2014

Distinct Claims for Distinct Wrongs?: The Preemption Treatment of Highly Personal Wrongs

Evan Feinauer

Follow this and additional works at: http://chicagounbound.uchicago.edu/uclf

Recommended Citation

Available at: http://chicagounbound.uchicago.edu/uclf/vol2014/iss1/14

This Comment is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
Distinct Claims for Distinct Wrongs: The Preemption Treatment of “Highly Personal” Wrongs

Evan Feinauer

INTRODUCTION

Title VII of the 1964 Civil Rights Act\(^1\) prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.\(^2\) In 1972, Congress enacted the Equal Employment Opportunity Act (EEOA),\(^3\) which extended this prohibition to protect federal employees.\(^4\) While Congress employed a “savings clause” to disavow an explicit intent to displace state laws under which remedies for employment discrimination or other wrongs already existed,\(^5\) courts have found that Title VII preempts certain claims.\(^6\)

Courts have found that Title VII preempts constitutional tort claims and federal tort claims seeking to redress harms arising from an instance of employment discrimination, such as emotional distress.\(^7\) Yet Title VII does not always preempt state

---

\(^{1}\) BA 2009, University of Wisconsin; MS 2011, Suffolk University; JD Candidate 2015, The University of Chicago Law School.

\(^{2}\) 42 USC § 2000e et seq.

\(^{3}\) Id.


\(^{5}\) Id ("All personnel actions affecting employees or applicants for employment [with the federal government] shall be made free from any discrimination based on race, color, religion, sex, or national origin.").

\(^{6}\) Id ("Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.").

\(^{7}\) See, for example, Brown v General Services Administration, 425 US 820, 834–35 (1976) (holding that 42 USC § 2000e-16 provides the exclusive judicial remedy for claims of discrimination in federal employment).

See, for example, Pueschel v United States, 369 F3d 345, 353 (4th Cir 2004)
law tort claims. Some courts find that Title VII does not preempt state tort claims based on a “highly personal” wrong, even when the state tort claim arises from the same set of facts as a Title VII discrimination claim. Other courts reject the “highly personal” theory, finding that Title VII preempts such state tort claims. This split may have enormous effects on a federal employee pursuing a Title VII claim. Which side of the split a court comes down on could, for example, determine what remedies are available to the plaintiff, the size of any monetary relief, the procedural limitations on bringing such an action, and, perhaps, whether any relief will be available at all.

This Comment argues that actions that seek to remedy a wrong or harm that is conceptually and actually distinct—and not merely duplicative—from the wrong or harm of employment discrimination should not be preempted. In order to achieve this result, this Comment concludes that courts should abandon the “highly personal” wrong standard in favor of a standard that more explicitly identifies this salient feature of those tort actions that ought not to be preempted. Thus, Title VII should preempt wrongs that are the direct result of employment discrimination because they are indistinct from Title VII claims—unless the harms resulting from employment discrimination are so egregious that the remedies available under Title VII are clearly inadequate. In that case, it is possible that either a distinct wrong is actually present or that tort law may serve to supplement Title VII in limited cases.

Part I of this Comment discusses Title VII as amended by the EEOA and the current state of preemption doctrine as it relates to Title VII. Part II describes the differing treatment of

\( ^8\) See, for example, Brock v United States, 64 F3d 1421, 1423 (9th Cir 1995) (holding that Title VII did not preempt claim alleging negligent supervision of complainant’s superior).

\( ^9\) Id.

\( ^10\) See, for example, Mathis v Henderson, 243 F3d 446, 451 (8th Cir 2001) (holding that Title VII preempts the several state claims, including loss of consortium, brought by the plaintiff).

\( ^11\) See Part II.B.

\( ^12\) See Part IV.

\( ^13\) Id.
“highly personal” state tort claims, with a focus on courts' reasoning about Congressional purpose and the manner in which they frame the harms implicated by this category of cases. Part III contends that a singular focus on purpose is either inconclusive or misleading, and that the “highly personal” standard is inadequate. Part IV argues that the resolution to this conflict lies in clarifying which sorts of harms give rise to claims that ought not to be preempted. The Comment then determines that a move away from the highly personal standard is advisable in order to properly address the reasonable concerns of both lines of cases. Finally, Part V concludes with a brief summary of the proposal.

I. CURRENT LAW

A. Title VII and the Equal Employment Opportunity Act

Title VII of the 1964 Civil Rights Act\textsuperscript{14} prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.\textsuperscript{15} It also prohibits retaliation against an employee who complains about discrimination, files a complaint, or participates in an investigation of the alleged discrimination.\textsuperscript{16} The Equal Employment Opportunity Commission (EEOC) enforces Title VII and other federal employment discrimination laws.\textsuperscript{17}

In 1972, Congress passed the Equal Employment Opportunity Act (EEOA),\textsuperscript{18} which extended Title VII protection to federal employees.\textsuperscript{19} This extension rendered the federal government subject to the same prohibitions Title VII initially placed on private employers. Prior to the EEOA, federal employees faced an uncertain procedural path when seeking administrative relief within their respective federal agencies: each individual agency handled discrimination complaints through its own internal process, which confused and

\begin{flushright}
\textsuperscript{14} 42 USC § 2000e et seq.
\textsuperscript{15} 42 USC § 2000e-2.
\textsuperscript{16} 42 USC § 2000e-3.
\textsuperscript{17} 42 USC § 2000e-4.
\textsuperscript{19} 42 USC § 2000e-16.
\end{flushright}
discouraged federal employees seeking relief.\textsuperscript{20} Judicial review of these administrative decisions was even more uncertain in the pre-EEOA regime; unclear exhaustion requirements, among other practical obstacles, made meaningful judicial review difficult.\textsuperscript{21} Both of these concerns appear to have influenced Congress’s approach; the EEOA creates a clear procedure for aggrieved federal employees to file complaints with the EEOC and to appeal decisions on those complaints to administrative judges and federal district courts.\textsuperscript{22}

B. Preemption Doctrine

Although the EEOA addressed the problems of administrative and judicial relief, the law’s interaction with federal preemption doctrine presented new challenges. The doctrine of preemption is grounded in the Supremacy Clause of the United States Constitution,\textsuperscript{23} which declares federal law to be “the supreme Law of the Land,” meaning that when federal law and state law conflict, federal law preempts state law.\textsuperscript{24}

\textsuperscript{20} \textit{Brown v. General Services Administration}, 425 US 820, 825-26 (1976) (“Charges of racial discrimination were handled parochially within each federal agency. A hearing examiner might come from outside the agency, but he had no authority to conduct an independent examination, and his conclusions and findings were in the nature of recommendations that the agency was free to accept or reject. Although review lay in the Board of Appeals and Review of the Civil Service Commission, Congress found ‘skepticism’ among federal employees ‘regarding the Commission’s record in obtaining just resolutions of complaints and adequate remedies. This has, in turn, discouraged persons from filing complaints with the Commission for fear that doing so will only result in antagonizing their supervisors and impairing any future hope of advancement.’”) (internal citations omitted).

\textsuperscript{21} Id at 826-28 (“‘[T]he committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U. S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt.’ Similarly, the House Committee stated: ‘There is serious doubt that court review is available to the aggrieved Federal employee. Monetary restitution or back pay is not attainable. In promotion situations, a critical area of discrimination, the promotion is often no longer available.’”) (internal citations omitted).

