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Fakers and Floodgates

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FAKERS AND FLOODGATES

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INTRODUCTION

This symposium addresses barriers to Title VII claims. Until recently, scholars and litigants could only wonder whether Supreme Court decisions limiting discrimination law were driven by inherent judicial skepticism about the plaintiff's claims. If this skepticism existed, it remained important to the underlying doctrine, but hidden from view.[1]

The Supreme Court's decision in *University of Texas Southwestern Medical Center v. Nassar* represents a watershed moment in employment

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1. *See generally* Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 ILL. L. REV. 145 (2011) (arguing that some doctrinal changes can best be understood as a shift in underlying factual premises). Although not its main focus, this Article contributes to Professor Sherry's account of foundational facts. Professor Sherry describes these facts as invisible intuitions. *Id.* at 146. This Article discusses how the Supreme Court explicitly articulates its beliefs about fakers and floodgates, thus bringing foundational facts into view.

discrimination litigation.[2] The majority opinion posited that an employee might try to avoid termination by filing a fake retaliation claim against his employer.[3] It also expressed fears about courts, administrative agencies, and employers being subjected to floodgates of litigation.[4] It then explicitly used these concerns about fakers and floodgates to tip substantive discrimination law in an employer-friendly direction.

Nassar expresses three ideas about employees and their claims. First, the sheer volume of cases is enough to favor a more onerous causal standard.[5] Second, enough employees will bring false claims that substantive retaliation doctrine needs to protect courts, administrative agencies, and employers from fakers.[6] Third, existing procedural mechanisms are not adequate to ferret out these false claims.[7] Rather, they must be dealt with by altering the substantive law.

This Article responds to the alleged fakers and floodgates problem. First, it argues that the Court has created reasons to alter the law that are not grounded in congressional intent. Title VII contains numerous provisions that limit the reach of the statute.[8] Beyond these restrictions, Congress never expressed any intention to limit the number of claims heard by the Equal Employment Opportunity Commission (EEOC) or the courts based on concerns about the sheer volume of such claims. Nor did Congress express any intent that the courts use the substantive law to screen for false retaliation cases. Through various provisions in Title VII, Congress established a statute designed to protect employers, employees, and courts. Multiple provisions establish a mechanism to ensure that employees are able to bring claims, that employers can adequately defend against claims, and that courts do not hear claims that can be resolved by the EEOC.[9] Moreover, Title VII was enacted in the presence of several existing devices that can be employed to stem any false claims and any related floodgates of litigation.[10] These devices allow judges to sanction parties who file false claims and to dismiss these cases. While the Supreme Court considers these devices to be adequate to handle the misbehavior of employers, in *Nassar* the Court rejected the possibility that procedural mechanisms are sufficient to deal with false claims filed by employees.

Second, although we argue that the Court's fakers and floodgates arguments are improper, they are also problematic because they are not supported by empirical or other evidence. To the contrary, available evidence

2. 133 S. Ct. 2517 (2013).
3. *Id.* at 2531-32.
4. *See id.*
5. *See id.* at 2531.
6. *See id.* at 2531-32.
7. *See id.* at 2532.
8. *See infra* Part II.
9. *See infra* Part II.
10. *See infra* Part II.

shows that the number of employment-related civil rights claims is decreasing both in raw numbers and in proportion to the number of civil claims filed in federal court.[11] This Article questions whether the judiciary generally, and the Supreme Court in particular, is the best institution to make factual claims about fakers and floodgates.

Third, this Article also challenges the accuracy of the Court's assertion that changing the substantive law will reduce the number of spurious claims. At best, such a change is a blunt instrument for handling frivolous claims. Most importantly, changing the law represents a choice about what counts as legal retaliation and what does not. By requiring plaintiffs to establish but for cause, the Supreme Court has declared that an employer does not retaliate against an employee (in a legal sense) if the causal connection is less strong. In other words, if an employee can show only that retaliatory motive was a motivating factor in her termination, she has not suffered retaliation under Title VII.

Fourth, we discuss the dangers of the floodgates and fakers arguments becoming explicitly embedded in judicial doctrine. Such a default position distracts from the larger congressional goal of preventing retaliation and confuses the underlying legal doctrine. Thus far, two courts have already cited the Court's concerns in their opinions.[12] This Article calls for the EEOC and other organizations concerned with employment discrimination to develop a factual response to arguments about fakers and floodgates before these myths develop into an uncontestable judicial narrative that courts can use to justify other changes in the law.

Finally, we argue that the fakers and floodgates arguments are consistent with a broader problem—courts' infusion of their own views of evidence of discrimination into procedure and substance. Courts use these devices to prevent juries from hearing factually intensive civil rights cases, even when a plaintiff presents evidence of a colorable claim.

Part I explores the *Nassar* decision, specifically focusing on the portion of the opinion where the Supreme Court makes arguments about the number of retaliation claims and about spurious claims. Part II discusses congressional intent related to retaliation law and shows that Congress did not intend to use the substantive law to reduce the number of claims beyond limits already contained in the statute. Part III uses empirical and other evidence to factually challenge the Court's intuitions about fakers and floodgates. Part IV explores broader problems with explicitly imbedding the fakers and floodgates tropes into substantive law. Finally, in Part V, we show how this recent explicit turn by the Court to fakers and floodgates is consistent with a broader pattern of the

11. *See infra* Part III.A.

12. Childs-Bey v. Mayor of Balt., No. TJS-10-2835, 2013 WL 5718747, at *2 (D. Md. Oct. 17, 2013); Foster v. Univ. of Md. E. Shore, No. TJS-10-1933, 2013 WL 5487813, at *2 (D. Md. Sept. 27, 2013); *see also* Chase v. U.S. Postal Serv., No. 12-11182-DPW, 2013 WL 5948373, at *11 (D. Mass. Nov. 4, 2013) (citing concerns in FMLA context).

courts using their own views of evidence of discrimination to take civil rights cases away from juries.

I. BACKGROUND

Title VII is a federal statute that prohibits an employer from taking certain actions based on an employee's race, color, national origin, sex, or religion.[13] In Title VII, Congress explicitly acknowledged that some employers discriminate against employees based on these protected traits and that a litigation remedy should exist for such improper conduct.[14] Congress also specifically provided protection against retaliation for employees who complain about discrimination and later face an adverse action.[15]

In *Nassar*, the Supreme Court determined the causal standard that a plaintiff is required to establish in Title VII retaliation cases.[16] *Nassar* required the Court to make a choice between three possible interpretations of Title VII, each reflecting a different choice about Title VII's text, Court precedent, and the effects of the 1991 amendments to Title VII's retaliation provisions.[17] The Court held that plaintiffs in Title VII retaliation cases were required to establish "but for" cause.[18] This choice favors employers because it requires the plaintiff to bear the burden of persuasion related to causation and makes that causal burden a "but for" standard, rather than the less onerous "motivating factor" standard. Indeed, in an earlier Title VII case, the Court noted that to require the plaintiff to establish "but for" cause would mean that many plaintiffs would be unable to prevail, even though their protected traits played a role in an

13. 42 U.S.C. § 2000e-2(a) (2011). Fakers and floodgates claims also potentially affect claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2012), and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (2011). This Article focuses primarily on Title VII.

14. *See* 42 U.S.C. § 2000e-2(a).

15. *See* 42 U.S.C. § 2000e-3(a).

16. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S.Ct. 2517, 2522-23 (2013).

