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Article

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† Professor of Law, Associate Dean for Research and Faculty Affairs, Ira C. Batman Faculty Fellow, Indiana University Maurer School of Law. The genesis of this Article was an invitation from the Hon. Judge John Tinder of the Seventh Circuit, to present a keynote lecture at the Seventh Circuit Judicial Conference on simpler proof structures that could be used in employment discrimination litigation. In preparing that lecture, I benefited enormously from conversations with Judge Tinder and with his colleague, the Hon. Judge David Hamilton. I am also grateful for conversations about the ideas that became this Article and for detailed and insightful suggestions on earlier drafts from Rachel Arnow-Richman, Jessica Clarke, Katie Eyer, Tristin Green, Judge David Hamilton, Pauline Kim, Orly Lobel, Jamie Macleod, D'Andra Millsap Shu, Austen Parrish, Leticia Saucedo, Sandra Sperino, Charles Sullivan, and Michelle Travis, as well as participants in the 2020 Colloquium on Scholarship in Labor and Employment Law. I received excellent research assistance from Maurer students Corttany Brooks and Jordan Lee. My thanks as well to the editors of the *Minnesota Law Review*, particularly Samantha Marquardt and Keenan Roarty, for their extremely conscientious work finalizing this Article for publication.

INTRODUCTION

In the landmark Civil Rights Act of 1964, Congress made the "simple but momentous"[1] declaration that it is illegal to deny employment opportunities to individuals because of their race, color, religion, sex, or national origin.[2] Congress has likewise prohibited discrimination based on age, disability, and other factors,[3] and it has made clear that individuals who complain about unequal treatment should be protected from retaliation.[4] However, academic studies,[5] case filings,[6] and the groundswell of support for advocacy movements

1. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

2. *See* 42 U.S.C. § 2000e-2.

3. *See* 29 U.S.C. § 623 (prohibiting discrimination based on age); 42 U.S.C. § 12112 (prohibiting discrimination based on disability); *see also* 42 U.S.C. § 2000ff-1 (prohibiting discrimination based on genetic information); 38 U.S.C. § 4311 (prohibiting discrimination based on military service).

4. *See, e.g.*, 42 U.S.C. § 2000e-3(a).

5. *See, e.g.*, Derek R. Avery & Enrica N. Ruggs, *Confronting the Uncomfortable Reality of Workplace Discrimination*, MASS. INST. TECH. SLOAN MGMT. REV. (July 14, 2020), https://sloanreview.mit.edu/article/confronting-the-uncomfortable-reality-of-workplace-discrimination [https://perma.cc/ZU2B-6KTZ] (gathering research showing widespread racial discrimination in hiring, pay, and downsizing policies); Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018), https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment [https://perma.cc/AG86-UGCH] (reporting 38% of women have experienced sexual harassment at work); Elaine H. Ecklund, Denis Daniels, Daniel Bolger & Laura Johnson, *A Nationally Representative Survey of Faith and Work: Demographic Subgroup Differences Around Calling and Conflict*, RELIGIONS (2020) (reporting 29% of workers, including 54% of Jews and 62% of Muslims, report experiencing religious discrimination at work); Joe Kita, *Workplace Age Discrimination Still Flourishes in America*, AARP (Dec. 30, 2019), https://www.aarp.org/work/working-at-50-plus/info-2019/age-discrimination-in-america.html [https://perma.cc/WDP8-AHM7] (reporting 76% of workers over 45 years old perceive age discrimination as a hurdle to finding a new job).

6. *See* U.S. Courts, Table C-2-U.S. District Courts-Civil Federal Judicial Caseload Statistics (Mar. 31, 2020) available at https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2020/03/31 (reporting over 15,000 employment discrimination cases filed in 2019, accounting for more than 10% of all

such as Black Lives Matter and #MeToo make clear that workplace discrimination and harassment remain distressingly common. As a lived experience, individuals often face discrimination on the basis of multiple facets of identity, frequently compounding disadvantage for the most vulnerable.[7]

But when employees who have been treated unfairly at work turn to the legal system for relief, courts rarely assess whether their claims meet the statutory standard. Instead, they typically funnel the evidence through a convoluted body of judge-made law known as *McDonnell Douglas*[8] burden-shifting.[9] Earlier commentators have observed that the *McDonnell Douglas* test lacks a basis in the operative language of the statutes.[10] This Article shows the disconnect is more fundamental, and more harmful, than previously recognized. *McDonnell Douglas* is not only unanchored to the statutory language; it is deeply in tension with it. *McDonnell Douglas* effectively holds plaintiffs to a heightened causation standard—sole causation—that Congress unequivocally rejected.[11] Other aspects of the test also function as judicially-created hurdles that may be irrelevant to the ultimate question a jury would decide.

This has long been a problem in employment discrimination doctrine, but several recent Supreme Court cases analyzing the causal language in employment discrimination statutes make the discrepancies more evident. These cases clarify that the statutory language requires, at most, that an employee prove that a protected trait or activity made a difference in an employer's action.[12] Under this standard, known as but-for causation, it is irrelevant whether other factors also play a role. The Court's decision in the landmark case of *Bostock v. Clayton County* is particularly salient.[13] In holding that

federal question non-prisoner cases).

7. *See, e.g.*, Ayden I. Scheim & Greta R. Bauer, *The Intersectional Discrimination Index: Development and Validation of Measures of Self-Reported Enacted and Anticipated Discrimination for Intercategorical Analysis*, 226 SOC. SCI. & MED. 225 (2019) (quantitatively measuring compound effects of multiple identities, including race, age, gender identity, sexuality, and education).

8. McDonnell Douglas v. Green, 411 U.S. 792 (1973).

9. *See infra* Part II.

10. *See, e.g.*, Sandra F. Sperino, *Flying Without a Statutory Basis: Why* McDonnell Douglas *Is Not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743 (2006).

11. *See infra* Part I.B.

12. Liability under Title VII may also be established by proving a protected trait was a "motivating factor" in the decision. *See infra* Parts I.C, I.D.

13. 140 S. Ct. 1731 (2020).

discrimination on the basis of sexual orientation and gender identity is also discrimination on the basis of sex, the Court affirmed that but-for causation can be a "sweeping standard" and that there can be, and often are, several distinct but-for causes of an action.[14]

McDonnell Douglas, by contrast, rests on the false assumption that in cases based on circumstantial evidence, there will only be a *single* cause of a challenged action: either discriminatory bias *or* a legitimate justification.[15] An employee trying to prove discrimination is expected to show that an employer's claimed rationale for the action is "pretextual."[16] The difference between these standards is considerable. Under but-for causation, an employee alleging pregnancy discrimination simply needs to prove that if she had not been pregnant, she would not have been fired. If she can meet this standard, it is not supposed to matter whether legitimate factors also contributed to the decision. In practice, however, courts will typically assess the claim under *McDonnell Douglas*, and the employee will often lose if she cannot prove that the employer's claimed rationale was false.

The first step of *McDonnell Douglas* burden-shifting is similarly flawed. Plaintiffs are required to establish what is known as the prima facie case, which is commonly phrased as requiring that the plaintiff be a member of a "protected class," "qualified," that she suffered an "adverse action," and that a "similarly-situated employee outside her protected class" was treated differently, or, in some circuits, simply that there are "circumstances giving rise to an inference of discrimination."[17] Although countless judicial decisions and reams of academic commentary dissect the meaning of these elements, their connection to the statutory language is tenuous at best.[18] Moreover, the *McDonnell Douglas* test functionally discounts the significance of statements of discriminatory bias by relevant decision makers.[19]

It is easy to get lost in the technical details of the *McDonnell Douglas* burden-shifting regime—there is a reason the various tests it has spawned have been described as a "rat's nest"[20]—but the practical

14. *Id.* at 1739–40. This clarification is important because imprecise language in some earlier employment discrimination decisions had fueled the misconception that but-for cause is functionally akin to sole cause. *See infra* Parts I.D.1, III.A.

15. *See infra* Part III.A.

16. *See infra* Part II.C.

17. *See infra* Part II.B.

18. *See infra* Part II.B.

19. *See infra* Part II.D.

20. *See* Ortiz v. Werner Enters., Inc., 834 F.3d 760, 766 (7th Cir. 2016).

effects are very real. Workplace discrimination remains acutely apparent, but plaintiffs lose on summary judgment in employment cases at a higher rate than typical in other civil litigation.[21] Often this is because they cannot satisfy the *McDonnell Douglas* test, even when there is ample evidence suggesting unlawful discrimination.[22]

In the wake of the Supreme Court's causation decisions, there has been a flourishing of academic scholarship exploring the promises and limits of but-for causation.[23] And lower court judges[24] as well as academic commentators[25] have long argued *McDonnell Douglas* is confusing, unnecessary, and inefficient. But the existing literature does not engage substantively with the tensions between these two bodies of doctrine.[26] This Article builds on earlier critiques to make important contributions to both doctrine and theory.

21. *See, e.g.*, Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts,* J. EMP. LEGAL STUD. 861, 887 (2007). My research did not identify a comparably rigorous empirical study based on more recent data, but it is fair to say that summary judgment remains extremely prevalent in employment discrimination cases. *Cf.* Nancy Gertner, *Losers' Rules*, 122 YALE L.J. FORUM 109 (2012) (article written by a longstanding federal judge suggesting these statistics conformed with her experience in seventeen years on the federal bench and identifying "losers' rules" that help explain the skew).

22. *See* Katie Eyer, *The Return of the Technical* McDonnell Douglas *Paradigm*, 94 WASH. L. REV. 967, 977 n.55 (2019) (reporting that 88% of all appellate decisions invoking *McDonnell Douglas* over a three-month period resulted in a total loss for plaintiffs).

23. *See, e.g.*, Hillel J. Bavli, *Counterfactual Causation*, 51 ARIZ. ST. L.J. 879 (2019); Jessica Clarke, Formal Causation (Feb. 13, 2021) (unpublished paper) (on file with author); Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. (forthcoming 2021), https://papers.ssrn.com/abstract=3801699 [https://perma.cc/R5XH-68N8]; James A. MacLeod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957 (2019); Andrew Verstein, *The Failure of Mixed-Motive Jurisprudence*, 86 U. CHI. L. REV. 725 (2019) [hereinafter Verstein, *Failure*]; Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106 (2018) [hereinafter Verstein, *Jurisprudence*].

24. *See infra* Part III.C.

