

**“LE ROI EST MORT; VIVE LE ROI!”: AN ESSAY
 ON THE QUIET DEMISE OF *MCDONNELL
 DOUGLAS* AND THE TRANSFORMATION OF
 EVERY TITLE VII CASE AFTER *DESERT
 PALACE, INC. V. COSTA* INTO A “MIXED-
 MOTIVES” CASE**

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I. INTRODUCTION

*McDonnell Douglas v. Green*¹ is dead. With apologies to Dickens, it is “dead as a doornail”²—along with its traveling companion, *Texas Department of Community Affairs v. Burdine*.³ And this report of its death is neither “greatly exaggerated”⁴ nor a loss deserving of our mourning.⁵

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

2. CHARLES DICKENS, *A CHRISTMAS CAROL* 1 (John C. Winston Co. 1938) (1849) (opening with Dickens's reference to Jacob Marley, Ebenezer Scrooge's late business partner).

3. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). For convenience of expression, when I refer to *McDonnell Douglas*, I generally intend that to encompass the further elaboration of its proof scheme in *Burdine*.

4. Stewart P. Sherman, *Mark Twain*, 90 THE NATION 477, 477 (1910), available at http://etext.lib.virginia.edu/railton/sc_as_mt/mtobit6.html (last visited Oct. 21, 2003).

5. See, e.g., *Wells v. Colo. Dep't of Transp.*, 325 F.3d 1205, 1221 (10th Cir. 2003) (Hartz, J., dissenting) (“The *McDonnell Douglas* framework only creates confusion and distracts courts from ‘the ultimate question of discrimination *vel non*.’ *McDonnell Douglas* has served its purpose and should be abandoned.”) (citation omitted).

This Essay explores two key themes relating to *McDonnell Douglas*: first, the atmospherics of *McDonnell Douglas*'s quiet yet well-earned and beneficial demise, and second, of greater consequence to all the constituencies of employment law in the United States (employees, employers, lawyers, and courts), what the future holds for employment discrimination litigation under Title VII of the Civil Rights Act of 1964.⁶

What has finished off dear old *McDonnell Douglas*? Nothing less than the most significant Supreme Court decision of the October 2002 Term. No, this is not another article about *Grutter v. Bollinger*,⁷ “the” affirmative action case.⁸ Instead, it is about the monumental “sleeper” decision of this Term—*Desert Palace, Inc. v. Costa*.⁹ Even astute observers, such as *New York Times* Supreme Court beat reporter Linda Greenhouse, have not fully grasped what Justice Clarence Thomas—former Chairman of the Equal Employment Opportunity Commission during the Reagan Administration—has done in the Court’s unanimous opinion.¹⁰ Whatever the corrosive effect on the interests of minority group members that the views that Justice Thomas expressed in his *Grutter* dissent¹¹ may be argued

6. 42 U.S.C. §§ 2000e-2000e-17 (2000).

7. *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); *see also* *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).

8. *See* *Grutter v. Bollinger*, 123 S. Ct. at 2342 (holding that a public law school’s policy of using an applicant’s race and ethnic background as one of many factors in evaluating his or her application for admission was narrowly tailored to serve the compelling interest in obtaining the benefits of a diverse student body and, therefore, did not violate the Equal Protection Clause). *But see* *Gratz v. Bollinger*, 123 S. Ct. at 2430 (holding that the use of race in an undergraduate admissions policy, which was not narrowly tailored, violated the Equal Protection Clause, Title VI, and 42 U.S.C. § 1981).

9. *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003).

10. For example, in a front-page article assessing what she deems quite correctly to have been a “momentous” term, Ms. Greenhouse makes only cursory reference to the *Costa* case. Linda Greenhouse, *In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1, A18. In fact, Ms. Greenhouse provides only the following sketch:

A unanimous decision made it easier for workers to win discrimination suits against employers in cases where race, sex, religion or national origin is one factor among others in a dismissal or other adverse job action. Direct evidence of discrimination is not necessary in these so-called “mixed motive” cases, and circumstantial evidence is sufficient to show that discrimination was a “motivating factor,” Justice Thomas wrote for the [C]ourt in *Desert Palace v. Costa*, No. 02-679.

Id. at A18.

11. *Grutter v. Bollinger*, 123 S. Ct. at 2362-63 (Thomas, J., dissenting).

to have, his opinion in *Costa* more than recompenses.¹² “What has Thomas wrought?”—to borrow loosely from Scripture¹³ and Samuel F.B. Morse¹⁴—is what this Essay is all about.

We must start at the beginning—in 1965, when Title VII took effect¹⁵—then fast-forward to 1973, to the Supreme Court’s first, and unfortunately ham-handed, attempt to flesh out the laconic statutory provisions of Title VII.¹⁶ Perhaps nothing in the large, judicially created body of law that fleshed out Title VII’s antidiscrimination mandates has been more of a double-edged sword to victims of discrimination than the Supreme Court’s loose adaptation of the “prima facie case” concept as the framework for organizing proof in Title VII cases.

That framework led to an incredible volume of controversies. It continued to plague the Supreme Court with its problematic nature for almost thirty years after its birth. To keep it alive, the Supreme Court was forced to revisit and repair it in a litany of cases (quite familiar to employment discrimination lawyers and law students).¹⁷

In the process of this germinating litany, *McDonnell Douglas* also

12. *Desert Palace, Inc. v. Costa*, 123 S. Ct. at 2150-54; *see also* Jerome McCristal Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The “Impossibility” of Permanent Reform*, 45 RUTGERS L. REV. 965, 965 (1993) (noting another curious connection between Mr. Justice Thomas and the Civil Rights Act: “We will never know whether George Bush would have signed a “Civil Rights Bill” if Clarence Thomas had not been nominated and/or confirmed, but it is clear that the impetus to help one of Clarence Thomas’s chief supporters, Senator Danforth, was a large part of the decision to sign what became the 1991 Civil Rights Act.”).

13. *Numbers* 23:23; *Acts* 21:19.

14. *Invention of the Telegraph*, at <http://lcweb2.loc.gov/ammem/sfbmhtml/sfbmhighlights01.html> (“[T]he historic [first] message transmitted by Samuel F.B. Morse reads, ‘What hath God wrought?’ Morse sent it from the Supreme Court room in the U.S. Capitol in Washington to his assistant, Alfred Vail, in Baltimore. Morse credits Annie Ellsworth . . . for suggesting the message he sent. She found it in the Bible, Numbers 23:23.”).

15. *See* Civil Rights Act of 1964, Pub. L. No. 88-352 §§ 716(a)-(b), 78 Stat. 241, 266 (1964) (stating that Title VII was to take effect one year after its date of enactment, July 2, 1964).

16. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (setting forth a burden-shifting scheme of proof for Title VII cases).

17. *See, e.g.,* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *O’Connor v. Consol. Coin Caterers*, 517 U.S. 308 (1996); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *Bd. of Trs. v. Sweeney*, 439 U.S. 24 (1978) (per curiam); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978).

became a legal liturgy. Some courts referred to *McDonnell Douglas* as a “minuet,”¹⁸ a mechanical mantra that often obscured the underlying substance of the issues raised by the plaintiff’s factual contentions.¹⁹ Well-versed plaintiffs’ lawyers have advised their brethren that a “major premise” of a winning strategy is to “avoid being confined solely to the *McDonnell Douglas* model of proof if at all possible.”²⁰

There are those who say it is bad theater to give away the ending at

18. See, e.g., *Fisher v. Vassar Coll.*, 114 F.3d 1332, 1343 (2d Cir. 1997) (en banc). In *Fisher*, the majority described the dance that the Supreme Court had created:

[T]he minuet [was] set in motion by *McDonnell Douglas*. For the first step, plaintiff must produce evidence to meet the minimal demands of a Title VII prima facie case. Plaintiff’s doing so shifts the burden of production to the defendant to proffer a nondiscriminatory explanation. The statement that, once the defendant has made such a proffer, plaintiff is not required to produce “additional proof” of discrimination does not necessarily mean anything more than that, procedurally, the plaintiff need not proffer *additional* evidence but may rely on the evidence already received to rebut defendant’s explanation and prove discrimination. Such a procedural observation does not diminish the plaintiff’s obligation in the end to adduce sufficient evidence of discrimination to support a finding that discrimination was more probable than not.

Id.; see also Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2232 (1995) (stating that the burden of proof plays itself out in a three-part minuet); Stephen W. Smith, *Title VII’s National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371, 382 (1997) (“[T]here is mounting evidence that preoccupation with *McDonnell Douglas* and its periodic reiteration and reformulation in subsequent Supreme Court cases is generating unproductive, conflicting, and often quite dubious legal doctrines. As a consequence, both litigants and courts wind up pursuing intellectual rabbit trails which, if they go anywhere at all, veer away from the statute Congress enacted.”). Smith observes that “the McDonnell Douglas three-step is too malleable to assist employers in obtaining summary judgments, too peripheral to assist plaintiffs in avoiding summary judgment, and too unrealistic to assist in the order and presentation of proof at trial,” and poses the provocative question, “[i]f, as appears to be the case, McDonnell Douglas offers little help for litigants, the question becomes whether it is any more useful to the fact finders themselves.” *Id.* at 380 (footnote omitted).

19. See *Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481, 488 (S.D.N.Y. 1998) (stating that the court would bypass the *McDonnell Douglas* minuet and “proceed[] directly to the real issues presented by [the] plaintiff’s claims”); Phyllis Tropper Bauman et al., *Substance in the Shadow of Procedure: The Integration of Substance and Procedural Law in Title VII*, 33 B.C. L. REV. 211, 220 (1992) (“[I]n [T]itle VII cases courts often decide outcomes using procedural devices, without struggling with the complexity of congressional purpose or of substantive issues.”).

20. 1 KENT SPRIGGS, REPRESENTING PLAINTIFFS IN TITLE VII ACTIONS § 2.06[1], at 2-66 (2d ed. 1998).

the beginning. However, in this case, the ending may be so startling to those weaned on the bland diet of *McDonnell Douglas-Burdine* that it will intrigue you, gentle reader, to press on. So, I will now give away the denouement: By a stroke of the judicial pen, the unanimous Supreme Court in *Costa* has transformed every Title VII disparate treatment claim into a “mixed-motives” claim.²¹

The Court read literally the provisions of section 703(m) of Title VII, a seemingly innocuous provision of the Civil Rights Act of 1991,²² with the coy caption of “Impermissible consideration of race, color, religion, sex, or national origin in employment practices.”²³ However, section 703(m) is a monumental shift in the approach to Title VII litigation. Amending section 703 of the original Title VII, entitled “Unlawful employment practices,” section 703(m) flatly states that an aggrieved person establishes such an unlawful employment practice merely by “demonstrat[ing] that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice.”²⁴

How does one demonstrate this? The Civil Rights Act of 1991 defined “demonstrates” as when the aggrieved individual “meets the burdens of production and persuasion.”²⁵ But section 703(m) forever altered that burden. A plaintiff does not need to dance the “*McDonnell Douglas* minuet”²⁶ any longer—the plaintiff gets to a jury whenever he or she, by hook or by crook, develops enough facts to create a genuine issue as to whether one’s race, sex, religion, color, or national origin was at all considered in an employment decision—the only material fact at issue.²⁷ The nature of that inquiry is causation—not the swami’s task of trying to read the defendant’s corporate or collective mind, but rather, simply

21. See discussion *infra* Part V.B.

22. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(m) (2000)).

23. 42 U.S.C. § 2000e-2(m) (2000).

24. *Id.* (emphasis added).

25. *Id.* § 2000e(m).

26. See Malamud, *supra* note 18, at 2232, 2236 (calling the attachment to *McDonnell Douglas* “[n]ostalgia” and arguing that “the *McDonnell Douglas-Burdine* proof structure ought to be abandoned”).

27. See *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2155 (2003) (“In order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for any employment practice.’”).

showing that an adverse decision was made in the face of one's protected status under circumstances where a reasonable fact finder could conclude that the protected status was more likely than not at least a causative factor in the decision—unless the defendant can carry its own burden of proof by a preponderance of the evidence to persuade the fact finder either: (a) that the protected status was not a causative factor at all (a complete defense), or (b) that the defendant would have made the same decision anyway in the plaintiff's case, even if the plaintiff was not a member of a protected class (a partial defense).²⁸

Is this the way it should have been all along? At least after 1991? This has been the law on the books since 1991, but virtually no court or commentator²⁹ has expressly come to grips with it.³⁰ Instead, for the last

28. 42 U.S.C. § 2000e-5(g)(2)(B) (2000).

29. See, e.g., Thomas H. Barnard & George S. Crisci, "Mixed-Motive" Discrimination Under the Civil Rights Act of 1991: Still A "Pyrrhic Victory" for Plaintiffs?, 51 MERCER L. REV. 673 (2000); Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 18 (1991); Michael A. Zubrensky, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After Price Waterhouse v. Hopkins*, 46 STAN. L. REV. 959 (1994); Christopher Y. Chen, Note, *Rethinking the Direct Evidence Requirement: A Suggested Approach in Analyzing Mixed-Motives Discrimination Claims*, 86 CORNELL L. REV. 899 (2001); Benjamin C. Mizer, Note, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 MICH. L. REV. 234 (2001); see also Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982) (considering causation issues before the Civil Rights Act of 1991).

In 1995, Professor Michael Zimmer recognized that the *McDonnell Douglas* model overlapped with the "mixed-motive" model, but (concededly, without the benefit of having the *Costa* decision) he did not carry his observation to its logical conclusion. See Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 585-86, 601, 609, 621 (1996). Without much elaboration, Professor Zimmer argued that section 703(m) "appl[ies] to all individual disparate treatment cases brought under Title VII" and that "courts should not attempt to categorize [the] evidence as direct or circumstantial" but should submit the case to the jury. *Id.* at 621. However, Professor Zimmer still viewed section 703(m) as focused on intent (to which he applied Professor Lawrence's views of unconscious racism). *Id.* at 585-86, 602, 618-19, 621 (citing Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987)). This Essay argues that the correct inquiry under section 703(m) is causation and that Professor Lawrence's work tells us that "intent" may be assumed. See discussion *infra* Part III.

30. Early commentators on the Civil Rights Act of 1991 took so little note of section 703(m) that they could write that "[t]he reform of employment discrimination laws embodied in the 1991 Civil Rights Act does not effectively raise or answer the" problem of how "race alter[s] the contours of legal reality." Culp, *supra* note 12, at

dozen years, courts and commentators have struggled with the notion that somehow, section 703(m) was meant only to apply to “mixed motive” cases, due to *Price Waterhouse v. Hopkins*,³¹ which held that when there was direct evidence that an employment action was reached by considering the plaintiff’s race, sex, color, national origin, or religion, “the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision” even without considering the plaintiff’s protected characteristic.³² The *Costa* decision is significant because of the Court’s endorsement of sending the case to the jury on an instruction that charges the jury according to section 703(m), even if the plaintiff’s evidence is *McDonnell Douglas*-style circumstantial evidence.³³ Thus, no matter how many legitimate nondiscriminatory

966-67. It is my contention, however, that as to all of the prohibited Title VII categories of discrimination, Congress gave the courts two powerful tools with which to answer that question: the “motivating factor” and traditional tort burden of proof elements of section 703(m).

31. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

32. *Id.* at 240-41. A typical example of the confusion that followed *Price Waterhouse* is found in the leading “employer-perspective” treatise on employment discrimination law, which limited its discussion of section 703(m) to dueling viewpoints over whether direct evidence was required to trigger its applicability—and in the process, missed the proverbial 800-pound gorilla:

It remains unclear, after the 1991 Act, what kind and quantum of proof by the plaintiff is sufficient to trigger a mixed-motive analysis and jury instruction. Defendants will contend that a case is a mixed-motive case, and the *Price Waterhouse* burden-shifting framework is applicable, only if the plaintiff presents substantial direct evidence of discrimination. Plaintiffs, on the other hand, will argue that the 1991 Act, while silent on the issue, implicitly changed that rule; that the key to determining whether a case is a mixed-motive case is whether, and only whether, there were both legitimate and illegitimate motives for the decision, not whether the evidence of illegitimate motive is direct or circumstantial; and that, if the court finds a triable question of mixed motive, the jury should be instructed accordingly. Even under this view, however, the plaintiff presumably must offer stronger evidence to invoke the mixed-motive framework than that needed to establish a prima facie case under *McDonnell Douglas-Burdine-Hicks*.

1 BARBARA LINDEMAN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 42-43 (3d ed. 1996) (footnotes omitted). As I argue in this Essay, the real question is, eschewing the former models of proof, whether section 703(m) controls the garden-variety cases in which plaintiffs allege an unlawful employment practice and employers deny discriminatory intent. My conclusion, based on the statute and *Costa*, and buttressed by the cognitive theory of unconscious discrimination, is that section 703(m) does control these garden-variety cases.

33. *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2154-55 (2003).

reasons the employer proffers, the Title VII plaintiff can get to a jury simply by establishing a fact issue as to whether his or her protected characteristic was considered—in any way at all—in the decision.³⁴ In this way, *Costa* effectively recognizes that every case becomes a mixed-motive case when the employee raises a prima facie case and the employer responds with a “reason.”³⁵

My objective in writing this Essay is to demonstrate the following points: (1) section 703(m) fundamentally changed the nature of all Title VII disparate treatment litigation; (2) courts, commentators, and attorneys for Title VII plaintiffs have largely failed to recognize that change; (3) the Supreme Court in *Costa* has left that change an inescapable conclusion for all future Title VII litigation; (4) all of the controversies that *McDonnell Douglas* and its progeny created and attempted to address are gone; and (5) the quiet little revolution started in *Costa* will be one of the most significant advances for civil rights enforcement in the twenty-first century. The tone of this Essay is not a neutral one; it is written from the unusual perspective of a convert who has chosen to carry the plaintiff’s brief. Having practiced employment discrimination law (albeit primarily for management) for almost twelve years before joining the academy, I have long believed that the judicial construction of Title VII was ineffectual—indeed, affirmatively harmful—to the best interests of victims of bias as well as the overall well-being of a rapidly diversifying society.³⁶

34. *Id.* at 2155 (holding that in order to have the jury instructed that an unlawful employment practice is established if the plaintiff’s protected characteristic was “a motivating factor” for the employment decision, “the plaintiff need only present sufficient evidence [direct or circumstantial] for a reasonable jury to conclude, by a preponderance of the evidence” that the protected characteristic was a motivating factor) (emphasis added).

35. See discussion *infra* Part V.B.

36. My view of Title VII contrasts markedly with my scholarship in the area of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (2000), where I contend that the greatest harms to plaintiffs have come from ineffective lawyering by their counsel who do not understand the law. See Jeffrey A. Van Detta & Daniel R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response to Professor Colker*, 19 REV. LITIG. 505, 515 (2000) (stating that, for example, summary judgments against plaintiffs in ADA cases are generally a result of low-quality advocacy). In contrast, in the Title VII arena, I agree with Professor Colker’s criticism of the federal court use of summary judgment, which has now been joined in a more general indictment of federal court use of summary judgment by Professor Arthur Miller. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101 (1999) (arguing that district courts are abusing their summary judgment power); Arthur R. Miller, *The Pretrial Rush to*

To accomplish the foregoing objectives, in Part II, I demonstrate that a Title VII claim is simply a federalized common-law claim for an intentional tort, which should be treated in accordance with traditional tort law notions of a prima facie case rather than the odd burden-shifting devised in Justice Powell's *McDonnell Douglas* opinion.³⁷ Part III develops the proposition that the intent requirement was similarly misunderstood in *McDonnell Douglas*. Rather than presenting the onerous burden that Justice Powell fretted about, intent should be viewed from the perspective of Professor Lawrence's now well-known model of unconscious racism.³⁸ That is to say, intent sufficient to satisfy the judicial gloss on Title VII's intent requirement should be presumed when an employment practice adversely affects a member of a discrete and insular minority group because of the high risk that knowledge of his or her race (or color, sex, religion, or national origin) has engaged unconscious veins of racism (and other forms of invidious discrimination) that permeate American society.³⁹ The statutory structure of Title VII and section 703(m) is explored briefly in Part IV to demonstrate the semantic soundness of the *Costa* ruling. Part V demonstrates the doctrinal soundness of *Costa* by explaining how to make every disparate treatment case a mixed-motives case harmonizes well with the two themes developed in Parts II and III regarding the "tort-nature" of Title VII claims and the unconscious racism model of employment discrimination. Finally, Part VI concludes by demonstrating how establishing any of the paradigm prima facie cases⁴⁰ familiar to lawyers from *McDonnell Douglas* days is sufficient under *Costa* to defeat an employer's summary judgment motion and send the plaintiff's claim to a jury with an instruction on the "a motivating factor" standard.

Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. REV. 982, 1053-54 (2003) (stating that "many practitioners believe a case is won or lost on summary judgment").

37. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (setting forth the burden-shifting framework).

38. See Lawrence, *supra* note 29 at 322 ("[A] large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.").

39. Cf. *id.* at 323 (arguing that because of unconscious racism, courts should not require "proof of conscious or intentional motivation as a prerequisite to" an Equal Protection Clause violation).

