University of Miami Law Review

Volume 79 | Number 1 Article 5

10-29-2024

Reverse Discrimination: An Opportunity to Modernize and Improve Employment Discrimination Law

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Recommended Citation
William R. Corbett, *Reverse Discrimination: An Opportunity to Modernize and Improve Employment Discrimination Law*, 79 U. Mia. L. Rev. 160 ()
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Reverse Discrimination: An Opportunity to Modernize and Improve Employment Discrimination Law

WILLIAM R. CORBETT*

The issue of how to prove discrimination in reverse discrimination cases has produced a division in the circuits and some strongly worded opinions about discriminatory discrimination law. The courts begin with the three-stage proof framework developed by the Supreme Court in 1973 in McDonnell Douglas Corp. v. Green*, 411 U.S. 792. Some courts adjust the prima facie case, the first stage of the analysis, by requiring a reverse discrimination plaintiff to prove background circumstances that justify the inference that the defendant discriminates in a way that is not consistent with historical patterns of discrimination. Other courts reject the background circumstances requirement and permit reverse discrimination plaintiffs to establish a rebuttable presumption of discrimination based on the acknowledged weak evidence of the prima facie case. Neither of these approaches is acceptable. The background circumstances approach always has been susceptible to an Equal Protection challenge. That challenge seems even more likely, and perhaps more likely to succeed, after the Supreme Court's decision in* Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141 (2023). On the other hand, permitting reverse discrimination plaintiffs to establish a*

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prima facie case based on the same evidence required in traditional discrimination cases undermines the basic assumption on which the prima facie case was based. The appropriate solution is for the Supreme Court to abrogate the McDonnell Douglas *analysis and free courts in all employment discrimination cases to analyze motions under the sufficiency-of-the-evidence standard and factfinders to evaluate the ultimate issue of employment discrimination under the preponderance standard. The shifting burdens and proxy questions of the* McDonnell Douglas *framework served a useful purpose in developing employment discrimination law in its early decades. Now it is time for the Court to jettison the five-decade-old structure and permit employment discrimination law to evolve. The Court has that opportunity in a case in which it has granted certiorari:* Ames v. Ohio Department of Youth Services*, 87 F.4th 822, 824 (6th Cir. 2023), cert. granted, 2024 WL 4394128 (U.S. Oct. 4, 2024) (No. 23-1039).*

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INTRODUCTION

Should members of a "majority protected class" claiming employment discrimination under Title VII of the Civil Rights Act of

1964[1] and relying on "indirect evidence" be required to prove "background circumstances" to establish a prima facie case of discrimination? Yes, according to a per curiam decision of a Sixth Circuit panel, applying the law of the circuit.[2] A concurring judge agreed that the majority decision applied the law of the circuit, but he noted that there is a split in the circuits.[3] Furthermore, the concurring judge argued that to impose a different burden on a member of the "majority" group is to discriminate.[4] The concurring judge described the "background circumstances" requirement as "not a gloss upon [Title VII], but a deep scratch across its surface."[5] He closed by speculating that perhaps the Supreme Court will soon address the issue.[6] The closing statement sounded like a thinly veiled invitation to the Court. It is an invitation that the Court has now accepted, which should not be surprising in the aftermath of the Court's decision regarding the invalidity of affirmative action in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*.[7]

Although *Students for Fair Admissions* involved a challenge to affirmative action in higher education admissions based on Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment, it seems likely that the decision will

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1 42 U.S.C. §§ 2000e–2000e-17.

2 Ames v. Ohio Dep't of Youth Servs., 87 F.4th 822, 824 (6th Cir. 2023), *cert. granted*, 2024 WL 4394128 (U.S. Oct. 4, 2024) (No. 23-1039).

3 *Id.* at 827 (Kethledge, J., concurring).

4 *Id.*

5 *Id.*

6 *Id.* at 828.

7 600 U.S. 181, 230–31 (2023).

have significant ramifications for affirmative action in employment.[8] One of those ramifications is almost certain to be a substantial increase in reverse discrimination claims being filed.[9] Moreover, the Supreme Court's recent decision in *Muldrow v. City of St. Louis*[10] may also result in an increase in reverse discrimination claims.[11] Two decades ago, Professor Charles Sullivan noted that affirmative action in higher education was preserved by the Court in *Grutter v. Bollinger*[12] but that there was a "parallel question" to resolve regarding reverse discrimination in employment under Title VII.[13] Twenty years later, the Court has struck down affirmative action in higher education under Title VI, and the need to resolve issues of reverse discrimination in employment discrimination law

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[8] *See id.* at 181–82. Although the Court is not bound to find that a decision based on Title VI and the Equal Protection Clause applies to affirmative action and racial preferences under Title VII, the Court certainly may decide to revisit and modify its test for the validity of affirmative action plans under Title VII. The test for the validity of affirmative action plans under Title VII was developed by the Court in *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979), and *Johnson v. Transportation Agency*, 480 U.S. 616, 626 (1987). The Title VII test has been more permissive of affirmative action than has the test under the Equal Protection Clause. *See, e.g.*, Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1036 (2004).

[9] *See, e.g.*, Cole Schotz et al., *The U.S. Supreme Court Recently Overturned Affirmative Action Precedent in Higher Education – Will Employer DEI Efforts Be Invalidated Next?*, JD SUPRA (Dec. 13, 2023), https://www.jdsupra.com/legalnews/the-u-s-supreme-court-recently-5250967/; Julian Mark, *Supreme Court Case Could Spark Rush of Reverse-Discrimination Claims*, WASH. POST (Dec. 5, 2023, 7:05 AM), https://www.washingtonpost.com/business/2023/12/05/supreme-court-diversity-equity-inclusion-muldrow/.

[10] 144 S. Ct. 967, 976–77 (2024) (holding that an adverse employment action need not be "significant" or "serious" to be actionable under Title VII; instead, there must be only an injury in terms or conditions of employment that leaves the plaintiff "worse off").

[11] The Court's decision in *Muldrow* almost certainly will result in an increase in all employment discrimination claims and an increase in those that survive defendants' motions for summary judgment. However, it also likely will increase claims by men and Caucasians who cannot participate in employers' diversity, equity, and inclusion programs, such as mentoring and training programs created to improve diversity in their workforces. *See* Mark, *supra* note 9.

[12] 539 U.S. 306, 343 (2003).