\textsuperscript{22} Id at 828 citing to Congressional Record: “The conclusion of the committees was reiterated during floor debate. Senator Cranston, coauthor of the amendment relating to federal employment, asserted that it would, ‘for the first time, permit Federal employees to sue the Federal Government in discrimination cases.’ Senator Williams, sponsor and floor manager of the bill, stated that it ‘provides, for the first time, to my knowledge, for the right of an individual to take his complaint to court.’”). For federal regulations concerning the complaint process, see 29 CFR §§ 1614 et seq.

\textsuperscript{23} US Const Art VI, cl 2.

Congress may explicitly state its intention to preempt state law when passing legislation. Alternatively, even when Congress does not explicitly address preemption, a court can find that Congress implicitly intended to preempt state law. Courts have consistently recognized two types of implicit preemption: "field preemption" and "conflict preemption." Field preemption cases are those in which the federal law is said to have "occupied a field in which the States are otherwise free to legislate." The Supreme Court has held that:

[The intent to displace state law altogether can be inferred from a framework of regulation “so pervasive . . . that Congress left no room for the States to supplement it” or where there is a “federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”]

Conflict preemption occurs when “compliance with both federal and state regulations is a physical impossibility,” or when the challenged state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” To determine whether the state law presents such an obstacle, courts must examine the federal

Gunther & Kathleen M. Sullivan, Constitutional Law 337 (13th ed 1997) ("When Congress exercises a granted power, the federal law may supersede state laws and preempt state authority, because of the operation of the supremacy clause of Art. VI. In these cases, it is ultimately Art. VI, not the commerce clause or some other grant of delegated power, that overrides the state law.").

See, for example, Chamber of Commerce of US v Whiting, 131 S Ct 1968, 1975 (2011) (finding that the Immigration Reform and Control Act expressly preempts state laws imposing civil fines for employing unauthorized workers), quoting 8 USC § 1324a ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions . . . upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.").


Id. See also Arizona v United States, 132 S Ct 2492, 2500–01 (2012).


Arizona, 132 S Ct at 2501, quoting Hines v Davidowitz, 312 US 52, 67 (1941).
statute in its entirety and identify the law’s purpose and intended effects.\textsuperscript{32}

The Supreme Court has explained that “the purpose of Congress is the ultimate touchstone in every pre-emption case.”\textsuperscript{33} Therefore, every preemption case requires an investigation into legislative purpose. The Court also recently reiterated that “courts should assume that ‘the historic police powers of the States’ are not superseded ‘unless that was the clear and manifest purpose of Congress.”\textsuperscript{34} This “presumption against preemption” has been the subject of much debate.\textsuperscript{35} For the purposes of this Comment, it is simply important to note that federal courts exercise restraint when deciding whether to preempt state laws.\textsuperscript{36}

Title VII itself seems to address preemption by including a “savings clause,” which appears to preclude any preemption of state law.\textsuperscript{37} In 1987, the Supreme Court found that this provision conclusively indicates that “Congress has explicitly disclaimed any intent categorically to pre-empt state law or to ‘occupy the field’ of employment discrimination law.”\textsuperscript{38} The Court also held, however, that this provision does not preclude a finding of conflict preemption.\textsuperscript{39} For a preemption argument to be successful, therefore, a court must find either that it is


\textsuperscript{34} \textit{Arizona}, 132 S Ct at 2501, quoting \textit{Rice}, 331 US at 230.


\textsuperscript{36} See, for example, \textit{Paul}, 373 US at 146-47 (“[W]e are not to conclude that Congress legislated the ouster of this California statute ... in the absence of an unambiguous congressional mandate to that effect.”).

\textsuperscript{37} 42 USC § 2000e-7 (“Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.”).


\textsuperscript{39} Id at 281, 288 (finding no conflict between Title VII as amended by the Pregnancy Discrimination Act and California state law because the laws shared the same goals).
impossible to comply with both the state law and Title VII or that the state law presents an obstacle to the purposes and objectives of Congress in passing the EEOA.\textsuperscript{40}

There is an important distinction between state anti-discrimination laws and state tort claims in the context of preemption. In \textit{California Savings and Loan Association v Guerra},\textsuperscript{41} the Court considered a potential conflict between state laws concerning pregnancy discrimination and Title VII as amended by the Pregnancy Discrimination Act.\textsuperscript{42} Both laws sought to address employment discrimination, so the court asked whether (1) it was impossible to comply with both Title VII and the state law and (2) whether the state law presented an obstacle to the purposes and objectives of the Pregnancy Discrimination Act.\textsuperscript{43} The cases discussed in this Comment are different. The state tort claims in question can, and typically are, brought outside of the employment context altogether. Put differently, state tort law is not a parallel attempt by the state legislature to address employment discrimination. It is difficult to imagine how it would be impossible for someone to comply with both Title VII and a state tort law. For “conflict preemption” to apply here, therefore, it most likely will have to be of the “obstacle preemption” variety. The Supreme Court’s ruling in \textit{Brown v General Services Administration}\textsuperscript{44} demonstrated that laws might present an obstacle to Title VII by allowing plaintiffs to circumvent the carefully crafted framework of the EEOC.\textsuperscript{45}

C. Preemption and the EEOC

In \textit{Brown}, the Supreme Court held that the plaintiff’s Title VII claim preempted a claim brought under the general federal civil rights.\textsuperscript{46} The Court found that Congress enacted the EEOA to create a mechanism for relief for beleaguered federal employees, which it intended to be “an exclusive, pre-emptive

\begin{footnotesize}
\textsuperscript{41} 479 US 272 (1987).
\textsuperscript{42} Id at 281.
\textsuperscript{43} Id.
\textsuperscript{44} 425 US 820 (1976).
\textsuperscript{45} Id at 832–33.
\textsuperscript{46} Id at 829.
\end{footnotesize}
administrative and judicial scheme for the redress of federal employment discrimination. The Court supported this conclusion by looking at the structure of the EEOA. The Court found that the EEOA's thorough and complete treatment of the procedural requirements and available remedies for federal employment discrimination actions were inconsistent with an intention to create a merely supplemental scheme of relief. In particular, the Court found that the Act's rigorous requirements of exhausting administrative remedies and strict time limitations, as well as its unique blend of judicial and administrative relief, demonstrate that Congress intended for the EEOA to subsume all federal employment discrimination claims. The Court reasoned that to hold otherwise would permit federal employees to circumvent these rigorous requirements by pursuing other remedies and that "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." The Court further emphasized that its conclusion was consistent with the practice of finding "a precisely drawn, detailed statute pre-empts more general remedies."

The Court in Brown also distinguished its earlier holding in Johnson v Railway Express Agency, in which the Court held that Title VII does not preempt other remedies in the private employment context. The Court noted that there are no sovereign immunity concerns in the context of private employment and that the legislative history of the 1964 Civil Rights Act "manifests a congressional intent to allow an individual to pursue independently his rights under both Title

---

47 Id.
48 Brown, 425 US at 829 ("We need not, however, rest our decision upon this inference alone. For the structure of the 1972 amendment itself fully confirms the conclusion that Congress intended it to be exclusive and pre-emptive.").
49 Id at 832 ("The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief.").
50 Id.
51 Id at 833.
52 Brown, 425 US at 834.
54 Id at 459. See also Brown, 425 US at 833.
VII and other applicable state and federal statutes." In contrast, the Court saw no such intent in the legislative history surrounding the 1972 EEOA. The Fourth Circuit has relied upon the reasoning in Brown in holding that Title VII preempts federal tort claims that seek relief for harms caused by discrimination.