17. In 1989, the Court interpreted Title VII to require a plaintiff to establish that a protected trait was a substantial factor or motivating part in a decision. Price Waterhouse v. Hopkins, 490 U.S. 228, 240-41, 250 (1989) (plurality); *id.* at 259 (White, J., concurring) (using a substantial factor analysis); *id.* at 265 (O'Connor, J., concurring) (using a substantial factor analysis). The Court held that an employer could avoid liability by establishing that it would have made the same decision absent consideration of the protected trait. *Id.* at 258 (plurality); *id.* at 259-60 (White, J., concurring); *id.* at 267 (O'Connor, J., concurring). In 1991, Congress amended Title VII by codifying the motivating factor standard, but altering an employer's affirmative defense to liability. If the employer established the same decision defense, it would not escape liability, but would face a limited scope of damages. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 185 (2009) (Stevens, J., dissenting). In 2009, the Court held that plaintiffs alleging age discrimination must establish "but for" cause. *Id.* at 180 (majority opinion).

18. *Nassar*, 133 S.Ct. at 2528.

employment outcome.[19]

The Court bolstered its statutory construction with a section of the opinion dedicated to administrability concerns. The Court noted that causation standards "have central importance to the fair and responsible allocation of resources in the judicial and litigation systems."[20] It recited that the number of retaliation claims filed with the EEOC had doubled from 16,000 in 1997 to 31,000 in 2012.[21]

Next, the Court stated that it chose the more employer-friendly causation standard because to do otherwise would be to "contribute to the filing of frivolous claims, which would siphon resources from efforts by employer[s], administrative agencies, and courts to combat workplace harassment."[22] Employees who become aware of a pending negative employment action may be tempted to raise unfounded discrimination claims to create a false retaliation claim.[23] The Court provided an example of the kind of person who would be able to take advantage of a lower causal standard. Writing for the majority, Justice Kennedy hypothesized:

> Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation. If respondent were to prevail in his argument here, that claim could be established by a lessened causation standard, all in order to prevent the undesired change in employment circumstances. Even if the employer could escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage. Cf. *Vance v. Ball State Univ.*, *post*, at 9-11. It would be inconsistent with the structure and operation of Title VII to so raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent. See Brief for National School Boards Association as *Amicus Curiae* 11-22. Yet there would be a significant risk of that consequence if respondent's position were adopted here.[24]

The Court gave one final reason for the establishment of a more difficult causation standard. The summary judgment mechanism would not adequately ferret out these claims, even though employers could escape judgment after

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19. *See Price Waterhouse*, 490 U.S. at 241 (plurality); *see also* David Sherwyn, Michael Heise & Zev J. Eigen, *Experimental Evidence that Retaliation Claims are Unlike Other Employment Discrimination Claims*, 44 SETON HALL L. REV. 455, 486–500 (2014) (discussing mock juror responses to different causal standards).

20. *Nassar*, 133 S.Ct. at 2531.

21. *Id.*

22. *Id.* at 2531-32.

23. *Id.*

24. *Id.* at 2532.

trial.[25]

These passages convey three ideas. First, the volume of retaliation claims justifies a shift in the substantive law. Second, enough people would file fake retaliation claims if the Court adopted a motivating factor causal standard that the substantive law must respond to protect the resources of employers, administrative agencies, and courts. Third, existing sanctions and other mechanisms are inadequate to address the stated problems and the substantive change does address them.

Nassar is striking because the choice it makes will hamper legitimate claims by plaintiffs. A simplified example of an employment decision illustrates the problem. Sally's supervisor is Bob. Sally complains to the human resources department that Bob is sexually harassing her. Bob gets angry and starts micromanaging Sally's work. Bob tells his supervisor Larry that Sally is a problem employee and that she is making mistakes. Larry, who is not aware of the sexual harassment allegation, begins to think of Sally as a problem employee. Bob reports to Larry that Sally is fifteen minutes late for work two days in a row. Although Larry would normally overlook such an infraction, he decides to fire Sally. Before he does, he asks Bob whether Sally should be fired. Bob also recommends that Sally be fired.

While it is clear that the sexual harassment complaint played a role in Sally's termination, it is unclear whether Sally could establish "but for" cause. This difficulty occurs, at least in part, because the "but for" construct does not work well for internal states of mind and in situations involving multiple decision makers. By choosing the "but for" standard to address fakers and floodgates concerns, the Court chose a blunt instrument. The substantive law may limit or deter fakers, but it will also limit and deter legitimate claims. The more important question, which the Court did not address, is whether courts should recognize a retaliation claim in such circumstances to bolster the effectiveness of the statute's anti-discrimination protections and to encourage plaintiffs to raise claims.

Importantly, altering the substantive standard changes what the courts count as constituting retaliation. If an employer takes an adverse action in part because of a retaliatory motive, that action will not count as legal retaliation unless the aggrieved person can prove the retaliatory motive was a "but for" cause of the adverse action. According to the Court, if retaliatory motive only plays a motivating factor in a decision, it is not enough for the law to recognize the result as retaliation.[26]

It could be argued that the Court's discussion of fakers and floodgates is simply dicta. Support for this argument is found in the Court's summary, which does not include a reference to fakers and floodgates but rather a discussion of

25. *Id.*

26. *See id.* at 2533.

only statutory construction.[27] However, the dissent itself recognized the Court's "zeal to reduce the number of retaliation claims filed against employers" apparently drove the Court's holding in favor of the more onerous causation standard.[28] In any event, even if dicta, the fakers and floodgates arguments suggest the influence of improper motivations over the Court's holding. Lower courts already have cited these passages from *Nassar*.[29]

II. CONGRESSIONAL INTENT

In *Nassar*, the majority makes three separate claims. First, it asserts that it can consider the volume of litigation to decide the merits of the underlying statutory dispute.[30] Second, it states that the volume of false claims affects the resources of courts, administrative agencies, and employers and justifies choosing one causal, substantive standard over another.[31] Third, it argues that existing sanction and procedural mechanisms are not adequate to handle these concerns and a more onerous causal standard will be.[32]

The Court's claim about the sheer volume of litigation is problematic because it ignores congressional intent. Congress created the Title VII retaliation provisions to protect people who complain about discrimination and explicitly provided a private right of action for retaliation victims.[33] So, Congress has directed the courts to hear and resolve such claims. No congressional authority in Title VII or otherwise permits the Court to shift the substantive law to decrease the workload of the federal courts.[34]

Congress inserted numerous procedural and substantive provisions in Title VII that limit the number of claims, and there is no indication that it intended to allow the courts to further limit the volume of claims. Before filing suit in court, plaintiffs must file a charge of discrimination with the EEOC or state agency within a specified time and then must file the lawsuit within a specified time period.[35] If a plaintiff does not file the charge or lawsuit within the

27. *Id.* at 2532-33.

28. *Id.* at 2547 (Ginsburg, J., dissenting).

29. *E.g.*, Childs-Bey v. Mayor of Balt., No. TJS-10-2835, 2013 WL 5718747, at *2 (D. Md. Oct. 17, 2013); Foster v. Univ. of Md. E. Shore, No. TJS-10-1933, 2013 WL 5487813, at *2 (D. Md. Sept. 27, 2013); *see also* Chase v. U.S. Postal Serv., No. 12-11182-DPW, 2013 WL 5948373, at *11 (D. Mass. Nov. 4, 2013) (citing concerns in FMLA context).

30. *See Nassar*, 133 S.Ct. at 2531.

31. *Id.* at 2531-32.

32. *See id.* at 2532.

33. *See, e.g.*, 42 U.S.C. § 2000e-3(a) (2011).

34. Further, the Supreme Court does not typically rely on floodgates arguments when Congress explicitly provides for a private right of action and the issue is whether to allow claims under that explicit right of action. *See generally* Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007 (2013) (discussing how courts use floodgates arguments in various contexts).