[13] Sullivan, *supra* note 8, at 1035.

has become more urgent. There is substantial backlash against "diversity, equity, and inclusion (DEI)," and reverse discrimination litigation is burgeoning.[14]

Reverse discrimination cases and the background circumstances requirement have generated some strong emotions and words in court opinions.[15] For example, state courts generally apply the same analysis as the federal courts to intentional discrimination claims under their state employment discrimination statutes.[16] The Michigan Supreme Court overruled precedent and rejected the background circumstances requirement for a claim under the Michigan Civil Rights Act in *Lind v. City of Battle Creek*.[17] Although the majority opinion was quite short, the concurrence and two dissents directed some incendiary language toward each other. The concurring judge wrote that "[o]ur dissenting colleagues have advocated that the *judicial* branch of government require persons of one race to bear a higher burden of maintaining an employment discrimination case than persons born of another race."[18] He concluded by writing that he did not question the good intentions of the dissenters, but he did challenge "their Orwellian racial policy preferences."[19] One of the two dissenters urged readers "to look beyond the surface appeal of

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[14] *See, e.g.*, Jessica Guynn, *DEI Under Siege: Why More Businesses Are Being Accused of 'Reverse Discrimination*,*'* USA TODAY, (Dec. 26, 2023, 11:23 AM), https://www.usatoday.com/story/money/careers/2023/12/20/dei-reverse-discrimination-lawsuits-increase-woke/71923487007/; Alexandra Olson et al., *DEI Backlash Has Companies Quietly Changing Their Programs to Avoid Wave of Lawsuits Alleging Discrimination*, FORTUNE (Jan. 15, 2024, 8:15 AM), https://fortune.com/2024/01/15/dei-backlash-fearless-fund-companies-changing-programs-avoid-wave-lawsuits-alleging-discrimination/; *see also* Michael Z. Green, *(A)woke Workplaces*, 2023 WIS. L. REV. 811, 814–15 (describing backlash attacks as part of a larger "anti-anti-racism narrative").

[15] *See, e.g.*, Lind v. City of Battle Creek, 681 N.W.2d 334, 335 (Mich. 2004) ("We are uncertain how many pages the dissent believes are required to explain that 'individual' means 'individual.' Further, we note that in its much longer opinion, the dissent, unlike the majority, never actually bothers to decide the issue before this Court."); Ja'han Jones, *Federal Judge Rules Minority Business Program Must Serve White People*, MSNBC (Mar. 7, 2024, 6:01 AM), https://www.msnbc.com/the-reidout/reidout-blog/texas-reverse-discrimination-minority-business-development-agency-rcna142124.

[16] *See, e.g.*, *Lind*, 681 N.W.2d at 338–39 (Cavanaugh, J., dissenting).

[17] *Id.* at 335 (majority opinion).

[18] *Id.* at 336 (Young, J. concurring) (emphasis in original).

[19] *Id.*

[the concurrence's] simplistic argument and examine not only the text but also the *context* of the Civil Rights Act."[20] This dissenter concluded that the majority and the concurrence failed to recognize the historical context of the Civil Rights Act "as well as the pervasive and continuing discrimination rooted in that historical context."[21]

How to prove reverse discrimination and whether background circumstance evidence should be required of reverse-discrimination plaintiffs has been a controversial issue for decades.[22] If the concurrence in *Ames* was inviting the Supreme Court to grant certiorari in *Ames* or another case presenting the "background circumstances" issue, I join that invitation, and I am pleased to see that the Court has accepted. However, I do not join in the hope that the Court will reject the "background circumstances" requirement and hold that all plaintiffs have the same requirements for establishing a prima facie case of discrimination. Rather, I urge the Court, at long last, to take a reverse discrimination case as an opportunity to jettison the prima facie case and the rest of the pretext proof framework that the Court developed half a century ago in *McDonnell Douglas Corp. v. Green*.[23] The issue of background circumstances in reverse discrimination cases provides the Supreme Court with an opportunity to acknowledge that the occurrence of discrimination in the workplace is an evolving, rather than static, phenomenon.[24] Accordingly, we need an evolving body of law to address the issue. Moreover, the rejection of the *McDonnell Douglas* framework and a concomitant shift to treating employment discrimination cases like other types of cases in civil litigation may help shield employment discrimination law against Equal Protection challenges. This year, six decades after

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20 *Id.* (Cavanaugh, J., dissenting) (emphasis in original).

21 *Id.* at 340.

22 *See* Sullivan, *supra* note 8, at 1033–34.

23 411 U.S. 792, 807 (1973). Proof framework refers to what must be proven, in what order, and on whom the burden rests at each stage. In *McDonnell Douglas*, the Court stated what it was addressing: "The case before us raises significant questions as to the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964." *Id.* at 793–94.

24 *See, e.g.*, Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 974; Trina Jones, *Title VII at 50: Contemporary Challenges for U.S. Employment Discrimination Law*, 6 ALA. C.R. & C.L. L. REV. 45, 74 (2014).

the enactment of Title VII,[25] would be a propitious time to modernize and improve federal employment discrimination law.[26] The Court needs to recognize that the "background circumstances" requirement is not the problem; it is instead the entire *McDonnell Douglas* analysis. While the framework facilitated the development of employment discrimination law in the early decades after Title VII became law, it has long since outlived its usefulness, and it has become an impediment to needed innovation in doctrine.

I. THE CREATION, ASCENDANCE, AND DOMINANCE OF THE *MCDONNELL DOUGLAS* PRETEXT PROOF FRAMEWORK

The *McDonnell Douglas* pretext analysis or framework[27] was developed by the Court in its third Title VII decision.[28] The case involved a claim of intentional race discrimination against an individual—what would later be denominated by the Court as an individual disparate treatment claim.[29] The framework has been described as a three-step minuet.[30] The burden of production is first on

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[25] The Civil Rights Act of 1964 was signed by President Lyndon Johnson on July 2, 1964. *See Landmark Legislation: The Civil Rights Act of 1964*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1964.htm. Title VII, prohibiting employment discrimination because of race, color, sex, religion, and national origin, became effective one year later. Civil Rights Act of 1964, Pub. L. No. 88-352, § 716, 78 Stat. 241, 266 (stating that effective date shall be one year after the date of enactment).

[26] The Court rendered its decision in *McDonnell Douglas* on May 14, 1973. Thus, the hoary proof framework has been a fixture in individual disparate treatment case law for over five decades.

[27] The Court described what it was creating early in the decision—the "order and allocation of proof" in an individual discrimination case. *McDonnell Douglas*, 411 U.S. at 800.

