases [that] involve employees who have not been discharged, or quit and alleged constructive discharge," the Restatement Third of Employment in a draft tentatively approved by the ALI membership in May, 2009, stated a tort of "Employer Discipline in Violation of Public Policy." Drawing from *Burlington Northern*, § 4.01 of that draft covered "an action short of discharge that is reasonably likely to deter a similarly situated employee from engaging in protected activity, including an action that significantly affects employee compensation or working conditions."²³⁸

²³⁷ 262 Kan. 12, 20, 935 P.2d 1054, 1060 (1997). See also, e.g., *Powers v. Springfield City Schs.*, 1998 WL 336782 (Ohio Ct. App. June 26, 1998) (claim of wrongful failure to promote for performing duty to report child abuse); *Garcia v. Rockwell Int'l corp.*, 232 Cal Rptr. 490 (Cal. Ct. App. 1986) (claim of wrongful suspension and demotion for revealing mischarging to National Aeronautics and Space Administration); *Trosper v. Bag 'N Save*, supra note xxx..

²³⁸ Section 4.01(b) of the Restatement Third of Employment Law (Tentative Draft No.2 2009). Section 4.01 of this draft stated in full:

§ 4.01 Employer Discipline in Violation of Public Policy

- (a) An employer that discharges or takes other material adverse action against an employee because the employee has or will engage in protected activity under §4.02 is subject to liability in tort for wrongful discipline in violation of public policy, unless the statute or other law that forms the basis of the applicable public policy precludes tort liability or otherwise makes inappropriate judicial recognition of a tort claim.

To be sure, a majority of those courts that have considered expanding the common law claim of wrongful discharge to include other adverse personnel actions, have declined to do so, in part because of concern about additional regulation of employers' personnel discretion.²³⁹ Indeed, the final Restatement Third of Employment draft, in deference to this judicial reluctance to expand the tort of wrongful discharge, does not cover wrongful discipline short of that which is sufficiently intolerable to warrant a reasonable employee's resignation, i.e. a constructive discharge.²⁴⁰ The *Burlington Northern* test nonetheless remains a useful standard for any jurisdiction that adopts a comprehensive cause of action for wrongful discipline, either through judicial or legislative lawmaking.

V.

Vicarious Employer Liability for Punitive Damages

Not all federal law making effected through the interpretation of federal statutes can be expected to influence the general common law of the states, however. There may be good reasons why newly formulated legal doctrine announced as an interpretation of a federal statute will not influence the resolution of parallel issues in state law even when the new formulation purports to build on or refine the general common law. First, the resolution of the parallel issues under state common law may be well established in each jurisdiction, even if not

(b) "Other material adverse action" in this Section means an action short of discharge that is reasonably likely to deter a similarly situated employee from engaging in protected activity, including an action that significantly affects employee compensation or working conditions.

²³⁹ See, e.g., *Jewett v. Gen. Dynamics Corp.*, 1997 WL 255093 (Conn. Super. Ct. 1997) (not recognizing claim for retaliatory demotion); *Mintz v. Bell Atl. Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 553, 905 P.2d 559, 562 (Ariz. Ct. App. 1995) ("tort of wrongful failure-to-promote does not presently exist"); *Hindo v. Univ. of Health Scis.*, 604 N.E.2d 463, 468 (Ill. App. Ct. 1992) (not recognizing claim for retaliatory demotion).

²⁴⁰ This final draft will be presented to the ALI Membership for final approval in May, 2014. The draft deleted "other material adverse action" from the black letter, to "reflect[] the majority view of the jurisdictions addressing the issue." See *comment c.* to Section 5.01(b) of the Restatement Third of Employment Law (Council Draft No.11 2013) (in this draft Chapter 4 has become Chapter 5). *Comment c.* also explained that wrongful discharge "covers claims for wrongful discharge," and that "[a]n employer constructively discharges an employee if the employer creates working conditions so intolerable that a reasonable employee under the circumstances would be compelled to quit, and the employee in fact quits." *Id.*

This standard for constructive discharge was endorsed by the Court in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004). See note xxx *supra*. Courts have recognized that the tort of wrongful discharge would be without substantial practical meaning if it did not cover employer actions that made continuation of work intolerable for reasonable employees. See, e.g., *Strozinsky v. Sch. Dist.*, 237 Wisc.2d 19, 66-67, 614 N.W.2d 443 (2000).

