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# Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith

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# ARTICLE

## RECREATING DIVERSITY IN EMPLOYMENT LAW BY DEBUNKING THE MYTH OF THE *MCDONNELL DOUGLAS* MONOLITH

*Sandra F. Sperino\**

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## I. INTRODUCTION

Discrimination laws serve an important societal function. The laws serve to debunk myths by making it illegal for employers to act on unjustified stereotypes of employees based on certain protected traits. Unfortunately, the employment discrimination field continues to be dominated by a myth of another kind—the idea that the standard enunciated in *McDonnell Douglas Corp. v. Green*<sup>1</sup> is a monolithic framework that should identically apply to both state and federal discrimination claims.

Although realizing that prongs of the test may change depending on the type of claim before the court, both courts and litigants often assume that once a particular claim is identified, the prongs of *McDonnell Douglas* are fairly stable.<sup>2</sup> This assumption leads to a somewhat formulaic result: The federal courts apply the same *McDonnell Douglas* test to claims brought not only under federal antidiscrimination statutes but also to claims brought pursuant to often similar, but not identical, state antidiscrimination laws.<sup>3</sup>

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1. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

2. *Id.* at 802 (holding that if a plaintiff establishes a prima facie case of discrimination, then the burden to proffer a nondiscriminatory justification shifts to the defendant).

3. *See, e.g., Gallo-Loeks v. US W. Commc'ns, Inc.*, 57 F. App'x 846, 847–48 (10th

Such a result is unwarranted in all circumstances.<sup>4</sup> Any careful study of *McDonnell Douglas* reveals that it is not a monolithic test but rather a collection of tests gathered deceptively under one name. While the singular term "*McDonnell Douglas* framework" can be used to describe a three-part burden-shifting framework, use of this general term does not mean that there is agreement regarding the specific factors that comprise the test.

One example is the current debate over whether reverse-discrimination plaintiffs should be required to prove more than other discrimination plaintiffs to obtain an inference of discrimination.<sup>5</sup> Despite the important policy decisions that underlie this debate, courts assume, with little discussion, that a state claim will rely on whatever version of *McDonnell Douglas* is being advocated by the particular federal court considering the issue.<sup>6</sup> This truncated analysis ignores the important role that state law can play in fostering innovation within the field of employment discrimination law, and diminishes the choices of sovereign political entities that should be respected.

Not only have federal courts asserted the singularity of *McDonnell Douglas*, they have also assumed that state courts will follow the federal lead regarding the circumstances in which the test is applicable.<sup>7</sup> There is currently wide disagreement in the federal system about whether *McDonnell Douglas* should apply in mixed-motive cases, whether *McDonnell Douglas* has been superseded by the Civil Rights Act of 1991, how and whether the framework should be incorporated into jury

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Cir. 2003) (noting the plaintiff did not argue that a different standard would apply to her state law claims); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801–02 (6th Cir. 1994) (indicating Kentucky law would apply to state law claims and applying the federal *McDonnell Douglas* standard because Kentucky law follows the *McDonnell Douglas* analysis in "so-called reverse discrimination" cases).

4. See generally Alex B. Long, "If the Train Should Jump the Track . . .": *Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 483 (2006) (noting the divergence between federal and state employment law is widening as states begin interpreting their antidiscrimination statutes independently of federal law).

5. See generally Brenda D. Diluigi, Note, *The Notari Alternative: A Better Approach to the Square-Peg-Round-Hole Problem Found in Reverse Discrimination Cases*, 64 BROOK. L. REV. 353, 355–56 (1998) (discussing the varying burdens placed on reverse-discrimination plaintiffs for proving a prima facie case).

6. See *infra* Part III.C.1 (examining the various state approaches to reverse-discrimination standards, and concluding that federal courts in diversity cases often erroneously assume that the federal standard, rather than the state standard, applies); see also, e.g., *Jones v. United Parcel Serv., Inc.*, 461 F.3d 982, 993 (8th Cir. 2006) (assuming that the federal *McDonnell Douglas* framework applies to a Kansas whistleblower retaliation claim).

7. See *infra* Part III.C.1.

instructions, and whether the framework can be expanded to apply to other statutes.<sup>8</sup> Despite this widespread disagreement, federal courts considering state claims often do not investigate whether a particular state would weigh in differently on these matters than the federal court considering the issue.

The beliefs that state courts will apply the same *McDonnell Douglas* test, and in the same circumstances as federal courts, have resulted from generalizations about state law as well as unwarranted assumptions and incomplete analysis by the courts. Educating courts and litigants alike about the issues, and encouraging a more thorough dialogue about the importance of both state and federal precedent in employment law, can change these erroneous beliefs.

However, some courts have attempted to memorialize the dominance of *McDonnell Douglas* by characterizing it as procedural for purposes of vertical choice of law,<sup>9</sup> a mechanism that improperly ends the debate on the important questions about *McDonnell Douglas*'s continuing role in employment discrimination law. Courts that have justified the application of *McDonnell Douglas* to state claims through this choice of law analysis have reasoned that because *McDonnell Douglas* is procedural in nature, federal courts are not required to defer to state law when exercising diversity or supplemental jurisdiction over state antidiscrimination claims.<sup>10</sup>

This finding is contrary to the Supreme Court's vertical choice of law jurisprudence<sup>11</sup> and undervalues the substantive diversity that states can and should provide in developing discrimination laws. Despite the potential federalism problems that improper vertical choice of law characterization will bring to employment law, there is little academic commentary on the intersection of these two principles. The void is so notable that

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8. See generally William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549, 1557–59 (2005) (discussing the applicability of *McDonnell Douglas* in various employment discrimination contexts).

9. *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1090–92 (9th Cir. 2001) (applying the doctrine and progeny of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), which held that federal courts should follow state substantive law but federal procedural law in diversity of citizenship cases); *McEwen v. Delta Air Lines, Inc.*, 919 F.2d 58, 59–60 (7th Cir. 1990) (finding the burden-shifting framework of Title VII to be procedural because it did not affect “the risk of nonpersuasion”).

10. See, e.g., *Snead*, 237 F.3d at 1090–92; *McEwen*, 919 F.2d at 59–60.

11. Cf. *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 416, 427–28 (1996) (summarizing the emergence and evolution of the “outcome-determinative” test in key Supreme Court decisions); *Hanna v. Plumer*, 380 U.S. 460, 466–67 (1965) (indicating that the determination of whether to apply state procedural law should turn on ensuring consistency of the resulting decision in both forums to avoid “forum shopping”).

Judge Richard Posner has even mentioned the lack of scholarship on this topic.<sup>12</sup>

To protect the important role of state law in developing employment discrimination laws, courts must recognize that *McDonnell Douglas* is not a monolith, that states have important contributions to make on the debate regarding what factors comprise the framework and how the framework should be used, and that the use of a procedural characterization to apply a federal framework to state discrimination claims is not appropriate. Part II of this Article begins by explaining the important role that state law has played in the development of employment law. Part III explains how courts have unintentionally assumed the monolithic nature of *McDonnell Douglas* and the consequences this idea has on the development of frameworks for analyzing discrimination. Part IV discusses how the improper application of vertical choice of law principles will undermine continued debate about *McDonnell Douglas* and its proper role in employment discrimination litigation. Part V concludes by urging courts to characterize the test as substantive for purposes of vertical choice of law and to better recognize the importance of state law in developing the field of employment discrimination law.

## II. THE IMPORTANCE OF STATE LAW IN DEVELOPING DISCRIMINATION LAW

As a descriptive matter, employment law in the United States is properly characterized as a form of interactive, cooperative, or “polyphonic” federalism.<sup>13</sup> The federal

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12. *Bourbon v. Kmart Corp.*, 223 F.3d 469, 474 (7th Cir. 2000) (Posner, J., concurring) (noting the lack of “any illuminating scholarly discussions of the issue”).

13. See, e.g., Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 249 (2005) (explaining that, unlike cooperative federalism, “polyphonic” federalism “recognizes an important role for competition among states and between states and the federal government”). By making this descriptive claim, the Author does not intend to make any normative claims about federalism as it relates to employment discrimination law. Such a discussion is beyond the scope of this Article. See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1485 (1994) (“Talking about federalism feels a bit like joining the proverbial blind men trying to describe an elephant. It’s such a big topic, one can’t possibly hope to grasp more than a small part of the beast.”). Additionally, arguing that the federal courts should be more deferential to notions of federalism is not intended to critique the fact that portions of employment law have been federalized. Given the history of discrimination within this country and the likely reluctance of some states to pass any legislation prohibiting employment discrimination, it is important to have federal laws that provide some liability for discriminatory conduct. See Alberto B. Lopez, *Forty Yeas and Five Nays—The Nays Have It: Morrison’s Blurred Political Accountability and the Defeat of the Civil Rights Provision of the Violence Against Women Act*, 69 GEO. WASH. L. REV. 251, 283 (2001) (suggesting

government, through statutes such as the Americans with Disabilities Act (ADA),<sup>14</sup> the Age Discrimination in Employment Act (ADEA),<sup>15</sup> Title VII of the Civil Rights Act of 1964 (Title VII)<sup>16</sup> and amendments to Title VII in the Civil Rights Act of 1991,<sup>17</sup> prohibits certain types of employers from engaging in discrimination against employees on the basis of the statutorily defined traits of disability, age, race, color, national origin, gender, and religion. All fifty states also have enacted statutes that prohibit discrimination in the workplace.<sup>18</sup>

Given the overlay of federal statutes prohibiting discrimination, some may wonder whether the benefits of state law can still be feasibly argued in the employment discrimination context. The limitations of the federal discrimination statutes clearly demarcate areas where states can and do play an

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that the federal government, not the states, "best protects the interests of minority groups"). However, when enforcing state laws, federal courts should provide due deference to the states.

14. 42 U.S.C. §§ 12,101–12,213 (2000).

15. 29 U.S.C. §§ 621–634 (2000).

16. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

17. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.).

18. See ALA. CODE §§ 25-1-21 to -28 (LexisNexis 2000); ALASKA STAT. § 18.80.220 (2004); ARIZ. REV. STAT. ANN. §§ 41-1463 to -1465 (2004); ARK. CODE ANN. § 16-123-107(a)(1) (2006); CAL. GOV'T CODE §§ 12,920–12,926 (West 2005); COLO. REV. STAT. § 24-34-402 (2006); CONN. GEN. STAT. ANN. § 46a-60 (West 2004); DEL. CODE ANN. tit. 19, § 711 (2005); FLA. STAT. ANN. § 760.10 (West 2005); GA. CODE ANN. §§ 45-19-29 to -35 (2002); HAW. REV. STAT. ANN. §§ 378-2 to -3 (LexisNexis 1999); IDAHO CODE ANN. §§ 67-5909 to 67-5910 (2006); 775 ILL. COMP. STAT. ANN. 5/2-102 to -105 (LexisNexis 1993 & Supp. 2003); IND. CODE ANN. §§ 22-9-1-3, 22-9-2-2, 22-9-5-19 (LexisNexis 1997); IOWA CODE ANN. § 216.6 (West 2000); KAN. STAT. ANN. § 44-1009 (2000); KY. REV. STAT. ANN. §§ 344.040–.050 (LexisNexis 2005); LA. REV. STAT. ANN. §§ 23:312, :323, :332, :342, :352, :368 (1998 & Supp. 2007); ME. REV. STAT. ANN. tit. 5, §§ 4572–4573 (2002); MD. ANN. CODE art. 49B, §§ 14, 16 (2003); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2004 & Supp. 2006); MICH. COMP. LAWS ANN. §§ 37.2102, .2202–.2206 (West 2001); MINN. STAT. ANN. § 363A.08 (West 2004); MISS. CODE ANN. §§ 25-9-103, 25-9-149 (West 2003); MO. ANN. STAT. §§ 213.010, .055 (West 2004); MONT. CODE ANN. §§ 49-2-101, 49-4-303 (2005); NEB. REV. STAT. §§ 48-1101 to -1115 (2004); NEV. REV. STAT. ANN. §§ 613.330–.390 (LexisNexis 2006); N.H. REV. STAT. ANN. §§ 354-A:1 to :7 (LexisNexis 2001); N.J. STAT. ANN. §§ 10:5-4, -12 (West 2002); N.M. STAT. ANN. §§ 28-1-7, 28-1-9 (LexisNexis 2005); N.Y. EXEC. LAW §§ 291, 296 (McKinney 2005); N.C. GEN. STAT. §§ 143-422.1 to .3 (2005); N.D. CENT. CODE §§ 14-02.4-03 to 14-02.4-09 (2004); OHIO REV. CODE ANN. § 4112.02 (LexisNexis 2001); OKLA. STAT. ANN. tit. 25, §§ 1302–1308 (1987); OR. REV. STAT. §§ 659A.006, .009, .030 (2005); 43 PA. CONS. STAT. ANN. § 955 (West 1991); R.I. GEN. LAWS §§ 28-5-1 to -7 (2003); S.C. CODE ANN. §§ 1-13-10 to -80 (2005); S.D. CODIFIED LAWS § 20-13-10 (2004); TENN. CODE ANN. §§ 4-21-401 to -408 (2005); TEX. LAB. CODE ANN. §§ 21.051–.055 (Vernon 2006); UTAH CODE ANN. §§ 34A-5-101 to -106 (2005); VT. STAT. ANN. tit. 21, § 495 (2003); VA. CODE ANN. § 2.2-2639 (2005); WASH. REV. CODE ANN. §§ 49.60.040, 49.60.180 (West 2002 & Supp. 2007); W. VA. CODE ANN. §§ 5-11-3, -9 (LexisNexis 2006); WIS. STAT. ANN. §§ 111.321–.322 (West 2002); WYO. STAT. ANN. §§ 27-9-101 to -105 (2005).

important role in developing the law. For example, the term “employer” is defined under each of the major federal statutes as only covering those employers with a certain minimum number of employees. Employees who work for companies with fewer than fifteen employees do not fall within the protections of Title VII, and an employer must have at least fifty employees to fall within the reach of the Family and Medical Leave Act (FMLA).<sup>19</sup> As a result, individuals who work for smaller employers must rely on state statutes for discrimination protection.<sup>20</sup>

Likewise, some federal statutes do not provide the same incentives for plaintiffs to sue for discrimination. A plaintiff proceeding under the ADEA cannot recover punitive damages or emotional distress damages;<sup>21</sup> however, many states’ statutes

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19. 29 U.S.C. § 2611(4)(A) (2000) (defining the term “employer” under the Family and Medical Leave Act (FMLA) to mean “any person . . . who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year”); 42 U.S.C. § 2000e(b) (2000) (defining the term “employer” under Title VII to include only those employers with at least fifteen employees).

20. See, e.g., ALASKA STAT. §§ 18.80.220, 18.80.300(4) (2004) (applying the antidiscrimination statute to employers with 1 or more employees within the state); ARK. CODE ANN. §§ 16-123-102(5), 16-123-107 (2006) (9 or more); CAL. GOV’T CODE §§ 12926(d), 12940 (West 1992 & Supp. 2007) (5 or more); COLO. REV. STAT. §§ 24-34-401(3), 24-34-402 (2006) (1 or more); CONN. GEN. STAT. ANN. §§ 46a-51(10), 46a-60 (West 2004) (3 or more); DEL. CODE ANN. tit. 19, §§ 710(6), 711 (2005) (4 or more); HAW. REV. STAT. ANN. §§ 378-1 to -2 (LexisNexis 1999 & Supp. 2001) (1 or more); IDAHO CODE ANN. §§ 67-5902(6), 67-5909 (2006) (15 or more); IND. CODE ANN. §§ 22-9-1-2 to 22-9-1-3(h) (West 1997) (6 or more); IOWA CODE ANN. §§ 216.2(7), .6 (West 2000) (1 or more); KAN. STAT. ANN. §§ 44-1002(b), -1009 (2000) (4 or more); KY. REV. STAT. ANN. §§ 344.030(2), 344.040 (LexisNexis 2005) (8 or more); ME. REV. STAT. ANN. tit. 5, §§ 4553(4), 4572 (2006) (1 or more); MASS. GEN. LAWS ANN. ch. 151B, § 1(5) (West 2004) (6 or more); MICH. COMP. LAWS ANN. §§ 37.2201(a), 37.2202 (West 2001) (1 or more); MINN. STAT. ANN. §§ 363.03(16), 363.08 (West 2004) (1 or more); MO. ANN. STAT. §§ 213.010(7), 213.055 (West 2004) (6 or more); MONT. CODE ANN. §§ 49-2-101(11), 49-2-303 (2005) (1 or more); N.H. REV. STAT. ANN. § 354-A:2(VII), 354-A:7 (LexisNexis 2001) (6 or more); N.J. STAT. ANN. §§ 10:5-4, 10:5-5(e) (West 2002) (1 or more); N.M. STAT. ANN. §§ 28-1-2(B), 28-1-7 (LexisNexis 2000) (4 or more); N.Y. EXEC. LAW §§ 292(5), 296 (McKinney 2005); N.D. CENT. CODE §§ 14-02.4-02(7), 14-02.4-03 (2004) (1 or more); OHIO REV. CODE ANN. §§ 4112.01(A)(2), 4112.02 (LexisNexis 2001) (4 or more); OR. REV. STAT. § 659A.001(4), 659A.006 (2005) (1 or more); 43 PA. CONS. STAT. ANN. §§ 954(b), 955 (West Supp. 2006) (4 or more within state); R.I. GEN. LAWS §§ 28-5-6(7), 28-5-7 (2003) (4 or more); S.D. CODIFIED LAWS §§ 20-13-1(7), 20-13-10 (2004) (1 or more); TENN. CODE ANN. §§ 4-21-102(4), 4-21-401 (2005) (8 or more); VT. STAT. ANN. tit. 21, §§ 495, 495d(2) (2001) (1 or more within state); VA. CODE § 2.2-2639 (2005) (6 or more); WASH. REV. CODE ANN. §§ 49.60.040(3), 49.60.180 (West 2002 & Supp. 2007) (8 or more); W. VA. CODE ANN. §§ 5-11-3(d), 5-11-9 (LexisNexis 2006) (12 or more); WIS. STAT. ANN. §§ 111.32(6), 111.321, 111.322 (West 2002) (1 or more); WYO. STAT. ANN. §§ 27-9-102(b), 27-9-105 (2005) (2 or more).