[28] *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971); Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

[29] Although the Court stated that the plaintiff in *McDonnell Douglas* "appear[ed] in different clothing" than the plaintiff in *Griggs*, it was not until 1977 that the Court crystalized the distinctions between disparate treatment claims and disparate impact claims. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[30] *See, e.g.*, Etienne v. Spanish Lake Truck & Casino Plaza, LLC, 778 F.3d 473, 475 (5th Cir. 2015); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2232 n.16 (1995).

the plaintiff to prove a prima facie case of discrimination.[31] In the *McDonnell Douglas* decision, the Court explained what a plaintiff must prove to establish a prima facie case:

> (i) [T]hat he belongs to a racial minority[32]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[33]

If the plaintiff establishes a prima facie case, the burden shifts to the defendant to "articulate"[34] a legitimate, nondiscriminatory reason for the employee's rejection.[35] Finally, if the defendant employer satisfies the burden at the second stage, the burden shifts back to the plaintiff to prove that the defendant's articulated reason is a pretext for discrimination that is prohibited by Title VII.[36]

The Court's announcement of the pretext framework in *McDonnell Douglas* in 1973 was only a first statement. In later decisions, the Court would find it necessary to explain and expound on each of the three stages.[37] First, the Court explained the meaning of "articulat[ing]" a legitimate, nondiscriminatory reason at the second stage: a defendant must establish the reason for the adverse employment action through the introduction of admissible evidence.[38] In that same case, the Court clarified that the burden that shifts to the defendant at the second stage is the burden of production,[39] and the ultimate burden of persuasion never shifts, instead remaining on the

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[31] *McDonnell Douglas*, 411 U.S. at 802.

[32] I know this does not sound right, but read on! *See infra* text accompanying notes 54 and 55.

[33] *McDonnell Douglas*, 411 U.S. at 802.

[34] I know this also does not sound quite right, but read on! *See infra* text accompanying note 38.

[35] *McDonnell Douglas*, 411 U.S. at 802.

[36] *Id.* at 804.

[37] *See* Texas Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254–55 (1981); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (2003); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000).

[38] *See Burdine*, 50 U.S. at 254–55.

[39] *Id.* at 254.

plaintiff at all stages.[40] In two later decisions, the Court explained the meaning of the third stage—pretext—and the procedural effect of a plaintiff's establishing said pretext.[41] First, the Court explained that satisfying the burden of production on pretext does not necessarily satisfy the burden of persuasion on the ultimate issue of discrimination, although a finding of pretext may permit the factfinder to infer discrimination.[42] Then, in the next case, the Court further clarified the procedural effect of pretext by explaining that proving pretext, in most but not necessarily all cases, will permit a plaintiff to survive a defendant's motion to dismiss based on the insufficiency of the evidence (a motion for judgment as a matter of law or a motion for summary judgment).[43]

In post-*McDonnell Douglas* decisions, the Court also elaborated on the prima facie case, which is the issue implicated in *Ames* and other cases considering the background circumstances requirement.[44] Four years after *McDonnell Douglas,* the Court explained why the prima facie case raises an inference of discrimination in *International Brotherhood of Teamsters v. United States*.[45] The Court stated that the prima facie case eliminates the two most common reasons an employer would reject an applicant—the applicant is absolutely or relatively unqualified for the job or there is no job vacancy.[46] The Court later elaborated in *Furnco Construction Corp. v. Waters*, saying that the prima facie case raises an inference of discrimination because the Court presumes that if adverse employment actions are otherwise unexplained, they probably are based on consideration of discriminatory reasons.[47] The rationale, then, for the prima facie case can be succinctly stated: the Supreme Court believed that racial discrimination in employment was so prevalent

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[40] *Id.* at 254–56.

[41] *See Hicks*, 509 U.S. at 515–16; *Reeves*, 530 U.S. at 143.

[42] *See Hicks*, 509 U.S. at 511.

[43] *See Reeves*, 530 U.S. at 151–54.

[44] *See, e.g.*, Ames v. Ohio Dep't of Youth Servs., 87 F.4th 822, 824 (6th Cir. 2023), *cert. granted*, 2024 WL 4394128 (U.S. Oct. 4, 2024) (No. 23-1039).

[45] 431 U.S. 324, 357–58, 358 n.44 (1977).

[46] *Id.* at 358 n.44.

[47] Furnco Const. Corp. v. Waters, 438 U.S. 567, 577 (1978). The Court's explanation seems to address not just the prima facie case, but the entire pretext analysis; that is, the inference is based not on just the prima facie case, but on the outcome of the three-part analysis. *See id.* at 577–78.

that if the two most likely reasons for an adverse employment action could be eliminated, the Court found it reasonable to infer discrimination. One commentator aptly termed this inference "the basic assumption," which she said was a cornerstone of intentional discrimination law.[48]

Three years after the *McDonnell Douglas* decision, the Court considered the application of the pretext framework to a case involving Caucasian plaintiffs in *McDonald v. Santa Fe Trail Transportation Co.*[49]—the Supreme Court's only encounter to date with the application of the pretext framework to what is often referred to as a reverse discrimination case.[50] In *Santa Fe Trail*, two white employees were discharged for stealing cans of antifreeze while a black employee accused of the same crime was not fired.[51] The two white former employees sued their former employer under Title VII and section 1981[52] for race discrimination.[53] The Court first explained that Title VII prohibits employment discrimination because of an individual's race, regardless of whether the individual is a member of a majority or minority race.[54] The Court thus clarified a statement it had made in *McDonnell Douglas*: the Court had stated that one element of the plaintiff's prima facie case is proving that he is a member of a racial minority.[55] The employer in *Santa Fe Trail* argued that, although Title VII applies to employment discrimination claims of white employees, it did not provide protection under the facts of the case because the plaintiffs had committed a serious criminal offense.[56] The Court rejected that argument, reasoning that it was foreclosed by the decision in *McDonnell Douglas*, in which the employer's asserted reason for not rehiring the plaintiff was his

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[48] *See* Deborah A. Calloway, St. Mary's Honor Center v. Hicks*: Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 998 (1994); *see also* Sullivan, *supra* note 8, at 1062 (stating that the low threshold of the prima facie case was based on the idea that employers frequently discriminated against African Americans and other minorities).

[49] 427 U.S. 273, 275–76, 281–84 (1976).

[50] *See generally* Sullivan, *supra* note 8, at 1039–40; Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 78–81 (2011).

[51] *Santa Fe Trail*, 427 U.S. at 276.

[52] 42 U.S.C. § 1981.

[53] *Santa Fe Trail*, 427 U.S. at 276.

[54] *Id.* at 278–79.

