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Flying without a Statutory Basis: Why McDonnell Douglas is Not Justified by any Statutory Construction Methodology

Sandra F. Sperino
University of Cincinnati College of Law, sandra.sperino@uc.edu

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ARTICLE

FLYING WITHOUT A STATUTORY BASIS: WHY *McDONNELL DOUGLAS* IS NOT JUSTIFIED BY ANY STATUTORY CONSTRUCTION METHODOLOGY

*Sandra F. Sperino**

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* Assistant Professor, Saint Louis University School of Law. I am indebted to Stephen F. Ross from the University of Illinois, Susan A. Fitzgibbon and Frederic M. Bloom from Saint Louis University, Michael E. Gold from Cornell University, Jarod S. Gonzalez from Texas Tech University, and Elaine W. Shoben from the University of Nevada Las Vegas, for their insightful comments on drafts of this Article. I also would like to thank Jennifer Carnahan and Kelly Starkweather for their research assistance.

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I. INTRODUCTION

In 1973, the Supreme Court considered the question of whether Percy Green, a former employee at a McDonnell Douglas plant, could establish a claim of race discrimination based on circumstantial evidence.[1] The Court held that Mr. Green could establish his claim through circumstantial evidence and then enunciated what is now referred to as the *McDonnell Douglas* burden-shifting test.[2]

1. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973) (setting out "to clarify the standards governing the disposition of an action challenging employment discrimination").

2. *See id.* at 802 (holding that the plaintiff carries the initial burden to show discrimination, and if satisfied, the burden then shifts to the employer to put forth a nondiscriminatory reason for rejecting the employee); *id.* at 804 (noting that after defendant presents legitimate, non-discriminatory reason for its actions, plaintiff must demonstrate the reason is pretextual). For convenience, I have referred to *McDonnell Douglas* as a singular test. However, *McDonnell Douglas* "is not a monolithic test, but rather a collection of tests gathered rather deceptively under one name." Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the*

Since 1973, both courts and litigants have struggled to understand and apply the three-step burden-shifting framework. Commentators have noted that "although the Supreme Court initially adopted the *McDonnell Douglas* approach to make it easier for plaintiffs to prove a prima facie case, the courts of appeals now use this construct to defeat plaintiffs' claims."[3] Some members of the court have noted that the numerous and complicated frameworks used in the employment context have resulted in employment law becoming "difficult for the bench and bar,"[4] and that "[l]ower courts long have had difficulty applying *McDonnell Douglas* . . . ."[5] One commentator has described the test as having "befuddled most of those who have attempted to master it"[6] and calls the burden-shifting framework "complex" and "somewhat Byzantine."[7] Perhaps even more surprising than the test's continued viability is the fact that few courts question its authority or statutory basis.[8]

More than 30 years after the *McDonnell Douglas* decision was handed down, fundamental disagreements still exist within the circuits about how it should be applied. Some within the academic community even question its continued viability and applicability, based on subsequent amendments to Title VII.[9] This Article argues that *McDonnell Douglas* has proven

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McDonnell Douglas *Monolith*, 44 HOUS. L. REV. (forthcoming 2007) (manuscript at 1, on file with Author).

3. Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 229 (1993) (footnote omitted).

4. Price Waterhouse v. Hopkins, 490 U.S. 228, 279 (1989) (Kennedy, J., dissenting).

5. *Id.* at 291.

6. Kenneth R. Davis, Price-*Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 859 (2004).

7. *Id.* at 862; *see also* Denny Chin & Jodi Golinsky, *Moving Beyond* McDonnell Douglas*: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 659 & n.3 (1998) (indicating how courts have struggled with the test).

8. *But see* Griffith v. City of Des Moines, 387 F.3d 733, 740 (8th Cir. 2004) ("Absent from [the *McDonnell Douglas*] opinion was any justification or authority for [the burden-shifting] scheme.").

9. *See, e.g.*, Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 934 (2005) ("The ramifications of *Desert Palace* are as yet unclear, but the broadest view is that the case collapsed all individual disparate treatment cases into a single analytical method, thereby effectively destroying *McDonnell Douglas*. The decision, however, can be read more narrowly. Because footnote one specifies that the Court was not deciding the effects of this decision 'outside of the mixed-motive context,' *McDonnell Douglas* may continue to structure some cases, although its viability under Title VII is suspect." (footnote omitted) (quoting Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 n.1 (2003)); *see also* William R. Corbett, *An Allegory of the Cave and the* Desert Palace, 41 HOUS. L. REV. 1549, 1566 (2005) (removing "the shadow of *McDonnell Douglas*'s continuing viability once and for all").

unsatisfactory in analyzing discrimination claims for two reasons related to statutory construction. First, the Supreme Court provided no guidance on how the test is analytically connected to the statute itself.[10] Indeed, a close examination demonstrates that the test draws little support from the text, intent, or purpose of Title VII.[11] Second, the Court failed to provide any explanation why such a departure from the express statutory language was warranted.[12] The pre-1973 case law and the *McDonnell Douglas* opinion itself do not suggest that the test was necessary to give meaning to ambiguous statutory language or to provide guidance to lower courts struggling with how to analyze claims. These omissions lead to serious concerns about whether the test was created within acceptable bounds of statutory construction.

Over the years, the statutory underpinnings of *McDonnell Douglas* have received surprisingly little attention and criticism.[13] This is largely due to explanations of the framework as merely an evidentiary standard.[14] If Title VII operates merely as an evidentiary standard, the theory goes, then the Supreme Court, through its supervisory powers, has the ability to create the shifting burdens of production and persuasion to assist lower courts in their decisionmaking.[15] This belief about *McDonnell Douglas* is undermined by recent cases holding that trial courts should not instruct juries about the three-part framework.[16]

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10. *See* Mark A. Schuman, *The Politics of Presumption:* St. Mary's Honor Center v. Hicks *and the Burdens of Proof in Employment Discrimination Cases*, 9 ST. JOHN'S J. LEGAL COMMENT. 67, 70 (1993) ("The *McDonnell Douglas* Court gave no justification or authority for its establishment of this structure of proof. . . .").

11. *Id.* (noting that the Court did not discuss passages from Title VII, the Civil Rights Act of 1964, or the Act's legislative history).

12. *Id.* (observing that "[n]o Justice bothered to concur and explain his own rationale for the holding of the case").

13. *Id.* (finding that subsequent cases took the *McDonnell Douglas* structure for granted).

14. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002) ("The prima facie case under *McDonnell Douglas* . . . is an evidentiary standard . . . .").

15. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 514 (1993); *cf.* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 93–95 (2004) (explaining why courts are allowed to create decision rules in the constitutional context).

16. Whittington v. Nordam Group Inc., 429 F.3d 986, 998 (10th Cir. 2005) ("[T]he instructions should not 'lead jurors to abandon their own judgment and to seize poorly understood legalisms to decide the ultimate question of discrimination.'" (quoting Messina v. Kroblin Transp. Sys., Inc., 903 F.2d 1306, 1308 (10th Cir. 1990))); Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 576 (5th Cir. 2004) ("[D]istrict courts should not frame jury instructions based upon the intricacies of the *McDonnell Douglas* burden shifting analysis."); Sanders v. New York City Human Res. Admin., 361 F.3d 749, 758 (2d Cir. 2004) ("Explaining [the burden shifting scheme of *McDonnell Douglas*] to the jury in the charge, we believe, is more likely to confuse rather than enlighten the members of the jury."); Sanghvi v. City of Claremont, 328 F.3d 532, 539–41 (9th Cir. 2003) (concluding that "it is error to charge the jury with the elements of the *McDonnell Douglas* prima

Thus, in many circuits, we are left with an "evidentiary framework" that is not supposed to play a role in the jury's deliberations.[17] As its courtroom use diminishes, it becomes increasingly problematic to justify *McDonnell Douglas* as an evidentiary standard under the Federal Rules of Civil Procedure.

As the evidentiary-standard justification for *McDonnell Douglas* erodes, it is important to examine the test's legal heritage. This Article attempts to map the accepted methods of statutory construction and to demonstrate that the *McDonnell Douglas* test is not the product of any accepted methodology or combination of methodologies. Instead, the Court elevated the factual basis for one case into a test that courts now try to apply universally, albeit with modification. The result is a test that is both underinclusive and overinclusive, requiring plaintiffs to prove facts that are unnecessary to establish discrimination and robbing defendants of some of their prerogatives under the common law to make employment decisions. The Article then continues by demonstrating why the framework is no longer justified as an evidentiary standard and argues that even if such a characterization were appropriate, *McDonnell Douglas*'s flaws outweigh any benefits it once had as such a standard.

This Article is not intended to engage in a discussion about the relative merits of the tools used by the court in interpreting statutes, but merely to demonstrate that the court does not appear to have relied on any of these tools in creating the now familiar *McDonnell Douglas* framework. This Article argues from two premises. First, the Court failed to provide any meaningful guidance regarding how the framework comports with the plain meaning of the statute, its legislative intent, or the statute's broader remedial purposes. Indeed, the framework is not so supported; nor does it appear to be supported by a common law approach to statutory construction. Second, the Article questions whether the lack of justification for such a departure warrants a determination that the standard itself is illegitimate.

Part II of the Article begins with a discussion of *McDonnell Douglas Corp. v. Green* itself, describing the somewhat narrow factual circumstances that led to the adoption of the now ubiquitous three-part burden-shifting framework. Part III discusses four theories of statutory construction—plain meaning, intentionalism, purposivism, and common law decisionmaking—and demonstrates that the test created by the courts does not

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facie case").

17. *See Sanghvi*, 328 F.3d at 541 (noting that the jury should focus on "one essential question: whether the plaintiff is a victim of intentional discrimination").

comport well with any accepted methodology. Part IV examines why characterization of the test as merely an evidentiary framework may have stymied courts from considering whether a satisfactory link existed between Title VII and the framework. The section also examines why it is no longer satisfying to characterize the test merely as an "evidentiary framework." Part V discusses the effect the Court's straying from the statutory text had on the development of employment law, arguing that the test needlessly created years of circuit splits and debate over intricacies of the test itself. The Article concludes by arguing that the *McDonnell Douglas* test should be abolished and replaced with a standard that tracks the statutory language in Title VII and by discussing the benefits and drawbacks of the suggested proof regime.

II. GETTING BACK TO WHERE WE STARTED: AN EXAMINATION OF *GREEN V. MCDONNELL DOUGLAS*

A. The Case of Percy Green

1. Proceedings Before the District Court. The facts of *McDonnell Douglas v. Green* are rather straightforward. Plaintiff Percy Green had been employed by McDonnell Douglas since 1956.[18] He was rated average as a mechanic, and his employment record demonstrated that his work was viewed as satisfactory.[19] In 1963, plaintiff applied to work in the Electronic Equipment Division, as a nonunion laboratory technician.[20] The supervisors in the Electronic Equipment Division informed Mr. Green that if he transferred into the department, there was a possibility of a layoff, due to the short term of the project upon which they were working.[21] Mr. Green accepted a position in the Electronic Equipment Division.[22]

In the spring of 1964, employees in the Electronic Equipment Division were laid off; however, Mr. Green was not one of these employees.[23] It became clear that more employees in the department would be laid off.[24] The company used a

18. Green v. McDonnell-Douglas Corp., 318 F. Supp. 846, 847 (E.D. Mo. 1970), *aff'd in part, rev'd in part*, 463 F.2d 337 (8th Cir. 1972), *vacated*, 411 U.S. 792 (1973).

19. *Id.*

20. *Id.*

21. *Id.* at 847–48.

22. *Id.* at 848.

23. *Id.*

24. *Id.*

semiannual ranking of employees to determine which employees would be laid off.[25] The company tried to place employees on the layoff list in other jobs within the company, and gave a voluntary test "to help determine the qualifications of the men for higher job classifications which were open."[26] Plaintiff chose not to take the test.[27]

It was undisputed that plaintiff had been involved in civil rights related protest activities since the early 1960s.[28] During meetings related to the layoff, Mr. Green told company officials that he believed he was being laid off because of his participation in these activities.[29] The company officials told Mr. Green this was not the case.[30] On August 28, 1964, Mr. Green and eight other technicians were laid off.[31]

After his layoff, Mr. Green engaged in numerous protests against McDonnell Douglas, including writing letters, filing charges and picketing.[32] In October of 1964, Mr. Green, along with other members of the Congress on Racial Equality, stopped their cars on the main roads to McDonnell Douglas's plant during the time of a shift change.[33] Mr. Green led a second demonstration that caused McDonnell Douglas's employees to be locked in the building at the end of their work day.[34]

On July 26, 1965, Mr. Green applied for a position at McDonnell Douglas.[35] Even though he was qualified, he was not offered the job.[36] The defendant rejected the plaintiff due to his involvement in the demonstrations, which the company considered to be illegal actions.[37]

Mr. Green brought two claims against McDonnell Douglas.[38] First, he claimed that his original 1964 layoff violated 42 U.S.C. § 1981 because he was fired due to his race and participation in civil rights activities.[39] Second, Mr. Green claimed that the

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25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 849.
36. *Id.*
37. *Id.* at 850–51.
38. *Id.*
39. *Id.*

company violated 42 U.S.C. § 1981 and 42 U.S.C. § 2000e-3(a) by refusing to rehire him based on his race, his participation in civil rights activities, and his opposition of practices that were deemed unlawful under the Civil Rights Act of 1964.[40]

Prior to the trial on the merits, the trial court dismissed plaintiff's Title VII claim that the company refused to rehire him based on his race.[41] The trial court held that because the Equal Employment Opportunity Commission (EEOC) had not issued a reasonable cause finding on plaintiff's refusal to rehire claim based on race, the court did not have jurisdiction to consider this claim.[42] However, plaintiff's section 1981 claim that he was not rehired based on his race still remained for resolution by the trial court.[43]

The trial court dismissed the layoff claim as untimely, leaving the refusal to rehire claims for trial by the court.[44] In ruling on the discrimination and retaliation claims, the trial court articulated that "the controlling and ultimate fact questions are: (1) whether the plaintiff's misconduct is sufficient to justify defendant's refusal to rehire, and (2) whether the 'stall in' and the 'lock in' are the real reasons for defendant's refusal to rehire the plaintiff."[45] The trial court held that the refusal to rehire (brought under section 1981) was not based on racial prejudice.[46] Further, the trial court found that plaintiff's participation in the stall-in and lock-in constituted illegal activities, and that the company could legitimately base its decision not to rehire plaintiff on his participation in this illegal conduct.[47]

2. *Proceedings Before the Eighth Circuit Court of Appeals.* Mr. Green raised several issues on appeal.[48] Among other things, Mr. Green argued that the trial court erred in dismissing his layoff claim by concluding that his involvement in the lock-in and stall-in was not protected by 42 U.S.C. § 2000e-3(a), and by

40. *Id.*

41. Green v. McDonnell-Douglas Corp., 299 F. Supp. 1100, 1102 (E.D. Mo. 1969), *aff'd in part, rev'd in part*, 463 F.2d 337 (8th Cir. 1972), *vacated*, 411 U.S. 792 (1973).

42. *Id.*

43. *See id.* (dismissing the Title VII claim); *see also Green*, 318 F. Supp. at 851 (holding that plaintiff's § 1981 claim was barred by the statute of limitations).

44. *Green*, 318 F. Supp. at 849.

45. *Id.* at 850.

46. *Id.*

47. *Id.* at 851.

48. Green v. McDonnell Douglas Corp., 463 F.2d 337, 338 (8th Cir. 1972), *vacated*, 411 U.S. 792 (1973).

"striking the allegations of the complaint which charged McDonnell with denying him employment for reasons of race."[49]

Even though the Eighth Circuit's opinion was the result of a three-judge panel, it produced a majority opinion, a concurring opinion, and a dissenting opinion.[50] After briefs were submitted for rehearing en banc, the majority submitted an altered version of section V of the opinion, which drew a supplemental dissent.[51] The three-judge panel of the Eighth Circuit unanimously determined that the layoff claim was barred by a five-year statute of limitations.[52] In a portion of the decision joined by two judges, the Eighth Circuit panel concluded that the evidence before the trial court did not support a claim that plaintiff actively participated in a lock-in;[53] therefore, the appeals court considered only whether the plaintiff's involvement in the stall-in was a nondiscriminatory and nonretaliatory basis for his discharge.[54] The panel also unanimously agreed that the retaliation provisions of Title VII did not protect individuals who engaged in illegal activity as a form of protest and that the stall-in fit within this category.[55]

The Eighth Circuit found that the district court erred in striking plaintiff's Title VII claim for refusal to rehire based on race because the plaintiff was not required to have a reasonable cause finding from the EEOC to proceed on such a claim.[56]

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49. *Id.* at 340.

50. *Id.* at 337. This fact was not lost on the Supreme Court. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) ("The two opinions of the Court of Appeals and the several opinions of the three judges of that court attempted, with a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case.").

51. *Green*, 463 F.2d at 353 (Johnsen, J., dissenting).

52. *Id.* at 340–41 (majority opinion).

53. *Id.* at 341. The question asked by the Court of Appeals regarding the lock-in is actually the wrong question. The Court of Appeals should have asked whether McDonnell Douglas reasonably believed that the plaintiff participated in the lock-in. *See* Singh v. Shoney's, Inc., 64 F.3d 217, 219 (5th Cir. 1995) (finding that a plaintiff who claimed that coworkers fabricated allegations leading to her discharge must demonstrate that her employer did not reasonably believe those allegations when it terminated her); *cf.* Hughes v. Brown, 20 F.3d 745, 747 (7th Cir. 1994) (finding that employer's mistaken belief that plaintiff was less qualified for the position is a legitimate, nondiscriminatory reason for its actions). The key issue in both disparate treatment and retaliation cases is the motive of the decisionmaker. *See, e.g.*, Williams v. Frank, 757 F. Supp. 112, 116 (D. Mass. 1991), *aff'd*, 959 F.2d 230 (1st Cir. 1992). Thus, even if Mr. Green had not participated in the lock-in or had only tangentially participated, a finding on behalf of the company still could have been appropriate, if the company reasonably believed that Mr. Green had engaged in such activity.

54. *Green*, 463 F.2d at 341.

55. *Id.*

56. *Id.* at 342.

Because the dismissal of this claim may have hindered plaintiff's presentation of evidence, the appeals court determined that the plaintiff should have an additional opportunity to make his claim that the dismissal was based on race and violated Title VII.[57]

It would have been proper for the Eighth Circuit to end its analysis there. However, in section V of the majority opinion, the panel began to create the outlines of what would later become the *McDonnell Douglas* test.[58] The panel indicated that "[o]ur prior decisions make clear that, in cases presenting questions of discriminatory hiring practices, employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination."[59] The Court did not cite any statutory principle for this proposition, but rather cited two cases: *Moore v. Board of Education*[60] and *Carter v. Gallagher*.[61] The panel continued by quoting a disparate impact case, *Griggs v. Duke Power Co.*,[62] stating, "'If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.'"[63]

The panel went on to say that a plaintiff presents a prima facie case of discrimination when he "demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job."[64] Once the prima facie case is proven, "the burden passes to the employer to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job."[65] The court further indicated that McDonnell Douglas would essentially be required to prove "that Green's participation in the 'stall-in' would impede his ability to perform the job for which he applied."[66] The court provided no statutory or case support for these propositions.[67]

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57. *Id.* at 343.
58. *Id.* at 343–44.
59. *Id.* at 343.
60. Moore v. Bd. of Educ., 448 F.2d 709 (8th Cir. 1971).
61. Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971).
62. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
63. *Green*, 463 F.2d at 343 (quoting *Griggs*, 401 U.S. at 431).
64. *Id.* at 344.
65. *Id.*
66. *Id.*
67. Although the discussion in the original section V provides insight into the court's rationale, it appears that the test articulated in that original section was superseded by the test articulated in the substituted section V. *See id.* at 353 (Johnsen, J. dissenting). However, it should be noted that the panel adopted portions of its earlier test in the modified section. *See id.* at 353–54 (clarifying differences between the original section V opinion and the modified opinion and noting that the district court is likely to be confused by the modifications).

