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Employment Law: Desert Palace, Inc. v. Costa: Returning to Title VII's Core Principles by Eliminating the Direct Evidence Requirement in Mixed-Motive Cases

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Employment Law: *Desert Palace, Inc. v. Costa*: Returning to Title VII's Core Principles by Eliminating the Direct Evidence Requirement in Mixed-Motive Cases*

I. Introduction

Congress passed the Civil Rights Act of 1991 (the 1991 Act)[1] in response to what it perceived to be the U.S. Supreme Court's curtailment of employee rights under Title VII of the Civil Rights Act of 1964.[2] Among the decisions that Congress determined were incorrectly decided was *Price Waterhouse v. Hopkins*,[3] a plurality decision. The *Price Waterhouse* decision not only allowed employees to maintain a cause of action under a mixed-motive theory,[4] but it also allowed employers to escape liability under the same-action defense.[5] In her concurring opinion, Justice O'Connor argued that for plaintiffs to be entitled to proceed to a jury on a mixed-motive theory, they must prove by direct evidence the existence of discriminatory animus on the part of their employer.[6]

The 1991 Act codified the Supreme Court's recognition of a mixed-motive theory of discrimination. Under the 1991 Act, "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice."[7]

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* The author would like to dedicate this work to his wife, Amy, for her unwavering love and support. In addition the author would like to thank the countless friends and family who have contributed to his growth and success both personally and professionally.

1. 42 U.S.C. § 1981a (2000). The portions of the 1991 Act that are relevant to this note were subsequently incorporated into Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B).

2. 42 U.S.C. §§ 2000e to 2000e-17.

3. 490 U.S. 228 (1989).

4. Under a mixed-motive theory, employees must prove that their employer considered both legitimate (e.g., performance, tardiness) and illegitimate (i.e., race, color, religion, sex, or national origin) factors in taking the adverse employment action against them. *Id.* at 241. The mixed-motive theory ultimately allows employees to successfully litigate their claims without the burden of proving the "precise causal role" that the illegitimate considerations played in the adverse employment action. *Id.* Instead, employees must show that an illegitimate consideration was merely a factor in the employer's decision. *Id.*

5. *Id.* at 242. Justice Brennan, writing for a four-justice plurality, concluded that "an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person." *Id.*

6. *Id.* at 276 (O'Connor, J., concurring) ("[P]laintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision.").

7. 42 U.S.C. § 2000e-2(m) (emphasis added).

This new method of establishing that an employer violated Title VII departs from the traditional method of proving unlawful discrimination in employment, which required Title VII plaintiffs to proceed under the framework set forth in *McDonnell-Douglas Corp. v. Green*.[8] In addition, employers traditionally had a complete defense to complaints that they violated Title VII if they "[could] demonstrate by a preponderance of the evidence that [they] would have taken the same action against the employee even absent any discriminatory or retaliatory motive."[9] The 1991 Act significantly limited the effect of this same-action defense by preventing employers who successfully asserted the defense from completely escaping liability under Title VII.[10] Moreover, the 1991 Act omitted any reference to the direct evidence requirement imposed by Justice O'Connor in her concurring opinion in *Price Waterhouse*.[11] The principal case ultimately arises from this omission.

Desert Palace, Inc. v. Costa[12] stands as a tribute to results-oriented jurisprudence. In *Costa*, the U.S. Supreme Court held that Congress overruled the direct evidence requirement of *Price Waterhouse*.[13] In doing so, the Court carelessly interchanged important terms that have distinct and specific

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8. 411 U.S. 792 (1973); *see infra* Part II.A.

9. Shea v. Tosco Corp., Nos. 98-35588, 98-35658, 98-36019, 2000 U.S. App. LEXIS 18610, at *5 (9th Cir. July 27, 2000).

10. Today, the same-action defense merely limits the remedies available to employees. Title 42 U.S.C. § 2000e-5(g)(2)(B) provides:

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

Id.

11. For purposes of precedent, most lower courts consider Justice O'Connor's concurring opinion as the holding of *Price Waterhouse*. *See generally* Watson v. S.E. Pa. Transp. Auth., 207 F.3d 207, 215 (3rd Cir. 2000); Thomas v. Nat'l Football Players Ass'n, 131 F.3d 198, 204 (D.C. Cir. 1997); Plair v. E.J. Brach & Sons, Inc., 105 F.3d 343, 347 (7th Cir. 1997); Fuller v. Phipps, 67 F.3d 1137, 1141 (4th Cir. 1995); Heim v. Utah, 8 F.3d 1541, 1546-47 (10th Cir. 1993); Brown v. E. Miss. Elec. Power Ass'n, 989 F.2d 858, 861 (5th Cir. 1993); Ostrowski v. Atl. Mut. Ins. Co., 968 F.2d 171, 181 (2nd Cir. 1992); Wilson v. Firestone Tire & Rubber Co., 932 F.2d 510, 514 (6th Cir. 1991); EEOC v. Alton Packaging Corp., 901 F.2d 920, 924 (11th Cir. 1990); Jackson v. Harvard Univ., 900 F.2d 464, 467 (1st Cir. 1990).

12. 539 U.S. 90 (2003) (*Costa III*).

13. *Id.* at 98.

meanings, effectively creating confusion and ambiguity where the opportunity to add clarity to the law plainly existed. In addition, the Court's analysis of the 1991 Act's effect on *Price Waterhouse's* direct evidence requirement is fundamentally flawed because it ignores (1) the essential holding and precedential value of *Price Waterhouse*,[14] (2) basic rules of statutory interpretation,[15] and (3) the opposite conclusion reached by a vast majority of the circuit courts.[16] The more appropriate decision in *Costa* would have been to uphold the direct evidence requirement of *Price Waterhouse* and seize the opportunity to identify which definition of direct evidence employed by the circuit courts was the correct definition.[17]

Despite *Costa's* analytical shortcomings, its conclusion lends credence to the idea that the Supreme Court has recommitted itself to the goals and policies of Title VII. Accordingly, *Costa* may induce greater employer compliance with Title VII because the lowered evidentiary burden may increase the number of successful Title VII claims. In addition, conciliation and settlements may also increase as employers become less eager to engage in risky jury trials given employees' lessened evidentiary burdens. Moreover, though the Court's opinion is poorly reasoned, *Costa* furthers the important national goal of ending discrimination in the workplace, which justifies the Supreme Court's holding.

Part II of this note discusses the law before *Costa*. This section emphasizes the traditional pretext theory by which parties to Title VII litigation proceeded, the addition of the mixed-motive theory following *Price Waterhouse*, and the fundamental differences between the two theories. Part II also includes a short discussion of the 1991 Act, Congress's purpose in passing the 1991 Act, and the Act's impact on Title VII litigation. Part III

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14. *See infra* notes 99-100 and accompanying text.

15. *See infra* Part IV.B.2.

16. *See infra* notes 101-02 and accompanying text.

17. The different definitions of direct evidence developed by the lower courts can be divided into three distinct groups: (1) the "classic position," which "require[s] mixed-motive plaintiffs to present evidence that suffices to prove, without inference, presumption, or consideration of other evidence, that a discriminatory animus motivated the defendant employer in the challenged employment decision"; (2) the "animus plus position," which defines "direct evidence [as including] statements or conduct by the employer that directly reflect the alleged discriminatory animus, and that relate precisely to the employment decision at issue"; and (3) the "animus position" which "requires only direct or circumstantial evidence that shows a discriminatory animus." Benjamin C. Mizer, Note, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 MICH. L. REV. 234, 239-40 (2001). The essential difference in all three positions is the "[amount] of circumstantial evidence that the courts allow to satisfy the direct evidence requirement." *Id.*

describes the factual events giving rise to *Costa* and provides a brief discussion of the litigation and the opinions of the lower courts. Further, Part III discusses the issue that was presented to the Supreme Court, the holding of the Court, and the basis of the Court's decision. The next section of this note, Part IV, critiques the Court's opinion by focusing on the Court's misuse of important and well-defined terms, as well as the incorrect interpretation of the 1991 Act's effect on mixed-motive cases. In addition, Part IV demonstrates that it is contrary to congressional intent to collapse mixed-motive and pretext theories into one theory to prove discrimination under Title VII. Despite the analytical shortcomings of the decision, Part IV argues that *Costa* signals the Court's recommitment to the governing principles of the federal civil rights legislation — a recommitment that is not surprising given the Court's recent aggressive scrutiny in the constitutional context.[18] This note concludes with a discussion of *Costa's* impact on the burden employees carry in Title VII litigation and on employers' compliance with Title VII's mandates.