21. 29 U.S.C. § 216(b) (2000); see also *Comm’r Internal Revenue v. Schleier*, 515 U.S. 323, 325-26 (1995) (explaining the damages available under the Age Discrimination in Employment Act (ADEA)); *Villescas v. Abraham*, 311 F.3d 1253, 1257 (10th Cir. 2002) (same); *Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 773 (7th Cir. 2002) (same). Although punitive damages are not available under the ADEA, plaintiffs may obtain liquidated



grant age discrimination plaintiffs the ability to recover both types of damages.<sup>22</sup> Under Title VII, the amount of punitive and emotional distress damages that a plaintiff may obtain is limited by statutory caps.<sup>23</sup> These caps are not present in some state statutory schemes.<sup>24</sup> As these examples demonstrate, federal discrimination legislation does not protect all employees and does not provide plaintiffs with the same remedies as state counterparts. State discrimination laws, therefore, still play an important role in this overlapping system of employment legislation.

When discussing federalism, commentators often list four common benefits, all of which apply in the employment context. "[T]hese are public participation, effectuating citizen choice through competition among jurisdictions, achieving economic efficiency through competition among jurisdictions, and encouraging experimentation."<sup>25</sup> By discussing each of these benefits, and the results they have yielded in other portions of discrimination law, I hope to demonstrate why proper deference to the states' development of *McDonnell Douglas* is important.

One of the benefits of our system of federalism is the role that the states play in serving as a "laboratory" for the development of legislation.<sup>26</sup> This role was perhaps most eloquently stated by Justice Louis Brandeis when he opined:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.<sup>27</sup>

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damages if the violation was willful. 29 U.S.C. § 216(b) (2000).

22. See, e.g., *Morse v. S. Union Co.*, 174 F.3d 917, 924 (8th Cir. 1999) (noting that punitive damages are available under Missouri's age discrimination statute); *Hipp v. Liberty Nat'l Life Ins. Co.*, 39 F. Supp. 2d 1359, 1364 (M.D. Fla. 1999) (same for Florida); *United Servs. Auto. Ass'n v. Brite*, 161 S.W.3d 566, 575 (Tex. App.—San Antonio 2005) (same for Texas), *rev'd on other grounds*, 215 S.W.3d 400 (Tex. 2007); *Pelletier v. Rumpke Container Serv.*, 753 N.E.2d 958, 964 (Ohio Ct. App. 2001) (same for Ohio).

23. 42 U.S.C. § 1981a(b)(3) (2000).

24. See, e.g., *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 576 (8th Cir. 1997) (indicating that Missouri law would not apply the same statutory caps as Title VII); *Whitten v. Cross Garage Corp.*, No. 00-Civ.5333 JSM FM, 2003 WL 21744088, at \*5 (S.D.N.Y. July 9, 2003) (same as to New York state discrimination law).

25. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 914 (1994).

26. See, e.g., Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 908 (2000).

27. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

In other words, states may develop different solutions to discrimination problems than the federal government and “may serve as ‘laboratories of experimentation’ that help identify the most effective laws.”<sup>28</sup>

These experiments with the contours of employment law can be seen in many different ways. Given the rather restrictive definition of “disability” in the federal courts under the ADA, many states have broadened the definition in their statutes.<sup>29</sup> While the federal ADEA limits age discrimination claims to those aged forty or older, some state statutes allow age claims to be brought by any employee.<sup>30</sup> While most of the federal statutes do not allow for individual liability, some of their state counterparts do provide individual liability.<sup>31</sup> These areas demonstrate ways in which the states are experimenting with different approaches to employment law.

Scholars also point to the competitive benefits of federalism, where states attempt to attract businesses or individuals to their

28. Simons, *supra* note 26, at 908.

29. See, e.g., CAL. GOV'T CODE § 12926(k)(1)(B) (West 1992 & Supp. 2007) (defining a disability as, inter alia, a condition that “limits” a major life activity); CONN. GEN. STAT. § 46a-51(15) (2004) (defining disability to include “any chronic physical handicap, infirmity, or impairment”); EEOC v. United Parcel Serv., Inc., 424 F.3d 1060, 1068–69 (9th Cir. 2005) (discussing differences between the Americans with Disabilities Act (ADA) definition of disability and the California statute’s definition of that term); Beason v. United Techs. Corp., 337 F.3d 271, 277 (2d Cir. 2003) (discussing how the Connecticut statute’s definition of “disability” is broader than the definition provided by the ADA).

30. See, e.g., ALASKA STAT. § 18.80.220 (2004) (not providing an age limit for discrimination claims); CONN. GEN. STAT. ANN. § 46a-60 (West 2004) (same); FLA. STAT. ANN. §§ 112.043, 112.044, 760.10 (West 2005) (same); HAW. REV. STAT. § 378-2 (LexisNexis 1999 & Supp. 2005) (same); IOWA CODE ANN. § 216.6 (West 2000) (defining age discrimination to include individuals at least eighteen years of age); KAN. STAT. ANN. §§ 44-1112 to -1113 (2000) (same); KY. REV. STAT. ANN. §§ 344.040, 344.050, 344.060 (LexisNexis 2005); ME. REV. STAT. ANN. tit. 5, §§ 4571–4572 (2006) (not providing an age limit for discrimination claims); MD. CODE ANN., LAB. & EMPL. §§ 14, 16 (LexisNexis 2003) (same); MICH. COMP. LAWS ANN. § 37.2202 (West 2001) (same); MINN. STAT. ANN. §§ 363A.03, 363A.08 (West 2004) (defining age discrimination to include individuals at least twenty-five years of age); MONT. CODE ANN. §§ 49-1-102, 49-2-101 (2005) (not providing an age limit for discrimination claims); NEV. REV. STAT. § 613.330 (LexisNexis 2006) (same); N.H. REV. STAT. ANN. §§ 354-A:1, 354-A:6 to :7 (LexisNexis 2001) (same); N.M. STAT. ANN. § 28-1-7 (LexisNexis Supp. 2005) (same); N.Y. EXEC. LAW § 296 (McKinney 2005) (same); OR. REV. STAT. §§ 659A.009, 659A.030 (2005) (same); VT. STAT. ANN. tit. 21, § 495 (2001) (defining age discrimination to include individuals at least eighteen years of age). In contrast, some states have placed an upper age limit on age discrimination claims. See, e.g., COLO. REV. STAT. §§ 24-34-301, 24-34-402 (2006) (providing protection to individuals age forty through seventy); GA. CODE ANN. §§ 45-19-21, 45-19-28 to 45-19-29 (2002) (same); IND. CODE ANN. §§ 22-9-2-1 to 22-9-2-3 (West 2004) (same); MO. ANN. STAT. §§ 213.010, 213.055 (West 2004) (same); NEB. REV. STAT. §§ 48-1001, 48-1003 (2004) (same).

31. See, e.g., Thompson v. City of Memphis, 86 F. App'x 96, 103 (6th Cir. 2004) (discussing how Title VII does not provide for individual liability but noting that the Tennessee discrimination statute provides such liability for certain individuals).

states by developing an attractive package of laws. While such a competitive paradigm may also promote the so-called "race to the bottom," in the field of employment discrimination, the federal discrimination legislation prevents this from occurring, as it provides incentives for most employers to provide protection against discrimination.<sup>32</sup> Given the federal overlay, in many instances, the states exhibit "race to the top" behavior, protecting broader categories of individuals from discrimination than the federal counterpart.<sup>33</sup>

These competitive benefits can be seen in other areas as well. In many instances, state statutes provide plaintiffs with additional remedies they would not have under federal legislation.<sup>34</sup> Given the dissatisfaction with litigation as a mechanism for resolving discrimination disputes, some states attempt to resolve discrimination problems primarily through administrative processes, rather than the litigation-reliant model provided by the federal system.<sup>35</sup>

States also foster public participation and provide a mechanism for citizen choice that is not available at the national level. While protecting certain types of discriminatory conduct at the federal level would be politically difficult, citizens in some states have the political will to effectuate such a choice, and have done so through state legislation. Thus, "[l]ocal decisionmakers are more likely than centralized ones to be attuned to local concerns and responsive to the local electorate."<sup>36</sup> For example, while no federal statute prohibits employment discrimination in the private sector based on sexual orientation, several states have enacted statutes prohibiting such discrimination.<sup>37</sup> In a

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32. See Michael Mankes, Comment, *Combatting Individual Employment Discrimination in the United States and Great Britain: A Novel Remedial Approach*, 16 COMP. LAB. L.J. 67, 115-16 (1994) (indicating that enhanced remedies encourage employees to come forward with claims and, correspondingly, employers are more likely to take precautions against discriminatory practices).

33. See *infra* notes 36-37 and accompanying text.

34. See *supra* notes 20, 30 and accompanying text.

35. See, e.g., 775 ILL. COMP. STAT. 5/7A-10 to 5/7B-104. (LexisNexis 1993 & Supp. 2003) (providing administrative process for resolution of discrimination claims); *Pierson v. Univ. Orthopedics, S.C.*, 668 N.E.2d 180, 183 (Ill. App. Ct. 1996) (explaining that trial court does not typically have jurisdiction over claims brought pursuant to the Illinois Human Rights Act).

36. Simons, *supra* note 26, at 908.

37. CAL. GOV'T CODE § 12,920 (West 2005); HAW. REV. STAT. § 368-2 (1993) (prohibiting employment discrimination on the basis of sexual orientation); 775 ILL. COMP. STAT. 5/1-102A (2006); WASH. REV. CODE ANN. § 49.60.180 (West 2002 & Supp. 2007).

similar vein, some states protect the victims of domestic violence against discrimination in the workplace.<sup>38</sup>

As these examples demonstrate, the system of federalism adds diversity to the legal discussion about the contours of discrimination and how it should be remedied. As discussed below, similar benefits can be achieved by recognizing that the federal versions of the *McDonnell Douglas* standard should not place a complete stranglehold on state development of the standard. Before exploring the ways that states can contribute to this development, it is important to examine the ways in which the federal courts limit state involvement in this important area of the law.

### III. CREATING AND MAINTAINING THE MONOLITHIC MYTH

Like many myths, the idea that the *McDonnell Douglas* standard is a monolith has some basis in fact. It is true that some states would apply the same *McDonnell Douglas* standard as federal courts when addressing particular types of discrimination claims.<sup>39</sup> This basic principle has been embellished over the years to become an assumption by both courts and litigants that most states will follow the federal *McDonnell Douglas* standard and that this standard is actually a singular enunciation for any particular type of discrimination case.<sup>40</sup>

Thus, the monolithic myth begins when courts extend the initial truism in unwarranted ways. First, it appears that in many cases, both courts and litigants assume that *McDonnell Douglas* will apply to state law claims of discrimination based on circumstantial evidence.<sup>41</sup> Second, once this assumption is made,

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38. See, e.g., 820 ILL. COMP. STAT. ANN. 180/1 to 180/999 (LexisNexis 1993 & Supp. 2003) (Victims' Economic Security and Safety Act).

39. See, e.g., *Adkins v. United Food & Commercial Workers Int'l Union, Local 7*, 16 F. App'x 855, 859–60 (10th Cir. 2001) (citing both federal cases and state cases in support of using *McDonnell Douglas* standard); *Ross v. Int'l Bus. Machs. Corp.*, No. 2:04-CV-103, 2006 WL 197137, at \*11–14 (D. Vt. Jan. 24, 2006) (same).

40. Some may question whether the benefits of considering the state law concerns outweigh the complexity and confusion that may result from their recognition. As an initial matter, vertical choice of law issues often become complex, and the complexity alone does not warrant the conclusion that the courts should rely on a faulty, but simpler way of addressing issues. Additionally, other problems with the *McDonnell Douglas* standard warrant proper application of state law to state law claims when that law differs from *McDonnell Douglas*. See generally Sandra Sperino, *Flying Without a Statutory Basis: Why McDonnell Douglas Is Not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743 (2006).

41. See, e.g., *Acree v. Tyson Bearing Co.*, 128 F. App'x 419, 429–30 (6th Cir. 2005) (assuming that the *McDonnell Douglas* framework applied to age discrimination cases under Kentucky state law).

the federal courts engage in scant analysis about whether the state has articulated the same *McDonnell Douglas* standard as the federal court.<sup>42</sup> There are several key areas of employment discrimination law where such an assumption is unwarranted, and where employment law could benefit from a broader discussion about applicable proof standards. It is important to analyze the legal reasoning, or lack thereof, that allows perpetuation of this monolithic belief about *McDonnell Douglas*, even where such a belief is clearly not appropriate.

#### A. *The McDonnell Douglas Framework*

Before discussing whether state laws conform to the federal *McDonnell Douglas* standard, it is important to understand the history and development of the standard itself. In 1973, the Supreme Court addressed the question of whether Percy Green, a former *McDonnell Douglas* employee, could proceed on his failure-to-hire claims based on circumstantial evidence.<sup>43</sup> In affirming Mr. Green's ability to proceed on such evidence, the Supreme Court also laid out its now familiar three-part burden-shifting framework to aid the lower courts in the consideration of circumstantial evidence.<sup>44</sup> To prevail on a claim of discrimination based on circumstantial evidence, a plaintiff is required to first:

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.<sup>45</sup>

The burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."<sup>46</sup> The plaintiff is then provided the "opportunity to

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42. See, e.g., *Higgins v. Johnson County Med. Labs. Inc.*, No. 95-2295-JWL, 1996 WL 707102, at \*3 n.5 (D. Kan. Nov. 15, 1996) (assuming that *McDonnell Douglas* standard would apply to Kansas antidiscrimination statute).

43. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803-04 (1973).

44. At the time, plaintiffs bringing claims under Title VII did not have the right to a jury trial. The right to a jury trial was added in the Civil Rights Act of 1991. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981a(c) (2000)); *Republic of Austria v. Altmann*, 541 U.S. 677, 692 (2004) (discussing addition of right to jury trial).

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

46. *Id.*

show that petitioner's stated reason for respondent's rejection was in fact pretext."<sup>47</sup> The court noted that the facts required to prove a *prima facie* case will vary depending on the factual scenario.<sup>48</sup>

The Supreme Court characterized the *McDonnell Douglas* case as addressing the "proper order and nature of proof" required to establish discrimination under Title VII.<sup>49</sup> And, in subsequent decisions, the Court has bolstered this rationale by indicating that the decision was rendered "according to traditional practice" that provides the Court with the ability to "establish certain modes and orders of proof."<sup>50</sup> The Court also later described the *McDonnell Douglas* standard as a "procedural device,"<sup>51</sup> as "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination,"<sup>52</sup> and as simply a means of "arranging the presentation of evidence."<sup>53</sup>

Over the past forty years the *McDonnell Douglas* framework has become the most widely used method for evaluating, ordering, and structuring the presentation of circumstantial evidence of discrimination in Title VII cases.<sup>54</sup> The test is now used when analyzing claims under the ADA,<sup>55</sup> the ADEA,<sup>56</sup> and discrimination cases brought pursuant to 42 U.S.C. § 1981.<sup>57</sup> And, most importantly for purposes of this Article, the *McDonnell Douglas* standard has been used to determine whether discrimination is established under various state antidiscrimination statutes.<sup>58</sup> Unfortunately, neither litigants nor

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47. *Id.* at 804.