[55] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[56] *Santa Fe Trail*, 427 U.S. at 281.

commission of a crime.[57] The Court then rejected the argument that section 1981 does not apply to employment discrimination claims of white employees.[58] Thus, the Court clearly declared that Title VII and section 1981 protect members of all races from employment discrimination. Notably, the Court's only application of the pretext framework to a reverse discrimination claim required the Court to provide a clarification of the elements of the prima facie case, but the Court said nothing about a heightened standard, more onerous burden of production, or different type of proof for reverse discrimination plaintiffs in *Santa Fe Trail*.[59]

In 1989, the Court created a second framework for analyzing individual disparate treatment claims.[60] In *Price Waterhouse v. Hopkins*, the Court created the mixed-motives analysis.[61] The Court found the *McDonnell Douglas* framework inapt to evaluate a disparate treatment claim in which the following applied: (1) the plaintiff presented "direct evidence" of discrimination, and (2) the factfinder believed the reasons given by both the plaintiff and the employer played a role in the adverse employment action.[62] After *Price Waterhouse*, lower courts understood, based on a concurring opinion in the decision, that the *McDonnell Douglas* framework was to apply to claims based on circumstantial evidence, and the *Price Waterhouse* mixed-motives framework was to apply to claims in which direct evidence of discrimination was presented.[63] Congress later codified a modification of the *Price Waterhouse* mixed-motives analysis as part of the Civil Rights Act of 1991.[64] In 2003, the Supreme Court, in *Desert Palace, Inc. v. Costa*, rejected the distinction

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[57] *Id.* The Court was explaining that even if the defendant's articulated reason is the plaintiff's commission of a crime, the plaintiff still may be able to prove that the reason is a pretext for discrimination. In *McDonnell Douglas,* the plaintiff was permitted to proceed with his claim even though the employer claimed to have not rehired him because the plaintiff illegally stalled his car on the road to block access to the plant in protest of racial inequality. 411 U.S. at 801.

[58] *Santa Fe Trail*, 427 U.S at 295–96.

[59] *Id.* at 280.

[60] Price Waterhouse v. Hopkins, 490 U.S. 228, 239–58 (1989) (plurality opinion).

[61] *Id.* at 244–45.

[62] *Id.* at 270–78 (O'Connor, J., concurring).

[63] *See id.* at 276.

[64] Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(1), 105 Stat. 1071, 1075 (1991) (codified as amended at 42 U.S.C. §§ 2000e-2(m), e-5(g)(2)(B)).

that the line of demarcation between claims analyzed under the two proof frameworks is whether the claim is supported by circumstantial or direct evidence.[65] That decision prompted commentators to predict the demise of the *McDonnell Douglas* analysis.[66] However, *Desert Palace* seems to be one of the most ignored Supreme Court decisions in history, as many lower courts have resurrected the circumstantial evidence-direct evidence dichotomy.[67] Even the Supreme Court seems to have forgotten or ignored its *Desert Palace* precedent.[68]

Although the Court developed two proof frameworks to evaluate individual disparate treatment claims, the vast majority of disparate treatment claims under Title VII have been evaluated under the *McDonnell Dougla*s pretext framework.[69] *McDonnell Dougla*s remains by far the most important decision and the most important

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[65] Desert Palace, Inc. v. Costa, 539 U.S. 90, 100–01 (2003).

[66] *See, e.g.*, Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 102–03 (2004); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 765–66 (2005); Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 76 (2003).

[67] *See, e.g.*, Carraher v. Target Corp., 503 F.3d 714, 716, 716 n.3 (8th Cir. 2007); Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004) (claiming that direct or circumstantial evidence dichotomy is "entirely consistent with *Desert Palace*"); Ibanez v. Texas A&M Univ. Kingsville, No. 23-40564, 2024 WL 4438682, at *4 (5th Cir. Oct. 8, 2024) ("A plaintiff may prove a case under Title VII using either direct evidence or circumstantial evidence. Absent direct evidence of discrimination, this court applies the burden shifting framework set forth in *McDonnell Douglas Corp. v. Green*.").

[68] *See, e.g.*, Young v. United Parcel Serv., Inc., 575 U.S. 206, 213 (2015) (stating that a plaintiff can prove discrimination by proffering direct evidence or by using the *McDonnell Douglas* framework).

[69] The astounding pervasiveness of the *McDonnell Douglas* framework has not abated in recent years. Since it was decided in 1973, the *McDonnell Douglas* framework has been implicated in about 10,000 federal court opinions. Westlaw search in "All Federal Cases: ("McDonnell Douglas" /5 Green) and pretext and DATE(after 1-1-1973). Of those decisions, about 2,562 were reported in 2023-24 (through Oct. 8, 2024). Westlaw search in "All Federal Cases": "McDonnell Douglas" /5 Green) and pretext and DATE(after 1-1-2023). Those numbers include not only Title VII cases, but also cases under the Age Discrimination in Employment Act and the Americans with Disabilities Act. The Court has never expressly held that the framework applies under those two laws, but courts have

analysis in disparate treatment law specifically—and consequently in employment discrimination law generally.[70]

Many commentators have criticized the cumbersome *McDonnell Douglas* framework and called for either its revision or abrogation.[71] Some courts have also criticized the emphasis placed on *McDonnell Douglas* to evaluate disparate treatment cases.[72] Among the many reasons for such advocacy is the obvious weakness of the prima facie case to support an inference of discrimination.[73] As the Supreme Court acknowledged in the *McDonnell Douglas* decision itself, the elements are variable, depending on the facts of the case.[74] Thus, there are multiple formulations of the prima facie case, depending primarily on what adverse employment action is at issue.[75] More significantly, the burden of satisfying the prima facie case is

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routinely applied it. *See, e.g.*, Jones v. Okla. City Pub. Schs., 617 F.3d 1273, 1277 (10th Cir. 2010) (ADEA); Oehmke v. Medtronic, Inc., 844 F.3d 748, 755 (8th Cir. 2016) (ADA). Professor Sullivan has explored why the "motivating factor" standard—the first stage of the two-stage mixed-motives analysis—has not displaced the *McDonnell Douglas* analysis to any significant degree. *See* Charles A. Sullivan, *Making Too Much of Too Little?: Why "Motivating Factor" Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357, 382–98 (2020).

[70] Professor Sandra Sperino has written a book aptly expressing the idea. SANDRA SPERINO, MCDONNELL DOUGLAS: THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW (2018).

[71] *See, e.g.*, Amanda Berg, Note, *"An Allemande Worthy of the 16th Century:" A Call to Abolish the* McDonnell Douglas *Framework and Adopt Judge Wood's Proposed Flexible Standard*, 33 REV. LITIG. 639, 677 (2014); William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself*, 62 AM. U. L. REV. 447, 511 (2013).