II. The Mixed-Motive Landscape Before Costa

A. The Creation of the Mixed-Motive Theory in Price Waterhouse v. Hopkins

McDonnell-Douglas Corp. v. Green[19] established the pretext framework under which Title VII[20] litigation traditionally proceeded until the addition of the mixed-motive theory in *Price Waterhouse*.[21] Under the pretext framework, plaintiffs carry the burden of establishing a prima facie case of discrimination.[22] To meet their burden, plaintiffs must prove:

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18. *See generally* Grutter v. Bollinger, 539 U.S. 306, 336-37 (2003) (noting that race may be accounted for in university admissions policies only if taken holistically with all other relevant factors; holding that awarding "a point" to applicants solely on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment); United States v. Virginia, 518 U.S. 515, 524 (1996) (requiring an "exceedingly persuasive justification" for gender-based classifications challenged under the Equal Protection Clause of the Fourteenth Amendment); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995) (applying strict scrutiny to even benign discrimination based on race).

19. 411 U.S. 792 (1973).

20. Title VII is the portion of the Civil Rights Act of 1964 that forbids discrimination in employment. *See generally* 42 U.S.C. §§ 2000e to 2000e-17 (2000).

21. Price Waterhouse v. Hopkins, 490 U.S. 228, 251-52 (1989).

22. *McDonnell-Douglas*, 411 U.S. at 802.

> (i) that [they belong] to a [protected class]; (ii) that [they] applied and [were] qualified for a job for which the employer was seeking applicants; (iii) that, despite [their] qualifications, [they] were rejected; and (iv) that, after [their] rejection, the position remained open and the employer continued to seek applicants from persons of [plaintiffs'] qualifications.[23]

Once an employee establishes a prima facie case, employers have the burden of "articulat[ing] some legitimate, nondiscriminatory reason for the employee's rejection."[24] If they articulate such a reason, employees have the ultimate burden of proving by a preponderance of the evidence that the proffered reason "[is] in fact pretext[ual]."[25] The *McDonnell-Douglas* framework has been effective in ridding the workplace of some employment discrimination; however, it has not cured all discrimination because employees' success under the traditional framework depends on their ability to prove "but for" causation.[26] For example, under *McDonnell-Douglas*, employees who claim that their former employer has violated Title VII must prove by a preponderance of the evidence that "but for" the employees being members of a protected class, their employer would not have taken the adverse employment action against them.[27] In contrast, employees who proceed under a mixed-motive theory of discrimination merely have to establish by a preponderance of the evidence that an impermissible consideration was *a motivating factor* in an adverse employment action.[28]

Price Waterhouse established an employee's right to maintain a cause of action for discrimination under a mixed-motive theory.[29] As Justice O'Connor noted in her concurring opinion, the procedure for Title VII litigation needed to change if the goal of eliminating discrimination in the workplace was to become a reality.[30] The Court announced the new mixed-motive theory in *Price Waterhouse*, indicating that the Court realized that a significant amount of discrimination that occurs in the workplace is often masked with legitimate reasons for taking an adverse employment action.[31] Although *Price*

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23. *Id.*
24. *Id.*
25. *Id.* at 804.
26. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143-44 (2000).
27. *Id.*
28. 42 U.S.C. § 2000e-2(m) (2000).
29. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (O'Connor, J., concurring).
30. *Id.* at 272 (O'Connor, J., concurring).
31. *Id.* Justice O'Connor noted that "a number of the evaluations of Ann Hopkins submitted by partners in the firm overtly referred to her failure to conform to certain gender

Waterhouse was a plurality opinion, a majority of the Court was able to agree on at least two grounds: (1) employees should be able to proceed under a mixed-motive theory, and (2) employers could still avoid liability under Title VII by successfully asserting the same-action defense.[32] As previously noted, Justice O'Connor's concurring opinion sought to require an employee proceeding under a mixed-motive theory to prove discrimination by direct evidence.[33] By recognizing that Title VII plaintiffs could proceed under a mixed-motive theory, the Court gave employees the tools necessary to attack discrimination carried out under the auspices of legitimate considerations.

B. The Civil Rights Act of 1991

Congress passed the 1991 Act in response to a few significant U.S. Supreme Court decisions,[34] including *Price Waterhouse*, that dealt with employees' rights under the federal employment laws. The portion of the 1991 Act that addresses *Price Waterhouse* codified plaintiffs' ability to proceed under a mixed-motive theory in Title VII litigation. However, rather than accepting the same-action defense as articulated by the Court,[35] Congress approved a narrower version of the defense.[36] Under the 1991 Act, the

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stereotypes as a factor militating against her election to the partnership" and "these evaluations were given 'great weight' . . . ." *Id.* These evaluations were significant because they included legitimate assessments of Hopkins's professional abilities in addition to the illegitimate comments about her failure to conform to gender stereotypes. *Id.* at 233-35 (Brennan, J., plurality).

32. *See supra* notes 4-5 and accompanying text; *see also Price Waterhouse*, 490 U.S. at 261-62 (White, J., concurring).

33. *See supra* note 6 and accompanying text.

34. H.R. REP. NO. 102-40, pt. II, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 694-96. Among the cases that the 1991 Act expressly dealt with were *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989), *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989), *Martin v. Wilks*, 490 U.S. 755 (1989), *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), *Library of Congress v. Shaw*, 478 U.S. 310 (1986), *Evans v. Jeff D.*, 475 U.S. 717 (1986), *Marek v. Chesny*, 473 U.S. 1 (1985), and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *See* H.R. REP. NO. 102-40, pt. 2, (II) at 2-4, *reprinted in* 1991 U.S.C.C.A.N. at 694-96.

35. *See supra* note 5 and accompanying text.

36. Title 42 U.S.C. § 2000e-5(g)(2)(B) (2000) provides:

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

successful assertion of the defense only limits employees' available remedies, rather than completely alleviating employers of Title VII liability.[37] Notably, Congress failed to address the effect of the 1991 Act on *Price Waterhouse's* direct evidence requirement,[38] which lower courts had nearly universally applied.[39] This shortcoming led to much disagreement among lower courts concerning whether the direct evidence requirement still existed. The vast majority of courts recognized that the requirement was retained but were uncertain about the appropriate definition of direct evidence.[40] Thus, *Costa* presented the U.S. Supreme Court with the opportunity to dispel this confusion.[41]

III. Statement of the Case: Desert Palace, Inc. v. Costa

A. Facts Giving Rise to the Dispute

Catharina Costa was the sole female employee in a traditionally male occupation.[42] She worked in a warehouse for Desert Palace, operating forklifts and other heavy machinery.[43] Costa's supervisors generally gave her favorable evaluations, and testimony at trial indicated that when Costa was

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promotion, or payment, described in subparagraph (A).

Id.

37. *Id.*

38. Price Waterhouse v. Hopkins, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring) ("[P]laintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision.").