25. *See, e.g.*, SANDRA F. SPERINO, *MCDONNELL DOUGLAS*: THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW (2020) (providing meticulous explanation of the doctrine and highlighting areas of inconsistency and confusion); *id.* at 321–22 (collecting critiques); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703 (1995); Eyer, *supra* note 22; Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229 (1995) (arguing that the *McDonnell Douglas* proof structure ought to be abandoned).

26. As this Article was being finalized for publication, I located a relatively short essay that identifies the same disconnect and likewise contends *McDonnell Douglas* should be abandoned or substantially revised. *See* Noelle N. Wyman, *Because of* Bostock, 119 MICH. L. REV. ONLINE 61 (2021).

First, it lays bare the fundamental disconnect between the statutes' causal language—as explained in *Bostock* and other Supreme Court decisions—and *McDonnell Douglas* burden-shifting. As Justice Gorsuch's majority opinion in *Bostock* emphasized, "You can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law."[27] Where there is a discrepancy between statutory language and a judge-made standard ostensibly aiding in the implementation of that statute, it is clear Congress's directive should control.

Second, the Article provides a straightforward and practical solution: When ruling on a motion for summary judgment, courts should assess the evidence based on the operative language in the statute. Existing Supreme Court precedent offers lower courts sufficient discretion to employ this approach. The Seventh Circuit has taken an important step in this direction by authorizing the use of a text-based standard.[28] However, because the circuit did not simultaneously disclaim *McDonnell Douglas*, courts are currently operating under a confusing hybrid. The D.C. Circuit has likewise indicated that the prima facie case is usually unnecessary, but other circuits have declined to follow this approach.[29] These examples suggest both the possibilities and limitations of what I call "middle-down" reform. Circuit courts can modify their own practice and instruct district courts to do so, but they are themselves unsure how much flexibility the doctrine affords.

To effectively address this problem, the Supreme Court will need to give explicit directions to lower courts. The Court should either substantially modify the burden-shifting process to comply with the statutory language, or it should recognize the inherent tension and simply instruct lower courts to no longer employ the burden-shifting process.[30] It should also clearly and completely reject the putative distinction between so-called "single-motive" cases and so-called "mixed-motive" cases and the erroneous, but oft-stated, assumption that "mixed-motive" claims are not cognizable under a but-for causal standard.

Finally, this Article contributes to a nascent but growing literature that highlights the progressive possibilities of textualism.[31]

27. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1745 (2020).

28. *See infra* text accompanying notes 340–350.

29. *See infra* text accompanying notes 215–219.

30. *See infra* Part III.D.

31. *See, e.g.*, Katie Eyer, *Symposium: Progressive Textualism and LGBTQ Rights*,

Textualism has long been associated with right-leaning judges; however, there is nothing inherently conservative about prioritizing fidelity to statutory language. *Bostock* stands as a prime example of this principle, but it is not an anomaly; there are other prominent employment discrimination cases in which conservative Justices, employing textualist tools, have interpreted statutes in ways that are protective of employees.[32] While academic and popular commentators often describe such decisions as surprising,[33] they should not be. A fair reading of a progressive statute will often—and should often—advance progressive objectives.

This Article proceeds as follows. Part I discusses the relevant statutory language and the key Supreme Court decisions interpreting the causation standard in that statutory language. Part II explains *McDonnell Douglas* and its progeny, highlighting disconnects between the burden-shifting test and the statutes. Part III provides historical context to expose the false dichotomies that underlie *McDonnell Douglas*, and it discusses reforms that have been implemented by some circuits to address these issues. It argues the Court should either substantially clarify *McDonnell Douglas* burden-shifting to address these tensions, or simply instruct lower courts to no longer employ the doctrine. Part IV shows how a simpler standard based on the statute's operative language would better assess discriminatory treatment and more fully realize Congress's promise of equality.

SCOTUSBLOG (June 16, 2020), https://www.scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq-rights [https://perma.cc/RQQ2-8MKF]; Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 85 (2019); Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020); Kathryn E. Kovacs, *Progressive Textualism in Administrative Law*, 118 MICH. L. REV. ONLINE 134 (2019).

32. *See, e.g.*, Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) (majority opinion by Justice Breyer on behalf of eight Justices and concurrence by Justice Alito concluding non-employment related actions can constitute unlawful retaliation); Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003) (unanimous opinion by Justice Thomas concluding "motivating factor" claims can be based on circumstantial as well as direct evidence); Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75 (1998) (unanimous opinion by Justice Scalia concluding same-sex sexual harassment actionable). To be sure, there are also textualist decisions that are somewhat less plaintiff friendly, such as the causation decisions discussed *infra* Part I.C. However, the relevant language—"because of"—was ambiguous in those cases. Moreover, but-for cause, properly interpreted, is a relatively capacious standard. *See infra* Part I.D.1.

33. *See, e.g.*, Robert Barnes, *Neil Gorsuch? The Surprise Behind the Supreme Court's Surprising LGBTQ Decision*, WASH. POST (June 16, 2020), https://www.washingtonpost.com/politics/courts_law/neil-gorsuch-gay-transgender-rights-supreme-court/2020/06/16/112f903c-afe3-11ea-8f56-63f38c990077_story.html [https://perma.cc/MZD7-JTGX].

I. CAUSATION

Employment discrimination laws prohibit employers from taking adverse actions against employees because of their race, sex, or other protected traits.[34] Generally, the key factual dispute in a case will be whether a plaintiff can prove this causal connection. But before a judge or jury can answer that factual question, there is a separate *legal* question of how close the nexus needs to be. The causal standard is particularly likely to be contested when the evidence suggests the relevant action was based on a combination of lawful and unlawful considerations.

For example, imagine a pregnant employee is fired shortly after she makes a significant mistake at work. Her boss claims he was simply responding to poor performance, but the evidence also suggests he was unhappy about her pregnancy and may not have believed she would come back from maternity leave. If the employee wants to challenge the termination as illegal sex discrimination, does she need to prove that the mistake was entirely irrelevant, and she was fired solely because of her pregnancy? That the mistake may have played a role in the decision to fire her, but if she hadn't been pregnant, she wouldn't have been fired? That the mistake may have been a primary cause, but her pregnancy was also at least a substantial factor? Or simply that the pregnancy played some role in the decision?

This range of potential causal standards—sole cause, but-for cause, substantial factor, or contributing factor—arises in constitutional, statutory, and common law claims ranging from tax law to torts.[35] When faced with the question in a statutory claim, courts are of course bound by the operative language in the law. This Part introduces the relevant statutory standards that apply in employment discrimination statutes and then judicial interpretations of that language.

A. STATUTORY STANDARD

The scope of unlawful discrimination is—or, more accurately, *should* be—defined by statutory law. At common law, employers enjoy

34. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination based on race, color, religion, sex, and national origin).

35. *See* Macleod, *supra* note 23, at 974–77 (identifying these four distinct causal standards as arising in tort and criminal law, as well as antidiscrimination statutes); *see also* Verstein, *Jurisprudence*, *supra* note 23, at 1134–43 (articulating and graphically illustrating a range of standards expressed in law as including sole, but-for, primary, and any motive).

wide discretion to make personnel decisions. Under the "at will" rule, an employee can generally be fired or refused employment for any reason or no reason, as long as it is not for a reason that has been specifically prohibited.[36] Title VII of the Civil Rights Act of 1964, and subsequent civil rights statutes, change this baseline by mandating that certain personal traits may not be used by employers to deny employment opportunities.

Most individuals bringing a case under Title VII allege a violation of section 703(a)(1) of the statute, which provides:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin.[37]

The statutory language thus requires a plaintiff to prove that an employer engaged in a requisite adverse action (i.e., "refusal to hire," "discharge," or other discrimination in the "compensation, terms, conditions, or privileges of employment") "because of" an individual's protected trait (e.g., race, color, religion, etc.). Section 703(a)(2) proscribes additional unlawful actions that deprive or would tend to deprive an individual of opportunities "because of" a protected trait.[38] A separate section of the statute, section 704(a), prohibits employers from discriminating against an employee "because" he filed a charge alleging discrimination, participated in an investigation or hearing, or opposed unlawful practices under the law.[39] These claims are generally known as retaliation claims.

Title VII was the model for many other federal employment discrimination statutes. For example, the Age Discrimination in Employment Act (ADEA) prohibits discrimination by private employers "because of" age,[40] and the Americans with Disabilities Act prohibits discrimination "on the basis of disability" (while also

36. *See, e.g.*, Rachel Arnow Richman, *Just Notice: Re-Reforming Employment At-Will*, 58 UCLA L. REV. 1, 4 (2010). There are a few common law exceptions to the rule, such as terminations in violation of public policy. *Id.* at 10.

37. 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

38. 42 U.S.C. § 2000e-2(a)(2) (providing that employers cannot "limit, segregate, or classify [their] employees" in a way that deprives or would tend to deprive an individual of opportunities or otherwise adversely affect an employee because of protected traits). For a persuasive argument that this clause prohibits a much broader range of employer actions than is typically assumed, see Sandra F. Sperino, *Justice Kennedy's Big New Idea*, 96 B.U. L. REV. 1789 (2016).

39. 42 U.S.C. § 2000e-3(a).

40. 29 U.S.C. § 623(a).

providing a more extensive definition of what constitutes discrimination).[41] Many state employment discrimination statutes include similar language,[42] as do state and federal statutes addressing discrimination in other contexts, such as housing and education.[43]

The statutory language—"because of"—does not clearly resolve what causal standard applies when there are multiple motivations for a given action. In ordinary speech, those words can encompass, at least, "but-for" causation and a "substantial" or "contributing factor" standard.[44] As in any instance where statutory language is ambiguous, courts interpret the relevant language as necessary to decide specific cases, using a range of tools of statutory interpretation. Once the Supreme Court issues a definitive interpretation, that interpretation binds lower courts. However, Congress has ultimate authority in that it may amend the statute to supersede a judicial interpretation with which it disagrees.[45] This interplay has been significant in the development of causation standards under antidiscrimination laws.

B. (NOT) SOLE CAUSATION

The next Section discusses a several decades-long, and still ongoing, dialogue between the Supreme Court and Congress as to whether Title VII and other anti-discrimination statutes adopt a but-for standard or a motivating factor standard. It is abundantly clear, however, that these statutes do not adopt a sole-cause standard.

The Supreme Court has consistently held that Title VII does not require a plaintiff to prove a protected trait was the only cause of an adverse employment action. It first disavowed a sole-causation standard almost fifty years ago,[46] and it reaffirmed this conclusion in

41. 42 U.S.C. § 12112(a).