35. 42 U.S.C. § 2000e-5(e)(1), (f)(1). The requirements under the ADEA vary slightly

required period, the claim is usually barred.[36] These time periods are short. Plaintiffs must file a charge within 180 or 300 days from the discriminatory act and must file their claim in court within ninety days of receiving a right-to-sue letter.[37] Moreover, after hearing from the employee and the employer, the EEOC or the state agency may mediate the claim and/or find that there is no reasonable cause for the claim.[38]

Congress has permitted only certain claims to proceed. For example, if the charge filing requirements are not met, the claims generally cannot proceed.[39] Also, plaintiffs may only bring claims against employers who employ at least fifteen employees.[40] The person bringing the claim must be an individual that falls within the statutory protections, such as an employee or former employee.[41] Often volunteers, independent contractors, and other similarly situated people are not protected by Title VII, even if they are subjected to discrimination.[42]

Title VII explicitly provides numerous defenses and affirmative defenses to employer liability. Under the bona fide occupation qualification (BFOQ) provision, the employer may make employment decisions based on a person's protected class in limited instances.[43] Title VII protects certain seniority systems from statutory reach, even though they arguably perpetuate past discrimination.[44] An employer may prevail on a disparate impact claim if its job criteria are job-related and consistent with business necessity.[45]

Congress also limited the relief available under Title VII. Title VII caps the total combined compensatory and punitive damages a plaintiff may recover dependent upon the number of employees employed by the defendant.[46] The highest cap, which applies to employers with more than 500 employees, is

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but still require the filing of a charge. *See, e.g.*, Lowe v. Am. Eurocopter, LLC, No. 1:10CV24-A-D, 2010 WL 5232523, at *2 (N.D. Miss. Dec. 16, 2010) (discussing how Title VII requires plaintiffs to receive a right-to-sue letter from the EEOC while ADEA does not contain this requirement).

36. *See* 42 U.S.C. § 2000e-5(e)(1).

37. 42 U.S.C. § 2000e-5(e)(1), (f)(1).

38. *Filing a Charge of Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://eeoc.gov/employees/charge.cfm (last visited Apr. 22, 2014) (describing various ways to resolve a charge).

39. *See, e.g.*, Houston v. Saint John's Mercy Skilled Nursing Ctr., No. 94-2141, 1994 WL 567475, at *1 (8th Cir. Oct. 18, 1994).

40. *See* 42 U.S.C. § 2000e(b).

41. *See* 42 U.S.C. § 2000e-2(a).

42. *E.g.*, Broussard v. L.H. Bossier, Inc., 789 F.2d 1158, 1160-61 (5th Cir. 1986) (holding that independent contractors are not protected by Title VII); Smith v. Berks Cmty. Television, 657 F. Supp. 794, 796 (E.D. Pa. 1987) (holding that volunteers are not protected by Title VII).

43. 42 U.S.C. § 2000e-2(e).

44. 42 U.S.C. § 2000e-2(h).

45. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

46. 42 U.S.C. § 1981a(b)(3).

$300,000.[47] The statute also explicitly defines the type of compensatory damages available under it.[48]

Although the *Nassar* majority purports to be following congressional intent in other portions of the opinion, the Court does not consider congressional intent related to its floodgates or fakers claims. This omission is problematic in its own right, but also points to a larger problem with how the Court engages in statutory interpretation. In *Nassar*, the Court considered congressional intent to be evidenced in the choice of the words "because of" and Congress's failure to explicitly amend Title VII's retaliation causal standard in 1991.[49] The Court completely ignores how Title VII's text, when taken as a whole, balances employee, employer, agency, and court interests in ways that express intent related to administrability.

Nassar's second and third assertions are that the courts must use substantive law to reduce spurious claims because available procedural and substantive mechanisms are inadequate.[50] However, Congress already addressed these concerns within Title VII. As discussed in prior paragraphs, Congress set forth several mechanisms in Title VII to ensure that only a limited number of claims would proceed through the courts and plaintiffs who prevailed would receive only certain relief. Moreover, Congress enacted Title VII against a backdrop of available mechanisms giving courts the power to dismiss claims with no evidence of discrimination and sanction parties who brought such claims.

Facets of the administrative process and the statutory language address frivolity concerns. The charge of discrimination is notarized under penalty of perjury.[51] Title VII's fee-shifting provisions can be used to punish a plaintiff for bringing a frivolous claim.[52] A court can award an employer attorneys' fees and costs if it finds that the plaintiff's claim was frivolous, unreasonable or groundless, and the defendant is not required to establish the plaintiff's subjective bad faith to obtain these fees and costs.[53]

Congress enacted Title VII against a backdrop of existing mechanisms for judicial case management. Federal judges possess a wide range of tools to dismiss false claims and to sanction parties who raise them. Before discussing these mechanisms, a caveat is necessary. We do not advocate that courts broadly use procedural mechanisms and sanctions to dismiss employment discrimination claims. Rather, we discuss tools that courts have to respond to

47. 42 U.S.C. § 1981a(b)(3)(D).

48. 42 U.S.C. § 1981a(b)(3).

49. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S.Ct. 2517, 2527-31 (2013).

50. *Id.* at 2532.

51. *Charge of Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/foia/forms/upload/form_5.pdf (last visited Apr. 22, 2014).

52. 42 U.S.C. § 2000e–5(k).

53. EEOC v. Great Steaks, Inc., 667 F.3d 510, 517 (4th Cir. 2012).

plaintiffs who bring false or meritless claims in court.

The Federal Rules of Civil Procedure provide a number of sanction mechanisms. Under Rule 11, a party's or attorney's signature on a document represents that the document is not being presented for improper purposes and that the claims are warranted by existing law or non-frivolous arguments to change the law, and that factual contentions have evidentiary support.[54] Available penalties include payment of attorneys' fees or other expenses to the opposing party related to the violation.[55] Those signing discovery responses and requests make similar representations, with sanctions available for violating these representations.[56] Sanctions are also available under Rule 37 for discovery violations, which would likely occur if the plaintiff fabricated her claim.[57] Similarly, attorneys may be sanctioned pursuant to a federal statute, and federal judges may hold parties or attorneys in contempt of court.[58]

Moreover, attorneys who file false claims may be referred to bar authorities for sanctions, and federal courts may revoke the ability of an attorney to appear before the court. Outside of specific sanction mechanisms, the courts possess inherent authority to manage cases and issue sanctions.[59]

Although other procedural devices are not specifically directed toward false claims, they can be used to resolve claims that lack merit. Early in a case, a defendant can seek dismissal under Rule 12(b)(6) if the plaintiff's complaint does not provide facts to establish a plausible claim.[60] A defendant may seek summary judgment under Rule 56 prior to trial,[61] judgment as a matter of law under Rule 50(a) during trial,[62] and renewed judgment as a matter of law after trial under Rule 50(b).[63] Moreover, if the case reaches a jury, the jury is not required to believe evidence offered by the plaintiff and can make credibility determinations at trial. Together, this is a powerful set of devices to limit false claims of which Congress was aware when it enacted and amended Title VII.

Indeed, in an analogous context, a line of Supreme Court cases has asserted that these mechanisms are strong enough to curb employer misconduct in employment discrimination cases. In *St. Mary's Honor Center v. Hicks*, the

54. FED. R. CIV. P. 11(b).

55. FED. R. CIV. P. 11(c)(4).

56. FED. R. CIV. P. 26(g)(1), (3).

57. FED. R. CIV. P. 37.

58. 28 U.S.C. § 1927 (2012).

59. *See* Shepherd v. Am. Broad. Cos., 62 F.3d 1469, 1472 (D.C. Cir. 1995) ("As old as the judiciary itself, the inherent power enables courts to protect their institutional integrity and to guard against abuses of the judicial process with contempt citations, fines, awards of attorneys' fees, and such other orders and sanctions as they find necessary, including even dismissals and default judgments.").