set in the same manner in all. Second, the new formulation may be dependent on a policy balance made in interpretation of the federal law that is not persuasive to state courts making different policy balances under their own law.²⁴¹

An example of federal judicial employment lawmaking which should not be influential for these reasons is provided by the Court's modification in *Kolstad v. American Dental Association*²⁴² of the approach of the Restatement Second of Agency²⁴³ and of the Restatement Second of Torts²⁴⁴ (Restatement Rule) to the imposition of punitive damages on employers for the torts of their agents. After first holding that the Title VII standard of culpability for the imposition of punitive damages is subjective knowledge of a risk of acting in violation of law,²⁴⁵ the Court in *Kolstad* also held that employers should not be liable for punitive damages for their agents' knowing violation of Title VII, even in cases where the Restatement Rule's standard of employer complicity through managerial agents is met, if "the discriminatory employment decision of [the] managerial agents" were "contrary to the employer's 'good-faith efforts to comply with Title VII.'"²⁴⁶

The *Kolstad* Court's reasons for modifying the Restatement Rule for purposes of Title VII, though potentially applicable to a general common law rule, were not sufficiently

²⁴¹ Neither of these reasons seem applicable to the potential federal contributions to the general common law of employment thus far considered in this article. For instance, the definition of employee has never been fully crystallized because of the flexibility of the multifactor tests, see TAN xx-xx supra, and the exclusion of controlling owners from this definition only has become salient recently, see TAN xx-xx supra. Further, as argued above, the Supreme Court's decisions in *Clackamas*, see TAN xx supra, *Faragher-Ellerth*, see TAN xx-xx supra, and *Burlington Northern*, see TAN xxx-xxx supra, carry persuasive rationales that could influence the development of unsettled general common law.

²⁴² 527 U.S. 526, 545-546 (1999).

²⁴³ Section 217C of the Restatement Second of Agency states:

"Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if:

- (a) the principal authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal was reckless in employing him, or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
- (d) the principal or a managerial agent of the principal ratified or approved the act.

²⁴⁴ Section 909 of the Restatement Second of Torts states the same formulation as that in § 217C of the Restatement Second of Agency. See note xxx supra. The Restatement Third of Agency, § 7.03 cmt. e, at 156-160, endorses the approach of § 909, interpreting it to provide that "unless a tortfeasor is a managerial agent, punitive damages may be awarded only when the culpability of the managerial agent can be shown. Id. at 158.

²⁴⁵ 527 U.S. at 535-536.

²⁴⁶ 526 U.S. at 545-546.

persuasive to have a likely salutary effect on the common law of most states. The Restatement Rule allows punitive damages when the tort-committing agent was employed in a managerial capacity and was acting in the scope of employment, or when a managerial agent ratified or approved the tortious act.²⁴⁷ Justice O'Connor in her opinion for the *Kolstad* Court expresses dissatisfaction with basing employer liability for punitive damages on the culpability of some manager when the employer "himself is personally innocent and therefore liable only vicariously"²⁴⁸ because he has "undertaken good faith efforts at compliance."²⁴⁹ Justice O'Connor's personalization of employers is a distortion of the reality of the modern economy, however. Most employers are legal entities that act only through their human agents. It is not obvious why an employer that employs culpable managerial decision making agents²⁵⁰ should be described as innocent.

Justice O'Connor also asserted that adopting the Restatement Rule on employer liability for punitive damages "would reduce the incentive for employers to implement antidiscrimination programs."²⁵¹ This assertion seems illogical. The greater an employer's vulnerability to punitive damages, the greater the incentive to implement antidiscrimination programs to ensure the avoidance of discrimination that could result in onerous damage awards. Also unconvincing is Justice O'Connor's suggestion that adoption of the Restatement Rule, in tandem with the underlying Title VII knowing violation standard for punitive damages,²⁵² would penalize "those who educate themselves and their employees on Title VII's prohibitions."²⁵³ Few officers and decision makers today do not understand the basic anti-

²⁴⁷ See note xxx supra.

²⁴⁸ 527 U.S. at 544, quoting Restatement Second of Torts, § 909, at 468, cmt. b.

²⁴⁹ 527 U.S. at 544.

²⁵⁰ As stated in the Restatement Third of Agency, § 7.03 cmt. e, at 159, the determination of whether an agent is a "managerial agent" "should focus on the agent's discretion to make decisions that would have prevented the injury to the plaintiff or that determine policies of the organization relevant to the risk that resulted in the injury."