In the amended section V of the opinion, the court clarified that "[w]hen a black man demonstrates that he possesses the qualifications to fill a job opening and that he has been denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination."[68] The panel instructed that on remand, "Green should be given the opportunity to show that these reasons offered by the company were pretextual, or otherwise show the presence of racially discriminatory hiring practices by McDonnell which affected its decision."[69] Again, the appeals court gave no statutory (or other) support for such a test.

3. *Proceedings Before the Supreme Court.* The Supreme Court characterized the *McDonnell Douglas* case as addressing "the proper order and nature of proof" required to prove discrimination under Title VII.[70] After reiterating the factual context of the case, the Supreme Court laid out the now familiar burden-shifting framework.[71] The Court held:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (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. . . .
>
> The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.[72]

The plaintiff then has the opportunity to demonstrate that the defendant's reason for the rejection was simply pretext.[73] The court noted that "[t]he facts [required to establish a prima facie case] necessarily will vary," depending on the factual scenario.[74]

The three-part burden-shifting framework was a significant change from the tests that other lower courts previously had used in disparate treatment discrimination cases. Prior to *McDonnell Douglas*, other courts had applied a less regimented standard, requiring that a plaintiff prove by a preponderance of

68. *Id.* at 353.
69. *Id.* at 353 (footnote omitted).
70. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973).
71. *See id.* at 801–03.
72. *Id.* at 802 (footnote omitted).
73. *Id.* at 804.
74. *Id.* at 802 n.13.

the evidence that the employer was guilty of a discriminatory act and noting that this determination was one that should be made on a case-by-case basis.[75] As one court indicated:

> The burden of persuasion is on the plaintiff and the court is concerned about the difficulty often inherent therein. Normally, it can be aided by an overall statistical showing but in a limited case such as this it is dependent upon inferences of motive, intent and state of mind often from very slight circumstances. For claimant and counsel, this is not an easy task. In such instances, all a court can do is evaluate these intangibles through the witnesses and weigh the overall situation and performance of the employer.[76]

Under the test enunciated by some circuits prior to *McDonnell Douglas*, once the plaintiff met this burden, the employer could prevail by proving, as an affirmative defense, that "he failed to hire a person for reasons which would exonerate him."[77] The Court did not discuss this prior case law in its *McDonnell Douglas* decision and did not explain why it was lowering the employer's burden from an affirmative defense to a mere burden of production.[78]

Not only did the Court fail to place its newly created test within the context of the then developing body of disparate treatment case law, it also failed to justify the standard with an adequate statutory basis.[79] Surprisingly, in crafting the *McDonnell Douglas* test, the Court referenced the operative language of Title VII, but did not connect this language with the test it was creating.[80] The Court never stated that it had

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75. *See* Reid v. Memphis Publ'g Co., 468 F.2d 346, 348 (6th Cir. 1972) (holding that plaintiff had the burden of proving that refusal to hire was based on protected trait); Anderson v. Methodist Evangelical Hosp., Inc., No. 6580, 1971 WL 150, at *5 (W.D. Ky. June 23, 1971) ("Questions of whether employer was guilty of discriminatory practice is basically one of fact for determination on case by case basis."), *aff'd*, 464 F.2d 723 (6th Cir. 1972).

76. Culpepper v. Reynolds Metals Co., 442 F.2d 1078, 1080 (5th Cir. 1971).

77. Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 822 (5th Cir. 1972).

78. *McDonnell Douglas Corp.*, 411 U.S. at 802–03. A discussion of the perceived inadequacies of the tests existing prior to *McDonnell Douglas* would have been helpful in understanding the rationale behind the highly regimented and complex structure created by the Court.

79. Unfortunately, this frustration may just be a common problem in statutory construction. *Cf.* S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims are Different*, 33 CONN. L. REV. 603, 663–64 (2001) (expressing frustration with courts' refusal to fully explain statutory construction issues under ADA and expressing belief that courts often borrow from Title VII in considering ADA claims without first looking at plain language and legislative history).

80. *See McDonnell Douglas Corp.*, 411 U.S. at 800–04 ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities . . . .").

consulted the legislative history of the statute in creating the test.[81] And, although the Court discussed the broader purposes of Title VII in the *McDonnell Douglas* decision, it did not specifically discuss how these purposes were supported by the test articulated by the Court.[82]

Nor did the opinion provide an extra-statutory basis for its opinion, such as a need to provide concrete guidance to lower courts or to operationalize an ambiguous statute.[83] Unfortunately, given the subsequent importance of the *McDonnell Douglas* standard, the opinion articulating the standard does not provide an adequate historical, statutory, or philosophical basis for its holding.[84] Nor does it adequately explain how practitioners or judges should use the newly minted test.[85]

B. Later Justification for and Expansion of McDonnell Douglas

Although it did not undertake to do so in the *McDonnell Douglas* opinion itself, the Court later tried to justify the origin of *McDonnell Douglas* and provide the decision with a sounder legal heritage.[86] In subsequent opinions, the Supreme Court indicated that the *McDonnell Douglas* framework was rendered "according to traditional practice" that provides the Court with the ability to "establish certain modes and orders of proof."[87] The Court also later described the *McDonnell Douglas* standard as "a procedural device,"[88] as "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination,"[89] and as simply a means of "arranging the presentation of evidence."[90] Notably, the court has expressed a belief that *McDonnell Douglas* serves "to assure that

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81. *Id.*

82. *Id.* (noting that Congress acted "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens").

83. *Id.*

84. *Id.*

85. *Id.*

86. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 514 (1993); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

87. *St. Mary's*, 509 U.S. at 514.

88. *Id.* at 521.

89. *Furnco*, 438 U.S. at 577.

90. *Watson*, 487 U.S. at 986; *see also* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002) (clarifying that the "*McDonnell Douglas* [prima facie case] is an evidentiary standard, not a pleading requirement").

the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'"[91]

The *McDonnell Douglas* framework is now the most widely used method for establishing circumstantial evidence of discrimination in Title VII cases.[92] Indeed, many circuits recite that there are two methods by which plaintiffs may proceed on disparate treatment claims—either through direct evidence or the *McDonnell Douglas* framework.[93] And, even though the Court has taken great care to explain that the factors of the test are flexible and should change with the circumstances of each case,[94] plaintiffs advocating that modifications to the test should be made in a particular instance often face a skeptical and unyielding court.[95]

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91. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (alteration in original) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)).

92. *See* Michael Evan Gold, *Towards a Unified Theory of the Law of Employment Discrimination*, 22 BERKELEY J. EMP. & LAB. L. 175, 184 (2001) (identifying the *McDonnell Douglas* formula as "the most commonly used" of several methods of proving discrimination via indirect evidence).

93. *See* Gamboa v. Am. Airlines, 170 F. App'x 610, 612 (11th Cir. 2006) (noting that the *McDonnell Douglas* burden-shifting framework is used to review claims based on circumstantial evidence, but not claims based on direct evidence); Jones v. United Space Alliance, L.L.C., 170 F. App'x 52, 56 (11th Cir. 2006) ("Absent direct evidence of an employer's discriminatory motive, a plaintiff may establish his case through circumstantial evidence, using the burden-shifting framework established by the Supreme Court in *McDonnell Douglas* . . . ."); Hill v. Forum Health, 167 F. App'x 448, 451–52 (6th Cir. 2006) (observing that because the plaintiff presented no direct evidence, the lower court used the *McDonnell Douglas* framework to evaluate circumstantial evidence). *But see* Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 768 n.3 (11th Cir. 2005) ("We emphasize that the *McDonnell Douglas* . . . framework remains only one method by which the plaintiff can prove discrimination by circumstantial evidence."); EEOC v. Clay Printing Co., 955 F.2d 936, 940 (4th Cir. 1992) (explaining that, as an alternative to *McDonnell Douglas*, "[t]he plaintiff may meet this burden under the ordinary standards of proof by direct or indirect evidence relevant to and sufficiently probative of the issue"); Gold, *supra* note 92, at 196–97 (arguing that statistical evidence and evidence of disparate treatment can also be used to prove discrimination through circumstantial evidence, outside the *McDonnell Douglas* standard).

94. *Swierkiewicz*, 534 U.S. at 512 ("[T]he precise requirements of a prima facie case can vary depending on the context and were 'never intended to be rigid, mechanized, or ritualistic.'" (quoting *Furnco*, 438 U.S. at 577)).

95. *See, e.g.*, O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996) (reversing the lower court's refusal to modify the elements of a *McDonnell Douglas* prima facie case in an Age Discrimination in Employment Act (ADEA) case); Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 356–57 (3d Cir. 1999) (explaining that a plaintiff is not required to prove he was replaced by someone outside the protected class as part of a prima facie case, but noting that in many prior cases it appeared this was an element). As Deborah Malamud notes, lower courts may have difficulty making such determinations because "[t]he [Supreme] Court has created rule-like formulations, with the hope that the lower courts will bend them correctly, without any principled guidance." Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2313 (1995).

The reach of *McDonnell Douglas* also has been expanded from a Title VII tool to a test that is now used when analyzing claims under the Americans with Disabilities Act (ADA),[96] the Age Discrimination in Employment Act (ADEA),[97] and discrimination cases brought pursuant to 42 U.S.C. § 1983.[98] Additionally, the *McDonnell Douglas* standard has been used to determine whether discrimination is established under various state antidiscrimination statutes.[99] Given the significance of the *McDonnell Douglas* framework, it is important that we understand whether it is supported by Title VII.

C. *Why a Statutory Examination Matters*

An examination of the statutory underpinnings of *McDonnell Douglas* is especially important now, when the test is coming under criticism for numerous deficiencies.[100] One of the prominent criticisms of the *McDonnell Douglas* test is that it distracts the court from considering whether discrimination took place, and instead focuses on a rather mechanized and procedural framework.[101] Although the specific ways in which this

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96. Raytheon Co. v. Hernandez, 540 U.S. 44, 49–51 (2003) (noting that the lower court correctly attempted to apply the *McDonnell Douglas* standard to the ADA claim but erred in its application).

97. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) (assuming that the *McDonnell Douglas* framework is appropriate in an ADEA context, but noting that the Court has never squarely addressed the issue).

98. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 n.1 (1993) (considering the *McDonnell Douglas* framework "fully applicable to racial-discrimination-in-employment claims under 42 U.S.C. § 1983").

99. Gamboa v. Am. Airlines, 170 F. App'x 610, 612 (11th Cir. 2006) (applying the *McDonnell Douglas* standard to claims asserted under a Florida antidiscrimination statute); Perry v. Woodward, 199 F.3d 1126, 1141 (10th Cir. 1999) (New Mexico statute); Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 95 (2d Cir. 1999) (New York statute); Carpenter v. Fed. Nat'l Mortgage Ass'n, 165 F.3d 69, 72 (D.C. Cir. 1999) (District of Columbia statute); Mullin v. Raytheon Co., 164 F.3d 696, 699 (1st Cir. 1999) (Massachusetts statute); Lee v. Minn. Dep't of Commerce, 157 F.3d 1130, 1133 (8th Cir. 1998) (Minnesota statute); Nichols v. Lewis Grocer, 138 F.3d 563, 565–66 (5th Cir. 1998) (Louisiana statute); Olson v. Gen. Elec. Astrospace, 101 F.3d 947, 956 (3d Cir. 1996) (New Jersey statute); Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 802 n.8 (6th Cir. 1994) (Kentucky statute); Flentje v. First Nat'l Bank of Wynne, 11 S.W.3d 531, 536–38 (Ark. 2000) (Arkansas statute).

100. *See, e.g.*, Henry L. Chambers, Jr., *Recapturing Summary Adjudication Principles in Disparate Treatment Cases*, 58 SMU L. REV. 103, 124 (2005) ("[T]he Court appears to allow trial judges to require far more evidence than should be sufficient to avoid summary judgment."); Marcia L. McCormick, *The Allure and Danger of Practicing Law as Taxonomy*, 58 ARK. L. REV. 159, 183 (2005) ("[T]he *McDonnell Douglas* test has obscured the failure of courts to apply a stricter definition of discrimination than exists or than is required by our antidiscrimination laws.").

101. Corbett, *supra* note 9, at 1576–77 ("Stripped of procedural significance and having no place in the organization and presentation of evidence at trial, what is left for

diversion happens are detailed in Part III, *infra*, this criticism is best demonstrated by a concrete example.

Consider the facts of *Jowers v. Lakeside Family and Children's Services*.[102] Lynn Jowers, the plaintiff in the case, worked as a counselor for abused and underprivileged youth.[103] Six years after the plaintiff was hired, his employer implemented a fingerprinting policy that applied to all staff.[104] As a result of the fingerprint analysis, the employer discovered that plaintiff pled guilty to criminal sale of a controlled substance six months prior to his hiring.[105] Plaintiff admitted to pleading guilty, but denied that he committed the conduct underlying the charges.[106] On his employment application plaintiff had indicated that he had not been convicted of a felony in the past seven years.[107] Plaintiff was terminated from his position.[108] The employer stated that it terminated the employee because of the misrepresentations on his employment application.[109]

Plaintiff asserted that he was not terminated because he withheld information, but rather based on his race and color.[110] The judge indicated that, through his own deposition testimony, the "[p]laintiff ha[d] produced personal anecdotes of racially charged, verbal exchanges with one of his co-workers, and his supervisor . . . ."[111]

In considering the plaintiff's wrongful termination claim, the court cited the *McDonnell Douglas* prima facie case.[112] The court granted summary judgment on behalf of the employer on plaintiff's wrongful termination claim based on plaintiff's failure to establish a prima facie case of discrimination.[113] The court's analysis in support of summary judgment presents an especially

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McDonnell Douglas? It is a mere shadow of its former self, and one that will confuse and distract us and generally work mischief if it is permitted to linger.").

102. Jowers v. Lakeside Family & Children's Servs., No. 03 Civ. 8730 (LMS), 2005 WL 3134019 (S.D.N.Y. Nov. 22, 2005).

103. *Id.* at *1.

104. *Id.*

105. *Id.*

106. *Id.* at *2.

107. *Id.*

108. *Id.*

109. *Id.* at *2 n.3.

110. *Id.* at *2. In addition, plaintiff asserted that he was terminated on the basis of his gender. *Id.* Plaintiff also asserted claims of retaliation and workplace harassment. *Id.* at *3.

111. *Id.* at *7.

112. *Id.* at *6.

113. *Id.* at *6–8.

compelling case of how the *McDonnell Douglas* framework easily diverts courts from the question of discrimination.[114]

The first reason the court provided for the propriety of summary judgment was that the plaintiff had not satisfactorily performed the duties of his position.[115] The employer had not asserted that the plaintiff's termination was related to his job performance in any way or that plaintiff's background made him unqualified for the job in question.[116] Yet, the court spends more than a page of a rather short opinion discussing plaintiff's performance evaluations.[117] Then, even though the court admitted that there were "differing versions regarding the Plaintiff's quality of work," the court found that plaintiff had not established this prong of the *McDonnell Douglas* test.[118]

The court then articulated the fourth prong of the test as requiring plaintiff to show "the adverse employment action gave rise to an inference of discrimination."[119] Even though the plaintiff presented deposition testimony of racially charged conversations with his supervisor and described several incidents where his supervisor and a co-worker used racial epithets, the court found that plaintiff could not prevail on the fourth prong of the *McDonnell Douglas* test because he failed to produce "other supporting evidence of such racial tension" or witnesses to support his deposition testimony.[120]

The court then assumed, for the sake of argument, that the plaintiff could prevail on his prima facie case.[121] Accepting the plaintiff's admitted guilty plea to the felony conviction as a legitimate, nondiscriminatory reason for his termination, the court then found that the plaintiff failed to meet his final burden under the *McDonnell Douglas* test—to rebut the employer's reason and to produce evidence suggesting that a protected trait was the motivation for the termination.[122] In reaching this conclusion, the court again discounted plaintiff's deposition testimony regarding racially charged conversations in the workplace.[123]

114. *Id.*
115. *Id.* at *7.
116. *Id.* at *2 n.3.
117. *See id.* at *6–7.
118. *Id.* at *7.
119. *Id.* at *6.
120. *Id.* at *7, *10.
121. *Id.* at *7.
122. *Id.* at *8.
123. *Id.*

Without making any conclusions about the proper resolution of this case or about whether the court properly followed the federal summary judgment standard, this case highlights many of the ways in which *McDonnell Douglas* leads courts away from the real issues presented for resolution. The issue in this case was whether plaintiff's evidence of racially charged conversations with his supervisor could cause a reasonable jury to believe that he was terminated based on his race, in light of plaintiff's admitted misrepresentations on his application and his guilty plea.[124]

The opinion never directly engages this question. Instead, it spends a great deal of time focusing on the red herring of job qualifications.[125] The opinion confuses the various burdens required under the framework (as well as the federal summary judgment standard) and weighs the evidence presented by both parties when considering the prima facie case. The court then treats this as a simple pretext case, without considering the possibility that a single-motive, pretext analysis may not be appropriate because both parties admitted that the plaintiff had presented false information to the employer.[126] The court then discounts the plaintiff's deposition testimony of racially charged conversations, finding that it failed to rebut the employer's legitimate, nondiscriminatory reason for the termination.[127] The opinion also fails to discuss these racially charged conversations in determining whether the plaintiff actually had direct evidence of discrimination, which would remove his claims from the proper purview of the *McDonnell Douglas* test. Each of these failings points to significant problems with the *McDonnell Douglas* inquiry.[128]

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124. *Id.* at *2.

125. *Id.* at *6–8.

126. *Id.* at *8.

127. *Id.* at *7.