42. *See generally* Kevin J. Koai, Note, *Judicial Federalism and Causation in State Employment Discrimination Statutes*, 119 COLUM. L. REV. 763 (2019) (discussing state employment laws with language similar to Title VII).

43. *See, e.g.*, 42 U.S.C. § 3604 (prohibiting discrimination in housing); 20 U.S.C. § 1681 (prohibiting discrimination on the basis of sex in federally funded education programs).

44. *See, e.g.*, Macleod, *supra* note 23, at 998–1002.

45. *See generally* Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859 (2012) (describing the role of overrides in causation cases).

46. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.10 (1976) (holding that a plaintiff is not required to "show that he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies").

Bostock.[47] The Court's interpretation reflects the ordinary meaning of the relevant language; research shows that most people do not interpret the phrase "because of" to mean a sole causation standard.[48] The Court has also bolstered this interpretation by referencing Congress's explicit rejection of a proposed amendment that would have added "solely" before the words "because of,"[49] and distinguishing Title VII's language from other statutes that *do* explicitly adopt a sole-causation standard.[50]

Congress's debate regarding the proposed amendment highlights the problems with a sole cause standard. Notably, the amendment was authored by Senator John McClellan, a Southerner who was a leading opponent of the Civil Rights Act generally.[51] Senator Clifford Case, a floor manager spearheading support for the bill, argued vehemently against the change:

> [T]his amendment . . . would render title VII totally nugatory. If anyone has ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of . . . . [T]his amendment would place on persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless.[52]

After further substantive debate on the merits of the proposal, the amendment was defeated on the floor of the Senate; a comparable amendment in the House was also defeated.[53]

47. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1744 (2020) (asserting that the plaintiff's "sex need not be the sole or primary cause of the employer's adverse action"); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (plurality) ("[W]e know the words 'because of' do not mean '*solely* because of' . . . ."); *see also id.* at 284 (Kennedy, J., dissenting) ("No one contends, however, that sex must be the sole cause of a decision before there is a Title VII violation.").

48. Macleod, *supra* note 23, at 998–1002.

49. *Price Waterhouse*, 490 U.S. at 241 n.7 (plurality) (citing the failed amendment).

50. *See Bostock*, 140 S. Ct. at 1739 (contrasting Title VII's language with 11 U.S.C. § 525, which prohibits employment discrimination against an individual "solely because" the individual has been a debtor in bankruptcy law, and 16 U.S.C. § 511, which prohibits cancelation of homestead entries "solely because" of the erroneous allowance of such entries).

51. *See, e.g.*, *M'Clellan, Attacking Rights Bill, Quotes Johnson Speech of '49*, N.Y. TIMES (Apr. 15, 1964), https://www.nytimes.com/1964/04/15/mclellan-attacking-rights-bill-quotes-johnson-speech-of-49.html [https://perma.cc/V3UK-487D] (describing Senator McClellan's opposition).

52. 110 CONG. REC. 13,837–38 (1964).

53. *Id.* at 2728, 13,838. For a more detailed discussion of this legislative history, see Mark S. Brodin, *The Standard in Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982).

Lower courts likewise consistently opine that antidiscrimination statutes that use the same or similar causal language to Title VII—that is, that prohibit adverse actions "because of" or "on the basis of" protected traits or activities—also do not require a plaintiff to prove sole causation.[54] To be sure, there are a few antidiscrimination statutes that explicitly adopt a sole cause standard,[55] but the inclusion of the word in some statutes generally strengthens the argument that the requirement should not be read into statutes that lack the language.

In other words, to satisfy the relevant statutory standards in virtually all employment discrimination cases, a plaintiff should not need to show that a protected trait or protected activity is the *only* cause of a challenged decision. This statement, however, comes with two major caveats. First, as developed in Parts II and III, common articulations of the *McDonnell Douglas* burden-shifting process functionally adopt a sole causation standard. Second, and relatedly, courts often suggest (incorrectly) there can be only *one* but-for cause of a decision.[56]

Thus, in practice, plaintiffs are being held to a standard that both Congress and the Court have unequivocally and repeatedly rejected. It is precisely this tension with the statutory language that highlights the need for the Court to clarify, or simply overrule, *McDonnell Douglas* and to reaffirm the important differences between but-for cause and sole cause.

C. MOTIVATING FACTOR OR BUT-FOR CAUSATION?

The harder question, as a matter of statutory interpretation, has been whether a plaintiff alleging employment discrimination must prove simply that a protected trait or activity was a factor in the

54. *See, e.g.*, Lewis v. Humboldt Acquisition Corp., Inc., 681 F.3d 312, 315–16 (6th Cir. 2012) (holding that the ADA does not require a plaintiff to prove sole causation); Jones v. Oklahoma City Pub. Schs., 617 F.3d 1273, 1278 (10th Cir. 2010) (holding that the ADEA does not require a plaintiff to prove sole causation); Papelino v. Albany College of Pharmacy of Union Univ., 633 F.3d 81, 92 (2d Cir. 2011) (holding that Title IX does not require a plaintiff to prove sole causation).

55. The prime example is the Rehabilitation Act, a predecessor to the Americans with Disabilities Act. *See* 29 U.S.C. § 794(a) (prohibiting discrimination "solely by reason . . . of a disability"). Even here, it is not clear whether this standard is still applicable to employment discrimination claims under the Rehabilitation Act, as a separate provision of the Rehabilitation Act incorporates the ADA's causation standard. *See* Natofsky v. City of New York, 921 F.3d 337 (2d Cir. 2019) (discussing this issue).

56. *See infra* Parts I.D.1, III.B.

challenged action, or whether a plaintiff must prove that if the employer had not considered the protected trait or activity, the outcome would have been different (i.e., but-for causation).

The Court's first extended discussion of this question came in the 1989 case *Price Waterhouse v. Hopkins*.[57] The case was brought by Ann Hopkins, who challenged Price Waterhouse's refusal to make her a partner.[58] The evidence considered by the trial court established that Hopkins did very good work, but that she was often abrasive in her personal interactions.[59] Several partners also made clear they deemed her to be insufficiently feminine.[60] Accordingly, the trial court concluded that, as a factual matter, she was denied partnership in part based on legitimate, non-discriminatory concerns about her interpersonal skills, and in part based on her failure to conform to sex-based stereotypes about the proper behavior of women.[61]

The Supreme Court granted certiorari to resolve a circuit split regarding the legal standard that applied when the evidence established multiple reasons for an employer's action, some of which were permissible and some of which were not.[62] *Price Waterhouse* failed to fully resolve this confusion, as no single opinion garnered five votes. A plurality opinion, authored by Justice Brennan on behalf of four Justices, interpreted "because of" to mean that showing that gender was a factor in a decision was enough to create liability under the statute, unless the employer could prove—as an affirmative defense—that it would have made the "same decision even if it had not allowed gender [or another protected trait] to play . . . a role."[63] Concurrences by Justice White and Justice O'Connor suggested a plaintiff would need to prove the protected trait was a "substantial" factor, and Justice O'Connor interpreted the statute to require a plaintiff to provide "direct evidence" that a protected trait played a role in the decision before shifting the burden to the defendant to

57. 490 U.S. 228 (1989).

58. *Id.* at 231–32.

59. *Id.* at 234–35.

60. *Id.* at 235–36.

61. *Id.* at 236–37.

62. *See* Hopkins v. Price Waterhouse, 825 F.2d 458, 470–71 (D.C. Cir. 1987) (discussing circuit split).

63. *Id.* at 244–45. The plurality also stated that "because of" did not mean but-for causation, but later suggested that it understood that the defense was substantively equivalent to but-for causation, albeit with the burden on the defendant to prove its absence. *Id.* at 240, 249.

justify its actions.[64] Justice Kennedy, writing for three Justices in dissent, did not believe that it was appropriate to shift the burden to the defendant at any point.[65] Rather, under the interpretation he proposed, a plaintiff would bear the burden of proving that but-for the employer's consideration of a protected trait, the outcome would have been different.[66]

In the 1991 Civil Rights Act, Congress responded to *Price Waterhouse*, partially codifying and partially overriding the standard announced by the plurality opinion. The Act added a new subsection that explicitly stated that liability could be established if a plaintiff demonstrated a protected trait was a "motivating factor" in a relevant adverse action.[67] It also provided that if liability was established under this subsection, a defendant could limit remedies to injunctive and declaratory relief, plus attorney's fees, by proving it would have made the same decision without considering the prohibited factor.[68] Prior to the 1991 Act, many lower courts had interpreted Title VII's original language to authorize a comparable limitation on remedies.[69] This is not surprising, as it merely makes explicit the result that basic remedial principles would often yield. That is, it recognizes that it is improper to allow discriminatory bias to infect an employment decision, but it avoids putting the plaintiff in a better position than she would have been absent the discrimination.

As I have discussed in detail elsewhere, Congressional overrides, such as this one, can give rise to difficult questions of statutory interpretation.[70] Both federal and state courts have grappled with how Congress's response to *Price Waterhouse* should affect the interpretation of other statutes modeled on Title VII.[71]

The Supreme Court first addressed the question in *Gross v. FBL Financial Services*, which concerned the standard of causation under the ADEA.[72] In *Gross,* the majority opinion interpreted the ADEA's prohibition on adverse actions "because of" age to require a plaintiff to prove age was "the" but-for cause of the employer's action.[73] It

64. *Id.* at 259 (White, J., concurring); *id.* at 275 (O'Connor, J., concurring).
65. *Id.* at 284 (Kennedy, J., dissenting).
66. *Id.*
67. 42 U.S.C. § 2000e-2(m).
68. 42 U.S.C. § 2000e-5(g)(2)(B).
69. *See* Widiss, *supra* note 45, at 903 (collecting cases).
70. *See* Widiss, *supra* note 45, at 866–80.
71. *See* Widiss, *supra* note 45, at 884–88.
72. 557 U.S. 167 (2009).
73. *Id.* at 177. The Court's use of a definite article—"the"—rather than an

based this interpretation on dictionary definitions of "because" and judicial interpretations in other contexts,[74] while holding *Price Waterhouse* and Congress's response in the 1991 Act inapplicable on the ground that Congress did not make comparable changes to the language to the ADEA.[75] A few years later, the Court reasoned that the retaliation provisions of Title VII likewise require a showing of but-for causation,[76] and, just this past year, that section 1981 does as well.[77] By contrast, the Court held that the federal sector provisions of the ADEA—which require personnel decisions be made "free from" any consideration of age—simply require a plaintiff to prove that age played a "part" in the decision, but a plaintiff can only recover full remedies if she proves age was a but-for cause of the differential treatment.[78]

Lower courts have followed the Court's reasoning in *Gross* when interpreting other statutes, like the ADA, that prohibit discrimination "because of" or "on the basis of" traits or actions.[79] In short, based on this series of cases, it is increasingly clear that most—but not all[80]—federal employment discrimination statutes other than Title VII will be interpreted to require a plaintiff to prove but-for causation. The causal standard under state anti-discrimination statutes is likely to be more mixed because state courts can choose to interpret state statutes differently from their federal analogs.[81]

In previous work, I have been critical of the Supreme Court's reasoning in *Gross* and the cases that followed *Gross*.[82] But while reasonable minds can disagree as to the proper inferences to draw

indefinite article—"a"—has contributed to lower courts' improper conflation of but-for cause and sole cause. *See infra* text accompanying notes 116–18.