60. FED. R. CIV. P. 12(b)(6).

61. FED. R. CIV. P. 56.

62. FED. R. CIV. P. 50(a).

63. FED. R. CIV. P. 50(b).

Court was faced with a case in which the district court judge determined that the employer had not provided the real reasons for its decisions to demote and dismiss the plaintiff.[64] The trial court analyzed the case under the three-part, burden-shifting *McDonnell Douglas* test.[65] Under this test, a plaintiff could establish a rebuttable presumption of discrimination by proving the elements of a prima facie case.[66] The test then required the defendant to articulate a legitimate, non-discriminatory reason for its actions.[67] The district court found that the employer articulated a false reason for the employee's demotion and dismissal.[68] In determining how this should affect the discrimination analysis, the Supreme Court allowed the employer to meet its burden of production in the *McDonnell Douglas* test by articulating a reason for acting that was not the true reason.[69] Stated another way, a defendant can meet its obligations under the second step of the *McDonnell Douglas* test even if it lies about why it took an employment action.

The Court believed that fact-finders were capable of determining whether the employer's false reason for its conduct was a cover for unlawful discrimination.[70] In the case, the Court recognized that civil and criminal penalties exist for perjury.[71] The Court set forth reasons that employers might present evidence that does not represent the real reason for their actions.[72] It stated that discrimination cases often involve complex determinations about actors' state of mind and that the employer must often rely on information provided to it by low-level employees.[73] The Court indicated that it was absurd to paint all employers who presented unpersuasive testimony as liars or perjurers.[74]

The Court's belief that courts can handle analogous employer misconduct through typical procedural devices is also illustrated in the after-acquired evidence context. In *McKennon v. Nashville Banner Publishing Co.*, the Court created an equitable defense to damages called the after-acquired evidence defense.[75] If the employer is able to prove that the employee engaged in wrongdoing that would have resulted in her termination, the employer can limit

64. 509 U.S. 502, 508 (1993).

65. *Id.* at 506.

66. *Id.* at 506-07.

67. *Id.*

68. *Id.* at 508.

69. *Id.* at 510-11.

70. *Cf. id.* at 521-22 (explaining that devices other than Title VII exist to deter employers' false statements and that plaintiffs should not be expected to refute reasons for termination not articulated by employers).

71. *Id.* at 521.

72. *Id.* at 520-22.

73. *Id.* at 520.

74. *Id.* at 521.

75. 513 U.S. 352, 362-63 (1995).

its damages even if the employee establishes the employer discriminated against her.[76] The Court indicated the "not . . . insubstantial" concern that employers might inappropriately undertake extensive discovery into an employee's background or performance to find after-acquired evidence.[77] However, the Court was certain that attorneys' fees provisions and the Federal Rules of Civil Procedure were adequate to meet these concerns.[78]

When the *Nassar* Court used the volume of claims and the possibility of frivolous claims to shift statutory interpretation, it failed to explicitly consider or even balance how Title VII's language reflects congressional intent regarding these issues. Nor did it consider that Congress created and amended Title VII against a backdrop of robust judicial mechanisms for controlling spurious claims.

III. UNSUPPORTED ARGUMENTS ABOUT FALSE CLAIMS AND FLOODGATES

Nassar makes factual arguments related to how the number of retaliation claims will affect the resources of three entities: employers, administrative agencies, and courts.[79] As described above, Congress has established a cause of action for employment discrimination and provided numerous mechanisms within Title VII to limit claims. Also as described, it was aware of other mechanisms outside of Title VII to assess claims and punish false claims. In other words, through these mechanisms Congress chose to give the courts certain mechanisms to ferret out claims but did not give them the authority to otherwise assess whether there were too many claims of discrimination. Assuming the Court has any authority to speak on this topic, this Part discusses how the Court is not competent to make this argument.

It is important to remember that the only empirical evidence that the Court relied upon was the number of charges of retaliation filed with the EEOC over time.[80] The Court did not rely on a factual record provided by the parties, the government, or amici. Although the argument made by the Court is similar in some ways to other arguments about floodgates, these floodgates arguments are particularly egregious here because the Court is attempting to use such arguments to shift the substantive law for a claim explicitly provided for by the statutory scheme and also to trump the interpretation of the law advocated by the executive branch.[81]

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76. *Id.*

77. *Id.* at 363.

78. *Id.* It is possible that a plaintiff with a spurious claim could slip through all of these mechanisms. But this is not the correct concern or the concern raised by the Supreme Court. The question is whether there are enough of these individuals to warrant tipping substantive law in favor of the employer and against some retaliation victims.

79. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S.Ct. 2517, 2531 (2013).

80. *Id.*

81. *See also* Michael E. Solimine, *The Solicitor General Unbound: Amicus Curiae*

As a practical matter, it is difficult to understand how the Supreme Court Justices could possess any accurate insight into the number of false retaliation cases filed in federal courts. The Court considered only a handful of retaliation cases over the span of a decade.[82] The cases the Supreme Court considered involved large legal questions about how to interpret the underlying statute. The Supreme Court is not a court that regularly considers the veracity of the underlying claims. The *Nassar* case itself does not present a spurious claim. In *Nassar*, the jury found that the employer retaliated against Dr. Nassar, and the Fifth Circuit Court of Appeals affirmed that decision.[83] It is difficult to understand how the Court would possess any particular knowledge or feel for retaliation cases in general, let alone understand what the typical retaliation case in a federal district court looks like.

The Supreme Court possesses no information about what claims are made in administrative filings and how many of them are spurious. Even if it did, it is unclear whether the Supreme Court should be the entity determining whether there are too many spurious claims affecting the EEOC's workload. Such a finding depends upon information the Supreme Court does not possess, such as the workload of the EEOC. It also depends on value judgments that the agency should be able to make for itself in line with its congressional mandate, such as whether encouraging reporting of all potential retaliation is desirable, even if this leads to non-cognizable complaints.

More importantly, the Court did not engage in any credible fact-finding to interrogate the correctness of its assumption. Based on its citation, it appears that someone simply went to the EEOC's website and found the number of retaliation charges filed under Title VII.[84] Whoever visited the website purported to do so on June 20, 2013, after the oral argument in the case, and just four days prior to the Court issuing its decision on June 24, 2013.[85]

The Court did not ask the parties to brief issues related to administrability and thus did not have the benefit of a factual record developed through the adversarial process. It did not ask the EEOC or the government for information about spurious claims. It did not ask the EEOC about the information available on its web site and what the data actually reflects. It did not rely on any

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Activism and Deference in the Supreme Court, 45 ARIZ. ST. L.J. 1183, 1191-92 (2013) (discussing court deference to briefs filed by the Solicitor General). *See generally* Levy, *supra* note 34, at 1009-10 (discussing how courts use floodgates arguments in various contexts). We are not arguing that the Court was required to defer to the executive agency's position regarding the underlying substantive law. However, since the Court professed administrability concerns related to administrative agencies, it is problematic that the Court did not look to the administrative agency for information about whether it faced a floodgate of claims or a floodgate of spurious claims.

82. *See, e.g.*, CBOCS W., Inc. v. Humphries, 553 U.S. 442 (2008); Gómez-Pérez v. Potter, 553 U.S. 474 (2008).

83. *Nassar*, 133 S. Ct. at 2524.

84. *Id.* at 2531.

85. *Id.*

available empirical or other evidence to support its intuition.

The rest of this Part explores how the "evidence" the Court used in *Nassar* does not support its factual claims and explores how available evidence seriously undermines them. Finally, it questions whether the sheer volume of claims is a valid argument.

A. No Empirically Verifiable Flood

In *Nassar*, the Court noted the ever-increasing number of retaliation claims is itself problematic.[86] This Subpart explores whether the federal courts are being inundated with retaliation cases.

The only data the Court cited in support of its argument was the increase in the number of retaliation charges filed with the EEOC, which had nearly doubled from 16,000 in 1997 to 31,000 in 2012.[87] A near doubling of charges sounds like a significant increase, but the number of charges filed with the EEOC does not show that the court system faces floodgates of litigation. These charge filing numbers do not provide any information about the number of cases actually filed in court.