128. A potential criticism of using a handful of cases to provide concrete examples of the problems with the *McDonnell Douglas* test is that the chosen examples may represent outlying cases where a particular judge misapplied a standard or perhaps manipulated the standard to reach a desired result. However, the judiciary itself has confirmed its belief that the *McDonnell Douglas* test leads courts awry in making decisions about discrimination cases. *See, e.g.*, Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1221 (10th Cir. 2003) (Hartz, J., writing separately) ("The *McDonnell Douglas* framework only creates confusion and distracts courts from 'the ultimate question of discrimination *vel non*.'" (quoting U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983))). "Rather than concentrating on what should be the focus of attention—whether the evidence supports a finding of unlawful discrimination—courts focus on the isolated components of the *McDonnell Douglas* framework, losing sight of the ultimate issue." *Id.* at 1224; *see also* Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 660 (6th Cir. 2000) ("While the discrete stages are meant to facilitate litigants and courts in reaching and

Another significant weakness of the test is its feigned malleability. Many courts recite that the *McDonnell Douglas* test is flexible, and its factors may change according to the facts of the case before the court.[129] Despite this recognition, courts often refuse to adapt the factors of the test, even when doing so provides a better mechanism for ferreting out whether discrimination occurred.[130]

For example, in *O'Connor v. Consolidated Coin Caterers Corp.*,[131] the plaintiff, who was 56 years old, alleged that he was terminated because of his age.[132] The plaintiff was replaced by a person who was 40 years old.[133] When thinking about discrimination in common sense terms, it seems feasible that a company could be committing age discrimination when it terminates an employee and hires another individual 16 years his junior. However, both the district court and the court of appeals in the *Consolidated Coin* case held the plaintiff to a somewhat rigid prima facie case, with the district court dismissing the case at summary judgment and the appeals court affirming that dismissal.[134] Both of the lower courts held that the plaintiff could not prove discrimination because he could not establish a factor of the *McDonnell Douglas* test—that he was replaced by someone outside of his protected class.[135]

Although the Supreme Court later relieved plaintiffs of the burden of proving that a replacement employee was outside of the ADEA's protected class, the plaintiff in this case was required to undertake three years of additional litigation after the denial of summary judgment to obtain this result.[136] For

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resolving that ultimate question of discrimination, when misapplied, they tend to distract courts from the central issue.").

129. *See, e.g.*, *supra* note 94 and accompanying text (exemplifying the Court's characterization of the *McDonnell Douglas* framework as flexible).

130. *See supra* note 95 and accompanying text (discussing how plaintiffs who attempt to convince courts that modifications to the *McDonnell Douglas* standard are necessary are often met with skepticism).

131. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996).

132. *Id.* at 309.

133. *Id.* at 310.

134. *Id.* at 309–10.

135. O'Connor v. Consol. Coin Caterers Corp., 56 F.3d 542, 546–48 (4th Cir. 1995), *rev'd*, 517 U.S. 308 (1996); O'Connor v. Consol. Coin Caterers Corp., 829 F. Supp. 155, 157–58 (W.D.N.C. 1993), *aff'd*, 56 F.3d 542 (4th Cir. 1995), *rev'd*, 517 U.S. 308 (1996).

136. The district court originally granted summary judgment in the employer's favor in 1993. *O'Connor*, 829 F. Supp. at 159–60. Ironically, on remand from the Supreme Court, the Fourth Circuit Court of Appeals found that summary judgment in the employer's favor was appropriate because the plaintiff could not establish the third factor of the *McDonnell Douglas* test—that his job performance was satisfactory. O'Connor v. Consol. Coin Caterers Corp., 84 F.3d 718, 719–20 (4th Cir. 1996). Initially, the Fourth

plaintiffs whose attorneys are working on a contingency fee, it is cold comfort that original errors in applying the *McDonnell Douglas* framework may eventually be corrected at the appellate level.

III. EXPLORING WHETHER *MCDONNELL DOUGLAS* IS SUPPORTED BY COMMON METHODS OF STATUTORY CONSTRUCTION

As discussed throughout this Article, it is not clear whether the *McDonnell Douglas* standard actually operates as the prima facie case for discrimination or only as an evidentiary framework.[137] If the test spells out the elements of a cause of action for discrimination,[138] we should be satisfied either that the test has a satisfactory statutory basis or that there is a principled reason for such a departure.[139] Parts III.A and III.B explore whether the test is supported by the text, legislative history or underlying purposes of Title VII, and conclude that it is not. Part III.C explores whether a common law methodology explains the burden-shifting framework and likewise concludes that such a justification is lacking. If, on the other hand, the standard is merely evidentiary, Part III.D concludes that the test still lacks a sufficient tie to the statute to justify its continued use.

Circuit affirmed summary judgment despite the fact that the employer's evidence regarding the plaintiff's performance was disputed. *See O'Connor*, 56 F.3d at 547.

137. There is no question that the Supreme Court has claimed that the test is merely an evidentiary framework. *See, e.g.*, Swierkiewicz v. Sorema N. A., 534 U.S. 506, 510 (2002) ("The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement."); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) ("We have cautioned that [the *McDonnell Douglas* framework is] meant only to aid courts and litigants in arranging the presentation of evidence . . . ."). However, as discussed in Part IV of this Article, recent changes in the way in which courts apply the test makes this assertion less convincing. *See infra* Part IV.

138. For a description of the differences between the standard as a prima facie case and as an evidentiary tool, see Gold, *supra* note 92, at 188–89, which posits that the term "prima facie case" can refer to both "the elements of a claim" and "the evidence that proves a claim."

139. One area in which a departure from a statutory basis is generally accepted is antitrust. *See generally* Daniel A. Farber & Brett H. McDonnell, *"Is There a Text in this Class?" The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 621–24 (2005) (discussing how the typical textualist "zeal" is lacking in antitrust statutory construction). However, construction of Title VII disparate treatment claims should differ markedly from construction of the Sherman Act because the potential breadth and ambiguity of the latter statute's operative language renders literal application of the statutory text impossible and provides little guidance on how to apply the statute to complex economic situations. *See* 15 U.S.C. § 1 (2000) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."). Additionally, some believe that "increased consensus and sophistication in the economic analysis of antitrust" has and should alter the original tenets of the field. *See* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 229 (1999).

Wading into the thicket of the varied and conflicting methods of statutory construction is, at first blush, a daunting task. However, concerns about the scope of such a task can be diminished by beginning with two basic caveats. First, this Article is not attempting to make any descriptive, evaluative, or normative claim about any particular statutory construction methodology over another. Such an analysis is unnecessary given the thesis of this Article—that *McDonnell Douglas* does not evidence proper consideration of any of these methods of statutory construction. The solution offered to correct the existing problem is consistent with all of the discussed methodologies, thus requiring no choice between them.

Second, the Article is not intending to suggest that the methodologies can be neatly pressed into the general categories used in this section. There is much debate within the academic community about where the delineations between the methods of statutory construction lie,[140] and this Article is not intended to enter that fray. Rather, the goal of this section is to describe the contours of each statutory construction method in a way that is conducive to exploring those methods in conjunction with Title VII.

With these caveats in mind, it is also important to stress that despite the conflicting beliefs about what tools courts should use in construing statutes, there are points of agreement about proper statutory interpretation. One such point of agreement is

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140. *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 78 (2006) (noting that the dividing line between textualism and purposivism is not "cut-and-dried"); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 355–56 (2005) (discussing the acknowledgement by textualists of the relevance of purpose in statutory interpretation); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 592–93 (1988) (commenting that a plain meaning analysis must take into account both the internal context of the statute as well as the external context).

Further, in a descriptive sense, it is not clear whether such delineations even exist. Popkin describes the process of statutory construction as "moving back and forth betweens words and other indicia of meaning without preconceived notions about whether the words are clear." *Id.* at 594. William Eskridge and Philip Frickey similarly describe the process as "polycentric" and not "linear and purely deductive." William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 348 (1990). Indeed they suggest that "an interpreter will look at a broad range of evidence—text, historical evidence, and the text's evolution—and thus form a preliminary view of the statute." *Id.* at 352. This view would then be refined by political and other considerations. *Id.* at 347. They also suggest that different methods should be accorded different weights in the consideration process, with the text enjoying primacy. *Id.* at 353–54. Given both time and space limitations, it would be impossible to discuss all of the possible distinctions that may be made in various statutory construction theories, and thus, it becomes necessary to make choices about how to slice the statutory construction pie. Although recognizing that others may slice this pie differently, my goal is to discuss the four major methodologies and apply them to the problem at hand.

that courts should use some method or combination of accepted methods in construing statutory language.[141] Again, there is disagreement about what the methodology should consist of, but there is general agreement that it is improper for courts to simply create elements of a statutory cause of action without reference to some recognized tool.[142]

A second point of agreement in the statutory construction literature is that the words used in a statute matter.[143] This is not to suggest that commentators and judges agree about what tools should be used to interpret statutory words, only that statutory construction involves some interaction between the court and the words in the statute.[144] With these general propositions in mind, let's begin by exploring the accepted tools that courts use in construing statutes.

A. *A Plain Meaning Analysis of the Framework*

One of the primary methods of statutory interpretation is the plain meaning approach.[145] While the term "plain meaning" exudes a sense of simplicity, such an assumption would be misplaced because the exact contours of plain meaning interpretation are

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141. *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 14–37 (Amy Gutmann ed., 1997) (criticizing various theories of statutory interpretation and expressing concern about the lack of an "intelligible theory"); Eskridge & Frickey, *supra* note 140, at 353–54 ("In formulating and testing her understanding of [a] statute, the interpreter will [examine various interpretation methods], evaluating and comparing different considerations represented by each source of argumentation."); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388–89 (2003) (discussing the long-standing role of the "absurdity doctrine" in various schemes of statutory interpretation).

142. *See, e.g.*, Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the* Harvard Law Review *and Other Great Books*, 100 HARV. L. REV. 887, 899 (1987) (contrasting the judicial role in statutory construction with that in the application of common law).

143. *See, e.g.*, Eskridge & Frickey, *supra* note 140, at 353–54 (noting that the statute's text provides the source of the "[m]ost [c]oncrete [i]nquiry" in statutory interpretation); Manning, *supra* note 141, at 2388 (stating that the Court has long looked to the statutory text, deviating only when the application would create "absurd" results); Nelson, *supra* note 140, at 348 ("[N]o 'textualist' favors isolating statutory language from its surrounding context, and no critic of textualism believes that statutory text is unimportant." (footnote omitted)); Popkin, *supra* note 140, at 591–98 (observing that courts generally assign "primary significance" to the text of statutes).

144. *See* Popkin, *supra* note 140, at 594 ("The interpretive process is almost certainly . . . one of moving back and forth between words and other indicia of meaning . . . .").

145. *See, e.g.*, Robin Kundis Craig, *The Stevens / Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 971–72 (2005) (discussing the Supreme Court's application of the plain meaning rule).

debated.[146] However, it is safe to say that under a plain meaning approach, the jurist's goal is to explicate the meaning of the statutory text, typically by reference to the statutory text itself.[147] Recognizing that clear lines of demarcation do not exist between plain meaning approaches to statutory construction and other approaches, for purposes of this Article, plain meaning will refer to methods of construction that consider only the language of the statute, without seeking guidance from the statute's purpose, legislative history, or common law considerations.[148]

This definition of plain meaning is, therefore, intended to focus on the textualist aspects of this doctrine.[149] As textualism is the

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146. *See supra* note 140 and accompanying text (noting that the differences among methods of statutory construction are ambiguous and debated).

147. *See, e.g.*, Craig, *supra* note 145, at 971–72 ("[T]he rule operates . . . as a presumption, limiting the arguments available to promote any meaning other than the statute's plain meaning."). Such a definition is admittedly restrictive, because it does not encompass a broader approach to plain meaning that would recognize that there is often a difference between sentence meaning and speaker's meaning, which, as Stanley Fish describes, is the difference "between the meaning an utterance has by virtue of the lexical items and syntactic structures that make it up, and the meaning a speaker may have intended but not achieved." Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 629 (2005). However, adopting a broader definition of plain meaning is not helpful for purposes of this Article. Such an articulation necessarily encompasses elements of intentionalism and purposivism; it is easier, however, to consider these elements separately in trying to determine whether any of these tools support the three-part burden-shifting framework.

148. *But see* Manning, *supra* note 140, at 78 ("Properly understood, textualism is not and could not be defined either by a strict preference for enacted text over unenacted context, or by a wholesale rejection of the utility of purpose."); Nelson, *supra* note 140, at 355 (noting that textualism may not be so narrowly defined and suggesting that consideration of the purpose behind a statute is countenanced by the textualist approach). Nelson further suggests that textualists may be just as concerned about the intent of the legislators as intentionalists, but believe that legislative history is more likely to provide an inaccurate picture of the collective legislature's intent. *Id.* at 362–63.

149. *See, e.g.*, T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 23 (1988) (describing the basis of textualism as "a positivist claim that only the language actually adopted by the legislature is law"); Nelson, *supra* note 140, at 347–48 (noting that textualists do not support the severance of text from its context). For the sake of full discussion, the Author notes that the textualist approach, as with other approaches to statutory construction, has its critics. *See* Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 762 (1995) (arguing that the Supreme Court's continued use of "plain meaning" has caused lower courts to improperly adopt an increasingly stringent form of the "plain meaning" rule). Some commentators believe that sole reliance on statutory language may "wrench[] a word completely out of context" and that textualism produces cramped interpretations of legislation. Popkin, *supra* note 140, at 592; *see also* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 899 (1982) ("[T]he limitations of language mean that . . . the words of a statute may not fully capture congressional meaning."). Others criticize textualism's assumption that if a statute is interpreted too narrowly that Congress will correct the problem. *Id.* at 905 (arguing that textualism "assumes that Congress will continually reinterpret all legislation and will respond effectively to new problems as they arise" and noting that it is an impossible task for

most restricted method of plain meaning construction, it serves as a good starting point for our analysis of Title VII, and the starting point for the textualist approach is the language of the statute itself.[150]

The operative antidiscrimination provision of Title VII provides as follows:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .[151]

In *McDonnell Douglas*, the Court cited this operative language, but did not make any attempt to explain how this language in any way related to the three-part test that it created.[152] From a textualist perspective, the framework simply has no support in the language of the statute.[153] Four key features of *McDonnell Douglas* deserve further discussion from a textualist perspective.

1. The Framework Does Not Provide Plaintiffs with Adequate Protection. To successfully raise a prima facie case of discrimination under *McDonnell Douglas*, a plaintiff must establish:

> (i) that he belongs to a racial minority; (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

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Congress to anticipate all issues that will be raised under a statute). Judge Posner criticizes the descriptive power of the term "textualism" and other plain meaning approaches. *See* Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 807–08 (1983) ("Offered as a description of what judges do, the proposition is false. The judge rarely starts his inquiry with the words of the statute, and often, if the truth be told, he does not look at the words at all.").

150. The major critique of textualism in the context of civil rights legislation is that Congress has routinely amended statutes solely to fix what Congress believes to be cramped readings of the statutes. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 113–14 (1991) (Stevens, J., dissenting) (providing examples of Congress repudiating the Court's narrow reading of statutes in the civil rights context).

151. 42 U.S.C. § 2000e-2(a) (2000).

152. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 796 n.4 (1973) (quoting § 2000e-2(a)).

153. It is possible that the Supreme Court engaged in an analysis of the connections between the statute and the test and failed to explicitly provide this analysis within the opinion itself. However, given the ways in which the test appears to deviate from the statute and the lack of explanation for both the deviations and the need for a test, a reasonable conclusion is that the Court at least failed to provide proper consideration of the statutory text.

remained open and the employer continued to seek applicants from persons of complainant's qualifications.[154]

Only one of these four factors is supported by the statutory language and all three other factors can, in some cases, exclude legitimate claims of discrimination that should be cognizable under Title VII.[155]

The requirement that an applicant be qualified for the job was initially quite problematic for Title VII litigants.[156] Originally, some courts required litigants to establish that they met both the subjective and the objective qualifications for a job in order to establish a prima facie case.[157] It was often difficult for plaintiffs to prove subjective criteria, like good interviewing and communication skills, especially when the evaluation of these skills was being performed by the alleged discriminator.[158]

Before the courts articulated that the plaintiff only needs to prove objective qualifications for the job, the claims of individuals were dismissed for failure to fit within the *McDonnell Douglas* mold.[159] However, despite the growing body of case law finding that plaintiff must only demonstrate that he or she met the objective qualifications for the job, defendants continue to argue about this factor.[160]

Title VII imposes no requirement that only qualified individuals can be discriminated against.[161] Indeed, individuals who have direct evidence of discrimination are not required to prove that they were qualified for a position before establishing

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154. *McDonnell Douglas Corp.*, 411 U.S. at 802.

155. In this section, the discussion of the *McDonnell Douglas* test suggests that the courts are actually using the factors of the test as elements of a cause of action under the antidiscrimination statutes. In Part IV, *infra*, the Article will discuss the test's lack of a statutory basis if the test is viewed as merely an evidentiary standard.

156. *See, e.g.*, Cuthbertson v. Biggers Bros., Inc., 702 F.2d 454, 463–64 (4th Cir. 1983) (finding that an applicant was not qualified for a sales job even though he had graduated from high school, had completed six months of college, and had worked as a truck driver for the defendant for four years).

157. *See, e.g.*, *id.* at 465 (finding that plaintiff did not established a prima facie case absent evidence "that he was more qualified than anyone who was given a sales job between 1970 and 1976").

158. *See* Baldwin v. BellSouth Adver. & Publ'g Corp., 677 F. Supp. 1573, 1581 (M.D. Ga. 1988) (noting that "some subjectivity is unavoidable in making a decision as to who will be a good [employee]").

159. *See* Canty v. Olivarez, 452 F. Supp. 762, 770 (N.D. Ga. 1978) (stating that the plaintiff did not show a pretext for sexual discrimination under the *McDonnell Douglas* standard because the application process used by the employer was cancelled).

160. Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 768–69 (11th Cir. 2005) (dismissing defendant's argument that the plaintiff employee was unqualified because "he lacked the leadership style [the defendant] preferred").

161. 42 U.S.C. § 2000e-2(a)(1) (2000).

discrimination.[162] The easiest example demonstrating a problem with the qualifications requirement is a situation where the employer has a list of objective qualifications for a position that are normally used to evaluate candidates, but does not use them in making the decision related to the plaintiff, instead relying on a discriminatory reason. In this situation, it makes no difference whether the individual was qualified for the job. The individual was discriminated against based on a protected trait because equal consideration for the position was not given.[163]

Further, in some cases, requiring a plaintiff to prove qualifications for a job is unnecessary and unrelated to the question of whether discrimination occurred. A common example of such a situation is one in which the employer terminates an individual based on economic reasons, perhaps asserting that it no longer needs as many employees performing plaintiff's task. In this type of case, the employer has implicitly demonstrated that the plaintiff was qualified for the position by retaining the individual until economic circumstances changed. Yet, in cases of circumstantial evidence, the *McDonnell Douglas* test encourages defendants to retrospectively challenge plaintiff's qualifications solely for the purposes of litigation.[164]

To provide a more defendant-friendly hypothetical, consider a common scenario where an employer receives hundreds of applications for one available position. Many of the applicants possess the requisite minimum qualifications; however, the employer chooses a person who has more than the minimum qualifications.[165] While the plaintiff's qualifications, in contrast

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162. *See* Fadhl v. City & County of S.F., 741 F.2d 1163, 1165–66 (9th Cir. 1984), *overruled by* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

163. In these situations, courts may not require plaintiffs to prove qualifications for the job. *Id.* (expounding that plaintiffs subject to discrimination during hiring "need not prove that he or she was qualified to fill the position sought in order to obtain some relief"). Even though reformulating the *McDonnell Douglas* test is less problematic than denying the plaintiff's claim based on failure to prove a prima facie case, it still requires the plaintiff to come forward with additional evidence and convince the court that the change in the framework is warranted. Such evidence may be difficult to establish, especially if the employer placed a person in the position who met the objective qualifications of the job or if the plaintiff's evidence of discriminatory animus on the part of the decisionmaker is not related to the decision at issue. It should be noted that this argument also may not be successful. *See, e.g.*, Stevo v. CSZ Transp., Inc., No. 97-3974, 1998 WL 516788, at *4 (7th Cir. July 27, 1998) (unpublished table decision) (finding that even if qualifications had been considered, applicant would not have been hired).