II. THE SPLIT IN THE COURTS

Courts are divided over whether Title VII preempts state tort claims based on a "highly personal" wrong. The Ninth Circuit and district courts in the First and Fourth Circuits have held that a claim brought under Title VII, as amended by the EEOA, does not preempt state law tort claims arising from the same set of facts when the harm underlying the tort claim is "highly personal." Courts in the Fifth and Eighth Circuits find that a Title VII claim preempts state tort claims arising from the same set of facts, rejecting the "highly personal" standard.

This circuit split leaves courts without clear guidance in deciding whether state tort claims are preempted by Title VII. For prospective plaintiffs, the availability of state tort claims may be significant because the remedies available for Title VII and state tort claims may differ substantially. The remedies available under Title VII include back pay, benefits, placement in a job track if a promotion was wrongly withheld, and the costs of bringing the complaint, including attorney's fees. Title VII also allows for compensatory and punitive damages for harms

---

56 Brown, 425 US at 833.
57 See Pueschel v United States, 369 F3d 345, 353 (4th Cir 2004).
59 See Pfau v Reed, 125 F3d 927 (6th Cir 1997); Mathis v Henderson, 243 F3d 446 (8th Cir 2001).
60 See, for example, Charlot, 2012 WL 3264568 at *4 ("There is no Fourth Circuit precedent to guide the court.").
61 See Martha Chamallas, Shifting Sands of Federalism: Civil Rights and Tort Claims in the Employment Context, 41 Wake Forest L Rev 697, 698–99 (2006) (discussing an empirical study by Professor Catherine Sharkey indicating that the inclusion of tort claims for private sector employees, even after controlling for important variables, yielded a significantly higher median damages award).
62 42 USC §§ 2000e-5(g)(1)–(2), (k).
such as emotional distress but has relatively low caps, ranging from $50,000 to $300,000 combined, depending on the size of the employer. For federal employees, those under consideration here, the available remedies may be even more limited because punitive damages against the federal government are not available. This cap is particularly relevant when the plaintiff’s state law claims are based on emotional distress.

Additionally, the required elements of the state tort claim may be somewhat easier to show to a court’s satisfaction, meaning that for federal employees who are limited to a Title VII claim, there may be no viable claim or remedy. Finally, the relatively tight timelines facing a federal employee making a claim under Title VII may present a further impediment to recovery; these timelines are not only tighter than the statute of limitations facing a civil litigant but are even tighter than those facing private sector employees bringing a Title VII claim. The preemption of certain tort claims, therefore, may have a significant impact on the employee’s ability to recover.

A. Courts Not Preempting

The Ninth Circuit held that the Supreme Court’s decision in Brown does not necessarily require preemption of state tort claims when those claims arise from the same set of facts as the Title VII claim. In Brock v United States, a US Forest Service employee alleged that her supervisor made offensive sexual comments and unwanted sexual advances towards her. During overnight field outings, she had to share sleeping space with her supervisor, and she alleged that he raped her on one such
She refused to work in the field with this supervisor afterwards and was transferred to another office. She claimed that her former supervisor nevertheless continued to make unwanted sexual comments towards her and to initiate unwanted physical touching. She transferred again to get farther away from her former supervisor and at that time filed complaints with the EEOC against the Forest Service and the supervisor. Because of her complaints, the employee was subjected to ridicule and offensive comments from coworkers. After her EEOC claim was settled, the employee filed tort claims under the Federal Tort Claims Act (FTCA), alleging that the Forest Service was negligent in its supervision of both her manager and her coworkers. A magistrate judge granted the United States' motion for dismissal. The Ninth Circuit overturned that dismissal, stating that:

[Although [the supervisor's] rape and sexual assault of Brock is sufficient to establish a claim of sexual discrimination, that conduct also constitutes more than sexual discrimination . . . Title VII is not the exclusive remedy for federal employees who suffer "highly personal" wrongs . . . [w]hen the harms suffered involve something more than discrimination, the victim can bring a separate claim.

The Ninth Circuit tied its reasoning to legislative purpose by comparing a federal employee who is assaulted for non-discriminatory reasons and is therefore able to bring an assault claim under the Federal Tort Claims Act, with the federal

---

71 Id.
72 Id.
73 Brock, 64 F3d at 1422.
74 Id.
75 Id.
76 28 USC § 1346.
77 Brock, 64 F3d at 1422.
78 Id.
79 Id. at 1423 ("Just as every murder is also a battery, every rape committed in the employment setting is also discrimination based on the employee's sex. In both instances, however, the ability to characterize the ultimate harm suffered as including a lesser offense (i.e., battery or discrimination) does not change the nature or extent of the ultimate harm.").
80 28 USC § 1346.
employee who is assaulted for discriminatory reasons. On the Ninth Circuit’s understanding of the position taken by the Eighth and Fifth Circuits, the latter employee cannot now bring an assault claim because it is preempted by his Title VII claim.

The Ninth Circuit found this result so problematic as to “turn Title VII on its head,” which Congress cannot be presumed to have intended.

A Massachusetts district court agreed with the Ninth Circuit’s reasoning in *Brock*.

In *Kibbe v Potter*, both the plaintiffs and the defendant were employees of the United States Postal Service. The female plaintiffs alleged that the male defendant repeatedly made lewd gestures toward them and that he had intimidated and threatened them in the workplace, including swerving his vehicle at one of the plaintiffs in the parking lot. The plaintiffs brought assault and intentional infliction of emotional distress claims, as well as a claim for malicious interference with employment. The court noted that “[t]he First Circuit Court of Appeals has interpreted Title VII as supplementing, not supplanting, existing rights.... In this spirit, district judges in this circuit have held that, *Brown* notwithstanding, Title VII does not preclude a federal employee’s common law claim against a co-worker or other non-employer defendant.” Therefore, the court held, “it is not hard to suggest that Plaintiffs, as federal employees, should be able to

---

81 *Brock*, 64 F3d at 1424.
82 Id.
83 Id.
85 196 F Supp 2d 48 (D Mass 2002).
86 Id at 68.
87 Id at 55–60.
88 Id at 68–69.
89 The court’s rationale was tied to its understanding the ruling of *Brown* as being affected by concerns about sovereign immunity. *Kibbe*, 196 F Supp 2d at 69, citing *Wood v US*, 760 F Supp 952, 956 (D Mass 1991) ("*Brown* was decided on the basis of the sovereign immunity doctrine, a doctrine that curtails the ability of claimants to obtain official relief against the federal government.... But the doctrine does not extend to protect government officers from personal liabilities arising out of their official activities.... Taking the Federal Tort Claims Act as a model, it emerges that waivers of sovereign immunity do not in and of themselves affect preexisting remedies available against individual officials.... Since nothing in Title VII reveals an intent to disturb avenues of relief against discriminating officials in their personal capacities, *Brown’s* preemption rule stands circumscribed to the extent of cutting off only official remedies for federal employment discrimination.").
DISTINCT CLAIMS FOR DISTINCT WRONGS

bring such personal claims as assault and intentional infliction of emotional distress claims against an allegedly harassing co-employee.\textsuperscript{90} The court found that the malicious interference claim failed on the merits and did not reach the issue of whether Title VII would preempt a claim for malicious interference with employment, although the court described the question as "closer" than that of the other two claims.\textsuperscript{91}