48. *Id.* at 802 n.13.

49. *Id.* at 793-94.

50. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 514 (1993).

51. *Id.* at 521.

52. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

53. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002) (holding *McDonnell Douglas* is an evidentiary standard and not a pleading requirement).

54. *But see* Michael Evan Gold, *Towards a Unified Theory of the Law of Employment Discrimination*, 22 *BERKELEY J. EMP. & LAB. L.* 175 (2001) (arguing that *McDonnell Douglas* is just one of several methods of proving discrimination through indirect evidence).

55. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49 (2003).

56. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000).

57. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 & n.1 (1993).

58. *See, e.g., Gamboa v. Am. Airlines*, 170 F. App'x 610, 612 (11th Cir. 2006) (applying *McDonnell Douglas* standard to claims asserted under a Florida antidiscrimination statute); *Gentry v. Ga.-Pac. Corp.*, 250 F.3d 646, 650 (8th Cir. 2001) (same under Arkansas law); *Perry v. Woodward*, 199 F.3d 1126, 1141-42 (10th Cir. 1999) (same under New Mexico law); *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 95 (2d

the courts have fully explored when and how concepts of state law should come into play when the federal courts impose the *McDonnell Douglas* standard to state antidiscrimination laws. Even though courts routinely recognize that the *McDonnell Douglas* standard is malleable and must be tailored to fit the factual scenario before the court,<sup>59</sup> courts give little consideration to the idea that state courts might create a *McDonnell Douglas* test different from the one created by federal courts.

### B. Examining the Origins of the Monolithic Standard

The continuing belief that *McDonnell Douglas* is a monolithic standard (at least within a given type of discrimination claim) appears to be maintained by both attorneys and judges through two common errors—an assumption that *McDonnell Douglas* is applicable to state law claims and a failure to examine whether the term “*McDonnell Douglas* framework” refers to the same test under both federal and state law.

In some cases, litigants and courts simply assume that, in any given case, *McDonnell Douglas* should be applied to claims under a state antidiscrimination statute.<sup>60</sup> In many cases, it appears that the courts reach this conclusion without any reference to either the applicable state statute or to state case law interpreting the statute. For example, in one case, the court merely indicated that *McDonnell Douglas* is a “well-accepted legal framework” and applied it to all of the plaintiff’s discrimination claims.<sup>61</sup>

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Cir. 1999) (same under New York law); *Carpenter v. Fed. Nat’l Mortgage Ass’n*, 165 F.3d 69, 72 (D.C. Cir. 1999) (same under District of Columbia law); *Mullin v. Raytheon Co.*, 164 F.3d 696, 699 (1st Cir. 1999) (same under Massachusetts law); *King v. Herbert J. Thomas Mem’l Hosp.*, 159 F.3d 192, 198 (4th Cir. 1998) (same under West Virginia law); *Lee v. Minn. Dep’t of Commerce*, 157 F.3d 1130, 1133 (8th Cir. 1998) (same under Minnesota law); *Nichols v. Lewis Grocer*, 138 F.3d 563, 565–66 (5th Cir. 1998) (same under Louisiana law); *Olson v. Gen. Elec. Astrospace*, 101 F.3d 947, 956 (3d Cir. 1996) (same under New Jersey law); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 n.8 (6th Cir. 1994) (same under Kentucky law).

59. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.13 (1973) (“[T]he prima facie proof required . . . is not necessarily applicable in every respect to differing fact situations.”); see also *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 (1977).

60. See, e.g., *Acree v. Tyson Bearing Co.*, 128 F. App’x 419, 429–30 (6th Cir. 2005) (“Although the Kentucky Supreme Court has not squarely addressed whether the *McDonnell Douglas* burden-shifting analysis applies to age discrimination cases under the [Kentucky Civil Rights Act], the parties do not dispute the issue and we will therefore assume that it does.”); *Higgins v. Johnson County Med. Labs. Inc.*, No. 95-2295-JWL, 1996 WL 707102, at \*3 n.5 (D. Kan. Nov. 15, 1996) (assuming that *McDonnell Douglas* standard would apply to Kansas antidiscrimination statute).

61. *Higgins*, 1996 WL 707102, at \*3 n.5 (noting that the parties had failed to fully brief the applicable legal standards).

Of course, in many instances, this assumption would be correct, as many state courts have held that some version of the *McDonnell Douglas* standard applies to certain types of state claims.<sup>62</sup> However, it would be preferable if courts would simply cite the applicable state case to support their assumption. In cases where the state court has not yet ruled on a *McDonnell Douglas* issue, the federal court should engage in some analysis regarding how it reached its decision that the state court would use the federal standard.<sup>63</sup>

In other cases, the courts appear to at least cite state law or another federal case in support of the concept that *McDonnell Douglas* is applicable to claims brought pursuant to a state discrimination statute.<sup>64</sup> However, in these cases the courts do

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62. See, e.g., *Bd. of Edu. of Chi. v. Cady*, 860 N.E.2d 526, 535 (Ill. App. 2006) (allowing plaintiffs to indirectly prove discrimination using the *McDonnell Douglas* standard); see also *Farrugia v. N. Shore Univ. Hosp.*, 820 N.Y.S.2d 718, 726–27 (N.Y. Sup. Ct. 2006) (requiring only a *de minimus* showing to establish a prima facie case and shift the burden of proof); *James v. Bob Ross Buick*, 855 N.E.2d 119, 125–26 (Ohio Ct. App. 2006) (leveraging the *McDonnell Douglas* framework to avoid difficulties in proving discrimination).

63. Cf. *Meredith v. Winter Haven*, 320 U.S. 228, 237 (1943) (“[T]his Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain.”); *Herrmann Holdings Ltd. v. Lucent Techs. Inc.*, 302 F.3d 552, 558 (5th Cir. 2002) (explaining when a state court has not yet ruled on an issue of state substantive law, federal court sitting in diversity must attempt to determine how the state’s highest court would resolve the issue).

64. See, e.g., *Ferraro v. Kellwood Co.*, 440 F.3d 96, 99 (2d Cir. 2006) (applying *McDonnell Douglas* under claims brought pursuant to New York state and New York City antidiscrimination provisions); *McClain v. Nw. Cmty. Corr. Ctr. Judicial Corr. Bd.*, 440 F.3d 320, 332 (6th Cir. 2006) (same as to Ohio); *Baucom v. Holiday Cos.*, 428 F.3d 764, 766 (8th Cir. 2005) (same as to Minnesota); *Johnson v. AT&T Corp.*, 422 F.3d 756, 764 (8th Cir. 2005) (same as to Missouri); *Thomas v. Owen Elec. Coop., Inc.*, 121 F. App’x 598, 601 (6th Cir. 2005) (same as to Kentucky); *Succarde v. Fed. Express Corp.*, 106 F. App’x 335, 339 (6th Cir. 2004) (same as to Michigan); *Thompson v. City of Memphis*, 86 F. App’x 96, 103 (6th Cir. 2004) (same as to Tennessee); *Wellner v. Town of Westport*, 35 F. App’x 14, 15 (2d Cir. 2002) (same as to Connecticut); *Bishop v. Bell Atl. Corp.*, 299 F.3d 53, 58 n.3 (1st Cir. 2002) (same as to Maine); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir. 2002) (same as to Hawaii); *Gentry v. Ga.–Pac. Corp.*, 250 F.3d 646, 650 (8th Cir. 2001) (same as to Arkansas); *LaBlanche v. Univ. of Iowa, Coll. of Med.*, 1 F. App’x 574, 575 (8th Cir. 2001) (same as to Iowa); *Bogle v. Orange County Bd. of County Comm’rs*, 162 F.3d 653, 659 & n.9 (11th Cir. 1998) (same as to Florida); *Ray v. City of Puyallup*, No. 04-5475, 2006 WL 581085, at \*6 (W.D. Wash. Mar. 6, 2006) (same as to Washington); *Williams v. City of Harrisburg*, No. 1:CV-03-2339, 2005 WL 2335131, at \*5 (M.D. Pa. Sept. 23, 2005) (same as to Pennsylvania); *Jenkins v. Duke Energy Field Servs., L.L.C.*, No. 04-404, 2005 WL 2123544, at \*1 (W.D. La. Sept. 1, 2005) (same as to Louisiana); *Rosenberger v. Catholic Health Initiatives*, No. 03CV2412WDMPPA, 2005 WL 1994239, at \*4 (D. Colo. Aug. 15, 2005) (same as to Colorado); *St. Hilaire v. The Pep Boys—Manny, Moe and Jack*, 73 F. Supp. 2d 1350, 1358–59 (S.D. Fla. 1999) (same as to Florida); *Schmucker v. Data-Link Sys., Inc.*, No. 3:96-CV-138RP, 1997 WL 348061, at \*6 (N.D. Ind. June 5, 1997) (same as to Indiana). Some courts appear to be more careful in



not undertake any analysis to determine whether the *McDonnell Douglas* standard articulated by the state court is the same standard that the federal court would apply. In fact, some courts refer to the standard as “the *McDonnell Douglas* burden shifting test,” suggesting that a singular test exists.<sup>65</sup> As discussed in Part III.C below, this is not the case.

Failure to provide more than a cursory citation to state law leads to situations like the one that currently exists in the U.S. District Court for the District of New Jersey. In ruling on New Jersey state law discrimination claims, one judge in the district has explained in at least four separate opinions that “the New Jersey Supreme Court has adopted the *McDonnell Douglas* test for claims under all state proscriptions against discrimination, both statutory and constitutional.”<sup>66</sup> These cases cite to a 1978 New Jersey Supreme Court case for this proposition but provide no discussion of the referenced case.<sup>67</sup> Another judge in the same district has provided the same explanation of the law in New Jersey, citing both the 1978 New Jersey Supreme Court decision and a 1990 decision from the same court.<sup>68</sup>

While it is true that New Jersey state courts will apply a version of the *McDonnell Douglas* framework to some types of discrimination claims, the state’s courts have “refused to apply the *McDonnell Douglas* framework in [state law discrimination] cases alleging gender discrimination in the form of unequal pay; modified the elements of the *McDonnell Douglas* prima facie case in the context of reverse-discrimination failure-to-hire cases; and shifted to employers the burden of proving the validity of their decisions in some handicap discrimination cases.”<sup>69</sup> By ignoring

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their analysis, providing both federal and state citations for each prong of the *McDonnell Douglas* framework. See, e.g., *Adkins v. United Food & Commercial Workers Int’l Union, Local 7*, 16 F. App’x 855, 859–60 (10th Cir. 2001); *Ross v. Int’l Bus. Machs. Corp.*, No. 2:04-CV-103, 2006 WL 197137, at \*11 (D. Vt. Jan. 24, 2006).

65. *Bash v. City of Galena*, 42 F. Supp. 2d 1171, 1183 n.7 (D. Kan. 1999) (emphasis added); see also *Schmucker*, 1997 WL 348061, at \*6 (proceeding under the “*McDonnell Douglas* burden-shifting method”).

66. *O’Toole v. Philips Elec. N. Am. Corp.*, No. 04-1730 (SRC), 2006 WL 3019698, at \*2 (D. N.J. Oct. 23, 2006); *Cutrona v. Int’l Flavors & Fragrances*, No. 03-1886 (JAG), 2006 WL 1877134, at \*3 (D. N.J. July 6, 2006); *Hutchinson v. Bennigan’s/Metromedia Rest., Inc.*, No. 02-5364JAG, 2006 WL 477003, at \*3 (D. N.J. Feb. 28, 2006) (citing *Peper v. Princeton Univ. Bd. of Trs.*, 389 A.2d 465, 479 (N.J. 1978)); *Massaro v. Port Auth.*, No. 04-1548JAG, 2005 WL 3077918, at \*4 (D. N.J. Nov. 14, 2005).

67. *Hutchinson*, 2006 WL 477003, at \*3 (citing *Peper*, 389 A.2d at 479); *Massaro*, 2005 WL 3077918, at \*4 (citing *Peper*, 389 A.2d at 479).

68. *McConnell v. State Farm Mut. Ins. Co.*, 61 F. Supp. 2d 356, 362 (D. N.J. 1999) (citing *Erickson v. Marsh & McLennan Co.*, 569 A.2d 793, 798 (N.J. 1990); *Peper*, 389 A.2d at 479).

69. *McKenna v. Pac. Rail Serv.*, 32 F.3d 820, 828 (3d Cir. 1994) (citations omitted).

that the term “*McDonnell Douglas*” can refer to many different tests, the federal courts in New Jersey risk oversimplifying state discrimination claims and ignoring the vast differences that exist between state and federal standards for evaluating certain types of discriminatory conduct.

Even recognition by the courts that legitimate differences might exist between state and federal *McDonnell Douglas* standards does not always result in the required deference to the state standard. In some cases, the courts appear to recognize differences between the state and federal law but are dismissive of the state interests at stake. In one case, the court analyzed the plaintiff's claims under *McDonnell Douglas* and then continued with an analysis of the plaintiff's Oregon discrimination claims.<sup>70</sup> Although the court recognized that Oregon would not apply the burden-shifting analysis of *McDonnell Douglas* to the state claims, the court granted summary judgment in defendant's favor after simply stating that “the amount and type of evidence that plaintiff must produce to survive summary judgment under [Oregon law] is substantially similar to that required under Title VII.”<sup>71</sup> The court did not discuss the differences between the federal and state standards; nor did it provide any citation to Oregon law for the proposition that the amount and type of evidence the plaintiff would need to produce would be similar.<sup>72</sup>

### C. *Discussing Federalism Through Specific Examples*

By assuming that state courts will apply federal standards to discrimination claims, federal courts are depriving the employment discrimination field of a much-needed dialogue about how discrimination claims should be proved. This Part discusses three specific areas in employment law in which the federal courts have not yet decided how the *McDonnell Douglas* test operates. In each of these areas, there is wide disagreement among the federal courts about how the issue should be resolved. As would be expected, similar differences exist among state courts.

Despite the federal courts' growing recognition that substantive disagreements exist about the application of *McDonnell Douglas* in certain contexts, in many instances these same courts presume that a state court will simply follow the lead of the particular federal court in resolving the issue. Time

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70. Price v. Taco Bell Corp., 934 F. Supp. 1193, 1202–04 (D. Or. 1996).

71. *Id.* at 1204.

72. *Id.* at 1203–04.

after time, the federal courts fail to even consider, let alone discuss, whether the state court would reach a different result on these important conflicts.

1. *Examining Reverse-Discrimination Standards.* The *McDonnell Douglas* standard is currently in a state of flux in reverse-discrimination cases.<sup>73</sup> As described below, the federal circuit courts currently disagree about whether plaintiffs in reverse-discrimination cases must prove additional facts, beyond those required by the typical *prima facie* case, to gain the presumption of discrimination.<sup>74</sup> Although few states appear to have expressly addressed this issue, a split exists among those courts that have. Surprisingly, neither courts nor litigants appear to be using vertical choice of law arguments to push state reverse-discrimination laws toward or away from the various stances taken by the federal courts. This is especially startling because there are important policy issues at stake regarding the underlying purposes of antidiscrimination statutes.

In the *McDonnell Douglas* case itself, the Supreme Court articulated that to proceed on the first prong of the test, the plaintiff had to establish that he is a member of a racial minority.<sup>75</sup> Initially, some circuit courts interpreted the first prong of *McDonnell Douglas* to require a plaintiff to prove membership in a historically discriminated-against protected class.<sup>76</sup> Under this interpretation of the first prong, however, other courts reasoned that “applying the *McDonnell Douglas*

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73. The Author recognizes that there is debate within the academy about whether the term “reverse discrimination” is appropriate. See Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1135 n.13 (2004) (describing discussion over use of terminology). The use of the term “reverse discrimination” is not intended to imply that a distinction between reverse-discrimination claims and other types of discrimination claims should exist. Rather, this Section is merely designed to argue that important policy issues underlie how reverse-discrimination claims should proceed, and the states should be allowed to play a role in this debate.

74. A discussion about how this split should be resolved is outside the scope of the Article. The Author is more interested in how the parties can use vertical choice of law to differentiate the standard used in state reverse-discrimination claims from the one applied to federal claims. For scholarly treatments of the question of how and whether the *McDonnell Douglas* standard should be modified in reverse-discrimination cases, see generally Sullivan, *supra* note 73, at 1118–29; Darren D. McClain, Comment, *Racial Discrimination Against the Majority in Hiring Practices: Courts’ Misguided Attempts to Make Race-Conscious Law Color Blind*, 30 STET. L. REV. 755, 786–93 (2000).

75. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

76. See, e.g., *Gilmore v. Kan. City Terminal Ry. Co.*, 509 F.2d 48, 51 (8th Cir. 1975); *Sabol v. Snyder*, 524 F.2d 1009, 1012 (10th Cir. 1975); *Waters v. Wis. Steel Works of Int’l Harvest Co.*, 502 F.2d 1309, 1317 n.3 (7th Cir. 1974) (recognizing that Title VII required a plaintiff to show “that he belongs to a racial minority”).

standard literally in reverse-discrimination cases such as this would prevent any plaintiff from making out a *prima facie* case."<sup>77</sup> At the same time, these courts recognized that the explicit language of Title VII did not limit its protections to historically discriminated-against groups.<sup>78</sup>

Recognizing the malleability of the *McDonnell Douglas* test, some federal courts require that those seeking to prove a case of reverse discrimination establish "background circumstances' sufficient to demonstrate that the particular employer has 'reason or inclination to discriminate invidiously against whites' or evidence that 'there is something "fishy" about the facts at hand."<sup>79</sup>

The rationale behind such a test is an assumption that reverse discrimination rarely happens and therefore, these litigants should be required to prove more than a member of a historically discriminated against group to obtain an inference of discrimination. As one court indicated: "Invidious racial discrimination against whites is relatively uncommon in our society, and so there is nothing inherently suspicious in an employer's decision to promote a qualified minority applicant instead of a qualified white applicant."<sup>80</sup>

Some courts have rejected the idea that reverse-discrimination plaintiffs should be required to establish additional facts to proceed on their claims. Under the Third Circuit's articulation "all that should be required to establish a *prima facie* case in the context of 'reverse discrimination' is for the plaintiff to present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a trait that is protected under Title VII."<sup>81</sup> Likewise, the Fifth Circuit refuses to hold reverse-

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77. *Hague v. Thompson Distrib. Co.*, 436 F.3d 816, 821 (7th Cir. 2006) (quoting *Hill v. Burrell Commc'ns. Group, Inc.*, 67 F.3d 665, 668 (7th Cir. 1995), *overruled on other grounds* by *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996)) (discussing a "background circumstances" standard); *see also Sullivan*, *supra* note 73, at 1039 (discussing the Supreme Court's holding in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976), that "Title VII protects everyone").

78. *See, e.g., Hague*, 436 F.3d at 821.

79. *Id.* (quoting *Ineichen v. Ameritech*, 410 F.3d 956, 959 (7th Cir. 2005)).

80. *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993); *see also Gore v. Ind. Univ.*, 416 F.3d 590, 592 (7th Cir. 2005) (noting that "it 'is the unusual employer who discriminates against majority employees'" (quoting *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 456-57 (7th Cir. 1999))); *Zambetti v. Cuyahoga Cmty. Coll.*, 314 F.3d 249, 256 (6th Cir. 2002) (providing the equivalent for 6th Circuit).

81. *Iadimarco v. Runyon*, 190 F.3d 151, 161 (3d Cir. 1999); *see also Haley v. City of Plainfield*, 169 F. App'x 670, 672 (3d Cir. 2006) (applying the same standard). Notably, the Tenth Circuit has adopted a test that appears to combine the tests used by the Seventh and Third Circuits, allowing a reverse-discrimination plaintiff to prevail either

discrimination plaintiffs to a higher burden than other plaintiffs.<sup>82</sup> However, unlike the Third Circuit, the Fifth Circuit merely holds reverse-discrimination plaintiffs to the same prima facie case as other discrimination litigants.<sup>83</sup>

Without guidance from the circuit court, district courts in the Second Circuit are in disarray, with some applying a stricter standard for reverse-discrimination claims, and others applying the more relaxed standard.<sup>84</sup>

The Third Circuit has explicitly rejected the reasoning that those asserting reverse-discrimination claims should be required to come forth with extra evidence to survive summary judgment and has indicated that such an approach is both “problematic and unnecessary.”<sup>85</sup> The Sixth Circuit, which has required reverse-discrimination plaintiffs to establish “background circumstances,” has questioned the policy implications of such a choice. It noted: “We have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts.”<sup>86</sup>

Surveying the landscape of reverse-discrimination cases, there is clearly no consensus regarding whether the traditional *McDonnell Douglas* approach applies or whether some modification of the test is necessary to make the test’s presumptions meaningful. Even the circuits that agree on whether the plaintiff should or should not be required to make an additional showing do not agree about the test that should be applied to reflect this policy decision.

As would be expected, state law is equally muddled regarding the appropriate standard to apply in reverse-discrimination cases, even for states within the geographic area

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by showing additional background circumstances or “indirect evidence sufficient to support a reasonable probability, that but for the plaintiff’s status the challenged employment decision would have favored the plaintiff.” *Lyons v. Red Roof Inns, Inc.*, 130 F. App’x 953, 954 (10th Cir. 2005) (quoting *Stover v. Martinez*, 382 F.3d 1064, 1076 (10th Cir. 2004)).

82. *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 426 (5th Cir. 2000) (analyzing the plaintiff’s prima facie case and rejecting the employer’s argument that the plaintiff should also have to prove that he was a “racial minority at his place of work”).

83. *Id.* Courts within the Eleventh Circuit also apply the traditional *McDonnell Douglas* test to reverse-discrimination claims. *E.g.*, *Turner v. Bieluch*, No. 03-81058-CIV-HURLEY, 03-81059-CIV-HOPKINS, 2004 WL 2044291, at \*3 (S.D. Fla. Aug. 13, 2004).

84. *Brierly v. Deer Park Union Free Sch. Dist.*, 359 F. Supp. 2d 275, 294 n.7 (E.D.N.Y. 2005) (citing cases applying various standards to reverse-discrimination cases and noting the absence of a Second Circuit determination of the issue).

85. *Iadimarco*, 190 F.3d at 161.

86. *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 n.7 (6th Cir. 1994).

of the same federal court of appeals. Kentucky, Ohio, Michigan and Tennessee all fall within the Sixth Circuit's jurisdiction. Michigan has explicitly rejected the addition of a background circumstances prong to the *McDonnell Douglas* test, indicating that the explicit words of its antidiscrimination statute do not provide for application of different legal standards, depending on the protected class of the individual litigant.<sup>87</sup> Likewise, a Tennessee appellate court applied the traditional test to a reverse-discrimination claim.<sup>88</sup> However, under both Kentucky and Ohio law, a plaintiff attempting to proceed on a reverse-discrimination claim is required to establish that additional background circumstances support his claim.<sup>89</sup>

The Sixth Circuit has recognized that states within the circuit have different reverse-discrimination standards.<sup>90</sup> Despite this recognition, it is interesting to discuss how the Sixth Circuit deals with reverse-discrimination statutes brought under Tennessee's antidiscrimination statute.<sup>91</sup>

In *Leadbetter v. Gilley*,<sup>92</sup> the Sixth Circuit considered reverse-discrimination claims brought under both Title VII and the Tennessee discrimination statute.<sup>93</sup> In ruling on the claims, the Sixth Circuit applied its own reverse-discrimination test to both the federal and state claims, which required the plaintiff to establish additional background circumstances to demonstrate the defendant "was the unusual employer who discriminates against men . . . ."<sup>94</sup> The Sixth Circuit applied this standard without any separate discussion about whether a different standard should be applied to the Tennessee state law claims and failed to discuss a Tennessee court of appeals decision that reached the opposite result.<sup>95</sup>

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87. See *Lind v. City of Battle Creek*, 681 N.W.2d 334, 335 (Mich. 2004) (holding that drawing such a distinction would be "clearly contrary to the language of Michigan's Civil Rights Act").

88. *Wilson v. Rubin*, 104 S.W.3d 39, 53 (Tenn. Ct. App. 2002).

89. *Stathis v. Univ. of Ky.*, No. 2004-CA-000556-MR, 2005 WL 1125240, at \*5 (Ky. Ct. App. May 13, 2005); *Johnson v. Gen. Motors Corp.*, No. 01-CA22-2, 2001 WL 1913820, at \*4 (Ohio Ct. App. Oct. 17, 2001).

90. See *Dabrowski v. Dow Chem.*, No. 06-11037-BC, 2007 WL 201047, at \*3 n.2 (E.D. Mich. Jan. 24, 2007) (noting Michigan's rejection of the background circumstances test).

91. TENN. CODE ANN. § 4-21-101 to 4-21-1004 (2005).

92. *Leadbetter v. Gilley*, 385 F.3d 683 (6th Cir. 2004).

93. *Id.* at 688.

94. *Id.* at 690.

95. *Id.* at 690-91; see also *Thompson v. City of Memphis*, 86 F. App'x 96, 103 (6th Cir. 2004) (applying higher standard to reverse-discrimination claims brought under Tennessee law without any discussion of underlying Tennessee law).

In another reverse-discrimination case brought under Tennessee law and federal law, the defendant did not argue that the Sixth Circuit's higher standard for reverse discrimination should apply.<sup>96</sup> The Sixth Circuit applied the same articulation of the *McDonnell Douglas* test as it would apply in a traditional discrimination case to both the federal claims and the state claims.<sup>97</sup> Explaining its application of federal law to the Tennessee claims, the court noted: "[A]s they are coextensive, the Title VII analysis subsumes the claims under the counterpart Tennessee statute."<sup>98</sup> The court did not cite any Tennessee reverse-discrimination case to support this proposition.

Clearly, the underlying Tennessee law on reverse-discrimination claims does not change depending on the three-judge panel that is considering the claim,<sup>99</sup> but this is the result that follows from an analysis that is all too common in employment cases. The court simply cites a state case indicating that it is appropriate to refer to federal law or *McDonnell Douglas* when analyzing state claims, and then assumes that the federal law is monolithic.<sup>100</sup> Such an assumption is inappropriate and leads to fragmented rulings where the state law changes depending on which court is ruling on the claim.

This result is especially surprising in the Sixth Circuit for several reasons. First, the states within the circuit are divided regarding the *prima facie* case to be applied in reverse-discrimination cases.<sup>101</sup> Second, at least one court in the Sixth

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96. *Willoughby v. Allstate Ins. Co.*, 104 F. App'x 528, 530 n.1 (6th Cir. 2004).

97. *Id.* at 530 & n.1.

98. *Id.* at 530 n.1.

99. In the court's defense, it may have simply been relying on the arguments of the parties in both cases. However, this merely points to an additional problem with the perception of *McDonnell Douglas*, in that one of the litigants in each case failed to argue for a legal standard that would better assist the client. In *Leadbetter*, the plaintiff should have argued—based on the prior ruling by the Tennessee Court of Appeals—that the traditional *McDonnell Douglas* *prima facie* case applied. Compare *Leadbetter* 385 F.3d at 688 (arguing for relief under Title VII and the Tennessee discrimination statute), with *Wilson v. Rubin*, 104 S.W.3d 39, 54 (Tenn. Ct. App. 2002) (holding that under *McDonnell Douglas*, a *prima facie* case can give rise to a rebuttable presumption of age or gender discrimination).

100. See, e.g., *Willoughby*, 104 F. App'x at 530 & n.1 (citing *Thompson v. City of Memphis*, 86 F. App'x 96, 103 (6th Cir. 2004)).

101. See *Sutherland v. Mich. Dept. of Treasury*, 220 F. Supp. 2d 815, 821 (E.D. Mich. 2001) (outlining the elements required for proving a *prima facie* reverse-discrimination case under Michigan state law); *Ekstrom v. Cuyahoga County Cmty. Coll.*, 779 N.E.2d 1067, 1074 (Ohio Ct. App. 2002) (listing elements of *prima facie* case under Ohio state antidiscrimination law that differ from those in Michigan); see also *Leadbetter*, 385 F.3d at 690 (applying the *McDonnell Douglas* test to a reverse-discrimination claim in Tennessee); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 n.8 (6th Cir. 1994) ("Kentucky courts apply the *McDonnell Douglas* framework to discrimination cases

Circuit has explicitly recognized that differences exist between Michigan law and the Sixth Circuit's reverse-discrimination standard and that Michigan courts have applied the different standards in some cases.<sup>102</sup> Finally, although the Sixth Circuit requires plaintiffs in reverse-discrimination cases brought under Title VII to prove additional background circumstances, it also has expressed some doubts about its position, leading to the natural conclusion that the Sixth Circuit is fully aware of the policy decisions that underlie choosing one *prima facie* articulation over another.<sup>103</sup>

However, the Sixth Circuit is not alone in this type of decisionmaking. Recall that the district courts within the Second Circuit disagree about which reverse-discrimination standard to employ.<sup>104</sup> Despite this difference, these courts continue to assert that the state law will follow federal law regarding reverse discrimination, and then apply the particular version of the federal standard that the court has adopted.<sup>105</sup> As with the cases in the Sixth Circuit, this results in different standards for reverse discrimination being applied to New York state law cases, without any recognition of the dichotomy.<sup>106</sup>

Underlying the debate about which standard to apply to reverse-discrimination cases are substantive issues that go to the core of the definition of discrimination itself. Although perhaps a slight simplification, this debate revolves around two competing views of employment in the United States—one that believes that individuals in the majority rarely face discrimination and another that believes that such discrimination is likely to occur.<sup>107</sup>

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brought under state law.”).

102. *Dabrowski v. Dow Chem. Co.*, No. 06-11037-BC, 2007 WL 201047, at \*3 n.2 (E.D. Mich. Jan. 24, 2007) (citing *Lind v. City of Battle Creek*, 681 N.W.2d 334, 335 (Mich. 2004)) (recognizing that the Michigan Supreme Court had rejected the background circumstances requirement).

103. See *Pierce*, 40 F.3d at 801 n.7 (expressing “serious misgivings about the soundness” of the additional background circumstances requirement).

104. *Brierly v. Deer Park Union Free Sch. Dist.*, 359 F. Supp. 2d 275, 294 n.7 (E.D.N.Y. 2005) (citing cases applying various standards to reverse-discrimination cases and noting the absence of a Second Circuit determination of the issue); *Stephens v. Brooklyn Hebrew Sch. for Special Children*, 356 F. Supp. 2d 248, 259 n.9 (E.D.N.Y. 2005) (same).

105. *Stephens*, 356 F. Supp. 2d at 258 (applying “Title VII jurisprudence”); *Ticali v. Roman Catholic Diocese of Brooklyn*, 41 F. Supp. 2d 249, 261 (E.D.N.Y. 1999) (refusing to apply a “modified *McDonnell Douglas* formulation”).

106. *Stephens*, 356 F. Supp. 2d at 258 (applying typical *McDonnell Douglas* standard to reverse-discrimination claims); *Ticali*, 41 F. Supp. 2d at 261 (refusing to apply typical *McDonnell Douglas* standard, but requiring proof of additional background circumstances).

107. Sullivan, *supra* note 73, at 1085.



States should be allowed to consider the policy implications relating to their state discrimination statutes, and the federal courts should respect these decisions about how reverse-discrimination claims are evaluated.

To date, both litigants and courts have largely ignored both the strategic and policy advantages that can be gained from using vertical choice of law to distinguish the varying *McDonnell Douglas* tests used in reverse-discrimination cases. As the debate over the appropriate standard continues, federal courts should show the required deference to interests of state law by recognizing that differences exist and by not blindly applying a specific, federal *McDonnell Douglas* standard to reverse-discrimination claims under state law.

2. *Examining the Application of Desert Palace and the 1991 Amendments to Title VII to State Law Claims.* Similar disarray exists within the federal court system regarding whether the *McDonnell Douglas* framework was modified by the 1991 amendments to the Civil Rights Act and the Supreme Court's decision in *Desert Palace, Inc. v. Costa*.<sup>108</sup>

To better understand the substantive issues created by this disagreement, it is important to understand the historic development of the problem. As originally enacted, Title VII prohibited discrimination "because of" certain protected traits.<sup>109</sup> Based on this language, it was unclear whether plaintiffs could proceed on a mixed-motive theory of discrimination, essentially arguing that both lawful and unlawful motives drove the employer's decision.

In *Price Waterhouse v. Hopkins*, the Supreme Court determined that mixed-motive claims could proceed under Title VII.<sup>110</sup> However, there was disagreement among the justices about how such claims should proceed, specifically whether plaintiffs should be required to provide direct evidence of discrimination to establish a claim of mixed-motive discrimination.<sup>111</sup> Additionally, the *Price Waterhouse* decision established an affirmative defense to liability for mixed-motive claims. An employer would be able to completely escape liability

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108. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

109. 42 U.S.C. § 2000e-2(a)(1) (2000).

110. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (concluding that employer is not liable if it can show that other factors would have led to the same hiring decision).

111. See *id.* at 261 (O'Connor, J., concurring) (disagreeing with the plurality opinion that requires employers to submit direct evidence to meet their burden of production in mixed-motive cases).

for mixed-motive discrimination if it could prove that the same employment action would have been taken absent the discriminatory motive.<sup>112</sup>

In response to the *Price Waterhouse* decision, Congress amended Title VII of the Civil Rights Act to make it clear that plaintiffs could prevail on discrimination claims—even if a discriminatory reason did not wholly motivate the employer—if the plaintiff could establish the protected trait “was a motivating factor for any employment practice, even though other factors also motivated the practice.”<sup>113</sup> At the same time, Congress also provided employers with a limited affirmative defense under Title VII. If 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, attorney’s fees and costs.<sup>114</sup> This was a significant change from the *Price Waterhouse* formulation, which allowed the employer to completely escape liability upon proof of the defense.

After the 1991 amendments to Title VII, it remained unclear whether plaintiffs could proceed on a mixed-motive claim without direct evidence of discrimination. In *Desert Palace, Inc. v. Costa*, the Supreme Court resolved this question by deciding that plaintiffs could proceed under a mixed-motive framework using direct or circumstantial evidence.<sup>115</sup> After *Desert Palace* and the passage of the 1991 amendments to the Civil Rights Act, courts began to consider whether the *McDonnell Douglas* framework should continue to function in the same manner as it had in the past.<sup>116</sup>

Currently, the federal law is in a state of flux regarding the intersection of the 1991 amendments to Title VII, the *Desert Palace* decision, and the *McDonnell Douglas* test.<sup>117</sup> Some courts

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112. *Id.* at 252, 258.

113. 42 U.S.C. § 2000e-2(m) (2000).

114. 42 U.S.C. § 2000e-5(g)(2)(B) (2000); *see also* *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 317 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1033 (2006).

115. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003).

116. *See, e.g.*, *Harris v. Giant Eagle Inc.*, 133 F. App’x 288, 297 (6th Cir. 2005) (observing that the Sixth Circuit had not yet had an opportunity to address any modifications to the burden-shifting framework as a result of the *Desert Palace* decision).

117. *See, e.g.*, *Sullivan, supra* note 73, 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.” (footnotes omitted)); William R. Corbett, *An Allegory*

have held that *McDonnell Douglas* was not affected by the 1991 amendments or the *Desert Palace* decision.<sup>118</sup> 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.<sup>119</sup> Some courts take a third approach to this question, indicating that *McDonnell Douglas* is no longer a viable method for proving discrimination.<sup>120</sup>

Likewise, questions also remain about whether the 1991 amendments and *Desert Palace* apply to claims brought under other federal discrimination statutes. Some circuits have refused to apply the *Desert Palace* standard to claims brought under other discrimination statutes, reasoning that if Congress had intended for such claims to proceed, it would have made similar amendments to the other federal discrimination statutes.<sup>121</sup> Some courts have reasoned that mixed-motive claims are viable under other discrimination statutes, but that these claims should proceed under the *Price Waterhouse* framework.<sup>122</sup> Some circuits

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of the Cave and the Desert Palace, 41 HOUS. L. REV. 1549, 1566 (2005) (hoping to “dispel the shadow of *McDonnell Douglas*’s continuing viability once and for all”); Jeffrey A. Van Detta, “Le Roi Est Mort; Vive Le Roi!”: An Essay on the Quiet Demise of *McDonnell Douglas* and the Transformation of Every Title VII Case After *Desert Palace*, Inc. v. Costa into a “Mixed Motives” Case, 52 DRAKE L. REV. 71, 72–73 (2003) (asserting that *McDonnell Douglas* is “dead as a doornail” (citing CHARLES DICKENS, A CHRISTMAS CAROL 1 (John C. Winston Co. 1938) (1849))); but see Christopher R. Hedican, Jason M. Hedican, & Mark P.A. Hudson, *McDonnell Douglas: Alive and Well*, 52 DRAKE L. REV. 383, 425 (2004) (“[T]he decision in *Costa* amply demonstrates that *McDonnell Douglas* is alive and well.”).

118. See, e.g., *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1017 (8th Cir. 2005) (explaining that *Desert Palace* does not change *McDonnell Douglas* in the summary judgment context); *Griffith v. City of Des Moines*, 387 F.3d 733, 735 (8th Cir. 2004) (limiting *Desert Palace* to jury instruction issues, rather than summary judgment issues).

119. See, e.g., *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004).

120. See, e.g., *Rollins v. Mo. Dep’t. of Conservation*, 315 F. Supp. 2d 1011, 1023 (W.D. Mo. 2004) (questioning validity of *McDonnell Douglas* and applying it reluctantly because the outcome would be the same whether or not it is used at the summary judgment stage); *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987, 994 (D. Minn. 2003) (declining to apply *McDonnell Douglas* to single-motive claims). It should be noted that the Eighth Circuit has consistently reiterated the continued viability of *McDonnell Douglas*. See, e.g., *Strate*, 398 F.3d at 1017 (allowing plaintiff who lacks proof of motive to avoid summary judgment by using the *McDonnell Douglas* test); *Griffith*, 387 F.3d at 735–36 (stating that “*Desert Palace* did not forecast a sea change” in the *McDonnell Douglas* standard).

121. See, e.g., *Baqir v. Principi*, 434 F.3d 733, 745 n.13 (4th Cir. 2006) (indicating that *Desert Palace* analysis does not apply to claims under the ADEA); *Aquino v. Honda of Am., Inc.*, 158 F. App’x 667, 676 (6th Cir. 2005) (refusing to apply *Desert Palace* standard to claims brought under 42 U.S.C. § 1981 because Congress chose not to amend that statute); *Bolander v. BP Oil Co.*, No. 3:02CV7341, 2003 WL 22060351, at \*3 (N.D. Ohio Aug. 6, 2003) (indicating *Desert Palace* does not apply to ADEA).

122. See, e.g., *Baqir*, 434 F.3d at 745 n.13 (noting that “ADEA mixed motive cases remain subject to the *Price Waterhouse* analysis”); *Glanzman v. Metro. Mgmt. Corp.*, 391 F.3d 506, 512 (3d Cir. 2004).

have applied the *Desert Palace* framework to claims under other federal discrimination statutes.<sup>123</sup>

Given the difficulties in resolving issues relating to the intersection of *McDonnell Douglas*, *Desert Palace*, *Price Waterhouse*, and the 1991 amendments to Title VII, it is not surprising that state courts are also in disarray regarding the proper test for resolving circumstantial evidence claims. It is also important to keep in mind that the state legislatures often did not modify their state discrimination suits to model them after the 1991 amendments to Title VII,<sup>124</sup> so questions remain about whether it is appropriate to interpret these state statutes through the lens of *Desert Palace* and Title VII's 1991 amendments.

Courts in some states have specifically rejected the application of a different framework to single-motive or mixed-motive discrimination claims and continue to apply the *McDonnell Douglas* framework to all such claims.<sup>125</sup> Other states apply the *Price Waterhouse* framework to all mixed claims, whether based on direct or circumstantial evidence.<sup>126</sup> Still other courts maintain that application of *McDonnell Douglas* is appropriate to mixed-motive claims with circumstantial evidence, and the *Price Waterhouse* framework should be applied to mixed-motive claims based on direct evidence.<sup>127</sup> Some states appear

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123. *Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 334 (5th Cir. 2005) (applying mixed-motive analysis to FMLA claims); *Rachid*, 376 F.3d at 311–12 (5th Cir. 2004) (applying the mixed-motive analysis to ADEA claims).

124. *See, e.g., Dare*, 267 F. Supp. 2d at 992 (explaining that Minnesota did not amend its state statute to reflect amendments made to Title VII); *see also* *Plagmann v. Square D Co.*, 695 N.W.2d 333 (Iowa Ct. App. 2004) (unpublished opinion) (indicating that *Desert Palace* analysis might not apply to state civil rights claim because Iowa's Civil Rights Act does not contain language identical to Title VII's 1991 amendment).

125. *Beckman v. KGP Telecomm., Inc.*, No. 02-1261 (JNE/JGL), 2004 WL 533943, at \*4 (D. Minn. Mar. 16, 2004) (applying *McDonnell Douglas* to Minnesota state law claims); *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 624, 626–27 (Minn. 1988); *see also* *Smidt v. Porter*, 695 N.W.2d 9, 14 n.1 (Iowa 2005) (noting that neither party challenged the application of *McDonnell Douglas* after *Desert Palace*, and so the court would apply the *McDonnell Douglas* standard). *But see* *Brekke v. City of Blackduck*, 984 F. Supp. 1209, 1222 & n.17 (D. Minn. 1997) (noting the distinction between state and federal application of *McDonnell Douglas*); *Brenden v. Westonka Pub. Sch.*, No. EM03-017571, 2005 WL 1936195, at \*8 (Minn. Dist. Ct. June 10, 2005) (applying *Desert Palace* as an affirmative defense).

126. *Jung v. George Washington Univ.*, 875 A.2d 95, 111 (D.C. 2005); *Newberne v. Dep't. of Crime Control & Pub. Safety*, 618 S.E.2d 201, 208 (N.C. 2005) (applying framework to claims under state whistleblower statutes).

127. *See, e.g., Nash v. Blood & Tissue Ctr. of Cent. Tex.*, No. 03-03-00763-CV, 2004 WL 2900483, at \*4 (Tex. App.—Austin Dec. 16, 2004, no pet.) (noting that nothing in the record indicated that the trial court applied the wrong standard and refusing to decide which is the correct test to apply because the same result would be reached under any articulation).

inclined to interpret their state discrimination statutes as incorporating the *Desert Palace* standard.<sup>128</sup> Some states that have considered questions about the intersection of *McDonnell Douglas*, *Price Waterhouse*, and *Desert Palace* have refused to resolve the dilemma by simply indicating that the same party would prevail no matter what test was used.<sup>129</sup>

Despite the diversity that exists among state outcomes, federal courts considering similar issues under state law often simply reiterate that the state court looks to federal law to determine the particular issue and then assumes the state would apply the same standard.<sup>130</sup> This oversimplification is problematic because it ignores the role that states should play in resolving the important substantive questions that underlie the debate, including (1) whether differences between circumstantial and direct evidence require different standards; (2) whether mixed-motive claims exist under state law; and (3) how and whether single-motive discrimination claims are different than mixed-motive claims.

Given the diversity of opinions about how the issues relating to *McDonnell Douglas*, *Price Waterhouse*, *Desert Palace*, and the 1991 amendments should be resolved, it is not appropriate for federal courts considering these issues to assume that a particular state will simply follow the federal courts' lead. Under our modern notions of federalism, federal courts considering these state claims have an obligation to consider how the state court would rule on these issues and not simply to take the analytic shortcut of assuming such agreement exists.

3. *Examining the Use of McDonnell Douglas in Jury Instructions.* The federal circuit courts are currently in disarray as to whether *McDonnell Douglas* should be incorporated in jury instructions.<sup>131</sup> Most circuits have held that *McDonnell Douglas*

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128. *Myers v. AT&T Corp.*, 882 A.2d 961, 971 (N.J. Super. Ct. App. Div. 2005) (concluding that *Desert Palace* analysis should not be limited to Title VII cases alone).

129. *See id.* at 972 (finding evidence sufficient under both *Desert Palace* and *Price Waterhouse* formulations); *DeLeon v. Iowa Select Farms, Inc.*, 699 N.W.2d 684 (Iowa App. 2005) (unpublished opinion) (affirming the district court's conclusion that the plaintiff's evidence was insufficient under both *Desert Palace* and *Price Waterhouse* formulations).

130. *See, e.g., Harris v. Giant Eagle Inc.*, 133 F. App'x 288, 292 n.2 (6th Cir. 2005) (noting that same framework applied to state and federal claims).

131. *Compare Williams v. Eau Claire Pub. Schs.*, 397 F.3d 441, 446 (6th Cir. 2005) (holding that the *McDonnell Douglas* framework may, but need not, be incorporated into jury instructions), *with Rodriguez-Torres v. Caribbean Forms Mfg., Inc.*, 399 F.3d 52, 58 (1st Cir. 2005) (noting that district court instructed the jury to evaluate the evidence by applying the *McDonnell Douglas* burden-shifting framework); *see also Kozlowski v. Hampton Sch. Bd.*, 77 F. App'x 133, 141 (4th Cir. 2003) (discussing use of *McDonnell Douglas* framework in jury instructions).

should not be used in jury instructions,<sup>132</sup> while a minority of circuits allow juries to be instructed using the *McDonnell Douglas* framework.<sup>133</sup> Despite the growing consensus in favor of excluding *McDonnell Douglas* from federal jury instructions, many states continue to require that juries be instructed using *McDonnell Douglas*'s three-part, burden-shifting framework.<sup>134</sup> However, like the majority of federal courts, some states indicate that juries should not be instructed on the framework.<sup>135</sup>

Important procedural and substantive concerns underlie the courts' disagreements about whether *McDonnell Douglas* should be incorporated into jury instructions. 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.<sup>136</sup> Other circuits eliminate *McDonnell 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

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132. *Whittington v. Nordam Group Inc.*, 429 F.3d 986, 997–98 (10th Cir. 2005); *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 576 (5th Cir. 2004); *Sanders v. N.Y. City Human Res. Admin.*, 361 F.3d 749, 758 (2d Cir. 2004); *Sanghvi v. City of Claremont*, 328 F.3d 532, 539–40 (9th Cir. 2003); *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322 (11th Cir. 1999); *Ryther v. KARE 11*, 108 F.3d 832, 849–50 (8th Cir. 1997) (en banc) (Loken, J., dissenting (Part II.A of dissent, which a majority of the court joined)); *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994). *But see* *Watson v. Se. Pa. Transp. Auth.*, 207 F.3d 207, 221–22 (3d Cir. 2000) (indicating that it is proper to instruct the jury that it may consider whether the factual predicates necessary to establish the prima facie case have been shown, but noting that it is error to instruct as to the *McDonnell Douglas* burden shifting scheme).

133. *Rodriguez-Torres*, 399 F.3d at 58 (finding that the district court instructed the jury to evaluate the evidence by applying the *McDonnell Douglas* burden-shifting framework); *Kozlowski*, 77 F. App'x at 139–40, 142 (finding that specific instructions were given incorrectly, but not taking issue with practice of giving jury *McDonnell Douglas* instructions); *Brown v. Packaging Corp. of Am.*, 338 F.3d 586, 595–96 (6th Cir. 2003) (approving the use of *McDonnell Douglas* in jury instructions). *But see* *Mullen v. Princess Anne Vol. Fire Co.*, 853 F.2d 1130, 1137 (4th Cir. 1988) (noting that the “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. *Sanders*, 361 F.3d at 758–59 (finding it was harmless error for district court to instruct jury as to burden-shifting framework); *Vincini v. Am. Bldg. Maint. Co.*, 41 F. App'x 512, 514 (2d Cir. 2002); *Dudley*, 166 F.3d at 1322. 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*, 207 F.3d at 221.

134. *See, e.g., Padilla v. Berkeley Educ. Serv. of N.J.*, 891 A.2d 616, 621 (N.J. Super. Ct. App. Div. 2005) (indicating that jury is required to consider *McDonnell Douglas* when deliberating over claims under New Jersey antidiscrimination statute).

135. *See, e.g., United Servs. Auto. Ass'n v. Brite*, 161 S.W.3d 566, 578 (Tex. App.—San Antonio 2005), *rev'd on other grounds*, 215 S.W.3d 400 (Tex. 2007); *Wong v. City of Cambridge*, No. 2001-2737-C, 2003 WL 1542117, at \*3 (Mass. Super. Feb. 21, 2003).

136. *See, e.g., Kanida*, 363 F.3d at 576; *Sanders*, 361 F.3d at 758; *see also Sanghvi*, 328 F.3d at 540–41; *Dudley*, 166 F.3d at 1322.

presumptions no longer apply at the trial stage. In these circuits, the “presumptions and burdens inherent in the *McDonnell Douglas* formulation drop out of consideration when the case is submitted to the jury.”<sup>137</sup>

Regarding state law discrimination claims, state courts should play a role in answering questions about whether *McDonnell Douglas* and its burden-shifting scheme are even applicable at the trial stage. To ignore legitimate state concerns about the function of *McDonnell Douglas* would allow the federal courts to provide different jury instructions from the state courts on state law claims. As discussed below, such an outcome raises serious vertical choice of law concerns.