²⁵¹ 527 U.S. at 544.

²⁵² This first part of the *Kolstad* decision confirmed that the "malice" or "reckless indifference" standard for the grant of punitive damages for Title VII violations, see 42 U.S.C. § 1981a(b)(1), "does not require a showing of egregious or outrageous discrimination independent of the employer's state of mind," but "pertain[s] to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." 527 U.S. at 535.

²⁵³ 527 at 544.

discrimination prohibitions of Title VII; effective anti-discrimination programs require much more than education.

Of course providing a maximum incentive to avoid tortious acts is not the only consideration in setting rules for punitive damages, as it is not the only consideration in setting any liability rules. More easily available punitive damages can result in inefficient levels of avoidance, regulation, and litigation, depending on the likelihood of recovery and the level of damages. Ultimately, setting rules for punitive damages requires a difficult policy balance that also takes into account the degree to which the substantive law being enforced may carry a moral condemnation of its intentional, reckless, or even negligent violators. One reason Justice O'Connor's "bad faith" overlay on the Restatement Rule likely will not be influential is that she failed to engage directly with this difficult balancing.

A more important reason that the *Kolstad* Court's modification of the Restatement Rule will not have substantial influence on the general common law is that the states already have set their own policy balance in variant but well established ways, both by statute and by judicial decision.²⁵⁴ Unlike the other common law rules discussed in this article, the rules governing employer punitive liability do not seem open to development or modification toward some general common law consensus. First, states set different standards for the level of fault required for the award of punitive damages,²⁵⁵ with a few jurisdictions not allowing any awards of punitive damages at all in common law actions.²⁵⁶ Of those jurisdictions that do allow such

²⁵⁴ See notes xxx-xxx infra.

²⁵⁵ Some jurisdictions require a conscious desire to injure, while some allow the imposition of punitive damages based on recklessness or even gross negligence. Compare, e.g., *Roby v. McKesson Corp.*, 47 Cal. 4th 686, 712, 219 P.3d 749, 765 (2009) (punitive damages are available under California Civ. Code § 3294, subd. (a), "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice."); *Darcars Motors of silver spring, Inc. v. Borzym*, 379 Md. 249, 264, 841 A.2d 828, 837 (2004) (punitive damages require "actual malice" which is "characterized by evil motive, intent to injure, ill will, or fraud."); with *Slovinski v. Elliot*, 237 Ill. 2d 51, 58, 927 N.E.2d 1221, 1225 (2010) (punitive damages available "when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others.") and *Phillips v. Cricket Lighters*, 584 Pa. 179, 189, 883 A.2d 439, 446 (2005) (punitive damages are available for "intentional, willful, wanton or reckless conduct.") Massachusetts has not accepted the *Kolstad* culpability standard, see note xxx supra, even for its own parallel general antidiscrimination law. See, e.g., *Haddad v. Wal-Mart*, 455 Ma. 91, 110, 914 N.E.2d 59 (2009) (punitive damages may be awarded when the defendant's conduct is "outrageous or egregious").

²⁵⁶ See, e.g., *Haddad*, supra, at 110 ("We impose punitive damages only when authorized by statute"); *Laramie v. Stone*, 160 N.H. 419, 433, 999 A.2d 262 (N.H. 2010) ("New Hampshire does not have punitive damages."); *Corona*

damages, many have set law for employer liability that varies widely from the Restatement Rule. Some jurisdictions allow the award of punitive damages against employers for torts committed by employees acting within the scope of their employment with the requisite *mens rea*.²⁵⁷ A number of other jurisdictions, in contrast, by statute or judicial decision are more restrictive of employer liability than is the Restatement Rule.²⁵⁸

To be sure, numerous jurisdictions have adopted the Restatement Rule by statute or judicial decision.²⁵⁹ But few of those jurisdictions, or others, have been influenced by the *Kolstad* modification of the Restatement approach. State court citations of this modification seem to have been limited to dicta in a few decisions interpreting state statutes.²⁶⁰ Not

de Camargo v. Schon, 278 Neb. 1045, 1053, 776 N.W.2d 1, 9 (Neb. 2009) (punitive damages not recoverable for any torts); Barr v. Interbay Citizens Bank of Tampa, Fla., 96 Wash. 2d 692, 697, 635 P.2d 441, 443 (Wash. 1981) (“Under the law of this state, punitive damages are not allowed unless expressly authorized by the legislature.”).