40. Refusal to hire, disciplinary termination, nondisciplinary termination, demotion, and failure to promote are the paradigms to which I refer. See ROBERT BELTON & DIANNE AVERY, *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* 89 n.6 (6th ed. 1999) (noting that courts have applied the *McDonnell Douglas* framework to these kinds of employment discrimination claims).

II. THE *MCDONNELL DOUGLAS* ILLOGIC—OR “A TORT IS A TORT, OF COURSE, OF COURSE”!

A. *Introduction to Arguments Based on a View of Title VII As Creating a Federalized Tort Claim for Discrimination*

One of the most interesting things about Title VII is that, since 1964, few have recognized that, from a litigation perspective, Title VII is simply a federally sanctioned tort cause of action. “Civil rights violations are torts,” Professor Dobbs has observed, and “[v]iolation of anti-discrimination statutes . . . causes economic, emotional, or dignitary harm.”⁴¹ Perhaps the belatedness of this recognition has resulted from the things that Congress and the courts needed to do to disguise it and persuade federal district judges, especially in the Deep South, to enforce it.⁴² For example, Congress did not originally provide for a jury trial, and the federal courts denied jury trials, where the employers, rather than the plaintiffs, sought them to take advantage of local animus to the civil rights laws.⁴³ Similarly, Congress provided only equitable relief, rather than the typical full range of tort-type damages that one would expect from a federalized tort cause of action.⁴⁴ Moreover, the introduction of an administrative process as a prerequisite to suit,⁴⁵ along with the empowerment of the Attorney General to bring suits under the Act,⁴⁶ further cloaked the tort implications of Title VII.

Nevertheless, a tort is a tort—no matter how well the legislative and

41. DAN B. DOBBS, *THE LAW OF TORTS* § 44, at 81-82 n.4 (2000).

42. See, e.g., JACK BASS, *UNLIKELY HEROES* 10 (1990) (stating that racial minorities have turned to lawsuits as an instrument of reform as a result of new procedures opening the doors of federal courthouses to these minorities); VICTOR NAVASKY, *KENNEDY JUSTICE* 245-53 (1971) (noting the tensions that arose between segregationist federal judges and civil rights policy).

43. *Beesley v. Hartford Fire Ins. Co.*, 171 F. Supp. 781, 782-83 (N.D. Ala. 1989) (nothing that “in the early years of 1964, it was the *employer* who longed for a jury” in Title VII cases “and was denied it” and that “Southern juries of 1989 look and act much differently than 1964’s Southern Juries”; see, e.g., *Johnson v. Ry. Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969) (affirming the district court’s decision to deny the defendant employer’s jury demand in a Title VII case); *Judge Acker’s Last Stand: The Northern District of Alabama’s Lonesome Battle for the Right to Trial by Jury Under Title VII*, 39 J. URB. & CONTEMP. L. 135 (1991).

44. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994) (“Before the enactment of the 1991 Act, Title VII afforded only ‘equitable’ remedies.”).

45. 42 U.S.C. § 2000e-5 (2000).

46. 42 U.S.C. § 2000e-6 (2000).

judicial branches may have sought to disguise its nature. And Title VII is unquestionably a tort, much like other federally created causes of action that impose new legal duties on private actors.⁴⁷ Such an analogous example is Title VIII of the Civil Rights Act of 1968,⁴⁸ which authorizes private lawsuits to enforce the mandates of the Fair Housing Act.⁴⁹ Writing for a unanimous Court in *Curtis v. Loether*,⁵⁰ Justice Marshall observed that “[a] damages action under [section 812 of the Fair Housing Act] sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant’s wrongful breach.”⁵¹ Moreover, the Supreme Court cited *Curtis* in treating claims under the Civil Rights Act of 1866 (colloquially known as § 1981 claims) as tort-like claims.⁵² Section 1981 is the functional equivalent of Title VII in race discrimination matters.⁵³ Indeed, in finding that § 1981 claims are essentially federalized torts, the Supreme Court described § 1981 in terms that apply in *proprio vigore* to Title VII, as “guaranteeing the personal right to engage in economically significant

47. *E.g.*, Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2000).

48. Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (2000).

49. Catherine G. Stearns, *Countering Implicit Discrimination in Real Estate Advertisements: A Call for the Issuance of Human Model Injunctions*, 88 Nw. U. L. REV. 1200, 1210 (1994).

50. *Curtis v. Loether*, 415 U.S. 189 (1974).

51. *Id.* at 195. In *Curtis*, Justice Marshall did play off a contrast to Title VII by citing lower federal court rulings that denied the right to jury trials in Title VII cases. *Id.* at 196 (citing *McFerren v. County Bd. of Educ.*, 455 F.2d 199, 202-04 (6th Cir. 1972); *Harkless v. Sweeney Indep. Sch. Dist.*, 427 F.2d 319, 324 (5th Cir. 1970); *Johnson v. Ga. Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir. 1971); *Smith v. Hampton Training Sch.*, 360 F.2d 577, 581 n.8 (4th Cir. 1966)). However, the discussion was on the significance of the compensatory and punitive damages available in Title VIII cases, rather than the significance of their absence in Title VII. *Id.* at 197. Thus, *Curtis* surely does not stand for the proposition that the basic liability imposed by Title VII is other than tort-like in nature.

52. *See Lytle v. Household Mfg. Inc.*, 494 U.S. 545, 550 (1990) (citing *Curtis v. Loether*, 415 U.S. at 196 n.11); *Patterson v. McLean Credit Union*, 491 U.S. 164, 211-12 (1989) (Brennan, J., concurring in part and dissenting in part) (allowing for tort awards) (citing *Curtis v. Loether*, 415 U.S. 189 (1974)); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 677 n.9 (1987) (citing *Curtis v. Loether*, 415 U.S. 189 (1974)); *Johnson v. Ry. Exp. Agency*, 421 U.S. 454 (1975) (allowing for tort-like recovery in damages). *See generally* Theodore Eisenberg & Stewart Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596 (1988).

53. *See* 42 U.S.C. § 1981 (2000) (prohibiting discrimination on the basis of race); *see also Johnson v. Ry. Express Agency, Inc.*, 421 U.S. at 459-60 (stating that § 1981 and Title VII are similar but not co-extensive).

activity free from racially discriminatory interference.”⁵⁴ Similarly, early in Title VII’s development, a number of federal courts recognized that “actions brought under Title VII of the Civil Rights Act of 1964 have been regarded as actions ‘fundamentally for the redress of a tort’”⁵⁵ and that “a Title VII violation has been regarded as a ‘type of tort’ for the purpose of determining the applicability of respondeat superior principles.”⁵⁶

54. *Goodman v. Lukens Steel Co.*, 482 U.S. at 662.

55. *Pavlo v. Stiefel Labs., Inc.*, No. 78 Civ. 5551, 1979 WL 105, at *1 (S.D.N.Y. Nov. 27, 1979) (quoting *Patterson v. Am. Tobacco Co.*, 535 F.2d 257, 269 n.10 (4th Cir. 1976)).

56. *Id.* (quoting *Miller v. Bank of Am.*, 600 F.2d 211, 213 (9th Cir. 1979)); see also *Burke v. United States*, No. Civ-1-88-508, 1990 WL 56155, at *4 (E.D. Tenn. Mar. 20, 1990) (noting that a Title VII claim “‘sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant’s wrongful breach’”) (quoting *Curtis v. Loether*, 415 U.S. at 195), *rev’d*, 929 F.2d 1119 (6th Cir. 1991), *rev’d*, 504 U.S. 229 (1992). In the *Patterson* case, Judge Butzner noted that analogizing a Title VII claim to “an ordinary tort case . . . is apt because a statutory action attacking racial discrimination is fundamentally for the redress of a tort.” *Patterson v. Am. Tobacco Co.*, 535 F.2d at 269 n.10 (citing *Curtis v. Loether*, 415 U.S. at 195). Similarly, in *Miller*, the court noted that both “Title VII and § 1981 define wrongs that are a type of tort, for which an employer may be liable.” *Miller v. Bank of Am.*, 600 F.2d at 213.

The Supreme Court, for purposes of classifying backpay awards under Title VII as income under the Internal Revenue Code, went to great lengths to conclude that because Title VII did not offer compensatory and punitive damages before the Civil Rights Act of 1991, it did not redress “a tort-type personal injury.” *United States v. Burke*, 504 U.S. 229, 238-42 (1992). However, as Justice O’Connor made clear in her dissent, “Discrimination in the workplace being no less injurious than discrimination elsewhere, the rights asserted by persons who sue under Title VII are just as tort-like as the rights asserted by plaintiffs in actions brought under §§ 1981 and 1983.” *Id.* at 252 (O’Connor, J., dissenting). Thus, “Title VII offers a tort-like cause of action to those who suffer the injury of employment discrimination.” *Id.* at 254. Buttressing this view is the fact that (apparently to reach a result that brought Title VII awards within the reach of the Internal Revenue Code), the majority in *Burke* ignored that

[t]he question whether Title VII suits are based on the same sort of rights as a tort claim must be answered with reference to the nature of the statute and the type of claim brought under it.

Title VII makes employment discrimination actionable without regard to contractual arrangements between employer and employee. Functionally, the law operates in the traditional manner of torts: Courts award compensation for invasions of a right to be free from certain injury in the workplace. Like damages in tort suits, moreover, monetary relief for violations of Title VII serves a public purpose beyond offsetting specific losses.

B. *The Primordial Soup*

If Title VII indeed creates a federal tort, why then did the simple proof principles of the average battery or tortious interference with prospective business advantage claims not control in Title VII cases? Because early on, the Powell opinions in *McDonnell Douglas* and *Burdine* became such an ingrained part of employment discrimination law⁵⁷ that few remember what it was like without them or that they were not actually enacted as part of Title VII. Title VII litigation proceeded quite nicely, thank you, from July 2, 1965—the Act’s effective date⁵⁸—through 1973, without the “benefit” of a burden-shifting scheme.⁵⁹

A good example of the common-sense approach of the early days in Title VII cases comes from the pen of Judge Lay of the Eighth Circuit Court of Appeals, who treated a wide variety of evidence as relevant to whether a plaintiff established “a prima facie case” of discrimination.⁶⁰ In *Marquez v. Omaha District Sales Office*,⁶¹ Judge Lay looked at a variety of evidence relating to both Mr. Marquez’s exemplary employment record and to the mixed record (with some recent affirmative action efforts) of the defendant, Ford Motor Company, of employing and promoting Mexican-Americans.⁶² He took the district court to task for apparently taking too narrow a view of the prima facie case, observing that it had “fail[ed] to give proper weight to relevant factors which establish a prima facie case of racial discrimination.”⁶³ Marquez’s prima facie case was built on a variety of circumstantial evidence that Judge Lay found created a “telling inference.”⁶⁴ To defend, the employer needed either to establish an

Id. at 250.

57. See Malamud, *supra* note 18, at 2229 n.3 (listing *McDonnell Douglas* and *Burdine* as being important decisions in establishing the “proof structure for proof of intentional discrimination by circumstantial evidence”).

58. Civil Rights Act of 1964, Pub. L. No. 88-352 §§ 716(a)-(b), 78 Stat. 241, 266 (1964) (stating that Title VII was to take effect one year after its date of enactment, July 2, 1964).

59. See, e.g., *Marquez v. Omaha Dist. Sales Office*, 440 F.2d 1157, 1161-62 (8th Cir. 1971) (holding that the plaintiff established a prima facie case that he was discriminated against when he was not promoted, even though he had maintained the same position for fifteen years, had not received any disparaging comments in appraisals from supervisors, and other men of equal caliber had been promoted).

60. *Id.*

61. *Marquez v. Omaha Dist. Sales Office*, 440 F.2d 1157 (8th Cir. 1971).

62. *Id.* at 1161-62.

63. *Id.* at 1160.

64. *Id.* at 1162.

affirmative defense or prove a rebuttal that refuted, by a preponderance of the evidence, the plaintiff's evidence.⁶⁵

Without saying as much, Judge Lay was unconsciously viewing Title VII in the same way he would view a typical claim for intentional tort—one that leaves the plaintiff to meet the burden of producing enough evidence on each element of the claim to raise a genuine issue of material fact for the trier of fact, along with the burden of persuading the trier to accept the plaintiff's version of the facts and rule in his or her favor.⁶⁶ This view leaves the defendant with the choices of defending by trying to undermine the persuasiveness of the plaintiff's case on the elements of the claim—otherwise known as rebuttal—or of establishing an affirmative defense to liability (such as the justification defenses in intentional tort).⁶⁷ According to Professor Dobbs, our generation's leading tort scholar, the hallmark of the prima facie case, is that the *plaintiff's* “*case goes to the jury* [and] the judge will not direct a verdict against her.”⁶⁸ Justice Powell changed this aspect in tinkering with Title VII—and while he maintained he did this to benefit Title VII plaintiffs,⁶⁹ Powell's changes have actually worked to the detriment of many plaintiffs and made Title VII unique by spawning countless cases, consuming hundreds of millions of dollars in attorneys' fees and court time arguing about what a prima facie case is and when establishing one gets a Title VII plaintiff to the jury.⁷⁰

65. *Id.*

66. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (holding that to avoid summary judgment, the plaintiff must make a showing sufficient to create a genuine issue of material fact as to each element of his or her claim).

67. *See, e.g., DOBBS, supra* note 41, § 19 (2001) (“The plaintiff has the burden of proving the elements of her prima facie case The defendant has the burden of proving affirmative defenses.”); *id.* § 68 (“Courts recognize many privileges or justifications that can be invoked by a defendant to defeat a claim that would otherwise be actionable.”).

68. *Id.* § 19 (emphasis added).

69. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973) (holding that the plaintiff “must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision”).

70. Professors Friedman and Strickler observed in an early edition of their now standard casebook that “[t]he ambiguity created by the Court's opinion in *McDonnell Douglas* resulted in inconsistent rulings [on a variety of key issues] by the lower federal courts and ultimately led to three more attempts by the Court to explain its position.” JOEL WILLIAM FRIEDMAN & GEORGE M. STRICKLER, JR., *THE LAW OF EMPLOYMENT DISCRIMINATION: CASES AND MATERIALS* 76 (1983) (citations omitted). *See* Joel William Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1, 55-56

C. McDonnell Douglas—*A Case of (Un)intended Consequences?*

In the early years of Title VII litigation, although courts took varying approaches to what was required for a plaintiff to prevail, most at least got to a bench trial for that determination to be made.⁷¹ Some judges required

(1979) [hereinafter Friedman, *The Burger Court*], for a discussion in which Professor Friedman pulled fewer punches in his criticisms of *McDonnell Douglas* and other cases:

Unfortunately, by using imprecise and ambiguous language as well as frequent question-begging, the Court did little to refine its thinking and merely contributed further to the confusion surrounding this question [of burdens surrounding the *McDonnell Douglas* prima facie case].

....

... The unprincipled and contrived reasoning running through these opinions manifests an intentional effort by the Court to impede litigants' ability to secure their rights to equal employment opportunity by raising the requirements of the prima facie case.... [T]he Court's opinions too frequently demonstrate a level of legal reasoning falling far short of the standard expected from our nation's highest tribunal.

Id. at 55-56.

71. See, e.g., *Turner v. Tex. Instruments*, 555 F.2d 1251, 1255 (5th Cir. 1977) (pre-*Burdine* case holding that plaintiff's establishment of a prima facie case shifted the burden of proof to the defendant to *prove* a LNDP, effectively precluding summary judgment and requiring trial); *Boles v. Union Camp Corp.*, 57 F.R.D. 46, 51-52 (S.D. Ga. 1972) ("In all events, a motion for summary judgment represents an unsatisfactory vehicle for determining whether to grant injunctive or affirmative relief in a Title VII... case" because "[t]o warrant summary disposition there must not only be no genuine issue of fact but the slightest doubt in that respect necessitates denial of the motion"); Friedman, *The Burger Court*, *supra* note 70, at 56 ("The unprincipled and contrived reasoning running through these opinions manifest an intentional effort by the Court to impede litigants' ability to secure their rights to equal employment opportunity by raising the requirements of the prima facie case."); 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, 220-21 (1993) (noting that "many courts... have misapplied the McDonnell Douglas/Burdine test" to grant summary judgment more frequently); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 141-42, 167-68 (2000) (comparing federal court climate of 1973 to 1997-1998, the author notes that the number of bench and jury trials stayed almost the same and that "[i]n contrast to the 1973 period, judges were far more apt to evaluate such indeterminate standards as intent and reasonableness as a matter of law on summary judgment" which has proven "especially pernicious in the field of employment discrimination law"; Courtney T. Nguyen, *Pretext: Weinstock v. Columbia University*, 35 U.C. DAVIS L. REV. 1305, 1316-18 & nn.54-55 (2002) (noting the general early hesitancy on the part of courts to resolve Title VII claims on summary judgment "[g]iven the inherent factual nature of Title VII inquiries"). A Westlaw search for

the plaintiff to show that discrimination somehow entered into the decision.⁷² Other judges required the plaintiff to show that discrimination was the “but-for” cause of an adverse employment action.⁷³ Finally, another group of judges insisted that the plaintiff show that defendant’s “sole” reason for acting was discrimination.⁷⁴ The last of the three approaches proved to be both troubling and predictive. It was troubling, in that it imposed on the plaintiff a task of Sisyphean proportions to prove both why the employer had acted and that he had no other reason for acting.⁷⁵ This approach was predictive in two ways: (1) it persuaded the nation’s highest court to grant certiorari on its first significant Title VII case,⁷⁶ and (2) once the idea that Title VII disparate treatment claims required independent proof of each defendant’s individual intent, the idea of requiring separate proof of intent “stuck” and outlived the short life of the sole-factor test from which it sprung.⁷⁷

The lower court opinion that ignited the path to the Supreme Court was authored by a two-judge majority of an Eighth Circuit panel, with Judge Bright writing and Judge Lay concurring.⁷⁸ The district court case was a bit messy because of the bleeding over between plaintiff Green’s claim that he was not rehired at McDonnell Douglas’s aircraft manufacturing plant in retaliation for his participation in protests against

summary judgment opinions issued by the federal courts in Title VII cases before January 1, 1973, reveals only forty-two reported opinions nationwide, with a fair proportion of them denying an employer’s summary judgment motion.

72. Price Waterhouse v. Hopkins, 490 U.S. 228, 238 (1989).

73. See *id.* at 238 n.2 (“The Third, Fourth, Fifth, and Seventh Circuits require a plaintiff challenging an adverse employment decision to show that, but for her gender (or race or religion or national origin), the decision would have been in her favor.”) (citations omitted).

74. See, e.g., Miller v. CIGNA Corp., 47 F.3d 586, 597-98 (3d Cir. 1995) (holding that the district court’s instruction that the plaintiff had to prove that discrimination was the “sole” reason for the employment action was reversible error); see also Zimmer, *supra* note 28, at 591-92 (criticizing the “sole-cause or sole-motivation standard”).

75. See Miller v. CIGNA Corp., 47 F.3d at 594 (noting that it would be loath to require the plaintiff to prove that discrimination was the *sole* reason for the employment decision).

76. Green v. McDonnell Douglas Corp., 463 F.2d 337 (8th Cir.), *cert. granted*, 409 U.S. 1036 (1972).

77. See Baumann et al., *supra* note 19, at 225 (stating that *McDonnell Douglas* has controlled “the contours of the entire litigation” of Title VII claims for thirty years).

78. Green v. McDonnell Douglas Corp., 463 F.2d 337, 338 (8th Cir. 1972) (opinion of Judge Bright); *id.* at 344 (Lay, J., concurring).

the plant's racial policy and his claim that he was not rehired because of his race.⁷⁹ But the case did not come to stand for the mode of proof for cases involving intertwined allegations of race discrimination and retaliation for opposing unlawful employment practice. To the contrary, it became the paradigm for all disparate treatment cases.⁸⁰ Therefore, because it became an abstraction, it is also fair to examine the Eighth Circuit opinion at its most abstract level. At that level, Judge Bright gave us a snapshot of what progressive judges in the 1960s and early 1970s viewed as the elegant, common-law rooted simplicity of a *prima facie* case of a Title VII violation:

When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job, we think he presents a *prima facie* case of racial discrimination and that the burden passes to the employer to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job.⁸¹

Judge Bright's bridge between code and courtroom is brilliant in its simplicity. The court recognized that, unfortunately, a black man (or any member of a minority group in our society) does not stand on the same footing as nonminority workers when it comes time to hand out punishments or deny jobs or benefits.⁸² In a single sentence, the court encapsulated the century of struggle that led up to the successor of another assassinated President signing antidiscrimination legislation into law. The court essentially said to employers: "When you fire or adversely treat a qualified minority group member, we know from the sociology of our country, including unpleasant things like the 'color line' spotlighted by

79. *Green v. McDonnell Douglas Corp.*, 463 F.2d at 339.

80. See Henry L. Chambers, *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1, 10 n.37 (1996) (examining how the Eighth Circuit case "contained the seeds" for the *McDonnell Douglas* test articulated by the Supreme Court).

