University of Illinois College of Law
Law and Economics Working Papers

Year 2006 *Paper* 56

Flying without a Statutory Basis: Why McDonnell-Douglas Is Not Justified by Any Statutory Construction Methodology

Sandra F. Sperino*

*University of Illinois College of Law, ssperino@law.uiuc.edu

Flying without a Statutory Basis: Why McDonnell-Douglas Is Not Justified by Any Statutory Construction Methodology

Sandra F. Sperino

Abstract

The McDonnell-Douglas three-part burden-shifting framework has come under increasing attack in recent years. While policy arguments in favor of eliminating the standard are important, one of the strongest arguments in favor if its demise, is that the standard was adopted without proper regard to the operative text, the legislative history, and the broad policies of Title VII. This Article examines the McDonnell-Douglas framework through four leading models of statutory construction and concludes that a satisfactory statutory justification for the test is lacking. While it arguably may have been appropriate to justify this lapse in the past by claiming that the test was merely an evidentiary standard and could be created through the Supreme Court's supervisory authority without reference to normal principles of statutory construction, this argument is no longer compelling. In recent years, courts have begun to water down or eliminate McDonnell-Douglas' use as an evidentiary standard by juries, and, in the process, weakened the argument for its continued legitimacy.

Flying Without A Statutory Basis: Why McDonnell-Douglas Is Not Justified By Any Statutory Construction Methodology

by Sandra F. Sperino[1]

I. Introduction.

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

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

More than 40 years after the *McDonnell-Douglas* decision was handed down, fundamental disagreements still exist within the circuits about how it

---

[1] Lawless Visiting Assistant Professor, University of Illinois College of Law. I am indebted to Stephen F. Ross from the University of Illinois, Tonie Fitzgibbon from Saint Louis University, Michael Gold from Cornell University, Jarod S. Gonzalez from Texas Tech University, and Elaine W. Shoben from the University of Nevada Las Vegas, for their insightful comments on drafts of this article.

[2] *See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973).

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

[4] Price Waterhouse v. Hopkins, 490 U.S. 228, 279 (1989).

[5] Price Waterhouse v. Hopkins, 490 U.S. 228, 291 (1989).

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

[7] Kenneth R. Davis, *Pricefixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 FLA. ST. L. REV. 859, 862 (2004); *see also* Denny Chin & Jodi Golinsky, *Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 659, 659 n.3 (1998) (indicating that courts have struggled with the test).

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

should be applied. Some within the academic community even question its continued viability and applicability, based on subsequent amendments to Title VII.[9] This article argues that *McDonnell-Douglas* has proven unsatisfactory in analyzing discrimination claims because the test was not created using any accepted method of statutory construction. Indeed, the test draws little support from the text, intent, or purpose of Title VII.[10]

Over the years, the statutory underpinnings of *McDonnell-Douglas* have received surprisingly little attention and criticism. This is largely due to explanations of the framework as merely an evidentiary standard.[11] If Title VII operates merely as an evidentiary standard, the theory goes, then the Supreme Court, through its supervisory powers, has the ability to create the shifting burdens of proof and persuasion to assist lower courts in their decisionmaking.[12] This belief about *McDonnell-Douglas* is undermined by recent cases holding that trial courts should not instruct juries about the three-part framework.[13] Thus, in many circuits, we are left with an "evidentiary framework" that is not supposed to play a role in the jury's deliberations. As its courtroom use diminishes, it becomes increasingly problematic to justify *McDonnell-Douglas* as an evidentiary standard under the Federal Rules of Procedure.

As the evidentiary standard justification for *McDonnell-Douglas* erodes, it is important to examine the test's legal heritage. This article attempts to map the

---

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

[10] See Mark A. Schuman, *The Politics of Presumption:* St. Mary's Honor Center v. Hicks *and the Burdens of Proof in Employment Discrimination Cases*, 9 ST. JOHN'S J. LEGAL COMMENT. 67, 70 (1993).

[11] St. Mary's Honor Center v. Hicks, 509 U.S. 502, 514 (1993).

[12] *See, e.g.*, St. Mary's Honor Center v. Hicks, 509 U.S. 502, 514 (1993) (explaining that the decision was rendered under the traditional practices for creating orders and burdens of proof); Mitchell Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 93-95 (Mar. 2004) (explaining why courts are allowed to create decision rules in the constitutional context).

[13] Sanders v. New York City Human Resources Admin., 361 F.3d 749, 758 (2d Cir. 2004); Watson v. Southeastern Pa. Transp. Auth., 207 F.3d 207, 221-222 (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); Kanida v. Gulf Coast Medical Personnel LP, 363 F.3d 568, 576 (5th Cir. 2004); Ryther v. KARE 11, 108 F.3d 832, 849-50 (8th Cir. 1997) (en banc) (Loken, J., in Part II.A. of the dissent, which a majority of the court joined); Sanghvi v. City of Claremont, 328 F.3d 532, 539-40 (9th Cir. 2003); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994); Whittington v. Nordam Group Inc., 429 F.3d 986, 998 (10th Cir. 2005); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999).

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

This article is not intended to engage in a discussion about the relative merits of the tools used by the court in interpreting statutes, but merely to demonstrate that the court did not properly rely on any of these tools in creating the now familiar *McDonnell-Douglas* framework. This article argues that the Court acted illegitimately when it constructed a framework onto Title VII that is not in line with the plain meaning of the statute, its legislative intent, or the statute's broader remedial purposes, and which does not appear to be supported by a common law approach to statutory construction.

Section II of the Article begins with a discussion of the *McDonnell Douglas v. Green* case itself, describing the somewhat narrow factual circumstances that led to the adoption of the now ubiquitous three-part burden-shifting framework. Section III discusses methods of statutory construction and demonstrates that the test created by the courts does not comport with any accepted methodology. Section IV examines why it is no longer satisfying to characterize the framework merely as an "evidentiary framework." Section V discusses the effect the court's straying from the statutory text had on the development of employment law, arguing that the test needlessly created years of circuit splits and debate over intricacies of the test itself. The Article concludes by arguing that the *McDonnell-Douglas* test should be abolished and replaced with a standard that tracks the statutory language in Title VII.

II. Getting Back to Where We Started: An Examination of *Green v. McDonnell Douglas*.

A. The Case of Percy Green.

1. Proceedings before the District Court.

The facts of *McDonnell Douglas v. Green* are rather straightforward. Plaintiff Percy Green had been employed by McDonnell Douglas since 1956.[14] He was rated as a mechanic, and his employment record demonstrated that his

[14] Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 847 (E.D. Mo. 1970).

work was viewed as satisfactory.[15] In 1963, plaintiff applied to work in the Electronic Equipment Division, as a non-union laboratory technician. The supervisors in the Electronic Equipment Division informed Mr. Green that if he transferred into the department, there was a possibility of a layoff, due to the short term of the project upon which they were working.[16] Mr. Green accepted a position in the Electronic Equipment Division.

In the spring of 1964, employees in the Electronic Equipment Division were laid off; however, plaintiff was not one of these employees.[17] Later it became evident that more employees in the department would be laid off. The company used a semiannual ranking of employees to determine which employees would be laid off. The company tried to place employees on the layoff list in other jobs within the company, and gave a voluntary test to determine the qualifications of the men for higher job classifications which were open.[18] Plaintiff refused to take the test.[19]

It was undisputed that plaintiff had been involved in civil rights related protest activities against McDonnell Douglas since the early 1960s.[20] During meetings related to the layoff, Mr. Green told company officials that he believed he was being laid off because of his participation in these activities.[21] The company officials told Mr. Green this was not the case. On August 28, 1964, Mr. Green and eight other technicians were laid off.[22]

After his layoff, Mr. Green engaged in numerous protests against McDonnell Douglas, including writing letters, filing charges and picketing. In October of 1964, Mr. Green, along with other members of the Congress on Racial Equality, stalled their cars on the main roads leading to defendant's plant at the time of a shift change.[23] Plaintiff led a second demonstration that resulted in the employees of the defendant being locked in the building at quitting time.[24]

On July 26, 1965, plaintiff applied for a position at McDonnell Douglas. Although plaintiff was qualified for the job, he was not hired. The defendant based its rejection of the plaintiff on his participation in the demonstrations, which the company considered to be illegal actions.[25]

---

[15] Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 847 (E.D. Mo. 1970).
[16] Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 847-48 (E.D. Mo. 1970).
[17] Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 848 (E.D. Mo. 1970).
[18] Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 848 (E.D. Mo. 1970).
[19] Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 848 (E.D. Mo. 1970).
[20] Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 848 (E.D. Mo. 1970).
[21] Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 848 (E.D. Mo. 1970).
[22] Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 848 (E.D. Mo. 1970).
[23] Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 848 (E.D. Mo. 1970).
[24] Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 848 (E.D. Mo. 1970).
[25] Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 849 (E.D. Mo. 1970).

Plaintiff brought two claims against McDonnell Douglas. First, Mr. Green claimed that his original layoff violated 42 U.S.C. § 1981 because of his race and civil rights activities.[26] Second, Mr. Green claimed that the company refused to re-hire him because of his race, his participation in civil rights activities, and opposing practices made unlawful under the Civil Rights Act of 1964, violating 42 U.S.C. §§ 1981 and 42 U.S.C. § 2000e-3(a).[27]

Prior to the trial on the merits, the trial court dismissed plaintiff's Title VII claim that the company refused to re-hire him based on his race.[28] The trial court held that because the EEOC had not issued a reasonable cause finding on plaintiff's refusal to re-hire claim based on race, that the court did not have jurisdiction to consider this claim.[29] However, plaintiff's section 1981 claim that he was not re-hired based on his race still remained for resolution by the trial court.