²⁵⁷ See, e.g., Bierman v. Aramark Refreshment Services, Inc., 198 P.3d 877, 884 (Okla. 2008); Dewitsky v. Pittson Lumber and Mfg. Co., 82 Pa. D. & C.4th 18, 22 (Pa.Com.Pl. 2007); Flood ex. rel. Oakley v. Holzwarth, 182 S.W.3d 673 (Mo.App. S.D. 2005); Johannesen v. Salem Hosp., 336 Or. 211, 219, 82 P.3d 139, 142 (Or. 2003); Infinity Products, Inc. v. Quandt, 775 N.E.2d 1144, 1154 (Ind. App. 2002); Wiper v. Downtown Development Corp. of Tucson, 152 Ariz. 309, 310, 732 P.2d 200, 201 (Ariz. 1987); Embrey v. Holly, 293 Md. 128, 135, 442 A.2d 966, 970 (Md. 1982).

²⁵⁸ See, e.g., Cavuoti v. New Jersey Transit Corp., 161 N.J. 107, 113, 735 A.2d 548, 551 (1999) (in suit under state antidiscrimination statute, plaintiff must show “actual participation in or willful indifference to the wrongful conduct on the part of upper management” and “proof that the offending conduct [is] especially egregious.”); Loughry v. Lincoln First Bank, N.A., 67 N.Y.2d 369, 494 N.E.2d 70, 76, 502 N.Y.S.2d 965, 971 (1988) (“The agent’s level of responsibility with the entity should be sufficiently high that his participation in the wrongdoing renders the employer blameworthy, and arouses the ‘institutional conscience’ for corrective action.”); N.C.G.S.A. § 1D-15(c) (North Carolina statute providing: “Punitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another. Punitive damages may be awarded against a person only if that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages, or if, in the case of a corporation, the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages.”)

²⁵⁹ See, e.g., Countrywide Home Loans, Inc. v. Thitchener, 124 Nev. 725, 192 P.3d 243 (Nev. 2008) (applying Nev.Rev.Stat. 42.007); Boykin v. Perkins Family Restaurant, 2002 WL 4548 (Minn. Spp. 2002) (applying, in employee’s sexual harassment case, Minn. Stat. § 549.20, subd. 2 (2000)); Weeks v. Baker & McKenzie, 63 Cal.App.4th 1128, 1150, 74 Cal. Rptr.2d 510, 523 (Cal.App. 1 Dist. 1998) (applying Cal. Civ. Code § 3294(b)); Beriner v. Hyslop, 337 N.W.2d 858, 861 (Iowa 1983); Fitzgerald v. Edelen, 623 P.2d 418, 423 (Colo. App. 1980); Mattyasovszky v. West Towns Bus. Co., 61 Ill.2d 31, 36, 330 N.E.2d 509, 512 (1975).

²⁶⁰ Shoucair v. Brown University, 917 A.2d 418, 433-436 (R.I. 2007) (discussing *Kolstad* in case under Rhode Island’s Fair Employment Practices Act, but deciding not to impose punitive damages on employer because of Rhode Island’s own restrictive common law rule on employer liability); (dicta suggesting that *Kolstad* may have changed law prospectively under Texas Human Rights Act); White v. Ultamar, Inc., 21 Cal.4th 563, 568, 981 P.2d 944, 948 n.2 (1999) (dicta indicating that *Kolstad* may have relevance in future cases under California’s statute on corporate liability for punitive damages, Cal. Civ. Code § 3294(b)). But cf., e.g., Jordan v. Bates Advertising Holdings, Inc., 816 N.Y.S.2d 310, 322 (N.Y. Supp. 2006) (in contrast to *Kolstad*’s interpretation of federal law, “the New York City Human Rights Law has made good faith compliance procedures only a factor to be considered in mitigation of punitive damages, rather than a complete defense”).

surprisingly, because of the variance of state law²⁶¹ and the *Kolstad* decision not providing an adequate unifying principle, the Restatement Third of Employment Law does not attempt to restate general common law on the issue of employer liability for punitive damages.

VI.