81. *Green v. McDonnell Douglas Corp.*, 463 F.2d at 344. In an addendum added upon denying McDonnell Douglas's rehearing petition, the panel majority revised the section of the opinion containing the quoted language without omitting that language. *Id.* at 353. It merely added an additional statement: "However, an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer." *Id.*

82. See *id.* at 352 ("Employers seldom admit racial discrimination. Its presence is often cloaked in generalities or vague criteria which do not measure an applicant's qualifications in terms of job requirements.") (citation omitted).

W.E.B. DuBois,⁸³ that, realistically, we have to be cautiously skeptical about the reason for the decision until you, Mr. Employer, prove otherwise.”⁸⁴ This represents the classic statement of a prima facie case: when the plaintiff shows enough evidence that establishes the elements of his case (i.e., “I’m protected, I’m qualified, you didn’t (re)hire me”),⁸⁵ then the burden, as it does with all torts, shifts to the defendant to prove a justification for his actions.⁸⁶ Just as Judge Lay had done in the *Marquez* case, Judges Lay and Bright in *McDonnell Douglas* treated Title VII as exactly what it was—a federalized tort, using the tort-type concept of the prima facie case.

These were not imperial judges, thirst-crazed for aggrandizing judicial power. Rather, these were common-law judges in an emergent statutory age, dealing with the realities of the workplace that had been shielded from view for so long by that uniquely perverse American invention, the employment-at-will doctrine. Their rationale was straightforward and sincere—to do what Congress in the statute had bidden the judiciary to do:

In enacting Title VII, Congress has mandated the removal of racial barriers to employment. Judicial acceptance of subjectively based hiring decisions must be limited if Title VII is to be more than an illusory commitment to that end, for subjective criteria may mask aspects of prohibited prejudice. . . . Consequently, a black job applicant must usually rest his case of discrimination upon proof that he possessed the requisite qualifications to fill the position which was denied him.⁸⁷

Judge Lay concurred to make the point even more clearly: “Civil rights legislation and case law dealing with discriminatory employment practices have added modification to” the traditional at-will employment rule and condemn discrimination “even though [discriminatory motives] constitute only a partial basis for an employer’s refusal to hire [and] are not sanctioned.”⁸⁸

83. See *infra* note 206 and accompanying text.

84. See *supra* note 81 and accompanying text.

85. See *Green v. McDonnell Douglas Corp.*, 463 F.2d at 344 (“When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job, we think he presents a prima facie case of racial discrimination . . .”).

86. See *supra* note 67 and accompanying text.

87. *Green v. McDonnell Douglas Corp.*, 463 F.2d at 343.

88. *Id.* at 346 (Lay, J., concurring).

But the Supreme Court did not see fit to leave well enough alone. Presciently, in his *McDonnell Douglas* concurrence, Judge Lay quoted the ancient apothegm “[t]hey tie our hands and then reproach us that we do not use them.”⁸⁹ And tie the hands of the federal judiciary and discrimination plaintiffs, is exactly what the Court’s patronizing opinion did in throwing out the Eighth Circuit’s approach to the prima facie case and attendant burdens of proof.⁹⁰

To appreciate the full impact of what the Supreme Court did to Title VII when it cast the common-law tort approach aside, it is helpful to discuss *McDonnell Douglas* and *Burdine* together as a conceptual unity, rather than chronologically and separately as is most often done.⁹¹ In *McDonnell Douglas*, the Supreme Court did not address why it simply ignored Judge Bright’s formulation of the classic tort-type burden of proof and instead offered a burden-shifting scheme, nor why it came up with this framework, nor why it let the employer off so lightly by requiring nothing more than a mere articulation of “some legitimate, nondiscriminatory reason” for its action.⁹² Indeed, Justice Powell’s peculiar phrasing—“some . . . reason”⁹³—makes it appear as if the employer must simply place its hand on its hip, chin in hand, inventory possible excuses for a discriminatory decision, and throw one out to see if it will stick.⁹⁴ Justice Powell also did not explain how this significant departure⁹⁵ from common-law pleading and practice would serve his view of Title VII’s goal, stated in

89. *Id.* at 344-45 (Lay, J., concurring); see *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 369 n.13 (8th Cir. 1973) (quoting the same apothegm quoted by Judge Lay in *Green v. McDonnell Douglas*).

90. See McGinley, *supra* note 71, at 214-21 (describing the analysis courts are forced to undertake under *McDonnell Douglas*).

91. See, e.g., Candace S. Kovacic-Fleischer, *Proving Discrimination After Price Waterhouse and Wards Cove: Semantics as Substance*, 39 AM. U. L. REV. 615, 636-37 (1990) (discussing *McDonnell Douglas* and *Burdine* chronologically and separately).

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

93. *Id.* (emphasis added).

94. This view is especially reinforced by the famous line from *Texas Department of Community Affairs v. Burdine*: “The defendant need not persuade the court that it was actually motivated by the proffered reasons.” *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1980). How does allowing a defendant to say “Not so!” work “progressively to sharpen the inquiry into the elusive factual question of intentional discrimination”? *Id.* at 255 n.8. The Court did not take up that question, and the history of *McDonnell Douglas-Burdine* suggests that the scheme does not perform as advertised.

95. McGinley, *supra* note 71, at 215 (noting that “the Court departed from the traditional order of proof in a civil case”).

a quaint, old-fashioned way: “efficient and trustworthy workmanship assured through fair and racially *neutral* employment and personnel decisions” that involve “no racial discrimination, subtle or otherwise.”⁹⁶

But the very minuet whose tune was first called in *McDonnell Douglas* assured that a good deal of racial discrimination, *both* subtle *and* otherwise, would escape judicial scrutiny.⁹⁷ Although *Burdine* asserted that “[t]he *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to th[e] ultimate question” of whether “defendant intentionally discriminated against the plaintiff,”⁹⁸ the history of the tortured minuet suggests that it obfuscates the question of discrimination to the detriment of the plaintiff.⁹⁹ *McDonnell Douglas* hardly “eliminates the most common nondiscriminatory reasons for” an adverse employment action, as it was advertised to do.¹⁰⁰ To the contrary, it simply shifts the “elusive factual question of intentional discrimination”¹⁰¹ down the line—except now the plaintiff has the additional burden to prove not only that the defendant is a discriminator, but also a liar.¹⁰²

This is a double-whammy for the Title VII plaintiff—proving the employer’s bad mindset both as to the employee’s race and as to the veracity of its facts. It perverts the classic *prima facie* case as described by Professor Dobbs and Judges Bright and Lay.¹⁰³ *McDonnell Douglas* is founded upon an erroneous presumption of *neutrality* as the everyday working model of employment practices.¹⁰⁴ As one commentator described Justice Powell’s view on this subject:

[Justice Powell] suggests that the status quo with respect to race—

96. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 801 (emphasis added).

97. *See supra* note 19 and accompanying text.

98. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. at 253.

99. *See supra* note 19 and accompanying text.

100. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. at 254.

101. *Id.* at 255 n.8.

102. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (stating that the plaintiff must have an opportunity on remand to show that the defendant’s stated reason for the adverse action was a pretext).

103. *See supra* notes 60-68, 78-85 and accompanying text.

104. *See Culp, supra* note 12, at 979 (“Th[e] jurisprudence of celebration of the status quo as race neutral is not new, and it continues to infect judicial views of race and the law.”); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. at 804 (stating that an employer “may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races”).

where blacks are economically exploited, socially isolated, and politically impotent—is less important than principles associated with racial *neutrality*. This is a view of law and justice which places the interests of black Americans outside the legal discourse of the courts.¹⁰⁵

Thus, *McDonnell Douglas* did Title VII plaintiffs no favor by replacing the common-law formulation of the prima facie tort case. As Professor Miguel Angel Mendez observed in the early years of *McDonnell Douglas*'s reign:

[T]he Court itself is responsible for the uncertainties surrounding the burden of proof in disparate treatment cases. These uncertainties stem from the Court's insistence on fashioning novel rules and terminology to govern these cases, while ignoring the general analysis that usually allocates burdens of proof in civil cases under federal law.¹⁰⁶

What *McDonnell Douglas* leaves in place of the tort approach is a desolate judicial ground for plaintiffs to furrow. Not surprisingly, problems with the *McDonnell Douglas* decision have been identified and discussed throughout its four decades of existence. What I propose here is to remind us of what that discussion has entailed, to set the stage for a more informed discussion of how the law needed to be—to use a computer technology term—“reset” to perform its congressionally mandated function.

1. *The “Elusive” Intent Requirement—In Reality, Causation*

Perhaps the greatest ill produced by *McDonnell Douglas-Burdine* is that its judicial haze¹⁰⁷ became a law of its own, preventing us from focusing on the statute itself. Professor George Rutherglen makes this point well when he reminds us that despite the emphasis in *McDonnell Douglas* and *Burdine* on “intentional discrimination,” the statute itself does not mention “intent” at all.¹⁰⁸ In the operative provision entitled “Unlawful

105. Culp, *supra* note 12, at 968-69.

106. Miguel Angel Méndez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1131 (1980).

107. Friedman, *The Burger Court*, *supra* note 70, at 8 (“[T]he Supreme Court’s struggle to explicate the proof requirements in disparate treatment cases resulted in a fairly straightforward formula that lies within the interstices of its several enigmatic opinions.”).

108. George Rutherglen, *Reconsidering Burdens of Proof: Ideology, Evidence, and Intent in Individual Claims of Employment Discrimination*, 1 VA. J. SOC. POL’Y & L. 43, 48-49 (1993).

employment practices,” section 703(a) simply speaks of prohibiting a variety of employment practices when the practices are “because of such individual’s race, color, religion, sex, or national origin.”¹⁰⁹ Professor Rutherglen emphasizes that “[a]n advantage of an analysis of the statutory language in terms of reasons for action [as opposed to the employer’s subjective mental intent] is that it makes the concept of pretextual discrimination, which is central to both the statute and the cases interpreting it, immediately clear”:¹¹⁰

Instead of relying upon the[] judicial glosses on the statute, or their offspring, “disparate treatment” and “disparate impact,” it is better to return to the statutory language. What is notable about the central prohibitions of Title VII is that they use no simple formula to define what is prohibited. Indeed, the word “intentionally” does not appear until the remedy section of the statute The closest that the statutory language comes to endorsing a single requirement is the phrase “because of,” which links a wide variety of different employment practices to “race, color, religion, sex, or national origin”; no employment decisions can be made “because of” these characteristics. In this context, “because of” means based upon: an employer cannot use “race, color, religion, sex, or national origin,” as a reason for rejecting an applicant for employment, discharging an incumbent employee, or denying other employment opportunities.¹¹¹

Professor Rutherglen has also challenged us to further reflect on exactly what “intentionally” discriminating could mean within the Title VII context. He observes that “the terminology of intentional discrimination raises, but fails to address, the question of the respect in which the action is

109. 42 U.S.C. § 2000e-2(a) (2000).

110. Rutherglen, *supra* note 108, at 50.

111. *Id.* at 48-49 (footnotes omitted). Another commentator has observed:

Based on the erroneous assumption that discriminatory intent is necessarily conscious, the Supreme Court created artificial proof constructs designed to ascertain whether discriminatory intent exists. . . . [However,] *the proof mechanisms serve the role of determining causation rather than conscious intent*, assuring the underlying employment decision is made because of the employee’s protected characteristic, either with or without the employer’s conscious awareness. Ironically, . . . courts originally applying these proofs constructs erroneously assumed the constructs identified an employer’s *conscious* intent to discriminate.

Ann C. McGinley, *!Viva La Evolución!: Recognizing Unconscious Motive In Title VII*, 9 CORNELL J.L. & PUB. POL’Y 415, 419 (2000) (footnotes omitted).

intentional.”¹¹² Three possible interpretations are proposed by Rutherglen: “Is it the fact that the employer . . . intentionally fired the plaintiff? Or that the employer intended to express hatred of anyone of the plaintiff’s race? Or is it that the employer intended to take account of the plaintiff’s race?”¹¹³ Rutherglen proposes that “[t]hese questions can be answered without appealing to the open-ended and ambiguous concept of intentional discrimination,” proposing instead “[a]n analysis in terms of reasons.”¹¹⁴

While Rutherglen’s discussion shines a clarifying light on the inherent problems of *McDonnell Douglas*’s almost casual imposition of an intent requirement, the discussion does not follow the implications of the problem all the way to the end of the logical road. I will do that in Part III, where I argue that the whole dialogue on “finding” intent in Title VII disparate treatment claims has been a misplaced and misguided by-product of the inadequacies of *McDonnell Douglas-Burdine*.¹¹⁵ I argue that when the elements of a prima facie case are satisfied, our societal history mandates that what *McDonnell Douglas* labeled intent must be presumed, for the reasons elaborated in Professor Lawrence’s model of “unconscious racism,”¹¹⁶ as well as by the text of section 703(m) itself.¹¹⁷

Although I elaborate on what intent means in Part III, I mean here to make an important distinction between what courts and commentators have traditionally called intent—the intent to discriminate, to invoke loosely section 703(a)’s key language, “because of” an individual or group’s protected characteristic—and the actual role of the “because of” language when section 703(a) is properly viewed as a species of intentional tort. The so-called intent is there—always outlying, lurking in the background in our discriminating society.¹¹⁸ The question is one properly of causation, not

112. Rutherglen, *supra* note 108, at 49.

113. *Id.*

114. *Id.* Rutherglen also makes a very effective contextual analysis of the provisions of Title VII that do discuss intent. *See id.* at 50-52. Rutherglen also notes that some of the confusion in Title VII law has come from “[t]he flaw in the constitutional analogy implicit in the ideological structure of *McDonnell Douglas*” that “equates judicial deference to the legislature with judicial deference to the employer.” *Id.* at 52.

115. *See* discussion *infra* Part III.

116. *See* Lawrence, *supra* note 29, at 322-23 (describing the construct of a norm in accordance with reality that racism is an unconscious cognitive response rather than the product of deliberation).

117. *See* discussion *infra* Part III.

118. *See* Lawrence, *supra* note 29, at 322-23 (contending that all Americans are unconsciously racist).

intent.¹¹⁹ The plaintiff raises a prima facie case not of intent, but rather of causation, which is what the language “because of” signals.¹²⁰

That a causative inquiry is the heart of employment discrimination law’s disparate treatment model was recognized by Professor Owen Fiss in

119. Professor Belton has offered a partial explanation of the difference between the two views—intent versus causation:

There is, however, a potential conceptual difference between “but for” and “pretext” analysis. But-for analysis attempts to answer a hypothetical question, “What would have happened?,” to reach a conclusion. If, under a but-for analysis, a court rules against the defendant, that ruling says the factfinder does not believe the defendant would have made the same adverse employment decision if it had been motivated only by legitimate nondiscriminatory reasons. Pretext analysis, on the other hand, attempts to answer the question, “What happened?” If a court rules in favor of the plaintiff under a pretext analysis, it is saying that the defendant did not rely on a legitimate nondiscriminatory reason in making the adverse employment decision, but in fact, relied solely on illegitimate reasons.

Robert W. Belton, *Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on Hopkins and Wards Cove*, 64 TUL. L. REV. 1359, 1383-84 (1990) (footnotes omitted).

120. The Supreme Court recognized as much in *Price Waterhouse*. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240-42 (1989) (discussing Congress’s use of the “because of” language). At the time of the *Price Waterhouse* decision, Professor Robert Belton pointed out that a majority of the Justices—and even Justice Brennan, who purported to eschew that view—had concluded that the “because of” language in section 703(m) of Title VII was a causation requirement:

Despite Justice Brennan’s attempt to put a noncausal gloss on the phrase “because of,” a majority of the Justices rejected his view, and construed the phrase as imposing a but-for test of causation. The but-for test is the most widely accepted standard for determining cause-in-fact in legal theory. Justice Kennedy is partly correct in his statement that, although “much of the plurality’s rhetoric is spent denouncing a ‘but-for’ standard of causation[. . .] the theory of Title VII liability [it] adopts . . . essentially incorporates the but-for standard.” Justice Brennan makes repeated references throughout the opinion to concepts such as “a motivating” factor, “a substantial” factor, and “played a part.” These terms generally are viewed as causal concepts.

Belton, *supra* note 119, at 1368-69 (footnotes omitted); *cf.* Rutherglen, *supra* note 108, at 61-62 (“The whole approach to the issue in terms of causes is ill-conceived.”). Rutherglen contends: “Causation in tort law is a broad limitation upon an equally broad system of liability under the common law. Claims for employment discrimination . . . are specialized creatures of statute, whose terms should determine the allocation of the burden of proof.” *Id.* at 61-62. In reply, I show in this Essay that the statutory language at issue (“because of”) is harmonious with the intentional tort view of Title VII claims and section 703(m)’s refinements. *See* discussion *infra* Part III.

a landmark essay whose ideas have now become embedded in every discussion of employment discrimination law.¹²¹ Although it predated *McDonnell Douglas* by three years, Professor Fiss's article notes that "[t]he central causal concepts of the antidiscrimination prohibition, such as 'based on,' 'because of,' and 'on the grounds of,' are given a psychological gloss."¹²² Professor Fiss sees this as problematic because, among other things:

[T]he psychological approach is inadequate because it incorrectly conceives the nature of the regulatory device. Antidiscrimination prohibitions try to regulate by prohibiting the use of a criterion ([e.g.,] race), and generally a violation of the prohibition does not turn on the motives or reason for the choice of the criterion.¹²³

In other words, "[t]he employer violates the prohibition when he judges people on the basis of race, regardless of whether the employer chose that particular criterion"¹²⁴ Therefore, according to Fiss, the inquiry into what section 703(m) now calls "motivating factors" is not, as Justice Powell and his brethren erroneously assumed in *McDonnell Douglas*, the employer's *intent*, but rather, the employer's *use* of criteria that includes prohibited factors, which therefore *causes* the employer's decision to be discriminatory: "The conduct that is regulated is the use of the criterion—judging people on the basis of the criterion—and the reasons or motives for the choice of the criterion are irrelevant under the theory and structure of fair employment laws."¹²⁵

121. Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 297 (1971).

122. *Id.* at 297.

123. *Id.* at 298.

124. *Id.*

125. *Id.* at 298-99. That is not to say that Fiss concluded that the employer's intent has no role in an employment discrimination analysis. For example, invidious decisionmaking may trigger the assessment of tort remedies, such as compensatory and punitive damages. *See id.* at 299-300 (stating that inquiry into an employer's motivation "may assist the court in determining how blameworthy the employer's conduct is"). In addition, if the employer's "motivation seems to be connected to a[n] . . . 'animus,'" then a court should be "more prepared to second-guess the primary decision-maker on his choice of criteria." *Id.* at 300. I generally concur with Fiss's observations, but I believe that the "intent" element, at least insofar as it is relevant to finding liability as opposed to damages, can be presumed, based on the model of unconscious discrimination developed by the scholars whose work is discussed in Part III, whenever the evidence presents a genuine issue of material fact as to whether a prohibited factor played any causative role in challenged actions or inactions. *See* discussion *infra* Part III.

What I seek here to elaborate upon is a distinction, hinted at in Fiss's work, between treating the protected classes as causative originators rather than as shorthand for the process of forming a conscious intention. In reading the intent requirement into the statute, the *McDonnell Douglas* Court ignored what tort experts can attest is a conscious process. For example, as Professor John Finnis has written, "the forming of an intention [must be] understood for what it is: the adopting of a proposal . . . [that] one has shaped in deliberation and preferred to any alternative option available for one's choice."¹²⁶ Professor Finnis explained:

When one intends some harm to (an)other human person or persons—when one's proposal includes, however reluctantly, some damage to (for example) . . . their participation in knowledge of reality, or to their means of sustenance—one is shaping oneself as one who, in the most straightforward way, exploits others. And this is so, whether one intends that harm for its own sake . . . or as a means In each case, the reality and the fulfillment of those other persons is radically subjected to one's own reality and fulfillment In *intending* harm, one precisely makes their loss one's gain, or the gain of some others; one to that extent uses them up, treats them as material, as a resource for a good that no longer includes their own.¹²⁷

This is the kind of intent that Justice Powell believed was the "elusive" inquiry of *McDonnell Douglas* and *Burdine*.¹²⁸ It rests on a fundamental philosophical fallacy of neutrality¹²⁹ that assumes that an "ism" like racism "is a thing done by that small group of people who hold black people" and others in protected groups "always and everywhere in low esteem and disfavor."¹³⁰ But it is also a Quixotic inquiry because the affliction of "isms" is unconscious and endemic in our society,¹³¹ as I argue, following Professor Lawrence,¹³² and the inquiry is unnecessary because the statute itself does not command examination of the defendant's subjective

126. John Finnis, *Intention in Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 229, 247 (David G. Owen ed., 1995).

127. *Id.* at 244 (footnote omitted).

128. See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 n.8 (1981) ("In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.").

129. See *supra* note 104 and accompanying text.

130. *Culp*, *supra* note 12, at 1009.

131. See Fiss, *supra* note 121, at 239 (explaining that racism is a historical legacy in America, resulting from slavery and Jim Crowism).

132. See discussion *infra* Part III.

intent in harming the plaintiff, but rather, only that a violation be found when the plaintiff's protected status has *caused* an adverse employment action.