Most recently, a South Carolina district court determined—in the absence of direct guidance from the Fourth Circuit—that \textit{Brock} was persuasive.\textsuperscript{92} In \textit{Charlot v Donley},\textsuperscript{93} the plaintiff was a civilian employee of the United States Air Force who brought a state law defamation claim alongside her discrimination claims.\textsuperscript{94} The plaintiff complained of racial discrimination, alleging that she was treated worse than white employees in terms of leave time and medical leave.\textsuperscript{95} The defamation claim was based on an allegation that her superior unnecessarily had her removed from the workplace by military police in full view of her coworkers, later erroneously telling others that she had attempted to evade those military police officers.\textsuperscript{96} He also allegedly told people she was "crazy" and a threat.\textsuperscript{97} The court found that Title VII did not preempt the defamation claim, because the plaintiff sought to redress a highly personal wrong distinct from that the Title VII claim seeks to redress.\textsuperscript{98}

B. Preempting Courts

Other courts have extended the reasoning in \textit{Brown} to include preemption of state tort law claims that arise from the same set of facts. In \textit{Pfau v Reed},\textsuperscript{99} the plaintiff, an employee of the Defense Contract Audit Agency, brought a Title VII claim alongside a claim for intentional infliction of emotional stress

\begin{footnotes}
\item[90] Kibble, 196 F Supp 2d at 70.
\item[91] Id.
\item[93] 2012 WL 3264568 (D SC Aug 9, 2012).
\item[94] Id at *1.
\item[95] Id.
\item[96] Id.
\item[97] \textit{Charlot}, 2012 WL 3264568 at *2.
\item[98] Id at *5.
\item[99] 125 F3d 927 (5th Cir 1997).
\end{footnotes}
under state law. The plaintiff alleged that her supervisor repeatedly made lewd comments and requests towards her, including requests that she allow him to accompany her on vacation and that she admit him to her apartment. The plaintiff further alleged that, after she filed a harassment claim, the supervisor retaliated against her by sabotaging her work assignments and denying her the training and opportunities she needed in order to advance her career, and ultimately fired her. The Fifth Circuit “interpreted the Supreme Court’s mandate in Brown to mean that, when a complainant against a federal employer relies on the same facts to establish a Title VII claim and a non-Title VII claim, the non-Title VII claim is ‘not sufficiently distinct to avoid’ preemption.”

In Pfau, the court found that both claims relied on the same set of facts and dismissed the intentional infliction of emotional stress claim, finding that Title VII preempted it. The plaintiff contended that the district court had “misconstrued which factual allegations supported which claims.” She argued that she had put forth types and instances of conduct that supported her state law claim but not the Title VII claim, such as the conduct that occurred outside the office and after business hours. The court disagreed: “[W]e reject Pfau’s contention that her allegations that [her supervisor] called her at home and demanded that she take him on vacation with her are not allegations that support her Title VII claims. Pfau cannot avoid Title VII preemption by picking and choosing which of her factual allegations she wishes to allocate to her Title VII claims and to her independent torts claims.” The plaintiff asked the Fifth Circuit to follow Brock, but the court would not ignore its conclusion that the Title VII and state tort claims were based on the same facts. The plaintiff was also unsuccessful in arguing
that Title VII did not preempt her intentional infliction of emotional stress claim because the two laws have different purposes.\textsuperscript{109} The court stated that “the existence of multiple reasons for preventing a particular type of conduct is ... irrelevant to the determination of preemption.”\textsuperscript{110}

Following \textit{Pfau}, the Eighth Circuit also found that Title VII preempts state law claims brought alongside a Title VII claim.\textsuperscript{111} In \textit{Mathis v Henderson},\textsuperscript{112} an employee of the United States Postal Service and her husband brought state and common law claims, including loss of consortium, in addition to a Title VII claim.\textsuperscript{113} The employee-plaintiff alleged that her supervisor, Dick, had been present when employees wore “hats” to a meeting that were made to look like condoms, calling themselves “Dickheads.”\textsuperscript{114} She further claimed that when she attempted to leave an afterhours poker game, her inebriated supervisor demanded that she sit down and remain.\textsuperscript{115} Finally, she alleged that, at a gathering of coworkers at a hotel bar, her supervisor demanded that she dance every dance with him.\textsuperscript{116}

Like the Fifth Circuit, the court in \textit{Mathis} focused on the facts supporting each claim. The court worried about the plaintiff’s attempt to base multiple claims on the same set of facts, stating that “she cannot bring state-law claims against Dick arising out of the same facts simply by labeling them as something other than employment discrimination claims.”\textsuperscript{117} The court cited the holding in \textit{Brown} as controlling, stating:

[w]e are unwilling—and under \textit{Brown}, unable—to give a plaintiff carte blanche to creatively plead as many state-law causes of action as she believes she may sustain against her supervisor, in addition to her Title VII claim, when, at bottom, her claim is for sexual harassment by a

for the claimant’s Title VII claims against a federal agency, we are bound to conclude that Title VII preempts the non-Title VII claims.”).\textsuperscript{109} Id at 933.
\textsuperscript{110} Id.
\textsuperscript{111} \textit{Mathis v Henderson}, 243 F3d 446 (8th Cir 2001).
\textsuperscript{112} 243 F3d 446 (8th Cir 2001).
\textsuperscript{113} Id at 447.
\textsuperscript{114} Id at 449.
\textsuperscript{115} Id.
\textsuperscript{116} \textit{Mathis}, 243 F3d at 449.
\textsuperscript{117} Id at 450.
supervisor, for which the government already stands liable under Title VII.\textsuperscript{118}

The Eighth Circuit did not view its holding as depriving the complainant of a remedy; rather, they contended that “she simply cannot have it both ways.”\textsuperscript{119} She still had the Title VII claim. The Eighth Circuit was particularly critical of the Ninth Circuit’s decision, stating that “[t]he holding in *Brock* violates the spirit of *Brown*, and then compounds the error by” employing a standard that invites artful pleading.\textsuperscript{120}

III. WHAT ARE THESE COURTS ACTUALLY DISAGREING ABOUT?

A. What Is the Legislative Purpose Again?

As discussed above,\textsuperscript{121} the variety of “conflict preemption” implicated by these state tort claims is obstacle preemption, wherein the state law is preempted by the federal law if the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”\textsuperscript{122} One might think, therefore, that the resolution to this disagreement is as simple as divining Congress’s purposes and objectives in passing the 1964 Civil Rights Act and the EEOA.\textsuperscript{123}