Conclusion – A Federal-State Lawmaking Enterprise

These illustrations demonstrate the potential for federal court participation in a dynamic general common lawmaking process, one in which federal court lawmaking through the interpretation of statutes can affect state common law in the same manner as federal common lawmaking in the age of *Swift*, through persuasion, rather than in the manner of the new federal common law under *Erie*, through command. While the illustrations all highlight the kind of doctrinal innovations that are likely to persuade state courts only after being pronounced by the Supreme Court, the lower federal courts also can influence the general common lawmaking process by contributing to the Court's new doctrinal formulations. The *Burlington Northern* Court's fashioning of its holding through the adoption of language from lower court decisions provides an example.²⁶²

This interactive general common lawmaking process also can result in the Court refashioning existing law in the light of state law developments; the Court's role in the search for the best law need not always be one of leadership. The Court's adoption, in *Moragne v. States Marine Lines, Inc.*,²⁶³ of a cause of action for wrongful death under federal maritime

²⁶¹ State statutes that cap punitive damages in at least certain actions also provide a special set policy balance between the deterrent purposes of punitive damages and their economic costs. See, e.g., Mo. Ann. Stat. 538.210 (limiting recovery for noneconomic damages in medical malpractice actions to \$350,000); Ga. Code Ann. 51-12-5.1 (1992) (limiting punitive damages outside of products liability to \$250,000 unless claimant demonstrates an intent to harm); Mass. Gen. Laws ch. 231, § 85K (limiting tort liability of certain charitable organizations to \$20,000 per action); Va. Code Ann. 8.01-38 (limiting punitive damages to \$350,000). Indeed, the caps on compensatory and punitive damages set by the Civil Rights Act of 1991, see note xxx supra, strike a particular balance for punitive damages that Justice O'Connor's modification of the Restatement Rule would seem to upset. Alternatively, a strong argument can be made that the *Kolstad* decision's limitation on punitive damages obviates the continuing need for the caps on Title VII damages. See Harper, supra note, at 494-496.

²⁶² See TAN and note xxx supra. Indeed, the Labor Board's role in the development of the "entrepreneurial" test for employment status, see TAN and notes xxx-xxx supra, and the EEOC's guideline excluding controlling employees from such status, see TAN and notes xxx-xxx supra, both suggest a role for the federal executive branch as well.

²⁶³ 398 U.S. 375 (1970).

common law²⁶⁴ provides a clear example of the Court changing federal law to align with new state law. The Court in *Moragne* relied in part on the states' unanimous adoption of wrongful death actions to overturn its earlier holding in *The Harrisburg*²⁶⁵ rejecting any action for wrongful death under federal maritime common law.²⁶⁶ The fact that the legal developments relied on in *Moragne* were primarily statutory²⁶⁷ does not make it less relevant to the potential for state common law influence on federal judicial lawmaking. Justice Harlan's finely crafted opinion for the *Moragne* Court explained why statutory law, like common law developments in "England,"²⁶⁸ also can express a policy consensus "to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law."²⁶⁹

In *Moragne* the Court exercised the specialized federal common lawmaking authority it retained after *Erie* to formulate general maritime law rather than the authority to construe statutes as in the employment law examples treated in this essay. The distinction between lawmaking authority outside of a statutory structure, like that for federal maritime or admiralty law, and lawmaking authority delegated through general statutory provisions, like those interpreted in this essay's examples, however, is not important to the potential relevance of state law. A statutory provision, like that in § 301 of the Labor Management Relations Act or that of the general provisions of the Sherman Act, can provide as much authority to make law as any constitutional provision. And even more confined statutory authority, like that exercised in this essay's examples, must be responsive to considerations of the statute's purposes in light of developing public policy.

Recognition of the appropriateness of the Court's exercise of statutory-based lawmaking authority in response to state law developments does not entail adoption of Judge Calabresi's

²⁶⁴ Id. at 409.

²⁶⁵ 119 U.S. 199 (1886).

²⁶⁶ 398 at 388-392.

²⁶⁷ Indeed, the state law on which the Court relied was exclusively statutory. Id. at 390 ("In the United States, every state today has enacted a wrongful-death statute.")

²⁶⁸ Id. at 388-89.