The trial court dismissed the layoff claim as untimely, leaving the refusal to re-hire claims for trial by the court.[30] In ruling on the discrimination and retaliation claims, the trial court articulated that the "controlling and ultimate fact questions are: (1) whether the plaintiff's misconduct is sufficient to justify defendant's refusal to rehire, and (2) whether the 'stall in' and the 'lock in' are the real reasons for defendant's refusal to rehire the plaintiff."[31] The trial court held that the refusal to re-hire (brought under section 1981) was not based on racial prejudice. Further, the trial court found that plaintiff's participation in the stall in and lock in constituted illegal activities, and that the company could legitimately base its decision not to re-hire plaintiff on his participation in this illegal conduct.[32]

2. Proceedings before the Eighth Circuit Court of Appeals.

Mr. Green raised several issues on appeal. Among other things, Mr. Green argued that the trial erred in dismissing his layoff claim, in its conclusion that his participation in the lock-in and stall-in did not fall within the protection of 42 U.S.C. § 2000e-3(a), and in striking the allegations of the complaint which charged McDonnell Douglas with denying him employment for reasons of race.[33]

Even though the Eighth Circuit Court of Appeals opinion was the result of a three-judge panel, it produced a majority opinion, a concurring opinion, and a

[26] Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 849 (E.D. Mo. 1970).
[27] Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 849 (E.D. Mo. 1970).
[28] Green v. McDonnell Douglas Corp., 299 F. Supp. 1100, 1102 (E.D. Mo. 1969).
[29] Green v. McDonnell Douglas Corp., 299 F. Supp. 1100, 1102 (E.D. Mo. 1969).
[30] Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 849-850 (E.D. Mo. 1970).
[31] Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 850 (E.D. Mo. 1970).
[32] Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 851 (E.D. Mo. 1970).
[33] Green v. McDonnell Douglas Corp., 463 F.2d 337, 340 (8th Cir. 1972).

dissenting opinion.[34] After briefs were submitted for rehearing en banc, the majority submitted an altered version of Part V of the opinion, which drew a supplemental dissent.[35] The three-judge panel of the Eighth Circuit Court of Appeals unanimously determined that the layoff claim was barred by a five-year statute of limitations.[36] In a portion of the decision joined by two judges, the Eighth Circuit panel then concluded that the evidence before the trial court did not support a claim that plaintiff actively participated in a lock-in;[37] therefore, the appeals court considered only whether plaintiff's participation in the stall-in was a non-discriminatory and non-retaliatory basis for his discharge.[38] The panel also unanimously agreed that the retaliation provisions of Title VII did not protect individuals who engaged in illegal activity as a form of protest and that the stall-in fit within this category.[39]

The Court of Appeals found that the district court erred in striking plaintiff's Title VII claim for refusal to re-hire based on race because the plaintiff was not required to have a reasonable cause finding from the EEOC to proceed on such a claim. Because the dismissal of this claim may have hindered plaintiff's presentation of evidence, the appeals court determined that the plaintiff should have an additional opportunity to make his claim that the dismissal was based on race and violated Title VII.[40]

It would have been proper for the court of appeals' to end its analysis there. However, in section V of the majority the opinion, the panel began to create the outlines of what would later become the *McDonnell-Douglas* test. The panel indicated that "[o]ur prior decisions make clear that, in cases presenting questions of discriminatory hiring practices, employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination." The Court did not cite any statutory principle for this proposition, but rather cited two cases: *Moore v. Board of Education of Chidester*

---

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

[35] Green v. McDonnell Douglas Corp., 463 F.2d 337, 353 (8th Cir. 1972).

[36] Green v. McDonnell Douglas Corp., 463 F.2d 337, 341 (8th Cir. 1972).

[37] The question asked by the Court of Appeals regarding the lock-in is actually the wrong question. The Court of Appeals should have asked whether McDonnell-Douglas reasonably believed that the plaintiff participated in the lock-in. *See, e.g.*, Singh v. Shoney's, Inc., 64 F.3d 217, 219 (5th Cir. 1995) (finding that plaintiff who claimed that co-workers fabricated allegations leading to her discharge must also demonstrate that employer did not reasonably believe those allegations when it terminated her); Hughes v. Brown, 20 F.3d 745, 747 (7th Cir. 1994) (finding that employer's mistaken belief that plaintiff was less qualified for the position is a legitimate, non-discriminatory reason for its actions). The key issue in both discrimination and retaliation cases is the motive of the decisionmaker. Even if Mr. Green had not participated in the lock-in or had only tangentially participated, a finding on behalf of the company still could have been appropriate, if the company reasonably believed that Mr. Green had engaged in such activity.

[38] Green v. McDonnell Douglas Corp., 463 F.2d 337, 341 (8th Cir. 1972).

[39] Green v. McDonnell Douglas Corp., 463 F.2d 337, 341 (8th Cir. 1972).

[40] Green v. McDonnell Douglas Corp., 463 F.2d 337, 343 (8th Cir. 1972).

School District No. 59, Ark.,[41] and *Carter v. Gallagher*.[42] The panel continued by citing a disparate impact case, *Griggs v. Duke Power Co.*,[43] for the proposition that: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[44]

The panel then articulated that a plaintiff presents a prima facie case of discrimination, when he "demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job" and that once the prima facie case is proven, "the burden passes to the employer to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job."[45] The court further indicated that McDonnell Douglas would essentially be required to prove that Mr. Green's participation in the stall-in "would impede his ability to perform the job for which he applied."[46] The court provided no statutory or case support for these propositions.[47]

In the amended section V of the opinion, the court clarified that "[w]hen a black man demonstrates that he possesses the qualifications to fill a job opening and that he has been denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination."[48] On remand, the panel instructed that "Green should be given the opportunity to show that these reasons offered by the company were pretextual, or otherwise show the presence of racially discriminatory hiring practices by McDonnell which affected its decision."[49] Again, there is no statutory (or other) support for such a test.

3. Proceedings before the Supreme Court.

The Supreme Court characterized the *McDonnell-Douglas* case as addressing the "proper order and nature of proof" required to prove discrimination under Title VII.[50] After reiterating the factual context of the case, the Supreme Court laid out the now familiar burden-shifting framework. The Court held that the plaintiff in a Title VII trial must do the following:

---

[41] 448 F.2d 709 (8th Cir. 1971).
[42] 452 F.2d 315 (8th Cir. 1971).
[43] 401 U.S. 424, 431 (1971).
[44] Green v. McDonnell Douglas Corp., 463 F.2d 337, 343 (8th Cir. 1972).
[45] Green v. McDonnell Douglas Corp., 463 F.2d 337, 344 (8th Cir. 1972).
[46] Green v. McDonnell Douglas Corp., 463 F.2d 337, 344 (8th Cir. 1972).
[47] Although the discussion in the original section V provides insight into the court's rationale, it appears that the test articulated in that original section was superseded by the test articulated in the substituted section V. However, it should be noted that the panel adopted portions of its earlier test in the modified section. *See* Green v. McDonnell Douglas Corp., 463 F.2d 337, 354 (8th Cir. 1972) (Johnsen, dissenting) (clarifying differences between the original section V opinion and the modified opinion and noting that the district court is likely to be confused by the modifications).
[48] Green v. McDonnell Douglas Corp., 463 F.2d 337, 354 (8th Cir. 1972).
[49] Green v. McDonnell Douglas Corp., 463 F.2d 337, 353 (8th Cir. 1972).
[50] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973).

> 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.[51]

The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the decision.[52] The plaintiff is then provided the opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext.[53] The court noted that the facts required to establish a prima facie case will necessarily vary, depending on the factual scenario.[54]

The three-part burden-shifting framework was a significant change from the tests that other lower courts previously had used in disparate treatment discrimination cases. Prior to *McDonnell-Douglas*, other courts had applied a less regimented standard requiring that a plaintiff prove by a preponderance of the evidence that the employer was guilty of a discriminatory act and noting that this determination was one that should be made "on [a] case by case basis."[55] As one court indicated:

> The burden of persuasion is on the plaintiff and the court is concerned about the difficulty often inherent therein. Normally, it can be aided by an overall statistical showing but in a limited case such as this it is dependent upon inferences of motive, intent and state of mind often from very slight circumstances. For claimant and counsel, this is not an easy task. In such instances, all a court can do is evaluate these intangibles through the witnesses and weigh the overall situation and performance of the employer.[56]

Under the test enunciated by some circuits prior to *McDonnell-Douglas*, once the plaintiff met this burden, the employer could prevail by proving, as an affirmative defense, that "he failed to hire a person for reasons which would exonerate him."[57] The Court did not discuss this prior case law in its *McDonnell-Douglas*

---

[51] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
[52] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
[53] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).
[54] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
[55] Anderson v. Methodist Evangelical Hosp., Inc., Civ. No. 6580, 1971 WL 150, at *5 (W.D. Ky. June 23, 1971) (finding that woman had been discriminated against based on her race when she was terminated because co-workers, who were motivated by racial animus, complained about plaintiff's performance); Reid v. Memphis Pub. Co., 468 F.2d 346, 348 (6th Cir. 1972) (holding that plaintiff had the burden of proving that refusal to hire was based on protected trait).
[56] Culpepper v. Reynolds Metals Co., 442 F.2d 1078, 1080 (5th Cir. 1971).
[57] Hodgson v. First Federal Sav. & Loan Ass'n of Broward County, Fla., 455 F.2d 818, 822 (5th Cir. 1972).

decision and did not explain why it was lowering the employer's burden from an affirmative defense to a mere burden of persuasion.[58]

Not only did the Court fail to place its newly created test within the context of the then developing body of disparate treatment case law, it also failed to justify the standard with an adequate statutory basis.[59] Surprisingly, in crafting the *McDonnell-Douglas* test, the Court referenced the operative language of Title VII, but did not connect this language with the test it was creating. The Court did not recite that it had consulted the legislative history of the statute in creating the test. And, although the Court discussed the broader purposes of Title VII in the *McDonnell-Douglas* decision, it did not specifically discuss how these purposes were supported by the test articulated by the Court.[60] Unfortunately, given the subsequent importance of the *McDonnell-Douglas* standard, the opinion articulating the standard does not provide an adequate historical, statutory, or philosophical basis for its holding. Nor does it adequately explain how practitioners or judges should use the newly minted test.

B. Later justification for and expansion of *McDonnell-Douglas*.

Although it did not undertake to do so in the *McDonnell-Douglas* opinion itself, the Court later tried to justify the origin of *McDonnell-Douglas* and provide the decision with a sounder legal heritage. In subsequent opinions, the Supreme Court indicated that *McDonnell-Douglas* framework was rendered "according to traditional practice" that provides the Court with the ability to "establish certain modes and orders of proof."[61] The Court also later described the *McDonnell-Douglas* standard as a "procedural device,"[62] as "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination,"[63] and as simply "a means of 'arranging the presentation of evidence.'"[64] Notably, the court has expressed a belief that

---

[58] A discussion of the perceived inadequacies of the tests existing prior to *McDonnell-Douglas* would have been helpful in understanding the rationale behind the highly regimented and complex structure created by the Court.

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

[60] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) ("[T]he purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.")

[61] St. Mary's Honor Center v. Hicks, 509 U.S. 502, 514 (1993).

[62] St. Mary's Honor Center v. Hicks, 509 U.S. 502, 521 (1993).

[63] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

[64] 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 that *McDonnell-Douglas* is an evidentiary standard and not a pleading requirement).

McDonnell-Douglas serves to assure that the "plaintiff [has] his day in court despite the unavailability of direct evidence."[65]

The *McDonnell Douglas* framework is now the most widely used method for establishing circumstantial evidence of discrimination in Title VII cases.[66] Indeed, many circuits recite that there are two methods by which plaintiffs may proceed on disparate treatment claims – either through direct evidence or the *McDonnell-Douglas* framework.[67] And, even though the courts have taken great care to explain that the factors of the test are flexible and should change with the circumstances of each case,[68] plaintiffs attempting to convince the court that modifications to the test should be made in a particular instance often face a skeptical and unyielding court.[69]

The reach of *McDonnell-Douglas* also has been expanded from a Title VII tool to a test that is now used when analyzing claims under the Americans with Disabilities Act ("ADA"),[70] the Age Discrimination in Employment Act

---

[65] Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).

[66] *But see generally* 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 via indirect evidence).