As described above, before a plaintiff can file a federal discrimination lawsuit, she is required to file a charge of discrimination with the EEOC or a comparable state agency.[88] One of the purposes of the EEOC administrative process is to help individuals understand whether their claims might constitute discrimination and to mediate claims between employers and employees. In 2012, for example, the EEOC conducted more than 11,000 mediations.[89] The number of charges filed provides little information about cases filed in court. One key effect of the EEOC process is that the number of cases filed in court is dramatically lower than the number of charges filed with the administrative agencies.

The total number of civil rights employment cases filed in federal court has declined over the past decade. The Federal Judicial Center maintains data regarding the type and number of cases filed in U.S. district courts. In the twelve-month period ending in March of 2003, the FJC reported more than 20,000 civil rights employment cases.[90] In the twelve-month period ending in

86. *Id.* at 2531-32.

87. *Id.*

88. 42 U.S.C. § 2000e-5(e)(1), (f)(1) (2011).

89. *EEOC Mediation Statistics FY 1999 through FY 2012*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/mediation/mediation_stats.cfm (last visited May 16, 2014).

90. U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT, DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2003, at tbl.C-2 (2003), *available at* http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2003/tables/C02Mar03.pdf [hereinafter 12-MONTH PERIOD ENDING MARCH 31, 2003].

March of 2012, the number of civil rights employment cases was 15,275.[91] In the twelve-month period ending in March of 2013, there were 14,078.[92] Data from other years also shows the declining number of civil rights employment cases filed in federal court.[93] Likewise, the number of employment trials in federal court also has declined substantially over time.[94]

These declines take on added significance when compared to the total civil case load of federal district courts, which has increased. In the twelve-month period ending in March of 2003, the Federal Judicial Center reported 256,858 civil cases filed in federal district court.[95] In the twelve-month period ending in March of 2012, 285,260 civil cases were commenced in federal court.[96] In the twelve-month period ending in March of 2013, there were 271,950.[97] Commentators have noted the sharp drop in employment discrimination claims since 1999.[98]

Instead of a floodgate of litigation, these numbers show a decline in the number of civil rights employment cases brought in federal court. It is true that the federal courts witnessed a large increase in the number of claims filed in federal court between 1990 and 1997.[99] But, in the last decade, the courts have

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91. U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT, DURING THE 12-MONTH PERIODS ENDING MARCH 31, 2012 AND 2013, at tbl.C-2 (2013), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C02Mar13.pdf [hereinafter 12-MONTH PERIODS ENDING MARCH 31, 2012 AND 2013] . The FJC separately reported employment cases under the ADA in 2012 and 2013. *Id.*

92. *Id.*

93. *See Caseload Statistics Archive*, U.S. COURTS, http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics_Archive.aspx (last visited May 16, 2014); *see also* U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, BY NATURE OF SUIT, DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2008 THROUGH 2012, at tbl.C-2A (2013), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C02ASep12.pdf (showing caseloads for civil rights employment cases in the 13,000-15,000 range from 2008 through 2012); U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, BY NATURE OF SUIT, DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 1999 THROUGH 2003, U.S. COURTS, at tbl.C-2A (2003), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2003/appendices/c2a.pdf (showing caseloads for civil rights employment cases in the 20,000-22,000 range).

94. Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, CORNELL L. SCH. LEGAL STUD. RES. PAPER SERIES, Nov. 2013, at 4, *available at* http://ssrn.com/abstract=2354386.

95. *See* 12-MONTH PERIOD ENDING MARCH 31, 2003, *supra* note 90, at tbl.C-2.

96. *See* 12-MONTH PERIODS ENDING MARCH 31, 2012 AND 2013, *supra* note 91, at tbl.C-2.

97. *Id.*

98. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 117-18 (2009).

99. *See* MARIKA LITRAS, BUREAU OF JUSTICE STATISTICS, CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1990-98, at 4 tbl.3 (2000), *available at* http://www.bjs.gov/content/pub/pdf/crcusdc.pdf.

seen fewer discrimination claims in both raw numbers and as a percentage of their docket.

It is possible that the majority opinion was trying to make a claim directed particularly at retaliation claims and not both retaliation and discrimination claims. However, it cites no evidence in support of this claim. Even if there is a chance that there is an increase in the number of retaliation claims filed in court, these increases are part of an overall decrease in the number of federal employment claims being filed both as a percentage of the federal docket and in raw numbers.

The factual claim made by the majority in *Nassar* is even less compelling when the argument is considered as a whole. The majority rejected a motivating factor standard for Title VII retaliation claims and argued that if it chose this standard, a floodgate of litigation would result. The Court ignores that lower federal courts applied the motivating factor standard to Title VII retaliation claims, especially after the Supreme Court issued its opinion in *Price Waterhouse* in 1989.[100] In *Price Waterhouse*, the Supreme Court interpreted Title VII's "because of" language to allow a plaintiff to prevail by establishing a protected trait played a motivating factor in a decision.[101] Moreover, after the 1991 amendments to Title VII, the EEOC issued guidance applying the motivating factor standard to Title VII retaliation claims, which courts followed.[102] As one commentator noted, "it is clear that all circuits were, at least at one time, willing to entertain mixed-motive Title VII retaliation claims."[103] Even after the *Gross* decision, some circuits continued to apply a motivating factor analysis in Title VII retaliation cases.[104]

The available data provides information about how many charge and court filings occur with the lower "motivating factor" causal standard in place in several circuits. In some sense, the *Nassar* majority mischaracterizes its own argument. In circuits that previously used the motivating factor standard, the Court is actually arguing that its new standard will reduce the number of claims filed below the current number, not stave off an impending flood of litigation.

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100. James Concannon, *Reprisal Revisited:* Gross v. FBL Financial Services, Inc. *and the End of Mixed-Motive Title VII Retaliation*, 17 Tx. J. C.L. & C.R. 43, 55-56 (2011) (discussing cases).

101. Price Waterhouse v. Hopkins, 490 U.S. 228, 240-41, 250 (1989) (plurality); *id.* at 259 (White, J., concurring) (using a substantial factor analysis); *id.* at 265 (O'Connor, J., concurring) (using a substantial factor analysis).

102. Univ. of Tx. Sw. Med. Ctr. v. Nassar, 133 S.Ct. 2517, 2533 (2013); Brief for the United States as Amicus Curiae Supporting Respondent at 8-9, *Nassar*, 133 S.Ct. 2517 (2013) (No. 12-484), 2013 WL 1462056, at *9.

103. Concannon, *supra* note 100, at 56-57.

104. *See, e.g.*, Bobo v. United Parcel Serv., 665 F.3d 741, 756–57 (6th Cir. 2012) (analyzing Title VII and § 1981 claims for retaliation using motivating-factor standard and *Price Waterhouse* burden shifting); Coleman v. Donahoe, 667 F.3d 835, 860 (7th Cir. 2012); Saridakis v. S. Broward Hosp. Dist., 468 Fed. Appx. 926, 931 (11th Cir. 2012); Smith v. Xerox Corp., 602 F.3d 320, 329-30 (5th Cir. 2010).

Additionally, making the retaliation standard higher does not necessarily reduce the total number of cases filed in federal court. This is because some plaintiffs file both discrimination and retaliation claims in the same complaint. For example, a plaintiff who experienced discrimination and then faced a negative consequence after complaining to the employer about discrimination would be able to allege both discrimination and retaliation. Also, the *Nassar* decision did not alter the Title VII discrimination causal standard, which permits the plaintiff to establish that a protected trait was a motivating factor in an employment decision.

Perhaps most importantly, even if there was empirical evidence to support a potential rise in the number of retaliation claims filed in federal court, there is no evidence that Congress wanted the courts to shift the substantive law based on the sheer volume of such litigation.

B. The Spurious Claims' Assertion

The *Nassar* majority also makes a second factual claim. It argues that choosing the motivating factor standard will lead to the filing of spurious claims that will affect the resources of employers, administrative agencies, and the courts. This combined fakers and floodgates argument depends on the underlying intuition that a significant number of employees make spurious allegations. This Part highlights the untested nature of the Justices' intuitions and uses empirical and other data to highlight flaws in these intuitions.