As these three examples demonstrate, there are important questions about *McDonnell Douglas* and its proper place in employment discrimination law being decided by both state and federal courts. Federal courts that ignore the developing case law and fail to recognize that the term “*McDonnell Douglas*” does not refer to a monolithic standard risk overlooking important state law concerns and applying an improper standard to state discrimination claims.

#### IV. THE INTERSECTION OF *MCDONNELL DOUGLAS* AND VERTICAL CHOICE OF LAW

While many federal courts have simply ignored the role that state courts can and should play in developing employment law, other courts have tried to quash the states’ role by declaring that federal courts sitting in diversity are required to apply that court’s version of *McDonnell Douglas* to both federal and state claims. This Part explores how some federal courts are using vertical choice of law principles to improperly supplant the development of state law.

A brief overview of the Supreme Court’s pronouncements regarding vertical choice of law is followed by a discussion of *Snead v. Metropolitan Property & Casualty Insurance Co.*,<sup>138</sup> the leading circuit court case finding that federal courts are required to use *McDonnell Douglas* in examining state law claims. This examination establishes that the *McDonnell Douglas* rule is clearly substantive in a vertical choice of law context and should yield to state standards when a conflict exists. Before proceeding

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137. *Whittington*, 429 F.3d at 998 (quoting *Messina v. Kroblin Transp. Sys., Inc.*, 903 F.2d 1306, 1308 (10th Cir. 1990)); *Sanghvi*, 328 F.3d at 537; *Gehring*, 43 F.3d at 343 (indicating that *McDonnell Douglas* is only for use in pretrial proceedings).

138. *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080 (9th Cir. 2001).

to an in-depth analysis of this question, it is important to examine the flaws in the Ninth Circuit's reasoning in *Snead*, which demonstrate common misconceptions that courts have regarding vertical choice of law analysis. A thorough discussion of the errors in this case is instructive in showing why other federal courts should reject its holding and instead apply a state standard to state discrimination claims.

#### A. *The Three-Tiered Approach to Vertical Choice of Law*

The era of modern vertical choice of law began in 1938. Prior to that time, federal courts sitting in diversity jurisdiction followed the doctrine announced in *Swift v. Tyson* and were not required to defer to a state's common law.<sup>139</sup> The *Swift* decision, founded on a natural law approach to judicial interpretation, was based on the beliefs that federal judges were just as skilled at discovering the law as their state counterparts and that such a rule would lead to a uniform body of law.<sup>140</sup>

In 1938, the Supreme Court announced its decision in *Erie v. Tompkins*, completely changing vertical choice of law and its underlying policy.<sup>141</sup> Under the *Erie* doctrine, "federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but it does not carry with it generation of rules of substantive law."<sup>142</sup> Therefore, according to the rule announced in *Erie*, a federal court sitting in diversity jurisdiction must apply the substantive law of the state in which it sits, including that state's choice of law rules.<sup>143</sup> However, the federal court could still apply its own procedural rules.<sup>144</sup> Since *Erie*, a positivist view of choice of law issues has predominated, where vertical choice of law issues are largely driven by concerns about federalism and practicality.<sup>145</sup>

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139. *Swift v. Tyson*, 41 U.S. 1, 9 (1842).

140. Robert J. Condlin, "A Formstone of Our Federalism": *The Erie/Hanna Doctrine & Casebook Law Reform*, 59 U. MIAMI L. REV. 475 (2005).

141. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

142. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426 (1996); *see also Erie*, 304 U.S. at 78.

143. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 ("The conflict of laws rules to be applied by the federal court in [a district] must conform to those prevailing in [that district's] state courts.").

144. *Erie*, 304 U.S. at 92 (Reed, J., concurring).

145. A comprehensive discussion of vertical choice of law issues is outside the scope of this Article. This Part is merely designed to provide a reader with a basic understanding of vertical choice of law issues. For a broader discussion of these issues, *see generally* Joseph P. Bauer, *The Erie Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1237 (1999); Condlin, *supra* note 140; John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); J. Benjamin



After *Erie*, the dichotomy between procedural and substantive rules remained unclear, and both the courts and commentators began to question whether use of this terminology was helpful in the vertical choice of law context.<sup>146</sup> These terms remain helpful if we think of vertical choice of law inquiries in the context of a two-circle Venn diagram. In one circle of the Venn diagram are issues labeled as substantive. In the other circle are issues labeled as procedural.

Some substantive issues clearly do not overlap into the realm of procedure. For example, the term “substantive” clearly describes the elements of a claim, for which the federal courts sitting in diversity will always apply state law. Likewise, some procedural issues are distinct from substantive issues. For example, it is almost always the case that rules provided in the Federal Rules of Civil Procedure will be held to be procedural. Indeed, under the Supreme Court’s decision in *Hanna v. Plumer*, if a court is faced with a Federal Rule of Civil Procedure that is validly enacted under Rules Enabling Act,<sup>147</sup> a federal court sitting in diversity will apply the Federal Rule of Civil Procedure, regardless of contrary state procedural law.<sup>148</sup>

Although relying on the monikers of “substantive” and “procedural” may be helpful in resolving many vertical choice of law questions, they do not answer the question of which law the court will use when a conflict arises between a federal, judge-made procedural rule and a state law or state rule. Arguably, these rules often have features that can be described as both procedural and substantive, and thus fall within the overlapping portions of the Venn diagram. The Supreme Court addressed this issue in *Gasperini v. Center for the Humanities, Inc.*<sup>149</sup> Although not a model of clarity,<sup>150</sup> the *Gasperini* case appears to establish the following framework for courts to use when trying to determine whether to apply a state procedural rule or a federal

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King, *Clarification and Disruption: The Effect of Gasperini v. Center for Humanities, Inc. on the Erie Doctrine*, 83 CORNELL L. REV. 161 (1997); Robert P. Wasson, Jr., *Resolving Separation of Powers and Federalism Problems Raised by Erie, the Rules of Decision Act, and the Rules Enabling Act: A Proposed Solution*, 32 CAP. U. L. REV. 519 (2004).

146. Cf. *Gasperini*, 518 U.S. at 427 (“Classification of a law as ‘substantive’ or ‘procedural’ for *Erie* purposes is sometimes a challenging endeavor.”); Condlin, *supra* note 140, at 492 (“[T]he substance/procedure distinction is a famously difficult one to make operational . . .”).

147. 28 U.S.C. § 2072 (2000).

148. *Hanna v. Plumer*, 380 U.S. 460, 469–74 (1965).

149. *Gasperini*, 518 U.S. at 426.

150. Condlin, *supra* note 140, at 525 (describing *Gasperini* as “confusing and strangely organized”).

judge-made procedural rule in a diversity case.<sup>151</sup> Some commentators have referred to these types of cases as ones involving an “unguided *Erie* choice.”<sup>152</sup>

One inquiry the court will consider is whether the procedural rule is outcome determinative, in the sense that it would cause forum shopping or result in an inequitable administration of justice.<sup>153</sup> In other words, will applying the state standard “have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against citizens of the forum State, or] be likely to cause a plaintiff to choose the federal court”?”<sup>154</sup> The *Gasperini* court was also concerned about whether the state procedural law at issue was manifestly substantive.<sup>155</sup> If the underlying policy of the procedural rule is intertwined with substantive policy objectives, then the federal court should give consideration to applying the state procedural rule.

However, *Gasperini* does not instruct federal courts sitting in diversity to apply the state procedural rule in all instances where the state procedural rule is outcome determinative or was enacted for substantive reasons. Rather, *Gasperini* creates a balancing test. If a state rule is outcome determinative or appears to have been adopted largely for substantive reasons, the federal court sitting in diversity will apply the state procedural rule unless the federal court determines that significant federal interests outweigh the state interests at stake.<sup>156</sup> When a significant federal interest does outweigh the state interest, the Court will either apply the federal procedural rule or try to find a way to accommodate both the state and federal interests.<sup>157</sup>

As indicated earlier, the Supreme Court has repeatedly indicated that the *McDonnell Douglas* test is a procedural,

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151. *Gasperini*, 518 U.S. at 426–32. The Author is not suggesting that the *Gasperini* case will be the Supreme Court’s last word on vertical choice of law issues related to judge-made procedural rules, merely that it is the Court’s most recent and, therefore, the currently binding pronouncement. See, e.g., Condlin, *supra* note 140, at 532 (questioning whether *Gasperini* will be fine-tuned or substantially re-directed by future courts and arguing that the case is “seriously confused”).

152. King, *supra* note 145, at 163.

153. *Gasperini*, 518 U.S. at 428.

154. *Id.* (alterations in original) (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 n.9 (1965)).

155. *Id.* at 429–31.

156. See *id.* at 431–32 (describing that federal interests may outweigh the state’s interest in applying the state rule).

157. See *id.* (holding that the federal trial court should apply the state standard for determining when a verdict is excessive).

evidentiary standard.<sup>158</sup> However, as this discussion highlights, labeling an issue as substantive or procedural does not aid a vertical choice of law inquiry in all instances. Indeed, the Court has repeatedly warned that characterizations of a rule as procedural or substantive in one context may not carry over into other contexts.<sup>159</sup> The failure to recognize that different contexts will change whether an issue is characterized as substantive or procedural has resulted in a large stumbling block in vertical choice of law determinations relating to *McDonnell Douglas*.

*B. Snead v. Metropolitan Property & Casualty Insurance Co.*

There are few cases that discuss the interaction of *McDonnell Douglas* and vertical choice of law issues with any specificity.<sup>160</sup> Unfortunately, the one reported circuit court case that considers the interaction in detail did not conduct a full *Gasperini* analysis and failed to recognize that the Supreme Court's descriptions of *McDonnell Douglas* as procedural were not binding in the vertical choice of law context.

In *Snead v. Metropolitan Property & Casualty Insurance Co.*,<sup>161</sup> the Ninth Circuit considered whether it would be appropriate to apply the *McDonnell Douglas* framework to a disability discrimination claim brought pursuant to Oregon's disability discrimination law.<sup>162</sup> The plaintiff originally filed her claims under the state statute in Oregon state court, and her claims were later removed to federal court on the basis of diversity jurisdiction.<sup>163</sup>

Under Oregon law, the federal court held that a defendant's motion for summary judgment should be denied as long as plaintiff established a *prima facie* case of discrimination.<sup>164</sup> In other words, under Oregon law, the second and third steps of the *McDonnell Douglas* case are not considered at the summary

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158. 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); see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002) (holding that *McDonnell Douglas* is an evidentiary standard and not a pleading requirement).

159. See, e.g., *Black Diamond Steamship Corp. v. Stewart & Sons*, 336 U.S. 386, 397 (1949) (finding that "[s]ubstance" and "procedure" . . . are not legal concepts of invariant content").

160. But see *Crout v. Barber-Colman Co.*, No. 93 C 20122, 1996 WL 304530, at \*8 (N.D. Ill. May 30, 1996) (explaining that the federal *McDonnell Douglas* standard can be used to evaluate state retaliatory discharge cases and describing *McDonnell Douglas* as procedural).

161. *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080 (9th Cir. 2001).

162. OR. REV. STAT. § 659A.112 (2005); *Snead*, 237 F.3d at 1089–93.

163. *Snead*, 237 F.3d at 1087.

164. See *id.* at 1090.

judgment stage. Even if a defendant articulates a legitimate, nondiscriminatory reason for its conduct during the summary judgment proceedings, the plaintiff is not required to rebut this evidence to survive summary judgment. The plaintiff argued that the federal court sitting in diversity jurisdiction was required to apply the state standard, while the defendant argued that *McDonnell Douglas* was procedural and should be applied.<sup>165</sup>

The Ninth Circuit indicated that it was proceeding under the assumption that the question before it was a *Gasperini* problem involving judge-made rules.<sup>166</sup> It then noted that "classification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor."<sup>167</sup> The Ninth Circuit then described a two-part test for determining whether the federal rule or state rule should prevail.<sup>168</sup> The court indicated that the first inquiry should be whether the state rule was outcome determinative in the sense that it would result in forum shopping by parties or the inequitable administration of justice.<sup>169</sup> Second, "[i]f the state law is indeed outcome determinative . . . we then must decide whether an overriding federal interest justifies application of federal law."<sup>170</sup> Notably, the Ninth Circuit did not address whether the Oregon rule was tied to substantive, rather than merely procedural, objectives.

In examining the first question, the Ninth Circuit held that the Oregon rule is not outcome determinative.<sup>171</sup> The court based its holding on the following analysis:

The only significant difference between the state and federal regimes is when a case that fails one of the *McDonnell Douglas* components will be dismissed. For example, a plaintiff whose case could not survive summary judgment on the third *McDonnell Douglas* component in federal court for lack of evidence would only delay the inevitable by proceeding in state court where, on the same record, a nonsuit or JNOV would be in order at the close of the plaintiff's case. In either case, the court would ultimately apply the same substantive law, employ the same reasoning, and produce the same result. Only the

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165. *Id.*

166. *Id.*

167. *Id.* (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996)).

168. *Id.* at 1090–91.

169. *See id.* at 1090.

170. *Id.* at 1091.

171. *Id.*

timing of the case's dismissal (along with the added expense of bringing the case to trial) would differ.<sup>172</sup>

The Ninth Circuit did little additional analysis, and simply declared that neither of *Erie*'s twin aims would be implicated because "no significant advantage would ultimately be gained by filing in state, as opposed to federal court."<sup>173</sup>

The Ninth Circuit then continued by finding that there was an overriding federal interest at stake.<sup>174</sup> The court identified the interest by providing that if the federal courts were required to follow the Oregon rule, "nearly every case of employment discrimination filed under Oregon law would go to trial, providing an increased burden on the district courts' already crowded trial dockets."<sup>175</sup> The court then threw in a paragraph about how questions regarding the allocation of decisions to be made between the judges and juries in the federal system are important.<sup>176</sup>

In a separate section, the court analyzed what it called "other considerations" that supported its analysis.<sup>177</sup> The first of these considerations was the Supreme Court's pronouncement that *McDonnell Douglas* was procedural.<sup>178</sup> The court also indicated that its "conclusion is also consistent with circuit law on the application of federal summary judgment procedures in diversity cases."<sup>179</sup>

Judge Donald Lay dissented from the panel decision on this issue but provided little helpful discussion regarding the underlying issues. Judge Lay simply indicated that "*Erie* . . . both teach[es] us that we simply exchange courtrooms, not law, in deciding diversity cases" and that there was no federal policy that should override Oregon law in this instance.<sup>180</sup>

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172. *Id.*

173. *Id.*

174. *Id.* at 1091-92.

175. *Id.* at 1092.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 1093.

180. *Id.* at 1095 (Lay, J., dissenting). The dearth of discussion may be explained by Judge Lay's belief that, even if application of federal law were appropriate, the *McDonnell Douglas* standard should not be applied to the disability discrimination issue before the court. *Id.* at 1095-96; see also *Morgan v. New Horizon Comm'n*, No. CV 03-851-HA, 2005 WL 326966, at \*3 (D. Or. Feb. 9, 2005) (applying *Snead*); *Thomson v. Mentor Graphics Corp.*, No. CV-03-1350-ST, 2004 WL 2584022, at \*4 (D. Or. Nov. 12, 2004) (same); *Jamal v. Wilshire Mgmt. Leasing Corp.*, 320 F. Supp. 2d 1060, 1075 (D. Or. 2004) (noting that while *McDonnell Douglas* framework did not apply in diversity cases, it still was appropriate in cases arising under ADEA).

C. *Learning from Vertical Choice of Law Characterization Mistakes*

An in-depth exploration of the Ninth Circuit's holding in *Snead* demonstrates five crucial mistakes the court made when considering whether vertical choice of law required the application of a federal version of the *McDonnell Douglas* standard. First, the court erred by characterizing this case as an unguided *Erie* problem, rather than a substantive issue governed by the *Erie* doctrine itself. However, even if we assume that the Ninth Circuit characterized the problem correctly, it failed to properly analyze the issue under the current principles underlying unguided *Erie* choices (1) by engaging in a truncated explanation of the *Gasperini* test, (2) by failing to fully consider the issue of outcome determinativeness, (3) by improperly overvaluing the federal interests at stake, and (4) by taking into account additional considerations that do not play a role in the vertical choice of law analysis.

1. *Considering Whether an Unguided Erie Choice Is Necessary.* In making determinations about vertical choice of law, the first task a court must undertake is to determine how the problem should be characterized. When determining whether to apply a federal version of *McDonnell Douglas* to state law claims, two of the potential vertical choice of law frameworks may be applicable. First, as discussed above, a court may understand a problem as involving purely substantive issues and simply apply the holding in *Erie* that federal courts sitting in diversity jurisdiction must apply state law. If the court rejects the question as falling clearly within the dictates of *Erie*, it may categorize the issue as one involving the unguided *Erie* choice described in the *Gasperini* case.