[67] Gamboa v. American Airlines, No. 05-13317, 2006 WL 346478, at *1-2 (11th Cir. Feb. 14, 2006); Jones v. United Space Alliance, L.L.C., No. 05-13001, 2006 WL 250761, at *4 (11th Cir. 2006) ("Absent direct evidence of an employer's discriminatory motive, a plaintiff may establish his case through circumstantial evidence, using the burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*[.]") (citation omitted); Hill v. Forum Health, No. 04-4160, 2006 WL 162967, at *3 (6th Cir. 2006); *but see* Vessels v. Atlanta Independent Sch. Sys., 408 F.3d 763, 768 (11th Cir. 2005) (noting that *McDonnell-Douglas* framework is one way to prove discrimination by circumstantial evidence, but noting that other methods exist); E.E.O.C. v. Clay Printing Co., 955 F.2d 936, 940 (4th Cir. 1992) (explaining that the plaintiff may meet this burden under "the ordinary standards of proof by direct or indirect evidence relevant to and sufficiently probative of the issue"); Michael Evan Gold, *Towards a Unified Theory of the Law of Employment Discrimination*, 22 BERKELEY J. EMP. & LAB. L. 175 (2001) (arguing that statistical evidence and evidence of disparate treatment can also be used to prove discrimination through circumstantial evidence, outside the *McDonnell-Douglas* standard).

[68] Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002) ("Moreover, the precise requirements of a prima facie case can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic.") (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

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

[70] Raytheon Co. v. Hernandez , 540 U.S. 44, 49 (2003).

(ADEA),[71] and discrimination cases brought pursuant to 42 U.S.C. § 1983.[72] Additionally, the *McDonnell-Douglas* standard has been used to determine whether discrimination is established under various state anti-discrimination statutes.[73] Given the significance of the *McDonnell-Douglas* framework, it is important that we understand whether it is supported by Title VII.

III. Exploring Whether *McDonnell-Douglas* Is Supported by Common Methods of Statutory Construction.

As discussed throughout this article, it is not clear whether the *McDonnell-Douglas* standard actually operates as the prima facie case for discrimination or only as an evidentiary framework.[74] If the test spells out the elements of a cause of action for discrimination,[75] it must have a statutory basis. Sections III.A. through III.C. explore whether the test is supported by the text, legislative history or underlying purposes of the Title VII, and concludes that it is not. On the other hand, if the standard is merely evidentiary, section III.E discusses that the test still lacks a sufficient tie to the statute to justify its continued use.

Wading into the thicket of the varied and conflicting methods of statutory construction is, at first blush, a daunting task. However, I hope to ward off concerns about the scope of such a task by beginning with twobasic caveats. First, I am not attempting to make any descriptive, evaluative, or normative claim about one methodology over another. Such an analysis is unnecessary given the thesis of this article – that none of the accepted methods of construction were used in interpreting Title VII.

---

[71] Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (2000) (indicating that the Court assumes, without deciding that it is appropriate to use the framework when analyzing ADEA claims).

[72] St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 n. 1 (1993).

[73] *See, e.g.*, Gamboa v. American Airlines, No. 05-13317, 2006 WL 346478, at *1-2 (11th Cir. Feb. 14, 2006) (applying *McDonnell-Douglas* standard to claims asserted under a Florida anti-discrimination statute); Gentry v. Georgia-Pacific 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) (New Mexico); Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 95 (2d Cir. 1999) (New York); Carpenter v. Federal Nat'l Mortgage Ass'n, 165 F.3d 69, 72 (D.C. Cir. 1999) (District of Columbia); Mullin v. Raytheon Co., 164 F.3d 696, 699 (1st Cir. 1999) (Massachusetts); King v. Herbert J. Thomas Mem'l Hosp., 159 F.3d 192, 198 (4th Cir. 1998) (West Virginia); Lee v. Minnesota, Dep't of Commerce, 157 F.3d 1130, 1133 (8th Cir. 1998) (Minnesota); Nichols v. Lewis Grocer, 138 F.3d 563, 565-66 (5th Cir. 1998) (Louisiana); Olson v. General Elec. Astrospace, 101 F.3d 947, 956 (3d Cir. 1996) (New Jersey); Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 802 n. 8 (6th Cir. 1994) (Kentucky).

[74] There is no question that the Supreme Court has claimed that the test is merely an evidentiary framework. *See, e.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988); Swierkiewicz v. Sorema N. A., 534 U.S. 506, 510 (2002) (holding that *McDonnell-Douglas* is an evidentiary standard and not a pleading requirement). However, as discussed later in the Article, recent changes in the way that the test is used by the courts makes this assertion less convincing.

[75] For a description of the differences between the standard as a prima facie case and as an evidentiary tool, see generally Michael Evan Gold, *Towards a Unified Theory of the Law of Employment Discrimination*, 22 BERKELEY J. EMP. & LAB. L. 175 (2001).

Second, I am not indicating that the methodologies can be neatly pressed into the general categories used in this section. There is much debate within the academic community about where the delineations between the methods of statutory construction lie,[76] and this article is not intended to enter that fray. Rather, the goal of this section is to describe the contours of each statutory construction method in a way that is conducive to exploring those methods in conjunction with Title VII.

With these caveats in mind, it also is important to stress that despite the conflicting beliefs about what tools courts should use in construing statutes, there are points of agreement about proper statutory interpretation. One such point of agreement is that courts should use some method or combination of accepted methods in construing statutory language.[77] Again, there is disagreement about what the methodology should consist of, but there is general agreement that it is not proper for courts to simply create elements of a statutory cause of action without reference to some recognized tool.

A second point of agreement in the statutory construction literature is that the words used in a statute matter.[78] This is not to suggest that commentators and judges agree about what tools should be used to interpret statutory words, only

---

[76] *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 78 (Jan. 2006) (noting there are not clear dividing lines between textualism and purposivism); Caleb Nelson, *What is Textualism*, 91 VA. L. REV. 347, 355 (2005); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 593 (March 1982) (suggesting that plain meaning analysis must take into account both the internal context of the statute, as well as the external context).

Further, in a descriptive sense, it is not clear whether such delineations even exist. Popkin describes the process of statutory construction as "moving back and forth betweens words and other indicia of meaning without preconceived notions about whether the words are clear." William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 594-95 (March 1982). Eskridge and Frickey similarly describe the process as "polycentric" and not "linear and purely deductive." William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 348 (1990). Indeed they suggest that the interpreter will look at the broad range of evidence relating to the statute, including the text, historical evidence, and the statute's evolution, to form a preliminary view of the statute. This view would then be refined by political and other considerations. *Id.* at 352. They also suggest that different methods should be accorded different weights in the consideration process, with the text enjoying primacy. *Id.* at 354.

[77] *See, e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388-89 (June 2003); William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 354 (1990); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 16-37 (Amy Gutmann ed., 1997).

[78] *See, e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388-89 (June 2003); William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 354 (1990); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 16-37 (Amy Gutmann ed., 1997); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 594-95 (March 1982).

that statutory construction involves some interaction between the court and the words in the statute. With these general propositions in mind, let's begin by exploring the accepted tools that courts use in construing statutes.

A. A Plain Meaning Analysis of theFramework .

One of the primary methods of statutory interpretation is the plain meaning approach.[79] While the term "plain meaning" exudes a sense of simplicity, such an assumption would be misplaced because the exact contours of plain meaning interpretation are debated. However, it is safe to say that under a plain meaning approach, the jurist's goal is to explicate the meaning of the statutory text, typically by reference to the statutory text itself.[80] Recognizing that clear lines of demarcation do not exist between plain meaning approaches to statutory construction and other approaches, for purposes of this article, plain meaning will refer to methods of construction that consider only the language of the statute, without seeking guidance from the statute's purpose, legislative history, or common law considerations.[81]

This definition of plain meaning is, therefore, intended to focus on the textualist aspects of this doctrine.[82] As textualism is the most restricted method of

---

[79] *See, e.g.*, Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 971-72 (2005) (describing plain meaning).

[80] *See id.* Such a definition is admittedly restrictive, because it does not encompass a broader approach to plain meaning that would recognize that there are often differences between sentence meaning and speaker's meaning, which as Stanley Fish describes is the difference "between the meaning an utterance has by virtue of the lexical items and syntactic structures that make it up, and the meaning a speaker may have intended but not achieved." Stanley Fish, There *Is No Textualist Position*, 42 SAN DIEGO LAW REV. 629, 629 (June 2005). However, adopting this broader definition of plain meaning is not helpful for purposes of this article because such an articulation necessarily encompasses elements of intentionalism and purposivism, which, are easier to consider separately, in trying to determine whether any of these tools supports the three-part burden-shifting framework.

[81] *But see* John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 78 (Jan. 2006); Caleb Nelson, *What is Textualism*, 91 VA. L. REV. 347, 355 (2005) (noting that textualism may not be this narrowly defined and suggesting that consideration of the purpose behind a statute is countenanced by the textualist approach). Nelson further suggests that textualists may be just as concerned about the intent of the legislators as intentionalists, but believe that legislative history is more likely to provide an inaccurate picture of the collective legislature's intent. *Id.* at 362-63.

[82] T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 23 (1988); Caleb Nelson, *What is Textualism*, 91 VA. L. REV. 347, 347 (2005). For the sake of full discussion, the author notes that the textualist approach, as with other approaches to statutory construction, has its critics. *See generally* Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 762 (May 1995). Some commentators believe that sole reliance on statutory language may "wrench[] a word completely out of context" and that textualism produces cramped interpretations of legislation. William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 592 (March 1982); Note, *Intent, Clear Statements and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 899, 905 (1982). Others criticize textualism's assumption that if a statute is interpreted too narrowly that

plain meaning construction, it serves as a good starting point for our analysis of Title VII, and the starting point for the textualist approach is the language of the statute itself.[83]

The operative anti-discrimination provision of Title VII provides as follows:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .."[84]

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

1. The framework does not provide plaintiffs with adequate protection.

To successfully raise a prima facie case of discrimination under *McDonnell-Douglas*, a plaintiff must establish, among other things "that he applied and was qualified for a job for which the employer was seeking applicants," "despite his qualifications, he was rejected," and "after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."[85] None of these three factors is supported by the statutory language and all three factors can, in some cases,

---

Congress will correct the problem. Note, *Intent, Clear Statements and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 899, 905 (1982) (arguing that textualism "assumes that Congress will continually reinterpret all legislation and will respond effectively to new problems as they arise" and that it is an impossible task for Congress to anticipate all issues that will be raised under a statute). Judge Posner criticizes the descriptive power of textualism and other plain meaning approaches. "Offered as a description of what judges do, the proposition is false. The judge rarely starts his inquiry with the words of the statute, and often, if the truth be told, he does not look at the words at all." Richard A. Posner, *Statutory Interpretation in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 807 (Spring 1983).

[83] The major critique of textualism in the context of civil rights legislation is that Congress has routinely amended statutes solely to fix what Congress believes to be cramped readings of the statutes. For a list of cases in which the Court's reading appears to conflict with the intention of Congress, *see* West Va. Univ. Hosp. v. Casey, 499 U.S. 83, 113-14 (1990) (Stevens, J., dissenting). The author does not necessarily express agreement with this critique as one benefit to the textualist approach in the civil rights context is to require Congress to speak plainly about its intentions.

[84] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 796 n. 4 (1973) (citing 42 U.S.C. § 2000e-2(a) (1)).

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

exclude legitimate claims of discrimination that should be cognizable under Title VII.