39. *See generally* Watson v. S.E. Pa. Transp. Auth., 207 F.3d 207, 215 (3rd Cir. 2000); Thomas v. Nat'l Football Players Ass'n, 131 F.3d 198, 204 (D.C. Cir. 1997); Plair v. E.J. Brach & Sons, Inc., 105 F.3d 343, 347 (7th Cir. 1997); Fuller v. Phipps, 67 F.3d 1137, 1141 (4th Cir. 1995); Heim v. Utah, 8 F.3d 1541, 1546-47 (10th Cir. 1993); Brown v. E. Miss. Elec. Power Ass'n, 989 F.2d 858, 861 (5th Cir. 1993); Ostrowski v. Atl. Mut. Ins. Co., 968 F.2d 171, 181 (2nd Cir. 1992); Wilson v. Firestone Tire & Rubber Co., 932 F.2d 510, 514 (6th Cir. 1991); EEOC v. Alton Packaging Corp., 901 F.2d 920, 924 (11th Cir. 1990); Jackson v. Harvard Univ., 900 F.2d 464, 467 (1st Cir. 1990).

40. *See* Costa v. Desert Palace, Inc., 299 F.3d 838, 851-54 (9th Cir. 2002) (en banc) (*Costa II*) (noting the three different definitions applied by the circuit courts, but declining to apply any direct evidence requirement in light of the 1991 Act). See also *supra* note 17 for an explanation of the different requirements of the three distinct direct evidence definitions.

41. Desert Palace, Inc. v. Costa, 539 U.S. 90, 92 (2003) (*Costa III*). The issue presented in *Costa* was "whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 . . . ." *Id.*

42. *Costa II*, 299 F.3d at 844.

43. *Id.*

working, her employer "knew . . . the job would get done."[44] Despite her apparently adequate job performance, Costa felt that she was not treated equally among her male counterparts.[45]

On many occasions, Costa was reprimanded for conduct that went undisciplined when engaged in by male employees.[46] Costa was repeatedly written up, counseled, and eventually "stalked" at work by a supervisor.[47] While Costa performed her job functions well, she did not exhibit the interpersonal skills of a "model employee."[48] For example, she was involved in numerous verbal disputes with co-workers and had a reputation for being a "bitch."[49] Costa's troubles with her employer culminated when she was involved in a physical altercation with a male employee after he confronted her about rumors that she had reported him for taking extra long lunch breaks.[50] Although Desert Palace only suspended the male employee involved in the fight, Desert Palace fired Costa.[51] Subsequently, Costa filed suit in the U.S. District Court for the District of Nevada for employment discrimination under Title VII of the Civil Rights Act of 1964.[52]

B. The District Court's Holding

At trial, Costa presented circumstantial evidence that her gender played a role in Desert Palace's decision to terminate her.[53] The district court provided a jury instruction that reflected the rule of *Price Waterhouse* and the 1991 Act by requiring the jury to find in favor of Costa if they determined that her

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44. *Id.* (internal quotations omitted).

45. *Id.*

46. *Id.* at 845. Costa's trial testimony indicated that "when men came in late, they were often given overtime to make up the lost time" while "she was issued a written reprimand" for the same behavior; "when men missed work for medical reasons, they were given overtime to make up the lost time" and when Costa missed work for the same reason she was "disciplined." *Id.* Another witness's testimony confirmed that, in one instance, a number of employees were "in the office eating soup on a cold day" when a supervisor "looked directly at Costa, and said, 'Don't you have work to do?' [but] did not reprimand any of [the male employees]." *Id.* Costa further contended that "she received harsher discipline than the men," she was "treated differently than her male colleagues in the assignment of overtime," and she "was penalized for her failure to conform to sexual stereotypes." *Id.*

47. *Id.*

48. *Id.* at 845-46.

49. *Id.*

50. *Id.* at 846.

51. *Id.*

52. *Id.*

53. See *id.* at 859-62 for the Ninth Circuit's summary of the evidence presented by Costa in support of her claims.

gender played *a motivating factor* in Desert Palace's decision.[54] Furthermore, the jury instruction also required the jury to limit Desert Palace's liability if they found the employer would have taken the same action despite Costa's gender, thus accurately reflecting the 1991 Act's version of the same-action defense.[55] Desert Palace objected to the jury instruction on the grounds that Costa had not presented direct evidence of discrimination, and therefore, she was not entitled to a mixed-motive jury instruction.[56] The trial court overruled the objection and submitted the case to the jury, who later returned a substantial verdict for Costa.[57] The issue of the propriety of the jury instruction was preserved for appeal and became the issue that was ultimately argued to the U.S. Supreme Court.

C. The Opinion of the Ninth Circuit Court of Appeals

The U.S. Court of Appeals for the Ninth Circuit reversed and remanded the district court's decision on the grounds that the jury had been improperly instructed.[58] Relying on the holdings of the vast majority of other circuit courts,[59] the Ninth Circuit held that the direct evidence requirement of *Price Waterhouse* was not abrogated by the 1991 Act, and thus, the plaintiff still had to produce direct evidence of discrimination if she was to receive the benefit of a mixed-motive instruction.[60] The Ninth Circuit denied Costa's petition for

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54. *Id.* at 858.

55. *Id.* The trial court's mixed-motive jury instruction read:

> You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason. However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

Id.

56. *Id.*

57. *Id.* at 846. Costa was awarded $64,377.74 in back pay, $200,000 in compensatory damages, and $100,000 in punitive damages. *Id.*

58. Costa v. Desert Palace, Inc., 268 F.3d 882, 884 (9th Cir. 2001) (*Costa I*). The court required "substantial evidence of conduct or statements by the employer directly reflecting discriminatory animus" for plaintiff to be deserving of a mixed-motive instruction. *Id.*

59. *Id.* at 886. All the other circuits have "reached the conclusion that evidence that merely raises an inference . . . is not sufficient." *Id.*

60. The Ninth Circuit appeared to adopt the "animus position" definition of direct evidence by only requiring evidence that "directly reflect[ed] discriminatory animus." *See id.* at 884;

rehearing but unanimously agreed to withdraw the opinion of the three-judge panel and hear the case en banc.[61]

D. The Opinion of the Ninth Circuit Court of Appeals En Banc

A divided Ninth Circuit reversed the three-judge panel's prior decision and held that the 1991 Act destroyed the direct evidence requirement for mixed-motive cases, despite the opposite conclusion reached by its sister circuits.[62] The majority noted Congress's direct assault on portions of the *Price Waterhouse* decision[63] and concluded that because Congress did not expressly adopt the direct evidence requirement, the 1991 Act implicitly overruled such requirement.[64] The dissenting judges, however, found that because Congress did not expressly overrule the direct evidence requirement, it should remain in effect.[65] Furthermore, the dissent noted that other courts overwhelmingly agreed with their position.[66] Desert Palace appealed this decision to the U.S. Supreme Court, which subsequently granted certiorari.[67]

E. The Opinion of the U.S. Supreme Court

The issue presented to the U.S. Supreme Court was "whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991."[68] In a unanimous decision authored by Justice Thomas, the Court held that the 1991 Act did not require a "heightened [evidentiary] showing."[69] Thus, the previous requirement imposed by *Price Waterhouse* was no longer good law.[70] Justice O'Connor wrote a separate

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Mizer, *supra* note 17, at 239-40.

61. *Costa I*, 268 F.3d at 884, *reh'g en banc granted*, 274 F.3d 1306 (9th Cir. 2002). The panel unanimously decided to withdraw its opinion, which is reported at 238 F.3d 1056 (9th Cir. 2000), and denied the petition for rehearing. The Ninth Circuit subsequently agreed to rehear the case en banc. *See* Costa v. Desert Palace, Inc., 299 F.3d 838 (2002) (en banc).

62. *Costa II*, 299 F.3d at 854.

63. *Id.* at 850.