74. *See* 557 U.S. at 177.

75. *Id.* at 174–75.

76. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013).

77. Comcast Corp. v. Nat'l Assoc. of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1017–18 (2020).

78. Babb v. Wilkie, 140 S. Ct. 1168, 1174 (2020).

79. *See, e.g.*, Murray v. Mayo Clinic, 934 F.3d 1101, 1107 (9th Cir. 2019) (holding that the ADA requires but-for causation); Gentry v. E. W. Partners Club Mgmt. Co., 816 F.3d 228, 235 (4th Cir. 2016) (holding that the ADA requires but-for causation).

80. Even after *Gross* and *Nassar*, at least some courts have deferred to regulations that apply a motivating factor standard to Family and Medical Leave Act retaliation claims. *See, e.g.*, Woods v. Start Treatment and Recovery Ctrs., Inc., 864 F.3d 158, 169 (2d Cir. 2017). There are also a few statutes that explicitly adopt a motivating factor standard. *See, e.g.*, 38 U.S.C. § 4311(c) (prohibiting adverse employment actions if an employee's military service was a "motivating factor" in the action).

81. *See generally* Koai, *supra* note 42 (surveying state court decisions on point).

82. *See* Widiss, *supra* note 45, at 926–41.

from Congress's response to *Price Waterhouse*, it is clear that throughout these cases, the Court is engaged in a process of statutory interpretation. That is, the Court is interpreting statutory language that is ambiguous, and it is using standard tools of statutory interpretation to do so.[83] This includes considering the ordinary meaning of the relevant words,[84] the verb tense of the operative language in which the phrase appears,[85] legislative history,[86] the way in which similar causation questions had been resolved under other statutes and in constitutional and common law,[87] relevant differences among otherwise similar statutes,[88] and statutory purpose[89] to resolve the question. As Part III shows, *McDonnell Douglas* is quite different, as it has virtually no statutory basis at all.

D. A DISTINCTION WITHOUT MUCH DIFFERENCE

During the decades-long fight over causation standards, many progressive advocates have vigorously argued that a "motivating factor" standard is essential to realize the transformative promise of antidiscrimination statutes.[90] In so doing, they have sometimes suggested that "but for" causation is extremely difficult to satisfy, or even that it is equivalent to a "sole cause" standard.[91] Courts sometimes make the same mistake.[92] Likewise, courts sometimes incorrectly suggest that the kind of evidence put forward in a case—direct or circumstantial—has relevance for determining the relevant causal standard. These premises are erroneous. In both theory and practice, but-for causation and motivating factor causation are quite

83. *See, e.g.*, CONG. RSCH. SERV., RL45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS (Apr. 5, 2018) (cataloging common tools of statutory interpretation).

84. *See, e.g.*, Babb v. Wilkie, 140 S. Ct. 1168, 1173–74 (2020); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009); Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989).

85. *See Price Waterhouse*, 490 U.S. at 240–41.

86. *See Gross*, 557 U.S. at 174–75; *Price Waterhouse*, 490 U.S. at 241 n.7, 243–45.

87. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 348–49 (2013); *Gross*, 557 U.S. at 176; *Price Waterhouse*, 490 U.S. at 258–60 (White, J., concurring); *Price Waterhouse*, 490 U.S. at 262–66 (O'Connor, J., concurring).

88. *See Babb,* 140 S. Ct. at 1175–76; *Nassar*, 570 U.S. at 35–52; *Gross*, 557 U.S. at 176–77.

89. *See Babb*, 140 S. Ct. at 1177; *Nassar*, 570 U.S. at 358–60; *Price Waterhouse*, 490 U.S. at 239; *Price Waterhouse*, 490 U.S. at 262–65 (O'Connor, J., concurring).

90. *See* Eyer, *supra* note 23 (collecting examples).

91. *See* Eyer, *supra* note 23, at 53.

92. *See infra* text accompanying notes 116–18.

similar, particularly since full remedies are only available if but-for cause is shown. In short, as Professor Charles Sullivan has aptly observed in a recent article, "one wonders what all the fuss is about."[93]

1. Multiple Factors

In *Bostock*, the employers claimed that their actions were based on the plaintiffs' sexual orientation or gender identity, rather than the plaintiffs' sex.[94] In addressing and rejecting this argument, the Court provided important clarification about the meaning and operation of but-for causation in employment discrimination doctrine generally. It explained that but-for causation simply requires a plaintiff to convince a fact finder that it is more likely than not that if the plaintiff's sex, race, or other relevant protected trait had been different, or she had not engaged in protected conduct, the challenged action would not have occurred.[95]

As the *Bostock* Court emphasized, but-for causation can "be a sweeping standard," and "[o]ften, events have multiple but-for causes."[96] It illustrated this point by describing a car accident that occurred "*both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection," and concluded that each factor could be a but-for cause.[97] Accordingly, under a but-for causation standard, a "defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged decision."[98] Moreover, the *Bostock* Court explained that the proscribed trait does not need to be the "primary cause" of the employer's adverse action; so long as the evidence shows that the trait made a difference, the standard is satisfied, "even if 'some other, nonprotected trait . . . was the more important factor' in the decision."[99]

This is not a new or novel interpretation of Title VII. To the contrary, the *Bostock* Court supported its discussion of but-for causation by referencing *Phillips v. Martin Marietta Corp.*, a 1971 decision that was one of the very first Title VII cases decided by the Supreme Court.[100] That case was brought by a woman named Ida

93. *See* Charles A. Sullivan, *Making Too Much of Too Little? Why "Motivating Factor" Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357, 359 (2019).

94. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

95. *Id.* at 1739.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1744.

100. *Id.* at 1743–44 (citing Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)

Phillips.[101] When she applied for a job, she was told the company would not hire women with young children; it did, however, routinely employ men with young children.[102] The company's refusal to hire Phillips was clearly based on *two* distinct factors: her sex, and the fact that she had young children.[103] If either factor had been different, the outcome would have been different. In other words, each was a but-for cause of the decision. The circuit court had held the policy was permissible,[104] but in a brief, per curium decision, the Court reversed,[105] giving rise to a doctrine that came to be known as "sex-plus."[106] So long as sex or another protected trait is *one* of the but-for causes of an adverse employment action, a violation can be established.[107]

Likewise, in *Price Waterhouse*, all of the Justices agreed that but-for causation—or, its corollary, the same decision defense—could be used to resolve a case in which the evidence had established multiple factors were at play.[108] This was also true in an earlier case, *McDonald v. Santa Fe Trail Transportation Co.*, where the evidence suggested an employee was discharged both because he had misappropriated cargo and because of his race.[109] In that case as well, the Court made clear that as long as race was *a* cause of the adverse action, liability could be established.[110] In fact, as developed further below, since *McDonnell Douglas* burden-shifting requires the employer to provide a justification for its actions, virtually *every* disparate treatment case

(per curiam)).

101. *Phillips*, 400 U.S. at 543.

102. *Id.* at 542.

103. *Id.*

104. Phillips v. Martin Marietta Corp., 411 F.2d 1, 4 (5th Cir. 1969), *vacated*, 400 U.S. 542 (1971).

105. *Phillips*, 400 U.S. at 544.

106. Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479–95 (1994).

107. *See, e.g.*, *id.* (discussing sex-plus doctrine). Prior to *Bostock*, these cases typically were not framed in reference to "but-for" cause, but the doctrine clearly establishes that where sex (or other protected trait) and some other factor are each a cause of a challenged act, liability can be established. *Cf.* Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1045–49 (10th Cir. 2020) (explaining how *Bostock*'s explication of but-for cause supports the conclusion that sex-plus-age claims are cognizable under Title VII).

108. *See supra* text accompanying notes 63–66.

109. 427 U.S. 273, 276 (1976).

110. *Id.* at 282–83; *see also id.* at n.10 (distinguishing but-for cause from sole cause).

includes at least some evidence suggesting both legitimate and non-legitimate factors played a role in a challenged decision.[111]

The recognition that but-for causation can exist even when other factors also contribute to an action, and that there can be multiple but-for causes of an action, is also well established in other areas of law. The most recent Restatement of Torts, which the Court often deems to be an important touchpoint for statutory discrimination law, devotes an entire section to describing the possibility of multiple sufficient causes for an action.[112] *Bostock* also relied in part on an interpretation of "because of" in a criminal statute, in which the Court explained but-for cause can be established if the act "combines with "some other factors" to produce the result."[113] In that case, the Court opined that relevant conduct simply can be the "straw that broke the camel's back."[114] In fact, in a comprehensive review (and critique) of mixed motive jurisprudence across constitutional, tort, and statutory laws, Professor Andrew Verstein describes "but-for" causation as the most common standard used to assess mixed motives.[115]

Thus, the difference between but-for causation and motivating factor is *not* whether the evidence suggests multiple causes of an adverse action; it is simply a question of how big a role the protected trait or activity needs to play in the decision to establish liability. Again, however, this basic principle comes with caveats. In *Gross* and *Nassar*, the Court stated the plaintiff would need to prove the protected trait or conduct was "the" but-for cause of the action.[116] Its

111. *See infra* Part III.A.

112. *See* RESTATEMENT (THIRD) OF TORTS § 27 (AM. L. INST. 2010). That said, tort principles also suggest that alternatives to traditional but-for cause may be better suited to apportioning responsibility when there are multiple but-for causes of a decision. *See id.* cmt. a.

113. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020) (citing Burrage v. United States, 571 U.S. 204 (2014)).

114. *Burrage*, 571 U.S. at 211.