Title VII imposes no requirement that only qualified individuals can be discriminated against. Indeed, individuals who have direct evidence of discrimination are not required to prove that they were qualified for a position before establishing discrimination. The easiest example demonstrating a problem with the qualifications requirement is a situation where the employer has a list of objective qualifications for a position, but does not use them in making the decision related to the plaintiff, instead relying on a discriminatory reason. In this situation, it makes no difference whether the individual was qualified for the job. The individual was discriminated against based on a protected trait because equal consideration for the position was not given.[86]

The requirement that an applicant be qualified for the job was initially quite problematic for Title VII litigants. Originally, some courts required litigants to establish that they met both the subjective and the objective qualifications for a job in order to establish a prima facie case.[87] It was often difficult for plaintiffs to prove subjective criteria, like good interviewing and communication skills, especially when the evaluation of these skills was being performed by the alleged discriminator.

Before the courts articulated that the plaintiff only needs to prove objective qualifications for the job, the claims of individuals were dismissed for failure to fit within the *McDonnell-Douglas* mold.[88] However, despite the growing body of case law finding that plaintiff must only demonstrate that he or she met the objective qualifications for the job, defendants continue to argue about this factor.[89]

---

[86] In these situations, courts may not require plaintiffs to prove qualifications for the job. *See, e.g.*, Jauregui v. City of Glendale, 852 F.2d 1128, 1134 (9th Cir. 1988). Even though re-formulating the *McDonnell-Douglas* test is less problematic than denying the plaintiff's claim based on failure to prove a prima facie case, it still requires the plaintiff to come forward with additional evidence and convince the court that the change in the framework is warranted. Such evidence may be difficult to establish, especially if the employer placed a person in the position who met the objective qualifications of the job or if the plaintiff's evidence of discriminatory animus on the part of the decisionmaker is not related to the decision at issue. It should be noted that this argument also may not be successful. *See* Stevo v. CSZ Transp., Inc., 1998 WL 516788, at *4 (7th Cir. July 27, 1998) (finding that even if qualifications had been considered, applicant would not have been hired).

[87] *See, e.g.*, Cuthbertson v. Biggers Bros., Inc., 702 F.2d 454, 465 (4th Cir. 1983) (finding that plaintiff had not established prima facie case because he had not proven "that he was more qualified than anyone who was given a sales job between 1970 and 1976. The fact that he may have been equally qualified is not enough to establish a prima facie case, for the employer has discretion to choose among equally qualified candidates, providing the decision is not based on unlawful criteria.") (quotations omitted).

[88] *See, e.g.*, Canty v. Olivarez, 452 F. Supp. 762, 770 (N.D.Ga. 1978).

[89] Vessels v. Atlanta Independent Sch. Sys., 408 F.3d 763, 769 (11th Cir. 2005).

Similar problems have arisen under the prong of the test that requires a plaintiff to prove that after being rejected for a job, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. This prong was fashioned on the specific facts of the *McDonnell-Douglas* case and has undergone extensive revision through litigation over the past 40 years.[90] This factor proved especially problematic in the reduction-in-force context, where it is possible for someone to be selected for termination based on a protected trait, yet not replaced by other workers.[91]

One response to these criticisms is to cite the mantra that the factors of *McDonnell-Douglas* are flexible and should change with the facts of the case. This retort is not fair to either party in a discrimination case, especially the plaintiff. Even while the Court has noted that the *McDonnell-Douglas* framework is flexible, it has also indicated that it is a "legally mandatory, rebuttable presumption"[92] And while it is possible for problems with the test to be overcome by asking the court to recraft the test in light of the facts of the particular case before it, courts are reluctant to veer from the pre-set *McDonnell-Douglas* course.[93]

It also should be recognized that some litigants are only afforded this "flexibility" if they have counsel who are willing to undertake the risk and expense of litigating a claim to the Supreme Court. For example, in *O'Connor v. Consolidated Coin Caterers Corp.*[94] the Court addressed the question of whether a prima facie case of discrimination under the Age Discrimination in Employment Act required the plaintiff to prove that he was replaced by someone outside of the protected class. Before the Supreme Court's reversal, both the district court and the court of appeals held the plaintiff to a somewhat rigid prima facie case, with the district court dismissing the case at summary judgment and the appeals court affirming that dismissal.[95] Given the expense of litigating a case to the Supreme

---

[90] *See, e.g.*, Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 356 (3d Cir. 1999) (explaining how courts eventually determined that plaintiffs are not required to prove replacement of individuals outside the protected class as part of prima facie case, while noting that in many prior cases it appeared this was an element); Steward v. Sears Roebuck & Co., 312 F.Supp.2d 719, 725 (E.D. Pa. 2004).

[91] Christina A. Smith, Note, *The Road to Retirement – Paved with Good Intentions But Dotted with Potholes of Untold Liability: ERISA Section 510, Mixed Motives and Title VII*, 81 MINN. L. REV. 735, 757, n. 129 (1997) (discussing problems with *McDonnell-Douglas*' original fourth prong in the context of reductions in force).

[92] O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996) (citations omitted).

[93] *See, e.g.*, Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 356 (3d Cir. 1999) (explaining how courts eventually determined that plaintiffs are not required to prove replacement of individuals outside the protected class as part of prima facie case, while noting that in many prior cases it appeared this was an element); Steward v. Sears Roebuck & Co., 312 F.Supp.2d 719, 725 (E.D. Pa. 2004); Charles A. Sullivan, *Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 926 (2005) ("Although the McDonnell Douglas Court explicitly recognized that its formulation of prima facie proof would need to be modified for other situations, lower courts have often disagreed about what evidence constitutes a prima facie case in other contexts.").

[94] 517 U.S. 308, 312 (1996).

[95] 517 U.S. 308, 312 (1996).

Court, many plaintiffs may choose to settle their claims, rather than undertake the time and expense of extensive appellate litigation. Additionally, it should be remembered that the parties tailor their fact gathering during the discovery process to the standard that the court will use during summary judgment and trial. A standard that changes after discovery closes does not allow the parties to fully effectuate their discovery rights.

2. At times, the framework improperly requires defendants to articulate a reason for their conduct.

While many of the problems with the prima facie case disadvantage plaintiffs, they can also disadvantage defendants by raising an inference of discrimination, where none should exist. As discussed earlier, once the plaintiff establishes a prima facie case, an inference of discrimination arises, and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for its conduct.[96]

However, two rather simple scenarios demonstrate how *McDonnell-Douglas* is at times overinclusive when trying to ferret out discrimination. Let's say that Margaret, a white woman applied for a secretarial job with a company. She met the minimum, objective qualifications for the job, but was not hired for the position. Instead, the company hired Bob, a white man for the position. Bob's qualifications for the position were better than Margaret's. Second, consider a situation where an employee receives 100 applications for every position. Even though many of the applicants possess the requisite minimum qualifications, the employer chooses a person who has more than the minimum qualifications.[97]

Under these circumstances, plaintiff will have met the prima facie case for establishing discrimination under *McDonnell-Douglas*, but under these set of facts, it is not clear whether an inference of discrimination should arise. However, *McDonnell-Douglas* automatically assumes that such an inference is created and requires the parties to undertake the second and third step of the inquiry. Although *McDonnell-Douglas* attempts to rid the courts of deciding cases when "the most common nondiscriminatory reasons employment decisions are made (that he was unqualified for the position or that the position was no longer available)",[98] there are clearly non-discriminatory and common reasons for employment decisions that do not fit clearly within the prima facie case.

Further, under the familiar common law standard, absent an employment contract, an employer was allowed to take an employment action against a

[96] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).
[97] Kingsley R. Brown, *Statistical Proof of Discrimination: Beyond "Damned Lies,"* 68 WASH. L. REV. 477, 558 , 121 (1993)
[98] St. Mary's Honor Center v. Hicks, 509 U.S. 502, 527 (1993).

plaintiff for a good reason, a bad reason, or no reason.[99] There is nothing within the text of Title VII that suggests that it was designed to take away the employer's ability to act for no reason; however, this is essentially what the *McDonnell-Douglas* framework does. If an employer does not articulate a legitimate, non-discriminatory reason for its conduct, the inference of discrimination created by plaintiff's prima facie case is unrebutted. While there may be policy reasons for requiring employers to recite the reasons for an employment action, the operative language of Title VII does not mandate such a course.[100]

3. The framework creates a false dichotomy between direct and circumstantial evidence.

In addition to its substantive flaws, the *McDonnell-Douglas* test also created a false dichotomy between circumstantial evidence and direct evidence that is not supported by the statute's language. There is nothing within Title VII that suggests that plaintiffs alleging discrimination through the use of circumstantial evidence should be treated any differently than plaintiffs who are fortunate enough to be able to produce direct evidence of discrimination. Yet, at least with respect to single motive discrimination claims, this dichotomy continues in many circuits.[101] Such a dichotomy is especially puzzling because it conflicts with the evidentiary notion that direct and circumstantial evidence should be given equal weight by a jury.[102]

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

---

[99] *See, e.g.*, Miller v. Automobile Club Of New Mexico, Inc., 420 F.3d 1098, 1128 (2005) (stating New Mexico common law); Layton v. MMM Design Group, 32 Fed. Appx. 677, 680 (4th Cir. 2002) (Virginia).

[100] Admittedly, this problem with the *McDonnell-Douglas* standard does not receive much attention, because it has few practical consequences in actual litigation. Whether required by the standard or not, most employers would provide a reason for their employment decision as a matter of course in defending against the plaintiff's claims. This is demonstrated by employer's conduct prior to the articulation of *McDonnell-Douglas* standard. Anderson v. Methodist Evangelical Hosp., Inc., Civ. No. 6580, 1971 WL 150, at *5 (W.D. Ky. June 23, 1971) (employer asserting that it terminated plaintiff because she could not get along with co-workers); Huff v. N. D. Cass Co. of Ala., 468 F.2d 172, 176 (5th Cir. 1972) (employer stating that it did not recall worker because of his poor performance); Forte v. S.S. Kresge Co., Civ. No. 2370, 1971 WL 209, at *2 (E.D.N.C. Mar. 26, 1971) (plaintiff terminated for being discourteous to store manager's wife).

[101] *See, e.g.*, Charles A. Sullivan, *Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 934 (2005) (questioning whether the standard articulated in McDonnell Douglas is viable after the 1991 amendments to Title VII); William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549, 1566 (Spring 2005) (same).

[102] *See, e.g.*, U.S. v. Curry, 187 F.3d 762, 768 (7th Cir. 1999); Elliott v. Thomas, 937 F.2d 338, 345 (7th Cir. 1991) (indicating there is no principled distinction between direct and circumstantial evidence).

B. Applying an Intentionalist Framework to the *McDonnell-Douglas* Standard.

Several methods of statutory construction allow courts to consider the intention underlying a statute when interpreting that statute.[103] Leaving aside questions about when intent should comes into play in any statutory construction analysis, the difficulties inherent in determining what intent the court is attempting to discover,[104] and what sources are appropriate indicators of legislative intent,[105] this section merely seeks to determine whether a judge that was inclined to use legislative history could turn to Title VII's legislative history to justify the *McDonnell-Douglas* standard.

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

---

[103] The term "intentionalist" may be used to describe several different methods of statutory construction that allow the use of legislative history and other signals of intent, but these methods may differ significantly. Under one intentionalist method of statutory construction, if a statute is ambiguous, the Court should look to the legislative history of the statute and give the language the meaning intended by Congress. For an explanation of intentionalism, see Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 370 (1994). Other intentionalists countenance the use of legislative and other materials to determine the plain meaning of the language in the first place. I use the term "intentionalism" only to refer broadly to those methods of statutory construction that countenance the use of some method of legislative intent.