The courts favoring preemption and those opposing preemption both couch their arguments in the language of Congressional purpose, however.\textsuperscript{124} In arguing for non-

\begin{itemize}
  \item \textsuperscript{118} Id at 451.
  \item \textsuperscript{119} Id (“Either [her supervisor’s] extracurricular conduct was part of a pattern of employment discrimination, that is, sexual harassment, within the meaning of Title VII, which then is her sole remedy, or it was the individual tortious action of Dick for which he is personally responsible.”).
  \item \textsuperscript{120} *Mathis*, 243 F3d at 451 (criticizing the Ninth Circuit for “resorting to a test that proposes a subjective standard that invites plaintiffs to characterize defendant supervisors’ conduct as so egregious, and to describe plaintiffs’ sensitivities as so acute, as to make out a case that the behavior caused ‘highly personal’ harm, whatever that may be.”). The Tenth Circuit has also been critical of the holding in *Brock*. See *Mobley v Donahoe*, 498 Fed Appx 793, 796 (10th Cir 2012) (noting that the aggrieved employee was not even alleging a “highly personal” wrong, rendering the point moot).
  \item \textsuperscript{121} See Part I.B.
  \item \textsuperscript{122} See *Arizona*, 132 S Ct 2492, 2501 (2012), quoting *Hines v Davidowitz*, 312 US 52, 67 (1941).
  \item \textsuperscript{123} A single Congressional purpose is seldom, if ever, possible to divine. Moreover, there appears to be something deeply pragmatic in the cases discussed here; the courts are working to find a reasonable solution, and it is in this spirit that this Comment attempts to resolve this disagreement in the courts.
  \item \textsuperscript{124} See *Brock v United States*, 64 F3d 1421, 1424 (9th Cir 1995); *Mathis v Henderson*, \end{itemize}
preemption, the Ninth Circuit asserted that “[a]ny contrary result would contravene the basic purposes of Title VII.” At the same time, the Eighth Circuit quoted Brown in holding that “[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.” The emphasis given these interpretations of Congressional purpose—ensuring adequate legal relief and channeling plaintiffs into the Title VII framework exclusively—should not be surprising given the uniquely strong emphasis given to legislative purpose in preemption cases. That both courts claim to be following legislative purpose, however, complicates the matter; either one approach is incorrectly understanding Title VII’s purpose, there are multiple purposes, or purpose is not really doing any work in explaining the varying approaches.

B. Does Non-preemption Present an Obstacle to Title VII?

Both the Eighth and Fifth Circuits followed Brown in focusing on Congress’s intent to channel employment discrimination claims brought by federal employees into the relatively narrow constraints of Title VII. These courts argue that permitting complainants to seek relief outside this framework would thwart the purpose of Title VII as amended by the EEOA and that this would amount to obstacle conflict preemption. In particular, these courts envision non-preemption of “highly personal” state tort claims as being tantamount to permission to contort one’s claims into whatever form maximizes recovery. Acceptance of a loose “highly

243 F3d 446, 451 (8th Cir 2001).

125 Brock, 64 F3d at 1424. This is a stronger claim than merely stating that there is no conflict in allowing these claims. The Ninth Circuit is asserting that any rule other than permitting these state tort claims would be conflict with Title VII. It might be inferred from this that the Brock panel would find state laws prohibiting the bringing of such claims in the Title VII context to be conflict preempted. The states must allow these additional claims. That this seems a strong position may indicate that the court is being rhetorical in invoking legislature purpose in its reasoning.

126 Mathis, 243 F3d at 451.

127 See generally, Note, Preemption As Purposivism’s Last Refuge, 126 Harv L Rev 1056 (2013) (arguing that preemption doctrine has been unusually resistant to a turn toward textualism in statutory construction).

128 Mathis, 243 F3d at 451; Pfau, 125 F3d at 932.

129 Mathis, 243 F3d at 451; Pfau, 125 F3d at 932.

130 Mathis, 243 F3d at 451; Pfau, 125 F3d at 932.
personal” standard may also lead to uncertain and uneven preemption of state tort claims.

It is not clear that allowing other avenues for relief would lead to as much artful pleading as Mathis and Pfau indicate—the courts’ concerns are speculative—but the argument is not implausible; the Ninth Circuit even recognized this possibility in Brock.\textsuperscript{131} Assuming claimants seek to maximize recovery, they will have an incentive to seek additional claims when possible. Then, it is the court’s job to police the boundaries of justifiable pleading practices, and preemption is a powerful tool for judges to do so.\textsuperscript{132} However, courts criticizing the “highly personal” approach as inviting artful pleading implicitly assume that “highly personal” claims should be preempted—that is, that Congress intended to channel these claims within the Title VII framework through the EEOA amendment. In other words, artful pleading is only a problem to the extent that it allows for more claims to be brought than is desirable, against some baseline—here Congress’s purposes and objectives.

One reason to suspect that non-preemption of “highly personal” claims would lead to the successful pleading of more claims than was intended or is desirable is the vagueness of the “highly personal” standard itself.\textsuperscript{133} Vague standards can cause problems of administrability and predictability.\textsuperscript{134} One key concern with the vagueness of the “highly personal” standard is that even competent judges intent on policing the boundaries of federal preemption doctrine will struggle to develop a consistent and principled approach. It is not obvious whether “highly

\textsuperscript{131} Brock, 64 F3d at 1425 (“It is worth noting that Title VII’s limited remedies provide Brock’s incentive to maintain a separate action. At the time her law suit was filed, victims of sex discrimination could not receive compensatory or punitive damages under Title VII and regularly turned to common law tort claims.”).

\textsuperscript{132} Of course, this is not an observation unique to this area of law: artful pleading is a well-known issue in matters of federal jurisdiction, in particular. See Rivet v Regions Bank of Louisiana, 522 US 470, 475 (1998) (“The artful pleading doctrine allows removal where federal law completely preempts a plaintiff’s state-law claim.”).

\textsuperscript{133} Mathis, 243 F3d at 451 (expressing skepticism about whether the highly personal wrong standard has any substantive content at all, calling it “a test that proposes a subjective standard that invites plaintiffs to characterize defendant supervisors’ conduct as so egregious, and to describe plaintiffs’ sensitivities as so acute, as to make out a case that the behavior caused ‘highly personal’ harm, whatever that may be”) (emphasis added).

\textsuperscript{134} The points I make here are familiar in the rules versus standards literature. For an overview of the traditional arguments for rules and for standards, see Kathleen M. Sullivan, The Justices of Rules and Standards, 106 Harv L Rev 22, 62 (1992).
personal” is a necessary or sufficient condition for avoiding preemption by Title VII. Nor is it clear whether it is a subjective or an objective theory. A related concern is that courts will use the vagueness of the standard in order to implement their own policy views. For examples, judges might view Title VII’s limitations on recovery as unjust, and so will look for ways to permit additional claims. Or, judges might allow particularly sympathetic plaintiffs to recover more than a Title VII claim alone would permit. This concern may also have merit.

Poorly defined standards can also lead to uncertainty on the part of potential plaintiffs and defendants. Given the distinct time limitations and available remedies, not to mention the elements a successful claim must show, prospective plaintiffs have an interest in knowing what constitutes a highly personal wrong for which Title VII would not preempt a state tort. Since this classification is not inherently tied to specific causes of action, it will not always be obvious to the parties involved whether or not a highly personal wrong is at hand.

In sum, preempting courts might be right to view these state tort claims as no more than an attempt to avoid the limitations on claims and remedies that Title VII created. Under this view, the courts that decline to preempt when the harm is “highly personal” are undermining Title VII by colluding with plaintiffs to turn what is purely employment discrimination into multiple claims in order to multiply recovery beyond that contemplated by Congress. When combined with the uneven application of a vague standard, permitting these claims to proceed presents an obstacle to the proper administration of Title VII to the extent that it permits plaintiffs to overcome a significant portion of that law.