Indeed, the line between intent and causation can be a bit difficult to discern in tort law. As H.L.A. Hart and Tony Honoré noted in a slightly different context (that of one person's actions causing another person to act in a certain way), there is a zone where the question of intent has been conflated with the question of causation:

[There is a] very varied field of cases where one human action is said to be done 'in consequence of', 'because of', or 'as the result of' another, as, for example, where one man induces another to do something. . . . In this field of relationship between two human actions we have to deal with the concept of *reasons* for action rather than *causes* of events; yet there are many transitional cases for, while the contrast between these concepts is important, it shades off in many directions.¹³³

But Hart and Honoré go on to link these ideas of persons acting "because of" certain conditions to a presumption that, in a set of circumstances, people react in a certain way: "All that is required is that, if the case is to be one of a person acting for a reason, we must understand how it promoted some objective [that is] analogous at least in some way to those which human beings are known to pursue by action."¹³⁴ We indeed

133. H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 51 (2d ed. 1985).

134. *Id.* at 57. Some commentators, however, have disputed this view. For example, David Howarth has criticized it for miscasting the issue of motivation:

Certainly, one can "understand" people acting for a particular reason, in the sense that if they had not believed in or accepted the reason they would have acted differently. The problem is that one can also conceive of the same people in the same circumstances believing in the reason, but deciding not to act on it. One might describe such conduct as "irrational," but the possibility of it happening cannot be ruled out—unlike, for example, the possibility of a dropped brick not falling. Therefore, even "broad" generalizations are not possible. In other words, human consciousness and choice, although often constrained, cannot be reduced to causal laws.

David Howarth, "*O Madness of Discourse, That Cause Sets Up with and Against Itself!*", 96 YALE L.J. 1389, 1397 (1987) (reviewing H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW (2d ed. 1985)). Howarth's point, however, is really one of limitation, as the theme sounded in his article is that "[t]ort scholarship in the United States veers from one universal solvent to another . . . but just as Hart and Honoré refused to believe that the topic of their book was next to nothing, so they now refuse

know that human beings do act as a consequence of unconscious stereotypes about others based on their race, color, national origin, sex, and religion—indeed, that is at the heart of harassment law under Title VII.¹³⁵ So, when Title VII speaks of employment practices “because of . . . race, color, religion, sex or national origin,”¹³⁶ it is speaking of the same kind of causation that Hart and Honoré spoke of, rather than the subjective intent that Justice Powell and his brethren had in mind.¹³⁷ Thus, treating “because of” as a causation requirement is consistent with the proof that Title VII is merely a tort¹³⁸—whose key question is causation, rather than intent.¹³⁹ And the effect of establishing the prima facie case in the backdrop of “unconscious racism”—and sexism, colorism, national originism, and antireligionism, which I maintain follow naturally from our history of discrimination in those areas as well—is that causation is established.

That does not mean, as Hart and Honoré recognized, that the cause is

to believe that it is everything.” *Id.* at 1423. Hart and Honoré’s theory of causation leaves room for the question of employment decisions made “because of” a person’s race or sex, for example, to raise a presumption that the individual’s race or sex was known to the defendant and caused the defendant to act as it did—provided that the defendant received the opportunity to affirmatively disprove causation. In this sense, Title VII functions much like *res ipsa loquiter*—it provides that under a relevant set of circumstances, a prohibited consideration will be presumed to be the cause of plaintiff’s injury unless the defendant can bear the burden of proof to rebut that inference by a preponderance of the admissible evidence. DOBBS, *supra* note 41 at 377 (describing the burden shifting that applies in limited *res ipsa* contexts, requiring “defendant [to] introduce at least some evidence to rebut the inference”).

135. See Zubrensky, *supra* note 29, at 322.

136. 42 U.S.C. § 2000e-2(a) (2000).

137. Compare Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 248 (1981) (emphasizing the standard as one that requires proof that the “defendant intentionally discriminated against the plaintiff”), with HART & HONORÉ, *supra* note 133, at 51 (describing “because of” as a causation inquiry). This view has not yet caught hold of most scholars’ attention. Among the few who had reached a similar conclusion in the pre-*Costa* era are Linda Hamilton Krieger & Rebecca Hanner White, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 498 (2001), and Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 289 (1997). These approaches, however, effectively focused on telling the Supreme Court that its approach was all wrong, which is not all that new. These scholars did not focus on the powerful synergy created between section 703(m) and section 703(a)(1) that, in light of *Costa*, now makes it viable to revisit and reconceptualize liability for disparate treatment discrimination in the Title VII context.

138. See discussion *supra* Part II.A.

139. See *supra* notes 133-34 and accompanying text.

conclusively established in every case.¹⁴⁰ For example, they observed:

[T]his presupposition of broad similarity in human behavior, without which we could not have the concept of a reason for action, does not mean that, when on a particular occasion we assert that a person acted for a particular reason . . . we are committed to any assertion that, if the circumstances were repeated, the same action would follow: it may be that neither he nor anyone else would act so again in such circumstances.¹⁴¹

The placement of “because of” in Title VII validates that observation—the presumption is one of causation, unless the defendant, the one in control of the pertinent information (if any), can rebut the inference of causation by: (a) rebutting the causation inference by a preponderance of the defendant’s own countervailing evidence,¹⁴² or (b) proving the limited affirmative defense by a preponderance of the evidence that the defendant would have made the same decision anyway.¹⁴³ And I further maintain that this is the proof scheme that flows naturally from the language of section 703(m), restoring the status quo represented by the opinions of Judges Lay and Bright,¹⁴⁴ and allowing Title VII to be properly characterized according to its tort nature.

2. *The Ease of Putting Plaintiff to the Wall Merely by “Articulating” Relatively Weak Reasons*

He or she who gets to call the tune controls the minuet. By “delineation of the elements of the prima facie case and in the assignment of the burden of proof,” *McDonnell Douglas* has controlled “the contours of the entire litigation” of Title VII claims for thirty years.¹⁴⁵ By not discussing the nature of discrimination, the *McDonnell Douglas* Court set an unbroken pattern of Title VII disparate-treatment cases in which it has “limit[ed] [it]self to the technical language of allocating burdens of proof.”¹⁴⁶ In that technical dialogue, no point may be more troublesome than the decision to “virtually eliminat[e] defendant’s burden of persuasion” with the virtual nonrequirement of articulating “some” so-

140. HART & HONORÉ, *supra* note 133, at 57.

141. *Id.*

142. *See supra* note 133.

143. 42 U.S.C. § 2000e-5(g)(2)(B) (2000).

144. *See supra* notes 60-65, 78-81 and accompanying text.

145. Baumann et al., *supra* note 19, at 225.

146. *Id.* at 225.

called rationale for an action or omission that can be baldly claimed as both “legitimate” and based on factors other than the employer’s intention to discriminate against the plaintiff on an illegal basis.¹⁴⁷ This “burden” to “articulate” a legitimate nondiscriminatory reason (hereinafter, in shop-talk, LNDR) is really no burden at all. The *Burdine* Court as much as said so when it conceded that “defendant[s] need not persuade the court that it was actually motivated by the [articulated] reasons.”¹⁴⁸ Then what is the purpose of the articulation at all? The only purpose (as discussed below) is to require the plaintiff, in addition to calling the employment action into question, to tackle a whole new obstacle of tearing down the LNDR even though it may not really be the employer’s motivation at all! The so-called articulation burden, then, imposes little more of a practical obligation than the “burden” of explanation placed on a four-year-old child with his or her hand caught in the cookie jar.

This is an almost farcical feature of the *McDonnell Douglas* minuet; it never requires the defendant to truly “defend.”¹⁴⁹ Instead, it sets the case up for summary judgment by requiring the plaintiff to prove not only a prima facie case, but to effectively start over again by mounting evidence to attack an assertion—not a fact that will necessarily be proven at trial—that is the employer’s mere articulation.¹⁵⁰ Indeed, in order to grant summary judgment in favor of an employer, the court must effectively ignore the admonition to draw all inferences in the plaintiff’s (nonmoving party’s) favor.¹⁵¹ Yet trial might well demolish the defendant’s articulation like a house of cards—as it did in the *Costa* case itself.¹⁵² By not requiring the defendant to prove the reason for its actions, the articulation feature is a major cop-out that allows the defendant, who already (at least in an organizational sense) possesses a monopoly over information about its action, to remain silently defiant about the details with the expectation that the plaintiff will not be able to survive summary judgment and put the defendant’s articulated reason to the test at trial.¹⁵³

147. *Id.*

148. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 248 (1981).

149. *See, e.g., Rutherglen, supra* note 108, at 71-72 (“The defendant . . . should bear a heavier burden, not just of producing a legitimate reason . . . but of producing evidence that the reason did in fact play a role in the decision.”).

150. *McGinley, supra* note 71, at 218 n.58, 231-32.

151. *Id.* at 237 n.165.

152. *See Costa v. Desert Palace, Inc.*, 249 F.3d 838, 847 (9th Cir. 2002) (discussing how evidence at trial rebutted the legitimate nondiscriminatory reason offered by the employer).

153. *See Méndez, supra* note 106, at 1158 n.146, 1161 (“In view of the goals

3. *The Problem of Proving Pretext*

McDonnell Douglas effectively transforms every case about discriminatory treatment into a case about the employer's veracity: "[T]he issue of pretext has proved to be indistinguishable from the ultimate issue of intentional discrimination."¹⁵⁴ Offered in *Burdine* as the final step in the three-move minuet, the plaintiff's so-called obligation to prove that the employer's LNDR is merely a "pretext for discrimination" is nothing more than a second injection of the inappropriate burden to prove intent. Not only must the plaintiff have circumstantial evidence of intent to raise a prima facie case, he or she must then come back with more and different evidence of intent to survive summary judgment, survive a directed verdict motion and have his or her case submitted to the jury. Thus, *McDonnell Douglas* not only forces the plaintiff to answer the wrong question to even call out the defendant—the question of the defendant's intent within the context of the circumstances in which the basic adverse employment action takes place—but also, if the plaintiff succeeds in doing that, then forces the plaintiff to address a second, entirely different intent question—the question specifically addressed to discrediting whatever alibi the defendant happens to offer. As Professor Belton observed at the time *Burdine* "clarified" *McDonnell Douglas* in this respect: "[T]he Court decided the case without extensive analysis."¹⁵⁵ In other words, the Court did not realize (or perhaps did not want *us* to realize) what a sham *McDonnell Douglas-Burdine* was for Title VII plaintiffs.¹⁵⁶ Thus, far from easing plaintiff's burden, this "double-intent" element makes the *McDonnell*

embodied in Title VII and the likelihood the employers have superior access to evidence of intent, it would not be unfair to impose on them more than a minimal requirement to produce some evidence of nondiscrimination."); Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1232-33, 1261-74 (1981) (discussing the relatively unstructured LNDR and advocating that the prima facie case should raise a rebuttable presumption of discrimination to which the employer must plead the LNDR as an affirmative defense under Federal Rule of Civil Procedure 8(c) and prove it to be the "real" reason by a preponderance of the evidence).

154. Rutherglen, *supra* note 107, at 58.

155. Belton, *supra* note 151, at 1209.

156. *See id.* at 1273-74 (calling for elimination of the pretext stage because it "is completely unnecessary"; arguing that "[t]he defendant should be required to establish a statutory exception, business necessity, or a legitimate, nondiscriminatory reason," which would impose the further burden on the defendant to prove "that his reasons were genuine and nondiscriminatory in order to prove a nonpretextual defense").

Douglas model doubly unfair to Title VII plaintiffs.¹⁵⁷

Shifting the “intent” inquiry into a pretext mode places control of the case entirely in the defendant’s hands with no corresponding burden of production or proof to detain it.¹⁵⁸ The plaintiff, on the other hand, must now attack the defendant’s subjective honesty.¹⁵⁹ Thus, it is not enough for the plaintiff to show that the defendant’s action was “mistaken”—or even that it is “a good reason, a bad reason, a mistaken reason, or no reason at all.”¹⁶⁰ That a jury might infer the employer gave a bad reason, a wrong reason, or no reason at all does not suffice to support a plaintiff’s verdict under *McDonnell Douglas*.¹⁶¹ Instead, the plaintiff must shoulder an even graver burden than proving the employer’s intent to discriminate. The plaintiff must prove that the employer knew the LNDR offered was false or that the employer acted with subjective bad faith by “manufactur[ing]” the LNDR.¹⁶² The problem was enhanced with the decision in *St. Mary’s*

157. See Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary’s Honor Center v. Hicks, Pretext, and the “Personality” Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 205 (1997) (“Requiring plaintiffs to go beyond both establishing the prima facie case and discrediting the employer’s rebuttal unjustifiably ‘multiplies the plaintiff’s burden’ and defies common sense . . .”) (quoting *MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1059 (8th Cir. 1988)).

158. See *id.* at 207 (“[A defendant] is not required to prove that its decision was correct; the trier of fact need only determine that the defendant, in good faith believed the plaintiff’s performance to be unsatisfactory and that the asserted reason for the action was not a mere pretext for discrimination.”) (quoting *Radovanic v. Centex Real Estate Corp.*, 767 F. Supp. 1322, 1334 (W.D.N.C. 1991)).

159. See *id.* (“A finding of pretext means that the [defendant] ‘did not give an honest account of its behavior.’”) (quoting *Walker v. Nationsbank of Fla. N.A.*, 53 F.3d 1548, 1564 (11th Cir. 1995) (Johnson, J., concurring)).

160. *Id.* at 206 (quoting *Radovanic v. Centex Real Estate Corp.*, 767 F. Supp. at 1334).

161. See *infra* notes 162-65 and accompanying text.

162. Brodin, *supra* note 157, at 207; see Baumann et al., *supra* note 19, at 229-30 (“The effect of not requiring defendant to bear the burden of persuading the factfinder that the reasons for its behavior were race-neutral, and of requiring the plaintiff to prove that the defendant’s explanation was pretextual . . . was the addition of a new element to plaintiff’s prima facie case . . .”). Baumann, Brown, and Subrin give the example of a hospital that refuses to hire a black doctor because her father was not a doctor. *Id.* at 231. Although that is a “facially” neutral reason, it may mask the discriminatory intent to keep out the vast majority of African-Americans who may be the first in their families to have attended medical school. However, the pretext analysis adopted by the Supreme Court would make it virtually impossible for any plaintiff to muster sufficient, specific evidence of the hospital’s discriminatory motive to get the case past summary judgment. *Id.* Instead, to survive the hospital’s motion for summary judgment, she would have to have evidence that “the hospital’s refusal was specifically motivated by hatred of African-American doctors.” *Id.*

Honor Center v. Hicks,¹⁶³ in that even proof of falsity was not enough; the plaintiff must prove that the falsity was premeditated to hide a “true” discriminatory purpose.¹⁶⁴ Under this (somewhat perverse) riff on *McDonnell Douglas-Burdine*, “the fact-finder [may] reject both the employer’s defense and the plaintiff’s proof of discriminatory motive, then . . . substitute an entirely different scenario that absolves the defendant of liability.”¹⁶⁵ For example, in *St. Mary’s Honor Center*, the district judge found that the African-American plaintiff had proven he was demoted and discharged on the basis of trumped-up disciplinary violations.¹⁶⁶ The judge found that the real reason for the demotion and discharge was neither the LNDR articulated by the employer—the disciplinary violations—nor the discriminatory motive asserted by plaintiff; instead, the real reason was “personal animosity” between the plaintiff and his supervisors.¹⁶⁷ Thus, *St. Mary’s Honor Center* took the *McDonnell Douglas-Burdine* pretext inquiry yet another step further—this time, requiring that the plaintiff attack the LNDR defendant relied on, and not only that the plaintiff prove the defendant’s real reason was “discrimination,” but also that “*all* other reasons suggested, no matter how vaguely, in the record” were false and camouflage for discriminatory reasons.¹⁶⁸ Professor Culp despaired of this outcome:

Unless Congress rewrites the law, I would expect that more Title VII plaintiffs will decide not to sue, will settle for less, and will lose more cases. One might have thought that . . . this Court might have been chastened by Congress’ actions in specifically rejecting several Supreme Court opinions in the 1991 Civil Rights Act¹⁶⁹

What makes this all even more fiendishly difficult is the judicial tendency to pick apart the conglomeration plaintiff offers as her evidence, by which she aspires to maximize the opportunity for the factfinder to draw the inferences she urges from that evidence.¹⁷⁰ “By discussing each piece of evidence separately and pointing out the weakness of each piece, the courts

163. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

164. *Id.* at 515.

165. Brodin, *supra* note 157, at 209.

166. *Id.* at 193-94.

167. *Id.* at 198-99.

168. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. at 523; *see, e.g.*, Culp, *supra* note 12, at 1007-10 (discussing *St. Mary’s Honor Center*).

169. Culp, *supra* note 12, at 1010.

170. *See* McGinley, *supra* note 71, at 233-36.

distort the plaintiff's case."¹⁷¹ In this "piecemeal" fashion, courts have found it relatively easy to conclude at the summary judgment stage that the plaintiff has failed to cast "sufficient" doubt on the employer's LNDR.¹⁷² The courts have improperly drawn inferences against the plaintiff on the question of whether the plaintiff created a genuine issue of material fact as to the veracity of the LNDR.¹⁷³ Courts have further imposed a unique burden on the plaintiff not merely to raise an issue of material fact as to the veracity of the LNDR, but to do so "with great specificity" targeted precisely at the factual basis of the LNDR.¹⁷⁴ Even "a plethora" of surrounding circumstances that could reasonably suggest the LNDR was both out of character for the plaintiff and possibly trumped-up would be insufficient to meet this burden.¹⁷⁵

4. *Rule 56: The Terminator*

"Procedure now defines unlawful discrimination and determines the outcome of Title VII cases"¹⁷⁶—and it has largely been that way since 1973.¹⁷⁷ Indeed, as Bauman, Brown, and Subrin observed, "the courts have rewritten the law and changed workplace behavior using the language of procedure," which "is now the master, not the handmaid, of substance."¹⁷⁸ How was this done? "By imposing a greater burden on [T]itle VII plaintiffs and by virtually eliminating defendant's burden of persuasion, the courts have made it more difficult for plaintiffs to prevail."¹⁷⁹ In this way, *McDonnell Douglas* and its progeny

reflect[ed] an ideological shift from the notion of discrimination as an historically entrenched, pervasive social evil (and the corresponding belief that the prima facie case and defenses should reflect this), to the idea that discrimination is an aberrant, transient and isolated phenomenon (and that Title VII cases should therefore be difficult to prove and easy to defend).¹⁸⁰

171. *Id.* at 235 n.151.

172. *Id.* at 237 n.165.

173. *Id.* at 236-37 & n.165.

174. *Id.* at 238-39 & n.175.

175. *Id.* at 239 & n.175.

176. Baumann et al., *supra* note 19, at 220.

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

178. Baumann et al., *supra* note 19, at 220 (referencing a phrase from Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938)).

179. *Id.* at 225 (footnotes omitted).

180. *Id.* at 225-26 (footnotes omitted).

Nowhere has this come to pass more than in the foundering of Title VII disparate treatment cases on the shoals of defense motions for summary judgment.¹⁸¹ In a pioneering critique a decade ago, Professor McGinley found that “[s]ince the summary judgment trilogy, the federal courts of appeals have decided hundreds of discrimination cases on appeal from a grant of summary judgment,” largely affirming the dismissal of Title VII claims.¹⁸² Specifically, Professor McGinley focused on “the *McDonnell Douglas* approach . . . [that] the courts of appeals now . . . use to defeat plaintiff’s claims.”¹⁸³ *McDonnell Douglas* permits courts to “believe” the defendants on mere articulation and to “disbelieve” plaintiffs who must leap a higher hurdle to create a jury issue on pretext.¹⁸⁴ Exacerbating this tendency, Rule 56 is used as a means of dissecting the plaintiff’s evidence into small “segments,” rigorously scrutinizing each segment of evidence to declare it “insufficient,” and then declaring that plaintiff has not raised a genuine issue of material fact at all. In effect, this is merely the old practice of “divide-and-conquer” at work. Courts have used *McDonnell Douglas* and Rule 56 motions to occasion “discuss[on of] each piece of evidence separately and pointing out the weakness of each piece,” which “distort[s] the plaintiff’s case” because the decision whether to infer discrimination from circumstantial evidence must be made based on “the totality of the evidence.”¹⁸⁵ However, by using *McDonnell Douglas* as a spectroscope¹⁸⁶ for deciding Rule 56 motions, courts often conclude that each piece of evidence on its own is “insufficiently probative,” and therefore that there is “no” evidence left to consider in the big picture of a Title VII plaintiff’s

181. See, e.g., McGinley, *supra* note 71, at 206 (discussing the increasing use of summary judgment).

182. *Id.* at 228. The “trilogy,” of course, refers to the three contemporaneous Supreme Court decisions instructing the federal district courts to grant summary judgment when Rule 56’s standards are met, and delineating—some say in a promovant fashion—the requirements of Rule 56. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (holding that summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986) (same); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986) (same).

183. McGinley, *supra* note 71, at 229 (footnote omitted).

184. *Id.* at 231.

185. *Id.* at 235 & n.151; see also *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) (noting that “the court should review the record as a whole”).