The Supreme Court did not support its claim that there are enough false discrimination claims to warrant changing the substantive law. The majority opinion in *Nassar* cites no empirical or other evidence regarding the number or likelihood of false cases or the costs to the courts, EEOC, or employers. Again, the only data the Court invoked was the increased retaliation charge filing with the EEOC.[105] The number of EEOC charges does not provide any information about the number of *false* claims filed.

As the prior Part discusses in detail, many federal courts used the lower causal standard for retaliation claims, and the data shows that the number of civil rights employment cases filed in federal court declined over time.[106] In light of this data, it is difficult to make an argument that the courts will be inundated with frivolous claims if the Court kept the standard that many courts were already using for Title VII retaliation claims.

The Supreme Court's argument depends on the intuition that the significant increase in Title VII retaliation charges must somehow reflect a tendency for retaliation claims to be frivolous and that this frivolity relates to the substantive causal standard. The Court failed to consider how its own case law clarified the boundaries of retaliation law and how the EEOC's efforts affected charge

105. *Nassar*, 133 S. Ct. at 2531.

106. *See supra* Part III.A.

filing.[107] Practitioners have noted that pre-*Nassar* changes in retaliation law made it more difficult for employers to obtain summary judgment on such claims and expanded the fact scenarios that might create liability.[108] They also noted that an increased focus by the EEOC on retaliation claims might be responsible for the increased charges.[109]

Available social science evidence actually shows that employees are reluctant to believe that they have been discriminated against and are reluctant to complain formally. For example, Professors Deborah Brake and Joanna Grossman's work illustrates that only a small percentage of women who experience harassment in the workplace file a formal complaint with their employer.[110] People are reluctant to make discrimination claims because they fear retaliation.[111]

C. The Argument Does Not Hold

The fakers and floodgates arguments are not credible, even if one ignores the lack of empirical or other evidence to support them. Recall what the Court claimed. It claimed that if it chose the motivating-factor causal standard, the courts would be inundated with claims, some of them spurious.[112]

Let us return to Justice Kennedy's hypothetical in *Nassar* about employees who fake claims, paying specific attention to what one must believe about spurious claims and how they affect particular entities.[113] The hypothetical Justice Kennedy posits is not supported by reference to any objective evidence. Indeed, the hypothetical strains credulity.

To believe that a large number of spurious claims affect the federal courts, you must believe that a substantial number of employees understand that they are about to face a negative employment action. These same people must then understand discrimination and retaliation law and be clever enough to manufacture both a discrimination and a retaliation claim. These same claimants must then successfully navigate the charge filing process described above. Justice Kennedy's hypothetical also requires the reader to believe that there are a significant number of people willing to lie to both an administrative agency and a court.

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107. *See* Crawford v. Metro. Gov't of Nashville and Davidson Cnty., Tenn., 555 U.S. 271 (2009); Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

108. David Long-Daniels & Peter N. Hall, *Risky Business: Litigating Retaliation Claims*, 28 A.B.A. J. LAB. & EMP. L. 437, 439 (2013).

109. *Id.* at 438-39.

110. Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 897-900 (2008) (summarizing social science literature).

111. *Id.* at 882-83, 900-05.

112. Univ. of Tx. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2531 (2013).

113. *Id.* at 2531-32.

To save employers from these false claims prior to any involvement by a plaintiff's attorney, we must believe that the nefarious fakers now understand the change in the substantive causal standard and this knowledge will deter the faker. In other words, the nefarious faker would think, "Well, I was going to file a false claim to my employer, but the new 'but for' standard changes my mind."

What is more realistic is that all potential plaintiffs, whether fakers or not, will receive the same advice from a plaintiff's lawyer: it is now difficult for the plaintiff to win even when the person's protected activity played a role in an employment decision. While this attorney intervention may thwart some false claims, it will also deter legitimate claims.

In *Nassar*, the Court expressed a separate concern that the EEOC will waste resources if the Court chooses a causal standard that is less onerous than "but for" cause.[114] However, as a factual matter, the agency that oversees the charge filing process is in a much better position to evaluate how a floodgate of charges affects its resources. Indeed, in *Nassar*, the EEOC argued in favor of the "motivating factor" standard, and the government more generally argued in favor of Dr. Nassar's position during the Supreme Court oral argument.[115]

Finally, there is simply no data to determine the number of frivolous retaliation complaints made to employers. In this regard, the employer argument is more akin to an amorphous policy argument than a factual assertion. As discussed earlier, though, the Supreme Court's argument to favor employers is flawed because it fails to balance the interests of retaliation victims, which Congress explicitly required the Court to take into account in Title VII's text.

IV. FOUNDATIONAL FACTS COME TO VIEW

What may be most interesting about *Nassar* is that the majority explicitly states its concern that some significant portion of retaliation claims could be frivolous if courts used a motivating factor causal standard. Given this standard was already in place in many circuit courts, the majority opinion suggests that many frivolous cases were filed as a result of the motivating factor standard.[116]

In her article, *Foundational Facts and Doctrinal Change*, Professor Suzanna Sherry showed how an unstated shift in the Supreme Court's belief about the prevalence of discrimination affected several doctrinal changes in affirmative action law and federal employment discrimination law.[117] She also showed how an unstated belief about the number of frivolous claims could alter

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114. *Id.* at 2531.

115. Brief for the United States as Amicus Curiae Supporting Respondent, *Nassar*, 133 S.Ct. 2517 (No. 12-484), 2013 WL 1462056.

116. *Nassar*, 133 S. Ct. at 2531-32.

117. *See generally* Sherry, *supra* note 1.

long-standing civil procedure doctrine.[118] In Professor Sherry's account, these foundational facts about the prevalence of discrimination and about the likelihood of frivolous claims are not expressly stated in the relevant opinions and must be divined from doctrinal shifts that occur over time.[119] *Nassar* contributes to Professor Sherry's account of foundational facts. In *Nassar*, the Court actually professes its concern about volume and false claims in conjunction with changing the substantive standard.[120] Thus, the foundational facts are not hidden, but rather in plain view. This Part explores what this means for retaliation law and for discrimination law more broadly.

A. Disbelief as a Default Position

The Supreme Court has now expressed that it believes a significant number of people who raise retaliation claims may be lying.[121] While some employees may make spurious claims, this is not a helpful position from which to begin to understand retaliation, and to take this as a default position stunts our understanding of the dynamics that lead to retaliation claims.

There is a rich literature showing how the default position one takes can skew the outcome of decision making. Professor Susan Sturm has shown how false assumptions can lead to problems in understanding how a protected trait affects a person's success in the workplace.[122] Sturm wrote an article describing how a leading accounting firm lost significant numbers of female accountants in the transition from junior roles to more senior roles within the organization.[123] The senior management assumed that the women were leaving the firm to care for children at home.[124] After interviewing women who left the firm, the company discovered that the women who left were still in the workforce.[125] This then led the firm to consider ways in which its policies might negatively affect women.[126]

Retaliation cases involve a complex dynamic. An employee who complains of discrimination is making an allegation that can potentially affect the accused discriminator's career trajectory and employment. One normal human response to such an accusation is defensiveness and a desire to retaliate against the complainer. Those who complain about discrimination are often viewed as troublemakers.

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118. *Id.* at 167-78.

119. *Id.* at 146-47.

120. *Nassar*, 133 S.Ct. 2531-32.

121. *Id.*

122. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 492-94 (2001).

123. *Id.*

124. *Id.* at 493.

125. *Id.*

126. *Id.* at 493-99.