[72] *See, e.g.*, Tynes v. Fla. Dep't of Juv. Just., 88 F.4th 939, 941 (11th Cir. 2023) ("[*McDonnell Douglas* framework] is not a set of elements that the employee must prove—either to survive summary judgment or prevail at trial."), *cert. denied*, 2024 WL 4426607 (Oct. 7, 2024) (No. 23-1235). The concurring judge was even more critical than the majority. *Id.* at 951 (Newsom, J., dissenting) ("Upon reflection, it now seems to me that *McDonnell Douglas* is the interloper—it is the judge-concocted doctrine that obfuscates the critical inquiry."); *see also* Khorri Atkinson, *Decades-Old Workplace Bias Burden Test Under Circuit Scrutiny*, BLOOMBERG L.: DAILY LAB. REP. (Sept. 30, 2024, 5:44 AM), https://news.bloomberglaw.com/daily-labor-report/decades-old-workplace-bias-burden-test-under-circuit-scrutiny.

[73] *See, e.g.*, Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371, 377 (1997).

[74] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973).

[75] *See* Smith, *supra* note 72, at 373–77.

astoundingly light.[76] No better illustration exists of that fact than the back story of the Supreme Court's decision in *Texas Department of Community Affairs v. Burdine*,[77] the first Supreme Court decision to interpret and apply *McDonnell Douglas*. As recounted by Professor Deborah Malamud, when the justices exchanged a draft of the opinion, one justice challenged the statement of the prima facie case, arguing that his hiring of a male judicial clerk rather than two qualified female applicants should not be sufficient evidence of sex discrimination to establish a prima facie case, although it would be under the prima facie case as stated in *McDonnell Douglas*.[78] To address that concern, the Court added to its statement of the prima facie case in *Burdine* what Professor Malamud terms a "stealth evidentiary requirement"[79]: "The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances *which give rise to an inference of discrimination*."[80] What does that language require? That additional language has never been clarified by the Court, but it is a stark reminder of the inherent weakness of the prima facie case. The Court's internal debate over what is required to establish a prima facie case calls into question whether the Court ever really accepted its own articulated rationale for the prima facie case—that evidence satisfying the elements of the prima facie case justifies an inference of discrimination after the two most common reasons for a refusal to hire an applicant have been eliminated.[81]

The weakness of the *McDonnell Douglas* prima facie case is the reason for the development of the background circumstances requirement for reverse discrimination cases.[82]

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[76] *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993).
[77] 450 U.S. 248, 252–56, 258 (1981).
[78] *See* Malamud, *supra* note 30, at 2246–49.
[79] *Id.* at 2246.
[80] *Burdine*, 450 U.S. at 253 (emphasis added).
[81] *See* Malamud, *supra* note 30, at 2246.
[82] Corbett, *supra* note 71, at 496–97.

II. REVERSE DISCRIMINATION CASES AND THE NEED TO ABANDON *MCDONNELL DOUGLAS*

A. *Reverse Discrimination Claims*

Reverse discrimination has always posed interesting issues and challenges for employment discrimination law and the courts that grapple with the cases.[83] To begin with, a full understanding of the issues and challenges requires a definition of the term. It is often said that reverse discrimination is discrimination against a member of a majority class, as the Sixth Circuit characterized it in *Ames*.[84] That definition, however, is not quite correct. There are not actually protected classes under Title VII; instead, there are protected characteristics—color, race, sex, religion, and national origin.[85] Thus, everyone may make a claim of color, race, sex, or national origin discrimination, and it is likely that everyone may make a religion-based discrimination claim.[86] But majority or minority does not adequately capture the meaning. For example, there are more women in the United States than men,[87] but a reverse sex discrimination claim is understood to mean a sex discrimination claim by a man.[88] A more accurate definition is that the person aggrieved has a protected characteristic that is different from that of those people who

[83] *See* Sullivan, *supra* note 8, at 1035–36.

[84] *See* Ames v. Ohio Dep't of Youth Servs., 87 F.4th 822, 825 (6th Cir. 2023), *cert. granted*, 2024 WL 4394128 (U.S. Oct. 4, 2024) (No. 23-1039); *see also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976).

[85] 42 U.S.C. § 2000e-2(a).

[86] It is possible that a person has no religious beliefs, but given the breadth of the definition of religion, it seems likely that everyone can claim religious beliefs. *See generally* 29 C.F.R. § 1605.1 (defining religion "to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views").

[87] *See, e.g.*, Israel Webb Carey & Conrad Hackett, *Global Population Skews Male, but UN Projects Parity Between Sexes by 2050*, PEW RSCH. CTR. (Aug. 31, 2022), https://www.pewresearch.org/short-reads/2022/08/31/global-population-skews-male-but-un-projects-parity-between-sexes-by-2050/ (stating that there have been more females than males in the United States since 1946).

[88] *See, e.g.*, David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657, 662.

historically have most often experienced employment discrimination based on their protected characteristic.[89] Obviously, Caucasians (reverse race discrimination), men (reverse sex discrimination), and American-born individuals (reverse national origin discrimination)[90] would bring such claims. Beyond race, sex, and national origin, the definition can become more problematic.

Regarding religion, who would bring a reverse religious discrimination claim? An easy answer in the United States is Christians. However, what if we make the situation more nuanced and ask about Catholics or various Protestant denominations? Some courts have labeled—as reverse religious discrimination—those cases in which the plaintiff is not a member of the same "minority" religious group as the supervisor or decision maker.[91]

A reverse age discrimination claim, if viable, would be brought by a younger person, who is covered by the Age Discrimination in Employment Act (ADEA),[92] alleging discrimination in favor of an older person. However, the Supreme Court held that such claims are not cognizable under the ADEA because Congress did not intend to cover such discrimination.[93]

For disabilities, it should be obvious that there can be no reverse discrimination claim because a person without a disability is not

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[89] But perhaps a case should not be considered reverse discrimination if the plaintiff is of a different race, sex, religion, or national origin from that of those who control the employer's decision-making process. For example, should a case be considered reverse discrimination if a Caucasian plaintiff is not hired by an employer with decisionmakers who are black? Should a case be labeled reverse discrimination if a male is not hired by a company whose executive ranks are filled predominantly by women? Consider this point, also, regarding religion, *infra* note 90.

[90] The Ninth Circuit recently held that section 1981, which covers employment discrimination claims based on race, covers discrimination against citizens of the United States. Rajaram v. Meta Platforms, Inc., 105 F.4th 1179, 1181 (9th Cir. 2024).