115. Verstein, *Failure*, *supra* note 23 at 727.

116. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013) ("Title VII retaliation claims require [plaintiff prove that] the desire to retaliate was the but-for cause of the challenged action."); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177 (2009) ("Plaintiff retains the burden . . . to establish that age was the 'but-for' cause of the challenged employment action."). In *Nassar*, the dissenting Justices also seem to incorrectly equate but-for cause with sole cause. *See Nassar,* 570 U.S. at 384 (Ginsburg, J., dissenting) (asserting that under the but-for standard adopted by the Court, a plaintiff alleging retaliation could not establish liability if her firing was "prompted by both legitimate and illegitimate factors"). By contrast, in *Price Waterhouse*, the dissenting Justices arguing that the but-for standard should apply properly characterized it as requiring that a plaintiff show a protected trait was "*a* cause of the

use of a definite article, rather than an indefinite article, helped fuel the misimpression that there can only be one but-for cause,[117] and that but-for cause is functionally equivalent to sole cause.[118]

Additionally, courts persist in erroneously suggesting that so-called "mixed motive" claims are not cognizable under a "but-for" causation standard.[119] Part III explains how the development of the doctrine led to an association between the "motivating factor" standard and the idea of "mixed motives," but this presumed dichotomy reflects a misunderstanding of relevant causal standards. By stating explicitly that there can be multiple distinct but-for causes of an action and providing examples of this principle, *Bostock* provides much-needed clarification. However, *Bostock* does not announce a "new" standard; rather, *Bostock* conforms to long-established understandings of but-for causation and the differences between but-for causation and sole causation. Reaffirming these distinctions is particularly essential given Congress's clear repudiation of a sole causation standard in Title VII.[120]

Finally, it is worth noting that the distinction between but-for causation and motivating factor has not had much effect on Title VII practice. In a recent article, Professor Charles Sullivan suggests this is in part because courts have been confused by the motivating factor standard, or simply unwilling to apply it literally.[121] But he also notes

decision," while distinguishing the standard from sole causation. Hopkins v. Price Waterhouse, 490 U.S. 241, 284 (1989) (Kennedy, J., dissenting).

117. *See, e.g.*, Pelcha v. MW Bancorp, Inc., 988 F.3d 318, 323–24 (6th Cir. 2021) (relying on this language from *Gross* to suggest that under the ADEA, as compared to Title VII, there could only be a single but-for cause); Mollet v. City of Greenfield, 926 F.3d 894, 897 (7th Cir. 2019) ("[T]he question is not . . . [whether plaintiff's complaint] was *a* but-for cause of the adverse action, rather whether the protected activity was *the* but-for cause of the adverse action."); *see also* D'Andra Millsap Shu, *The Coming Causation Revolution in Employment Discrimination Litigation*, CARDOZO L. REV. (forthcoming 2022) (manuscript at *19–20 nn.123–24), https://papers.ssrn.com/abstract=3915252 (critiquing the Court's use of "the but-for cause" and collecting additional lower court cases that conclude there can only be a single but-for cause); Brian S. Clarke, *The* Gross *Confusion Deep in the Heart of* University of Texas Southwest Medical Center v. Nassar, 4 CALIF. L. REV. CIR. 75 (critiquing use of "the" in *Gross* as inconsistent with *Price Waterhouse*'s conception of but-for cause).

118. *See, e.g.*, Hendon v. Kamtex, Inc., 117 F. Supp. 3d 1325, 1330 (N.D. Ala. 2015) ("'But-for' causation *is* sole causation."); Gard v. U.S. Dep't of Edu., 752 F. Supp. 2d 30, 35 (D.D.C. 2010) ("'[S]olely by reason of' is the equivalent to the 'but-for' analysis adopted in *Gross*.").

119. *See infra* text accompanying note 306; *see also* Shu, *supra* note 117, at *17–26 (discussing such misconceptions in detail).

120. *See supra* Part I.B.

121. *See* Sullivan, *supra* note 93, at 383–95.

that many plaintiffs' lawyers eschew the framework because they fear it invites juries to split the difference between parties, providing a technical win on liability while precluding most monetary damages.[122] As this suggests, plaintiffs' lawyers recognize that they can and do win jury trials under a but-for standard.[123] Indeed, Professor Katie Eyer argues that the but-for standard may actually be helpful for plaintiffs, as it focuses judicial attention on differential treatment, rather than intent or motivation.[124] Professor Jessica Clarke makes a similar point, suggesting that it offers less space for conservative judges or juries to excuse discriminatory motives as benign.[125]

2. Direct or Circumstantial Evidence

Before turning to *McDonnell Douglas* and its progeny, it is important to highlight one other important point of commonality between "motivating factor" and "but-for" causation standards: The Supreme Court has interpreted the relevant statutory language to allow either to be established with direct evidence, circumstantial evidence, or a combination of the two.

This is not surprising, as it is the standard rule for all civil litigation.[126] However, recall that in *Price Waterhouse*, Justice O'Connor interpreted Title VII to require "direct" evidence that a prohibited trait played a role in a decision to shift the burden to the defendant to justify its action.[127] After Congress responded to *Price Waterhouse* by adding the "motivating factor" subsection, lower courts were split as to whether the "direct" evidence requirement

122. Sullivan, *supra* note 93, at 396–98; *see also* David Sherwyn, Steven A. Carvell & Joseph Baumgarten, *The Mixed Motive Instruction Employment Discrimination Cases: What Employers Need to Know*, 2007–08 UNIV. RISK MGMT. & INS. ASS'N 75–80 (providing empirical support for this concern).

123. Most circuits apply but-for causation as their default jury instruction. *See, e.g.*, COMM. ON PATTERN CIV. JURY INSTRUCTIONS OF THE SEVENTH CIR., FED. CIV. JURY INSTRUCTIONS OF THE SEVENTH CIR. § 3.01 (2017), http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf [https://perma.cc/KV8G-XN2Z]. While only a tiny sliver of all cases filed are resolved at a jury trial, plaintiffs win about 40% of those that do go to trial. *See* Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & POL'Y REV. 237, 252 (2004). This study does not specify whether a motivating factor instruction was given; however, these are so rare that it is reasonable to assume that most were decided under a standard but-for charge.

124. *See* Eyer, *supra* note 23, at 19–21.

125. *See* Clarke, *supra* note 23, at 6.

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

127. Hopkins v. Price Waterhouse, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring).

applied to that provision.[128] The Court addressed and resolved the question in *Desert Palace, Inc. v. Costa.*[129] The unanimous decision, authored by Justice Thomas, focused narrowly on the text of the statute.[130] Noting that the relevant provision simply required a plaintiff "demonstrate" the employer considered a prohibited trait, and contrasting it with provisions in the same title of the U.S. Code that apply heightened proof structures, the Court concluded that either circumstantial or direct evidence could be used to make the relevant showing.[131] The Court also supported this interpretation by citing an earlier Title VII case, brought under section 703(a)(1), which had also concluded that "as in any lawsuit, the plaintiff may prove his case by 'direct or circumstantial evidence.'"[132]

Accordingly, the Court has definitively held that a plaintiff can use both circumstantial and direct evidence to satisfy the requisite causal standards set forth in section 703(a)(1) (prohibiting discrimination "because of" of a protected trait) and section 703(m) (providing liability can also be established by showing a protected trait was a "motivating factor" in an adverse action). In other words, under both of these provisions, courts should treat "circumstantial and direct evidence alike."[133] However, as was true above in the discussion of the Court's clear rejection of a "sole" causation standard, and the discussion of the meaning of but-for cause, this statement comes with a caveat. As Parts II and III discuss, common articulations of the *McDonnell Douglas* burden-shifting process, and its relationship to so-called "mixed motive" cases, continue to suggest that there is a relevant distinction between "direct" and "circumstantial" evidence. This again highlights the need for the Court to clarify, or simply reject, *McDonnell Douglas*.

II. MCDONNELL DOUGLAS BURDEN-SHIFTING

Part I discusses the Supreme Court's repeated and detailed consideration of the causal burden on a plaintiff under various employment discrimination statutes. In practice, however, the causation standard employed is less important than whether a

128. *See Desert Palace, Inc.*, 539 U.S. at 95 (cataloguing circuit split).

129. *Id*.

130. *Id.* at 98 (emphasizing that the "starting point" for the analysis is the "statutory text").

131. *Id.* at 99–100.

132. *Id.* (quoting Postal Serv. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983)).

133. *Id.* at 100.

plaintiff can successfully squeeze the evidence into an arcane and complicated body of judge-made law known as *McDonnell Douglas* burden-shifting.

It is difficult to overstate the influence of *McDonnell Douglas*. Professor Sandra Sperino accurately describes it as "the most important case" in employment discrimination law, and she has written an entire book on its application.[134] A judge recently put it more colorfully, noting that in the half century since the opinion was issued, "[m]ore than 57,000 court opinions have cited it," amounting to a rate of "[m]ore than 3 cases a day (including weekends and holidays!)."[135] This Part explains the doctrine. The next Part shows how it relates to the causation standard, arguing that it is difficult—if not impossible—to reconcile them.