64. *Id.* at 850-51. The premise for the direct evidence requirement was abrogated by the limitations placed on the same-action defense in the 1991 Act. *Id.* The Ninth Circuit made this conclusion though neither the text nor the legislative history of the 1991 Act refers to the direct evidence requirement. *Id.*; *see also* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2000).

65. *Costa II*, 299 F.3d at 866 (Gould, J., dissenting).

66. *Id.*

67. Desert Palace, Inc. v. Costa, 537 U.S. 1099 (2003).

68. Desert Palace, Inc. v. Costa, 539 U.S. 90, 92 (2003) (*Costa III*).

69. *Id.* at 101.

70. *Id.*

concurring opinion noting that Congress's codification of "a new evidentiary rule" abrogated the previous requirement of direct evidence.[71]

After rehashing the decisions of the lower courts and the history of the direct evidence requirement,[72] the Court focused on three different justifications for its conclusion. First, the Court analyzed the text of the 1991 Act.[73] In its analysis, the Court correctly noted that the statute fails to mention the direct evidence requirement.[74] The Court concluded that the only burden textually required of employees proceeding under a mixed-motive theory is that they "demonstrate that an employer used a forbidden consideration with respect to any employment practice."[75] Therefore, the Court reasoned that the only evidentiary burdens Congress placed on plaintiffs were the traditional "burdens of production and persuasion."[76] In the Court's view, had Congress intended to impose a "heightened showing,"[77] Congress would have expressly done so as it had done in the past.[78]

The second justification the Court found for abrogating the direct evidence requirement was somewhat of a corollary to the previously noted justification. Specifically, the Court determined that because Congress was silent about the type of evidence required under a mixed-motive theory, the traditional rule in civil cases — that the burden of proof can be met by either circumstantial or direct evidence — was implied.[79] After noting that circumstantial evidence is not only an adequate means of proving a plaintiff's case, but is often more

71. *See id.* at 102 (O'Connor, J., concurring). Justice O'Connor wrote separately to explain that the previous direct evidence requirement "triggered the deterrent purpose of [Title VII]," but Congress's codification of a "new evidentiary rule" abrogated such requirement. *Id.*

72. *See generally id.* at 93-98.

73. *Id.* at 98-99.

74. *Id.* at 99-100.

75. *Id.* at 91.

76. *Id.* at 99 (quoting 42 U.S.C. § 2000e-2(m) (2000)).

77. This note points out in Part IV, *infra*, that the Court's habitual use of direct evidence as synonymous with increased evidentiary burdens is unfounded and is one of the shortcomings of this opinion.

78. *Costa III*, 539 U.S. at 99.

79. *Id.* It should be noted that the Court included in its definition of the "conventional rule" a statement that the "plaintiff must prove his case by a preponderance of evidence." *Id.* (internal quotations omitted). Fundamental to this note is the idea that merely requiring plaintiffs to meet their burden of proof by a specific type or quality of evidence does not change the quantitative amount of proof required of plaintiffs. The Court's statement about the burden of proof in civil cases and the types of evidence that can be used in such cases unreasonably blurs the line between these two distinct concepts.

persuasive than direct evidence,[80] the Court proceeded to the third and final justification for its decision.

The third part of the Court's analysis focused on the use of the term "demonstrates" in both 1991 amendments to Title VII.[81] Essentially, the Court concluded that because the same-action defense allows employers to satisfy their burden of persuasion in asserting the defense by circumstantial and direct evidence, the use of the same term in adopting the mixed-motive theory implicitly allows employees to prove their cases in the same manner absent any congressional intent to the contrary.[82]

On first impression the Court's analysis in *Costa* seems persuasive. The discussion that follows, however, contends that the Court created ambiguity in the law where it should have refrained from interchanging distinctly defined terms. The court also incorrectly interpreted the impact of the 1991 Act on the direct evidence requirement by ignoring the precedential value of *Price Waterhouse*, thus failing to properly use important rules of statutory interpretation and ultimately acting contrary to congressional intent. Despite the analytical shortcomings of the opinion, this note concludes that *Costa* demonstrates the Court's recommitment to the core principles of Title VII.

IV. Analysis

A. Misuse of Direct Evidence Creates Ambiguity in the Law

In reaching its conclusion, the Court treated the requirement of direct evidence as synonymous with a heightened burden of proof.[83] Direct evidence is concerned with the type of evidence that must be produced for a party to satisfy the burden of proof.[84] In contrast, the burden of proof implicates the

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80. *Id.* at 100. "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying, and persuasive than direct evidence." *Id.* (quoting Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 508 (1957)).

81. *Id.* at 100-01; *see* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2000).

82. *Costa III*, 539 U.S. at 101; *see* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B).

83. *Costa III*, 539 U.S. at 99. Congress's failure to include language imposing a direct evidence requirement on plaintiffs proceeding under a mixed-motive theory of discrimination "is significant, for Congress has been unequivocal when imposing *heightened proof requirements* in other circumstances." *Id.* (emphasis added). Clearly, this indicates the Court's view that requiring direct evidence is equivalent, or at least analogous, to increasing the burden of proof.

84. *Black's Law Dictionary* defines direct evidence as "[e]vidence that is based on personal knowledge or observation that, if true, proves a fact without inference or presumption." BLACK'S LAW DICTIONARY 577 (7th ed. 1999). After *Price Waterhouse*, each of the lower courts adopted one of the three definitions of direct evidence (classic, animus plus, and animus), which are mentioned in note 17 *supra*. *See also* Costa v. Desert Palace, Inc., 299 F.3d 838,

quantum of evidence that a party must present to continue with its case.[85] By speaking of these two distinct concepts as if they were interchangeable terms with the same meaning and significance, the Court risked creating uncertainty in the law where none was necessary.[86] The Court's misuse of direct evidence as a substitute for a heightened burden of proof not only creates difficulties for future courts and attorneys in distinguishing the important differences between these concepts, but also illustrates why the Court's concern with placing an "increased evidentiary burden" on plaintiffs in mixed-motive cases is ill-founded.[87] Specifically, the Court incorrectly held that requiring employees to present direct evidence of discrimination[88] to receive a mixed-motive instruction is the equivalent of raising the plaintiff's burden of proof without congressional authorization.[89]

The direct evidence requirement in *Price Waterhouse* did not have this effect. Rather, the direct evidence requirement merely specified the *type* of evidence required to prove discrimination. Thus, the burden of proof remained the traditional preponderance of the evidence, which is the same

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852-53 (9th Cir. 2002) (en banc) (*Costa II*) (discussing the three definitions of direct evidence adopted by the lower courts).

85. The burden of proof "includes both the burden of persuasion and the burden of production." BLACK'S LAW DICTIONARY 190 (7th ed. 1999) (emphasis omitted). The burden of persuasion requires a party in a civil case to "convince the fact-finder to view the facts in a way that favors that party . . . 'by a preponderance of the evidence'"; while the burden of production is the party's "duty to introduce enough evidence on an issue to have the issue decided by the fact-finder." *Id.*

86. There has long been a judicial preference for clarity in the law where it is attainable. *See* Horne v. Coughlin, 178 F.3d 603, 609 (2d Cir. 1999); John Does 1-100 v. Boyd, 613 F. Supp. 1514, 1526 (D. Minn. 1985).

87. *Costa III*, 539 U.S. at 99.

88. *EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 922 (11th Cir. 1990), provides an example of direct evidence. In that case, an employee who was responsible for making decisions regarding the hiring and promotion of employees stated that "if it was his company, he wouldn't hire any black people." *Id.* Because the statement was made by a decisionmaker and directly reflected discriminatory animus in a specific employment activity, the court held it to be direct evidence of discrimination sufficient to warrant a mixed-motive instruction. *Id.* In contrast, the court in *Allen v. City of Athens*, 937 F. Supp. 1531 (N.D. Ala. 1996), held that evidence that a decisionmaker had "hired black and female applicants to avoid claims of race and sex discrimination, [referred to an employee] as 'the black guy,' [told] racial jokes . . . [used] the 'N' word and would not shake [the black employee's hand] when he was being evaluated for [a different position]" was not direct evidence of discrimination. *Id.* at 1542. "[D]irect evidence of discrimination is rare." *Id.* "Stray remarks . . . statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself" are not direct evidence. Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989).