[104] Inherent difficulties exist in ascertaining the actual intent of the legislature. One of these inherent difficulties is in determining what intent is being discerned. For example, two approaches to determining statutory intent advocate that the court look back to the time when the statute was enacted. One method, imaginative reconstruction, which was proposed by Judge Richard Posner, requires a judge to try to place himself in the position of the legislature enacting the legislation and determine how that legislature would interpret the statutory text. Richard A. Posner, *Statutory Interpretation in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817. The imaginative reconstruction method suggests that the judge look at language, the apparent purposes of the statute, its background and structure, its legislative history, related statutes, the values at the time the statute was enacted, and "any signs of legislative intent regarding the freedom with which the judge should exercise the construction function." *Id.* Another similar methodology coined as "original meaning" by Judge Easterbrook asks courts to determine what knowledgeable users of the words at the time that the statute passed would have thought about the meaning of the words. Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 535 n. 3, 547 (1983); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 29 (1988).

Eskridge and Frickey question whether a judge is ever actually capable of ascertaining the intent of individuals in a different time period, given the bias of the judge as historian. William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 329 (1990). This may be especially true in the case of civil rights litigation, where societal norms and expectations have changed dramatically over the last 100 years.

[105] The narrowest approach at intentionalism allows the use of committee reports and floor statements by bill sponsors to determine the intent of the legislature. William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 326-27 (1990).

The concerns with intentionalism have been widely discussed in the literature. One critique is that individual legislator's expressions of intent may not reflect the collective will of the legislature; in other words, individual legislators can change the intent of the statute through manipulative use of legislative history.[106] Further, there is concern that intentionalist judges selectively cull through legislative history for signals about intention that support the judge's reading of the statute, while ignoring other relevant portions of the legislative history.[107] Additionally, public choice jurisprudence cautions that statutes are carefully crafted outcomes created after compromises between competing political interests and that relying too much on legislative history may unduly upset the intended outcome, which can only be expressed through the actual language of the statutory provisions themselves.[108]

These concerns may be truer when interpreting the operative language of Title VII, even more so than in other contexts. As one court noted, "[t]he legislative history of Title VII has virtually been declared judicially incomprehensible."[109] The debate over the Civil Rights Act of 1964, which also included civil rights protections in the areas of public accommodations and voting, has been coined "The Longest Debate."[110] Debate lasted nine days on the floor of the House of Representatives.[111] Behind-the-scenes maneuvering in the Senate lasted throughout 13 weeks of filibustering by the bill's opponents, which represented the longest filibuster in the history of the Senate.[112] As one commentary indicates: "The 1964 civil rights Senate debate lasted over eighty days and took up some seven thousand pages in the Congressional Record. Well over ten million words were devoted to the subject by members of the upper house. In addition, the debate produced the longest filibuster in Senate history, as well as the first successful invocation of cloture in many years."[113]

One public choice criticism of legislative history is that only the words of the statute can be relied on because the legislative history itself may reveal only the tumult of the legislative process and not the final result intended to be reached

---

[106] Caleb Nelson, *What is Textualism*, 91 VA. L. REV. 347, 362 (2005).
[107] Caleb Nelson, *What is Textualism*, 91 VA. L. REV. 347, 362 (2005).
[108] Caleb Nelson, *What is Textualism*, 91 VA. L. REV. 347, 370-71 (2005).
[109] Beverly v. Lone Star Lead Const. Corp., 437 F.2d 1136, 1138 (C.D. Tex. 1971).
[110] Charles and Barbara Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* 118 (1985).
[111] Charles and Barbara Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* 118 (1985) (discussing a coalition of five congresswomen who supported the amendment).
[112] Charles and Barbara Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* 193 (1985). *See generally id.* at 124-193 (discussing the filibuster of the bill, as well as actions taken by Senators to move the legislation through the Senate).
[113] *See* Bernard Schwartz, STATUTORY HISTORY OF THE UNITED STATES: 2 CIVIL RIGHTS 1089 (Commentary).

by the legislators.[114] Whether this criticism is valid in the abstract is not at issue here, but the Civil Rights Act of 1964's legislative history is one that is certainly clouded by the political maneuvering happening at the time. The bill was passed in the shadow of the assassination of John F. Kennedy, Jr.[115] and was deftly maneuvered through the political process, in a manner designed to thwart some Southern legislators' opposition to the bill.

Indeed, opponents of the bill described the way it was brought before the House of Representatives as not "permit[ting] to ask questions, have an explanation of the bill, discuss it, consider its provisions, and offer amendments."[116] The same concerns were echoed in the Senate debate, where Sen. Richard Russell indicated: "The bill has never been upon the usual legislative highways at any point in its career. It is untouched by any of the ordinary legislative processes."[117] Sen. Russell further opined that the House Judiciary Committee's consideration of the civil rights bill was "summarily junked" and "[i]n its place was substituted a bill drafted by the office of the Attorney General in conjunction with certain key leaders of the movement."[118]

Further, it has been suggested that many amendments to the legislation, including the addition of gender as a protected class, were inserted into the legislation by Southern politicians to ensure that the legislation would not garner enough votes in the House of Representatives.[119] However, these amendments were also championed by others, such as a bloc of female legislators, who actually supported the amendments.[120]

---

[114] *See generally* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988) (noting the criticism, but finding that legislative intent should still play a role in statutory construction).

[115] *See* Bernard Schwartz, STATUTORY HISTORY OF THE UNITED STATES: 2 CIVIL RIGHTS 1019 (Commentary) ("In a memorial address to Congress only five days after the assassination, the slain President's successor declared, 'No memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bull for which he fought so long.'")

[116] *See* Bernard Schwartz, STATUTORY HISTORY OF THE UNITED STATES: 2 CIVIL RIGHTS 1116 (Edwin Willis, D.-La.).

[117] *See* Bernard Schwartz, STATUTORY HISTORY OF THE UNITED STATES: 2 CIVIL RIGHTS *1141* (Richard Russell, D.–Ga.).

[118] *See* Bernard Schwartz, STATUTORY HISTORY OF THE UNITED STATES: 2 CIVIL RIGHTS 1142 (Richard Russell, D.–Ga.). *See also id.* at 1142-43 ("Time and again it was stated in the debate on the floor of the House, and never at any time denied or questioned, that the Attorney General's 56-page bill of 10 titles was steamrolled through the committee without permitting a single member of the committee to ask even one question about the bill or to offer a single amendment to it.")

[119] Charles and Barbara Whalen, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 116-17 (1985) (discussing Congressman Smith's proposal to add sex as a protected trait).

[120] Charles and Barbara Whalen, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 116-17 (1985) (discussing a coalition of five congresswomen who supported the amendment).

Even setting these caveats regarding legislative history aside, it is still difficult to discern anything within the legislative history of Title VII that clearly supports the *McDonnell-Douglas* standard. Indeed, given the magnitude of the changes wrought by the bill, a large portion of the discussion about the bill in both the House and the Senate focused on whether the bill, as a whole, should be passed.[121] There is little discussion about the specific provisions of Title VII, beyond the summaries of the provisions provided by individual legislators.[122]

Surprisingly, there is little discussion in the legislative history regarding what Congress intended by Title VII's operative language that "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .."[123] One legislator even commented on the lack of discussion regarding this important issue by indicating "[t]here is no attempt whatever in any title of the bill to define what is meant by the offense of discrimination. That definition is nowhere in the context, in the intent or in the purpose, or even in the preface of the bill."[124]

There is also little legislative history regarding how litigation brought pursuant to Title VII would proceed once it was initiated in federal court. One of the few indicators that we do have suggests, at least mildly, that the burden-shifting framework of *McDonnell-Douglas* is inappropriate. During the Senate's debate of the legislation, Senator Humphrey indicated that "[t]he suit against the respondent, whether brought by the Commission or by the complaining party, would proceed in the usual manner for litigation in the federal courts . . . [T]he plaintiff would have the burden of proving that discrimination had occurred."[125] While it is true that the *McDonnell-Douglas* standard places the ultimate burdens of proof and persuasion on the plaintiff, the three-part burden-shifting framework cannot be said to describe the "usual manner for litigation in the federal courts."

At least one of the intentionalist frameworks of statutory construction suggests that courts should use legislative history, along with other tools, to determine whether there are "any signs of legislative intent regarding the freedom with which the judge should exercise the construction function."[126] In other

---

[121] *See, e.g.*, H.R. REP. 88-914, 2475 (1963) (discussing constitutionality of Civil Rights Act of 1964); 1964 U.S.C.C.A.N. 2391, 2479-80 (1963) (discussing broad economic reasons for passage of Title VII).

[122] See, e.g., H.R. REP. 88-914, at 2474 (1963) (summarizing provisions of Title VII)

[123] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 796 n. 4 (1973) (citing 42 U.S.C. § 2000e--2(a) (1)).

[124] *See* Bernard Schwartz, STATUTORY HISTORY OF THE UNITED STATES: 2 CIVIL RIGHTS 1148 (Richard Russell, D.–Ga.).

[125] See Bernard Schwartz, STATUTORY HISTORY OF THE UNITED STATES: 2 CIVIL RIGHTS 1228 (Humphrey).

[126] Richard A. Posner, *Statutory Interpretation in the Classroom and in the Courtroom* 50 U. CHI. L. REV. 800, 817.

words, the legislative history itself can grant courts greater power in interpreting statutory terms. There is one passage in Title VII's legislative history, which arguably could support the position that Congress granted the courts explicit permission to create the *McDonnell-Douglas* framework. When discussing amendments to Title VII, one of the senators explained, "A substantial number of committee members, however, preferred that the ultimate determination of discrimination rest with the Federal Judiciary."[127]

However, reading this sentence to provide a broad grant of statutory construction leeway would be to misconstrue the context of the sentence within a broader discussion. This sentence merely expresses the conclusion that the legislature made to provide the courts, rather than an administrative agency, with authority to hear discrimination cases.[128] It does not express any opinion about the courts' ability to construe Title VII's statutory language.

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

> The ambiguity of its language creates a cloud of obscurity which conceals its potential consequences. While we are unprepared to say that the ambiguity is deliberate and calculated, it is difficult to believe that it is altogether accidental. Statutory ambiguities require judicial interpretation. In light of the trend court decisions have taken in recent years, it is not unrealistic to predict that the interpretations the courts would make would be of the broadest possible scope. What the courts interpret tomorrow may be altogether different from what a majority of the Members of Congress intended . . .. When the statute is loosely drawn, vague, ambiguous and obscure, the judicial branch is handed a blank check, signed by the legislative branch.[129]

Although this passage may predict interpretations of Title VII that contradict its express statutory language, it does not provide the type of legislative mandate that Posner envisions the legislature providing to the courts to warrant such an interpretation of Title VII's express terms.

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

---

[127] 1964 U.S.C.C.A.N. 2391, 2515 (1963).
[128] 1964 U.S.C.C.A.N. 2391, 2515 (1963).
[129] 1964 U.S.C.C.A.N. 2391, 2479-80 (1963).