[91] *See, e.g.*, Noyes v. Kelly Servs., 488 F.3d 1163, 1165–66 (9th Cir. 2007) (supervisor was a member of the small religious group the Fellowship of Friends); Bishop v. Donahoe, 479 F. App'x. 55, 57 (9th Cir. 2012) (supervisor was a Mormon); Shapolia v. Los Alamos Nat'l Lab., 992 F.2d 1033, 1035 (10th Cir. 1993) (supervisor was a Mormon).

[92] The ADEA covers individual who are forty years old or older. 29 U.S.C. § 631(a).

[93] *See* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 584 (2004).

covered by the Americans with Disabilities Act.[94] To resolve the matter conclusively, however, Congress expressly provided in the ADA Amendments Act of 2008 that such claims are not cognizable.[95]

One may argue that the term "reverse discrimination" is not useful, that it is inexact and ambiguous in some cases, or even that it is offensive and contrary to the employment discrimination statutes because Title VII prohibits discrimination based on race, color, religion, sex, or national origin, making no distinction between or among the sub-characteristics (African American or Caucasian, for example) that bore the brunt of historical discrimination and those that did not. On the other hand, Congress did not enact Title VII principally to eliminate or reduce employment discrimination against Caucasians and men.[96] Accordingly, there may be a reason to develop different law for such claims. Thus, the distinction between "traditional discrimination"[97] and "reverse discrimination" remains useful and, in any event, inevitable.

The effect of *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*[98] on federal employment discrimination law remains to be seen, but it is likely to be significant. Some reverse discrimination cases implicate affirmative action plans,[99] and some do not.[100] A plaintiff may sue for reverse discrimination, alleging that an adverse employment action was taken pursuant to an affirmative action plan that is invalid, or a plaintiff may allege

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[94] 42 U.S.C. § 12112(a) (prohibiting employment discrimination against "a qualified individual on the basis of disability").

[95] 42 U.S.C. § 12201(g).

[96] *See* Sullivan, *supra* note 8, at 1040 n.25.

[97] *Id.* at 1035 n.13.

[98] 600 U.S. 181, 230 (2023).

[99] In one case, *DeCorte v. Jordan*, the Fifth Circuit considered the characteristics of an affirmative action plan and concluded that the "cultural-diversity report" at issue was an invalid affirmative action plan. 497 F.3d 433, 440–41 (5th Cir. 2007). Thus, the label that is given to a plan does not determine whether it will be evaluated under the Supreme Court's current two-part test for valid affirmative action plans under Title VII. *See, e.g.*, *id.*; *see also* Sullivan, *supra* note 8, at 1035–36.

[100] *See, e.g.*, Ames v. Ohio Dep't of Youth Servs., 87 F.4th 822, 824 (6th Cir. 2023), *cert. granted*, 2024 WL 4394128 (U.S. Oct. 4, 2024) (No. 23-1039).

reverse discrimination that was not the product of an affirmative action plan.[101]

The D.C. Circuit originated the background circumstances requirement in *Parker v. Baltimore & Ohio Railroad Co*.[102] The employer in *Parker* attempted to justify its employment actions based on an affirmative action plan agreed to by a multiemployer bargaining unit.[103] Although the district court had granted summary judgment for the defendant employer, the appellate court found the dismissal premature.[104] The employer had conceded reliance on the affirmative action plan for one employment action at issue, but it had not so conceded for another.[105] Thus, on remand, the plaintiff would be required to prove racial discrimination.[106] The court stated that he could avail himself of the *McDonnell Douglas* framework but with a modification—the background circumstances requirement to establish a prima facie case.[107] The court explained that the *McDonnell Douglas* framework is not "an arbitrary lightening of the plaintiff's burden, but rather a procedural embodiment of the recognition that our nation has not yet freed itself from a legacy of hostile discrimination."[108] The court illustrated the point by providing the Supreme Court's explanation from *Furnco*[109] regarding why the prima facie case raises an inference of discrimination.[110] The court clarified that "[m]embership in a socially disfavored group was the assumption on which" the framework was built.[111] Thus, the court reasoned, "[I]t defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white coworkers in our present society."[112] The *Parker* decision was rendered by the D.C. Circuit in 1981. The court, in a subsequent case, would state that the requirement "is not an additional hurdle for

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[101] *See* Sullivan, *supra* note 8, at 1047–48.
[102] 652 F.2d 1012, 1017 (D.C. Cir. 1981).
[103] *Id.* at 1015.
[104] *Id.* at 1016.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 1017–18.
[108] *Parker*, 652 F.2d at 1017.
[109] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).
[110] *Parker*, 652 F.2d at 1017.
[111] *Id.*
[112] *Id.*

white plaintiffs" but rather "a faithful transposition" of the *McDonnell Douglas* framework "into the reverse discrimination context."[113]

From its origin in the D.C. Circuit, the background circumstances requirement has been adopted by some courts and rejected by others.[114] The concurring opinion in *Ames* encapsulated the mixed reception the background circumstances requirement has received among the circuits, stating that five adhere to it, two have expressly rejected it, and five do not apply it.[115]

In *Iadimarco v. Runyon*,[116] the Third Circuit rejected the background circumstances requirement, noting several problems. First, the court stated that the D.C. Circuit went too far in modifying the prima facie case for reverse discrimination.[117] The court went on to say that, regardless, the additional requirement is "irremediably vague and ill-defined."[118] Next, the Third Circuit said the most problematic aspect is that it confounds the steps of the *McDonnell Douglas* analysis because it seems to require "cramming" evidence that is relevant to pretext, the third stage of the analysis, into the prima facie case, the first stage.[119] Thus, the Third Circuit rejected the background circumstances requirement for reverse discrimination cases and instead held that a plaintiff is required to produce sufficient evidence, under the totality of the circumstances, that the defendant treated him less favorably than others because of his protected characteristic.[120]

B. *The Inadequacy of the Prima Facie Case and the Danger Posed by the Background Circumstances Requirement*

The basic assumption underlying the *McDonnell Douglas* prima facie case is that racial employment discrimination is so prevalent that, if the two most common reasons for denying employment are