164. *See, e.g.*, Jauregui v. City of Glendale, 852 F.2d 1128, 1135 (9th Cir. 1988) (rejecting the City's arguments that it dismissed the plaintiff due to a lack of interpersonal skills and that it did not mention this shortcoming in the plaintiff's performance evaluation because it would lower his self esteem).

165. *See* Kingsley R. Browne, *Statistical Proof of Discrimination: Beyond "Damned Lies,"* 68 WASH. L. REV. 477, 513 n.121 (1993) (noting that minimally-qualified minorities

with the hired individual's qualifications, will likely be relevant to the case, the fact that the plaintiff met the minimal qualifications does not suggest that discrimination has occurred. In cases like those discussed in this section, *McDonnell Douglas* requires the plaintiff to prove too much or too little and distracts the courts and litigants from the actual question at hand.[166]

Similar problems have arisen under the prong of the test that requires a plaintiff to prove that, after he was rejected for a job, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[167] This prong was fashioned from the specific facts of the *McDonnell Douglas* case and has undergone extensive revision through litigation over the past 30 years.[168] This factor proved especially problematic in the reduction-in-force context, where it is possible for someone to be selected for termination based on a protected trait, yet not be replaced by other workers.[169]

Some courts have replaced this fourth factor with a more general requirement that the plaintiff produce evidence that the "adverse employment action gave rise to an inference of discrimination."[170] It is difficult to determine how the broadening of this fourth prong provides the court with any additional aid in

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should be required to show more than just rejection because "rejection of one qualified applicant in favor of another raises no inference of discrimination").

166. *See, e.g.*, Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1221, 1224 (10th Cir. 2003) (Hartz, J., writing separately) (recognizing that "the *McDonnell Douglas* framework only creates confusion and distracts" the courts, which focus on the individual parts of *McDonnell Douglas* when they should be focusing on the main issue—namely "whether the evidence supports a finding of unlawful discrimination").

167. *See, e.g.*, Michas v. Health Cost Controls of Ill., Inc., 209 F.3d 687, 693 (7th Cir. 2000) (noting it makes little sense to require fourth prong of the *McDonnell Douglas* test in reduction in force cases); Greene v. Safeway Stores, Inc., 98 F.3d 554, 560 (10th Cir. 1996) (explaining that the fourth factor must be applied flexibly in reduction in force cases); Verbraeken v. Westinghouse Elec. Corp., 881 F.2d 1041, 1045 (11th Cir. 1989) (explaining that in reduction in force cases the *McDonnell Douglas* test has been modified because the employer does not replace the discharged employee).

168. *See, e.g.*, Pivirotto v. Innovative Sys. Inc., 191 F.3d 344, 356 (3d Cir. 1999) (explaining how courts eventually determined that plaintiffs are not required to prove they were replaced by individuals outside the protected class as part of their prima facie case while noting that in many prior cases it appeared this was an element); Steward v. Sears, Roebuck & Co., 312 F. Supp. 2d 719, 725 (E.D. Pa. 2004) (noting that plaintiff need not prove that he was replaced by a person outside of his protected class, but rather must only show that employees outside that class received more favorable treatment).

169. *See* Christina A. Smith, Note, *The Road to Retirement—Paved with Good Intentions but Dotted with Potholes of Untold Liability: Erisa Section 510, Mixed Motives and Title VII*, 81 MINN. L. REV. 735, 757 n.129 (1997) (citing JOEL W. FRIEDMAN & GEORGE M. STRICKLER, JR., CASES AND MATERIALS ON THE LAW OF EMPLOYMENT DISCRIMINATION 927–28 (3d ed. 1993)).

170. Jowers v. Lakeside Family & Children's Servs., No. 03 Civ. 8730 (LMS), 2005 WL 3134019, at *6 (S.D.N.Y. Nov. 22, 2005).

determining whether discrimination occurred or why the court's consideration of evidence of discrimination should be divided between the prima facie case and the third stage of the test following the employer's articulation of a legitimate, nondiscriminatory reason for its actions.

One response to these criticisms is to cite the mantra that the factors of *McDonnell Douglas* are flexible and should change with the facts of the case.[171] This retort is not fair to either party in a discrimination case, especially the plaintiff.[172] Even while the Court has noted that the *McDonnell Douglas* framework is flexible, it has also indicated that it is a "'legally mandatory, rebuttable presumption,'"[173] and while it is possible for problems with the test to be overcome by asking the court to recraft the test in light of the facts of the particular case before it, courts are reluctant to veer from the preset *McDonnell Douglas* course.[174]

It also should be recognized that some litigants are only afforded this "flexibility" if they have counsel who is willing to undertake the risk and expense of litigating a claim to the Supreme Court. For example, in *O'Connor v. Consolidated Coin Caterers Corp.*, the Court addressed the question of whether a prima facie case of discrimination under the ADEA required the plaintiff to prove that he was replaced by someone outside of the protected class.[175] Before the Supreme Court's reversal, both the district court and the court of appeals held the plaintiff to a somewhat rigid prima facie case, with the district court dismissing the case at summary judgment and the appeals court affirming that dismissal.[176] Given the expense of litigating a case to the Supreme Court, many plaintiffs may choose to settle their claims, rather than undertake the time and expense of extensive appellate litigation.[177] Additionally, it should be remembered that the parties tailor their fact gathering during the discovery process to the standard that the court will use during summary

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171. *See Pivirotto*, 191 F.3d at 357.

172. *See* Sullivan, *supra* note 9, at 926–27 ("Although the *McDonnell Douglas* Court explicitly recognized that its formulation of prima facie proof would need to be modified for other situations, lower courts have often disagreed about what evidence constitutes a prima facie case in other contexts." (footnote omitted)).

173. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996) (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981)).

174. *See* sources cited *supra* notes 168, 172.

175. *O'Connor*, 517 U.S. at 311–12.

176. *Id.* at 309–10.

177. *See* Sullivan, *supra* note 9, at 941 n.120 (noting that "judges' views about the potential merits of a case are likely to shape settlement decisions at pretrial settlement conferences").

judgment and trial.[178] A standard that changes after discovery closes does not allow the parties to fully effectuate their discovery rights.

2. *At Times, the Framework Improperly Requires Defendants to Articulate a Reason for Their Conduct.* While many of the problems with the prima facie case disadvantage plaintiffs, they can also disadvantage defendants by raising an inference of discrimination, where none should exist.[179] As discussed earlier, once the plaintiff establishes a prima facie case, an inference of discrimination arises and the burden of production shifts to the defendant to show a legitimate, nondiscriminatory reason for its conduct.[180]

However, two rather simple scenarios demonstrate how *McDonnell Douglas* is at times overinclusive when trying to ferret out discrimination. First, assume that Margaret, a white woman, applied for a secretarial job with a company. She met the minimum, objective qualifications for the job, but was not hired for the position. Instead, the company hired Bob, a white man for the position. Bob's qualifications for the position were better than Margaret's. Second, consider the situation discussed in the previous section, where an employer receives one hundred applications for every position. Even though many of the applicants possess the requisite minimum qualifications, the employer chooses a person who has more than the minimum qualifications.[181]

Under these circumstances, plaintiff would have met the prima facie case for establishing discrimination under *McDonnell Douglas*; but under this set of facts, it is not clear whether an inference of discrimination should arise. However, *McDonnell Douglas* automatically assumes that such an inference is created and requires the parties to undertake the second and third steps

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178. *See id.* at 941–43 (discussing the wide use of summary judgment and the low success rates in various discrimination claims).

179. *See, e.g.*, Jauregui v. City of Glendale, 852 F.2d 1128, 1134 (9th Cir. 1988) (explaining that proof of an employer's intent to discriminate "may be inferred from circumstantial evidence" (internal quotation marks omitted)).

180. *See supra* text accompanying notes 72–74. Typically, defendants will offer a legitimate, nondiscriminatory reason for their conduct and also offer evidence to attack the plaintiff's prima facie case. *See, e.g.*, Mayfield v. Patterson Pump Co., 101 F.3d 1371, 1375 (11th Cir. 1996) (reviewing the legitimate, nondiscriminatory reasons for discharge proffered by the employer, including allegations the employee lacked overall competence).

181. *See* Browne, *supra* note 165, at 513 n.121 ("[T]he mere rejection of a minimally qualified minority should not be enough to establish a prima facie case, since rejection of one qualified applicant in favor of another raises no inference of discrimination.").

of the inquiry.[182] Although *McDonnell Douglas* attempts to rid the courts of deciding cases when the most common nondiscriminatory reasons are given for employment decisions—unqualified candidate or position unavailability,[183] there are clearly nondiscriminatory and common reasons for employment decisions that do not fit clearly within the prima facie case.

Further, under the familiar common law standard, absent a contrary employment contract or state law, an employer was allowed to take an employment action against a plaintiff for a good reason, a bad reason, or no reason.[184] There is nothing within the text of Title VII that suggests that it was designed to take away the employer's ability to act for no reason; however, this is essentially what the *McDonnell Douglas* framework does.[185] If an employer does not articulate a legitimate, nondiscriminatory reason for its conduct, the inference of discrimination created by plaintiff's prima facie case is unrebutted.[186] While there may be policy reasons for requiring employers to recite the reasons for an employment action, the operative language of Title VII does not mandate such a course.[187]

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182. *Id.* at 513–14 & nn.121–22.

183. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 527 (1993) (Souter, J., dissenting) ("By [establishing a prima facie case], Hicks 'eliminat[ed] the most common nondiscriminatory reasons' for demotion and firing: that he was unqualified for the position or that the position was no longer available." (alteration in original) (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981))).

184. *See* Miller v. Auto. Club of N.M., Inc., 420 F.3d 1098, 1128 (10th Cir. 2005) (explaining that, under New Mexico common law, employment contracts are presumed to be terminable at will by either party); Layton v. MMM Design Group, 32 F. App'x 677, 679–80 (4th Cir. 2002) (noting that according to Virginia's at-will employment doctrine, an employer may terminate an employee any time for any reason).

185. *See* Pepe v. Rival Co., 85 F. Supp. 2d 349, 368 (D.N.J. 1999) ("The antidiscrimination statutes are designed to protect against discrimination, not to displace employers' discretion in making employment decisions."). *But see* Perry v. Woodward, 199 F.3d 1126, 1133 (10th Cir. 1999) ("Although the general rule that an employer can discharge an at-will employee for any reason or no reason is still valid, an employer can no longer terminate an at-will employment relationship for racially discriminatory reason.").

186. *See* Jauregui v. City of Glendale, 852 F.2d 1128, 1134 (9th Cir. 1988).

187. Admittedly, this problem with the *McDonnell Douglas* standard does not receive much attention, because it has few practical consequences in actual litigation. Whether required by the standard or not, most employers would provide a reason for their employment decision as a matter of course in defending against the plaintiff's claims. This is demonstrated by employer's conduct prior to the articulation of *McDonnell Douglas* standard. Huff v. N. D. Cass Co. of Ala., 468 F.2d 172, 174 (5th Cir. 1972) (noting that the defendant argued the plaintiff's termination was due to his poor performance); Anderson v. Methodist Evangelical Hosp., Inc., No. 6580, 1971 WL 150, at *2 (W.D. Ky. June 23, 1971) (suggesting the plaintiff was fired because she could not get along with coworkers), *aff'd*, 464 F.2d 723 (6th Cir. 1972); Forte v. S.S. Kresge Co., No. 2370, 1971 WL 209, at *1 (E.D.N.C. Mar. 26, 1971) (suggesting that the plaintiff was terminated for being discourteous to the store manager's wife), *aff'd*, 1972 WL 2592 (4th Cir. Feb. 14, 1972).

3. The Framework Creates a False Dichotomy Between Direct and Circumstantial Evidence. In addition to its substantive flaws, the *McDonnell Douglas* test also created a false dichotomy between circumstantial evidence and direct evidence that is not supported by the statute's language.[188] There is nothing within Title VII that suggests that plaintiffs alleging discrimination through the use of circumstantial evidence should be treated any differently than plaintiffs who are fortunate enough to be able to produce direct evidence of discrimination.[189] Yet, at least with respect to single motive discrimination claims, this dichotomy continues in many circuits.[190] Such a dichotomy is especially puzzling because it conflicts with the evidentiary principle that direct and circumstantial evidence should be given equal weight by a jury.[191]

4. The Framework Does Not Appear to Have Addressed an Existing Problem. One suggestion in support of the framework could be that the term "discrimination" is inherently ambiguous and that the Supreme Court needed to provide a test to ensure a workable standard for the lower courts. This argument is unconvincing for several reasons. First, the operative statutory language does not just state that it is unlawful to discriminate.[192] Instead, it prohibits employers from failing to hire, discharging, or discriminating against a person with respect to compensation or other terms or privileges of employment.[193]

While it may be difficult to interpret some portions of this operative language, such as when discrimination happens in the "privileges" of employment or whether disparate impact results in discrimination,[194] the Court was not faced with this type of

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188. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 291 (1989) (Kennedy, J., dissenting) ("Courts will . . . be required to make the often subtle and difficult distinction between 'direct' and 'indirect' or 'circumstantial' evidence.").

189. *Cf.* Griffith v. City of Des Moines, 387 F.3d 733, 744–45 (8th Cir. 2004) (stating that direct and circumstantial evidence are equally persuasive in proving discrimination and that all Title VII requires is proof that "discrimination was a motivating factor in the employment decision").

190. *See id.* at 743–45 (observing pervasive use of differing standards for direct and circumstantial evidence); *cf.* Corbett, *supra* note 9, at 1568 n.109 (questioning the viability of the *McDonnell Douglas* standard after Congress codified the "motivating factor standard" in the Civil Rights Act of 1991).

191. *See* United States v. Curry, 187 F.3d 762, 768 (7th Cir. 1999); Elliott v. Thomas, 937 F.2d 338, 345 (7th Cir. 1991) (agreeing that "there is no principled difference between direct and circumstantial evidence").

192. 42 U.S.C. § 2000e-2(a)(1) (2000) (providing specific prohibited practices rather than a general statement that discrimination is prohibited).

193. *Id.*

194. *See generally* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (recognizing

question. Mr. Green brought a failure to hire case.[195] The statutory language clearly tells us that if there is evidence that an employer failed to hire an individual because of his race, the individual can prevail under Title VII.[196]

Secondarily, it might be suggested that the lower courts were confused about what evidence would support such a claim. The district court did not appear to have any such problem. It articulated a sensible explanation of the key factual inquiries: "(1) whether the plaintiff's misconduct is sufficient to justify defendant's refusal to rehire, and (2) whether the 'stall in' and the 'lock in' are the real reasons for defendant's refusal to rehire the plaintiff."[197] Furthermore, although there are few reported disparate treatment cases pre-dating *McDonnell Douglas*, there does not appear to be confusion within these courts.[198] Neither the Supreme Court nor the Eighth Circuit expressed that it was attempting to remedy such confusion.[199]

As these problems demonstrate, the *McDonnell Douglas* standard is not supported by the operative language of Title VII, and indeed, conflicts with the statute in many important respects.[200] Therefore, it is difficult to justify the framework under a plain meaning or textualist methodology.[201]

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that disparate impact claims were cognizable under Title VII).

195. McDonnell Douglas Corp. v. Green, 411 U.S. 782, 797 (1973).

196. § 2000e-2(a)(1).

197. Green v. McDonnell-Douglas Corp., 318 F. Supp. 846, 850 (E.D. Mo. 1970), *aff'd in part, rev'd in part*, 463 F.2d 337 (8th Cir. 1972), *vacated*, 411 U.S. 792 (1973).

198. *See, e.g.*, Reid v. Memphis Publ'g Co., 468 F.2d 346, 348–49 (6th Cir. 1972) (stating that the district court correctly held that the plaintiff had not met his burden of proving discrimination); Anderson v. Methodist Evangelical Hosp., No. 6580, 1971 WL 150, at *1–3 (W.D. Ky. June 23, 1971) (finding that the female plaintiff had been discriminated against based on her race when she was terminated because her coworkers, who were motivated by racial animus, complained about her performance), *aff'd*, 464 F.2d 723 (6th Cir. 1972).

199. Green v. McDonnell Douglas Corp., 463 F.2d 337, 343–44 (8th Cir. 1972) (addressing the much broader question of whether subjective hiring practices themselves are inherently discriminatory), *vacated*, 411 U.S. 792 (1973). The Supreme Court opinion rejects the idea that such practices necessarily raise a discriminatory inference, and its opinion does not appear to be directed specifically toward such practices. *McDonnell Douglas Corp.*, 411 U.S. at 803–04.

200. *See, e.g.*, Griffith v. City of Des Moines, 387 F.3d 733, 745–46 (8th Cir. 2004) (Magnuson, J., concurring) (illustrating inconsistencies between Title VII and the *McDonnell Douglas* framework).

201. The Supreme Court failed to provide any analysis connecting the framework with the statute, making it difficult to determine the Court's intended result in crafting the test. Eddie Kirtley, Comment, *Where's Einstein When You Need Him? Assessing the Role of Relative Qualifications in a Plaintiff's Case of Failure-to-Promote Under Title VII*, 60 U. MIAMI L. REV. 365, 390 n.160 (2006) (citing 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*

B. *Applying Intentionalist or Purposivist Frameworks to the* McDonnell Douglas *Standard*

Several methods of statutory construction allow courts to consider the intention underlying a statute when interpreting that statute.[202] Leaving aside questions about when intent should come into play in any statutory construction analysis, the difficulties inherent in determining what intent the court is attempting to discover,[203] and what sources are appropriate

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Motives" Case, 52 DRAKE L. REV. 71, 90–92 (2003)) (stating that the Supreme Court did not address why it came up with the framework it created or why it ignored the classic tort burden of proof standard and created a burden-shifting test). There is no indication that the Court was attempting to intentionally modify the statute in the aforementioned ways. Rather, it appears that the Court merely failed to anticipate the impact of the decision. Additionally, subsequent "clarification" of the *McDonnell Douglas* framework has amplified some of the problems with the framework. *See* Corbett, *supra* note 9, at 1558 (discussing the sharp criticism of applying *McDonnell Douglas* due to the difficulty of classifying and analyzing cases). *Compare* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (stating that a finding that reasons given for termination are false *permits* a finding that there was in fact discrimination), *with St. Mary's Honor Ctr.*, 509 U.S. at 528 (Souter, J., dissenting) (stating that a finding that reasons given for termination are false *compels* a finding of discrimination). It is unlikely that these subsequent clarifications were fully anticipated by the original court.