C. Applying a Purposivist Framework to the *McDonnell-Douglas* Standard.

Neither the express language of Title VII, nor its legislative history, supports the *McDonnell-Douglas* standard. The third major factor used in statutory construction is to look at the statute's broad purposes to determine whether a particular interpretation is warranted. However, even ignoring the argument that consideration of a statute's broad purposes is not appropriate construction tool, the purpose of Title VII also appears not to support the *McDonnell-Douglas* standard.[130] The Supreme Court in the *McDonnell-Douglas* opinion indicated that "the language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."[131]

As discussed in Section III.A., *supra*, in at least some circumstances, *McDonnell-Douglas* places unnecessary evidentiary burdens on plaintiffs or causes them to bear the burden of convincing a court to modify existing case law. At times, the framework clearly underenforces the rights granted by the statute. Even if the Court somehow construed *McDonnell-Douglas* as fulfilling Title VII's purpose in some factual scenarios, it is troubling that the test does not fully enforce a plaintiff's rights in others. Notably, even though it does not appear as if the Court was trying to restrict the reach of Title VII through the creation of the standard, it is questionable whether the court could use the statute's purpose to reach such a result.[132]

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

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

One of the few statutory construction methods that may describe (although not fully explain or justify) the *McDonnell-Douglas* is the common law approach.[133] As with the other methods of statutory construction, there are several

---

[130] *See generally* John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 78 (Jan. 2006) (describing purposivism).

[131] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

[132] William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 604 (March 1982) ("There is no nonpolitical principle which justifies using statutory purpose to limit rather than expand a statute.")

[133] While the author does not endorse the general use of the common law approach as a normative matter, it has been so embraced by others in the academic community. *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 889 (advocating a common law approach to constitutional interpretation).

iterations of the common law methodology to interpreting statutes.[134] However, the unifying thread of common law methodology appears to be its approval of and use of concerns other than the text, legislative history, and purpose of the statute.

One commentator described the common law approach as allowing "consideration of current values, such as fairness, relevant statutory policies, and [evolving] . . . values"[135] without masking these considerations as textual, intent, or purpose concerns. As the *McDonnell-Douglas* court provided little guidance as to why it created the three-part burden-shifting framework, one explanation may be that it did not explicitly rely on the text, legislative history, or purpose of the statute, but used these considerations along with consideration of external factors to create a test to deal with the emerging problem of indirect discrimination.[136]

However, this explanation has several large problems. First, it is not clear that the common law approach to statutory construction should apply when the statutory language is not ambiguous. In *McDonnell Douglas*, the court was not faced with a situation "in which alternative understandings of the text were available."[137] Nor was this a case where the courts were faced with a factual scenario that might fall within the contours of the statute, but that was not foreseen by the statute's drafters. In this instance, one might argue that creating a test to characterize the nature of evidence required might be appropriate.

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

---

[134] For example, Thomas Merrill defines common law interpretation to include "all potentially controversial forms of textual interpretation." Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985). T. Alexander Aleinikoff presents a nautical model of statutory interpretation whereby, "Congress suggests an initial course for a statute," but there is a recognition that Congress is unable to fully anticipate all of the factual scenarios to which the statute will be applied." The court system is then allowed to fill in gaps caused by these anticipated scenarios. The nautical model is more fully explained in T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988).

[135] William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 359 (1990).

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

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

Under the heading of direct authority, the Court's authority to engage in common law interpretation of statutes may either be explicitly delegated by Congress or the Court may believe it has this delegated power based on long-standing tradition.[138] For example, the Court has adopted a common law approach to maritime issues[139] and to interpreting the Sherman Act.[140]

The courts have sometimes used common law decisionmaking to not give effect to express statutory language. For example, in Sherman Act cases, the court has held that to give literal meaning to certain sections of the Act would "outlaw the entire body of private contract law."[141] Thus, the court explicitly imported the Rule of Reason, which has origins in the common law, into the Sherman Act.[142] However, even in this instance, the Court indicated that the legislative history of the Sherman Act "makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."[143]

There is no language in either Title VII or its legislative history granting the courts direct authority to engage in common law decisionmaking. Nor does it appear that there is any implicit grant of such authority. Indeed, Posner has suggested that a common law construction approach might not be appropriate in the Title VII context. He suggests that courts should be reluctant to exercise such a power when the statute appears "against a background of dissatisfaction with judicial handling of the same subject matter under a previous statute or the common law," and he suggests that much labor and regulatory legislation is of this character.[144]

Another circumstance under which common law decisionmaking is often used is when preemptive lawmaking is required to preserve the statutory mandate.[145] In these cases, Merrill suggests that the Court has authority to ask "what collateral or subsidiary rules are necessary to effectuate or to avoid further frustrating the specific intentions of the draftsmen."[146] However, Merrill's approval of the permissibility of preemptive lawmaking is based on an

---

[138] Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985).
[139] Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 30 (1985).
[140] Richard A. Posner, *Statutory Interpretation in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 818 (noting the use of common law methodology when interpreting antitrust issues). Further, Congress has explicitly provided the courts with the authority to engage in common law decisionmaking when applying Rule 501 of the Federal Rules of Evidence. FED.R.EVID. 501 (advisory notes).
[141] 435 U.S. 679, 688.
[142] 435 U.S. 679, 688.
[143] 435 U.S. 679, 688.
[144] Richard A. Posner, *Statutory Interpretation in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 818. In fairness, it should be noted that much of this congressional dissatisfaction arose after the courts' decision in McDonnell Douglas.
[145] Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 36 (1985).
[146] Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 36 (1985).

assumption that the courts will use this tool sparingly and confine it to "cases where it is truly necessary."[147]

Again, there is no indication that *McDonnell-Douglas* was needed to avoid frustrating the purpose of Title VII. As discussed in section III.A., the framework may limit plaintiffs with meritorious cases from proceeding to trial. Also surprising was the Court's willingness to create the framework without any discussion about whether it was even necessary. Prior to the adoption of the three-part burden-shifting test, courts had used a less structured standard that mimicked Title VII's statutory language.[148] Indeed, this looser standard of proof is one, that after more than 40 years of litigation, is now being advocated in the academic literature.[149]

Other justifications for common law decisionmaking can be drawn from Mitchell Berman's work. Berman has suggested that courts are authorized to create decision rules to serve adjudicatory and deterrent concerns.[150] Even if we transfer this same framework into the statutory context, it is difficult to justify the creation of *McDonnell-Douglas*.

Under the adjudicatory function, a court attempts to create a rule that minimizes errors by the lower courts in reaching a decision.[151] As Berman indicates, "[b]y minimizing adjudicatory errors, a decision rule is likely at the same time to optimize compliance with the operative proposition."[152] First, it should be note there was no discussion in *McDonnell-Douglas* about lower courts struggling with evidence in civil rights cases or that confusion was causing non-compliance with the operative provision. Further, the complexity of *McDonnell-Douglas* spawned decades of litigation about the allocation of burdens of proof and persuasion.[153] Courts and litigants continue to struggle with individual pieces

---

[147] Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 37 (1985).

[148] Culpepper v. Reynolds Metals Co., 442 F.2d 1078, 1080 (5th Cir. 1971); Anderson v. Methodist Evangelical Hosp., Inc., Civ. No. 6580, 1971 WL 150, at *5 (W.D. Ky. June 23, 1971) (finding that woman had been discriminated against based on her race when she was terminated because co-workers, who were motivated by racial animus, complained about plaintiff's performance); Reid v. Memphis Pub. Co., 468 F.2d 346, 348 (6th Cir. 1972) (holding that plaintiff had the burden of proving that refusal to hire was based on protected trait).

[149] *See generally* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229 (1995) (arguing for a less structured standard).

[150] Mitchell Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 93-95 (2004). Berman also suggests that decision rules can serve protective, fiscal, and institutional functions. None of these concerns appear to be significantly present in the *McDonnell-Douglas* context.

[151] Mitchell Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 93.

[152] Mitchell Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 93.

[153] *See* St. Mary's Honor Center v. Hicks, 509 U.S. 502, 514 (1993); Price Waterhouse v. Hopkins 490 U.S. 228, 253 (1989); 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); Mark A. Schuman, *The Politics of Presumption:* St. Mary's Honor Center v. Hicks *and the Burdens of Proof in Employment Discrimination Cases*, 9 ST. JOHN'S J. LEGAL COMMENT. 67, 70 (1993).

of the proof structure and how that structure should be used.[154] Even today, it is not clear that the framework satisfies the adjudicatory function in all cases.

Decision rules may also serve a deterrent function, when a rule is crafted to secure greater compliance with the underlying operative provision, such as the exclusionary rule.[155] *McDonnell-Douglas* does serve a deterrent function. By requiring employers to articulate a legitimate, non-discriminatory reason for their actions, it encourages employers to consider the reasons underlying employment decisions and to take care in making such decisions. While such a result is desirable, it contradicts the common law employment rights that employers enjoy, which were not taken away by Title VII.[156] Further, it is not clear that prior to creation of the standard, employers were shying away from providing reasons for their actions. Indeed, from a practitioner's perspective it would be bad strategy to defend a discrimination claim by stating that there was no reason for an action or to simply fail to present evidence of such a reason.

As this section demonstrates, justifying *McDonnell-Douglas* under a common law methodology is difficult because it is not clear that the standard was enacted pursuant to proper authority or that it fits within the normal policy parameters of when such rulemaking is allowed. However, even assuming that use of a common law method is appropriate in the context of a non-ambiguous statute, it is not clear that the *McDonnell-Douglas* standard would fit within the parameters of common law statutory interpretation. Ideally, the interpretation of the statute offered by the Court under this approach would be one "which fits most logically and comfortably into the body of both previously and subsequently enacted law."[157] As discussed in sections III.A. and C., the three-part burden-shifting framework does not meet this goal.[158]

---

[154] *See, e.g.*, Kenneth R. Davis, *Pricefixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 FLA. ST. L. REV. 859, 862 (2004).

[155] Mitchell Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 93-94 (2004).

[156] *See, e.g.*, Miller v. Automobile Club Of New Mexico, Inc., 420 F.3d 1098, 1128 (2005) (stating New Mexico common law); Layton v. MMM Design Group, 32 Fed. Appx. 677, 680 (4th Cir. 2002) (Virginia).

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

[158] This article does not discuss *McDonnell-Douglas*' viability under the political model of statutory construction because there is no indication that the Court was addressing those concerns when creating the test. The collaborative model of statutory interpretation assumes that it is proper for the courts to incorporate political values into the interpretation process, even if those political values did not originate with the legislature. Under this model, it is "normatively desirable" for judges to interject political values into the process. William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 590 (March 1982). Under the political reasoning model, it is appropriate for judges' political and other assumptions to be incorporated into the decisionmaking process. William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 347 (1990). The creators of the latter model recognize that the text, history and application of the statute will limit the

E. Justifying McDonnell-Douglas Based on Jurisprudential Concerns.

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

> Cases, such as *McDonnell Douglas,* that set forth an order of proof necessarily go beyond the minimum necessary to settle the narrow dispute presented, but evidentiary frameworks set up in this manner are not for that reason subject to summary dismissal in later cases as products of mere dicta. Courts and litigants rely on this Court to structure lawsuits based on federal statutes in an orderly and sensible manner, and we should not casually abandon the structures adopted.[159]

In at least one case the Supreme Court has suggested that even though the original construction of a statute was not proper, the fact that the opinion is a long-standing precedent may justified its continued force, even if it was not adopted properly.[160] Thus, the principle of stare decisis, with its focus on the importance of stability, predictability, efficiency, reliance and consistency might justify continued adherence to the three-step burden-shifting framework.[161]

However, this argument is easily countered in three ways. First, it is not clear that *McDonnell-Douglas* has yielded the stability, predictability, efficiency, reliance, and consistency that would require continued adherence to it. Second, if the test was created without any valid constitutional authority, it is invalid ab initio.[162] Further, as suggested by Berman in the constitutional context, it may be that decisional rules are entitled to less deference in the stare decisis context than explicit interpretation of statutes.[163] Therefore, to the extent that the framework is merely a decisional rule or an evidentiary standard, it deserves less deference in the stare decisis context.