186. Metaphors using scientific or medical measurement devices in describing the operation of legal rules are not unprecedented. See, e.g., *People v. Zachowitz*, 172 N.E. 466, 467 (N.Y. 1930) (“The sphygmograph records with graphic certainty the fluctuations of the pulse. There is no instrument yet invented that records with equal certainty the fluctuations of the mind.”).

case.¹⁸⁷ McGinley further notes that courts often (and inappropriately) use the language of Rule 52 factfinding when discussing whether plaintiff's case makes the grade under Rule 56.¹⁸⁸

The bottom line—no real surprise here—is that *McDonnell Douglas* has made it easier for defendants to seek, and courts to grant, summary judgment in Title VII cases than in almost any other category of tort cases.¹⁸⁹ The burden-shifting structure enables courts to try the case on the

187. See, e.g., *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763-64 (1984) (holding that the evidence in the case was insufficiently probative to send the case to a jury).

188. See McGinley, *supra* note 71, at 241-42 (noting that the problem is “likely generated by *Liberty Lobby* and *Celotex*, when combined with the courts’ misuse of the *McDonnell Douglas* construct”). I witnessed this practice firsthand in numerous employment discrimination cases in which I was defense counsel. I vividly recall an age discrimination case in which I won summary judgment from a Baltimore-based federal judge—but not exactly on the grounds I argued. The plaintiff contended he was constructively discharged because of his age when his supervisor told him: “Retire, or be fired.” The supervisor recalled the conversation differently: “Improve your performance, or consider retiring; otherwise you’ll be fired.” The district judge granted summary judgment on the erroneous ground that the plaintiff’s version of the conversation was not corroborated by a third-party witness! See *id.* at 237-41 (discussing misuse of credibility assessments in granting summary judgment against Title VII plaintiffs).

189. See, e.g., Peter J. Ausili, *Summary Judgment in Employment Discrimination Law Cases in the Eastern District of New York*, 16 *TOURO L. REV.* 1403, 1403 (2000) (noting that employment discrimination defendants move for summary judgment as a matter of course); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 *YALE L.J.* 73, 79 (1990) (“[L]iberalized summary judgment inhibits the filing of otherwise meritorious suits and results in a wealth transfer from plaintiffs as a class to defendants as a class.”); McGinley, *supra* note 71, at 206 (asserting that summary judgment has had a “devastating effect on civil rights law”); Miller, *supra* note 36, at 1052 (observing that employment discrimination law cases are among those that the federal courts target for summary-judgment resolution “with greater (and in some contexts almost Pavlovian) frequency,” and calling for reform of this trend); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 *LA. L. REV.* 555, 557-61 (2001) (presenting statistical evidence that employment discrimination cases are particularly difficult for plaintiffs to win); Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 *EMPLOYEE RTS. & EMP. POL’Y J.* 37, 49-50 (2000) (noting that employers frequently prevail on summary judgment); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Cases*, 61 *LA. L. REV.* 577, 577 (2001) (noting “the common practice of courts in slicing and dicing the evidence supporting plaintiff’s case in order to grant motions for summary judgment and judgment as a matter of law”). For a rather presumptuous argument that more summary judgment is needed all the time to “protect” the judiciary from suits that are “frivolous,” see Alexander Acosts &

papers¹⁹⁰ and to make the kinds of evidentiary demands and final conclusions that in any other kind of tort litigation are reserved for trial.¹⁹¹ This is a particularly anomalous result in the face of the jury trial provision of the Civil Rights Act of 1991.¹⁹²

As developed further in the next sections, much of the summary judgment problem stems from the fact that the *McDonnell Douglas* approach asks the *wrong* question. Section 703(m), as interpreted by *Costa*, frames the question correctly.

III. STRUGGLING WITH THE INTENT REQUIREMENT—HOW LAWRENCE’S MODEL OF UNCONSCIOUS RACISM OBVIATES THE STRUGGLE

The very idea of requiring a victim of discrimination to prove his or her victimizer’s intent should be troubling. Particularly in cases of race, sex, religion, and national origin discrimination, this idea appears to start from the assumption that nondiscrimination is the societal norm, and that discrimination is an exceptional aberration. Yet, our history and experience teach us exactly the converse—that our society has and continues to struggle with a pervasive group of “isms.” Racism is not the

Eric J. Von Vorys, *Bursting Bubbles and Burdens of Proof: The Deepening Disagreement on the Summary Judgment Standard in Disparate Treatment Employment Discrimination Cases*, 2 TEX. REV. L. & POL. 207, 209-10 (1998) (offering the nonsequitur—unless one believes that “most” Title VII law suits are “frivolous” and that discrimination is the exception rather than the rule—that “[b]ecause the number of employment discrimination cases is so high, even a small error in the summary judgment standard leads to a substantial waste of resources”).

190. Miller, *supra* note 36, at 1062-72 (discussing the “transformation of summary judgment into paper trials”).

191. See *supra* note 188 and accompanying text.

192. 42 U.S.C. § 1981a(c) (2000). The anomaly is even more apparent when one considers how “close” discrimination cases can be and still be dispatched on an employer’s summary judgment motion. As Professor Selmi has observed, federal judges, enabled by *McDonnell Douglas*, are willing to err consistently on the side of the defendant in Title VII cases:

This general misperception is that employment cases are easy—not difficult—to win, and the volume of employment discrimination cases is said to reflect an excessive amount of costly nuisance suits. This perception is reflected in one of the more ironic statements ever to be uttered by a federal judge, when Judge Frank Easterbrook of the Seventh Circuit Court of Appeals wryly noted that plaintiffs cannot win all close cases. Fair enough, but one might respond, how about just a few?

Selmi, *supra* note 189, at 556 (citing *Lever v. Northwestern Univ.*, 979 F.2d 552, 554 (7th Cir. 1992)).

only “ism”; it is “paradigmatic of other groups’ efforts to avail themselves of self-help against subtle discrimination.”¹⁹³ Discrimination is not the aberration; it is much more common and much more pervasive than those who do not feel its “heel on their necks”¹⁹⁴ can imagine. Like gazing into the swirls and dots of a Jackson Pollock painting, what one sees in the tableaux of our society largely depends on what one brings to the viewing. The *McDonnell Douglas* effort to streamline and simplify—or “sharpen,” as the Court euphemistically put it in *Burdine*¹⁹⁵—the inquiry on discriminatory intent turns out to be based on a seemingly utopian view of a “colorblind” (in the sense of unprejudiced generally) and tolerant society that in fact does not exist nor has ever existed in American history. Indeed, *McDonnell Douglas* turns out to be little more than a judicially constructed set not of evidentiary filters, but of blinders to the realities of daily life for millions of Americans. The only colorblindness in our society is our failure as a nation to see the flaws in our own idealized reflection of our “broad-mindedness.”¹⁹⁶

While our complacent idealism does not match reality, it does pervade Title VII jurisprudence in the way the courts have treated the employer’s intent. Of course, intent with respect to most employers is a bit

193. Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 534 (2003); see also Susan Bisom-Rapp, *Of Motives and Maleness: A Critical View of Mixed Motive Doctrine in Title VII Sex Discrimination Cases*, 1995 UTAH L. REV. 1029, 1042 & n.61 (1995) (discussing racism as an “unconscious phenomenon” and noting that feminist scholars find unconscious racism “very hard to root out”).

194. This is a phrase I first heard from a wise African-American friend in describing a diversity encounter group filled, as she put it, with “angry black women, angry white women, angry black men, and angry white men—everybody was angry and ready to complain about how ‘they’ had been treated by the others.”

195. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981).

196. See, e.g., Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 590-91 (2000) (discussing the “meritocracy myth,” which involves cultural beliefs that discrimination is rare and that merit alone determines employment success, and the fact that many courts do not recognize subtle discrimination); Selmi, *supra* note 189, at 563 (discussing how courts are reluctant to find discrimination absent compelling evidence and how “courts appear hesitant to draw inferences of racial discrimination based on circumstantial evidence”); Smith, *supra* note 193, at 533-35 (discussing subtle discrimination in the workplace and how many courts ignore the subtleties of discriminatory workplace environments); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (defining “second generation” bias as “cognitive or unconscious bias” that results in “social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups.”).

of a misnomer; most employers are business organizations of one sort or another—artificial creations of a state’s law of corporations, partnership, and agency. Such business organizations, as artificial receptacles of business powers, rights, privileges, duties, obligations, and liability, act only through those pursuing their business—i.e., through individual agents.¹⁹⁷ Thus, it is the motivation of individual agents that *McDonnell Douglas* would have us look at, and that Justice Powell in *Burdine* described as “elusive.”¹⁹⁸ As Rutherglen has written, “[t]he erroneous belief that no one else can become fully aware of an agent’s reasons has, as its flip side, the equally erroneous view that the agent herself is always aware of them.”¹⁹⁹ Indeed, agents may be well aware of the “reasons” for an employment-related decision, but simply “fail[] to recognize [them] as discriminatory.”²⁰⁰

How can the perception of too many Americans—and, by extension, the perception of our judiciary—about the nature of the problem of discrimination be so far out of touch with the pain and hardship caused to their fellow Americans? I think the answer was explained well by Professor Lawrence in his seminal work on what he describes as “unconscious racism,”²⁰¹ which has been elaborated upon in a number of other scholarly writings building upon his foundation.²⁰² The innovation here is to consider the theory (a) specifically in the Title VII context, and (b) for the purpose of “neutralizing” what most courts and writers have referred to as the “central” issue of intent. It is my position that causation is the central issue; intent is a backdrop.

Professor Lawrence’s work starts from the proposition that “a large part of the behavior that produces racial discrimination is influenced by *unconscious* racial motivation.”²⁰³ Lawrence argues that the source of this

197. See, e.g., ROBERT CHARLES CLARK, CORPORATE LAW § 3.3.1 (1986) (describing role and authority of agents in conducting a corporation’s activities); 18B AM. JUR. 2D *Corporations* § 1341 (1985) (stating that corporations may only act through individual agents).

198. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. at 255 n.8.

199. Rutherglen, *supra* note 108, at 55.

200. *Id.*

201. Lawrence, *supra* note 29, at 322-33 (coining the term “unconscious racism” and describing the theory).

202. See, e.g., Reshma M. Saujani, “*The Implicit Association Test*”: *A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395, 402-03 (2003) (discussing Lawrence’s theory of unconscious racism); Smith, *supra* note 193, at 536-37 (same); Ryan Tacorda, Comment, *Acknowledging Those Stubborn Facts of History: The Vestiges of Segregation*, 50 UCLA L. REV. 1547, 1574 (2003) (same); see also *infra* note 215 and accompanying text.

203. Lawrence, *supra* note 29 (emphasis added).

unconscious bias is our history and culture itself: “Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role.”²⁰⁴ This heritage is composed of a reservoir of “shared experience . . . ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and opinions,” but because of their archetypal and fundamental nature, “[w]e do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions.”²⁰⁵ In the early years of the last century, Dr. W.E.B. DuBois observed:

We have a way in America of wanting to be “rid” of problems. It is not so much a desire to reach the best and largest solution as it is to clean the board and start a new game. For instance, most Americans are simply tired and impatient [of the problem of racism and the vestiges of slavery]. They do not want to solve it, they do not want to understand it, they want simply to be done with it and hear the last of it. Of all possible attitudes this is the most dangerous, because it fails to realize the most significant fact of the opening century. . . . “The problem of the twentieth century is the problem of the Color Line.”²⁰⁶

Eighty-five years later, Professor Eric Foner observed that “[f]rom the enforcement of the rights of citizens to the stubborn problems of economic and racial justice, the issues central to Reconstruction are as old as the American republic, and as contemporary as the inequalities that still afflict our society.”²⁰⁷ What has been written of race and color can also be said of national origin,²⁰⁸ sex,²⁰⁹ and religion.²¹⁰ With respect to each, the

204. *Id.*

205. *Id.*

206. W.E.B. DuBois, *The Color Line Belts the World*, in W.E.B. DUBOIS: A READER 42, 43 (David Levering Lewis ed., 1995).

207. ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877, at xxvii (1988).

208. See, e.g., Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 807 (1994) (stating that claims of discrimination under Title VII based on national origin have not been as pursued or effective as those factors traditionally protected by Title VII); Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213, 1257 (1997) (discussing the pervasive, but less discussed, effects of racism on all people of color, and noting that the “absence of Latinos/as from histories of racism and the struggle against it enables people to maintain existing stereotypes of Mexican Americans”); Richard Delgado, *Rodrigo’s Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181, 1184-89 & nn.24-25 (1997) (reviewing LOUISE ANN

reality of how “isms” operate as discrimination demonstrates that the *McDonnell Douglas* quest for “intent” is “a major irrational feature of the law” of employment discrimination.²¹¹

FISCH, ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE (1996) and noting the effect the black-white binary has had on other minority groups’ struggle to be recognized by the law). *See generally* RICHARD RODRIGUEZ, BROWN: THE LAST DISCOVERY OF AMERICA (2002) (discussing discrimination against Hispanics).

209. *See, e.g., Nev. Dep’t of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1978-79 (2003) (noting that gender discrimination did not cease with the enactment of Title VII and that “women still face pervasive, although at times more subtle, discrimination . . . in the job market” and that “[a]ccording to the evidence that was before Congress when it enacted the F[amily and] M[edical] L[eave] A[ct], States continue to rely on invalid gender stereotypes in the employment context”) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)); RAYMOND F. GREGORY, WOMEN AND WORKPLACE DISCRIMINATION 62 (2003) (discussing sexual discrimination and sexual harassment in the workplace); LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 197-203 (1969) (discussing the differing treatment accorded to men and women in the United States legal system based solely on sex); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 14 (1979) (discussing sexual harassment as a form of sexual discrimination); Bisom-Rapp, *supra* note 193, at 1030 & n.6, 1042 & n.61; Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices That Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154, 156 (2003) (discussing aspects of discrimination against women due to religious and cultural practices).

210. *See* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 ANN. SURV. AM. L. 295, 296-301 (2002) (discussing how centralizing immigration power in the hands of the federal government in certain circumstances can exacerbate the negative civil rights impact of the enforcement of immigration laws); David Koenig, *Texas Jet Firm Sued for Discrimination*, AP ONLINE, Aug. 25, 2003, at 2003 WL 62376940 (discussing the EEOC’s lawsuit against Montreal-based Bombardier Aerospace Corp. “over its firing of a jet salesman who complained about an executive’s comments that because he is a Mormon he would offend customers by refusing to smoke or drink”); Rosemary Simota Thompson, *Civil Litigator, Islamic Scholar and CBA Member Discusses The Post 9/11 World*, CBA REC., May 2003, at 28 (discussing common misconceptions of the Islamic faith and how inequality sometimes emerges from these misconceptions).

211. Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L. J. 2279, 2280 (2001). Professor Delgado argues that Lawrence’s thesis is only a partial explanation for “isms” in our society:

It is time to move away from limited conceptions of racism located in the individual psyches of particular perpetrators and to begin the search for broad structures that submerge people of color, workers, and immigrants, and replace these structures with ones that can fulfill our unkept promises of

The practical implication of our unconscious propensity to categorize, organize, and rationalize each other in our society based on “isms” is simple; the notion of discriminatory intent developed through *McDonnell Douglas* and *Burdine* is seriously out of whack with reality.²¹² Charles Lawrence challenged us over fifteen years ago to look at the “cultural meaning” of conduct to evaluate whether that conduct was based on one of our inner “isms.”²¹³ We do this, he says, by recognizing that “certain actions, words, or signs may take on meaning within a particular culture as a result of the collective use of those actions, words, or signs to represent or express shared but repressed”—or simply unrecognized—attitudes that constitute our “isms.”²¹⁴ These thoughts and feelings that dwell just below the line of conscious cognition can manifest themselves in both individual workplace decisions as well as workplace policies of broader application.²¹⁵ Yet such decisions and policies would almost inevitably escape reproach or sanction under a *McDonnell Douglas* vision of “elusive” intentional discrimination, because they do not leave the kind of factual markers required by a paradigm that places no burden on the employer to justify its actions.²¹⁶

democracy, equality, and a decent life.

Id. at 2295. Perhaps a decrease in the level of powerlessness of minority group members to take on discriminators by a concomitant increase in effective enforcement of Title VII permitted by *Costa* and section 703(m) is a step in the direction posited by Professor Delgado.

212. See Lawrence, *supra* note 29, at 337-38 (discussing the prevalent tendency to unconsciously categorize and classify people into different groups).

213. *Id.* at 355-56.

214. *Id.* at 356.

215. See, e.g., Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1564 (1989) (discussing the effect of unconscious racism on the decisionmaking of judges and jurors); Barbara J. Flagg, *Fashioning A Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2013 (1995) (asserting that “whites tend to regard whiteness as racelessness, . . . [which] affects whites’ decisionmaking”); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 899 (1993) (observing that most discrimination “is the result of unintended and unconscious stereotyping”).

216. See, e.g., McGinley, *supra* note 111, at 420 (stating that “courts and legislatures should . . . incorporate[] into the law psychological and sociological evidence demonstrating that discriminatory behavior results from both conscious and unconscious bias”). However, McGinley does not appear to consider that section 703(m), properly interpreted, would obviate the need to try to “save the phenomenon” of *McDonnell Douglas*. See *id.* at 485-90; cf. J.L.E. DREYER, *A HISTORY OF ASTRONOMY FROM THALES TO KEPLER* 191-206, 305-44 (2d ed. 1953) (discussing medieval astronomers’ ever-expanding sets of epicycles to explain observed motions of

So what does all of this translate into for reconceptualizing the “intent” requirement of Title VII’s so-called disparate treatment provision, section 703(a)(1)? In a still small but growing literature, there have been a number of proposals for reconceptualizing Title VII to make its protections a workplace reality for individuals.²¹⁷ However, none of those commentators saw the unrecognized actuality, and therefore the power, of the potential of section 703(m). If Title VII sections 703(a) and (m) define a discrimination tort, and the key issue in that tort is causation,²¹⁸ then we need to consider what role, if any, intent should play. I think it is finally dawning on scholars that intent should be a matter presumed from the backdrop of our society. The work of scholars on the cognitive phenomenon of unconscious racism establishes it as a kind of mental static in all of our backgrounds—the Van Allen belt, as it were, of our societal relationships.²¹⁹

That is not to say that this background static of historical biases makes everyone guilty of an “ism” as a regular part of hir or her daily life, or that most Americans hold animus or outright hatred based on these “isms.” It is simply to recognize that the reason the intent inquiry has been so elusive is because we have been using the wrong tools to answer the wrong question.²²⁰ The question is whether this background static of “isms” has bubbled to the surface in any particular case involving any particular individuals, such that a reasonable observer could conclude that an action or decision more likely than not was, at least in some part,

the planets in a futile effort to “save” Ptolemy’s earth-centric theory of planetary motion—until that theory was exploded by the heliocentric model of Copernicus and Kepler).

217. See, e.g., Judith Olans Brown et al., *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1491 (1997) (advocating jury instructions, judicial notice, and expert testimony as means of forcing “judges and juries to listen to known facts about racism and discrimination”); McGinley, *supra* note 111, at 481-90 (discussing amendments to Title VII along with the use of a variety of techniques under pre-*Costa* Supreme Court precedent); Smith, *supra* note 193, at 534-35 (advocating an interpretation of section 704, the antiretaliation provision of Title VII, that gives minority-group workers broader latitude and more protection to exercise self-help opposition to discrimination—conscious and unconscious—in the workplace).

218. See discussion *supra* Part II.

219. See Lawrence, *supra* note 29, at 322-23 (explaining that racism is embedded in our subconscious minds); see also *supra* note 215 and accompanying text.

220. See, e.g., McGinley, *supra* note 111, at 419 (criticizing the proof constructs used by courts and arguing that the central issue is causation, not intent to discriminate).

“because of [an] individual’s race, color, religion, sex, or national origin.”²²¹ As a result, the intent can be presumed in every case in which the decisionmakers know that an individual is within a protected class and take actions against him or her with a factual context that would permit a judge or jury to conclude that the protected trait at issue played a causative role in the decision.

But if I am not calling everyone in the United States a bigot, not saying that an “ism” is automatically presumed every time a person in a protected class develops a work-related grievance, then under what circumstances *should* intent be presumed? I suggest that intent should be presumed, and that plaintiff should have no burden to “prove” intent, whenever the circumstances give rise to an issue of causation. That is to say, whenever there is evidence to create a genuine issue as to whether one’s membership in a protected class was a cause of an adverse employment action, then the “intent” should be presumed.

How then, if we jettison “intent” and look to causation, will we know when plaintiffs have raised a prima facie case of discrimination, rather than simply invoked Title VII because they happen to have one or more characteristics protected by that statute? Much of the same evidence once used as indicia of “intent” will be useful as indicia of causation (the real inquiry all along), except that it will now have the effect of shifting the burden of proof to the defendant under *Costa* and section 703(m).