A. JUDICIALLY-CREATED STANDARD

McDonnell Douglas burden-shifting is named in reference to the case where it was first articulated.[136] Percy Green, a black man and civil rights activist, was a mechanic at McDonnell Douglas.[137] In 1964, he was laid off as part of a reduction in force.[138] He protested this decision, and other allegedly discriminatory policies, by disrupting access to the plant.[139] The company subsequently advertised for new mechanics.[140] Mr. Green applied, but the company refused to rehire him.[141] The company claimed its decision was based on his participation in unlawful conduct connected with the protests; Mr. Green alleged it was based on his race.[142]

Faced with what it characterized as "opposing factual contentions," and no direct evidence of discrimination,[143] the Court announced a three-step process that courts could use to resolve such disputes under Title VII.[144] First, the plaintiff must establish a "prima facie case of racial discrimination."[145] In *McDonnell Douglas*, this was

134. SPERINO, *supra* note 25.
135. Nall v. BNSF Ry. Co., 917 F.3d 335, 351 (5th Cir. 2019) (Costa, J., concurring).
136. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
137. *Id.* at 794.
138. *Id.*
139. *Id.* at 794–95.
140. *Id.* at 796.
141. *Id.*
142. *Id.*
143. *Id.* at 801.
144. *Id.* at 802.
145. *Id.*

articulated as requiring the plaintiff to prove he belonged to a "racial minority," was qualified and applied for an open job, was rejected, and that the employer continued to seek applicants for the position.[146] Upon this showing, the employer is required to articulate a legitimate nondiscriminatory rationale for its action.[147] The plaintiff then has an opportunity to show that the employer's claimed justification was "in fact pretext."[148]

This three-part structure became the default framework to assess any case based on circumstantial evidence, at least at the summary judgment phase. In *McDonnell Douglas* and later cases, the Court has described the process as a mechanism for organizing the evidence rather than a formal legal test.[149] The Supreme Court has repeatedly suggested that it is meant to be a flexible standard. In *McDonnell Douglas* itself, the Court recognized that the prima facie case would "not necessarily [be] applicable in every respect to differing factual situations."[150] In later cases, it has affirmed that it "was never intended to be rigid, mechanized, or ritualistic,"[151] and that the burden of establishing the prima facie case is "not onerous."[152]

However, lower courts, bound to apply Supreme Court precedent, often demonstrate a slavish adherence to the structure. It has spawned fifty years of litigation and confusion, and significant inter- and intra-circuit splits have developed on many of the factors.[153] To resolve these questions, courts at all levels typically parse the language of prior judicial decisions, including portions that are arguably dicta, as if they were governing law. Shortly after joining the Supreme Court, Justice Scalia, already a firmly committed textualist, took issue with this practice.[154] But, despite the ascendance of textualist approaches to statutory interpretation in most areas of law, and the recognition that *McDonnell Douglas* itself is unanchored to the statute, the Supreme Court continues to treat *McDonnell Douglas*

146. *Id.*

147. *Id.*

148. *Id.* at 804.

149. *See* Swierkiewicz v. Sorema, 534 U.S. 506, 510 (2002).

150. *McDonnell Douglas*, 411 U.S. at 802 n.13.

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

152. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981).

153. *See infra* Parts II.B, II.C.

154. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993) (criticizing the dissent's argument as having support "only in the dicta of this Court's opinions" and then turning "begrudgingly" to "dissect the sentences of the United States Reports as though they were United States Code").

burden-shifting as the default framework by which most individual disparate treatment cases should be resolved.

Young v. United Parcel Service, Inc. is the most striking recent example of the ongoing centrality of *McDonnell Douglas*.[155] That case concerned the denial of a pregnancy accommodation,[156] and it turned on the Court's interpretation of an amendment to Title VII that added a specific mandate that employers treat pregnant employees the same as other employees with similar ability or inability to work.[157] Lower courts had struggled with how to adapt *McDonnell Douglas* to this context; by rigidly applying the standard prima facie case, they clearly imposed requirements in terms of comparators beyond what the law itself required.[158]

When arguing the case at the Supreme Court, the Petitioner, as well as the United States and the EEOC participating in the case as amici, took the position that *McDonnell Douglas* was unnecessary and unhelpful; they contended that the analysis should focus simply on the *statutory* language.[159] The Court, however, did not take this approach.[160] Instead, while it recognized that the standard articulation of the test did not work in this context, it implied that some version of *McDonnell Douglas* was *required* for disparate treatment cases involving only circumstantial evidence.[161] It then announced a modified test that changes each step so as to be almost unrecognizable and that blurs the putative distinction between disparate impact and disparate treatment.[162] My point here is not to

155. 135 S. Ct. 1338 (2015).

156. *Id.* at 1344.

157. *See* 42 U.S.C. § 2000e(k).

158. *See Young*, 135 S. Ct. at 1348, 1355.

159. *See id.*; Petitioner's Brief at 47, Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (No. 12-1226); Brief for the United States as Amicus Cur. at *16–17, Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (No. 12-1226).

160. *See Young*, 135 S. Ct. at 1345.

161. *See id.* ("We have also made clear that a plaintiff can prove disparate treatment either (1) by direct evidence that a workplace policy . . . expressly relies on a protected characteristic, or (2) by using the burden-shifting framework set forth in *McDonnell Douglas*.").

162. At step one, the Court reformulates the prima facie case to focus specifically on whether other employees denied accommodations were "similar in their ability or inability to work"; at step two, the Court categorically prohibits certain non-discriminatory rationales that are normally acceptable; and at step three, it states that the "pretext" analysis should consider factors that are typically relevant to disparate impact claims rather than disparate treatment claims. *Id.* at 1354; *cf. id.* at 1364 (Scalia, J., dissenting) (critiquing the majority's approach as entirely ungrounded in the relevant statutory text).

critique the end result.[163] Rather, my point is simply that *Young* and decisions like it perpetuate the idea that lower courts *must* continue to use *McDonnell Douglas*, even when it adds little to, or actually conflicts with, the analysis that the relevant statutory language suggests.

McDonnell Douglas is used primarily to assess cases based on circumstantial evidence at the summary judgment stage.[164] This is more central than it may seem. Only about six percent of employment discrimination cases advance to a trial; the vast majority are resolved at summary judgment, or settled in the shadow of summary judgment.[165] Likewise, as discussed more fully below, courts have adopted very narrow conceptions of what constitutes "direct" evidence of discrimination.[166] In general, it must be a statement made by the decisionmaker that explicitly links the adverse action to a protected trait—something akin to "I am firing you because you are pregnant." Such statements are, unsurprisingly, rare. And while plaintiffs asserting status-based claims under Title VII are entitled to proceed under the motivating factor standard, most decline to do so.[167] Thus, most employment discrimination cases are funneled through *McDonnell Douglas*.

Outside the summary judgment context, *McDonnell Douglas* is generally not used, or at least it is not dispositive.[168] The Supreme Court has held that a complaint can survive a motion to dismiss even if it does not plead facts supporting each element of the prima facie

163. If properly applied, the *Young* Court's version of *McDonnell Douglas* would often lead to the same result as the more straightforward textual approach advocated by the Petitioner. *See* Deborah A. Widiss, *The Interaction of the Pregnancy Discrimination Act and the Americans with Disabilities Act After* Young v. UPS, 50 U.C. DAVIS L. REV. 1423, 1441–49 (2017). Lower courts, however, are struggling to apply the new standard, importing rigid "comparator" requirements derived from other applications of *McDonnell Douglas* that go beyond what the statute itself requires. *See* Joanna L. Grossman & Gillian Thomas, *Making Sure Pregnancy Works: Accommodation Claims After* Young v. United Parcel Service, Inc., 14 HARV. L. & POL'Y REV. 319, 339–42 (2020).

164. *See, e.g.*, SPERINO, *supra* note 25, at 68.

165. *See* ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL 61 (2017) (showing that 76% of filed employment discrimination cases are resolved on summary judgment, or settlement during the discovery or pre-trial phases, while just 6% go to trial, with the remainder being resolved on a motion to dismiss).

166. *See infra* Part II.D; *see also* SPERINO, *supra* note 25, at 69–74.

167. *See* sources cited *supra* note 122.

168. For an excellent discussion of these nuances, see SPERINO, *supra* note 25, at 293–97, 302–10.

case or the burden-shifting process.[169] And most circuits discourage charging juries on the entire test, reasoning that it is too confusing and that the burden-shifting process is irrelevant once all of the evidence has been presented.[170] That said, discrete elements of the doctrine—e.g., that a jury may infer discrimination from a showing of pretext—are often charged.[171] Courts are inconsistent about whether the test should be used in post-trial motions or appeals; again, however, even if they do not use the full test, individual elements and subsidiary doctrines often play a key role in the analysis.[172]

The applicability of the test to statutes other than Title VII is also somewhat unclear. Lower courts and administrative agencies routinely apply the test in discrimination cases of all kinds.[173] Nonetheless, the Supreme Court has repeatedly refused to formally confirm that it governs other statutes; rather, it tends to indicate that since the parties have not challenged its applicability, it will assume it applies.[174] This coyness is somewhat confusing. If, as the Court asserts, *McDonnell Douglas* is simply a helpful mechanism for organizing evidence and clarifying reasonable inferences that flow from such evidence, it is hard to see why it wouldn't be applicable in other discrimination contexts. That said, since lower courts tend to treat the process as both compulsory and rigid, transposing the test to other statutes often causes confusion, because courts are unsure how to modify the structure to make it "fit" distinct statutory contexts.

B. THE PRIMA FACIE CASE

The initial articulation of the prima facie case in *McDonnell Douglas* was particularized to a race-based claim for failure to hire.[175] Later cases have generalized the test, but without uniformity. It is now typically phrased as requiring a plaintiff to prove she is a "member of a protected class," that she was "qualified" for the position or that she met the employer's "legitimate expectations," that she suffered an

169. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002).

170. *See* SPERINO, *supra* note 25, at 302–04.

171. *Id.* at 302.

172. *See id.* at 306–10.

173. *See, e.g.*, *id.* at 251–65 (discussing its application in ADEA, ADA, and section 1981 cases); *id.* at 311–15 (discussing its application under state discrimination laws); Eyer, *supra* note 22, at 975 n.42 (discussing application by administrative agencies in other discrimination contexts).

174. *See, e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 309 (1996).

175. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 794 (1973).

"adverse action," and either that she was treated differently than a "similarly-situated" individual who was not in the protected class, or (in some circuits) that she can identify evidence that supports "an inference of discrimination."[176] A modified version applies in retaliation cases,[177] and it has been adapted further in its application to other statutes.[178]

Scholars and courts have extensively critiqued the prima facie case, and Professor Sandra Sperino's treatise in particular offers detailed and perceptive commentary on many of the tensions I discuss. My objective in this Section is simply to highlight the disconnect between the underlying statutory language and each of the elements. In doing so, I use the word "element" consciously. The Court has stated that the test does not identify formal legal elements.[179] Lower courts, however, routinely dismiss cases that fail to satisfy one or more of its requirements, suggesting they *do* function as elements.[180]

The first element—membership in a "protected class"—suggests a particular concern with groups who have been historically subject to discrimination. The statute, by contrast, focuses on personal traits—race, sex, etc.—that all individuals possess. More than forty years ago, the Court interpreted the statutory language to hold a white employee who asserted he was treated less well than similarly-situated Black employees had a viable claim.[181] This would have been an opportune point for the Court to have clearly rejected the "protected class" language. It did not. Instead, there is now a sub-doctrine of lower court decisions straining to apply the "protected

176. *Compare, e.g.*, Lewis v. City of Union City, Ga., 918 F.3d 1213, 1221 (11th Cir. 2019) (en banc) (articulating fourth element as requiring a comparator and asserting Supreme Court "has repeatedly (and consistently) included a comparator-evidence assessment . . . as an element of a plaintiff's prima facie case"), *with* Bucalo v. Shelter Island Union Free Sch. Dist., 691 F.3d 119, 129 (2d Cir. 2012) (articulating fourth element as circumstances giving rise to an inference of discrimination). *See also* SPERINO, *supra* note 25, at 102–50 (discussing circuit-based variation in all of the elements in detail).