202. The term "intentionalist" may be used to describe several different methods of statutory construction that allow the use of legislative history and other signals of intent, but these methods may differ significantly. Under one intentionalist method of statutory construction, if a statute is ambiguous, the Court should look to the legislative history of the statute and give the language the meaning intended by Congress. *See* Thomas W. Merrill, Essay, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 366–68 (1994). Other intentionalists countenance the use of legislative and other materials to determine the plain meaning of the language in the first place. *See* Eskridge & Frickey, *supra* note 140, at 325–26 (explaining that the courts are agents of the legislature and should use congressional intent as "the touchstone for statutory interpretation"). In this Article, the term "intentionalism" refers broadly to those methods of statutory construction that countenance the use of some method of legislative intent.

203. Inherent difficulties exist in ascertaining the actual intent of the legislature. *See* Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 21–23 (1996) ("Determining legislative intent is frequently a difficult and creative enterprise.") One of these inherent difficulties is in determining what intent is being discerned. For example, two approaches to determining statutory intent advocate that the court look back to the time when the statute was enacted. One method, "imaginative reconstruction," which was proposed by Judge Richard Posner, requires a judge to try to put himself in the position of the legislature enacting the legislation and determine how that legislature would apply the statutory text. Posner, *supra* note 149, at 817. The imaginative reconstruction method suggests that the judge look at "the language and apparent purpose of the statute, its background and structure, its legislative history[,] . . . related statutes," the values at the time the statute was enacted, and "any sign of legislative intent regarding the freedom with which he should exercise his interpretive function." *Id.* at 818. Another similar methodology coined as "original meaning" by Judge Easterbrook asks courts to determine what knowledgeable users of the words, at the time that the statute passed, would have thought about the meaning of the words. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & SOC. POL. 59, 61 (1988).

indicators of legislative intent,[204] this section merely seeks to determine whether Congress directed the creation of the *McDonnell Douglas* test or, at least, to determine whether the test is consistent with original legislative intention.

Before addressing Title VII's legislative history, it is important to note academic and judicial critiques of intentionalism. This discussion is important because the criticisms of intentionalism play out starkly in the context of Title VII, perhaps more so than in other statutory contexts.

The concerns with intentionalism have been widely discussed in the literature. One critique is that an individual legislator's expressions of intent may not reflect the collective will of the legislature; in other words, individual legislators can change the intent of the statute through manipulative use of legislative history.[205] Further, there is concern that intentionalist judges selectively cull through legislative history for signals about intention that support the judge's reading of the statute, while ignoring other relevant portions of the legislative history.[206] Additionally, public choice jurisprudence cautions that statutes are carefully crafted outcomes created after compromises between competing political interests and that relying too much on legislative history may unduly upset the intended outcomes, which can be expressed only through the actual language of the statutory provisions themselves.[207]

These concerns may be truer when interpreting the operative language of Title VII, even more so than in other contexts. As one court noted, "[t]he legislative history of Title VII has virtually been declared judicially incomprehensible."[208] The debate over the Civil Rights Act of 1964, which also included civil rights protections in the areas of public accommodations and

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Eskridge and Frickey question whether a judge is ever actually capable of ascertaining the intent of individuals in a different time period, given the bias of the judge as historian. Eskridge & Frickey, *supra* note 140, at 330 (discussing how different interpretations can come from the same facts, depending on the "current context of the judicial interpreter"). This may be especially true in the case of civil rights litigation, where societal norms and expectations have changed dramatically over the last 100 years.

204. *See* Eskridge & Frickey, *supra* note 140, at 326–27 (discussing the use of committee reports and floor statements by bill sponsors to determine the "conventional intent" of the legislature).

205. Nelson, *supra* note 140, at 362–63 (describing Justice Scalia's concern that legislators might "salt the *Congressional Record* with misleading statements that further their own special agendas" if courts find the entire legislature's intent in such isolated statements).

206. *Id.* at 363.

207. *Id.* at 370–71.

208. Beverly v. Lone Star Lead Constr. Corp., 437 F.2d 1136, 1138 n.7 (5th Cir. 1971).

voting, has been coined "The Longest Debate."[209] Debate lasted nine days on the floor of the House of Representatives.[210] Behind-the-scenes maneuvering in the Senate lasted throughout 13 weeks of filibustering by the bill's opponents, which represented the longest filibuster in the history of the Senate.[211] As one commentator indicates:

> The 1964 civil rights Senate debate lasted over eighty days and took up some seven thousand pages in the Congressional Record. Well over ten million words were devoted to the subject by members of the upper house. In addition, the debate produced the longest filibuster in Senate history, as well as the first successful invocation of cloture in many years.[212]

One public choice criticism of legislative history is that only the words of the statute can be relied on because the legislative history itself may reveal only the tumult of the legislative process and not the final result intended to be reached by the legislators.[213] Whether this criticism is valid in the abstract is not at issue here, but the Civil Rights Act of 1964's legislative history is one that is certainly clouded by the political maneuvering happening at the time.[214] The bill was passed in the wake of the assassination of John F. Kennedy[215] and was deftly maneuvered through the political process in a manner designed to thwart some Southern legislators' opposition to the bill.[216]

Indeed, opponents of the bill described the way it was brought before the House of Representatives as not allowing committee members "to ask questions, have an explanation of the bill, discuss it, consider its provisions, and offer amendments."[217]

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209. CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).

210. *Id.* at 123.

211. *Id.* at 193. For a discussion of the filibuster and the Senators' attempts to move the bill, see generally *id.* at 124–93.

212. BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS PART II 1089 (Bernard Schwartz ed., 1970).

213. *See* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 427–29 (1988).

214. *See generally* WHALEN & WHALEN, *supra* note 209, at 141–93 (describing the Senate filibuster and the underlying manipulation by both Republicans and Democrats before the passage of the Civil Rights Act of 1964).

215. *See* SCHWARTZ, *supra* note 212, at 1018 (reporting that five days after President Kennedy's death, in a memorial address to Congress, newly-sworn President Lyndon Johnson said, "'No memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long'").

216. *See id.* at 1020.

217. 110 CONG. REC. 1530, 1531 (1964) (statement of Sen. Richard Russell), *reprinted*

The same concerns were echoed in the Senate debate, where Sen. Richard Russell indicated: "The bill has never been upon the usual legislative highways at any point in its career. It is untouched by any of the ordinary legislative processes."[218] Sen. Russell further opined that the House Judiciary Committee's consideration of the civil rights bill was "summarily junked" and "[i]n its place was substituted a bill drafted by the Office of the Attorney General in conjunction with certain key leaders of the movement."[219]

Further, it has been suggested that many amendments to the legislation, including the addition of gender as a protected class, were inserted into the legislation by Southern politicians to ensure that the legislation would not garner enough votes in the House of Representatives.[220] However, these amendments were also championed by others, such as a bloc of female legislators, who actually supported the amendments.[221]

Even setting these caveats regarding legislative history aside, it is still difficult to discern anything within the legislative history of Title VII that clearly supports the *McDonnell Douglas* standard.[222] Indeed, given the magnitude of the changes wrought by the bill, a large portion of the discussion about the bill in both the House and the Senate focused on whether the bill, as a whole, should be passed.[223] There is little discussion about the

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in SCHWARTZ, *supra* note 212, at 1116.

218. 110 CONG. REC. 4742, 4743 (1964) (statement of Sen. Richard Russell), *reprinted in* SCHWARTZ, *supra* note 212, at 1141 (quoting Sen. Richard Russell).

219. 110 CONG. REC. 4742, 4743 (1964) (statement of Sen. Richard Russell), *reprinted in* SCHWARTZ, *supra* note 212, at 1142. Sen. Russell continued, "Time and again it was stated in the debate on the floor of the House, and never at any time denied or questioned, that the Attorney General's 56-page bill of 10 titles was steamrolled through the committee without permitting a single member of the committee to ask even one question about the bill or to offer a single amendment to it." *Id.*

220. WHALEN & WHALEN, *supra* note 209, at 116.

221. *See id.* at 117 (discussing a coalition of five congresswomen who supported the amendment).

222. *See generally* Judith Olans Brown, Stephen N. Subrin & Phyllis Tropper Baumann, *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1520–21 n.158 (1997) (criticizing the *Hicks* Court for dismissing previous misreadings of *McDonnell Douglas* and its progeny while "'look[ing] neither to legislative history nor to Title VII for guidance'" in concluding that its "'belated interpretation is the proper one;'" instead, "' [w]hen confronting language that explicitly contradicted its position, the Court swept it aside, not by intellect or reasoned analysis, but mostly by fiat'" (quoting Robert Brookins, Hicks, *Lies and Ideology: The Wages of Sin Are Now Exculpation*, 28 CREIGHTON L. REV. 939, 994 (1995))).

223. *See, e.g.*, H.R. REP. NO. 88-914, at 108–10, 128 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2475–76, 2515 (discussing constitutional and broad economic issues implicated by Title VII).

specific provisions of Title VII, beyond the summaries of the provisions provided by individual legislators.[224]

Surprisingly, there is little discussion in the legislative history regarding what Congress intended by Title VII's operative language that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[225] One legislator even commented on the lack of discussion regarding this important issue by indicating "[t]here is no attempt whatever in any title of the bill to define what is meant by the offense of discrimination. That definition is nowhere in the context, in the intent or in the purpose, or even in the preface of the bill."[226]

There is also little legislative history regarding how litigation brought pursuant to Title VII would proceed once it was initiated in federal court.[227] One of the few indicators that we do have suggests, at least mildly, that the burden-shifting framework of *McDonnell Douglas* is inappropriate.[228] During the Senate's debate of the legislation, Senator Humphrey indicated that "[t]he suit against the respondent, whether brought by the Commission or by the complaining party, would proceed in the usual manner for litigation in the Federal courts. . . . [T]he plaintiff would have the burden of proving that discrimination had occurred."[229] While it is true that the *McDonnell Douglas* standard places the ultimate burdens of production and persuasion on the plaintiff, the three-part burden-shifting framework cannot be said to describe "the usual manner for litigation in the Federal courts."[230]

At least one of the intentionalist frameworks of statutory construction suggests that courts should use legislative history, along with other tools, to determine whether there is "any sign of

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224. *See, e.g.*, H.R. REP. NO. 88-914, at 107–08 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2474–75 (summarizing provisions of Title VII).

225. 42 U.S.C. § 2000e-2(a)(1) (2000).

226. 110 CONG. REC. 4746, 4746 (1964) (statement of Sen. Richard Russell), *reprinted in* SCHWARTZ, *supra* note 212, at 1148.

227. *See* H.R. REP. NO. 88-914, at 107–08 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2474–75 (providing little guidance regarding the procedure for litigating Title VII claims).

228. *See* 110 CONG. REC. 6548, 6549 (1964) (statement of Sen. Humphrey), *reprinted in* SCHWARTZ, *supra* note 212, at 1228.

229. *Id.*

230. *Id.*

legislative intent regarding the freedom with which [the judge] should exercise his interpretive function."[231] In other words, the legislative history itself can grant courts greater power in interpreting statutory terms. There is one passage in Title VII's legislative history, which arguably could support the position that Congress granted the courts explicit permission to create the *McDonnell Douglas* framework.[232] When discussing amendments to Title VII, one of the senators explained, "[a] substantial number of committee members . . . preferred that the ultimate determination of discrimination rest with the Federal judiciary."[233]

However, reading this sentence to provide a broad grant of statutory construction leeway would be to misconstrue the context of the sentence within a broader discussion. This sentence merely expresses the conclusion that the legislature intended to provide the courts, rather than an administrative agency, with authority to hear discrimination cases.[234] It does not express any opinion about the courts' ability to construe Title VII's statutory language.[235]

While there does not appear to be any statement in Title VII's legislative history affirmatively granting the courts any particular leeway in construing the statute, two legislators predicted that the ambiguity of the language itself would lead to such a result.[236] Representatives Richard Poff and William Cramer predicted:

> The ambiguity of its language creates a cloud of obscurity which conceals its potential consequences. While we are unprepared to say that the ambiguity is deliberate and calculated, it is difficult to believe that it is altogether accidental. Statutory ambiguities require judicial interpretation. In light of the trend court decisions have taken in recent years, it is not unrealistic to predict that

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231. Posner, *supra* note 149, at 818.

232. H.R. REP. NO. 88-914, at 29, 128 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2515 (1964) (discussing how the original Title VII would have allowed the Equal Employment Opportunity Commission to institute hearing procedures, but other committee members preferred discrimination cases to be decided by the federal court).

233. *Id.*

234. The sentence immediately followed a discussion concerning the breadth of the proposed EEOC's authority. *See id.*

235. *See* H.R. REP. NO. 88-914, at 128 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2515–16 (1964) (discussing instead the need for an expeditious method of resolving complaints, as opposed to granting broad authority for statutory interpretation).

236. *See* H.R. REP. NO. 88-914, at 112 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2479–80 (1964) (discussing the separate minority views of Representatives Richard H. Poff and William Cramer).

> the interpretations the courts would make would be of the broadest possible scope. What the courts interpret tomorrow may be altogether different from what a majority of the Members of Congress intended .... When the statute is loosely drawn, vague, ambiguous and obscure, the judicial branch is handed a blank check, signed by the legislative branch.[237]

This passage, however, does not provide the type of legislative mandate that Posner envisions the legislature providing to the courts to warrant such an interpretation of Title VII's express terms.[238]

In the end, the legislative history of Title VII provides the Court with little guidance regarding how to interpret the statute's operative provisions and certainly does not provide the courts with any instruction, permission, or mandate to construe Title VII's provisions in derogation of its express statutory language.

The third major factor used in statutory construction is to look at the statute's broad purposes to determine whether a particular interpretation is warranted.[239] However, even ignoring the argument that consideration of a statute's broad purposes is not an appropriate construction tool, the purpose of Title VII also appears not to support the *McDonnell Douglas* standard.[240] The Supreme Court in *McDonnell Douglas* indicated that "[t]he language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."[241]

As discussed in Part III.A., *supra*, in at least some circumstances, *McDonnell Douglas* places unnecessary evidentiary burdens on plaintiffs or causes them to bear the

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237. H.R. REP. NO. 88-914, at 112–13 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2479–80. For context, it should be noted that Mr. Poff was a representative from the state of Virginia, and Mr. Cramer from Florida. H.R. DOC. NO. 108-122, at 888, 1747 (2005).

238. *See* Posner, *supra* note 149, at 818–19 (distinguishing interpretive latitude in statutes whose language implies some flexibility in interpretation from those which are more specific and rigid in their requirements); *see also* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002) (suggesting that Congress should direct courts more explicitly regarding statutory construction).

239. *See, e.g.*, McCreary County v. ACLU, 125 S. Ct. 2722, 2734 (2005) ("Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country . . . .").

240. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

241. *Id.*

burden of convincing a court to modify existing case law. At times, the framework clearly underenforces the rights granted by the statute.[242] Even if the Court somehow construed *McDonnell Douglas* as fulfilling Title VII's purpose in some factual scenarios, it is troubling that the test does not fully enforce a plaintiff's rights in others. Notably, even though it does not appear as if the Court was trying to restrict the reach of Title VII through the creation of the standard, it is questionable whether the Court could use the statute's purpose to reach such a result.[243]

Although the *McDonnell Douglas* test can be said to effectuate Title VII's purposes in cases with facts similar to Percy Green's case, the fact that it significantly underenforces rights in other circumstances demonstrates that the test is not fully consistent with a purposivist approach to statutory construction.[244]

C. *Applying a Common Law Framework to the* McDonnell Douglas *Standard*

One of the few statutory construction methods that may describe, although not fully explain or justify, the *McDonnell Douglas* test is the common law approach.[245] As with the other methods of statutory construction, there are several iterations of the common law methodology to interpreting statutes.[246] However, the unifying thread of common law methodology appears to be its approval of and use of concerns other than the text, legislative history, and purpose of the statute.[247]

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242. *See supra* Part III.A.1 (observing that the plaintiff's burden to establish a prima facie case of discrimination can exclude otherwise legitimate discrimination claims).

243. Popkin, *supra* note 140, at 604 ("[T]here is no nonpolitical principle which justifies using statutory purpose to limit rather than expand a statute.").

244. *See supra* Part III.A.1 (explaining how the *McDonnell Douglas* test does not provide plaintiffs with adequate protection).

245. While the Author does not endorse the general use of the common law approach as a normative matter, it has been so embraced by others in the academic community. *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 3 (1985) (discussing the theory of common law interpretation).

246. For example, Thomas Merrill defines common law interpretation "to include all potentially controversial forms of textual interpretation." *Id.* at 5. T. Alexander Aleinikoff presents a "nautical" model of statutory interpretation whereby, "Congress . . . charts [an] initial course" for a statute, but there is a recognition that Congress is unable to fully anticipate all of the factual scenarios to which the statute will be applied. Aleinikoff, *supra* note 149, at 21. The court system is then allowed to fill in gaps caused by these anticipated scenarios. *Id.*

247. *See, e.g.*, Aleinikoff, *supra* note 149, at 21 (distinguishing the "nautical" method, which relies on current temporal context for statutory interpretation, from the "archeological" method, which relies more on historical context and stare decisis).

One commentator described the common law approach as allowing consideration of "current values, such as ideas of fairness, related statutory policies, and [evolving] . . . values" without masking these considerations as textual, intent, or purpose concerns.[248] As the *McDonnell Douglas* court provided little guidance as to why it created the three-part burden-shifting framework, one explanation may be that it did not explicitly rely on the text, legislative history, or purpose of the statute, but used these considerations along with consideration of external factors to create a test to deal with the emerging problem of indirect discrimination.[249]

However, this explanation has several large problems. First, it is not clear that the common law approach to statutory construction should apply when the statutory language is not ambiguous.[250] In *McDonnell Douglas*, the court was not faced with a situation "in which alternative understandings of the text were available."[251] Nor was this a case where the courts were faced with a factual scenario that might arguably fall within the contours of the statute, but that was not foreseen by the statute's drafters.[252]

Also problematic is any lack of direct, or even indirect, authority for creation of the standard. In characterizing the common law powers of courts, Thomas Merrill indicates that such power is at its most legitimate when such authority is granted to the courts or when lawmaking is necessary to preserve the underlying mandate of the statute.[253]

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248. Eskridge & Frickey, *supra* note 140, at 359.

249. Two major criticisms of the common law approach deserve brief discussion. As the Supreme Court itself has mentioned, common law decision making raises concerns about whether federal courts are exceeding their limited jurisdiction. Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 95 (1981) ("Although it is much too late to deny that there is a significant body of federal law that has been fashioned by the federal judiciary in the common-law tradition, it remains true that federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers."). Second, "once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law." *Id.* at 95 n.34.

250. *See id.* (discussing when the common law approach to statutory construction may not be appropriate).

251. Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 441 (1995).

252. *See id.* at 441–42 (asserting that courts engage in "judicial adventurism" when they attempt to fill gaps that are not provided for within the specific language of a statute).