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[113] Harding v. Gray, 9 F.3d 150, 154 (D.C. Cir. 1993).
[114] Ames v. Ohio Dep't of Youth Servs., 87 F.4th 822, 824 (6th Cir. 2023) (Kethledge, J., concurring), *cert. granted*, 2024 WL 4394128 (U.S. Oct. 4, 2024) (No. 23-1039).
[115] *Id.*
[116] 190 F.3d 151, 160 (3d Cir. 1999).
[117] *Id.* at 161.
[118] *Id.*
[119] *Id.* at 163.
[120] *Id.*

eliminated, then it is reasonable to infer discrimination.[121] The Supreme Court has stated that the burden of proving a prima facie case is "not onerous."[122] Indeed, the Court modified its statement of the prima facie case in *Burdine* because one of the justices argued that the elements stated in *McDonnell Douglas* were not sufficient to create an inference of discrimination.[123] The Court must have believed in the prevalence of employment discrimination to have permitted an inference of discrimination based on the modest prima facie case evidence. Professor Calloway argued, however, that the Court's belief in the prevalence of discrimination had changed when the Court refused to require judgment for the plaintiff on a showing of pretext in *St. Mary's Honor Center v. Hicks*.[124] Although the *Hicks* case dealt with the pretext stage of the analysis, if she was correct that the Court had lost confidence in the procedural effect of the overall analysis, it almost certainly also would have lost confidence in the inference to be drawn from the barebones prima facie case. Professor Calloway's argument regarding *Hicks* overstated the Court's loss of confidence in the framework, and this reality was later confirmed in *Reeves v. Sanderson Plumbing Products*.[125] Nonetheless, Professor Calloway posed an apt question in the aftermath of *Hicks*: three decades into the employment discrimination endeavor, had the Court, academics, judges, and public begun to question the continuing prevalence of employment discrimination against historical victims?[126] If they had, then the pretext framework would have lost its foundation for the prima facie case. If the *Hicks* decision and the passage of three decades since the enactment of Title VII cast doubt on the continuing confidence in and commitment to the *McDonnell Douglas* analysis in 1993, has that confidence and commitment further eroded after six decades of employment discrimination law?

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[121] *See supra* notes 44–48 and accompanying text.

[122] *See, e.g.*, Texas Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981).

[123] *See supra* notes 76–80 and accompanying text.

[124] 509 U.S. 502, 511 (2003). *See* Calloway, *supra* note 48, at 1036.

[125] 530 U.S. 133, 147–48 (2000). *See* William R. Corbett, McDonnell Douglas*, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 202–03 (2003).

[126] Calloway, *supra* note 48, at 1036.

The concurring judge in *Ames* suggested, perhaps wistfully, that the Supreme Court might take up the issue of the background circumstances requirement.[127] His apparent hope has been realized with the Court granting certiorari in *Ames*. I am pleased that the Court will address the issue of the background circumstances modification of the *McDonnell Douglas* prima facie case. However, I do not advocate the Court's rejecting background circumstances because of constitutional (Equal Protection Clause) concerns. Rather, I want the Court to abandon *McDonnell Douglas* and, by doing so, update and improve employment discrimination law.

Professor Sullivan addressed the issue of the background circumstances requirement in his 2004 article.[128] He noted that plaintiffs increasingly were challenging the requirement, arguing that its imposition is itself reverse discrimination.[129] Moreover, Sullivan speculated that twenty years after the D.C. Circuit had first announced the additional requirement in *Parker*, courts may have been reassessing the relative probability of racial discrimination against Caucasians and African Americans.[130] Thus, Sullivan posited that the "deterioration, if not demise," of the basic assumption, whether or not justified in traditional discrimination cases, explained the tendency of courts to impose a heightened burden in reverse discrimination cases.[131] He noted, however, that an Equal Protection challenge could be leveled against the imposition of an additional requirement on reverse discrimination plaintiffs, although it would be difficult to predict the outcome of such a challenge.[132]

Professor Sullivan's trenchant observations from 2004 merit reconsideration two decades later. There is now a clear and strong backlash against what many see as discriminatory discrimination law.[133] Never mind that the backlash does not take account of the

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[127] *See supra* text accompanying notes 22–24.

[128] Sullivan, *supra* note 8, at 1033, 1080.

[129] *Id.* at 1038.

[130] *Id.* at 1085.

[131] *Id.* at 1092–93.

[132] *Id.* at 1102–18 (concluding that the result is "hard to predict").

[133] *See, e.g.*, Green, *supra* note 14, at 833–34; Nicquel Terry Ellis & Catherine Thorbecke, *DEI Efforts Are Under Siege. Here's What Experts Say Is at Stake*, CNN (Jan. 11, 2024, 5:11 PM), https://www.cnn.com/2024/01/07/us/dei-attacks-experts-warn-of-consequences-reaj/index.html.

fact that the body of discrimination law has many distinctions (discriminations) within it. Moreover, the Supreme Court has recently declared the end of affirmative action in higher education admissions.[134]

When Professor Sullivan examined these issues, the Supreme Court had upheld affirmative action in education. However, the narrow preservation of affirmative action under Title VI and the Equal Protection Clause in *Grutter v. Bollinger* prompted him to propose addressing the issue of the background circumstances requirement in employment discrimination law.[135] Twenty years later, there is a significant prospect that the Court's reasoning in *Students for Fair Admissions* will impact employment discrimination decisions. Thus, in 2024, the need to devise an approach for reverse discrimination law other than the background circumstances requirement is far more urgent.

Professor Sullivan considered two alternatives: (1) reject background circumstances and apply the same prima facie case requirement to reverse and traditional discrimination plaintiffs, or (2) reject the *McDonnell Douglas* framework for all cases and just consider whether any plaintiff has produced sufficient evidence of discrimination.[136] Sullivan favored the latter, which is akin to the approach adopted by the Third Circuit in *Iadimarco v. Runyon*.[137] However, the Third Circuit simply created a modified version of the *McDonnell Douglas* analysis, substituting the sufficiency standard in place of the traditional prima facie case.[138] Professor Sullivan's proposal went beyond *Iadimarco,* recommending abandoning the pretext framework for all discrimination cases.[139]

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[134] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023).

[135] Sullivan, *supra* note 8, at 1035.

[136] *Id.* at 1118–19.

[137] *Id.*; *see* Iadimarco v. Runyon 190 F.3d 151, 163 (3d Cir. 1999).

[138] *See, e.g.*, Corbett v. Sealy, Inc., 135 F. App'x. 506, 509 (3d Cir. 2005) (affirming district court's decision that utilized a modified burden-shifting analysis under *Iadimarco*); Solomon v. Soc'y of Auto. Eng'rs, 41 F. App'x. 585, 586 (3d Cir. 2002) (rejecting argument that district court applied wrong legal standard in reverse discrimination case because court had applied *Iadimarco*).

[139] Sullivan, *supra* note 8, at 1129.

At its first opportunity, the Supreme Court should lay to rest the most important and omnipresent analysis in employment discrimination law. The *McDonnell Douglas* framework has many flaws, and there are many reasons to abandon it. The issues in the reverse discrimination context and the controversy over the background circumstances requirement provide an opportunity to reject the framework based on its most vexatious part, the prima facie case, which is constitutionally suspect anyway.