There is a strong argument that at least portions of the *McDonnell Douglas* framework call for a strict application of *Erie*. It is true that *McDonnell Douglas* and its state counterparts play a procedural role in that they establish the order in which the court will consider the parties' evidence.<sup>181</sup> However, it is not usually this portion of the test that litigants argue in relation to vertical choice of law issues.

Rather, litigants are typically litigating three other parts of the *McDonnell Douglas* framework that are overwhelmingly substantive. First, the federal test and its state counterparts indicate that parties must set forth certain facts to establish a

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181. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793–94 (1973).

presumption of discrimination and what facts are necessary for the defendant to rebut that presumption.<sup>182</sup> Second, once the required facts are established, the *McDonnell Douglas* test determines that a rebuttable inference of discrimination arises.<sup>183</sup> Third, the *McDonnell Douglas* test and its state counterparts direct each party as to the burden of production or persuasion that each party bears during each step of the analysis.<sup>184</sup>

Given these three factors, whether to apply *McDonnell Douglas* or a state counterpart appears to fall directly within the contours of the Supreme Court's decision in *Dick v. New York Life Insurance Co.*<sup>185</sup> That case revolved around whether an insurance company was required to pay double indemnity on a life insurance policy when the insurance company believed that the insured had committed suicide.<sup>186</sup>

The facts of the case are straightforward. A farmer was found dead in his barn with two gunshot wounds, one to his torso and the other to his head.<sup>187</sup> At trial, there was evidence that the farmer was healthy, happily married, and in good financial condition; in other words, he had no motive to commit suicide.<sup>188</sup> Evidence also was presented that the farmer's gun was old and that it discharged occasionally on accident.<sup>189</sup> The jury returned a verdict in favor of the farmer's widow, and the trial court denied the insurance company's motions for a judgment notwithstanding the verdict and for a new trial.<sup>190</sup> The court of appeals ruled that the district court erred in denying the judgment notwithstanding the verdict, finding that there was no version of the facts that supported an accidental death and that the death was a suicide.<sup>191</sup> The farmer's widow then appealed the case to the Supreme Court.

Both of the parties assumed that North Dakota law applied to the case.<sup>192</sup> And, although the Supreme Court noted that questions lurked within the case regarding whether state or federal sufficiency of the evidence standards prevailed,<sup>193</sup> the

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182. *Id.* at 802-04.

183. *Id.*

184. *Id.*

185. *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437 (1959).

186. *Id.* at 438.

187. *Id.* at 441.

188. *Id.* at 446.

189. *Id.* at 441-42.

190. *Id.* at 442.

191. *Id.* at 444.

192. *Id.* at 442.

193. *Id.* at 444-45.

Court's discussion of the remaining, uncontested choice of law issues suggested that the parties' assumption was consistent with federal law. The Court noted that under North Dakota law, there was a presumption that a death was accidental and that the insurance company was required to overcome that presumption.<sup>194</sup> In applying the North Dakota rule, the Court indicated that "[u]nder the *Erie* rule, presumptions (and their effects) and burden of proof are 'substantive' and hence respondent was required to shoulder the burden during the instant trial."<sup>195</sup>

Other courts have likewise assumed or decided that in a diversity case state law would govern the existence of a presumption and the evidence required to obtain the presumption.<sup>196</sup> Likewise, burdens of persuasion and production are nearly universally classified as substantive for *Erie* purposes.<sup>197</sup> Even within the *McDonnell Douglas* context, courts have characterized the question before them as involving a straightforward *Erie* issue, and not an unguided *Erie* choice.<sup>198</sup> The *Snead* opinion failed to consider the possibility that the issue before it may have involved a simple application of *Erie*. Had it characterized the problem before it as involving a simple *Erie* choice, it would have reached the opposite conclusion.

Skipping the initial characterization issue, the Ninth Circuit assumed that the question before it involved an unguided *Erie* choice. It then began to apply the test announced in *Gasperini* to the problem before it.<sup>199</sup> However, it is unclear from the court's reasoning whether it properly applied the *Gasperini* test.

As discussed earlier, the *Gasperini* test is not a model of clarity, but commentators and courts (including the Ninth Circuit) have indicated that the test requires consideration of

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194. *Id.* at 442–43.

195. *Id.* at 446.

196. See *Johnston v. Pierce Packing Co.*, 550 F.2d 474, 476 (9th Cir. 1977) (indicating that parties agreed that Idaho law should govern question of whether plaintiff was entitled to a presumption that he was exercising due care); *Dodson v. Imperial Motors, Inc.*, 295 F.2d 609, 614 (6th Cir. 1961) (holding that state presumption regarding validity of a document signed by a notary should be used); *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1377 (E.D.N.Y. 1988) (holding that New York law created in effect a presumption that ambiguous clauses in insurance policies were construed in favor of the insured).

197. *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1200 (3d Cir. 1978) (indicating that burdens of proof are typically considered substantive for *Erie* purposes); see also *Mayer v. Gary Partners & Co.*, 29 F.3d 330, 333 (7th Cir. 1994) (same for burdens of persuasion).

198. See *Sandbank v. Kodak Elec. Printing Sys., Inc.*, No. 96-1342, 1997 WL 595087 (6th Cir. Sept. 27, 1997).

199. *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1090–93 (9th Cir. 2001).



both outcome determinativeness and whether an arguably procedural rule is bound up with substantive concerns.<sup>200</sup> Courts should consider whether the state law is “merely a form and mode of enforcing the [right]” or whether it is “a rule intended to be bound up with the definition of the rights and obligations of the parties.”<sup>201</sup> If the rule is merely procedural, the analysis weighs in favor of applying federal law. If the rule has substantive underpinnings, then the calculus shifts in favor of applying the state law.

Several portions of the *McDonnell Douglas* test are clearly substantive in nature. First, *McDonnell Douglas* sets forth burdens of production and persuasion for both parties.<sup>202</sup> The plaintiff is required to provide sufficient evidence to establish a prima facie case.<sup>203</sup> If the plaintiff is successful in doing this, the defendant must merely articulate a legitimate, nondiscriminatory reason for its actions (a burden of production).<sup>204</sup> Likewise, state counterparts to *McDonnell Douglas* set forth similar burdens of persuasion and production. These burdens are almost always classified as substantive for *Erie* purposes.<sup>205</sup>

Additionally, the federal test and its state counterparts establish the material facts that the plaintiff will need to demonstrate to obtain the presumption, and the ones the defendant will need to articulate to rebut it.<sup>206</sup> As discussed above, the test also tells us what presumption results from the establishment of the prima facie case—a rebuttable presumption that discrimination is a likely cause of the employment action.

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200. See, e.g., *Gasperini v. Ctr. For Humanities*, 518 U.S. 415, 428–29 (1996); *In re Larry's Apartment, L.L.C.*, 249 F.3d 832, 838 (9th Cir. 2001) (“[A] federal court sitting in diversity applies state law in deciding whether to allow attorney’s fees when those fees are connected to the substance of the case.” (quoting *Price v. Seydell*, 961 F.2d 1470, 1475 (9th Cir. 1992))); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999).

201. *Byrd v. Blue Ridge Coop.*, 356 U.S. 525, 536 (1958).

202. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973).

203. *Id.* at 802 (stating that a plaintiff may establish discrimination “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”).

204. *Id.* at 802–03.

205. See *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1200 (3d Cir. 1978) (indicating that burdens of proof are typically considered substantive for *Erie* purposes); see also *Mayer v. Gary Partners & Co.*, 29 F.3d 330, 333 (7th Cir. 1994) (same for burdens of persuasion).

206. See *McDonnell Douglas*, 411 U.S. at 802–04.

All of these portions of *McDonnell Douglas* are tied up with substantive, and not merely procedural, interests.

The Ninth Circuit did not address whether the Oregon rule was tied to substantive, rather than merely procedural, objectives. As discussed earlier, had the court conducted this analysis, it would have determined that the rule is tied to substantive policy decisions. Given the inherent ambiguities in the *Gasperini* test and its subsequent interpretations, it does not make sense to dwell upon or to too heavily emphasize this omission in the court's analysis. However, it is noted to demonstrate the lack of care undertaken in reaching the conclusion that federal law should apply.

2. *An Unsatisfactory Examination of Outcome Determinativeness.* The Ninth Circuit also engaged in a cursory analysis regarding whether use of the state *McDonnell Douglas* framework would be outcome determinative. Before plunging into a discussion about whether the *McDonnell Douglas* framework is outcome determinative, it is first necessary to define the term "outcome determinative," as the meaning of this term has changed since its original inception in choice of law jurisprudence.

In *Guaranty Trust Co. v. York*,<sup>207</sup> the Supreme Court considered whether a federal court sitting in diversity was required to follow a state statute of limitations or whether the court could apply the equitable doctrine of laches.<sup>208</sup> In determining that the lower courts were required to follow the state statute of limitations, the Court indicated that the state statute of limitations should be followed because it was outcome determinative.<sup>209</sup> As the Court stated: "[I]n all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."<sup>210</sup> Using *York*, the term "outcome determinative" was read to mean that if application of a state rule would lead to a dismissal and application of a federal rule would not (or vice versa), then the state rule was "outcome determinative" and should be applied in the *Erie* context.<sup>211</sup>

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207. *Guar. Trust Co. v. York*, 326 U.S. 99 (1945).

208. *Id.* at 107.

209. *Id.* at 110.

210. *Id.* at 109.

211. *See, e.g., Hanna v. Plumer*, 380 U.S. 460, 466 (1965) (noting that counsel had

However, as most civil procedure students know, this definition proved unworkable because almost all rules that parties are vigorously disputing can be outcome determinative when viewed from the *ex post* perspective.

In the case of *Hanna v. Plumer*, the Supreme Court appeared to modify the *York* definition of outcome determinativeness, at least in dicta.<sup>212</sup> The Court first noted that a definition of outcome determinativeness that only looked at whether the outcome of the case was affected would prove unworkable because “in this sense every procedural variation is ‘outcome-determinative.’”<sup>213</sup> In rejecting this interpretation of the term, the *Hanna* court appeared to change the perspective from which outcome determinativeness should be viewed. Rather than asking about the *ex post* consequences of the term, the *Hanna* court instructed that outcome determinativeness be considered from an *ex ante* perspective. As the Court indicated: “The ‘outcome-determination’ test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”<sup>214</sup>

Thus, the primary focus of outcome determinativeness post-*Hanna* is whether the type of rule in question is one that would lead to forum shopping by the parties or the inequitable administration of justice.<sup>215</sup> The Ninth Circuit indicated that it was using this definition of outcome determinativeness when deciding the *Snead* case.<sup>216</sup> The Ninth Circuit indicated that “[t]he only significant difference between the state and federal regimes is *when* a case that fails one of the *McDonnell Douglas* components will be dismissed.”<sup>217</sup> Thus, the Ninth Circuit posited that because it would be appropriate to dismiss the case under the Oregon standard upon a directed verdict at the close of plaintiff’s case, the application of the federal *McDonnell Douglas* standard (which would dismiss the case at summary judgment)

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argued that the state law must be applied in any instance where it would affect the outcome of the case); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 197 (2004) (discussing meaning of outcome determinativeness).

212. *Hanna*, 380 U.S. at 466–70. I characterize *Hanna*’s modification of *Erie* as dicta because the Court did not base its holding on whether the state and federal rules were outcome determinative.

213. *Id.* at 468.

214. *Id.*

215. *Id.* As Larry Solum has indicated, this articulation of outcome determinativeness is not wholly satisfactory in striking a line between procedural and substantive rules. Solum, *supra* note 211, at 201–04.

216. *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1090 (9th Cir. 2001).

217. *Id.* at 1091.

would not lead to forum shopping.<sup>218</sup> Stated another way, the court reasoned that a plaintiff's lawyer would not choose a forum simply because it would wait to dismiss the case at trial, rather than at the earlier summary judgment stage.

However, the Ninth Circuit's analysis appears to misunderstand its own interpretation of Oregon law. One of the cases cited by the Ninth Circuit indicates that "[a] plaintiff's *prima facie* case does not disappear merely because a defendant asserts a nondiscriminatory reason which may or may not persuade the trier of fact."<sup>219</sup> Thus, it appears that under Oregon law (as articulated by the Ninth Circuit),<sup>220</sup> if a plaintiff proves a *prima facie* case of discrimination, and the defendant offers a legitimate, nondiscriminatory reason for its actions, the defendant's burden is not merely one of articulation. Rather, the defendant must actually prove the legitimate, nondiscriminatory reason for taking its action, and the jury is free to believe or reject that reason based on the evidence. Contrary to the Ninth Circuit's holding, a directed verdict would not be appropriate at the close of plaintiff's case simply because the defendant articulated a reason for its conduct, even if the plaintiff presented no evidence of pretext. This is true because the jury could simply choose not to believe the defendant's articulation of its reason, and the plaintiff's *prima facie* case, and the inferences it created, would remain.

Even outside of the specific context of *Snead*, it is important to understand the ways in which application of a federal version of *McDonnell Douglas* (rather than a different state rule) would lead to forum shopping and the inequitable administration of justice.<sup>221</sup> In making this inquiry, it is important to remember

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218. *Id.*

219. *Henderson v. Jantzen, Inc.*, 719 P.2d 1322, 1324 (Or. Ct. App. 1986).

220. There is some dispute regarding whether the Ninth Circuit properly interpreted the use of *McDonnell Douglas* under Oregon law. Brief for Appellant at 21–22, *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080 (1999) (No. 99-35071). This Article does not comment on the propriety of the court's decision in that regard, only that the court appears to contradict its own understanding of Oregon law.

221. It is unclear whether plaintiffs' attorneys are motivated by the same factors in forum selection that would be outcome determinative under the modified outcome-determinative test. One study found that "the outcome-determinative factors relating to judicial qualities and local bias were the strongest forces in defense attorneys' forum selection decisions. Among plaintiff attorneys, by contrast, most important were attorney convenience and the pace and cost of litigation, factors that are not outcome determinative." Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 400 (1992).

that "[a] difference is significant if it induces litigants with a choice of forums to pick one over the other."<sup>222</sup>

Using this definition, *McDonnell Douglas* can be outcome determinative in three different ways. First, *McDonnell Douglas* places burdens of persuasion and burdens of production on the parties. A plaintiff determining which forum to proceed in would choose a forum that placed lower burdens of persuasion or production on the plaintiff or higher burdens of persuasion or production on the other party.<sup>223</sup>

Second, the *McDonnell Douglas* framework creates and destroys presumptions as the parties litigate through the framework. The outcome determinativeness of *McDonnell Douglas* can easily be seen in reference to these inferences and the two standards at issue in the *Snead* case. Under *McDonnell Douglas*, once the plaintiff establishes a prima facie case of discrimination, an inference of discrimination is created. That inference is destroyed if the defendant articulates a legitimate, nondiscriminatory reason for its conduct. In *Snead*, the Oregon standard did not allow the defendant to rebut the inference created by the prima facie case at the summary judgment stage.<sup>224</sup>

Third, at summary judgment, *McDonnell Douglas* and its companion state standards provide litigants with a list of the facts that are material in establishing discrimination. In other words, both the federal *McDonnell Douglas* standard and the similar state court standards are a proxy for the following statement: These facts are material to determining whether there is evidence of discrimination. Some states have weighed that decision differently and determined that fewer facts are material in the calculation of whether discrimination is present.<sup>225</sup> The materiality of a fact within the summary judgment analysis is outcome determinative.<sup>226</sup>

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222. *Fauber v. KEM Transp. & Equip. Co.*, 876 F.2d 327, 331 (3d Cir. 1989).

223. *See, e.g., Alvarez-Fonseca v. Pepsi Cola of Puerto Rico Bottling Co.*, 152 F.3d 17, 29 n.9 (1st Cir. 1998) (noting that "[t]he difference between the burdens of proof placed upon plaintiffs and defendants . . . can be outcome determinative"); *Lewis v. Heckler*, 808 F.2d 1293, 1298 (8th Cir. 1987) (stating that the "allocation of the burden of proof could be outcome determinative"); *Carvalho v. Raybestos-Manhattan, Inc.*, 794 F.2d 454, 455 (9th Cir. 1986) (noting that "placing the burden of proof on the wrong party in a civil action generally constitutes reversible error").

224. *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1090 (9th Cir. 2001).

225. *See generally supra* Part III (discussing the lack of consensus among the different approaches to *McDonnell Douglas* taken by various courts).