253. Merrill, *supra* note 245, at 46–48.

Under the heading of direct authority, the Court's authority to engage in common law interpretation of statutes may either be explicitly delegated by Congress, or the Court may believe it has this delegated power based on long-standing tradition.[254] For example, the Court has adopted a common law approach to maritime issues,[255] to the Sherman Act,[256] and to section 301 of the Labor Management Relations Act.[257]

The courts have sometimes used common law decisionmaking to not give effect to express statutory language.[258] For example, in Sherman Act cases, the court has held that to give literal meaning to certain sections of the Act would "outlaw the entire body of private contract law."[259] Thus, the court explicitly imported the Rule of Reason, which has origins in the common law, into the Sherman Act.[260] However, even in this instance, the Court indicated that the legislative history of the Sherman Act "makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."[261]

There is no language in either Title VII or its legislative history granting the courts direct authority to engage in common law decisionmaking.[262] Nor does it appear that there is any implicit grant of such authority. Indeed, Posner has suggested that a common law construction approach might not be appropriate in the Title VII context.[263] He suggests that courts should be reluctant to exercise such a power when the statute appears "against a background of dissatisfaction with judicial handling of the same subject under a previous statute or the

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254. *Id.* at 44.

255. *Id.* at 30.

256. Posner, *supra* note 149, at 818 (noting the use of common law methodology when interpreting antitrust issues). Further, Congress has explicitly provided the courts with the authority to engage in common law decisionmaking when applying Rule 501 of the Federal Rules of Evidence. H.R. REP. NO. 93-650, at 8 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7075, 7082 ("[T]he Committee . . . provided that [Rule 501] shall continue to be developed by the courts . . . . [This standard] mandates the application of the principles of the common law as interpreted by the courts of the United States in light of reason and experience.").

257. Int'l Bhd. of Elec. Workers v. Hechler, 481 U.S. 851, 855–56 (1987).

258. *See, e.g.*, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 686–89 (1978) (arguing that the Sherman Act "cannot mean what it says," and interpreting it accordingly).

259. *Id.* at 688.

260. *Id.* at 688–89.

261. *Id.* at 688.

262. *See generally supra* Part III.

263. Posner, *supra* note 149, at 818–19.

common law," and he suggests that much labor and regulatory legislation is of this character.[264]

Another circumstance under which common law decisionmaking is often used is when preemptive lawmaking is required to preserve the statutory mandate.[265] In these cases, Merrill suggests that the Court has authority to "ask[] what collateral or subsidiary rules are necessary in order to effectuate or to avoid frustrating the specific intentions of the draftsmen."[266] However, Merrill's approval of the permissibility of preemptive lawmaking is based on an assumption that the courts will use this tool sparingly and limit its use to "cases where it is truly necessary."[267]

Again, there is no indication that *McDonnell Douglas* was needed to avoid frustrating the purpose of Title VII.[268] As discussed in Part III.A, the framework may limit plaintiffs with meritorious cases from proceeding to trial.[269] Also surprising was the Court's willingness to create the framework without any discussion about whether it was even necessary.[270] Prior to the adoption of the three-part burden-shifting test, courts had used a less structured standard that mimicked Title VII's statutory language.[271] Indeed, this looser standard of proof is one that, after more than 30 years of litigation, is now being advocated in the academic literature.[272]

Other justifications for common law decisionmaking can be drawn from Professor Mitchell Berman's work.[273] Berman

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264. *Id.* at 818. In fairness, it should be noted that much of this congressional dissatisfaction arose after the Court's decision in *McDonnell Douglas*. *See* H.R. REP. NO. 102-40(II), at 1 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 694 (asserting in the statement of Summary and Purpose that one of the objectives of the Civil Rights Act of 1991 "is to respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions").

265. Merrill, *supra* note 245, at 36.

266. *Id.*

267. *Id.* at 37.

268. Schuman, *supra* note 10, at 70.

269. *See supra* Part III.A.

270. Schuman, *supra* note 10, at 70.

271. *See* Reid v. Memphis Publ'g Co., 468 F.2d 346, 348–49 (6th Cir. 1972) (agreeing with the district court's finding that the plaintiff had the burden of proving that the defendant's refusal to hire was based on a protected trait); Culpepper v. Reynolds Metals Co., 442 F.2d 1078, 1080 (5th Cir. 1971) (placing the burden of persuasion on the plaintiff); Anderson v. Methodist Evangelical Hosp., Inc., No. 6580, 1971 WL 150, at *5 (W.D. Ky. June 23, 1971) (finding that a plaintiff must show discrimination by a preponderance of the evidence), *aff'd*, 464 F.2d 723 (6th Cir. 1972).

272. *See, e.g.*, Malamud, *supra* note 95, at 2237–38 (arguing for a less structured standard).

273. Berman, *supra* note 15, at 92–93 (2004) (listing six factors a judge may draw upon to make a decision).

has suggested that courts are authorized to create decision rules to serve adjudicatory and deterrent concerns.[274] Even if we transfer this same framework into the statutory context, it is difficult to justify the creation of the *McDonnell Douglas* framework.

Under the adjudicatory function, a court attempts to create a rule that minimizes errors by the lower courts in reaching a decision.[275] As Berman indicates, "[b]y minimizing adjudicatory errors, a decision rule is likely at the same time to optimize compliance with the operative proposition."[276] First, it should be noted that there was no discussion in *McDonnell Douglas* either about lower courts struggling with evidence in civil rights cases or about confusion causing noncompliance with the operative provision.[277] Further, the complexity of *McDonnell Douglas* spawned decades of litigation about the allocation of burdens of production and persuasion.[278] Courts and litigants continue to struggle with individual pieces of the proof structure and how that structure should be used.[279] Even today, it is not clear that the framework satisfies the adjudicatory function in all cases.[280]

Decision rules may also serve a deterrent function when a rule is crafted to secure greater compliance with the underlying operative provision such as the exclusionary rule.[281] *McDonnell Douglas* does serve a deterrent function. By requiring employers to articulate a legitimate, nondiscriminatory reason for their actions, it encourages employers to consider the reasons underlying employment decisions and to take care in making such decisions.[282] While such a result is desirable, it contravenes the common law

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274. *Id.* at 92–96 (2004) (describing the basis for such suggestions). Berman also suggests that decision rules can serve protective, fiscal, and institutional functions. *Id.* at 94–95. None of these concerns appear to be significantly present in the *McDonnell Douglas* context.

275. *Id.* at 93–94.

276. *Id.* at 93.

277. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973) (listing the Court's reasons for granting certiorari).

278. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 514 (1993) (stating that *McDonnell Douglas* represents the Court's establishing an initial rebuttable presumption); Price Waterhouse v. Hopkins, 490 U.S. 228, 252–54 (1989) (discussing the various standards and burdens of proof in Title VII cases).

279. *See, e.g.*, Davis, *supra* note 6, at 860–62 (describing the ambiguities created by the *McDonnell Douglas* framework and calling for its abandonment).

280. *Id.* at 860–61.

281. Berman, *supra* note 15, at 93–94.

282. *Price Waterhouse*, 490 U.S. at 264–65.

employment rights that employers enjoy, which were not taken away by Title VII.[283] Further, it is not clear that, prior to creation of the standard, employers were shying away from providing reasons for their actions. Indeed, from a practitioner's perspective it would be bad strategy to defend a discrimination claim by stating that there was no reason for an action or to simply fail to present evidence of such a reason.

As this section demonstrates, justifying *McDonnell Douglas* under a common law methodology is difficult because it is not clear that the standard was implemented pursuant to proper authority or that it fits within the normal policy parameters of when such rulemaking is allowed.[284] However, even assuming that use of a common law method is appropriate in the context of a nonambiguous statute, it is not clear that the *McDonnell Douglas* standard would fit within the constraints of common law statutory interpretation. Ideally, the interpretation of the statute offered by the Court under this approach would be one "which fits most logically and comfortably into the body of both previously and subsequently enacted law."[285] As discussed in Parts III.A and B, the three-part burden-shifting framework does not meet this goal.[286]

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283. *See, e.g.*, Miller v. Auto. Club of N.M., Inc., 420 F.3d 1098, 1128 (10th Cir. 2005) (summarizing New Mexico common law); Layton v. MMM Design Group, 32 F. App'x 677, 679–80 (4th Cir. 2002) (describing Virginia common law).

284. Schuman, *supra* note 10, at 70.

285. W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100 (1990). In his dissent, Justice Stevens indicated that "[i]n recent years the Court has vacillated between a purely literal approach to the task of statutory interpretation and an approach that seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation." *Id.* at 112 (Stevens, J., dissenting).

286. *See supra* Parts III.A–B. This Article does not discuss *McDonnell Douglas*'s viability under the political model of statutory construction because there is no indication that the Court was addressing those concerns when creating the test. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (failing to mention or address the political model of statutory construction). The collaborative model of statutory interpretation assumes that it is proper for the courts to incorporate political values into the interpretation process, even if those political values did not originate with the legislature. Popkin, *supra* note 140, at 590–91. Under this model, it is "normatively desirable" for judges to interject political values into the process. *Id.* at 590. Under the political reasoning model, it is appropriate for judges' political suppositions and other assumptions to be incorporated into the decisionmaking process. Eskridge & Frickey, *supra* note 140, at 347. The creators of the latter model recognize that the text, history and application of the statute will limit the choices regarding how to interpret a statute, but that, among this list, "the actual choice will not be 'objectively' determinable." *Id.*

D. *Justifying* McDonnell Douglas *Based on Jurisprudential Concerns*

Perhaps the best explanation for the continued viability of *McDonnell Douglas* relates to jurisprudential concerns, rather than statutory ones. As Justice Souter noted in 1993:

> Cases, such as *McDonnell Douglas*, that set forth an order of proof necessarily go beyond the minimum necessary to settle the narrow dispute presented, but evidentiary frameworks set up in this manner are not for that reason subject to summary dismissal in later cases as products of mere dicta. Courts and litigants rely on this Court to structure lawsuits based on federal statutes in an orderly and sensible manner, and we should not casually abandon the structures adopted.[287]

In at least one case, the Supreme Court has suggested that even though the original construction of a statute was not proper, the fact that a decision is long-standing precedent may justify its continued force.[288] Thus, the principle of stare decisis, with its focus on "[t]he interests of stability, predictability, efficiency, consistency and reliance" might justify continued adherence to the three-step burden-shifting framework.[289]

However, this argument is easily countered in three ways. First, it is not clear that *McDonnell Douglas* has resulted in the "stability, predictability, efficiency, consistency and reliance" that would require continued adherence to it. Second, the lack of textual and other support for the test, as well as any discussion about why such a radical departure from these considerations might be warranted, lends support to the argument that the test is invalid *ab initio*. Further, as suggested by Berman in the constitutional context, it may be that decisional rules are entitled to less deference in the stare decisis context than explicit interpretation of statutes.[290] Therefore, to the extent that the framework is merely a decisional rule or an evidentiary standard, it deserves less deference in the stare decisis context.

A second jurisprudential concern that may motivate the continued use of *McDonnell Douglas* is a belief that if the standard was an improper interpretation of Title VII, Congress

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287. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 540 (1993) (Souter, J., dissenting).

288. *See* Runyon v. McCrary, 427 U.S. 160, 190–91 (1976) (Stevens, J., concurring) (explaining that "even if *Jones* did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today").

289. Aleinikoff, *supra* note 149, at 51.

290. Berman, *supra* note 15, at 102–04 (discussing the interaction between federal courts and Congress with respect to statutory and constitutional issues).

would have acted to remedy the problem, as it has done with other court rulings on Title VII issues.[291] It might be that we are not as concerned with activism in the statutory context because "if an interpretation of a statute misapprehends the actual intent of Congress or is proved by experience to have been unwise, remedial legislation can be promptly enacted."[292]

However, many courts and commentators question whether Congress has already acted to nullify *McDonnell Douglas*.[293] In the Civil Rights Act of 1991, Congress clarified that a plaintiff establishes an unlawful employment practice when he or she

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291. *St. Mary's Honor Ctr.*, 509 U.S. at 542 (Souter, J., dissenting).

292. Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 86 n.15 (1981). Indeed, Congress has taken steps to remedy other tests created by the Court. In *Price Waterhouse v. Hopkins*, the dissenting opinion lamented that "[t]oday's creation of a new set of rules for 'mixed-motives' cases is not mandated by the statute itself." Price Waterhouse v. Hopkins, 490 U.S. 228, 287 (1989) (Kennedy, J., dissenting). Several years later Congress amended Title VII to create a new mixed-motive framework. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76.

293. *See, e.g.*, Corbett, *supra* note 9, at 1566 (hoping to show that *McDonnell Douglas* is no longer a viable framework after *Desert Palace*); Sullivan, *supra* note 9, at 933–36 (discussing *Desert Palace* and questioning whether the standard articulated in *McDonnell Douglas* is viable after the 1991 amendments to Title VII); Van Detta, *supra* note 201, at 124–26 (arguing that Congress's amendments to Title VII in 1991 were a response to *McDonnell Douglas* and its progeny); *see also* Rollins v. Mo. Dep't of Conservation, 315 F. Supp. 2d 1011, 1023 (W.D. Mo. 2004) (questioning the validity of *McDonnell Douglas* after *Desert Palace*, but choosing to apply the burden-shifting framework anyway); Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 994 (D. Minn. 2003) (stating that "the Civil Rights Act of 1991 directly conflicts with . . . the *McDonnell Douglas* burden-shifting paradigm"). *But see* Christopher R. Hedican, Jason M. Hedican & Mark P.A. Hudson, McDonnell Douglas*: Alive and Well*, 52 DRAKE L. REV. 383, 395–402 (2004) (stating that the Supreme Court recognized the continued viability of *McDonnell Douglas* in cases after *Desert Palace* and the 1991 amendments to Title VII). It should be noted that the Eighth Circuit has consistently reiterated the continued viability of *McDonnell Douglas*. *See, e.g.*, Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1017 (8th Cir. 2005); Griffith v. City of Des Moines, 387 F.3d 733, 735–36 (8th Cir. 2004).

Currently, the federal law is in a state of flux regarding the intersection of the 1991 amendments to Title VII, *Desert Palace*, and the *McDonnell Douglas* test. *See* Sullivan, *supra* note 9, at 934 ("The ramifications of *Desert Palace* are as yet unclear, but the broadest view is that the case collapsed all individual disparate treatment cases into a single analytical method, thereby effectively destroying *McDonnell Douglas*. The decision, however, can be read more narrowly. Because footnote one specifies that the Court was not deciding the effects of this decision 'outside of the mixed-motive context,' *McDonnell Douglas* may continue to structure some cases, although its viability under Title VII is suspect." (footnote omitted)); Corbett, *supra* note 9, at 1555–60 (comparing differing standards of proof among *McDonnell Douglas*, *Price Waterhouse*, and *Desert Palace* after the 1991 amendments to Title VII). Some courts have held that *McDonnell Douglas* was not affected by the 1991 amendments or the *Desert Palace* decision. *See, e.g.*, *Strate*, 398 F.3d at 1017; *Griffith*, 387 F.3d at 735–36. Other courts have indicated that the third prong of the *McDonnell Douglas* test should be modified to allow the plaintiff either to prove pretext or mixed motive. *See, e.g.*, Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004). As discussed earlier, some courts take a third approach to this question, indicating that *McDonnell Douglas* is no longer a viable method for proving discrimination. *Dare*, 267 F. Supp. 2d at 994.

"demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[294] In *Desert Palace v. Costa*, the Supreme Court indicated that the 1991 amendments allowed plaintiffs to proceed under a mixed-motive theory using either circumstantial or direct evidence of discrimination.[295] The Court stated that to prevail on a mixed-motive claim of discrimination, the plaintiff needs to prove that the employment decision at issue was, at least in part, motivated by an improper factor.[296] The Court's opinion does not discuss how the 1991 amendments affected single-motive discrimination cases, and the issue remains unsettled.[297]

While the focus of this Article primarily relates to the propriety of the Court's interpretation of Title VII prior to the 1991 amendments, the continued viability of *McDonnell Douglas* based on jurisprudential concerns is significantly affected by these later amendments.[298] First, the amendments provide an argument that *McDonnell Douglas* is no longer viable.[299] Second, to the extent the courts successfully consider mixed-motive claims under the 1991 amendments without reference to *McDonnell Douglas*, it diminishes any argument that the courts need the framework to better analyze evidence in discrimination cases.[300]

IV. EXAMINING *MCDONNELL DOUGLAS* AS MERELY AN EVIDENTIARY TOOL

One of the reasons for the continued viability of *McDonnell Douglas* is the belief that *McDonnell Douglas* does not actually prescribe the elements of a cause of action, but rather merely

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294. 42 U.S.C. § 2000e-2(m) (2000). At the same time, Congress also provided employers with a limited affirmative defense under Title VII, providing that where the employer can establish that it "would have taken the same action in the absence of the impermissible motivating factor," it can restrict a plaintiff's damages to injunctive and declaratory relief, and attorney's fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B) (2000).

295. Desert Palace, Inc. v. Costa, 539 U.S. 90, 98–100 (2003).

296. *Id.* at 101.

297. The legislative history of the 1991 amendments provides little guidance on whether the amendments were intended to affect *McDonnell Douglas*. In a portion of the legislative history discussing changes to disparate impact burdens of proof, the committee indicated that disparate impact burdens are different than disparate treatment claims. H.R. REP. NO. 102-40(II), at 7–8 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 694, 699–701 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). However, this is the only specific mention of the case in the legislative history of the 1991 amendments.

298. *See supra* notes 293–297 and accompanying text.

299. *Id.*

300. Corbett, *supra* note 9, at 1551–52.

serves as an evidentiary framework that courts use in considering whether a plaintiff's evidence demonstrates discrimination.[301] While it is true that the courts continue to describe *McDonnell Douglas* as an evidentiary standard,[302] it is not used in this manner. Rather, the circuit courts have almost universally indicated that juries are not to be instructed on the framework.[303] As discussed below, this practice leads to even larger questions about the test's legal heritage.[304]

Despite these problems, and even if there is some justification for the belief that the framework serves as an evidentiary standard, it is not clear that the standard is supported by Title VII, at least not in all discrimination cases.[305] Even if we assume that the courts inherently possess the ability to determine burdens of production and persuasion in a case where the legislature has not chosen to do so, the issue still remains: from what were the burdens articulated in *McDonnell Douglas* derived? The courts' ability to fashion such burdens should not be standardless. Rather, "burdens of proof should be allocated by the policy choices of the substantive law . . . ."[306] It is not clear that the *McDonnell Douglas* framework serves the purposes of the statute in all cases.

A. *An Evidentiary Framework Without a Factfinder*

One place where confusion over the burden-shifting framework's proper use is most visible relates to jury instructions.[307] When discrimination cases go to trial, the *McDonnell Douglas* test raises unnecessary complications for both the judge and the jury.[308] Even thirty years after the test's

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301. *Id.* at 1555–57.

302. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 510 (2002) ("The prima facie case under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement."); Gold, *supra* note 92, at 185–86 (describing the *McDonnell Douglas* framework as procedural).

303. *See infra* notes 308–316.

304. *Id.*

305. *See, e.g.*, Griffith v. City of Des Moines, 387 F.3d 733, 745 (8th Cir. 2004) (Magnuson, J., concurring) (emphasizing that the burden-shifting framework is not consistent with Title VII).

306. 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5122 (2d ed. 2005).