²⁶⁹ Justice Harlan drew support from James Landis's classic article, *Statutes and the Sources of Law* in Harvard Legal Essays 213 (1934), reprinted at 2 Harv. J. on Legis. 7 (1965). Justice Harlan, 398 U.S. at 392, quoted Professor Landis's conclusion that "much of what is ordinarily regarded as 'common law' finds its source in legislative enactment." 2 Harv. J. on Legis. at 8. For another insightful exposition of the interaction between statutes and the common law, see Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 Cath. U.L. Rev. 401 (1967).

radical proposal to free courts to reinterpret statutes free of statutory constraints that the legislature has failed to “update” in response to post-enactment developments.²⁷⁰ To varying degrees, statutes do constrain the law making authority delegated to the courts and executive agencies. Even when such constraints, in the face of legislative inaction, frustrate the law’s response to social developments, courts must respect the constitutional prerogatives of Congress. Such respect, however, does not require ignoring the broad gap-filling authority typically delegated by Congress. Though the delegated authority usually may not be as broad as that conveyed by § 301 of the LMRA²⁷¹ or by the Sherman Act,²⁷² few statutes, including employment statutes like Title VII, include language that can or is intended by Congress to anticipate and answer all doctrinal questions. If a statute is not to be implemented by an executive agency that is delegated lawmaking authority to fill the statute’s gaps, those questions must be answered by courts free to consider the answers state courts have provided to cognate questions.

Some might argue that federal lawmaking in the exercise of statutory authority cannot be as dynamic as Justice Harlan’s refashioning of maritime law in *Moragne* because the Court cannot as readily reinterpret a statutory provision as it can a principle of federal common law not derived from a statutory source.²⁷³ Yet, in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*,²⁷⁴ the Court overruled one of its most important early interpretations of § 301(a) of the LMRA²⁷⁵ in light of a different understanding of what could advance “the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor

²⁷⁰ See Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard 1982). Judge Calabresi most succinctly states his proposal as a “hypothetical doctrine:” “Let us suppose that common law courts have the power to treat statutes in precisely the same way that they treat the common law. They can ... alter a written law or some part of it in the same way (and with the same reluctance) in which they can modify or abandon a common law doctrine or even a whole complex set of interrelated doctrines.” *Id.* at 82.

²⁷¹ 29 U.S.C. § 185(a).

²⁷² 15 U.S.C. § 1 et seq.

²⁷³ See, e.g., *Levi*, *supra* note xx, at 523-24.

²⁷⁴ 398 U.S. 235 (1970).

²⁷⁵ *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1970) (holding that the anti-injunction provisions of the Norris-LaGuardia Act bar federal court injunctions of a strike in breach of a no-strike clause in a collective bargaining agreement).

disputes.”²⁷⁶ And the Court, without any Congressional modification of the Sherman Act, has overruled numerous prior decisions in light of a better understanding of how to serve best the statute’s goals of benefitting consumers through efficient competition.²⁷⁷ The employment law doctrines fashioned in the decisions considered in this essay provide as clear examples of judicial lawmaking as do § 301 or Sherman Act decisions. The employment law decisions, like § 301 or Sherman Act decisions, made law; they did not simply determine what law was made by Congress. There is thus no reason why these decisions could not be modified in response to a better understanding of how statutory purposes might be served within intended statutory constraints, and no reason that innovative decisions by state courts could not contribute to that understanding.²⁷⁸

The more common flow of influence in modern judicial lawmaking, nonetheless, is likely to be from the Supreme Court to the state courts. The Supreme Court by virtue of its placement at the top of the American judicial hierarchy is more likely to influence even when it cannot command. This essay has attempted to explain through illustrations drawn from recent employment law developments how the Court retains in an era of statutory law much of the capability to influence state law that it claimed in the general common law era of *Swift*.

²⁷⁶ 398 U.S. at 253. The *Boys Market* Court held that federal courts can issue injunctions to enforce no-strike clauses in collective bargaining agreements where the enjoined strike is over a grievance subject to arbitration under the agreement. *Id.* at 253-254.

²⁷⁷ See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) to hold that vertical maximum price fixing is not a per se violation of § 1 of Sherman Act); *Continental T.V. v. GTE Sylvania*, 433 U.S. 36, 58 (1977) (overruling the per se rule against vertical territorial restraints stated in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)).

²⁷⁸ For instance, state law decisions refining the distinction between employees and independent contractors could provide support for the Supreme Court’s ultimate explicit acceptance of the entrepreneurial control test stated in § 1.01 of the Restatement of Employment Law Third. See TAN and notes xxx-xxx supra.