C. Does Preemption Present an Obstacle to Title VII?

As noted above, the Ninth Circuit claims that any rule other than one that permits tort claims based on “highly personal” harms would “contravene the basic purposes of Title

---

135 The Eighth Circuit, at least, describes it as a subjective theory that they are rejecting, Mathis, 243 F3d at 451.
136 That is, not all defamation claims, for example, will be deemed “highly personal” and therefore non-preempted by courts following the Ninth Circuit’s approach.
137 See Part II.B.
The cases with which *Brock* is concerned are not the cases where employment discrimination is artificially forced into a state tort cause of action, but rather where a state cause of action is wrongly construed as equivalent to an employment discrimination claim that may only be brought under Title VII. To hold otherwise would restrict the remedies available to the federal employee who suffers additional wrongs, when Title VII as amended by the EEOA was only supposed to provide improved relief for federal workers who are the victims of employment discrimination, not affect the remedies available under preexisting causes of action. The Ninth Circuit views preemption of such a claim as absurd.

While the Ninth Circuit does not elaborate on this point, preempting these claims could present an obstacle to the "purposes and objectives of Congress" in two ways. First, it might steer federal employees away from Title VII for fear that it would preempt state tort claims that otherwise are viable. Then victims of bona fide federal employment discrimination would be seeking a remedy, in effect, outside of Title VII altogether. Second, by reclassifying a state cause of action as a form of employment discrimination, preemting courts are affecting preexisting causes of action that fall outside the objectives of Congress in passage of the EEOA. In short, courts favoring the allowance of "highly personal" claims might plausibly be concerned about restricting legal relief beyond Congress’s intent.

**D. Is This Disagreement Even About Legislative Purpose?**

Given that these courts focus on different obstacles, the explanation for the split may really be about which purpose is important, or has priority, in considering preemption. An analysis of this question would likely involve examining the Congressional record to locate a driving motivation for Title VII and the EEOA—which is the approach the Supreme Court took.

---

138 *Brock*, 64 F.3d at 1424.
139 See notes 18–22 and accompanying text.
140 This would also explain why the court simply does not say there is no conflict, and instead makes the considerably stronger claim that "any contrary result would contravene the basic purposes of Title VII." *Brock*, 64 F.3d at 1424.
141 Id. The court’s discussion concludes abruptly.
in Brown.\textsuperscript{142} Even if such an analysis could be drawn to a decisive conclusion,\textsuperscript{143} identifying the legislative purpose does not answer the additional question of what outcomes, exactly, present an obstacle to that purpose. As the preceding discussion illustrates, it is unclear how to answer this second question.\textsuperscript{144}

However, there is a way to resolve this split without giving either purported purpose priority. This resolution is possible because both purposes can be served by addressing the underlying conceptual disagreement latent in these opinions. At the heart of the argument about preemption lays a conceptual disagreement between the circuits. On its face, Title VII provides a remedy for wrongs due to federal employment discrimination.\textsuperscript{145} The courts disagree, this Comment argues, about whether the wrongs asserted by these plaintiffs in the form of state tort claims are wrongs in addition to those of employment discrimination, qualitatively worse employment discrimination wrongs deserving of greater remedies, or the same wrong for which plaintiffs are seeking multiple remedies.

From the perspective of the non-preempting courts, the ability to bring separate actions for “highly personal” wrongs is not an attempt to seek redress for the same wrong twice or for the same wrong by a more favorable means, but rather the ability to bring two actions for two wrongs. The Ninth Circuit found error with the lower court’s determination that the plaintiff’s FTCA sexual harassment claim and Title VII sexual discrimination claim sought relief for the same wrong twice.\textsuperscript{146} The court reasoned that “[r]ape can be a form of sexual discrimination, but we cannot say to its victims that it is nothing

\begin{itemize}
\item \textsuperscript{142} See Brown, 425 US at 828.
\item \textsuperscript{143} It might require a great deal of investigation into the nature of cases in which federal employees who bring a Title VII action also bring state law claims. Empirical information about recovery rates and sizes in these cases, with a counterfactual analysis of whether in the absence of state tort claims recovery would have been limited or precluded, might be necessary. Professor Catharine Sharkey has shown that the presence of state tort claims boosts median recovery amounts in sexual harassment cases generally, though her study does not specifically treat “highly personal” cases brought by federal employees. See Catherine M. Sharkey, Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards, 3 J Empirical Legal Stud 1, 42 (2006).
\item \textsuperscript{144} See Part III.B and III.C.
\item \textsuperscript{145} See 42 USC § 2000e-16.
\item \textsuperscript{146} Brock, 64 F3d at 1423.
\end{itemize}
more.” 147 This argument asserts that the “she simply cannot have it both ways” 148 conception of the wrongs and remedies in play in these cases is illogical; it wrongly indicates that a given set of facts cannot show both employment discrimination and another, distinct wrong.

The Ninth Circuit expressed this point in multiple ways. In Brock, the court described that “highly personal” state tort claims ought not to be preempted because they relate to harms that are “something more than discrimination,” “beyond the meaning of discrimination,” “not simply discrimination,” “not the same harm as the Title VII action,” and that the wrongdoing is not “wholly eclipsed by Title VII.” 149

Similarly, in Kibbe, a Massachusetts district court cited the “highly personal” theory and then described the ultimately unreached malicious interference with employment claim as “closer” to being preempted because it was “somewhat akin to their employment discrimination causes of action.” 150 This signals that the court is thinking precisely in terms of wrongs or harms that are coextensive with employment discrimination, versus those that are distinct from it.

Yet, it remains unclear what work the “highly personal” designation is actually doing in making this distinction. Rather, by relying on “highly personal,” the court is missing the important question: which harms are employment discrimination harms, and which are “beyond?” These cases indicate that some characteristic of “highly personal” wrongs merits non-preemption, but the standard itself does not capture exactly what those characteristics are.

The preempting courts, in contrast, appear to view any claim arising from the same set of facts as necessarily “not sufficiently distinct to avoid’ preemption.” 151 Pfau noted that “[b]y establishing the occurrence of sexually harassing conduct, a plaintiff may at the same time establish the existence of extreme and outrageous conduct.” 152 The court saw this as a

---

147 Id (emphasis in original).
148 See Mathis, 243 F3d at 451.
149 Brock, 64 F3d at 1423.
151 See Pfau, 125 F3d at 932, quoting Rowe v Sullivan, 967 F2d 186, 189 (5th Cir 1992).
152 Pfau, 125 F3d at 933.
reason to preempt an intentional infliction of emotional distress claim but without any reasoning beyond the fact that both claims arose from the same set of facts. The plaintiff and the court disagreed about precisely whether or not the same facts grounded both claims; the plaintiff argued unsuccessfully that certain of her allegations grounded her Title VII claim and others grounded her intentional infliction of emotional distress claim. The court held that since all of the allegations could support a Title VII claim, the plaintiff could not separate the facts based on which claim they support.

This overly simple rule similarly elides the difficult question of which harms are employment discrimination harms and which are not. As Brock correctly points out, a woman who is sexually assaulted at work in the culmination of a pattern of unwanted sexual advances may reasonably be considered the victim of not only sexual assault but also employment discrimination; that the sexual assault could also support a sexual discrimination claim does not necessarily mean that there are not two distinct wrongs. The "same set of facts" approach is inadequate to the task of distinguishing which state tort claims should and should not be preempted. Yet, like the "highly personal" formulation, it is motivated by a desire to identify which claims are based on distinct harms and which are duplicative claims based on indistinct harms.