177. *See* SPERINO, *supra* note 25, at 237–51 (collecting case law on the retaliation prima facie case).

178. *See id.* at 251–65, 311–15 (discussing modifications under other statutes).

179. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002).

180. *See* SPERINO, *supra* note 25, at 108–46 (providing examples of courts dismissing cases that fail to satisfy the requirements); *see also* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011) (discussing and critiquing cases dismissed because plaintiff could not identify a comparator).

181. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 (1976).

class" language to so-called "reverse discrimination" claims,[182] as well as to claims based on an individual's "association" with someone of a different race, religion, or other protected trait.[183] There is also an ongoing circuit split as to how the "protected class" element applies when a plaintiff alleges the employer has misperceived her identity, for example a Latino man alleging he is subject to discrimination because his supervisor incorrectly thinks he is of Middle Eastern origin.[184]

The second element—"qualified" for the relevant position—has no anchoring in the primary operative clauses of Title VII. This absence is particularly significant, given that a more specific provision included in the statute permits use of professionally-developed ability tests so long as they are not "designed, intended or used to discriminate" because of the protected traits.[185] The existence of language specifically addressing how qualification tests may be used suggests it is inappropriate to read a qualification requirement into the general prohibition on discrimination.[186] Nor is the meaning of this judicially-created requirement clear. It has most salience in cases challenging a failure to hire, where it is used to assess whether a plaintiff meets objective requirements, such as licensure.[187] By contrast, in cases challenging a termination, demotion, or failure to promote, the employer's legitimate nondiscriminatory rationale is generally that an employee has engaged in workplace misconduct or is less qualified than other employees or applicants.[188] Employers

182. *See, e.g.*, SPERINO, *supra* note 25, at 146–50, 230–34.

183. *See id.* at 104–06.

184. *See id.* at 106–08; *see also* Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101 (2017).

185. 42 U.S.C. § 2000e-2(h); *see also id.* § 2000e-2(l) (prohibiting adjusting scores based on protected traits).

186. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 524 (1989) ("A general statutory rule usually does not govern unless there is no more specific rule."). Furthermore, Congress has included more general qualification language in other statutes that are generally similar. For example, the Americans with Disabilities Act prohibits discrimination against "a qualified individual." 42 U.S.C. § 12112(a). Title VII simply prohibits discrimination against "any individual." 42 U.S.C. § 2000e-2(a). Courts often interpret such differences to be significant. *Cf.* Lorillard v. Pons, 434 U.S. 575, 581–82 (1978) (discussing the significance of Congress's incorporating and modifying language from earlier statutes).

187. *Cf.* Narin v. Lower Merion Sch. Dist., 206 F.3d 323, 332 (3d Cir. 2000) (concluding that plaintiff failed to produce any evidence showing she had teaching certifications in both mathematics and science).

188. *See, e.g.*, Waters v. Logistics Mgmt. Inst., 716 F. App'x 194, 197 (4th Cir. 2018) (recounting employer's argument that it had failed to retain plaintiff in a restructuring

sometimes point to such evidence to suggest that the employee cannot meet the "qualification" prong.[189] This requires courts to either grapple prematurely with the ultimate question in the case, or to make the standard almost meaningless by interpreting it to simply require meeting the bare minimum of expectations for a position.

The third element—often phrased as being "subject to an adverse action"—is the element that has the most grounding in the statute. To proceed under section 703(a)(1), an employee must be able to show that an employer has "fail[ed] or refuse[d] to hire or . . . discharge[d], or otherwise discriminated against any individual with respect to the compensation, terms, conditions, or privileges of employment."[190] 703(a)(2) proscribes actions related to the classification of employees[191] and 704(a) proscribes discriminatory actions in responses to complaints.[192] These provisions are wordy, and "adverse action" could be a helpful shorthand to reference the full range of prohibited actions. However, in practice, courts often treat the phrase as an independent element that is unanchored from the relevant statutory language, meaning they rely on a common-law like body of doctrine about what suffices, while ignoring the interpretation of similar language in other statutes governing the workplace.[193]

Courts also frequently use "adverse action" as a generic term when articulating the prima facie case for retaliation claims.[194] The statutory provision relating to retaliation, however, encompasses a broader range of actions than those listed in section 703, as the retaliation provision simply prohibits "discrimination" without the reference to hiring, firing, or the privileges, terms, or conditions of employment.[195] Focusing on this statutory difference, the Court has concluded that a retaliation claim may be brought to challenge any action that would tend to deter a reasonable person in a similar

because plaintiff had not been performing his job well).

189. *See id.* (referencing alleged performance difficulties in managing employees as failure to meet this prong).

190. 42 U.S.C. § 2000e-2(a)(1).

191. *Id.* § 2000e-2(a)(2).

192. *Id.* § 2000e-3(a).

193. *See* SPERINO, *supra* note 25, at 111–26 (collecting caselaw and suggesting it could be appropriate for courts to consider how the statutory language has been interpreted in other contexts).

194. *See, e.g.*, A.C. *ex rel.* J.C. v. Shelby Cnty. Bd. of Educ., 711 F.3d 687, 697 (6th Cir. 2013) (noting that the prima facie case in retaliation claim includes the defendants "took adverse action" against plaintiffs); SPERINO, *supra* note 25, at 239–44 (discussing confusion caused by use of the same phrase in both contexts).

195. 42 U.S.C. § 2000e-3(a).

position from complaining about alleged discrimination, and that this may encompass non-work-related actions.[196] Harassment cases have spawned yet another, confusingly similar judge-created term: "tangible employment action," which has relevance in assessing vicarious liability.[197] Refocusing attention on the relevant statutory text in all of these contexts would alleviate significant confusion.

The fourth element—most frequently articulated as requiring identification of "a similarly-situated comparator outside the protected class who is treated differently"—includes multiple sub-elements, none of which is based in the statute, and the meaning of which is often deeply contested. This requirement imports all of the problems with the concept of "protected class" articulated above. It then compounds those problems by requiring courts to determine who is within or outside such class; this is particularly challenging if a plaintiff brings an intersectional claim, alleging discrimination on the basis of multiple traits, such as her race and her sex.[198] It then requires courts to parse—ostensibly as a precursor to the employer's articulation of a legitimate non-discriminatory rationale—whether an employee is "similarly situated" to the proposed comparator, an analysis that typically turns on the employer's claimed rationale.[199] And, most obviously, it categorically denies claims where an employee cannot identify a sufficiently similar comparator, even if there may be ample evidence suggesting discriminatory intent.[200]

Some circuits have taken steps to ameliorate these problems. For example, circuit court decisions have specified that if a plaintiff can provide specific other forms of circumstantial evidence—most

196. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68–69 (2006).

197. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

198. Kimberlé Crenshaw first developed her theory of intersectionality in an article arguing Black women should be considered a separate protected class under Title VII. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, 1 U. CHI. LEGIS. F. 139 (1989). Courts have signaled some openness this approach. *See* Jeffries v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980). But it remains somewhat unclear how relevant comparators "outside" the protected class are identified.

199. *See, e.g.*, Lewis v. City of Union City, Ga., 918 F.3d 1213, 1224–29 (11th Cir. 2019) (en banc) (discussing range of standards used to determine sufficient similarity).

200. *See, e.g.*, *id.* at 1230–31 (affirming summary judgment on grounds plaintiff had failed to identify comparators who were similar "in all material respects"). *But see id.* at 1257–60 (Rosenbaum, J., dissenting in part) (cataloguing evidence suggesting discrimination). *See generally* Goldberg, *supra* note 180 (discussing and critiquing the comparator requirement).

commonly, that a relevant decisionmaker relied on stereotypes associated with a protected trait—a comparator is not required.[201] Of course, this distinction is also not in the statute, and it can lead to a fight as to whether specific comments fit within this category.[202] Nor is a comparator typically required in harassment cases (which often proceed on an entirely distinct track from *McDonnell Douglas*).[203] While this solves the comparator problem, it promotes the misconception that harassment claims are fundamentally different from other disparate treatment claims, and it may mean that courts refuse to consider how evidence suggesting an employee was subject to severe or pervasive abuse may also suggest a subsequent adverse action was based on discriminatory intent.[204]

The cleaner, better solution to the comparator problem is to rephrase the fourth element as merely requiring "circumstances that support an inference of discrimination." Comparators are one way, but not the only way, of satisfying this standard. Some circuits use this formulation regularly,[205] and the Supreme Court has at least implied this is permissible.[206] In retaliation cases, it is standard to articulate the final element of the prima facie case as simply requiring evidence of a "causal link" between an employee's protected conduct and an adverse employment action.[207] These articulations mean the final element of the prima facie case addresses the ultimate factual question in the case—is the challenged action based on discrimination? So long as a court is willing to consider the same evidence at this stage and the "pretext" stage, this is merely inefficient and repetitive. However, if a court is reluctant to do so, it may discount

201. *See, e.g.*, Chadwick v. Wellpoint, Inc. 561 F.3d 38, 45 (1st Cir. 2009).

202. *See id.* at 49 (reversing lower court decision that had held statement must specify "sex" explicitly to qualify).

203. *See, e.g.*, Stewart v. Rise, Inc., 791 F.3d 849, 859–60 (8th Cir. 2015) (articulating different prima facie case for harassment that does not include a comparator element).

204. *See* SPERINO, *supra* note 25, at 281–85 (discussing the relationship between *McDonnell Douglas* and harassment claims).

205. *See, e.g.*, Mandel v. M&Q Packaging Corp. 706 F.3d 157, 169 (3d Cir. 2013); Blizzard v. Marion Tech. Coll., 698 F.3d 275, 283 (6th Cir. 2012); Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 97 (2d Cir. 2010).

206. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510, 515 (2002) (referencing, without qualification, this articulation of the fourth element of the test as used by the lower court, while overruling the lower court's holding that the complaint must allege each element).