89. *Costa III*, 539 U.S. at 99-100.

burden that must be met in other civil cases. Moreover, direct evidence in mixed-motive cases does not require *more* evidence, as the Court implies, but rather, *better* evidence of discrimination.[90] Justice O'Connor recognized the need for better evidence in mixed-motive cases because when employees prove that a prohibited factor was taken into account, the burden of proof shifts to the employer.[91] According to Justice O'Connor, employees should present sufficiently powerful evidence to justify a shift in the traditional paradigm of proof in civil cases.[92]

Costa gave the Court a chance to acknowledge the confusion among the lower courts and to recognize, in a bright-line manner, the important distinction between *type of evidence* and *burden of proof*. If the Court had distinguished between the type of evidence required and the burden of proof placed on Costa, only the most important question would remain — which of the lower courts' definitions of direct evidence should be adopted.[93] By failing to initially make the important bright-line distinction and subsequently failing to adopt a uniform standard for direct evidence, the Court failed to create clarity in the law. Instead, the Court chose to eliminate the direct evidence requirement altogether and in the process risked creating ambiguity in the law by using distinct legal terms interchangeably.

B. The Court's Rationale for Destroying the Direct Evidence Requirement is Flawed

1. The Court Ignored Justice O'Connor's Precedent From Price Waterhouse

Given that *Price Waterhouse* was a plurality opinion, the limited precedential value of *Price Waterhouse* allowed the Court to easily overrule the direct evidence requirement in *Costa*. Plurality decisions are troublesome because, rather than having a clear rationale to follow, they present lower courts and attorneys with at least two differing rationales.[94] The lower courts have the burden of determining which rationale should be followed for purposes of precedent.[95] In *Marks v. United States*,[96] the Supreme Court provided some guidance for determining which rationale of a plurality opinion

90. *Price Waterhouse*, 490 U.S. at 275-77 (O'Connor, J., concurring).
91. *Id.*
92. *Id.*
93. *See supra* note 17.
94. Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 426 (1992).
95. *Id.*
96. 430 U.S. 188 (1977).

courts should follow as precedent.[97] For purposes of precedent, the holding in plurality opinions is found by determining the narrowest possible grounds of the opinion.[98] Given the rule in *Marks*, it appears that lower courts must follow as precedent the rationale that has the least potential for making sweeping changes to the law.

Clearly, the narrowest holding of *Price Waterhouse* was Justice O'Connor's concurring opinion because none of the other Justices would have required direct evidence to shift the burden of proof to the defendant.[99] Justice O'Connor's opinion not only recognized that employees could claim relief under Title VII by pursuing a mixed-motive theory, but also required employees to prove their employer's animus toward them by direct evidence.[100] Significantly, nearly all of the circuit courts have recognized some form of direct evidence requirement, even after the enactment of the 1991 Act.[101] In fact, the Ninth Circuit was the only appellate court to hold that the direct evidence requirement was eliminated by the new legislation.[102]

Given that all of the circuit courts except the Ninth Circuit held that the direct evidence requirement survived the 1991 Act, and the apparent precedential value of Justice O'Connor's concurring opinion in *Price Waterhouse*, the decision of the Supreme Court to eliminate the direct evidence requirement seems peculiar at best. Rather than eliminating the direct evidence requirement entirely, the Court in *Costa* should have recognized the precedential value of Justice O'Connor's *Price Waterhouse* concurrence and adopted one of the three definitions of direct evidence developed by the circuit courts.[103] If the Court had seized this opportunity, it could have weighed the interests of employees, employers, and the goals and policies of Title VII in reaching its conclusion. Instead, the Court chose to

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97. *See id.* at 193-94.

98. *Id.* at 193 ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds.'") (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

99. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251, 258-61 (1989).

100. *See id.* at 275-77 (O'Connor, J., concurring).

101. *See* Weston-Smith v. Cooley Dickinson Hosp., 282 F.3d 60, 64 (1st Cir. 2002); Cronquist v. City of Minneapolis, 237 F.3d 920, 925 (8th Cir. 2001); Shorter v. ICG Holdings, Inc., 188 F.3d 1204, 1207 (10th Cir. 1999); Burrell v. Bd. of Trs. of Ga. Military Coll., 125 F.3d 1390, 1394 n.7 (11th Cir. 1997); Ostrowski v. Atl. Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992).

102. *See* Costa v. Desert Palace, Inc., 299 F.3d 838, 853 (9th Cir. 2002) (en banc) (*Costa II*).

103. *See supra* note 17.

sidestep the issue and take the less prudent path of eliminating direct evidence in mixed-motive cases.

2. The Court Ignored Important Rules of Statutory Interpretation

The Court's errors in deciding *Costa* are not limited to the Court's failure to afford *Price Waterhouse* proper precedential weight. In reaching its conclusion, the Court made inappropriate and ill-founded conclusions regarding both the implications of the express statutory language of the 1991 Act and the congressional intent behind the statute. Central to the Court's holding was the idea that because the text of the statute did not impose a direct evidence requirement on mixed-motive plaintiffs, the Court had no power to require one.[104] The Court correctly observed that the relevant provisions of the 1991 Act say nothing about the direct evidence requirement.[105] However, the Court's ability to find, implicit in the statute's silence, congressional intent to abrogate an established evidentiary requirement is puzzling. When a statute is silent, courts should not infer the intent of the legislature.[106] Thus, because no portion of the 1991 Act addresses the direct evidence requirement,[107] the judicially created rule requiring such evidence in mixed-motive cases should remain in effect.[108] In light of this fundamental principle, the Court clearly erred in interpreting Congress's silence as an intent to destroy the evidentiary requirement imposed by *Price Waterhouse*.[109]

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104. Desert Palace, Inc. v. Costa, 539 U.S. 90, 99-100 (2003) (*Costa III*) (noting that Congress's failure to make its intent clear is significant).

105. *Id.*

106. CHW West Bay v. Thompson, 246 F.3d 1218, 1224 (9th Cir. 2001) ("It is incorrect to make assumptions on congressional intent from Congress's silence . . . . Congress' failure to distinguish . . . does not constitute the kind of 'direct speech' indicative of clear congressional intent . . . .") (emphasis omitted).

107. *See supra* notes 10-11 and accompanying text.

108. *See* Palmore v. Sup. Ct. of D.C., 515 F.2d 1294, 1307 (D.C. Cir. 1975) (holding that "repeals by implication . . . are disfavored."). While *Palmore* was concerned with the repeal of the district court's power to hear habeas corpus petitions, the same principal seems to be logical when dealing with law created by legislatures, as in *Palmore*, and in dealing with law created by the judiciary, as in *Costa*.

109. For other cases holding that courts should not infer an intent to overrule existing law from congressional silence, see *CHW West Bay*, 246 F.3d at 1224, *United States v. Rivera*, 153 F.3d 809, 812 (7th Cir. 1998) ("An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.") (internal citations and quotations omitted), *In re Providence Television Ltd. Partnership*, 75 B.R. 139, 140 (N.D. Ill. 1987) ("Where Congress knows how to say something and chooses not to, its silence is controlling."), and *City of Duncan v. Bingham*, 394 F.2d 456, 460 (Okla. 1964).