307. *See, e.g.*, Cabrera v. Jakabovitz, 24 F.3d 372, 380–81 (2d Cir. 1994) (discussing problems that arise when *McDonnell Douglas* burden-shifting framework language is used in jury instructions); Lewis v. Sears, Roebuck & Co., 845 F.2d 624, 634 (6th Cir. 1988) (commenting that *McDonnell Douglas* instructions "confuse the jurors with legal definitions of the burdens of proof, persuasion and production").

308. *See* Armstrong v. Burdette Tomlin Mem'l Hosp., 438 F.3d 240, 249 (3d Cir.

creation, courts continue to struggle with how to incorporate its rationale into jury instructions.[309] Indeed, the circuits are currently split regarding how and whether to instruct the jury on the three-part framework.[310] Some courts incorporate *McDonnell Douglas* into the jury instructions by instructing the jury on the changing burdens of production and persuasion.[311] However, most circuits have issued opinions indicating that *McDonnell Douglas* should not be used in jury instructions.[312] The Third Circuit has

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2006) ("[T]he 'prima facie case and the shifting burdens confuse lawyers and judges, much less juries, who do not have the benefit of extensive study of the law on the subject.'" (quoting Mogull v. Commercial Real Estate Group, 744 A.2d 1186, 1199 (N.J. 2000))); Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979) (conceding that "subtleties" of the burden-shifting framework have created difficulties for judges and jurors); *see also* Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 760 (1995) (observing that the three-stage *McDonnell Douglas* framework has divided circuit courts and confused jurors).

309. *See, e.g.*, Sanghvi v. City of Claremont, 328 F.3d 532, 538–41 (9th Cir. 2003) (evaluating the role of *McDonnell Douglas* factors in jury instructions).

310. *Compare* Watson v. Se. Pa. Transp. Auth., 207 F.3d 207, 221–22 (3d Cir. 2000) (holding that it is proper to instruct the jury to consider facts necessary to establish the prima facie case but it is error to instruct the jury on the burden-shifting framework), *and* Gafford v. Gen. Elec. Co., 997 F.2d 150, 167 & n.9 (6th Cir. 1993) (holding that it was not error to "guide[] the jury through a three-stage order of proof as opposed to instructing the jury solely on the ultimate issue of . . . discrimination"), *with* Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999) (stressing that the *McDonnell Douglas* framework is not necessary and is improper for the jury to consider), Ryther v. KARE 11, 108 F.3d 832, 849 (8th Cir. 1997) (en banc) (Loken, J., dissenting) (stating that "the jury need only decide the ultimate issue of intentional . . . discrimination"), Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) (holding that the jury need only consider whether the plaintiff is a victim of discrimination), Cabrera v. Jakabovitz, 24 F.3d 372, 380–81 (2d Cir. 1994) (noting that the terms "prima facie case" and "defendants' burden of produc[tion]" created a risk of confusing the jury (internal quotation marks omitted)), Walther v. Lone Star Gas Co., 952 F.2d 119, 127 (5th Cir. 1992) ("Instructing the jury on the elements of a prima facie case, presumptions, and the shifting burden of proof is unnecessary and confusing."), Messina v. Kroblin Transp. Sys., Inc., 903 F.2d 1306, 1308 (10th Cir. 1990) (noting that the *McDonnell Douglas* guidelines are not relevant to the jury), Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1137 (4th Cir. 1988) (observing that "[t]he shifting burdens of production of *Burdine* . . . are beyond the function and expertise of the jury"), *and Loeb*, 600 F.2d at 1016 (explaining that the phrase "prima facie case" and other "legal jargon" need not be explained to the jury).

311. *E.g.*, Rodriguez-Torres v. Caribbean Forms Mfr., Inc., 399 F.3d 52, 58 (1st Cir. 2005) (noting that "[t]he district court instructed the jury to evaluate the evidence by applying the *McDonnell Douglas* burden-shifting framework"); Kozlowski v. Hampton Sch. Bd., 77 F. App'x 133, 141 (4th Cir. 2003) (discussing use of the *McDonnell Douglas* framework as it relates to jury instructions); *Ryther*, 108 F.3d at 846–47 (agreeing that the jury should be instructed as to the burdens of the parties); Lynch v. Belden & Co., 882 F.2d 262, 269 (7th Cir. 1989) (approving instruction to jury on shifting burdens).

312. *See, e.g.*, Whittington v. Nordam Group Inc., 429 F.3d 986, 997–98 (10th Cir. 2005) (asserting that the *McDonnell Douglas* framework increases chances of jury error because of its complexity); Williams v. Eau Claire Pub. Sch., 397 F.3d 441, 446 (6th Cir. 2005) (holding that the *McDonnell Douglas* framework may, but need not, be incorporated into jury instructions); Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 576 (5th Cir. 2004) ("This Court has consistently held that district courts should not frame jury instructions based upon the intricacies of the *McDonnell Douglas* burden shifting

taken an intermediate approach, explaining that "the subtleties of the *McDonnell Douglas* framework are generally inappropriate" for juror consideration, but that judges may find it necessary to propound instructions that contain portions of the framework.[313] As discussed below, each side of this issue highlights more complex problems with *McDonnell Douglas* as an evidentiary standard.

The best argument against construing *McDonnell Douglas* as an evidentiary framework is the fact that the majority of circuits discourage the use of the three-part burden-shifting framework in jury instructions.[314] Thus, if the test is designed to help factfinders sift through evidence to determine whether discrimination has occurred, the courts have essentially made the test meaningless at trial in cases presented to a jury.[315] In these cases, *McDonnell Douglas* has become an evidentiary standard without a factfinder.

There appear to be two different rationales for such holdings. Some courts believe that any discussion of the three-part burden-shifting test in jury instructions would be so confusing that the jury may not be able to render a verdict based on such instructions.[316] Other circuits eliminate *McDonnell*

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analysis"); Sanders v. New York City Human Res. Admin., 361 F.3d 749, 758 (2d Cir. 2004) (commenting that the jury should not be instructed on the *McDonnell Douglas* burden-shifting framework); Brown v. Packaging Corp. of Am., 338 F.3d 586, 592 (6th Cir. 2003) (indicating a preference to avoid using the *McDonnell Douglas* framework in jury instructions); Gordon v. New York City Bd. of Educ., 232 F.3d 111, 118 (2d Cir. 2000) (noting that the burden-shifting issues of *McDonnell Douglas* are not in the realm of the jury); Sharkey v. LASMO, 214 F.3d 371, 374 (2d Cir. 2000) (indicating that *McDonnell Douglas* instructions should not be provided to the jury in an ADEA case); *Dudley*, 166 F.3d at 1322 (emphasizing that *McDonnell Douglas* is inappropriate for jury instruction); *Ryther*, 108 F.3d at 849–50 (Loken, J., dissenting) (concluding that the *McDonnell Douglas* framework should be the province of attorneys and judges); *Gehring*, 43 F.3d at 343 (noting that the "burden-shifting model applies to pretrial proceedings, not to the jury's evaluation of evidence at trial"); Williams v. Valentec Kisco, Inc., 964 F.2d 723, 731 (8th Cir. 1992) (identifying "that the *McDonnell Douglas* 'ritual is not well suited as a detailed instruction to the jury'" (quoting Grebin v. Sioux Falls Indep. Sch. Dist., 779 F.2d 18, 20 (8th Cir. 1985))); *Mullen*, 853 F.2d at 1137 (observing that jury instructions regarding burden-shifting were "overly complex"); Smith v. Univ. of N.C., 632 F.2d 316, 335 (4th Cir. 1980) (explaining that all of the elements of *McDonnell Douglas* may not be relevant to jury instructions).

313. Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 348 (3d Cir. 1999); *see also Armstrong*, 438 F.3d at 249–50 (noting that most aspects of *McDonnell Douglas* are inappropriate for juries but some elements may, nonetheless, be presented to the jury).

314. *See* cases cited *supra* note 312 (providing examples of circuits discouraging the use of the *McDonnell Douglas* framework in jury instructions).

315. *See* Gerrilyn G. Brill, *Instructing the Jury in an Employment Discrimination Case*, 1998 FED. CTS. L. REV. 2, ¶ 4.6 (1998), *available at* http://www.fclr.org/articles/1998fedctslrev2.wpd (noting that once the case is submitted to the jury, the *McDonnell Douglas* formulation is irrelevant).

316. *See, e.g.*, *Sanders*, 361 F.3d at 758 (stating that *McDonnell Douglas* instructions

Douglas from jury instructions not only because of its tendency to be confusing, but also because the courts believe that *McDonnell Douglas* and its related presumptions no longer apply at the trial stage.[317] In these circuits, the "presumption[s] and burdens inherent in the *McDonnell Douglas* formulation drop out of consideration when the case is submitted to the jury on the merits."[318] In other words, the trial judge may use the *McDonnell Douglas* standard to determine whether summary judgment is proper, but once it has served that function, it is no longer appropriate for the factfinder to use the test to make a finding of discrimination.[319]

Considering the degree to which courts have stopped using the framework as an evidentiary standard in the courtroom, it is difficult to articulate how it can continue to be justified as one. Perhaps one way around this dilemma is to characterize the test as an evidentiary standard that can be used by judges in pretrial proceedings and to determine whether a directed verdict is appropriate. However, this characterization also raises problems. To the extent that *McDonnell Douglas* is no longer a trial standard, it appears to occupy a unique procedural niche—one that is not supported by the Federal Rules of Civil Procedure.[320] Under Federal Rule of Civil Procedure 56, a court may only grant summary judgment when the evidence before the court demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[321] The standard for establishing entitlement to a judgment as a matter of law is that "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on

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create a risk of jury confusion); Sanghvi v. City of Claremont, 328 F.3d 532, 540–41 (9th Cir. 2003), (noting that the technical aspects of the *McDonnell Douglas* framework may confuse juries); *Dudley*, 166 F.3d at 1322 (observing that *McDonnell Douglas* jury instructions do not always successfully track the burden-shifting framework and confuse juries); Walther v. Lone Star Gas Co., 952 F.2d 119, 127 (5th Cir. 1992) ("Instructing the jury on the elements of a prima facie case, presumptions, and the shifting burden of proof is unnecessary and confusing.").

317. *See, e.g.*, *Gehring*, 43 F.3d at 343 (indicating that *McDonnell Douglas* is only for use in pretrial proceedings).

318. Messina v. Kroblin Transp. Sys., Inc., 903 F.2d 1306, 1308 (10th Cir. 1990); *see also* Whittington v. Nordam Group Inc., 429 F.3d 986, 998 (10th Cir. 2005) (endorsing *Messina*'s criticism of using the *McDonnell Douglas* framework in jury instructions).

319. *See* Chi. Dist. Council of Carpenters Pension Fund v. Reinke Insulation Co., 347 F.3d 262, 265 (7th Cir. 2003) (commenting that the burden-shifting framework is intended for pretrial proceedings such as summary judgment and discovery and "falls away" at trial).

320. *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (discussing summary judgment standard).

321. FED. R. CIV. P. 56(c).

that issue . . . ."[322] The Federal Rules of Civil Procedure thus contemplate that the court ruling on summary judgment will be using the same standard to determine whether liability is appropriate as that being considered by the jury.[323] However, by isolating *McDonnell Douglas* into a summary judgment standard only, the courts are using one standard to determine whether a case should go to trial and having the jury apply quite a different standard at the trial itself.

This is simply not the approach allowed by the Federal Rules of Civil Procedure.[324] These problems are further highlighted if the court uses the *McDonnell Douglas* framework to determine summary judgment issues and then uses the 1991 amendments to the Civil Rights Act to instruct the jury.[325]

It appears that in the past several years, courts have become uncomfortable with the dichotomy between *McDonnell Douglas* and the trial standard.[326] For example, in a recent decision, the Seventh Circuit held that the outcome of the *McDonnell Douglas* test for the facts at hand was not important.[327] In affirming a grant of summary judgment for the defendant, a panel of the court noted that "[t]he [*McDonnell Douglas*] formula has its place but does not displace the general standards for summary judgment."[328] Therefore, even though the plaintiff had presented evidence that the employer was "bending the rules" to give the available job to a particular applicant, the court found that no reasonable jury would conclude that the rules were bent for discriminatory reasons.[329]

It may be appropriate to argue that *McDonnell Douglas* remains an appropriate jury standard, and that the courts that hold to the contrary are simply wrong. However, even in circuits that allow juries to be instructed on the *McDonnell Douglas*

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

323. *See, e.g.*, Walker v. Abbott Labs., 416 F.3d 641, 645 (7th Cir. 2005) (noting that the judge and jury use the same considerations to determine liability).

324. *Id.* (describing the summary judgment standard and its applicability as a separate standard from the *McDonnell Douglas* framework).

325. Griffith v. City of Des Moines, 387 F.3d 733, 745 n.9 (8th Cir. 2004) (Magnuson, J., concurring) (illustrating the impracticality of applying the *McDonnell Douglas* framework at the summary judgment stage and subsequently employing the Civil Rights Act of 1991 at trial).

326. *See, e.g.*, Helfter v. United Parcel Serv., Inc., 115 F.3d 613, 615–16 (8th Cir. 1997) (noting that while summary judgment should be cautiously granted in employment discrimination claims, the standard for summary judgment is unchanged).

327. *Walker*, 416 F.3d at 645.

328. *Id.*

329. *Id.* at 644–45.

framework,[330] it is not clear that juries use the test as merely a way of analyzing evidence. Instead, juries use the framework to create the elements of the offense itself. As discussed earlier, using the framework to create the elements of a Title VII violation is not supported by the Act's statutory language, legislative history, or broader purposes.[331]

Thus, in these circuits, the jury can be given an instruction indicating that a plaintiff must establish a prima facie case, that once this prima facie case is established an inference of discrimination is created, and that the defendant must rebut this inference by articulating a legitimate, nondiscriminatory reason for its actions.[332] Once the defendant has articulated this reason, the plaintiff must establish that discrimination was the true reason behind the employer's conduct.[333]

It is difficult to construct a believable argument that when jurors are given this instruction, they merely use *McDonnell Douglas* to determine whether circumstantial evidence of

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330. *See, e.g.*, Rodriguez-Torres v. Caribbean Forms Mfr., Inc., 399 F.3d 52, 58 (1st Cir. 2005) (finding that the district court instructed the jury to evaluate the evidence by applying the *McDonnell Douglas* burden-shifting framework); Kozlowski v. Hampton Sch. Bd., 77 F. App'x 133, 141–42 (4th Cir. 2003) (discussing use of the *McDonnell Douglas* framework in jury instructions); Brown v. Packaging Corp. of Am., 338 F.3d 586, 595–98 (6th Cir. 2003) (Clay, J., concurring) (approving the use of *McDonnell Douglas* in jury instructions). *But see* Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1137 (4th Cir. 1988) (noting that "[t]he shifting burdens of production of *Burdine* . . . are beyond the function and expertise of the jury" and are "overly complex").

Even some circuits that do not generally countenance the use of the standard, will find that it is harmless error for such instructions to be given. *E.g.*, Sanders v. New York City Human Res. Admin., 361 F.3d 749, 758–59 (2d Cir. 2004) (finding it was harmless error for the district court to instruct a jury as to the burden-shifting framework); Vincini v. Am. Bldg. Maint. Co., 41 F. App'x 512, 514 (2d Cir. 2002) (finding no error in the administration of *McDonnell Douglas* jury instructions); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999) (deciding that *McDonnell Douglas* jury instructions were harmless error). The Third Circuit allows the court to instruct the jury regarding the factual predicates underlying *McDonnell Douglas*, but not on the burden of articulation that shifts to the defendant. *See* Watson v. Se. Pa. Transp. Auth., 207 F.3d 207, 221 (3d Cir. 2000) (holding that *McDonnell Douglas* instruction on defendant's intermediate burden of production constituted error).

331. *See* Griffith v. City of Des Moines, 387 F.3d 733, 745 (8th Cir. 2004) (Magnuson, J., concurring) (noting that "[t]he burden-shifting framework is not supported in the language of the statute, nor does it impose liability under Title VII").

332. *See supra* Parts III.A–B; *see also* Gafford v. Gen. Elec. Co., 997 F.2d 150, 167 n.9 (6th Cir. 1993) (permitting jury instructions on three-stage framework).

333. *See, e.g.*, *Sanders*, 361 F.3d at 758 (explaining that after the defendant articulates a nondiscriminatory reason for its action, the burden then shifts back to the plaintiff to establish that the reason was pretextual); Cooper v. Paychex, Inc., Nos. 97-1645,-1543,-1720, 1998 WL 637274, at *8 (4th Cir. Aug. 31, 1998) (unpublished table decision) (discussing the burden shifting); Lafate v. Chase Manhattan Bank, 123 F. Supp. 2d 773, 786–87 (D. Del. 2000) (comparing relative weight of shifting burdens of proof between plaintiff and defendant).

discrimination exists. Rather, stronger argument supports the conclusion that jurors actually use the test to determine the elements of a Title VII violation.[334] This is true for several reasons.

First, jurors are not presented with the evidence in a manner that would lead us to believe that they are actually treating the three inquiries of the test separately. At the time that the jurors are considering whether the defendant has articulated a legitimate, nondiscriminatory reason for its actions, the jurors have already heard the plaintiff's evidence about whether such a reason should be believed or not.[335] It strains credulity to believe that jurors are parsing out the evidence of pretext at the time that they are determining whether the defendant has articulated a legitimate, nondiscriminatory reason for its conduct. Further, numerous courts have indicated their doubts about whether lay jurors can understand and apply shifting burdens of production and persuasion.[336] It is both the order of consideration and the shifting burdens that give *McDonnell Douglas* its only arguable usefulness in considering evidence.[337] Yet, neither of these benefits is realized given the current way of presenting evidence and instructing juries.

Second, the use of the three-part test as an actual jury instruction will likely cause juries to overstep the limitations of the test. In subsequent cases, the Supreme Court clarified that determinations relating to steps one and two of the *McDonnell Douglas* framework "can involve no credibility assessment" because "the burden-of-production determination necessarily *precedes* the credibility-assessment stage."[338] As most juries are instructed that they are to be the judges of credibility in a trial, it

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334. *See* Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371, 389 (1997) (contending that juries are not likely to be able to perform the "mental gymnastics" required by the *McDonnell Douglas* framework and noting that, "[a]s a practical matter, the jury will have decided the case when it makes the initial credibility determination").

335. *See* Brill, *supra* note 315, ¶ 4.6 (suggesting that the order in which evidence is presented at trial is not conducive to assessing each part of the framework individually).

336. *See, e.g.*, Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 576 (5th Cir. 2004) (stating that a jury can be mislead by focusing on burden-shifting); *Sanders*, 361 F.3d at 758 (stating that burden-shifting instructions likely confuse juries); Sanghvi v. City of Claremont, 328 F.3d 532, 540–41 (9th Cir. 2003) (discussing jury confusion resulting from instructions including details of the burden-shifting framework); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999) (noting potential jury confusion arising from unfamiliar terminology and complexity of the burden-shifting framework).

337. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 521 (1993) (observing that "the *McDonnell Douglas* presumption is a *procedural* device, designed only to establish an order of proof and production").