The alternative of rejecting the background circumstances requirement and simply applying the prima facie case to both traditional and reverse discrimination plaintiffs is an inferior solution. Although it would avoid the looming constitutional problem, it would also deprive the prima facie case of the basic assumption on which it was created—that discrimination against African Americans is so prevalent that it is reasonable and just to infer such discrimination if the two most common reasons for adverse employment actions are eliminated. It may be that some or perhaps many courts and people in society do not believe that employment discrimination against African Americans remains sufficiently pervasive in 2024 to justify the inference based on the prima facie case. Regardless of what one thinks about the matter, however, it is a less cogent argument that employment discrimination against Caucasians is so pervasive that the inference of discrimination is justified by the meager evidence required for a prima facie case. Moreover, the *McDonnell Douglas* framework is applied to individual disparate treatment claims of sex discrimination, national origin discrimination, and religion-based discrimination under Title VII.[140] Would the inference of discrimination based on the prima facie case be justified in all those types of reverse discrimination cases? Ultimately, the basic assumption probably commands less commitment than in 1973, 1993, or 2004, even in cases of traditional race discrimination. Law cannot countenance a prima facie case that is no longer ungirded by an assumption to which judges are committed.[141]

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[140] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–07 (1973); 42 U.S.C. § 2000e-2(a). But if *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), were followed, all claims under Title VII could be evaluated under the mixed-motives analysis. *See supra* notes 65–68 and accompanying text.

[141] The commitment of judges is the most important and relevant issue for the *McDonnell Douglas* framework because judges apply the analysis on motions for

Another reason the Court should not just reject the background circumstances requirement and apply the same prima facie case to all individual disparate treatment cases is that this approach would make employers more vulnerable to employment discrimination lawsuits.[142] Case law is replete with statements that Title VII aims to eliminate discrimination but still preserve an employer's prerogative and free choice when possible.[143] Making the light burden of the prima facie case applicable to all discrimination cases, especially amid a backlash against DEI and an onslaught of reverse discrimination cases, will impose significant litigation burdens on employers and not accord them the deference due to their managerial freedoms.

The better solution is, as Sullivan advocated in 2004, to jettison the *McDonnell Douglas* framework altogether.[144] The problems created by that analysis are legion, and many commentators have advocated for its abrogation for various reasons.[145] Reverse discrimination provides a compelling reason to put it to rest and be done with all the problems it creates. To reiterate: the prima facie case should not be applied generally to both traditional and reverse discrimination claims because the underlying assumption is not valid. On the other hand, a modified prima facie case is constitutionally suspect, in addition to fomenting backlash, rancor, and distrust of employment discrimination law. So, what comes next?

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summary judgment and motions for judgment as a matter of law. *See generally* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."); FED. R. CIV. P. 50(a) (stating that a court may grant a motion for judgment as a matter of law if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue").

[142] *See, e.g.*, Sullivan, *supra* note 8, at 1114–18.

[143] *Id.* at 1115; *see also* William R. Corbett, *The "Fall" of* Summers, *the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305, 307 (1996).

[144] Sullivan, *supra* note 8, at 1034.

[145] *Id.* at 1033–34.

III. EVOLVING DISCRIMINATION LAW

In 1973, when the Court created the *McDonnell Douglas* framework, discrimination law was in its infancy. Creating a rebuttable presumption of discrimination based on a weak production of evidence by a plaintiff was appropriate and probably necessary to facilitate the development of the law. The proxy questions of the prima facie case and pretext, which were intended to sharpen the focus on the difficult and "elusive" ultimate issue—whether the employer discriminated[146]—were helpful in adjusting the perspectives of judges and members of society under the new law. But society is not static, nor should law be. Six decades after Title VII was enacted and five decades after the Court fashioned the pretext analysis, discrimination as a phenomenon in the workplace is different.[147] While discrimination against African American and female applicants and employees still occurs frequently, discrimination against Caucasians and men probably occurs more often than it did in 1964 when Title VII was enacted and in 1973 when *McDonnell Douglas* was decided. With a changing phenomenon such as discrimination, we should not cling to the same law that we had fifty years ago.

McDonnell Douglas has done its service and has taught us much about what kinds of evidence are relevant and probative in employment discrimination cases. A nonexhaustive list includes comparative evidence, evidence of employers' adherence to or divergence from standard procedures, shifting statements of reasons for the adverse action, general and comparative treatment of employees, statistical information about the employer's workforce, and statements made by co-employees and supervisors.[148] It is time to let courts evaluate such evidence under the sufficiency standard on motions for summary judgment[149] and judgment as a matter of law[150] and courts and juries to evaluate the evidence at the end of trials under

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[146] Texas Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 255 n.8 (1981); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993).

[147] *See supra* note 24 and accompanying text.

[148] *See* Sullivan, *supra* note 8, at 1049, 1058, 1131.

[149] *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (stating that there is no issue for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party").

[150] FED. R. CIV. P. 50(a) (stating that a court may grant a motion for judgment as a matter of law if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue").

the preponderance standard.[151] The idea that consideration of all relevant evidence is what judges and juries should be doing to evaluate discrimination is not far-fetched. It probably is what some courts have in mind when they discuss proving discrimination by presenting a "convincing mosaic" of discrimination.[152] Professor Malamud's admonition in her 1995 article rings truer today than it did then: "Perhaps it is better to let the cold winds of litigation blow. At least the cold air will be clear."[153]

CONCLUSION

The Third Circuit decision in *Ames* exemplifies the problems posed by trying to analyze reverse discrimination cases under the *McDonnell Douglas* framework. It is time for the Supreme Court to put the workhorse analysis of disparate treatment law out to pasture. It has done its work, and now employment discrimination law must evolve.

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[151] This is the change for which Professor Sullivan advocated in 2004. Sullivan, *supra* note 8, at 1129–30. He added that plaintiffs would be well served to introduce evidence regarding the continuing prevalence of discrimination. *Id.* at 1131.

[152] *See, e.g.*, Jenkins v. Nell, 26 F.4th 1243, 1250–51 (11th Cir. 2022); Ortiz v. Werner Enters., Inc., 834 F.3d 760, 763–64 (7th Cir. 2016). Some courts have noted the artificial nature of trying to force evidence into the three stages of the *McDonnell Douglas* analysis. *See, e.g.*, Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011) (stating that "[plaintiff] did not need to rely on the *McDonnell Douglas* presumption to establish a case for the jury").

[153] Malamud, *supra* note 30, at 2324.