"[S]tatutory construction is, at best, an imperfect science,"[110] and mistakes should be expected when the Court delves into such a practice. As the Court correctly noted in *Costa*, the first step in statutory interpretation is an analysis of the statutory text.[111] After such analysis, no further interpretation is required if the meaning of the statute is clear.[112] Because the text of the relevant statute in *Costa* was void of any language expressly addressing the direct evidence requirement, the Court incorrectly concluded that no purview into the legislative history of the 1991 Act was necessary.[113] Given the unhelpful nature of the 1991 Act's text, the Court should have explored the legislative history of the statute to determine congressional intent relating to the direct evidence requirement.[114]

Exploring the legislative history of the 1991 Act reveals that Congress was primarily concerned with decisions such as *Wards Cove Packing Co. v. Atonio*[115] and *Griggs v. Duke Power Co.*,[116] rather than *Price Waterhouse*.[117] In fact, the provisions of the 1991 Act that dealt specifically with *Price Waterhouse* were only concerned with providing statutory recognition for the mixed-motive theory and restricting the scope of the same-action defense.[118]

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110. *Palmore*, 515 F.2d at 1299 (quoting Schiaffo v. Heltoski, 492 F.2d 413, 428 (3d Cir. 1974)).

111. Desert Palace, Inc. v. Costa, 539 U.S. 90, 93 (2003) (*Costa III*).

112. *Id.* at 93-94.

113. *Id.*

114. *Palmore*, 515 F.2d at 1299 ("Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent.").

115. 490 U.S. 642 (1989).

116. 401 U.S. 424 (1971).

117. *See* H.R. REP. NO. 102-40, pt. II, at 2-4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 694-96. The opinions that Congress was concerned with were *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989), *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989), *Martin v. Wilks*, 490 U.S. 755 (1989), *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), *Library of Congress v. Shaw*, 478 U.S. 310 (1986), *Evans v. Jeff D.*, 475 U.S. 717 (1986), *Marek v. Chesny*, 473 U.S. 1 (1985), and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *See* H.R. REP. NO. 102-40, pt. II, at 2-4, *reprinted in* 1991 U.S.C.C.A.N. at 694-96.

118. H.R. REP. NO. 102-40, pt. II, at 65-66, *reprinted in* 1991 U.S.C.C.A.N. at 751-52. The portion of the 1991 Act that dealt directly with the *Price Waterhouse* opinion merely sought to "reaffirm[ ] that any reliance on prejudice in making employment decisions is illegal." H.R. REP. NO. 102-40, pt. II, at 2, *reprinted in* 1991 U.S.C.C.A.N. at 695. The statute also set out the appropriate relief for such discrimination by preventing the courts from ordering "the hiring, retention or promoting of a person not qualified for the position." H.R. REP. NO. 102-40, pt. II, at 3, *reprinted in* 1991 U.S.C.C.A.N. at 695.

Even more revealing about Congress's intent regarding the direct evidence requirement is the statement in the report of the House Committee on Education and Labor that "[s]ection 5 overturns *one* aspect of . . . [*Price Waterhouse*] by adding a new subsection . . . to Title VII."[119] The "one aspect" that the House Committee addressed was the scope of the same-action defense.[120] This is evident from the statement in the Education and Labor Committee's report that *Price Waterhouse* "undercut [Title VII's] prohibition [by] threatening to undermine Title VII's twin objectives of deterring employers from discriminatory conduct and redressing the injuries suffered by victims of discrimination."[121] Clearly, Congress believed that a same-action defense that alleviated employers of all liability significantly undercut the deterrent value of Title VII.

Contrary to the Court's holding in *Costa*, Congress may have intended to retain the direct evidence requirement. Not only did Congress fail to mention the direct evidence requirement in the statute, but relevant portions of the 1991 Act's legislative history also indicate Congress's intent to retain the direct evidence requirement.[122] The House Education and Labor Committee's reports reveal that Congress intended the 1991 Act to establish "the rule applied by the majority of the circuits,"[123] which, as previously noted, required some form of direct evidence. Furthermore, if the Court had taken the additional step of reviewing the relevant legislative history, it may have avoided trying to decide which of the three direct evidence definitions to adopt in *Costa*. Congress indicated which definition of direct evidence it intended to adopt by stating:

> Conduct or statements are relevant under this test only if the plaintiff shows a nexus between the conduct or statements and the employment decision at issue. For example, isolated or stray remarks not shown, under the standards generally applied for

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119. H.R. REP. NO. 102-40, pt. II, at 16, *reprinted in* 1991 U.S.C.C.A.N. at 709 (emphasis added).

120. *See id.*

121. H.R. REP. NO. 102-40, pt. II, at 17, *reprinted in* 1991 U.S.C.C.A.N. at 710 ("[In] enacting the Civil Rights Act of 1964, Congress made clear that it intended to prohibit *all* invidious consideration of sex, race, color, religion, or national origin in employment decisions.").

122. *See* H.R. REP. NO. 102-40, pt. II, at 18, *reprinted in* 1991 U.S.C.C.A.N. at 711; H.R. REP. NO. 102-40, pt. I, at 48, *reprinted in* 1991 U.S.C.C.A.N. at 586.

123. H.R. REP. NO. 102-40, pt. II, at 18, *reprinted in* 1991 U.S.C.C.A.N. at 711.

> weighing the sufficiency of evidence, to have contributed to the employment decision at issue are not alone sufficient.[124]

Thus, it appears that Congress not only intended to maintain the majority view that direct evidence was required in mixed-motive cases, but also determined that the "animus plus"[125] definition was appropriate.

The justification for maintaining the direct evidence requirement after the passage of the 1991 Act is two-fold. First, because Congress failed to address the direct evidence requirement either by express or implicit action, the rule of *Price Waterhouse*, that direct evidence is required to justify a mixed-motive instruction, should have remained in effect. This is because "[a]n inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent."[126] As previously noted, the legislative history that is available regarding the relevant portions of the 1991 Act indicates that the inference drawn by the Court in *Costa* clearly weighs against the textual and contextual evidence of the statute.[127] Second, the legislative history of the 1991 Act indicates, implicitly if not expressly, that *Price Waterhouse* imposed a direct evidence requirement in mixed-motive cases.[128] Furthermore, it appears that Congress sought to maintain such an evidentiary requirement to justify the burden shifting in mixed-motive cases. Notably, requiring a specific type or quality of evidence has no effect on the quantity of evidence an employee must produce. Therefore, compelling mixed-motive plaintiffs to prove their cases by direct evidence does not make employees' cases more difficult to prove by requiring a higher amount of evidence. Rather, it attempts to justify the burden of proof shift to the employers and breaks with the standard burden in civil suits by requiring employees to present better quality evidence.[129]

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124. *Id.*; *see also* H.R. REP. NO. 102-40, pt. I, at 48, *reprinted in* 1991 U.S.C.C.A.N. at 586 ("Conduct or statements are relevant under this test only if the plaintiff shows a nexus between the conduct or statements and the employment decision at issue, under the standards generally applied for weighing the sufficiency of evidence.").

125. The "animus plus" view of direct evidence has been described as "includ[ing] statements or conduct by the employer that directly reflect the alleged discriminatory animus, and that relate precisely to the employment decision at issue." Mizer, *supra* note 17, at 240.

126. United States v. Rivera, 153 F.3d 809, 812 (1998) (quoting Burns v. United States, 501 U.S. 129, 136 (1991)).

127. *See* H.R. REP. NO. 102-40, pt. II, at 18, *reprinted in* 1991 U.S.C.C.A.N. at 711; H.R. REP. NO. 102-40, pt. I, at 48, *reprinted in* 1991 U.S.C.C.A.N. at 586.

128. *See* H.R. REP. NO. 102-40, pt. II, at 18, *reprinted in* 1991 U.S.C.C.A.N. at 711; H.R. REP. NO. 102-40, pt. I, at 48, *reprinted in* 1991 U.S.C.C.A.N. at 586.