The language preempting courts use to describe claims demonstrates that they see these additional claims as indistinct. For example, preempting courts sometimes speak of the "highly personal" wrong in terms of the degree of harm rather than the kind of harm—that is, that claims for "highly personal" wrongs are really just especially bad discrimination wrongs and not wrongs beyond discrimination. In Mathis, the Eighth Circuit asserted that allowing tort claims in addition to a Title VII claim "invites plaintiffs to characterize defendant supervisors' conduct as so egregious, and to describe plaintiffs' sensitivities as so acute, as to make out a case that the behavior caused 'highly personal' harm, whatever that may be." Since degrees of

\[153\) Id.
\[154\) Id.
\[155\) Id.
\[156\) Brock, 64 F3d at 1423.
\[157\) Mathis, 243 F3d at 451.
employment discrimination harm are already accounted for in calculating the remedies available to a successful Title VII plaintiff, allowing additional claims for especially bad discrimination would be duplicative. Moreover, if “highly personal” wrongs are just particularly egregious cases of employment discrimination, then they are not additional wrongs requiring an additional remedy at all.

This is the sense in which this split has to do with how best to understand the character of these additional claims, and nothing at all to do with who is right about legislative purpose or what counts as “highly personal.” If a court views the tort claim as merely an attempt to get greater relief for what is, at root, employment discrimination, even if a particularly egregious case, it is to be expected that the court will find the claim to be preempted by Title VII. Conversely, when conceiving of the tort claim as seeking relief for a wrong distinct from discrimination yet arising from the same set of facts, it is understandable for the court to find that the claim ought not to be preempted by Title VII. In other words, the disagreement may only be apparent to the extent that the unclear “highly personal” argument for non-preemption is obscuring an agreement about the proper function of the Title VII framework for federal employees.

IV. TOWARD A BETTER STANDARD

Neither the “highly personal” theory nor the “same set of facts” approach creates a standard with an adequate degree of predictability, clarity, or administrability. As the preceding discussion illustrates, both approaches are based on the circuits’ underlying assumptions about whether such additional claims represent distinct harms. A legal standard that clarifies when there are two wrongs—and thus, when two claims should be allowed—would be both more predictable and more administrable. This would ensure that no wrong ever goes unremedied and that plaintiffs are unable to circumvent Title VII through duplicative claims. For this reason, the “highly personal” wrong standard should be abandoned in favor of a

---

158 See, for example, Pfau, 125 F3d at 933.
159 See, for example, Brock, 64 F3d at 1423.
160 See Part III.D.
standard that more explicitly identifies the salient characteristic of those tort actions that ought not to be preempted. This characteristic is that these claims seek a remedy for a wrong or harm that is conceptually and actually distinct from the wrong or harm of employment discrimination.

While identifying distinct harms is an intuitive goal, it is more difficult to state what standard best achieves this nuanced distinction. The proposed standard is that state law tort claims should not be preempted by Title VII when those claims seek to redress wrongs that are distinct from the wrongs of employment discrimination generally. Wrongs that are the direct result of employment discrimination should be preempted unless the harms resulting from employment discrimination are so egregious as to make the remedies available under Title VII clearly inadequate.

The proposed standard begins with the basic idea that state law tort claims that seek to redress wrongs distinct from those of employment discrimination generally should not be preempted. To illustrate the basic intuition, the court in *Kibbe* acted with great caution in considering the malicious interference with employment claim, which it described as “somewhat akin” to the employment discrimination claim.\(^\text{161}\) The harms that are typically attendant to employment discrimination overlap with those of malicious interference, and so this caution is quite reasonable. In contrast, in *Brock* the plaintiff alleged a wrong that was distinct from employment discrimination in a relatively clear way. Rape is distinct from the wrong we normally think of in considering employment discrimination, even if rape is capable of constituting discriminatory conduct. To preempt a claim for sexual assault in such a case would seem to block recovery for a distinct wrong that exists in addition to employment discrimination.

In order to better identify those wrongs that are distinct from those of employment discrimination generally, it is necessary to incorporate two additional concepts: causal connection and adequacy of remedy. In *Pueschel v United States*,\(^\text{162}\) the Fourth Circuit found that the plaintiff's federal tort claims were preempted by his Title VII discrimination claim because the emotional distress suffered was a direct result of the


\(^{162}\) 369 F3d 345 (4th Cir 2004).
discrimination. This “direct result” approach is intuitively appealing. If, for example, a plaintiff-employee is merely claiming that as a direct result of experiencing employment discrimination he also experienced emotional distress, then he is simply noting a harm that is unfortunately endemic to employment discrimination, and that is anticipated by the available remedies. Indeed, compensatory damages under Title VII are specifically permitted for “emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” So when the harm is the direct result of the employment discrimination itself, it should not be able to ground a state tort claim. Additionally, if a complainant described emotional pain primarily in terms of the stress and frustration she felt at being unable to advance her career in a way that was fair because her supervisor refused to afford her the training opportunities she deserved, then a separate claim for intentional infliction of emotional distress would be inappropriate because the emotional distress was a direct result of the employment discrimination itself. Title VII’s compensatory damages provide a remedy for that suffering by design. Put another way, recovery on both claims would constitute the sort of duplicative claims the Fifth and Eighth Circuits worried about.

A “direct result” standard is distinct from a “same set of facts” standard because it avoids the mistake of assuming that two distinct, legally cognizable harms cannot be caused by conduct buried in the same set of facts. Put another way, some conduct might cause both employment discrimination and another wrong; this is distinct from saying that the employment discrimination itself causes the additional wrong. For instance, in Brock, the supervisor’s conduct caused two wrongs: sexual assault and employment discrimination. Under a same set of facts approach, an assault claim would be preempted by a Title VII claim, while under a direct result approach an assault claim would not necessarily be preempted, either because other conduct could ground the Title VII claim or because some conduct constituted both sexual assault and employment discrimination.

---

164 42 USC § 1981a(b)(3).
One might worry, however, about a case where an employee is discriminated against and the discrimination causes unusually acute emotional distress. This might be a situation where the discrimination is of a particularly egregious character, and there is no question that the harm suffered was a direct result of discrimination. In these cases, one resolution is simply to provide what remedies are available under Title VII, acknowledging the existence of limitations on compensatory damages. Part of the decision to create statutory remedies is a limitation on the size of those remedies; to ignore this would be to ignore an important part of the law.

On the other hand, there might be a threshold at which the severity of harm caused by the discrimination transforms the wrong into something beyond employment discrimination (or indicates that something “beyond” employment discrimination is at play). If a harm is so extreme that Title VII’s remedies are clearly inadequate, then it may be that the sort of wrong implicated in that case is beyond that which was contemplated in capping recovery, and a distinct wrong is discernible in the very severity of the harm.\textsuperscript{165}

Consider two hypothetical cases. In the first case, the employee seeks to maximize recovery through both a Title VII claim and a tort claim. In this case, the tort claim is a substitute for the Title VII claim. In the second case, the plaintiff views the limitations on recovery for a Title VII claim as insufficient for the harm he suffered and brings an additional tort claim. In this case, the tort claim supplements the Title VII claim. Intuitions about the propriety of bringing a tort claim might differ between these two situations, and it is possible that this can provide a mechanism for distinguishing distinct from indistinct wrongs. A court might reasonably decline to preempt a state tort claim it viewed as supplementing the Title VII claim, even if employment discrimination was at the root of the harm suffered in the case.\textsuperscript{166} Thus, in extreme cases, the harm suffered may be

\textsuperscript{165} There is a legislative purpose argument lurking here. If the harms presented are so out of proportion to the available remedies as to make the latter clearly inadequate, then it may be assumed that such harms are beyond those contemplated in crafting Title VII and the remedies attached to it.