Both the complaining employee and the employer's agents are likely to possess different views on why an adverse action happens after an employee complains. To an employee who complains of discriminatory conduct and is then subject to an adverse action, retaliation is at least one plausible explanation for the employer's conduct. Although there might be some employers who admit to retaliating against an employee, many employers know that they are not supposed to engage in retaliatory conduct. They have a legal incentive to provide a legitimate reason for taking an adverse employment action.[127] Some employers may not be aware of how a retaliatory motive infected a decision, especially in situations involving group decision making. Further, the employer may possess information that the employee does not about why the employer took a particular action. And because human decision making is often not linear, it is actually difficult to determine what motivated a particular decision.

The facts of *Nassar* as recounted by the Supreme Court illustrate this complex dynamic. Dr. Nassar is a physician of Middle Eastern descent who was a university faculty member and a hospital physician.[128] He complained that one of his supervisors at the university discriminated against him based on his religion and ethnic background.[129] Dr. Nassar alleged the supervisor scrutinized his billing practices and productivity and said that "Middle Easterners are lazy."[130]

Dr. Nassar complained about the discrimination, and later received an offer to work at the hospital, separate from his appointment at the university.[131] He resigned his teaching position and sent a letter to a university official stating that he was quitting because of his supervisor's harassment.[132] The university official was upset because he thought the letter humiliated the supervisor.[133] The university official then contacted the hospital and objected to Dr. Nassar's job offer with the hospital.[134] The university official claimed that a contract between the hospital and the university required open positions at the hospital to be offered to university faculty.[135] The hospital then rescinded Dr. Nassar's job offer.[136] A jury found that the university discriminated against Dr. Nassar and retaliated against him for complaining about discrimination.[137]

Nassar includes many of the complex dynamics involved in retaliation

127. *See supra* notes 68-70.
128. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2523 (2013).
129. *Id.*
130. *Id.* at 2523.
131. *Id.* at 2523-24.
132. *Id.* at 2524.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*

cases. The case involves multiple supervisors making a series of employment-related decisions over time. The case presents a common dynamic in retaliation cases, where the employer's agents view the employee's complaint about discrimination as a career humiliation. The case involves actions that can be interpreted in many different ways, depending on the perspective of the interpreter. It is unclear whether the university official would have contacted the hospital about the contract issue absent the discrimination complaint. The employer and its agents possess most of the information about what was driving the decision to seek the rescission of Dr. Nassar's offer. This complexity created numerous factual questions relating to witness credibility, inferences that could be drawn from facts, and the weighing of evidence, which the Fifth Circuit Court of Appeals recognized as appropriate for the jury and not a judge.[138]

The *Nassar* majority does not further any nuanced understanding of these complex dynamics by advocating the view that many retaliation plaintiffs may be lying. Further, it is likely that lower courts will try to use the "but for" standard as a mechanism for granting summary judgment for employers and diminishing the jury's role in untangling these complex dynamics.

B. Fact-Checking the Court

The fakers/floodgates argument is also problematic because the significance of the argument is unclear. As stated above, it is unclear whether the fakers/floodgates argument itself is now an official pronouncement of legal doctrine or even dicta. It is unclear whether the claims the Court makes are now part of a factual record about retaliation claims that can be used in future cases.[139]

This leads to several practical problems. It is unclear how the fakers/floodgates argument can and should be used in future cases. At least one court has already cited the Supreme Court's assertions about the "fair and responsible allocation" of resources and concerns about "dubious" claims within its legal description of the Title VII retaliation standard.[140] Another court has referred to the Court's concerns as a policy reason that swayed the Court's analysis.[141]

These citations, just months after the Court published its *Nassar* decision,

138. Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448, 454 (5th Cir. 2012), *vacated and remanded*, 133 S. Ct. 2517 (2013).

139. *See generally* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012) (discussing the problems of judicial fact-finding).

140. Childs-Bey v. Mayor & City Council of Balt., No. TJS-10-2835, 2013 WL 5718747, at *2 (D. Md. Oct. 17, 2013); Foster v. Univ. of Md. E. Shore, No. TJS-10-1933, 2013 WL 5487813, at *2 (D. Md. Sept. 27, 2013).

141. Chase v. U.S. Postal Serv., 2013 WL 5948373, at *11 (D. Mass. 2013) (citing concerns in context of Family and Medical Leave Act litigation).

show that the Court has been successful in introducing new myths into discrimination and retaliation analysis: the sheer number of claims is too high and the number of dubious claims merits courts' attention. Given the uncertain legal status of these arguments, however, it is unclear how to disprove them as part of the legal process.

This Part briefly explores legal strategies for repudiating the fakers/floodgates myth. Given the EEOC's fact-finding role in discrimination law and the Supreme Court's co-opting of administrative concern in *Nassar*, the EEOC should respond systematically to the fakers/floodgates myth.

When the EEOC is a party in a case, it can repudiate potential fakers and floodgates claims in several ways. First, the EEOC should challenge the courts' authority to prioritize these arguments over congressional intent. Second, it should explicitly repudiate the fakers and floodgates claim with factual data. It should explicitly state that the sheer number of claims is not a good reason to limit protection. It should explicitly assert that the agency has considered the implications of frivolous claims upon its workload and found that these concerns do not merit favoring employers. It should assert an executive interest in making its own factual determinations about the number of spurious claims and should challenge the courts' ability to make these determinations as a factual matter. In cases in which the EEOC is not a party, it should consider filing amicus briefs making these points. At the very least, the EEOC should make more data available through which the public can more easily understand that discrimination claims and retaliation claims are often made in a single charge and how many claims actually end up in court.

Additionally, employees and their attorneys should consider refuting the fakers and floodgates claims in documents that they file with the courts. As recent citations show, lower court judges will feel free to cite the Supreme Court's unsupported claims about fakers and floodgates. Litigants and the EEOC should challenge these unsupported claims. Fakers and floodgates should not become a narrative in discrimination statutory interpretation.

C. Judicial Reasoning

In the end, what is most troubling about the fakers/floodgates claim is that it masks "what is really at stake, who wins and who loses and why."[142] The Court tries to claim that administrability concerns are driving a particular analysis when the Court lacks the evidence to support such a claim. In doing this, the Court is making a powerful choice about which party the law should favor. The Court's legal reasoning would be much more straightforward and accurate if it simply stated where and why statutory ambiguities exist and also stated that it must choose between conflicting accounts.

142. *See* Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, *in* TORT LAW 351, 389 (Ernest Weinrib ed., 1991).

Instead of such an analysis in *Nassar*, the Court masks its judicial power by claiming that various concerns forced a particular choice. The language that the Court uses suggests that it is not making a choice, but rather that objective characteristics of the legal system demand a particular outcome. The majority writes: "The proper interpretation and implementation of § 2000e–3(a) and its causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems. This is of particular significance because claims of retaliation are being made with ever-increasing frequency."[143]

The Court is choosing to prioritize arguments about the number and alleged frivolousness of claims. In doing so, it is choosing to ignore congressional intent related to administrability. It also is choosing to ignore other values and arguments. It does not consider whether the more onerous standard will prevent retaliation or discrimination. Nor does the Court consider whether retaliation law should recognize a cause of action when there is credible evidence that retaliatory motive played a role in an employment outcome.

The Justices engage in this passive construct throughout *Nassar*. In early portions of the opinion, the majority claims that tort law demands a particular result. It holds that tort law requires the plaintiff to establish "but for" cause and that the Court assumes that Congress legislated against the backdrop of common law torts.[144] However, neither of these propositions is universally true in the way the Court suggests. Tort law allows courts to shift causation proof burdens to defendants and also provides for lesser causal standards, such as substantial factor cause.[145] In any event, there is almost no evidence that Congress intended to use tort meanings for Title VII's provisions. Title VII's main operative provisions do not use tort words, and Title VII itself is a major departure from the common law rule of at-will employment.[146]

Once the reader understands that tort law and concerns about fakers and floodgates do not demand a particular outcome, it is easier to see the choices

143. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2531 (2013).