129. A helpful illustration of this important distinction can be found in the culinary world. Assuming a recipe calls for two cups of wine, the "burden" can be satisfied by using *any* wine

3. A Merger of Pretext and Mixed-Motive Theories is Contrary to Legislative Intent

At least one commentator has noted that the abandonment of the direct evidence requirement essentially merges mixed-motive and pretext theories into one theory of discrimination[130] because, without the direct evidence requirement, "there seems to be little practical difference between pretext and mixed-motive cases."[131] Before *Costa*, two essential differences existed between the theories: (1) the number of motivations involved in making the employment decision,[132] and (2) the requirement that mixed-motive plaintiffs present direct evidence of discriminatory animus.[133] By eliminating the direct evidence requirement, the distinction between the theories becomes factual rather than legal.[134] Thus, post-*Costa*, the argument for collapsing mixed-motive and pretext cases into one theory under Title VII is premised on the assumption that the two theories are not "fundamentally different causes of action."[135] However, the previous discussion regarding the legislative history of the 1991 Act and the structural makeup of Title VII indicates that *Costa's* collapse of the two theories into one is in itself contrary to congressional intent.[136]

As previously noted, the 1991 Act's legislative history indicates Congress's intent to retain the direct evidence requirement.[137] However, support for the argument that *Costa* inappropriately collapsed the two theories of discrimination in Title VII litigation into one theory is not limited to the legislative history. The structure of Title VII also provides evidence of congressional intent to maintain the direct evidence requirement, thus keeping the two theories necessarily distinct. The fact that the pretext theory[138] and

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or any combination of wines, so long as the amount is correct. However, if the chef really wants the dish to taste its best, he will want to use the highest *quality* wine. Thus, the recipe is not any more difficult or burdensome to make with the highest quality wine, but the dish may certainly taste better when the chef uses "the good stuff."

130. Kelly Pierce, *A Fire Without Smoke: The Elimination of the Direct Evidence Requirement for Mixed-Motive Employment Discrimination Cases in Costa v. Desert Palace, Inc.*, 87 MINN. L. REV. 2173, 2205-07 (2003).

131. *Id.* at 2205.

132. *Id.* at 2206.

133. Price Waterhouse v. Hopkins, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring).

134. Pierce, *supra* note 130, at 2205.

135. *Id.* at 2207.

136. *See supra* notes 110-22 and accompanying text.

137. *See supra* notes 122-24.

138. 42 U.S.C. § 2000e-2(a) (2000).

mixed-motive theory[139] are found in separate sections of Title VII is significant.

Congress's intent to formulate two separate standards for Title VII plaintiffs to seek relief is evidenced by the enactment of an entirely independent section of the 1991 Act that codifies the mixed-motive theory.[140] If the *Costa* decision is an accurate portrayal of congressional intent, as the Court claimed,[141] Congress would have merely amended the existing section to provide for a mixed-motive theory, rather than create an entirely new section within an already complex statute. By creating an entirely different section within Title VII,[142] Congress indicated that the theories embodied in these sections are fundamentally different. The abolition of the direct evidence requirement essentially merges these two theories into one and defeats the reason for enacting these theories in separate sections of Title VII. Thus, it is logical to conclude that the direct evidence requirement is indeed a significant reason, if not the only reason, for having two separate theories for discrimination actions under Title VII.

C. Costa Signals a Recommitment to the Principles of Title VII

While "the purpose of Title VII is not punitive but corrective,"[143] Congress's ultimate goal in enacting the historic legislation was "to eradicate unlawful discrimination."[144] By allowing employees to use a mixed-motive theory under Title VII and prove discrimination by either circumstantial or direct evidence, the Court has taken an important step toward the realization of this goal. Although the Court incorrectly equated the direct evidence requirement with an increased burden of proof, allowing employees to prove discrimination under a mixed-motive theory by circumstantial or direct evidence increases employees' chances of obtaining relief under Title VII. Employees are more likely to be victorious after *Costa* because circumstantial evidence is typically more common than direct evidence of discrimination.[145] By making it easier for employees to successfully litigate their claims under

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139. 42 U.S.C. § 2000e-2(m).

140. *See* 42 U.S.C. §§ 2000e-2(a), 2000e-2(m).

141. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 98-99 (2003) (*Costa III*). The Court specifically noted that, "where, as here, the words of the statute are unambiguous, the 'judicial inquiry is complete.'" *Id.* at 98 (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992)).

142. 42 U.S.C. § 2000e-2(m).

143. Pearson v. W. Elec. Co., 542 F.2d 1150, 1152 (10th Cir. 1976).

144. Adams v. United States, 932 F. Supp. 660, 664 (E.D. Pa. 1996).

145. *See Costa III*, 539 U.S. at 100 (quoting Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 508 (1957)).

Title VII, the Court has indicated its continued resolve to end discrimination in the workplace.

1. Costa Mirrors the Court's Recent Pattern of Taking a More Aggressive Stand Against Discrimination on Constitutional Grounds

Considering the Supreme Court's recent constitutional case law, it is not surprising that the Court also seeks to renew its commitment to ending private sector discrimination.[146] While merely changing the type of evidence allowed to carry a party's burden of proof seems insubstantial compared with decisions regarding discrimination on constitutional grounds, the converse may be more accurate. In fact, discrimination frequently occurs in the private sector between private actors, such as discrimination by employers against employees of protected classes.[147] Congress recognized the need to address discrimination in the workplace, which resulted in the passage of the Civil Rights Act of 1964.

The slight alteration in *Costa* of the requirements for employees proceeding under a mixed-motive theory allows for the principles of Title VII to be more readily enforced. As a result of the increased enforcement, there is a greater chance of achieving the goals of the statute.[148] In enacting Title VII,[149] Congress clearly understood that ending private sector discrimination ensures that all American citizens receive the benefits promised by this country's founding principles.[150] In *Costa*, the Court may also have realized that if the

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146. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003); *see also supra* note 18 and accompanying text.

147. *See* S. REP. NO. 88-872, at 2356 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2356. The fundamental purpose for passing Title VII was to "guarantee all persons freedom from refusal by an included establishment or organization to deal with them on account of race, [sex], color, religion, or national origin." *Id.*; *see Adams*, 932 F. Supp. at 664 ("Title VII was designed to eradicate unlawful discrimination, and the private right of action against an employer was intended to provide a remedy [against such employer].").

148. *See* Sink v. Knox County Hosp., 900 F. Supp. 1065, 1073 (S.D. Ind. 1995) ("By enacting Title VII, . . . Congress attempted to pass a law that would prevent the perpetuation of pernicious stereotypes, eliminate the degradation of persons who share certain protected characteristics, and thus open up employment opportunities to those persons."). The "prevention of pernicious stereotypes" by opening up the employment arena is best served by allowing those plaintiffs who have been discriminated against to enforce their rights under the statute. This is the reason Congress provided a private cause of action under Title VII. *See id.* The "underlying purpose of Title VII is to remove artificial, arbitrary and unnecessary barriers to employment when those barriers operate to discriminate on the basis of race, sex, or other protected characteristics." *Id.*

149. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

150. *See* S. REP. NO. 88-872, at 2362, *reprinted in* 1964 U.S.C.C.A.N. at 2362 (recognizing

fundamental notions of this country are to become a reality, victims of discrimination should not be limited only to discrimination that they can prove by direct evidence. To eradicate discrimination, the law must allow employees to challenge and defeat discrimination, regardless of whether the allegations are supported by direct evidence. By allowing employees to prove their mixed-motive theories of discrimination with circumstantial or direct evidence, *Costa* signifies a minor change in the law that constitutes one large stride toward ending workplace discrimination. Indeed, *Costa* expands the scope of Title VII to encompass those forms of discrimination that may not have been easily proven under the *Price Waterhouse* direct evidence requirement.