Obviously, the easiest way to do that is through prima facie cases that show treatment different from at least one other comparator, but this does not always have to be the case. The most readily identifiable hallmark of such a factual context will be comparative—i.e., specific examples of different treatment in similar circumstances—but it cannot, nor should it be, limited to those kinds of situations. Evidence in support of a prima facie case include imbalances in a workforce,²²² lack of efforts to add qualified minority candidates to hiring pools,²²³ expressions of hostility toward protected groups in the workplace,²²⁴ statements formerly called

221. 42 U.S.C. § 2000e-2(a)(1) (2000).

222. See, e.g., McGinley, *supra* note 111, at 466 (citing *Teamsters v. United States*, 431 U.S. 324 (1977)).

223. *Id.* at 489 (stating that “work units having a larger percentage of women and minorities have a positive effect on the job performance evaluations of women and minorities,” producing “fairer evaluation[s] if they represent at least 25% of the group”).

224. *Id.* at 448 (stating that this type of evidence was more prevalent immediately following passage of the Civil Rights Act of 1964 than today).

“stray remarks” that evince an “us-them” view of the workplace by nonminority employees,²²⁵ atmospheres of unwelcomeness for minority employees,²²⁶ lack of advancement for minority employees,²²⁷ lower minority retention rates,²²⁸ failure to do more than give lip service in meeting the goals and timetables in affirmative action plans required for federal contractors and subcontractors,²²⁹ and ineffectual handling of complaints of harassment or discrimination by employees.²³⁰ *Each and all* of these categories of circumstantial evidence should be admissible, when factually present, in *every* Title VII case to *permit* the trier of fact to determine whether, in *that case*, to draw the inference that an employment decision at issue (even if that decision per se has no particular causal relationship with these indicia of bias) was caused in any part by the plaintiff’s membership in a protected class.²³¹ Yet this is not all. By reconceptualizing the principal inquiry of discrimination as causation, the “motivating” factor standard²³² permits the reconceptualization of the evidence relevant to prove causation in ways that the straight-jacketed,

225. *Id.* at 486 (“Courts can limit the ‘stray remarks’ doctrine, holding that discriminatory remarks of co-workers or supervisors in the workplace are relevant to the question of whether the adverse employment decision resulted from discrimination by demonstrating that the co-workers or employer harbor stereotypical beliefs and that an atmosphere of tolerance by an employer may signal discrimination.”).

226. *Id.* at 486-87 (discussing the application of cognitive psychology principles to structuring workplace atmospheres in which decisionmakers can go beyond merely internalizing “egalitarian” principles to “learn inhibitory responses that challenge the[ir] stereotypes and permit them to reduce their automatic prejudicial responses”); see Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 772 (1995) (asserting that although stereotypes remain in the minds of many people, it is possible to inhibit their conscious realization).

227. McGinley, *supra* note 111, at 489-90 & nn.393-96 (noting scientifically documented cognitive failures of reasoning that lead to reliance on prejudice and stereotypes, including “failure to appreciate covariation, blocking of relevant hypothesis, and illusory correlation”).

228. *Id.* at 487 (asserting that retention is helped by effective training, managerial programs, and “enforcing objective criteria for evaluation”).

229. See MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* § 8.07 (1988) (stating that government contractors must make good faith attempts to set minority employment goals and “timetables for reaching those” goals).

230. See *id.* § 5.60, at 427 (stating that failure by an employer to correct employee harassment may render an employer liable for allowing the harassment to continue).

231. McGinley, *supra* note 111, at 466. Professor McGinley has also made the useful suggestion that plaintiffs’ lawyers build their prima facie cases from “expert testimony explaining the nature of discrimination and the existence of unconscious negative attitudes that result in discriminatory behaviors.” *Id.* at 485.

232. 42 U.S.C. § 2000e-2(m) (2000).

neutrality assumption of *McDonnell Douglas* would never accommodate.

For example, in promising new scholarship built upon the foundations of unconscious racism, Professor Tristin Green has explored disparate treatment as a product of institutionally enabled discrimination, which “focus[es] directly on the employer’s role in enabling the forms of discriminatory bias that hinder opportunities of women and minorities in the modern workplace.”²³³ Professor Green urges us to look at the dynamics of the workplace to ferret out discrimination—“bias as influenced, enabled, and even encouraged by the structures, practices, and dynamics of the organizations and groups within which individuals work.”²³⁴ Although admittedly in its formative stages and not yet reified to “the precise details of a complete legal regulatory regime,” the “broad contours of a possible legal theory of structural disparate treatment” have been sketched.²³⁵ The main inquiry is whether “the employer’s institutional structures or practices unreasonably enabled the operation of discriminatory bias.”²³⁶ The inquiry would require an analysis of the employer’s organization by a number of different expert witnesses from a variety of angles, depending on the defendant, the nature of plaintiff’s contention(s), and the employment practice(s) relevant to those contentions.²³⁷ Free from having to use the mechanical formula of *McDonnell Douglas* to raise a ritualistic “inference of discrimination” and empowered through the wide-open opportunity simply to establish causation through “a motivating factor,” the moribund litigation theories of plaintiff’s Title VII disparate treatment work should enjoy a renaissance that germinates and elaborates on new perspectives such as institutionally enabled discrimination.²³⁸ These new approaches can flourish under the

233. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 145 (2003).

234. *Id.* at 92; see also *id.* at 91-93 & nn.1-6 (citing sources regarding workplace discrimination) (citations omitted).

235. *Id.* at 145; see also McGinley, *supra* note 111, at 488 nn.376, 380 (discussing observations made by the American Psychological Association in its *Price Waterhouse v. Hopkins* amicus curiae brief that stereotyping is reduced by workplace structures that require “interdependence—an organization that uses teamwork and makes promotions dependent on group projects and emphasizes supervisors’ responsibilities for the success of subordinates”).

236. *Id.* at 147.

237. *Id.* at 146 & n.254.

238. See generally Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370 (1994) (discussing the effects of the structure of the workplace environment, particularly as to

Costa interpretation of section 703(m) that focuses on identifying contributory causation.²³⁹

Although such a causative formulation of the Title VII prima facie case is the objective towards which more progressive courts of appeals' employment discrimination jurisprudence has been evolving (recognizing the influence of unconscious "isms" at the expense of the intent-based approach),²⁴⁰ my thesis may still appear to be novel. To one schooled in the mythology of *McDonnell Douglas*, my causative reconceptualization with presumed intent may seem like a fairly radical suggestion reminiscent of the shift on the view of the solar system from geocentric to the heliocentric view.²⁴¹ However, section 703(m) and *Costa* occasion this re-examination. Novel though it may seem, this is the inevitable logical progression that *Costa* has ignited in killing off *McDonnell Douglas*, as I will demonstrate in Parts IV, V, and VI. All I have done here is to provide a bridge to harmonize the past with the present through

rules, practices, and structures that communicate and establish cultural domination tied to race, color, national origin, sex, or religion in addition to those structural features upon which Professor Green focuses). Under the traditional *McDonnell Douglas* approach to proving discrimination, "the law permit[ted] nondominant groups a cause of action only in extreme cases in which the exclusionary behavior of supervisors and co-workers is so intolerable as to amount to pervasive and severe harassment." *Id.* at 2408. However, Professor Chamallas identifies as also discriminatory "workplace rules such as English-only requirements" that "primarily function as cultural markers of exclusion and hierarchy." *Id.* For example, under the cultural domination model, discrimination is evidenced by features such as "exploitation, marginalization, powerlessness, [and] cultural imperialism." *Id.* at 2393. Such indicia are presented when employees are "exploited when their energies are continuously expended to augment the status of the dominants; . . . marginalized when they have no place in the system; and . . . powerless when their work as classified is nonprofessional—lacking in autonomy and respectability." *Id.* (footnotes omitted). While these categories may "intersect at some points with legally recognized harms," much of the discrimination evidenced by these indicia was not covered under the "neutrality" concept of discrimination in the *McDonnell Douglas* regime. *See id.* at 2394-95.

239. *See Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2155 (2003) (holding that the plaintiff must show that his or her protected characteristic was "a motivating factor" in the employment decision) (emphasis added).

240. *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 (1st Cir. 1999) ("The ultimate question" is not intent, but rather "whether the employee has been treated disparately 'because of race.' This is so regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias."); *see also* Green, *supra* note 231, at 128-31 (discussing how *Thomas v. Eastman Kodak Co.* illustrates the "traditional disparate treatment paradigm").

241. *See, e.g., DREYER, supra* note 216, at 191-206, 305-44.

reconceptualization. At the end of the day, the Civil Rights Act of 1991 transformed the focus of Title VII from the judicial gloss on section 703(a)(1) of “intent” to the causative definition of section 703(a)(1) discrimination that Congress gave us in section 703(m).²⁴² As a result of section 703(m), we need no other evidence of unlawful intent (beyond its presumption) once we show that a protected factor played any role whatsoever in bringing about an adverse employment action.²⁴³ It is then up to the defendant to carry the burdens of proof and persuasion by either refuting the verity of plaintiff’s allegations or by proving the limited affirmative defense afforded in section 703(m).²⁴⁴

IV. STATUTORY INTERPRETATION AS AN EXERCISE IN PRACTICAL REASONING—READING WHAT CONGRESS “WROTE” IN SECTION 703(m) OF THE CIVIL RIGHTS ACT OF 1991

A. *The Methodology*

The genesis of the Civil Rights Act of 1991 is well known to the practicing bench and bar and to scholars. Colloquially, it is thought of as a response to various rulings of the “Reagan” Supreme Court of the 1980s.²⁴⁵ But there is more purpose and depth behind the Act than such a “headnote” description implies. Indeed, to fully appreciate section 703(m), we must perceive it in a broader context, defined by the full impact of the Act. A useful vehicle for doing so is the seminal work of Professors Eskridge and Frickey on “practical reasoning” in statutory interpretation.²⁴⁶

The practical reasoning model posits that “an interpreter will look at a broad range of evidence” to develop a “preliminary view of the statute,” and then test that view against “the multiple criteria of fidelity to the text,

242. See discussion *supra* Part II.C.1.

243. See discussion *infra* Part V.B.

244. See *supra* notes 142-43 and accompanying text.

245. See generally Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1 (1990) (describing the reaction to the 1989 Term of the Supreme Court in curtailing the reach of Title VII).

246. E.g., William N. Eskridge, Jr., & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) [hereinafter Eskridge & Frickey, *Statutory Interpretation*]; William N. Eskridge, Jr., & Philip P. Frickey, *The Supreme Court 1993 Term—Forward: Law as Equilibrium*, 108 HARV. L. REV. 26 app. at 97-108 (1994) [hereinafter Eskridge & Frickey, *1993 Term*].

historical accuracy, and conformity to contemporary circumstances.”²⁴⁷ This is a fluid process, which Eskridge and Frickey represent with a conical visual metaphor—largest at the most abstract end of the cone, where the inquiry is less focused, using sources such as current policy and statutory evolution, and narrowing through less abstract; more concrete inquiries regarding legislative purpose and specific and general legislative history; and coming to a sharp focus at the level of the statutory text itself.²⁴⁸ Eskridge and Frickey write that “[i]n formulating and testing her understanding of the statute, the interpreter will move up and down” this hierarchy in “evaluating and comparing the different considerations represented by each source of argumentation.”²⁴⁹ This analysis will be applied to section 703 of Title VII.

B. *The Application of Practical Reasoning to Interpreting Section 703*

1. *Current Policy*

The poles of what the “current” policy of Title VII is or should be presents interestingly polarized positions. In *Desert Palace, Inc. v. Costa*, the Solicitor General entered, not as he once would on the side of the employee, but rather, on the side of business, submitting what is perhaps the most conservative position of all the amici briefs:

For thirty years, courts have used the *McDonnell Douglas/Burdine* pretext standard to resolve most Title VII cases. . . . It represents . . . this Court’s definitive construction of “[t]he language of Title VII.”. . . The *McDonnell Douglas* framework, moreover, has gained wide acceptance

. . . .

. . . [F]ar from undermining the need for a heightened, direct evidence standard in mixed-motive cases, Section [703(m)], by expanding liability in mixed-motive cases, supports requiring plaintiffs to make a strong initial showing, through direct evidence, that discriminatory intent in fact motivated the challenged employment action.

247. Eskridge & Frickey, *Statutory Interpretation*, *supra* note 246, at 352 (compiling the various “rules” of statutory interpretation used by the Rehnquist Court).

248. *Id.* at 354.

249. *Id.*

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. . . Although there is some reason to doubt whether Title VII initially drew a sharp distinction between pretext and mixed-motive cases, the courts have consistently treated these cases as distinct. . . . In addition, by introducing jury trials, the 1991 amendments created the possibility that jury instructions in mixed-motive cases could confuse jurors into thinking that the defendant bears the burden of proof on issues related to the defendant's conduct.²⁵⁰

What is perhaps most fascinating about the Solicitor General's position is that, despite the original structure, language, and intent of Title VII, he apparently concedes it does not contemplate the pretext/mixed motive or *McDonnell Douglas/Price Waterhouse* dichotomies. However, he argues that section 703(m) should be interpreted in a way to save the phenomenon of *McDonnell Douglas* and restrain Congress's attempt to push aside the trusty old *McDonnell Douglas* paradigm in a rump effort to expand the liability of those who consider a protected factor in employment decisions!²⁵¹ This produced a sharp rebuke from an employment law expert, Professor Eric Schnapper at Washington. As he cowrote in *Costa's* brief:

The government offers no explanation, and none is readily imaginable, for a rule of construction under which broadening the scope of Title VII should be deemed an evil to be counteracted wherever possible by judicial construction. There is, after all, no special rule of lenity for biased employers. Why legislation according greater protections to victims of invidious discrimination should be construed with such a jaundiced eye the Solicitor General does not say.²⁵²

The views expressed by those opposed to *Costa's* view suffer from the same defect. *Costa's* opponents tend to defend old Supreme Court cases, like *McDonnell Douglas* and *Price Waterhouse*, as if they were the statutory law passed by Congress, rather than mere judicial glosses. In this process, the policy at issue is the policy behind employment discrimination laws from Title VII in 1964 through the Family and Medical Leave Act of

250. Brief for the United States as Amicus Curiae at 2-3, 9-10, 14, *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003) (No. 02-679) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)).

251. Brief for United States as Amicus Curiae at 12-15, *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003) (No. 02-679).

252. Brief for Respondent at 16, *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003) (No. 02-679).

1993.²⁵³ The purpose of this policy is to eliminate workplace discrimination based on the various “isms.” To effect that purpose, some have argued that Title VII should be construed to require equality of opportunity—i.e., all “runners” (a.k.a. workers) in the rat race begin at the same starting line on an “equal footing.”²⁵⁴ Others have insisted that Title VII should be construed to require “equal achievement,” i.e., that those runners in the rat race whose protected group identity has been the subject of a persistent “ism” in American society should see an improvement in “both the quantity and the quality” of jobs, which “should be distributed so that the relative economic position of” the group as a whole “is improved” to the station of the dominant group.²⁵⁵ A third position might also be taken—that both positions articulate goals of Title VII, with the former more readily achieved by the prohibitive nature of Title VII, and the latter blending with the contentious subject of voluntary affirmative action programs.²⁵⁶ Both purposes, however, are equally advanced by a reading of section 703(m) that focuses on causation, rather than subjective intent, and that permits an individual who has evidence of disparate treatment to shift the burden of (dis)proof and, concomitantly, the risk of loss, upon the defendant.²⁵⁷

2. *Evolution of the Statute*

The evolution of section 703(a) has been traced above—it existed

253. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2619, 2631-2654 (2000).

254. See, e.g., Fiss, *supra* note 121, at 237-39 (discussing racial inequality and stating that minorities “should be treated ‘equally’ by employers in the sense that their race should be ‘ignored’”).

255. *Id.* at 237-38.

256. See, e.g., *id.* at 239-49 (outlining the equal-treatment and equal-achievement concepts).

257. As Owen Fiss observed in the racial discrimination context, viewing antidiscrimination law as primarily a causative inquiry does seem more aligned with the “equality of opportunity” goal, but the “equality of achievement” goal is also implicated:

Inequalities in the actual distribution of jobs between the races might also be due to the decisions of individual employers—the subject regulated by fair employment laws. . . . One need only be realistic about the historical legacy of blacks in America—one century of slavery and another of Jim Crowism. . . . [E]ven if race is not used by an employer, his decisions may be based on criteria that do not seem conducive to productivity and that, because of the legacy, give whites an edge.

Id. at 239; see *id.* at 297-301 (discussing the causative focus of fair employment laws).

with judicial gloss until the varnish of the Civil Rights Act of 1991 wiped that gloss clean, like removing the smoke and dust that obscured the vibrant colors of the Sistine Chapel frescoes, and erected in its place a new definition of an unlawful employment practice when before there had been only judicial pronouncements.²⁵⁸ This allows us to transition directly into the next level of ascending specificity as we descend towards the apex of Eskridge and Frickey's conical metaphor for practical reasoning in statutory interpretation—the considerations they classify as “legislative purpose.”²⁵⁹

3. *Legislative Purpose of Title VII*

The legislative purpose of Title VII is fairly obvious,²⁶⁰ but has been nonetheless subject to some debate²⁶¹—especially with regard to the idea that it does not compel affirmative action and that it does not unduly trammel on the employer's prerogative. But what prerogative does Title VII leave to employers to discriminate because of race, color, religion, sex, or national origin? None, of course, except as expressly defined in such narrow statutory exceptions as the bona fide occupational qualification defense, which, in any event, never applies to racial discrimination.²⁶² The whole philosophical framework for interpreting Title VII was fraught with limiting skepticism—and sometimes, barely concealed hostility—from Supreme Court majorities from *McDonnell Douglas* through the spate of

258. See discussion *supra* Part IV.B.1.

259. Eskridge & Frickey, *Statutory Interpretation*, *supra* note 246, at 353.

260. See, e.g., Franklin D. Roosevelt, Jr., 7 B.C. INDUS. & COMM. L. REV. 413, 413 (1966) (EEOC chairman explained that Title VII's purpose was “to assure that all are given a fair chance at employment and promotion on the basis of ability and qualification without regard to race, color, sex, religion or national origin,” objectives that are “based on a recognition of” a “fact of discrimination in American life—some of it willful and bigoted; much of it unwitting and flowing from deeply entrenched patterns of business and community behavior”); Carl Rachlin, *Title VII: Limitations and Qualifications*, 7 B.C. INDUS. & COMM. L. REV. 473, 473 (1966) (“Title VII of the Civil Rights Act of 1964 expresses the desire of most Americans for equal employment opportunity for all Americans. The purpose of the President and the Congress is clear on this.”).

261. See, e.g., RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 147-81 (1992). See Charles T. Schmidt, Jr., *Title VII: Coverage and Comments*, 7 B.C. INDUS. & COMM. L. REV. 459, 459-60 (1966).

262. See 42 U.S.C. § 2000e-2(e)(1) (2000) (“[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”).

infamous decisions in the 1988 Term (issued in 1989).²⁶³

Yet, even if there could have been some debate about the full reach of Title VII, the Civil Rights Act of 1991 put an end to such debate. The legislative purpose of the law that gave us section 703(m) was clearly stated, although little recognized by many amici appearing before the Supreme Court in *Costa*. The Act's purpose is "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace"²⁶⁴ in response to the congressional finding that "legislation is necessary to provide additional protections against unlawful discrimination in employment."²⁶⁵ This is the congressional equivalent of hitting the bench and bar about the head with a two-by-four. The haggling and nit-picking that the courts and commentators have engaged in, trying to maintain the iconic position of the 1973-1989 Supreme Court decisions, is most misplaced in the face of language of such sweeping breadth and expansive purpose. The legislative purpose laid out by Congress is quite obvious: to clear the litigation path for Title VII plaintiffs of the underbrush that the Supreme Court had planted and tended like some tangled, insular English garden.

Indeed, without limiting its reference as to case or time frame, Congress added that another of its purposes was "to respond to recent decisions of the Supreme Court by expanding the scope of the relevant civil rights statutes in order to provide adequate protection to victims of discrimination."²⁶⁶ While Congress did not target *McDonnell Douglas* and *Burdine* by name, it is not a far stretch to see them encompassed within the intentionally broad and vague reference. To conceptualize the language in this way takes only a little understanding of the edifice upon which *Price Waterhouse* was constructed and of what that edifice was comprised. Without *McDonnell Douglas* and *Burdine*, there would have been no

263. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (holding "when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account"); *Patterson v. McLean Credit Union*, 491 U.S. 164, 189 (1989) (holding that a plaintiff need not show that she was better qualified than other applicants in order to succeed in a § 1981 action for failure to promote); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (holding that Title VII plaintiffs do not establish a prima facie case merely by presenting evidence of a statistical racial disparity in the workplace); see also McGinley, *surpa* note 71, at 203 n.1 (listing and commenting on several cases from the 1988 Term).

264. Civil Rights Act of 1991, Pub. L. No. 102-166 § 3(1), 105 Stat. 1071 (1991).

265. *Id.* § 2(3).

266. *Id.* § 3(4).

raison d'être for *Price Waterhouse*, the 1989 decision that is assumed to be the target of section 703(m).²⁶⁷ While *Price Waterhouse* further complicated an already complicated framework by unnecessarily introducing a distinction between circumstantial and direct evidence cases,²⁶⁸ it must not be forgotten that without *McDonnell Douglas* and *Burdine*, the framework would not have existed in the first place.