A second jurisprudential concern that may motivate the continued use of *McDonnell-Douglas* is a belief that if the standard was an improper interpretation of Title VII, Congress would have acted to remedy the problem, as it has done with other court rulings on Title VII issues.[164] It might be that we are not as concerned with activism in the statutory context because "if an interpretation of a

---

choices regarding how to interpret a statute, but that the actual choice among this list will not be "objectively determinable." *Id.*

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

[160] Runyon v. McCrary, 427 U.S. 160, 190-91 (1976) (Stevens, concurring).

[161] T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 60 (1988).

[162] U.S. v. Dickerson, 530 U.S. 428, 456 (2000) (Scalia, J., dissenting).

[163] Mitchell Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 93 (2004).

[164] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 542 (1993) (Souter, J., dissenting).

statute misapprehends the actual intent of Congress or is proved by experience to have been unwise, remedial legislation can be promptly enacted."[165]

However, it is questionable whether Congress intends for the *McDonnell-Douglas* standard to continue.[166] In the Civil Rights Act of 1991, Congress clarified that a plaintiff establishes an unlawful employment practice when he or she "demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[167] Despite the fact that Title VII was amended more than 15 years ago, courts continue to cling to the *McDonnell-Douglas* framework, with many courts refusing to consider whether *McDonnell-Douglas* now directly conflicts with the express language of the statute by requiring litigants to prove but for causation.[168]

While these jurisprudential arguments may explain *McDonnell Douglas*'s continued existence, they do not justify its creation in the first place. Additionally, the 40 years of litigation concerning the meaning of Title VII and the confusion that still exists in the law strongly mitigate against its continued use as the dominant analytical tool for proving single-motive discrimination cases by circumstantial evidence.

IV. Examining McDonnell-Douglas as Merely an Evidentiary Tool.

One of the reasons for the continued viability of *McDonnell-Douglas* is the belief that *McDonnell-Douglas* does not actually prescribe the elements of a cause of action, but rather, merely serves as an evidentiary framework that courts use in considering whether a plaintiff's evidence demonstrates discrimination. While, it is true, that the courts continue to describe *McDonnell-Douglas* as an evidentiary standard,[169] it is not used in this manner. Rather, the circuit courts have almost universally indicated that juries are not to be instructed on the

---

[165] Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, 451 U.S. 77, 86, n.15 (1981). Indeed, Congress has taken steps to remedy other tests created by the Court. In *Price Waterhouse v. Hopkins*, the dissenting opinion lamented that: "[t]oday's creation of a new set of rules for 'mixed-motives' cases is not mandated by the statute itself." 490 U.S. 228, 287 (Kennedy, J., dissenting). Several years later Congress amended Title VII to create a new mixed motive framework. *See* Civil Rights Act of 1991, 105 Stat. 1071.

[166] *See, e.g.*, Charles A. Sullivan, *Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 934 (2005) (questioning whether the standard articulated in McDonnell Douglas is viable after the 1991 amendments to Title VII); William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549, 1566 (Spring 2005) (same).

[167] 42 U.S.C. § 2000e-2(m).

[168] Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 751-52 (1995) (criticizing all aspects of the three-part *McDonnell-Douglas* framework).

[169] Swierkiewicz v. Sorema N. A., 534 U.S. 506, 510 (2002) ("The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement."); Michael Evan Gold, *Towards a Unified Theory of the Law of Employment Discrimination*, 22 BERKELEY J. EMP. & LAB. L. 175, 185 (2001) (describing rule as procedural).

framework. As discussed below, this practice leads to even larger questions about the test's legal heritage.

Despite these problems, and even there is some justification for the belief that the framework serves as an evidentiary standard, it is not clear that the standard is supported by Title VII, at least not in all discrimination cases. Even if we assume that the courts inherently possess the ability to determine burdens of production and persuasion in a case where the legislature has not chosen to do so, the issue still remains: from what were the burdens articulated in *McDonnell-Douglas* derived? The courts' ability to fashion such burdens should not be standardless. Rather, "burdens of proof should be allocated by the policy choices of the substantive law."[170] It is not clear that the *McDonnell-Douglas* framework serves the purposes of the statute in all cases.

A. An Evidentiary Framework Without a Factfinder

One place where confusion over the burden-shifting framework's proper use is most visible relates to jury instructions. When discrimination cases go to trial, the *McDonnell-Douglas* test raises unnecessary complications for both the judge and the jury. Even forty years after the test's creation, courts continue to struggle with how to incorporate its rationale into jury instructions. Indeed, the circuits are currently split regarding how and whether to instruct the jury of the three-part framework. Several circuits incorporate *McDonnell-Douglas* into the jury instructions, instructing the jury on the changing burdens of proof and persuasion.[171] However, most circuits have declared that *McDonnell-Douglas* should not be used in jury instructions.[172] As discussed below, each side of the circuit split highlights more complex problems with *McDonnell-Douglas* as an evidentiary standard.

The best argument against construing *McDonnell-Douglas* as an evidentiary framework is the fact that the majority of circuits discourage the use of the three-part burden-shifting framework in jury instructions.[173] Thus, if the

---

[170] Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 5122

[171] Williams v. Eau Claire Public Schs., 397 F.3d 441, 446 (6th Cir. 2005) (holding that the *McDonnell-Douglas* framework may, but need not, be incorporated into jury instructions); 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); Kozlowski v. Hampton School Bd., 77 Fed. Appx. 133, 141 (4th Cir. 2003) (discussing use of *McDonnell-Douglas* framework in jury instructions).

[172] Whittington v. Nordam Group Inc., 429 F.3d 986, 998 (10th Cir. 2005); Sanders v. New York City Human Resources Admin., 361 F.3d 749, 758 (2d Cir. 2004); Kanida v. Gulf Coast Medical Personnel LP, 363 F.3d 568, 576 (5th Cir. 2004); 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., in Part II.A. of the dissent, which a majority of the court joined); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994).

[173] Sanders v. New York City Human Resources Admin., 361 F.3d 749, 758 (2d Cir. 2004); Watson v. Southeastern Pa. Transp. Auth., 207 F.3d 207, 221-222 (3d Cir.2000) (indicating that it is proper "to instruct the jury that it may consider whether the factual predicates necessary to

test is designed to help factfinders sift through evidence to determine whether discrimination has occurred, the courts have essentially made the test meaningless at trial in cases presented to a jury. In these cases, *McDonnell-Douglas* has become an evidentiary standard without a factfinder.

There appear to be two different rationales for such holdings. Some courts believe that any discussion of the three-part burden-shifting test in jury instructions would be so confusing that the jury may not be able to render a verdict based on such instructions.[174] 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 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."[175] In other words, the trial judge may use the *McDonnell-Douglas* standard to determine whether summary judgment is proper, but once it has served that function, it is no longer appropriate for the factfinder to use the test to make a finding of discrimination.

To the extent that courts have stopped using the framework as an evidentiary standard in the courtroom, it can no longer be justified under the Supreme Court's supervisory authority. If the standard cannot be explained under the Court's supervisory authority or by reference to any of the normal methods of statutory construction, its legal foundation becomes even more suspect.

Perhaps one way around this dilemma is to characterize the test as an evidentiary standard that can be used by judges in pre-trial proceedings and to determine whether a directed verdict is appropriate. However, this characterization also raises problems. To the extent that *McDonnell-Douglas* no longer is a trial standard, it appears to occupy a unique procedural niche – one that is not supported by the Federal Rules of Civil Procedure. Under FED.R.CIV. P. 56, a court may only grant summary judgment when the evidence before the court demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[176] The standard for

---

establish the prima facie case have been shown," but noting that it is error to instruct as to the *McDonnell Douglas* burden shifting scheme); Kanida v. Gulf Coast Medical Personnel LP, 363 F.3d 568, 576 (5th Cir. 2004); Ryther v. KARE 11, 108 F.3d 832, 849-50 (8th Cir. 1997) (en banc) (Loken, J., in Part II.A. of the dissent, which a majority of the court joined); Sanghvi v. City of Claremont, 328 F.3d 532, 539-40 (9th Cir. 2003); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994); Whittington v. Nordam Group Inc., 429 F.3d 986, 998 (10th Cir. 2005); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999).

[174] *See, e.g.*, Sanders v. New York City Human Resources Admin., 361 F.3d 749, 758 (2d Cir. 2004); Kanida v. Gulf Coast Medical Personnel LP, 363 F.3d 568, 576 (5th Cir. 2004); Sanghvi v. City of Claremont, 328 F.3d 532, 540 (9th Cir. 2003); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999).

[175] Whittington v. Nordam Group Inc., 429 F.3d 986, 998 (10th Cir. 2005); Sanghvi v. City of Claremont, 328 F.3d 532, 540 (9th Cir. 2003); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) (indicating that *McDonnell-Douglas* is only for use in pretrial proceedings).

[176] FED.R.CIV. P. 56(c).

establishing entitlement to judgment as a matter of law is that "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue."[177] The Federal Rules of Civil Procedure thus contemplate that the court ruling on summary judgment will be using the same standard to determine whether liability is appropriate as that being considered by the jury. However, by isolating *McDonnell-Douglas* into a summary judgment standard only, the courts are using one legal standard to determine whether a case should go to trial and having the jury apply quite a different standard at the trial itself.