2. Response to Congress's Criticism Regarding the Rash of Cases Favoring Employers

Another signal of the Court's recommitment to Title VII's core principles of "'mak[ing] whole' victims of unlawful employment discrimination,"[151] eradicating unlawful discrimination,[152] and achieving "voluntary compliance with the nondiscrimination prohibitions,"[153] is that the Court recognizes and accepts Congress's motive in enacting the 1991 amendments to Title VII.[154] Specifically, the Court held that the purpose of the 1991 Act was not only to reverse certain decisions with which Congress disagreed, but also to strengthen the rights of employees.[155] An examination of the analysis in *Costa* indicates that the Court agreed with the mission of Congress in enacting the 1991 legislation.

As previously noted, the statute in question fails to speak, either by implication or expression, to the direct evidence requirement of *Price*

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that ending private sector discrimination "make[s] good at long last the guarantees of our Constitution.").

151. Darnell v. City of Jasper, 730 F.2d 653, 655 (11th Cir. 1984).

152. *Adams*, 932 F. Supp. at 664.

153. S. REP. NO. 88-872, at 2378, *reprinted in* 1964 U.S.C.C.A.N. at 2378.

154. H.R. REP. NO. 102-40, pt. II, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 694. The 1991 Act had two primary purposes: (1) "to respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions;" and (2) "to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination." *Id.*

155. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 93-95 (2003) (*Costa III*). "Congress passed the 1991 Act 'in large part as a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964.'" *Id.* at 94 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 250 (1994)) (internal alterations omitted).

Waterhouse.[156] Despite the analytical shortcomings of *Costa*, the elimination of the direct evidence requirement indicates the Court's willingness to pursue the goals announced by Congress in passing the 1991 Act. Though elimination of the direct evidence requirement was not warranted by the text or history of the 1991 Act, the justification for the repeal of the direct evidence requirement was plainly implicated by the 1991 Act's social policy.[157] By eliminating the direct evidence requirement, the Court served the goal of strengthening employee rights by providing them with a method of meeting their burden of proof that previously did not exist.[158] This change was made even though the vast majority of the circuits reached the opposite conclusion, and despite Congress's silence regarding the direct evidence requirement.[159] More importantly, the Court's willingness to strengthen employees' rights under Title VII, despite the precedent of *Price Waterhouse*, indicates a renewed commitment by the Court to the core principles of Title VII.[160]

D. Effect of Costa's Recommitment

1. Employees' Cases Are Easier to Prove

Practically speaking, the most important aspect of the *Costa* decision is its impact on Title VII litigation. By allowing employees to receive a mixed-motive jury instruction when they have met their burden of proof by either circumstantial or direct evidence, it is likely that courts will find more employers liable for violating Title VII. This is because circumstantial evidence is generally more readily available than direct evidence, regardless of which definition of direct evidence one uses.[161] Because there is a prospectively greater amount of satisfactory evidence in mixed-motive cases after *Costa*, there is a greater potential for successful Title VII claims. Congress's restriction of the effective scope of the same-action defense, as opposed to the abolition of the direct evidence requirement, will most likely be the cause of any "flood of litigation" that may result from the *Costa* decision.

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156. *See supra* notes 10-11 and accompanying text.

157. *See* H.R. REP. NO. 102-40, pt. I, at 4, *reprinted in* 1991 U.S.C.C.A.N. at 556; H.R. REP. NO. 102-40, pt. II, at 2, *reprinted in* 1991 U.S.C.C.A.N. at 694.

158. *See* 42 U.S.C. § 1981a (2000) (providing Title VII plaintiffs with a mixed-motive theory).

159. *See supra* notes 101-02 and accompanying text; *see also* 42 U.S.C. § 1981a (1991).

160. *See* Pearson v. W. Elec. Co., 542 F.2d 1150, 1152 (10th Cir. 1976).

161. *See supra* note 17; *see also* Desert Palace, Inc. v. Costa, 594 U.S. 90, 100 (2003).

The same-action defense under the 1991 Act[162] merely limits the remedies available to plaintiffs if the defendant is able to prove by a preponderance of the evidence that it would have taken the same adverse employment action even if the forbidden characteristic was not considered.[163] In contrast, the same-action defense, as promulgated in *Price Waterhouse*, would have allowed the defendant to completely escape liability.[164] Once this important distinction is noted, it becomes apparent that, although *Costa* may make it easier for employees to present enough evidence to defeat an employer's summary judgment motion, any increase in litigation because of encouraged employees is probably a result of the new scope of the same-action defense, as defined by Congress. The lack of a complete same-action defense, coupled with a more liberal evidentiary scheme as a result of *Costa*, may lead to a greater number of Title VII claims, and logically, more employees' verdicts.

In addition to increasing the likelihood of liability in Title VII actions, *Costa* brings the requirements of proof under mixed-motive theories in line with the evidentiary requirements of other civil suits.[165] Thus, *Costa* appears to further support the idea that the Court has recommitted itself to the principles of Title VII. Alternatively, to require direct evidence in mixed-motive cases is not only atypical of civil actions, but also may indicate a judicial prejudice against civil rights litigation.[166] Ultimately, the Court made the correct decision by holding that mixed-motive Title VII cases require the same evidence as other civil suits.

2. Greater Compliance Because of a Threat of Litigation and a Potential for More Settlements

Because of the increase in the likelihood of success for those employees pursuing Title VII claims under a mixed-motive theory, it is logical to conclude that the potential for employees to be more inspired to pursue litigation also increases. With this likelihood noted, it becomes increasingly

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162. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2000).

163. *Id.*

164. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989).

165. Compagnie des Bauxites de Guinee v. Ins. Co. of N. Am., 551 F. Supp. 1239, 1242 (D.C. Pa. 1982) ("In a civil case . . . the burden of [proof] . . . [is] a preponderance of the evidence.").

166. *See* Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 702 F. Supp. 1317, 1328 (E.D. Mich. 1988) ("Among the factors to be considered in allocating the burden of proof is an estimate of the probabilities, fairness, and special policy considerations."). If the Court had continued to apply an increased evidentiary burden to mixed-motive plaintiffs, the balance of these factors would cause plaintiffs to bear an increased risk of unsuccessful litigation. This would seem at odds with the Court's and Congress's intention to end workplace discrimination.

important for employers to be proactive in eliminating even inconsequential considerations of forbidden characteristics, so as to minimize the potential for litigation. Interestingly, by increasing the chances for employees to be successful through an adversarial process, the Court has given employers further incentive to comply with the mandates of Title VII before becoming involved in expensive litigation. The increased incentive corresponds nicely with Title VII's goal of "voluntary compliance with the nondiscrimination prohibitions."[167] Should employers fail to comply with Title VII's commands, the increased potential of liability for unlawful discrimination may result in an increased number of settlements to avoid costly litigation. Although perhaps unintentional, one of the potential results of *Costa* is to further the policy of conciliation and compensation, which was within the original purpose of the Civil Rights Act of 1964.[168]

V. Conclusion

Despite the analytical shortcomings of *Costa*, the decision was the correct conclusion in light of the important policies served by eliminating the direct evidence requirement in mixed-motive Title VII litigation. In eliminating the direct evidence requirement, the Court ignored important rules of statutory interpretation, its own precedent, and express congressional intent regarding the evidentiary requirements in mixed-motive cases. However, "[i]n a nation dedicated to the proposition that all men are created equal . . . discrimination has no place."[169] *Costa* indicates that the Court is aware of its opinion's implications on the continued viability of discrimination in the workplace. In the end, *Costa* serves as a reassurance that the Court is "pledge[d] . . . unreservedly to [the] eradication" of discrimination.[170]

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167. S. REP. NO. 88-872, at 2378 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2378.
168. Pearson v. W. Elec. Co., 542 F.2d 1150, 1152 (10th Cir. 1976).
169. S. REP. NO. 88-872, at 2362, *reprinted in* 1964 U.S.C.C.A.N. at 2362.
170. *Id.*