4. *Specific and General Legislative History*

Interpreting section 703(m) might have been made an easy task by Congress. An unusual feature of the Civil Rights Act of 1991 is that it exemplifies what Nicholas Rosenkranz has called a “statute-specific interpretative statute”²⁶⁹ because the Act provides that “[n]o statements other than the interpretive memorandum . . . shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.”²⁷⁰ This is an important example of what scholars, including Rosenkranz, have advocated—that Congress itself shares in the power of establishing interpretative rules and may do so without a “general, Article III objection that developing interpretive methodology is an inalienable judicial prerogative.”²⁷¹

Had section 703(m) been included within that command, the significance would be evident; it would provide a clear inference to be drawn from Congress’s restrictive interpretative command imbedded in the Act—that everything that came before section 703(m) has been swept

267. See Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177, 1199 n.104 (2003) (noting the section 703(m) amendment to Title VII, was in part, a response to the *Price Waterhouse* decision).

268. See Mizer, *supra* note 29, at 247-48 (noting the difficulty courts and commentators have experienced in attempting to apply the “direct evidence” requirement); see also *id.* at 247 n.82 (“Courts will . . . be required to make the often subtle and difficult distinction between ‘direct’ and ‘indirect’ or ‘circumstantial’ evidence. Lower courts long have had difficulty applying *McDonnell Douglas* and *Burdine*. Addition of a second burden-shifting mechanism . . . is not likely to lend clarity to the process.”) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. at 291 (Kennedy, J., dissenting)).

269. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2086, 2109-10 (2002).

270. Civil Rights Act of 1991, Pub. L. No. 102-166 § 105(b), 105 Stat. 1071, 1075 (1991).

271. Rosenkranz, *supra* note 269, at 2109.

aside by the new, replacement proof scheme. However, this statement was targeted only at disparate impact cases under Title VII, not the disparate treatment cases that appear to be the focus of section 703(m).²⁷²

What should we gather from Congress's express disavowal of any "outside" source for interpreting section 703(k), the disparate impact section, to protect it from erosion by any of the previous law, particularly the *Wards Cove*²⁷³ decision, yet its failure to do the same thing for section 703(m) by disavowing *McDonnell Douglas*, *Burdine*, and their progeny? Some will argue that this "omission" is a trump card demonstrating that Congress merely superimposed section 703(m) on existing law, without intending to displace anything but the confusion engendered by *Price Waterhouse* as to: (a) whether the discriminatory motive must be a "but for," "substantial," or "motivating" factor in order for mixed-motive analysis to apply; and (b) whether the effect of a finding of mixed motives allows the defendant to escape liability by showing it would have made the same decision anyway even if the prohibited motive had not been a factor.²⁷⁴ Such writers have warned us to read section 703(m) more broadly. For example, the standard in any Title VII disparate treatment case "will effectively override the *McDonnell Douglas v. Green* pretext framework."²⁷⁵

However, other writers have not been so impressed with the declared focus of section 703(m). To the contrary, they have thrown up their hands at a lack of congressional discussion of and deliberation on the scope and effect of the wording chosen for section 703(m).²⁷⁶ They have pointed out that while what little discussion there is of section 703(m) in the legislative history talks about the twin evils of *Price Waterhouse* in particular,²⁷⁷ the

272. See Civil Rights Act of 1991 § 105 (entitled "Burden of Proof in Disparate Impact Cases" and clearly applying to section 703(k)(1)(A), or disparate impact, cases).

273. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

274. See, e.g., Brian W. McKay, Note, *Mixed Motives Mix-Up: The Ninth Circuit Evades the Direct Evidence Requirement in Disparate Treatment Cases*, 38 TULSA L. REV. 503, 508-09 (2003) (citations omitted) (discussing Congress's purpose in passing the Civil Rights Act of 1991).

275. *Id.* at 505.

276. Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 661-62 (2000) (deeming the legislative history as "singularly uninformative" on the scope of section 703(m)); see Mizer, *supra* note 29, at 256-59 & nn.131-32 (2001) (observing that the legislative history is minimal).

277. E.g., H.R. REP. NO. 102-40(I), at 46-48, reprinted in 1991 U.S.C.C.A.N. 549, 584-86.

actual purpose of the Act was broader, i.e., to restore and enhance the effective enforcement of Title VII.²⁷⁸

In a particularly enigmatic discussion, the House Committee on Education and Labor declared that “in providing liability for discrimination that is a ‘contributing factor,’ the Committee intends to restore the rule applied in many federal circuits prior to the *Price Waterhouse* decision that an employer may be held liable for any discrimination that is actually shown to play a role in a contested employment decision.”²⁷⁹ The key words here are “actually shown to play a role.” It is unclear what this means. It makes little sense to argue there are two different kinds of discrimination: discrimination where the plaintiff proves “discrimination was a cause” versus where the plaintiff proves “discrimination was *actually* a cause.” The distinction is the height of semantic silliness. It may well be that the Committee was unclear on the effect of *McDonnell Douglas-Burdine*, which is to prove that discrimination was actually a cause, which was also the effect of the old direct-evidence approach under *Price Waterhouse*. Or it may well be to emphasize that the two schemes are met—that before *Price Waterhouse*, federal courts generally considered circumstantial and so-called direct evidence together in using the existing paradigm of *McDonnell Douglas*.²⁸⁰ Congress has before been less than informative in the legislative history of Title VII, such as when it added during floor debate “sex” to the protected classifications without reports, studies, or other deliberative data.²⁸¹ That Congress did not do more to explain section 703(m) is therefore certainly not unprecedented, but in light of the precedent of “sex” discrimination, counsels us to attach no significance to the absence of legislative deliberations on what the world of employment discrimination litigation will be like without *McDonnell Douglas-Burdine*. Any doubt, however, should be dispelled in light of the language Congress chose without any savings or limitation clause for the *McDonnell Douglas* paradigm,²⁸² as well

278. See *supra* notes 264-65 and accompanying text.

279. See H.R. REP. NO. 102-40(I), at 48, reprinted in 1991 U.S.C.C.A.N. at 586.

280. Belton, *supra* note 276, at 663.

281. See, e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1490 n.42 (1987) (noting that the House added the prohibition against sex discrimination after numerous other changes); CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE* 115-16 (1985) (describing how Howard W. Smith proposed an amendment to add sex to the list of Title VII’s protected characteristics during House floor debates in order to make the bill “so controversial that eventually it would be voted down”).

282. See discussion *infra* Part VI.

as in light of congressional purpose to restore and enhance the enforcement of Title VII.²⁸³

Thus, the fact that Congress attached less significance to overruling *McDonnell Douglas* than the sentimentality that has given it reverential “life-support” should not be cited as a reason for concluding that the whole burden-shifting scheme has continued vitality. Congress could, as Rosenkranz observes, “amend the entire United States Code in one fell swoop” or even “repeal [it] . . . with one sentence if it so chose.”²⁸⁴ Instead, Congress set out a mission in the 1991 Act—to provide “additional remedies . . . to deter . . . intentional discrimination in the workplace”²⁸⁵ and “to provide additional protections against unlawful discrimination in employment”²⁸⁶—and then gave courts the language to do it, which is the subject of the next subsection. Thus, considering the policy and legislative purpose stated in both Title VII and the 1991 Act, the argument that in order to “overrule” *McDonnell Douglas*, *Burdine*, and their offspring, Congress needed to specifically single out all of the procedural aberrations that have neutralized the effectiveness of Title VII holds no water. Indeed, regardless of whether the committees that considered the 1991 Act had *McDonnell Douglas* in their sights, to have injected an express discussion of *McDonnell Douglas* might have raised a red flag about section 703(m) at a time when President George H.W. Bush had already vetoed an earlier version of the Act.²⁸⁷ Thus, in the highest order of the practical reasoning model,²⁸⁸ any doubts that could be injected by Congress’s approach to the legislative history must be—and clearly are—resolved by the text of section 703(m) and its relationship to the core concept of employment discrimination.

5. *Statutory Text*

The statutory text sits at the apex of the conical view of “practical

283. See *supra* notes 264-65 and accompanying text.

284. See Rosenkranz, *supra* note 269, at 2113-14 (discussing the impact of “retrospective interpretive statutes” and concluding that “whether or not it is wise for Congress to amend the United States Code with retrospective interpretive instructions, there is no constitutional objection”).

285. Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071 (1991).

286. *Id.*

287. See Belton, *supra* note 276, at 661 n.45 (discussing the veto of the Civil Rights Act of 1990).

288. See *supra* notes 246-49 and accompanying text.

reasoning” described by Professors Eskridge and Frickey.²⁸⁹ As the other factors cited above appear somewhat soft in their impact, this is indeed a case in which the focus of the statutory analysis is directed toward the “more focused, concrete inquiries” of textualism that afford “a more limited range of arguments.”²⁹⁰ Those textual inquiries are Justice Thomas’s focus in the *Costa* opinion.²⁹¹ I will explore them in the course of discussing *Costa* in Part V. In the meantime, it suffices to say that after “mov[ing] up and down the [metaphoric] diagram [of the sources of practical reasoning], evaluating and comparing the different considerations represented by each source of argumentation,”²⁹² we can see not only that the results of the other modes of statutory interpretation do not contradict the view that all Title VII disparate treatment cases are now to be analyzed under section 703(m), but that in fact, they support that view. It is particularly interesting just how much courts have struggled to avoid the plain, consistent meaning of section 703(m). As Professor Eskridge has written, “[u]nder dynamic statutory interpretation, the textual perspective is critical in many cases,” especially “[w]hen the statutory text clearly answers the interpretive question,” in which case, “it will normally be the most important consideration.”²⁹³ However, in the case of section 703(m), courts apparently refused to read the plain language of the statute because they were mired so deeply in the status quo of *McDonnell Douglas-Burdine*.

V. *COSTA*: TITLE VII RESARTUS²⁹⁴

A. *Prologue*

There have been a number of student law review notes written about the Ninth Circuit’s split en banc decision in *Costa*, and, while they are not particularly helpful in the ultimate legal analysis, they do a skillful job of setting forth the basic facts and procedural history of *Costa*.²⁹⁵ It is not my

289. Eskridge & Frickey, *Statutory Interpretation*, *supra* note 246, at 353-54.

290. *Id.* at 354.

291. *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2150-55 (2003).

292. Eskridge & Frickey, *Statutory Interpretation*, *supra* note 246, at 354.

293. Eskridge, *supra* note 281, at 1483.

294. “Costa reclothed.” The allusion is to THOMAS CARLYLE, SARTOR RESARTUS: THE LIFE AND OPINIONS OF HERR TEUFELSDROCKH (1831).

295. See, e.g., *Employment Law—Discrimination—Ninth Circuit Finds for Employee in a Mixed-Motive Case Without “Direct Evidence” of Discrimination*, 116 HARV. L. REV. 1897, 1904 (2003) (recommending that the Supreme Court use the opportunity of reviewing *Costa* to select one of the competing opinions in *Price*

intention to rehash the ground covered there. Readers unfamiliar with the case can consult these sources, as well as the opinions themselves,²⁹⁶ for the detailed treatment one usually expects as filler in law review articles. My purpose in this section is to interpret *Costa* within the framework of criticism of *McDonnell Douglas* that I have constructed in Parts II through IV.

B. *How Costa Confirms that Every Title VII Case Is a Case of Mixed Motives*

Any employment lawyer or judge reading the facts of the *Costa* case would immediately think to himself or herself, "Ah, a classic *McDonnell Douglas* paradigm case of alleged disparate discipline based on 'circumstantial evidence.'" The facts are so familiar as to be almost archetypical. Ms. Costa was a Teamster working on the loading dock at a Las Vegas casino.²⁹⁷ The other employees and supervisors were men; Ms. Costa was the only woman.²⁹⁸ The supervisors wrote Ms. Costa up over a period of time for various disciplinary infractions.²⁹⁹ Finally, Ms. Costa was fired for engaging in fisticuffs with another (male) coworker.³⁰⁰ The coworker was suspended, not fired, because he had a "clean[er]" disciplinary record.³⁰¹

Waterhouse as the law); McKay, *supra* note 274, at 503 (rejecting the Ninth Circuit ruling ultimately affirmed by the Supreme Court); Kelly Pierce, Comment, *A Fire Without Smoke: The Elimination of the Direct Evidence Requirement for Mixed-Motive Employment Discrimination Cases in Costa v. Desert Palace, Inc.*, 87 MINN. L. REV. 2173, 2207 (2003) (concluding that "*Costa*'s merging of pretext and mixed-motive cases is appropriate").

296. *Costa v. Desert Palace, Inc.*, 238 F.3d 1056 (9th Cir. 2000), *opinion withdrawn and superceded by* 268 F.3d 882 (9th Cir. 2001), *and rev'd en banc*, 299 F.3d 838 (9th Cir. 2002), *and aff'd*, 123 S. Ct. 2148 (2003).

297. *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2152 (2003).

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.* In the original opinion (of the three generated in the Ninth Circuit), Judge Schwarzer provided a statement of facts that strikes one as the paradigmatic law-school fact pattern to illustrate the operation of *McDonnell Douglas* in disciplinary discharge cases:

Catharina Costa was employed by Caesars Palace Hotel & Casino (Caesars) as a warehouse worker from 1987 to 1994. She was the only woman in the bargaining unit covered by a collective bargaining agreement (CBA) between Caesars and Teamsters Local 995. A long history of disciplinary infractions and suspensions culminated in her termination in 1994, after she engaged in a

verbal and physical altercation with a fellow worker, Herbert Gerber. While Costa was fired, Gerber, a twenty-five year employee with a good disciplinary record and no prior suspensions, received only a five-day suspension. Both employees filed grievances under the CBA. An arbitrator sustained both disciplinary actions and found that Caesars had just cause to terminate Costa.

Costa v. Desert Palace, Inc., 238 F.3d at 1058. Desert Palace's brief to the Ninth Circuit gives more details, but these are also entirely consistent with classic *McDonnell Douglas* circumstantial evidence. See Appellant's Opening Brief at 4-13, Costa v. Desert Palace, Inc., 238 F.3d 1056 (9th Cir. 1999) (Nos. 99-15645, 99-15646). For example, the disciplinary incidents that preceded her fight are described as run-of-the-mill kinds of run-ins that generate discipline in a loading dock environment:

Within her first year of her employment at Caesars, on February 23, 1988, Costa received a written warning because, in a fit of anger, she threw a roll of tape at another employee and broke a window in the warehouse. On September 4, 1990, Costa received a verbal warning for verbally harassing another employee.

... Costa and a male co-worker, Michael Murphy engaged in a loud verbal confrontation with Murphy calling Costa a "fucking cunt" and Costa calling Murphy an "asshole." Murphy and Costa each received the identical three day suspension as discipline. . . .

On January 27, 1992, Costa engaged in a verbal confrontation with co-worker William McKennery who was a runner in the warehouse. Both of the parties were using profane and vulgar language and Costa attempted to run into McKennery with the pallet jack. Both Costa and her male co-worker William McKennery received the identical five-day suspension. Costa and her union negotiated a settlement on the five-day suspension short of taking it to arbitration. As part of the settlement, the suspension was reduced to two and one-half days. Costa also agreed as part of the settlement to release Caesars from any claims based on her employment and the suspension. In addition, however, all parties agreed that the suspension could be relied upon for further discipline up to and including termination. McKennery got the same settlement deal through his union.

....

On August 15, 1994, Costa and a co-worker, Herbert Gerber were involved in an altercation inside an elevator at the warehouse. Gerber was a 25 year employee with no suspensions in his file and, in fact, no discipline at all involving a failure to get along with other employees. Costa accused Gerber of hitting her and Gerber accused Costa of pushing him. There were no witnesses to the incident inside the elevator. Both individuals were suspended pending investigation of the incident. Caesars' Labor Relations Manager, Richard Stewart, interviewed both of the individuals and talked to any other

The facts present a classic circumstantial evidence case, the kind to which courts since 1973 routinely applied a *McDonnell Douglas* analysis.³⁰² In fact, Caesars's lawyers strongly and uncontestedly made that very argument to the Ninth Circuit on appeal:

The evidence does not directly reflect unlawful discrimination. Costa's evidence consists of several situations where she claims she was treated differently than male coworkers. *With nothing more, those allegations are merely part of what Costa would need to make her prima facie case under the McDonnell Douglas theory.* Those facts might enable a jury to infer unlawful discrimination as in any other *garden variety* disparate treatment case.³⁰³

Thus, no one was claiming that there was direct evidence in *Costa*, or any particular evidence that raised a "mixed-motives" issue as that phrase is understood in *Price Waterhouse*.³⁰⁴ Significantly, "[a]t trial", the court proposed

likely witnesses.

....

With regard to Ms. Costa's situation, management and Mr. Stewart considered the two suspensions for similar infractions. Mr. Stewart did not consider the thirty day suspension that had been reversed. After consideration of those factors, it was determined by Caesars that Costa would be terminated. As to Mr. Gerber, Stewart and management looked at Gerber's length of employment which was almost 25 years. Mr. Gerber had no suspensions in his file and, in fact, no discipline at all involving a failure to get along with other employees. There were some verbal warnings and some parking violations in Mr. Gerber's file. Based on those mitigating circumstances, Caesars determined that a five day suspension was appropriate.

Id. at 5-9 (citations omitted).

302. See, e.g., BELTON & AVERY, *supra* note 40, at 89 ("In a typical disciplinary discharge case, the plaintiff who has violated a legitimate rule or policy of the employer claims that, in imposing the sanction, the employer has treated him less favorably than other employees, not in the protected group, who have similarly violated company rules."). Belton and Avery explore variations on the kinds of circumstantial, comparative evidence used by employees in such *McDonnell Douglas* paradigm cases. *Id.* at 89-91.

303. Appellant's Reply Brief at 2, *Costa v. Desert Palace, Inc.*, 238 F.3d 1056 (9th Cir. 1999) (Nos. 99-15645, 99-15646) (footnotes omitted) (emphasis added).

304. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) ("Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations.").

jury instructions based on the *Price Waterhouse* mixed-motive theory. Caesars argued that Costa had not presented any direct evidence of gender animus. In all of her years at Caesars, Costa did not remember any manager or supervisor ever making a remark to her that included a specific reference to her being a woman or a girl or a female.³⁰⁵

The district judge, David Hagen, rejected Caesars's objection and gave a charge based, apparently exclusively, on the wording of section 703(m):

“[T]he plaintiff has the burden of proving . . . by a preponderance of the evidence that she ‘suffered adverse work conditions’ and that her sex was a motivating factor in any such conditions imposed upon her. . . . You have heard evidence that the defendant’s treatment of the plaintiff was motivated by the plaintiff’s sex and also by other lawful reasons. *If you find that the plaintiff’s sex was a motivating factor in the defendant’s treatment of the plaintiff, the plaintiff is entitled to your verdict*, even if you find that the defendant’s conduct was also motivated by a lawful reason.”³⁰⁶

Justice Thomas’s opinion endorses this charge.³⁰⁷ The principal line of reasoning is *strictissimus juris*: “where . . . the words of the statute are unambiguous, the ‘judicial inquiry is complete.’”³⁰⁸ This reasoning is applied both to section 703(m), the operative provision in question, and section 701(m),³⁰⁹ a definitional provision. Justice Thomas observed that section 703(m) “unambiguously states that a plaintiff need only ‘demonstrat[e]’ that an employer used a forbidden consideration with respect to ‘any employment practice.’”³¹⁰ Since no showing of direct evidence is mentioned, he reasons, none is required.³¹¹ He sees section 701(m)’s definition of the term “demonstrates” as a symmetrical buttress to the plain meaning of section 703(m); in defining “demonstrates” to mean meeting the burdens of production and persuasion, Congress did not, he

305. Appellant’s Opening Brief at 12, *Costa v. Desert Palace, Inc.*, 238 F.3d 1056 (9th Cir. 1999) (Nos. 99-15645, 99-15646) (citations omitted).

306. *Desert Palace, Inc. v. Costa*, 123 S. Ct. at 2152 (quoting *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 858 (9th Cir. 2002)) (quoting excerpts from the district court’s jury instructions) (emphasis added).

307. *Id.* at 2153-54.

308. *Id.* at 2149 (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

309. 42 U.S.C. § 2000e(m) (2000).

310. *Id.* at 2153 (quoting 42 U.S.C. § 2000e-2(m)).

311. *Id.*

noted, take the opportunity to impose any heightened evidentiary demand on that demonstration.³¹² “Congress,” Justice Thomas noted, “has been unequivocal when imposing heightened proof requirements in other circumstances.”³¹³

One of the many amici who appeared in this case, the Equal Employment Opportunity Advisory Council and the U.S. Chamber of Commerce, charged, Cassandra-like, in their brief to the Supreme Court that if a section 703(m) charge were affirmed in this case, then *McDonnell Douglas* was dead, because Judge Hagen’s charge

gives plaintiffs the ability to turn even garden variety discrimination claims into mixed motives cases, shifting the burden of proof to the employer every time. Even plaintiffs with only circumstantial evidence of discrimination will be able to bypass entirely the *McDonnell Douglas* test in favor of the higher burden a mixed-motives analysis places on employers. The absence of eyewitness evidence of discrimination, which led this Court to develop an alternative proof scheme in *McDonnell Douglas*, no longer will determine the employer’s burden of proof. Instead, the decision below significantly ratchets up the employer’s burden of proof in every case to prove lawful activity.³¹⁴

These amici could not have been more foresightful or correct in assessing the significance of this case to the victims of employment discrimination and those who stand accused of discriminating.³¹⁵ Quite correctly, they

312. *Id.* at 2154 (noting that “[Congress] could have made that intent clear by including language to that effect in [section 701(m)].”).