This is simply not the approach allowed by the Federal Rules of Civil Procedure. These problems are further highlighted if the court uses *McDonnell-Douglas* to determine summary judgment issues and then uses the 1991 amendments to the Civil Rights Act to instruct the jury.[178]

It appears that in the past several years, courts are becoming uncomfortable with the dichotomy between *McDonnell-Douglas* and the trial standard. For example, in a recent decision the Seventh Circuit suggests that the outcome of the *McDonnell-Douglas* test to the facts at hand is not important.[179] In affirming a grant of summary judgment for the defendant, a panel of the court notes that the *McDonnell-Douglas* "formula has its place but does not displace the general standards for summary judgment."[180] Therefore, even though the plaintiff had presented evidence that the employer was "bending the rules" to give the available job to a particular applicant, the court found that no reasonable jury would conclude that the rules were bent for discriminatory reasons.[181]

It may be appropriate to argue that McDonnell-Douglas remains an appropriate jury standard, and that the courts that hold to the contrary are simply wrong. However, even in circuits that allow juries to be instructed using the *McDonnell-Douglas* framework, [182] it is not clear that juries use the test as merely

---

[177] FED.R.CIV.P. 50(a).
[178] Griffith v. City of Des Moines, 387 F.3d 733, 745 (8th Cir. 2004).
[179] Walker v. Abbott Laboratories, 416 F.3d 641, 645 (7th Cir. 2005).
[180] Walker v. Abbott Laboratories, 416 F.3d 641, 645 (7th Cir. 2005).
[181] Walker v. Abbott Laboratories, 416 F.3d 641, 644 (7th Cir. 2005).
[182] Rodriguez-Torres v. Caribbean Forms Manufacturer, Inc., 399 F.3d 52, 58 (1st Cir. 2005) (finding that the district court instructed the jury to evaluate the evidence by applying the *McDonnell Douglas* burden-shifting framework); Kozlowski v. Hampton School Bd., 77 Fed.Appx. 133, 141, 2003 WL 22273073, at *5 (4th Cir. Oct. 3, 2003) (discussing use of *McDonnell-Douglas* framework in jury instructions); Brown v. Packaging Corp. of America, 338 F.3d 586, 595 (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 v. New York City Human Resources Admin., 361 F.3d 749, 758 (2d Cir. 2004) (finding it was harmless error for district court to instruct jury as to burden-shifting framework); Vincini v. American Bldg. Maintenance Co. , 41 Fed.Appx. 512, 514 (2d Cir. 2002); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999). The Third Circuit allows the court to instruct the jury regarding the factual

a way of analyzing evidence, rather than as creating the elements of the offense itself. As discussed earlier, using the framework to create the elements of a Title VII violation is not supported by the Act's statutory language, legislative history, or broader purposes.

Thus, in these circuits, the jury can be given an instruction indicating that a plaintiff must establish a prima facie case, that once this prima facie case is established an inference of discrimination is created, and that the defendant must rebut this inference by articulating a legitimate, non-discriminatory reason for its actions. Once the defendant has articulated this reason, the plaintiff must establish that discrimination was the true reason behind the employer's conduct.[183]

It is difficult to construct a believable argument that when jurors are given this instruction, they merely use *McDonnell-Douglas* to determine whether circumstantial evidence of discrimination exists. Rather, stronger argument supports the conclusion that jurors actually use the test to determine the elements of a Title VII violation. This is true for several reasons.

First, jurors are not presented with the evidence in a manner that would lead us to believe that they are actually treating the three inquiries of the test separately. At the time that the jurors are considering whether the defendant has articulated a legitimate, nondiscriminatory reason for its actions, the jurors have already heard the plaintiff's evidence about whether such reason should be believed or not. It strains credulity to believe that jurors are parsing out the evidence of pretext at the time that they are determining whether defendant has articulated a legitimate, non-discriminatory reason for its conduct. Further, numerous courts have indicated their doubts about whether lay jurors can understand and apply shifting burdens of persuasion and production.[184] It is both the order of consideration and the shifting burdens that give *McDonnell-Douglas* its usefulness in considering evidence. Yet, neither of these benefits is present given the current way of presenting evidence and instructing juries.

Second, the use of the three-part test as an actual jury instruction will likely cause juries to overstep the limitations of the test. In subsequent cases, the Supreme Court clarified that determinations relating to steps one and two of the

---

predicates underlying *McDonnell-Douglas*, but not on the burden of articulation that shifts to the defendant. Watson v. Southeastern Pennsylvania Transp. Authority, 207 F.3d 207, 221 (3d Cir. 2000).

[183] *See, e.g.*, Sanders v. New York City Human Resources Admin., 361 F.3d 749, 758 (2d Cir. 2004) (explaining jury instructions); Cooper v. Paychex, Inc., Nos. 97-1645, 97-1543, 97-1720, 1998 WL 637274, at *8 (4th Cir. Aug. 13, 1998); Lafate v. Chase Manhattan Bank (USA), 123 F. Supp. 2d 773, 786 (D. Del. 2000).

[184] *See, e.g.*, Sanders v. New York City Human Resources Admin., 361 F.3d 749, 758 (2d Cir. 2004); Kanida v. Gulf Coast Medical Personnel LP, 363 F.3d 568, 576 (5th Cir. 2004); Sanghvi v. City of Claremont, 328 F.3d 532, 540 (9th Cir. 2003); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999).

McDonnell Douglas framework "can involve no credibility assessment" because "the burden-of-production determination necessarily *precedes* the credibility-assessment stage."[185] As most juries are instructed that they are to be the judges of credibility in a trial, it seems likely that absent a contrary instruction, the jury will make credibility assessments in determining whether the plaintiff has produced evidence sufficient to establish a prima facie case. Thus, for example, when a jury is making a determination about whether the plaintiff was qualified for the position in question, it is likely that the jury is weighing the evidence presented by both the plaintiff and the defendant on this issue. Such an inquiry would transform the *McDonnell-Douglas* requirement from an evidentiary tool, into the actual elements of the case.

B. Even if McDonnell-Douglas is used solely as an evidentiary framework, its heritage is not wholly satisfying.

While the viability of *McDonnell-Douglas* as a trial standard diminishes, it continues to have force as a standard for helping courts to determine whether a plaintiff's evidence is strong enough to survive summary judgment[186] Even if we assume that *McDonnell-Douglas* acts as an evidentiary framework in this context, and that courts have the ability to create burdens of proof and persuasion when Congress has failed to do so, *McDonnell-Douglas*' existence still is not completely justified.

When considering whether and how to create such proof structures, courts often use three different considerations: the substantive policy being enforced, the possession of proof, and the probability of a certain set of facts occurring.[187] As discussed in section II.C., none of these factors were articulated by the Supreme Court when it created the *McDonnell-Douglas* test. Importantly, *McDonnell-Douglas* is not supported by the three normal considerations that typically are used to create such standards.

It makes sense that when a court is determining how to allocate burdens of production and persuasion in a case, it would "begin with the policy of the substantive law being enforced."[188] Given the broad, remedial purposes of Title VII, it makes sense to allocate the burdens in favor of the plaintiff, who "seeks to vindicate the policy of the substantive law."[189]

It is certainly arguable that *McDonnell-Douglas*, as originally crafted, accomplished this goal, and that subsequent clarifications of the standard watered

---

[185] St. Mary's Honor Center v. Hicks, 509 U.S. 502, 509-510 & n. 3 (1993).
[186] Such a discussion must necessarily place aside concerns that the use of summary judgment standard separate from a trial standard does not appear to be countenanced by the Federal Rules of Civil Procedure. *See* Section IV.A., *supra*.
[187] Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 5122.
[188] Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 5122.
[189] Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 5122.

down these benefits.[190] However, it is not clear that even in its original iteration, *McDonnell-Douglas* favored plaintiffs. As discussed in section III.A., the prima facie case unnecessarily cramped plaintiffs' cases into a mold that did not fit all factual scenarios where discrimination may have been present. Further, the dichotomy that the standard created between circumstantial and direct evidence unnecessarily complicated the presentation of proof. It also created opportunities for lawyers to argue about which proof structure was appropriate, rather than whether the evidence itself was probative of discrimination. Given the looser standards that were being used by courts prior to the adoption of *McDonnell-Douglas*, it is difficult to see how the allocation of burdens under the latter framework favors plaintiffs.

The second factor courts often consider in determining how to allocate burdens of persuasion and production is the probability of certain facts.[191] In other words, courts consider "what is the most likely state of affairs in situations like this?"[192] Courts will often "place the burdens of proof on the party asserting the least probable fact or set of facts."[193] It appears that the *McDonnell-Douglas* prima facie case is an attempt to create such a framework. It essentially requires a plaintiff to demonstrate that the most common reasons for non-hiring of an individual – lack of qualifications, failure to apply, and lack of an open position – are absent. However, as discussed above, there are many scenarios when the lack of these elements should not raise an inference of discrimination.

Even ignoring this problem, though, the remaining burdens of the test do not appear to comport with the probability theory of structuring burdens of persuasion and production. If the courts truly believed that the establishment of a prima facie case created a strong inference of discrimination, it would make sense to then place the burden on the defendant to actually prove that discrimination was not the cause of its actions. This is the proof structure that exists for claims brought under a direct evidence framework.[194] That the Court chose not to do so lends substantial credibility to the argument that the prima facie is not a good tool for creating an inference of discrimination in the first place.

The third factor that courts often consider in allocating burdens is the possession of proof.[195] "Here courts look to see whether one party has superior access to the evidence needed to prove the fact. If so, then that party must bear the burdens of proof."[196] The second prong of the *McDonnell-Douglas*

---

[190] *See generally* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2275 (1995).
[191] Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 5122.
[192] Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 5122.
[193] Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 5122.
[194] *See, e.g.*, Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 584 n. 10 (2003) (describing standard for proving discrimination via direct evidence); Pope v. Rent-A-Center, Inc., No. 02-10274-BC, 2003 WL 2286729, at *8 (E.D. Mich. Nov. 26, 2003).
[195] Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 5122.
[196] Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 5122.

framework is designed to address the possession of proof problem. After all, the employer is the entity most likely to know the reason for the employment action. The employer, therefore, is required to at least articulate the reason for its action. However, portions of the prima facie case also appear to be areas where the employer would possess the required evidence. For example, in many instances, the employer possesses information about the qualifications necessary for a position and about whether it continued to seek applicants after a position was filled. Yet, inexplicably, plaintiff must present some evidence of these factors to make a prima facie case.

While these underlying issues are problematic, there is a larger concern about why creation of the framework was even necessary in the first place. As discussed earlier, lower courts did not appear to be having problems with weighing evidence in discrimination cases prior to its adoption. And, while the Court has noted that "[c]onventional rules of civil litigation generally apply in Title VII cases," they have failed to explain how the burden-shifting framework enunciated in *McDonnell-Douglas* follows these same conventional rules."[197] Further, given the severe flaws in the test, it remains questionable whether the test serves any purpose in litigation that "the general rules of civil litigation do not serve . . . equally well."[198]

V. Conclusion.

For some, the lack of statutory support for *McDonnell-Douglas* is not problematic. In fact, it could be argued that it is just one example of the many statutory constructions enacted by the courts without due consideration for statutory heritage. However, *McDonnell Douglas*' lack of statutory support has created real problems in interpreting the employment discrimination statutes – problems that have unfortunately plagued the courts and wasted the attention of numerous courts and litigants over the past four decades.[199]

From a policy perspective, reconsideration of the standard is especially necessary because it appears to have few benefits. Indeed, many have argued that the benefits of *McDonnell-Douglas* have been eroded by subsequent case law.[200] And, one commentator noted that "the only minimal benefit of *McDonnell-Douglas* is forcing the defendant to articulate an explanation for the challenged

[197] Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989).
[198] Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2275 (1995) (arguing for the abandonment of the *McDonnell-Douglas* structure).
[199] Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 711-726 (1995) (criticizing all aspects of the three-part *McDonnell-Douglas* framework)
[200] 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).

employment action."[201] However, as noted earlier in the article, prior to *McDonnell-Douglas*, defendants were already proffering the reasons for their employment actions. Perhaps, the most severe critique of the test is that "[e]ven when applied properly, McDonnell Douglas may defeat an otherwise meritorious civil rights claim."[202]

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

[201] Kenneth R. Davis, *Pricefixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 FLA. ST. L. REV. 859, 862 (2004).

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