144. *Id.* at 2524-25.

145. *See, e.g.*, Sindell v. Abbott Labs., 607 P.2d 924, 928 (Cal. 1980) (discussing ways that plaintiff could recover despite being unable to establish which defendant caused plaintiff's harm); Summers v. Tice, 199 P.2d 1, 3 (Cal. 1948); RESTATEMENT (THIRD) OF TORTS § 27 (2010) (noting that a different factual cause standard exists when multiple sufficient causes exist); *id.* at § 27 reporter's note (stating that there is nearly universal recognition that the "but for" standard is inappropriate when multiple sufficient causes exist); RESTATEMENT (SECOND) OF TORTS § 430 cmt. d (1965) (noting there can be more than one source of harm); *id.* § 432 (noting that plaintiff can still establish factual cause when more than one actor causes harm); RESTATEMENT (FIRST) OF TORTS § 9 cmt. b (1934) (defining a legal cause as one that is a "substantial factor in bringing about the harm").

146. *See* Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. (forthcoming 2014); Sandra F. Sperino, *Discrimination Statutes, the Common Law and Proximate Cause*, 2013 U. ILL. L. REV. 1, 2 (2013).

the Court makes. We do not challenge the ability of the Court to make choices about statutory construction, but rather believe that the Court could state its arguments more clearly.

A much more interesting and helpful *Nassar* analysis could have proceeded along the following substantive lines. First, it would recognize how the Court's prior decisions and the 1991 amendments to Title VII created a complex and potentially ambiguous legal backdrop for resolving the problem. Second, the Court would admit that the first two decades of Title VII jurisprudence did not rely on tort law. Third, the Court would recognize that Title VII is designed to provide a remedy for retaliation victims, but that this aim might be in tension with other values that the Court believes should be considered in interpreting the statute. Finally, the Court would state that three possible interpretations of the Title VII retaliation provision are textually supportable.

The Court should state that it is making the choice regarding the direction of Title VII's retaliation provision and not contend that the choice is foisted upon it by external, objective concerns. This analysis describes the dispute more concretely, does not add extraneous elements, and provides a clearer account about the Court's statutory construction decisions.

V. THE BROADER PROBLEM OF COURTS' INTERFERENCE WITH CIVIL RIGHTS CLAIMS

The fiftieth anniversary of the Civil Rights Act of 1964 marks an important milestone and an opportunity to reflect on how courts approach claims under the statute. The skepticism articulated by the Supreme Court through its discussion about fakers and floodgates is indicative of a broader problem of how courts have treated civil rights claims. Judicial skepticism is now imbedded within the fabric of civil rights litigation through both substantive and procedural barriers. These barriers allow courts to dismiss cases before they go to a jury. When cases do go before a jury, a number of mechanisms allow courts to second guess the jury's verdict. For example, a court may grant a renewed motion for judgment as a matter of law, may grant remittitur, or may decrease the punitive damages award using a court-created proportionality analysis.

These limits are important because they are added to a series of barriers already placed within Title VII by Congress. As discussed earlier,[147] Congress requires Title VII plaintiffs to first submit their claims to a federal or state agency within a short limitations period. The plaintiff must then file her complaint within ninety days of receiving a right to sue letter. The plaintiff must be the kind of person protected by the statute and must work for an employer large enough to face liability under Title VII. If the plaintiff prevails on a Title VII claim, her available relief is limited by the statute's definition of

147. *See supra* Part II.

damages and the cap on combined compensatory and punitive damages. Congress has not increased this damages cap since 1991.

The courts have added even more substantive barriers to the ones explicitly provided in Title VII. While the Supreme Court has recognized a sexual harassment cause of action, the courts interpret the statute to require plaintiffs to establish a certain threshold of conduct before an employer will face liability.[148] This court-created interpretation allows courts to dismiss harassment claims for not meeting the required legal threshold, even when a jury might conclude that the plaintiff was harassed based on a protected trait. Courts have declared that the following conduct does not constitute harassment as a matter of law: kissing, slapping on the behind with a newspaper, brushing up against a plaintiff's breast and behind, rubbing the plaintiff's arm from shoulder to wrist, or attempting to touch the plaintiff on numerous occasions.[149]

Moreover, the Supreme Court created an agency doctrine for Title VII that allows employers to escape liability even if a plaintiff is able to establish she suffered harassment in the workplace. If the employer takes no tangible employment action against an employee, the employer can escape liability for harassment if it establishes a court-created affirmative defense.[150]

The courts have also created a stray remarks doctrine that allows courts considering summary judgment and other procedural motions to exclude certain discriminatory remarks and conduct from the evidence the court considers.[151] Courts often separate evidence in ways that allow them to dismiss plaintiff's claims without considering the totality of allegations.[152] Additionally, plaintiffs who try to establish discrimination by showing they were treated differently than others outside their protected class are often required to prove a higher level of similarity than is actually necessary to establish a possible inference of discrimination.[153] Some courts also infer that if a decision maker makes a positive employment decision about a plaintiff then it is unlikely that the person is motivated by a protected trait in making a subsequent negative decision.[154]

These substantive barriers are then combined with procedural mechanisms

148. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67, 72 (1986) (requiring the conduct to be severe or pervasive).

149. *See, e.g.*, Hockman v. Westward Commc'ns, LLC, 407 F.3d 317, 328 (5th Cir. 2004); Shepherd v. Comptroller of Pub. Accounts, 168 F.3d 871, 872, 874-75 (5th Cir. 1999); Weiss v. Coca-Cola Bottling Co., 990 F.2d 333, 337 (7th Cir. 1993).

150. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

151. *See generally* Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149 (2012).

152. Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 86 (2011).

153. Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 743-51 (2001).

154. Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 122-23 (2012), http://www.yalelawjournal.org/forum/losers-rules.

that bar or negatively affect claims. The possible convergence of the motions to dismiss and summary judgment under *Twombly* and *Iqbal* make employment discrimination claims even more vulnerable at a time in the litigation when there has been no opportunity for discovery.[155] The Supreme Court also heightened the requirements for class certification under Rule 23 in an employment discrimination case.[156] Moreover, several studies show that courts dismiss civil rights claims more often than other types of claims, often by summary judgment.[157] Upon a motion for summary judgment or to dismiss, it also appears that judges infuse their own views of the evidence.[158] On appeal, in employment discrimination cases, "courts reverse plaintiffs' wins below far more often than defendants' wins below."[159] Former judge Nancy Gertner has stated that this trend is not accidental. In judge training, judges have been instructed on how to "get rid" of civil rights cases.[160]

In the few cases when juries hear civil rights claims, courts often second-guess these types of claims more often than other types of claims. For example, judges remit damages found by juries in such cases comparatively more.[161] The treatment of the courts of these cases is even more remarkable because these cases are some of the most factually intensive in the courts, making them the least appropriate for judges to decide.

CONCLUSION

It is not new that judges' intuitions affect the substantive outcome of cases. But *Nassar*'s claims and outcome go beyond mere judicial intuition. The majority opinion makes unsupported factual claims about retaliation cases, claims that may become part of the running, default narrative about retaliation cases.

This Article has demonstrated three important facts about fakers and floodgates. First, the Supreme Court has cited no support for its factual assertions. Indeed, available evidence seriously undercuts them. Second, the federal courts possess powerful tools for handling these concerns without

155. *See* Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15 (2010).

156. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (holding that "commonality" requirement for class certification obligates named plaintiff to show that class members have suffered "the same injury").

157. Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 520-21 (2010).

158. Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 759 (2009).

159. Clermont & Schwab, *supra* note 98, at 111.

160. Gertner, *supra* note 154, at 117.

161. *See* Suja A. Thomas, *Re-examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731,745-46 (2003).

altering the substantive law. Third, through the fakers and floodgates claims, the Supreme Court is prioritizing its own intuitions about administrability over the intent of Congress as expressed in Title VII's text.