338. *Id.* at 509–10 & n.3.

seems likely that absent a contrary instruction, the jury will make credibility assessments in determining whether the plaintiff has produced evidence sufficient to establish a prima facie case. Thus, for example, when a jury is making a determination about whether the plaintiff was qualified for the position in question, it is likely that the jury is weighing the evidence presented by both the plaintiff and the defendant on this issue. Such an inquiry would transform the *McDonnell Douglas* requirement from an evidentiary tool into the actual elements of the case.

B. *Even if* McDonnell Douglas *Is Used Solely as an Evidentiary Framework, Its Heritage Is Not Wholly Satisfying*

While the viability of *McDonnell Douglas* as a trial standard diminishes, it continues to have force as a standard for helping courts to determine whether a plaintiff's evidence is strong enough to survive summary judgment.[339] Even if we assume that *McDonnell Douglas* acts as an evidentiary framework in this context, and that courts have the ability to create burdens of production and persuasion when Congress has failed to do so, *McDonnell Douglas*'s existence still is not completely justified.

When considering whether and how to create such proof structures, courts often use three different considerations: the substantive policy being enforced, the possession of proof, and the probability of a certain set of facts occurring.[340] As discussed in Part II.C, none of these factors were articulated by the Supreme Court when it created the *McDonnell Douglas* test.[341] Importantly, *McDonnell Douglas* is not supported by the three normal considerations that typically are used to create such standards.

It makes sense that when a court is determining how to allocate burdens of production and persuasion in a case, it would "begin with the policy of the substantive law being enforced."[342] Given the broad, remedial purposes of Title VII, it makes sense

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339. Such a discussion must necessarily place aside concerns that the use of a summary judgment standard separate from a trial standard does not appear to be countenanced by the Federal Rules of Civil Procedure. *See supra* Part IV.A (explaining how and why courts struggle to incorporate the *McDonnell Douglas* test and its rationale into jury instructions).

340. WRIGHT & GRAHAM, *supra* note 306, § 5122.

341. *See* Schuman, *supra* note 10, at 69–70 (observing that the *McDonnell Douglas* court failed to justify how the burden-shifting framework furthers the policy goals of Title VII or makes the fact-finding process more efficient).

342. WRIGHT & GRAHAM, *supra* note 306, § 5122.

to allocate the burdens in favor of the plaintiff who "seeks to vindicate the policy of the substantive law."[343]

It is certainly arguable that *McDonnell Douglas*, as originally crafted, accomplished this goal, and that subsequent clarifications of the standard watered down these benefits.[344] However, it is not clear that even in its original iteration, *McDonnell Douglas* favored plaintiffs. As discussed in Part III.A, the prima facie case unnecessarily cramped plaintiffs' cases into a mold that did not fit all factual scenarios where discrimination may have been present. Further, the dichotomy that the standard created between circumstantial and direct evidence unnecessarily complicated the presentation of proof.[345] It also created opportunities for lawyers to argue about which proof structure was appropriate, rather than whether the evidence itself was probative of discrimination.[346] Given the looser standards that were being used by courts prior to the adoption of *McDonnell Douglas*, it is difficult to see how the allocation of burdens under the latter framework favors plaintiffs.

The second factor courts often consider in determining how to allocate burdens of production and persuasion is the probability of certain facts.[347] In other words, courts consider "what is the most likely state of affairs in situations like this?"[348] Courts will often "place the burdens of proof on the party asserting the least probable fact or set of facts."[349] It appears that the *McDonnell Douglas* prima facie case is an attempt to create such a framework.[350] It essentially requires a plaintiff to demonstrate that the most common reasons for the nonhiring of an individual—lack of qualifications, failure to apply, and lack of an open position—are absent.[351] However, as discussed above,

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343. *Id.*

344. *See generally* Malamud, *supra* note 95, at 2275 (mentioning that *McDonnell Douglas* originated as a way of "smoking out" evidence of an employer's adverse action).

345. *See* Smith, *supra* note 334, at 388 (demonstrating that the differing proof schemes for direct and circumstantial evidence frustrate the goals of predictability and utility for the factfinder).

346. *Id.* at 385–86 (observing that adept trial lawyers take advantage of the difficulty in identifying evidence as direct or circumstantial to advantage their client).

347. WRIGHT & GRAHAM, *supra* note 306, § 5122.

348. *Id.* (quoting HENRY BRANDIS & KENNETH S. BROUN, BRANDIS AND BROUN ON NORTH CAROLINA EVIDENCE 127 (5th ed. 1998)).

349. *Id.*

350. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 248, 253–54 (1981) (discussing shifting burdens of presumption and production).

351. *See id.* (noting that the prima facie case functions to eliminate "the most common nondiscriminatory reasons for the plaintiff's rejection").

there are many scenarios when the lack of these elements should not raise an inference of discrimination.[352]

Even ignoring this problem, though, the remaining burdens of the test do not appear to comport with the probability theory of structuring burdens of production and persuasion. If the courts truly believed that the establishment of a prima facie case created a strong inference of discrimination, it would make sense to then place the burden on the defendant to actually prove that discrimination was not the cause of its actions. This is the proof structure that exists for claims brought under a direct evidence framework.[353] That the Court chose not to do so lends substantial credibility to the argument that the prima facie case is not a good tool for creating an inference of discrimination in the first place.[354]

The third factor that courts often consider in allocating burdens is the possession of proof.[355] "Here courts look to see whether one party has superior access to the evidence needed to prove the fact. If so, then that party must bear the burdens of proof."[356] The second prong of the *McDonnell Douglas* framework is designed to address the possession of proof problem.[357] After all, the employer is the entity most likely to know the reason for the employment action.[358] The employer, therefore, is required to at least articulate the reason for its action. However, portions of the prima facie case also appear to be areas where the employer would possess the required evidence. For example, in many instances, the employer possesses information about the qualifications necessary for a position and about whether it continued to seek applicants after a position was filled. Yet, inexplicably, the plaintiff must present some evidence of these factors to make a prima facie case.

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352. *See* Smith, *supra* note 334, at 377–78 (concluding that inferring discriminatory intent based on the plaintiff's presentation of the prima facie case is "logically weak").

353. *See, e.g.*, Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 584 n.10 (6th Cir. 2003) (describing the standard for proving discrimination via direct evidence); Pope v. Rent-A-Ctr., Inc., No. 02-10274-BC, 2003 WL 22867629, at *8 (E.D. Mich. Nov. 26, 2003) (discussing consequences of offering direct evidence).

354. *See* Malamud, *supra* note 95, at 2244–45 (demonstrating that "the prima facie case's evidentiary weakness undermines any attempt to draw a strong inference of discrimination from the proven prima facie case").

355. WRIGHT & GRAHAM, *supra* note 306, § 5122.

356. *Id.* (footnote omitted).

357. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253–54 (1981) (describing shifting burdens of proof).

358. *See* Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. C.R. & C.L. 1, 9 (2005) (observing that the burden-shifting framework acknowledges the employer's greater access to the reasons for its action).

While these underlying issues are problematic, there is a larger concern about why creation of the framework was even necessary in the first place. As discussed earlier, lower courts did not appear to be having problems with weighing evidence in discrimination cases prior to its adoption.[359] And, while the Court has noted that "[c]onventional rules of civil litigation generally apply in Title VII cases," they have failed to explain how the burden-shifting framework enunciated in *McDonnell Douglas* follows these same conventional rules.[360] Further, given the severe flaws in the test, it remains questionable whether the test serves any purpose in litigation that "the general rules of civil litigation do not serve . . . equally well."[361]

C. *A Suggestion to Eliminate or at Least Restrict the Applicability of the* McDonnell Douglas *Test*

It is important to be mindful of the ease of criticizing judicial opinions without discussing a solution to the problems the opinions originally sought to address, albeit imperfectly. To simply disparage the *McDonnell Douglas* test may leave the reader with the impression that while the test is perhaps not perfect, it may be, to recast a phrase from Winston Churchill, the worst way to evaluate discrimination claims, except for all of the other ways that have been tried. To the extent that this Article convinces the reader that the *McDonnell Douglas* test lacks a satisfying connection to Title VII's statutory language, the task then becomes to provide a better regime of proof should the courts decide to abandon the three-part burden-shifting framework.

In evaluating claims of discrimination under Title VII, courts should simply use the standard enunciated in the statutory text itself. In other words, when considering whether a plaintiff has presented enough evidence to proceed to trial or to prevail at trial, the decisionmaker would determine whether there is sufficient evidence to demonstrate "that race, color, religion, sex, or national origin was a motivating factor for any employment practice."[362]

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359. *See* Van Detta, *supra* note 201, at 84–85 (2003) ("Title VII litigation proceeded quite nicely . . . without the 'benefit' of a burden-shifting scheme.").

360. Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989); *see also supra* Part III.A.4.

361. *See* Malamud, *supra* note 95, at 2275 (arguing for the abandonment of the *McDonnell Douglas* structure).

362. 42 U.S.C. § 2000e-2(m) (2000). Although the Author believes that use of the "motivating factor" language is appropriate in both single-motive and mixed-motive cases

This proposal has clear benefits from a textualist statutory-construction perspective as it clarifies that the legal standard to be used by the courts in evaluating claims is the same standard provided by Congress.[363] There is nothing in the legislative history of the statute that suggests that Congress intended the words to be interpreted in a restrictive or counterintuitive manner.[364] From a purposivist perspective, the inquiry focuses the court's attention on whether discrimination occurred, and away from other, often irrelevant, inquiries, such as whether the plaintiff is qualified for the position in question or whether the case is based on circumstantial or direct evidence.

The standard draws strength from the fact that it is already successfully used in single-motive, direct evidence cases[365] and in mixed-motive discrimination cases, whether based on circumstantial or direct evidence.[366] Eliminating this distinction of terminology in single-motive, circumstantial evidence cases would allow the courts to focus more attentively to the real question they are trying to answer when making distinctions between "circumstantial" and "direct" evidence—whether the plaintiff's evidence is actually probative of discrimination, given the content of the language, the identity of the speaker, and the connection between the utterance and the alleged employment action. Under the existing *McDonnell Douglas* standard, it is difficult to make any principled argument for a court's characterization of evidence as circumstantial, rather than direct,[367] and the terminology itself is confusing. Therefore, in

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of discrimination, it should be acknowledged that others may find it appropriate to use the "because of" standard found in § 2000e-2(a)(1) for single-motive cases. Outside of the Title VII context, this proposal would recommend that the courts follow the operative text of the particular discrimination statute.

363. *See* Eskridge & Frickey, *supra* note 140, at 340–41 (noting that textualism strives to adhere to language "chosen by the legislature").

364. *See generally* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 433–42 (1966) (discussing the legislative history of Title VII).

365. *See, e.g.*, Hegger v. Visteon Auto. Sys., Inc., No. 05-5256, 2006 WL 1526092, at *2 (6th Cir. June 2, 2006) ("Direct evidence requires a conclusion by the fact finder that unlawful discrimination was at least a 'motivating factor' for the employer's actions."); Canady v. Wal-Mart Stores, Inc., 440 F.3d 1031, 1034 (8th Cir. 2006) (illustrating a successful use of the motivating factor inquiry).

366. *See, e.g.*, Richardson v. Sugg, Nos. 04-3049, 04-3187, 2006 WL 1445025, at *8–10 (8th Cir. May 26, 2006) (illustrating a successful use of the motivating factor inquiry in a mixed-motive context); Shakir v. Prairie View A&M Univ., No. 05-20010, 2006 WL 1209361, at *4 (5th Cir. Apr. 28, 2006) (noting that plaintiff may use direct or circumstantial evidence).

367. *See, e.g.*, Bergman v. Baptist Healthcare Sys., Inc., No. 04-6435, 2006 WL 126758, at *2 (6th Cir. Jan. 18, 2006) (finding that pregnant plaintiff only presented circumstantial evidence when her supervisor told her that she was a risk the employer was not willing to take, and then terminated her); Peyton v. Kellermeyer Co., No. 03-

many instances, use of the statutory language will relieve the courts of evaluating whether the evidence is direct or circumstantial, and more carefully focus their attention on whether the evidence is probative of discrimination.

One response to using the statutory language as a test would be that such a resolution fails to account for problems in analyzing discrimination cases that existed prior to the formulation of *McDonnell Douglas*. However, as discussed earlier in this Article, it does not appear that prior to the test's adoption that courts were having great difficulty making distinctions between cases where the plaintiff had presented evidence of discrimination and those where the plaintiff had not.[368] None of the *McDonnell Douglas* opinions discuss any wide-scale confusion within the law in this regard.[369]

One suggested benefit of *McDonnell Douglas* is that it forces a defendant to articulate a legitimate, nondiscriminatory reason for its conduct.[370] However, it seems difficult to fathom a case in which the court would not be provided with this information, either through the plaintiff's discovery efforts or through the defendant's articulation of that reason either on summary judgment or at trial.

Given the other problems created by the test, any *de minimis* benefit that the second step provides does not merit further use of the test. Further, there is no evidence that employers were refraining from providing reasons for their conduct before the test was articulated. Again, it is not clear that adoption of this second prong was a response to existing analytical or evidentiary problems.[371]

Although the proof structure suggested here jettisons the three-part framework of the test, the suggested structure still maintains a proper place for the ultimate holding of *McDonnell Douglas*. *McDonnell Douglas* continues to maintain validity to the extent it intended to make it clear that an employer may be liable for discrimination if it fails to hire a qualified individual for

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1657, 2004 WL 2625029, at *3 (6th Cir. Feb. 10, 2004) (describing the distinction between direct and circumstantial evidence as "murky at best").

368. *See supra* text accompanying notes 268–272, 277–280.

369. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 524 (1993) (noting that matters of discrimination are to be treated as all other fact questions).

370. *See* Davis, *supra* note 6, at 861 (observing that the *McDonnell Douglas* framework compels the defendant to provide a nondiscriminatory justification for its adverse employment actions).

371. *See* Spurlock v. United Airlines, Inc., 475 F.2d 216, 218–19 (10th Cir. 1972) (illustrating that the absence of the *McDonnell Douglas* framework did not prevent defendants from coming forward with their claims).

a job and offers a false reason for its conduct.[372] Indeed, in some cases, it will still be helpful to use the *McDonnell Douglas* factors, even if the test is eventually eliminated. For example, in failure-to-hire cases where the employer's proffered reason for its conduct is the plaintiff's lack of qualifications, it makes sense to consider the issues addressed by *McDonnell Douglas*. What makes the test unsound from both statutory and practical vantage points, is that it only describes one part of the universe of discrimination claims. Unfortunately, courts have spent countless wasted efforts trying to cram dissimilar fact patterns into the framework.[373]

To give proper credit to *McDonnell Douglas*, the thirty years the courts have spent struggling with the intricacies of the test have provided a rich source of discussion about which types of cases support claims of discrimination. Pretext will be important in some cases, where the plaintiff has evidence that the employer's proffered reason for its action may not be accurate. However, thinking about claims through the lens of pretext is not always helpful, especially when the facts are not clear regarding whether the case should proceed under a mixed-motive or single-motive framework.

Likewise, the employer's treatment of similarly situated employees will be the key inquiry in certain discrimination cases, but will not play a role in others. If the employer asserts that the plaintiff's qualifications or job performance resulted in an employment action, consideration of an employee's qualifications is probably relevant to the overall inquiry of whether discrimination occurred. However, in cases where an employer claims to have based a decision on criteria other than qualifications, the qualifications of the employee may carry little probative value in determining whether discrimination occurred.

Additionally, this suggestion places employment lawsuits more in line with other types of litigation, where the courts typically consider the elements of the plaintiff's cause of action and then determine whether there is sufficient evidence (depending on the standard required by the procedural posture) for the plaintiff to proceed or prevail.[374] While in some cases it

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372. *See* Chambers, *supra* note 100, at 118 (demonstrating that the *McDonnell Douglas* court required finding for the plaintiff if the employer offered a fabricated reason for the dismissal).

373. *See, e.g.*, Eastridge v. R.I. Coll., 996 F. Supp. 161, 166–67 (D.R.I. 1998) (showing problems that result when analyzing a reverse discrimination case under the *McDonnell Douglas* framework).

374. *See, e.g.*, Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1221 (10th Cir. 2003) (Hartz, J., writing separately) (noting that the *McDonnell Douglas* framework adopts a

may be difficult to determine whether the plaintiff has presented such evidence, this is not a fault of the suggested proof scheme, but rather a difficulty inherent in discrimination itself. Eliminating or significantly restricting the applicability of *McDonnell Douglas* will simplify this inquiry by focusing courts' attention on the ultimate issue, changing employment law to be more procedurally akin to other types of litigation, and encouraging courts to consider discrimination claims in their entirety, rather than as segmented portions of a mechanical test.[375]

V. CONCLUSION

For some, the lack of statutory support for *McDonnell Douglas* is not problematic. In fact, it could be argued that it is just one example of the many statutory constructions enacted by the courts without due consideration for statutory heritage. However, *McDonnell Douglas*'s lack of statutory support has created real problems in interpreting the employment discrimination statutes—problems that have unfortunately plagued and wasted the attention of numerous courts and litigants over the past four decades.[376]

From a policy perspective, reconsideration of the standard is especially necessary because it appears to have few benefits.[377] Indeed, many have argued that the benefits of *McDonnell Douglas* have been "eroded" by subsequent case law.[378] And, one commentator noted that the only "marginal benefit of *McDonnell Douglas* . . . [is] forcing the defendant to articulate an explanation for the challenged employment action."[379] However, as noted earlier in the Article, prior to *McDonnell Douglas*, defendants were already proffering the reasons for their employment actions.[380] Perhaps, the most severe critique of the

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unique approach in evaluating sufficiency of the plaintiff's evidence).

375. *See, e.g.*, Fierro v. Saks Fifth Ave., 13 F. Supp. 2d 481, 488 (S.D.N.Y. 1998) (eschewing the *McDonnell Douglas* burden-shifting analysis in favor of proceeding "directly to the real issues presented by a plaintiff s [sic] claims").

376. *See generally* Davis, *supra* note 308, at 711–26 (criticizing all aspects of the three-part *McDonnell Douglas* framework).

377. *See id.* at 711 (discussing confusion and uncertainty caused by the *McDonnell Douglas* framework).

378. *See* Davis, *supra* note 6, at 862 (suggesting that the *McDonnell Douglas* framework has largely been superseded).

379. *Id.*

380. *Id.* at 861 (arguing that employers submit proof that their actions were nondiscriminatory even without the *McDonnell Douglas* framework).

test is that "[e]ven when applied properly, *McDonnell Douglas* may defeat an otherwise meritorious civil rights claim."[381]

While these policy arguments are important, one of the strongest arguments in favor of eliminating the standard, or at least diminishing its importance, is that the standard was adopted without proper regard to the operative text, the legislative history, and the broad policies of Title VII. While it arguably may have been appropriate to justify this lapse in the past by claiming that the test was merely an evidentiary standard and could be created through the Supreme Court's supervisory authority, this argument is no longer compelling. Courts have begun to water down or eliminate *McDonnell Douglas*'s use as an evidentiary standard, and, in the process, weakened the argument for its continued legitimacy.[382] Now is the time to reconsider the legal heritage and appropriateness of *McDonnell Douglas*.

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381. Davis, *supra* note 308, at 707.

382. *See supra* Part IV.A.