\textsuperscript{166} Discussing the interaction of state tort and civil rights claims generally, Professor Chamallas asked “to what extent have courts allowed plaintiffs with workplace harassment claims to bring claims for intentional infliction of mental distress? . . . The short answer to the descriptive question is that there is currently considerable variation
a direct result of employment discrimination, yet nonetheless Title VII might be inadequate to redress it. For this reason an adequacy of remedy inquiry is necessary, both in order to identify when tort law may supplement Title VII, and to help identify when the severity of the harm suffered signals the existence of a distinct harm.

Thus the best alternative to the “highly personal” exception or a “same set of facts” rule is that state law tort claims only be preempted by Title VII when those claims seek to redress wrongs that are indistinct from the wrongs of employment discrimination generally. Wrongs that are the direct result of employment discrimination should be preempted, unless the harms resulting from employment discrimination are so egregious as to make the remedies available under Title VII clearly inadequate, in which case it is possible that either a distinct wrong is actually present or that tort law may serve to supplement Title VII in limited cases.

Of course, one could argue that this approach does not improve upon the “highly personal” standard, because “indistinct,” “direct result,” and “clearly inadequate” are equally vague terms. There is reason to believe, however, that this standard will be more readily administrable than a “highly personal” standard. Inquiring into how “personal” the harm is can be difficult. Moreover, consistency requires the court to apply the standard in a predictable manner. It is difficult to imagine such a vague standard being consistently applied and interpreted by different courts. In contrast, the proposed standard is one that merely asks the court to make familiar decisions. Employment discrimination cases are sufficiently common that courts have built up a competence in parsing difficult and congested fact patterns and determining how, if at all, an employee was harmed by employment discrimination.¹⁶⁷ It is reasonable to conclude that courts are well-situated to know which harms are routine to employment discrimination cases among the states. There are basically two approaches: the majority of courts treat the claim of intentional infliction of mental distress as a mere ‘gap filler’ that comes into play only when no other remedy is available; a minority of courts treat it as an independent cause of action that provides mutual reinforcement for civil rights and other important public policies.” Chamallas, 41 Wake Forest L Rev at 701–02 (cited in note 61).

and which are distinct, once they are directly confronted with the question. Further, determinations of whether the wrong is a direct result of the employment discrimination will not present a novel task for the court. Recall that this standard was taken from *Pueschel*, a federal case itself concerning Title VII and preemption.\(^{168}\) Moreover, courts are already tasked with understanding what causal connection, if any, exists between an injury and the conduct at issue.\(^{169}\) Finally, courts have long been charged with determining the adequacy of remedies.\(^{170}\) This issue already arises in employment discrimination cases, and courts have experience weighing pertinent expert evidence to determine the adequacy of damages for harms like emotional distress in this context.\(^{171}\)

There might also be a worry that this formulation misses something important that the “highly personal” approach attempted, however opaquely, to make relevant: the distinction between harms to the person and economic or professional harms. By describing wrongs as highly personal, the non-preempting courts were perhaps making a distinction between these two sorts of harm. This distinction, however, is neither as important nor as helpful as it seems. The primary problem with evaluating the extent to which a wrong is “personal” is that it implies that employment discrimination is not itself emotionally upsetting. It seems to suggest some conduct creates “highly personal” harms while victims of employment discrimination

\(^{168}\) *Pueschel*, 369 F3d at 353.

\(^{169}\) See *Orsini v Italian Line, Italia Societa Per Azioni Di Navigazione Sede in Genova*, 358 F2d 735, 736 (3d Cir 1966) (“We find no such error as would warrant our interference with the jury’s decision as to the extent of the injury caused by the accident in suit, particularly since it is clear that much of plaintiff's admittedly serious disability is the result of natural causes as well as an earlier accident.”).

\(^{170}\) See, for example, *Simone v Crans*, 891 F Supp 112 (SDNY 1994); *Chesser v United States*, 387 F2d 119, 120 (5th Cir 1967); *Orsini*, 358 F2d at 736.

\(^{171}\) See, for example, *Morse v Southern Union Co*, 174 F3d 917, 925 (8th Cir 1999) (“An expert in forensic psychology testified that in January 1997 he diagnosed Morse as suffering from major depression as a result of losing his job with Southern Union. Morse and his wife testified extensively about the emotional suffering Morse has endured since his employment suddenly was terminated after thirty-two years with the company. In light of prior cases and Morse’s evidence, we cannot say that $70,000 in compensatory damages is grossly excessive, and, therefore, the District Court did not abuse its discretion in remitting the compensatory damages award to $70,000.”); *MacMillan v Millennium Broadway Hotel*, 873 F Supp 2d 546, 560 (SDNY 2012) (discussing the Second Circuit’s practice of distinguishing between “garden variety,” “significant,” and “egregious” emotional distress awards in a case concerning racial discrimination under Title VII).
generally are not emotionally harmed or feel personally wronged. This point is belied by the remedies for emotional pain and suffering for Title VII.

Moreover, a claim such as defamation could be viewed as highly personal or more of a professional harm, depending on the context. As discussed above, the Massachusetts district court permitted the plaintiff’s defamation claim to proceed, finding that she “[sought] to remedy her reputation, which is a highly personal harm distinct from the harm that her Title VII claim [sought] to address.” There is a good argument, however, that Title VII claims inherently involve the complainant’s reputation. Prevailing on a Title VII claim is a formal recognition that discrimination took place. A successful Title VII claim might clear the name of an employee who has had difficulty progressing within a company or government agency, or who lost her job. For this reason, it is misleading to focus on the “highly personal” aspect of the court’s reasoning; removing “highly personal” from the above-quoted sentence has no real effect on the argument. A distinct wrong deserves a distinct remedy, regardless of how “personal” it is.

V. CONCLUSION

Courts are currently divided over whether state tort claims based on “highly personal” wrongs are preempted by a Title VII claim. This uncertainty has potentially deleterious effects on employers and employees alike. The “highly personal” standard relied on by some courts to avoid the preemptive effect of a Title VII claim has created more heat than light. It directs courts to ask the wrong questions and relies on vague notions of personalness in order to arrive at a decision. Most importantly, it fails to identify the subset of state tort claims which should not be preempted, that is, those that are based on genuinely distinct wrongs. The “highly personal” standard should therefore be abandoned in favor of a standard that explicitly focuses on distinguishing distinct harms from those normally caused by employment discrimination. This Comment proposes that Title VII should not preempt state law tort claims that seek to redress distinct wrongs. Wrongs that are the direct result of employment discrimination should be preempted, unless those

172 See Part II.A
wrongs are so egregious as to make the remedies available under Title VII clearly inadequate. This standard will better ensure access to relief for distinct harms that arise in the employment context and protect the integrity of Title VII relief for federal employees.