226. *West v. State Farm Fire & Cas. Co.*, 868 F.2d 348, 351 (9th Cir. 1989) (determining whether a reasonable jury could find for plaintiff by looking at actions that were allowed under state law); Steven Alan Childress, *Judicial Review and Diversity*

By denying the substantive differences between the state and federal *McDonnell Douglas* standards, the Ninth Circuit in *Snead* ignored the fact that certain portions of the test are considered to be outcome determinative. This omission denied the court the opportunity to properly conduct the weighing of state and federal interests required under vertical choice of law analysis. In essence, the Ninth Circuit held that the state had no interest in having its standard apply.

3. *A Strange Articulation of the Federal Interest at Stake.* The Ninth Circuit's *Gasperini* analysis relies heavily on the court's articulation of an overriding federal interest that prohibits the application of state law. The federal interest expressed by the Ninth Circuit is surprising. Essentially, the panel admits that *McDonnell Douglas* serves a docket-clearing function for the court, allowing the court to get rid of cases at the summary judgment stage, rather than allowing them to proceed to trial.<sup>227</sup>

Recognizing that a docket-clearing function is probably not an overriding federal interest, the Ninth Circuit then tries to justify the federal interest as one involving questions regarding the allocation of burdens between the judge and the jury.<sup>228</sup> However, this articulation of the federal interest misunderstands the issue before the court. No one in *Snead* argued that the court was not entitled to rule on summary judgment using Federal Rule of Civil Procedure 56, only that in using the federal standard, the court was required to rely on state rules about what was material to that determination and to use state guidance with regard to burdens of production and persuasion, and their effects.<sup>229</sup>

Thus, it appears that the Ninth Circuit conflated what should have been two distinct inquiries: who should evaluate the evidence and what the state law defined as the proper evidence to evaluate.<sup>230</sup> This conflation is not uncommon when trying to characterize an issue as procedural or substantive for purposes of vertical choice of law analysis. As one commentator noted:

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*Jurisdiction: Solving an Irrepressible Erie Mystery?*, 47 SMU L. REV. 271, 280 (1994).

227. *Snead*, 237 F.3d at 1092 ("If federal courts sitting in diversity were compelled to follow [Oregon summary judgment law], nearly every case of employment discrimination filed under Oregon law would go to trial, providing an increased burden on the district courts' already crowded trial dockets.").

228. *Id.*

229. *Id.* at 1090–91.

230. *Mayer v. Gary Partners & Co.*, 29 F.3d 330, 335 (7th Cir. 1994) (describing the distinction between these two inquiries).

Some of the inconsistency in the cases and commentators, then, may stem from failing to carefully distinguish similar-sounding review issues from true sufficiency review. Burdens and presumptions are part of the substantive package in a way that is simply not shared by the review test itself, even to the extent the test necessarily includes application of trial burdens and presumptions as part of the substantive law reviewed.<sup>231</sup>

In failing to make this distinction, the Ninth Circuit asserted a weighty federal interest into its analysis where none existed. The federal courts had no interest in determining what facts were material to summary judgment on a state law discrimination claim, what presumptions would arise from those facts, or what standards are necessary for creating those presumptions.

4. *Errors in the "Other Considerations."* After conducting its *Gasperini* analysis, the Ninth Circuit indicated that "other considerations" supported its decision. It is notable that none of these "other considerations" play a proper role in the *Gasperini* analysis. However, even if we were to consider them as only persuasive authority in support of the court's analysis, they do not carry much persuasive value.

The first "other consideration" that the Ninth Circuit relied on was the fact that the Supreme Court had indicated that *McDonnell Douglas* was procedural in two cases, *St. Mary's Honor Center v. Hicks*<sup>232</sup> and *Reeves v. Sanderson Plumbing Products, Inc.*<sup>233</sup> The Ninth Circuit noted that the Supreme Court's characterization of the test as procedural was "probative of the Court's view [of the] subject."<sup>234</sup> While it is true that both of those cases indicated the burden-shifting framework was procedural, neither of these cases was a diversity case.<sup>235</sup> And,

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231. Childress, *supra* note 226, at 280, 320 ("[T]o the extent burdens and standards of proof are now considered within the application of the federal summary judgment analysis, those burdens are likely found in state substantive law for that cause of action.").

232. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 521 (1993) (holding that the trier of fact's rejection of an employer's asserted reasons for its actions does not entitle a plaintiff to judgment as a matter of law).

233. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149 (2000) (holding that a plaintiff's prima facie case of discrimination, combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, may be adequate to sustain a finding for intentional discrimination under the ADEA).

234. *Snead*, 237 F.3d at 1092.

235. *Reeves*, 530 U.S. at 133 (noting that the claims were being brought pursuant to the federal ADEA); *Hicks*, 509 U.S. at 502 (indicating that the case was brought pursuant

importantly, neither case suggests the Court's view on whether *McDonnell Douglas* is procedural for purposes of vertical choice of law analysis.

This distinction is important because courts often characterize similar issues differently depending on whether they apply vertical choice of law analysis or decline to apply *Erie* considerations at all.<sup>236</sup> As the Third Circuit indicated: "We must be wary of importing the dichotomy of the substance/procedure label from one context to another."<sup>237</sup> The Supreme Court's indication that the framework is procedural in a federal question context provides us with little guidance about whether the Court would reach the same conclusion in a diversity case. As discussed earlier, given the twin aims of *Erie* and the substantive reasons underlying *McDonnell Douglas*, the better view holds that *McDonnell Douglas* belongs on the substantive<sup>238</sup> side of vertical choice of law issues.

In a separate consideration, the Ninth Circuit noted that its holding was "consistent with circuit law on the application of federal summary judgment procedures in diversity cases."<sup>239</sup> However, the cases cited by the court in support of this proposition are inapposite to the situation faced by the court.

In *Gasaway v. Northwestern Mutual Life Insurance Co.*, the Ninth Circuit considered whether a plaintiff's failure to submit evidence to counter evidence presented by defendants at summary judgment should be evaluated under Hawaiian law or under the Federal Rules of Civil Procedure.<sup>240</sup> Because Rule 56(e) was in direct conflict with the position being advocated by plaintiff under state law, a *Hanna* analysis would apply to the

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to Title VII).

236. Solum, *supra* note 211, at 196 (noting that the terms "substance" and "procedure" take on different meanings in different contexts).

237. Fauber v. KEM Transp. & Equip. Co., 876 F.2d 327, 331 (3d Cir. 1989); *see also* Md. Cas. Co. v. Williams, 377 F.2d 389, 394-95 (5th Cir. 1967) (indicating that presumptions may be procedural for horizontal choice of law questions and substantive for vertical choice of law questions).

238. Use of the terms "procedural" and "substantive" to describe vertical choice of law issues that fall under the *Gasperini* prong is inherently problematic because many of the rules that fall within this analysis are arguably both procedural and substantive. I use these terms only because the Ninth Circuit believed that the *McDonnell Douglas* test could easily be characterized as procedural. I find it more helpful in the *Gasperini* context to consider whether state rules that appear to be procedural rely on substantive concerns, not to rely on the monikers "substance" and "procedure."

239. *Snead*, 237 F.3d at 1093.

240. *Gasaway v. Nw. Mut. Life Ins. Co.*, 26 F.3d 957, 960 (9th Cir. 1994) (affirming a ruling that an insurer was entitled to rescind an insurance policy on grounds of misrepresentations in the application).



*Gasaway* case,<sup>241</sup> not the *Gasperini* analysis that the Ninth Circuit would use with a judge-made rule, like *McDonnell Douglas*. Likewise, although the Ninth Circuit in *Caesar Electric Inc. v. Andrews*,<sup>242</sup> expressed the broad statement that “under the *Erie* doctrine, federal law governs the procedural aspects of summary judgment in a diversity case,”<sup>243</sup> it appears that the panel was also dealing with a conflict with Rule 56.<sup>244</sup> The question before the court in *Snead* was much different than the issues faced in *Gasaway* and *Caesar*. In *Snead*, the plaintiff was challenging the underlying legal standard that the court used in determining summary judgment,<sup>245</sup> not the procedural aspects of Rule 56.

Surprisingly, the Ninth Circuit failed to review other circuits’ decisions regarding the interaction of *McDonnell Douglas* and its characterization for purposes of vertical choice of law. Although these cases engage in little substantive discussion about the two doctrines, many cases hold that where a state standard conflicts with *McDonnell Douglas*, the state standard, not the federal standard, should apply.<sup>246</sup> One case goes as far as referring to *McDonnell Douglas* as “federal common law.”<sup>247</sup>

5. *Why the Procedural Versus Substantive Characterization for Purposes of Vertical Choice of Law Matters.* While it is easy in hindsight to point out the mistakes in the Ninth Circuit’s analysis, the mistakes themselves are not as important as the ultimate effect of the holding. As discussed in Part III, the federal *McDonnell Douglas* standard is currently in disarray as it relates to certain types of discrimination claims. Both state and federal courts differ regarding how these underlying disputes should be resolved. While the fact that many courts ignore the

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241. See generally *Hanna v. Plumer*, 380 U.S. 460, 469–74 (1965).

242. *Caesar Elec. Inc. v. Andrews*, 905 F.2d 287 (9th Cir. 1990).

243. *Id.* at 289 n.3.

244. Further, it is not clear whether this statement is even part of the holding. The court indicated that the movant’s argument regarding the vertical choice of law issue was confusing, and that the case cited in support of his proposition was inapposite. *Id.*

245. *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1090 (9th Cir. 2001) (introducing the plaintiff’s argument that Oregon state law should govern the court’s determination of whether the defendant was entitled to summary judgment).

246. *Perry v. Woodward*, 199 F.3d 1126, 1142 (10th Cir. 1999) (applying New Mexico’s version of *McDonnell Douglas*); *Payne v. Nw. Corp.*, 185 F.3d 1068, 1073 (9th Cir. 1999) (noting that Montana state antidiscrimination laws did not follow the *McDonnell Douglas* standard and that state standard should apply in federal diversity action); *Sandbank v. Kodak Elect. Printing Sys., Inc.*, 124 F.3d 199 (6th Cir. 1997); see also *Monaco v. Am. Gen. Assurance Co.*, 359 F.3d 296, 303 (3d Cir. 2004) (assuming that state law would apply to a state age discrimination claim).

247. *Aquino v. Honda of Am., Inc.*, 158 F. App’x 667, 676 (6th Cir. 2005).

existence of these differences is problematic, this disregard is less harmful than the complete stifling of the debate through use of improper characterization achieved by the Ninth Circuit in the *Snead* decision. Those who doubt these effects need to look no further than subsequent federal district court opinions within the Ninth Circuit that are bound by *Snead*.<sup>248</sup> *Snead* essentially prohibits further development of *McDonnell Douglas* issues in federal court under the state discrimination laws of every state within the circuit.

The use of a procedural characterization in addressing a vertical choice of law issue to curtail the application of state standards will have the greatest effect in states that have explicitly rejected at least parts of the framework for analyzing state discrimination claims.<sup>249</sup> Under the holding in *Snead*, a federal court would be free to use a federal version of the *McDonnell Douglas* standard, even when a state court has held that standard inapplicable to the claim. This scenario would present the starkest example of how improper use of vertical choice of law characterization directly contradicts notions of federalism.

To date, very few federal employment cases have raised vertical choice of law issues related to use of the *McDonnell Douglas* standard. There are probably several reasons for this. First, many practitioners are probably unaware of the vertical choice of law issues lurking within employment cases. Even those who are aware of the issues may be wary to enter into disputes about the *Erie* doctrine because of unfamiliarity with the complex issues raised, especially if the issue is characterized as an unguided *Erie* choice.<sup>250</sup> Second, in many instances, plaintiffs are advancing both state and federal claims. Vertical choice of law

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248. See *Morgan v. New Horizon Commc'ns.*, No. Civ. CV 03-851-HA, 2005 WL 326966, at \*3 (D. Or. Feb. 9, 2005) (applying *Snead*); *Thomson v. Mentor Graphics Corp.*, No. CV-03-1350-ST, 2004 WL 2584022, at \*4 (D. Or. Nov. 12, 2004) (same); *Jamal v. Wilshire Mgmt. Leasing Corp.*, 320 F. Supp. 2d 1060, 1075 (D. Or. 2004) (same).

249. See, e.g., *Bourbon v. Kmart Corp.*, 223 F.3d 469, 474 (7th Cir. 2000) (Posner, J., concurring) (noting that Illinois has specifically rejected application of the *McDonnell Douglas* standard to retaliatory discharge cases); *McKenna v. Pac. Rail Serv.*, 32 F.3d 820, 828 (3d Cir. 1994) (noting that the New Jersey Supreme Court "has refused to apply the *McDonnell Douglas* framework in . . . cases alleging gender discrimination in the form of unequal pay; modified the elements of the *McDonnell Douglas* *prima facie* case in the context of reverse discrimination failure-to-hire cases; and shifted to employers the burden of proving the validity of their decisions in some handicap discrimination cases" (citations omitted)); *Ruhlmann v. Ulster County Dep't. of Soc. Servs.*, 234 F. Supp. 2d 140, 178 (N.D.N.Y. 2002) (indicating that even though New York applies the *McDonnell Douglas* standard, the elements of a *prima facie* case are different than the elements articulated by the federal courts).

250. Condlin, *supra* note 140, at 569-73.

issues are conceptually difficult, and attorneys may not want to confuse the court or the jury with the application of different legal standards in the same case or waste time and resources arguing over legal issues, rather than the merits of the underlying case.

Given these practical difficulties, it is easy to understand why few federal circuit courts have explicitly tackled the issue of the intersection of *McDonnell Douglas* and its characterization for purposes of vertical choice of law. This analytic hole makes it even more important to understand the errors in the *Snead* analysis, so that its faulty application of vertical choice of law is not relied upon by other courts to further expand the role of the federal *McDonnell Douglas* standard in resolving state discrimination claims.

## V. CONCLUSION

Debunking the myth that *McDonnell Douglas* is a monolithic standard that should be applied to both federal and state discrimination claims is especially important given the current debate about the continued use and expansion of the three-part burden-shifting framework.

In recent years, the *McDonnell Douglas* standard has come under increasing attack from both legal and academic circles. Some have argued that the benefits of *McDonnell Douglas* have been eroded by subsequent case law.<sup>251</sup> Others argue that “[e]ven when applied properly, *McDonnell Douglas* may defeat an otherwise meritorious civil rights claim.”<sup>252</sup> Many doubt the continued viability of the *McDonnell Douglas* test, given the 1991 amendments to the Civil Rights Act and the Supreme Court’s decision in *Desert Palace*.<sup>253</sup> This Author has questioned whether the framework was ever supported by the language of Title VII and suggested that the lack of a proper statutory foundation lends further credibility to the arguments for *McDonnell Douglas*’s demise.<sup>254</sup>

At the same time that the framework is coming under increasing scrutiny, it also is being expanded to apply to different employment-related statutes. Although the *McDonnell Douglas*

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251. See Kenneth R. Davis, *Pricefixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 FLA. ST. L. REV. 859, 862 (2004) (arguing that *McDonnell Douglas* framework has largely been superseded).

252. Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 707 (1995).

253. See, e.g., *supra* note 117.

254. See generally Sperino, *supra* note 40.

standard was originally limited to the Title VII context, it quickly expanded to a test used for analyzing claims under the ADA,<sup>255</sup> the ADEA,<sup>256</sup> and discrimination cases brought pursuant to 42 U.S.C. § 1983.<sup>257</sup> In recent years, courts have expanded the reach of *McDonnell Douglas* and applied it to cases brought under the FMLA and state workers' compensation cases.<sup>258</sup>

As the *McDonnell Douglas* test comes under increasing scrutiny and its continued usefulness is called into question, the resolution of substantive issues related to the framework is even more important. States, through the development of their own employment discrimination statutes, have important contributions to make in the development of employment law and to the ultimate questions of whether *McDonnell Douglas* should survive as an analytical framework and in what form. Unfortunately, by relying too heavily on the federal versions of the *McDonnell Douglas* framework, courts are stifling employment law and denying the field the benefits that our system of federalism offers.

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255. See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49 (2003).

256. See *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 142 (2000).

257. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 n.1 (1993).

258. *Daniels v. R.E. Michel Co.*, 941 F. Supp. 629, 632 (E.D. Ky. 1996) ("Although the Court is unable to locate any Kentucky cases which incorporate the *McDonnell Douglas* shifting burdens model commonly used in federal employment discrimination and retaliation cases (and Kentucky civil rights cases under KRS 344) in actions for retaliation for workers' compensation claims, this model is instructive in assessing the evidence presented here.").

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