313. *Id.*

314. Brief of Amici Curiae the Equal Employment Advisory Council and the Chamber of Commerce of the United States at 19, *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003) (No. 02-679).

315. In contrast, the United States as amicus did not state the issue correctly or fairly. Rather amusingly, the Solicitor General told the Supreme Court that the issue was “[w]hether a plaintiff in a Title VII case must adduce direct evidence of discriminatory intent to trigger application of the mixed-motive analysis under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).” Brief for the United States as Amicus Curiae at I, *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003) (No. 02-679). Of course, this misleads, and misstates the issue, which is about the scope of section 703(m), not about the scope of a pre-1991 Civil Rights Act decision. However, the Solicitor General did correctly perceive that “[t]he Ninth Circuit’s reading of the 1991 amendments would fundamentally alter all Title VII cases by allowing a plaintiff to proceed in every case under the instructions applicable to mixed-motive cases.” *Id.* at 23.

predicted that “the decision below significantly ratchets up the employer’s burden of proof in every case to prove lawful activity.”³¹⁶ And so it has.

C. Pandora’s Box Revisited: Does Costa’s Limiting Footnote Have Meaning?

Judicial footnotes have come under increasing fire from scholars and judges alike.³¹⁷ Some have been fairly blunt in their criticism, calling the footnote a “fungus.”³¹⁸ Others have seen a kind of lack of nerve in limiting footnotes in Supreme Court decisions, likening them to artificial restraints on the reasoning process itself:

[T]he footnote performs the crucial task of holding the logic of the opinion together, by putting off the evil day when these questions will have to be answered. The footnote is the red cape dangled in front of the charging bull, and then removed at the last second, preserving the life of the matador. Does it surprise us that this deferral, this avoidance, is the crucial move in the opinion (like the movement of the cape at the last split second)?³¹⁹

Former Supreme Court Justice Arthur Goldberg gave a more pungent critique of the limiting footnote: “Footnotes . . . cause more problems than

316. Brief of Amici Curiae the Equal Employment Advisory Council and the Chamber of Commerce of the United States at 19, *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003) (No. 02-679). Interestingly, Ann Hopkins, the plaintiff in *Price Waterhouse*, also filed an amicus brief in which she attempted to persuade the Court that an affirmative would not be so far reaching. See Brief of Amicus Curiae Ann B. Hopkins at 6-7, *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003) (No. 02-679) (arguing that a mixed-motives analysis should be used when the *Burdine* model is inapplicable and the mixed-motives test should not only be triggered by direct evidence). However, as shown above, that argument is refuted by the facts of Ms. Costa’s case and the breadth of Justice Thomas’s construction of section 703(m), as well as by the brief’s own reflection that

[i]n a case tried under the pretext model, which typically presents the trier of fact with a choice between two dominant motives—one unlawful, the other lawful—a plaintiff who prevails will necessarily satisfy the “motivating factor” test. That is, the jury will have decided that prohibited bias was the dominant factor (if not the sole motivation) causing the challenged decision, so it was necessarily a motivating factor.

Id. at 26.

317. Edward R. Becker, *In Praise of Footnotes*, 74 WASH. U. L.Q. 1, 1 (1996).

318. Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647, 647 (1985).

319. J. M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 281 (1989).

they solve.”³²⁰

Justice Thomas’s *Costa* opinion illustrates Justice Goldberg’s point well. Tucked away nicely in the *Costa* opinion’s first footnote is likely the weakest attempt at a limiting disclaimer to appear in a Supreme Court decision within recent memory. “This case,” the footnote intones solemnly, “does not require us to decide when, if ever, § [703(m)] applies outside of the mixed-motive context.”³²¹ This is little more than a judicial Trojan Horse. The Court never defines what it means by a mixed-motive “context” or case. It demolishes the *Price Waterhouse* concept of mixed-motive cases—those in which so-called direct evidence of discrimination has been presented—but it does not redefine the term “mixed-motive.” In fact, without so stating, Justice Thomas simply wrote the whole category of mixed-motive Title VII cases out of existence.³²² If there is no longer any need to offer “direct evidence” to go to a jury on a section 703(m) charge, then the concept of “mixed-motives” is no longer distinguishable from the concept of any Title VII plaintiff’s evidence of discrimination offered to rebut the employer’s nondiscriminatory explanation. All cases become mixed-motive cases—unless the employer offers an unlikely admission that its *sole* motivation was discrimination!

Thus, footnote one in *Costa* looks like nothing more than an afterthought, an artificial and ill-conceived attempt at limiting the case to its facts.³²³ But, the facts of the case and the statutory interpretation adopted by Justice Thomas open section 703(m) to the broadest application. The effort to somehow “wait” for another day to make that clear is both futile and a disservice.

It is futile because Justice Thomas and the Court have opened the lid to Pandora’s box and have shut it too late. Footnote one in *Costa* makes about as much sense as if Chief Justice Earl Warren had dropped a

320. Arthur J. Goldberg, *The Rise and Fall (We Hope) of Footnotes*, 69 A.B.A. J. 255, 255 (1983).

321. *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2151 n.1 (2003).

322. There is a disturbing yet illuminating parallel here: *McDonnell Douglas* and *Price Waterhouse* can be viewed in tandem as the *Plessy v. Ferguson* of Title VII law; together, they tried to establish a “separate, but equal” pair of proof paradigms that were each insufficient and inherently unequal to the basic proof scheme of common-law tort. See discussion *supra* Part II.A. Section 703(m), as applied in *Costa*, became the *Brown v. Board of Education* of Title VII law by abolishing this inherent inequality.

323. See *Desert Palace, Inc. v. Costa*, 123 S. Ct. at 2151 n.1 (limiting the analysis of section 107 to the mixed-motives context).

footnote in the *Brown v. Board of Education*³²⁴ decision stating something along the lines of, “Today, we decide only that segregation is unlawful in the state’s provision of public school education; we reach no conclusion as to the constitutionality of the state’s decision to maintain segregation in any other area or service and narrowly limit the scope of our decision to the provision of public education.”

A decision like this is a disservice because it threatens to confront hundreds of federal district court judges with the need to rule on whether there is still life for *McDonnell Douglas* in some classes of cases that does not involve mixed-motives within the rubric of section 703(m); it leaves thousands of plaintiffs who should get to a jury with the continuing specter of summary judgment under a pair of cases that have been overruled; and it portends that one or more of those cases will become vehicles for once again asking the Supreme Court what it really meant to say on Title VII.³²⁵ What a colossal waste of time this would be because upon closer examination, *Costa* is susceptible only to the conclusion that there is no such class of cases; they are now as mythical as the unicorn.

But sometimes judicial actions speak louder than judicial words. As Caesars Palace and the *amici* who supported it contended, the facts presented by Ms. Costa were no more than the “garden-variety” circumstantial evidence paradigm of *McDonnell Douglas* and *Burdine*.³²⁶ The affirmance of Judge Hagen’s decision to use a section 703(m) charge is itself a definition of a mixed-motive case.³²⁷ Every case in which the plaintiff raises a *prima facie* case that a factor in an adverse employment action was prohibited, and the defendant responds (to avoid summary judgment!) with an allegedly legitimate, nondiscriminatory explanation for the adverse employment action, will and must be a “mixed-motive” case as

324. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

325. *Cf.*, Robert C. Cadle, *Burdens of Proof: Presumption and Pretext in Disparate Treatment Employment Discrimination Cases*, 78 MASS. L. REV. 122, 135 (1993) (“In the wake of the Supreme Court’s decisions in *McDonnell Douglas* and *Burdine*, the lower courts have been unable to agree on even basic principles governing the quality and quantity of proof required to create an inference of intentional discrimination sufficient to refute the employer’s proffer of a nondiscriminatory reason for adverse employment action, much less on the application of those principles to specific situations of alleged discrimination.”).

326. Brief of Amici Curiae the Equal Employment Advisory Council and the Chamber of Commerce of the United States at 19, *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003) (No. 02-679).

327. *See Desert Palace, Inc. v. Costa*, 123 S. Ct. at 2155 (holding that the district court did not abuse its discretion in giving a mixed-motive instruction to the jury).

delineated by the Court's own reasoning in *Costa*.³²⁸ To say otherwise defies the facts on which *Costa* was decided and the reading of section 703(m) advanced by the Court.³²⁹ Just as section 703(m) "does not mention, much less require, that a plaintiff make a heightened showing through direct evidence,"³³⁰ neither does the statute mention, much less restrict, section 703(m) only to a particular class of Title VII cases based on "mixed-motive" claims.³³¹

D. *A Postscript*

There is some irony to this outcome, at least for me personally. A number of years ago, a federal district court judge in the Atlanta Division of the Northern District of Georgia denied a summary judgment motion I filed on behalf of Delta Air Lines in a retaliation lawsuit brought under the Railway Labor Act. The district judge's terse opinion had ruled that the case was one of mixed motives to be decided by a jury because, in effect, the plaintiff contended he was fired "because of" his supervisor's knowledge that he planned to engage in union organizing activity, while the defendant contended he was fired for violating a work rule. Indignant, I filed a motion for reconsideration, cited *McDonnell Douglas* and Justice O'Connor's opinion in *Price Waterhouse* as analogous precedent, and argued that the judge's interpretation of the law would make "every case a 'mixed-motives' case." The judge reconsidered, and changed his ruling. Now, almost a decade later, it appears—at least from a section 703(m) vantage point—the judge's common-sense interpretation had it right in the first place.

VI. CONCLUSION: THE POST-COSTA TITLE VII DISPARATE-TREATMENT LITIGATION LANDSCAPE

Unlearning learned—almost ingrained—behavior does not happen overnight. The judicial response to Title VII claims has been framed around *McDonnell Douglas* for so long that it will take several years to adjust to the new interpretation of section 703(m).³³² There will need to be

328. See discussion *supra* Part V.B.

329. See discussion *supra* Part V.B.

330. *Desert Palace, Inc. v. Costa*, 123 S. Ct. at 2153.

331. See 42 U.S.C. § 2000e-2(m) (2000).

332. Several federal courts having applied *Costa* have not fully grasped or discussed its ultimate implications for *McDonnell Douglas*. See, e.g., *Rowland v. Am. Gen. Fin.*, 340 F.3d 187, 191-94 (4th Cir. 2003); *Thomas v. Chrysler Fin., L.L.C.*, 278 F. Supp. 2d 922, 926-27 (N.D. Ill. 2003); *Campetti v. Career Educ. Corp.*, No.Civ.A. 02-

a number of high-profile circuit court reversals of grants of summary judgment to employers before the word adequately reaches our already overburdened district court judges. Yet once it does, there will be a revival of Title VII as a meaningful civil rights statute, instead of a hope that ultimately dawns futile for many individuals. Such hope has not been seen since the Supreme Court in 1968 intelligently read the Civil Rights Act of 1866³³³ in *Jones v. Alfred H. Mayer Company*.³³⁴

The process has already started. Before *Costa's* ink was barely dry, Senior U.S. District Judge Paul A. Magnuson—a life-long Republican and a 1981 appointee of President Ronald Wilson Reagan³³⁵—became the first to file an opinion applying *Costa's* reading of section 703(m) to deny an employer's effort to dispatch a garden-variety Title VII claim on summary judgment.³³⁶ Although sitting within the Eighth Circuit, Judge Magnuson decided to forestall ruling on Wal-Mart's motion for summary judgment in Lois Dare's Title VII discrimination lawsuit until the issue presented by the neighboring Ninth Circuit's en banc *Costa* decision was decided by the Supreme Court.³³⁷ I characterize Ms. Dare's claims as "garden-variety" not to imply a negative perception of the merits, but rather to describe its familiarity to anyone who knows the *McDonnell Douglas* paradigm well. Hers is a classic failure-to-hire claim based on circumstantial evidence.

CV-1349, 2003 WL 21961438, at *6-12 (E.D. Pa. June 25, 2003); *Davis v. Emery Worldwide Corp.*, 267 F. Supp. 2d 109, 119 n.2 (D. Me. 2003).

Other courts have continued to desperately salvage something of *McDonnell Douglas*, adding complexity where *Costa* intends simplicity, much like Ptolemaic astronomers who increased the complexity of their astromechanics with more and more epicycles to preserve their geocentric view in the face of Copernicus's triumph in the heliocentric revelation. See, e.g., *Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc.*, No. C02-3038-MWB, 2003 WL 22290229, at *15-17 (N.D. Iowa Oct. 7, 2003) (attempting to engraft *Costa* on *McDonnell Douglas* in a "modified paradigm" in which *Costa* applies as an alternative to the pretext stage of the minuet).

333. Civil Rights Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified at 42 U.S.C. §§ 1981, 1982 (2000)).

334. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); see Robert L. Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last: Jones v. Alfred H. Mayer Co.*, 55 VA. L. REV. 272, 272 ("During the latter part of the past century and throughout the greater part of this century the Act received a restrictive interpretation." However, the Supreme Court "resurrected the 1866 Act" in *Jones v. Alfred H. Mayer Co.*).

335. BIOGRAPHICAL DIRECTORY OF THE FEDERAL JUDICIARY 1789-2000 632 (Bernan Staff ed., 2001).

336. *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987, 994 (D. Minn. 2003).

337. *Dare v. Wal-Mart Stores, Inc.*, No. 02-0001, 2003 WL 21147657, at *9 (D. Minn. May 8, 2003).

Ms. Dare, an African-American, applied for one or more positions at a Wal-Mart store with openings (the number of positions in which she expressed interest is disputed) but encountered difficulty obtaining an interview. Although she was finally interviewed, she was not selected because at least one employee from another Wal-Mart location was transferred into the store.³³⁸ Typically, Wal-Mart would respond to Ms. Dare's contention by tossing out some reason(s) other than her race to "explain" why she was not hired, and that would be that—Ms. Dare's case would likely founder on summary judgment due to lack of pretext evidence (i.e., facts to show that Wal-Mart personnel were liars as well as discriminators). However, Judge Magnuson knew that *Costa* was "in the pipeline," so to speak, and thus took the unusual step of staying Ms. Dare's case until the *Costa* opinion had issued because "[t]he outcome of the *Costa* case has broad implications for lower courts analyzing discrimination claims."³³⁹ This *Costa* did indeed do, according to Judge Magnuson's opinion issued a mere five days after the Supreme Court announced its *Costa* decision.³⁴⁰

Had it not been for *Costa*, Judge Magnuson began, "the Court would have followed the *McDonnell Douglas* burden-shifting paradigm" because he found "no direct evidence of discriminatory motive" and thus found that this was indeed *not* a mixed-motive case.³⁴¹ Yet, Judge Magnuson found that the case must be analyzed as a section 703(m) case and denied summary judgment, damning the *Costa* footnote and moving full steam ahead, taking Justice Thomas's statutory interpretation to the logical conclusion it should have reached:

In this case, Dare apparently pleads a single motive case. She

338. *Id.* at *1.

339. *Id.* at *2. Judge Magnuson elaborated on his rationale by expressing the significance he saw that *Costa* portended:

Questions of fact remain on Dare's prima facie case of discrimination with respect to the lab technician position and with respect to the other positions at the Elk River store. On April 21, 2003, the Supreme Court heard oral argument on whether a plaintiff must present direct evidence of discrimination in order to make a "mixed-motive" claim of discrimination. The outcome of the *Costa* case has broad implications for lower courts analyzing discrimination claims and could effect the allocation of burdens in such claims. Therefore, the Court stays the Motion pending the Supreme Court's ruling on the issue.

Id.

340. *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987 (D. Minn. 2003).

341. *Id.* at 990.

contends that Wal-Mart refused to hire her because of her race. Although the Supreme Court did not address these types of claims, based on the statutory analysis in *Desert Palace*, this Court finds that the holding in *Desert Palace* applies to Dare's claims. "[T]he words of the statute are unambiguous" and nothing in the plain meaning of § 2000e-2(m) and § 2000e-5(g)(2)(B) expressly restricts the Civil Rights Act of 1991 to mixed-motive cases. Instead, the Civil Rights Act of 1991 states that "an unlawful employment practice is established when the complaining party 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." While the final phrase may imply multiple motives, nothing in the statute's language restricts its applicability to single-motive cases. Rather, the plain language of the statute allows a plaintiff to prevail if he or she can prove by a preponderance of the evidence that a single, illegitimate motive was a motivating factor in an employment decision, without having to allege that other factors also motivated the decision. The Court finds that in enacting the Civil Rights Act of 1991, Congress sought to penalize employers for considering the race, color, religion, sex, or national origin of its employees when making employment decisions, whether the employees' membership in one or more of these protected classes was the single motive for the employment decision or was only one of multiple motives for the employment decision. Therefore, because the Civil Rights Act of 1991 unambiguously prohibits any degree of consideration of a plaintiff's race, gender or other enumerated classification in making an employment decision, it must also extend to single-motive claims.³⁴²

Judge Magnuson recognized that even *McDonnell Douglas* paradigm cases involve mixed motives: "evaluating single-motive claims under the *McDonnell Douglas* burden-shifting scheme inevitably and paradoxically leads to a classic mixed-motive scenario," because "[i]n a single-motive case, the dichotomy is complete: either the plaintiff is correct in alleging that an illegitimate factor alone motivated the defendant, or the defendant's legitimate nondiscriminatory reason was the only reason for the decision."³⁴³ "The dichotomy produced by the *McDonnell Douglas* framework is a false one," Judge Magnuson pronounced, "incomplete, illogical, and prohibited by the Civil Rights Act of 1991," and there is no "efficacy in perpetuating this legal fiction implicitly exposed by the Supreme Court's ruling in *Desert Palace*. When possible, this Court seeks

342. *Id.* at 990-91.

343. *Id.* at 991.

to avoid those machinations of jurisprudence that do not comport with common sense and basic understandings of human interaction.”³⁴⁴

Lois Dare’s Title VII case against Wal-Mart—which even a year ago would not likely have survived summary judgment under *McDonnell Douglas*—will now go to trial. She becomes the first known beneficiary of *Costa*’s construction of section 703(m) of the Civil Rights Act of 1991, which, while slumbering for some time,³⁴⁵ has been at last brought to life³⁴⁶ through the words of the Supreme Court’s most conservative and criticized current member.

344. *Id.* at 991-92. In a conclusion expanding upon his thoughts and resembling some of the points made in this Essay, Judge Magnuson delivered a judicial eulogy for *McDonnell Douglas*:

Even putting the concerns of reality aside, however, a plaintiff’s unsuccessful challenge to the defendant’s non-discriminatory rationale should not automatically allow the defendant to escape liability. Instead, it should merely subject the defendant to the mixed-motive analysis dictated by the Civil Rights Act of 1991. The pretext phase of the *McDonnell Douglas* scheme sets one allegedly illegitimate rationale against a second, allegedly legitimate reason for the employment action. However, a defendant could have illegitimately considered a plaintiff’s race, gender, or other enumerated classification in making its employment decision and, at the same time, legitimately considered other factors, one of which it proffered to the court in satisfaction of its productive burden. Similarly, a plaintiff can fail to prove that the defendant’s proffered reason is false without automatically or necessarily failing to prove that another motivating factor was illegitimate. In other words, *when a defendant prevails under the McDonnell Douglas scheme, the court is left with a classic mixed-motive scenario*, in which both alleged motives could have factored into the defendant’s ultimate employment decision. This is clearly impermissible under the Civil Rights Act of 1991, which holds an employer liable for considering a discriminatory motive, even when other, legitimate and sufficient motives were also considered.

Id. at 992 (emphasis added). See Judge Magnuson’s further opinions on applicability of *Costa* to what used to be called “single-motive” cases in *Jackson v. Catholic Charities*, No. Civ. 02-1222PARMLE, 2003 WL 22533330, at *2 n.1 (D. Minn. Nov. 3, 2003) (“[T]he only logical reading of *Desert Palace* is that its holding applies to both mixed-motive and single-motive cases, and the burden-shifting of *McDonnell Douglas* is no longer good law.”).

345. See, e.g., *Questions Are Raised About 1991 Civil Rights Act*, N.Y. TIMES, July 27, 2003, § 4, at 2 (summarizing study published in Cato Institute’s *Regulation* by Stanford economics and Northwestern management policy professors who concluded that the Civil Rights Act “was basically ineffective” and “did not improve hiring ‘in fields with traditionally low representation of women and minorities’”).

346. For an example of other courts to date that have embraced Judge Magnuson’s view of *Costa* and *McDonnell Douglas*, see *Griffith v. City of Des Moines*, No. 4:01-CV-10537, 2003 WL 21976027 (S.D. Iowa July 3, 2003).

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We have seen the future of Title VII. And the future is now.