207. *See, e.g.*, A.C. *ex rel.* J.C. v. Shelby Cnty. Bd. of Edu., 711 F.3d 687, 697 (6th Cir. 2013).

evidence that could be very relevant to establishing discrimination because it was already "used" in the prima facie case.[208]

The deeper point is that the prima facie case under *McDonnell Douglas* is generally useless. The prima facie case was designed to provide sufficient evidence of discrimination to justify requiring an employer to articulate a legitimate non-discriminatory rationale for its actions.[209] This may have been a helpful tool when cases were decided by judges after bench trials. But even in that context, the Supreme Court quickly made clear that "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant."[210] Because the Supreme Court has also held that pleadings in a case do not need to satisfy *McDonnell Douglas*,[211] the first time the standard is dispositive is if a defendant moves for summary judgment. By that point, the employer has virtually *always* articulated a justification.[212] Indeed, in most instances, the employer provides a rationale for its actions even before the lawsuit is filed, in the position statement it files with the EEOC.[213] It then develops that justification throughout the discovery process and defends and supports its rationale in its summary judgment brief.[214]

The D.C. Circuit—but only the D.C. Circuit—has formally recognized this reality. More than a decade ago, in a decision by then-Judge Kavanaugh, it castigated the prima facie case as "a largely unnecessary sideshow" that "spawn[s] enormous confusion and

208. This same issue may arise when the fourth element specifies a comparator is required. *Cf.* Scruggs v. Garst Seed Co., 587 F.3d 832, 838 (7th Cir. 2009) ("The prima facie case and pretext analyses often overlap.").

209. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) ("The complainant . . . must carry the initial burden . . . of establishing a prima facie case [before] [t]he burden . . . must shift to the employer to articulate some legitimate, nondiscriminatory reason for [its actions].").

210. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983).

211. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002); *see also* Woods v. City of Greensboro, 855 F.3d 639, 648 (4th Cir. 2017) (discussing how *Swierkiewicz* interacts with *Iqbal* and *Twombly* but reaffirming that *Swierkiewicz* remains "binding precedent").

212. *See* SPERINO, *supra* note 25, at 152 (labeling the defendant's burden "not onerous").

213. *See Effective Position Statements*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/effective-position-statements [https://perma.cc/RYC2-QYT7].

214. *See* SPERINO, *supra* note 25, at 157 ("[T]he defendant cannot meet its burden merely through an answer to the complaint . . . .").

wast[es] litigant and judicial resources."[215] It explicitly directed that, so long as a plaintiff had suffered an adverse action within the meaning of the statutory language and the employer had asserted a legitimate justification of the action, district courts "should not" decide whether the prima facie case has been satisfied.[216] Lower courts listened; district courts within the D.C. circuit almost never consider the prima facie case anymore.[217] Individual judges in other circuits have likewise called for abandoning the prima face case, and it is relatively common for courts to "assume without deciding" it has been satisfied.[218] But in the many years since the D.C. Circuit made this shift, no other circuit has adopted the practice as a formal rule; to the contrary, several have considered and rejected the option.[219]

C. LEGITIMATE NON-DISCRIMINATORY RATIONALE / PRETEXT

The second and third stages of *McDonnell Douglas* burden-shifting—the employer's burden to provide a legitimate non-discriminatory rationale, and the plaintiff's burden to prove the rationale is pretextual—obviously interrelate. The formal burden on the employer at Step 2 is quite slight. It simply must articulate, based on admissible evidence, a rationale for its action.[220] This is a burden of production, not persuasion.[221] This burden is not onerous, and cases are virtually never resolved on an employer's failure to satisfy this requirement.[222]

215. *See* Brady v. Off. of Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008).

216. *See id.*

217. *See, e.g.*, Wang v. Wash. Metro. Area Transit Auth., 206 F. Supp. 3d 46, 67 (D.D.C. 2016) (following *Brady* to hold the prima facie case is not required and thus rejecting employer's argument that comparators were required as incorrect as a matter of law). Where appropriate, courts in the D.C. Circuit do still consider whether plaintiffs can establish an "adverse action," recognizing appropriately that that element *is* required by the statutory language. *See, e.g.*, Norris v. Wash. Metro. Area Transit Auth., 342 F. Supp. 3d 97, 112–13 (D.D.C. 2018).

218. *See, e.g.*, Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1225–26 (10th Cir. 2003) (Hartz, J., writing separately); Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. SCH. L. REV. 671, 678–79 (2012) (describing cases in which he assumed without deciding the prima facie case was established to focus on the ultimate factual issue in the case).

219. *See, e.g.*, Pepper v. Precision Valve Corp., 526 F. App'x 335, 336 n.* (4th Cir. 2013); Stallworth v. Singing River Health Sys., 469 F. App'x 369, 372 (5th Cir. 2012); Hinds v. Sprint/United Mgmt., 523 F.3d 1187, 1202 n.12 (10th Cir. 2008).

220. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254–55 (1981).

221. *Id.*

222. *See* SPERINO, *supra* note 25, at 151–52.

Once the employer has articulated its justification, the burden returns to the plaintiff to prove "pretext."[223] The most common articulation of this final step comes from *Texas Department of Community Affairs v. Burdine*.[224] In that case, the Court characterized the plaintiff's responsibility at this point as "demonstrat[ing] that the proffered reason was not the true reason for the employment decision," a burden that "merges with the ultimate burden of persuading a court that she has been the victim of intentional discrimination."[225] The intuition underlying this final step is important. As the Court put it in a case decided a few years after *McDonnell Douglas*, it is reasonable to assume that the employer acts with "*some* reason" rather than entirely arbitrarily; accordingly, if the evidence suggests that the employer's claimed justification is not credible, it will often suggest that the action was actually based on an "impermissible consideration."[226] This is a more general inference, not limited to employment discrimination. We often assume that individuals lie to cover up something improper.

In *Burdine*, the Court suggested this step offered two, disjunctive options; a plaintiff could prove discrimination "*either* directly by persuading the court that a discriminatory reason more likely motivated the employer *or* indirectly by showing that the employer's proffered explanation is unworthy of credence."[227] This gave rise to fifteen years of litigation over the legal relevance of establishing pretext *without* other evidence of discriminatory intent.[228] (It also suggests, I would argue unjustifiably, that these assessments are entirely distinct, a point further developed in the following Section.) The details of the debate are not important to the analysis that follows. Ultimately, the Court concluded that evidence of pretext could be—and often would be—sufficient to allow a fact finder to infer that the challenged decision was based on discriminatory bias, even if there was no other evidence of discriminatory intent.[229] In other words, if the evidence referenced in opposition to a defendant's motion for summary judgment could convince a reasonable fact finder that the

223. *Burdine*, 450 U.S. at 256.

224. *Id.*

225. *Id.*

226. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 568, 577 (1978).

227. *Burdine*, 450 U.S. at 256 (emphasis added).

228. *See generally* Eyer, *supra* note 22 (providing an excellent discussion of litigation on this point).

229. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147–49 (2000).

employer's justification was pretextual, summary judgment should typically be denied.

The more pertinent point is that throughout these cases, the Court consistently suggests that to show "pretext," a plaintiff must prove the employer's claimed justification is fabricated or untrue. In *Burdine*, the Court characterizes the step as allowing the plaintiff "the opportunity to demonstrate that the proffered reason was not *the true* reason," and that it is "unworthy of credence."[230] In *Hicks*, the second of these cases, the majority characterizes the stage as requiring the plaintiff to prove the employer's reason to be "false."[231] The dissent, arguing that a showing of pretext alone should be sufficient to mandate liability, is even more emphatic, repeatedly characterizing pretext as showing that the employer has been "caught in a lie," "lie[d]," and "offer[ed] false evidence."[232] Likewise, in *Reeves*, the last of these cases, the Court again asserts that pretext means that a plaintiff proves the employer's asserted justification is "false."[233]

Most circuits have developed similar articulations of the plaintiff's burden at this third step. For example, the Third Circuit commonly articulates the test as that the employer's "proffered reasons . . . [were] *not the real motivation* for the unfavorable job action."[234] The Second Circuit requires "not simply some evidence, but sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered by the [defendant] *were false*, and that more likely than not [discrimination] was the real reason for the [employment action]."[235] Or, as the Seventh Circuit puts it, "pretext 'means a lie.'"[236] The Sixth Circuit is somewhat more flexible, suggesting pretext can be established by showing the "proffered reason . . . (1) has no basis in fact, (2) did not actually motivate the

230. *Burdine*, 450 U.S. at 256 (emphasis added).

231. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515–16 (1993); *see also id.* at 517 ("[P]roving the employer's reason *false* becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination.") (emphasis added).

232. *See id.* at 537–43 (Souter, J., dissenting) (repeatedly characterizing the majority's approach as wrongly protecting "the employer who lies," or is "found to have given false evidence," arguing that it ultimately created bad incentives by providing a "benefit from lying" and a "reward[] for its falsehoods").

233. *Reeves*, 530 U.S. at 148.

234. Sarullo v. U.S. Postal Serv., 352 F.3d 789, 797 (3d Cir. 2003) (emphasis added).

235. Cooper v. State of Conn. Pub. Defs. Office, 280 F. App'x 24, 25–26 (2d Cir. 2008) (emphasis added).

236. Chatman v. Bd. of Educ. of City of Chi., No. 20-2882, 2021 WL 3046819, at *746 (7th Cir. 2021) (quoting Russell v. Acme-Evans Co., 51 F.3d 64, 68 (7th Cir. 1995)).

defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct," but even this formulation assumes the plaintiff must prove that the claimed rationale did not play a role in the employer's action.[237] In the past, the Fifth Circuit sometimes characterized the pretext step more expansively, under an approach that "merg[ed]" the *McDonnell Douglas* and *Price Waterhouse* approaches,[238] but after *Gross* and *Nassar*, it appears this test is not applied in cases that are not proceeding under Title VII's motivating factor standard.[239]

To be sure, courts also sometimes recognize "pretext" as a term of art. For example, there are cases suggesting that even if an employee *has* committed a workplace infraction, pretext may be shown by establishing other employees who engaged in similar misconduct were not disciplined,[240] that the discipline was clearly disproportionate to the infraction,[241] that the putative reason was a post hoc rationalization, or that the employer had offered multiple and inconsistent justifications for its actions.[242] But there are also numerous cases that assume clear evidence of misconduct functionally dooms a claim, and fail to engage substantively with evidence that could suggest discriminatory intent was *also* a cause of any adverse action.[243]

It is not surprising that the Supreme Court and lower courts typically characterize "pretext" as a dishonest or false statement.

237. Jackson v. VHS Detroit Receiving Hosp., Inc., 814 F.3d 769, 779 (6th Cir. 2016).

238. *See* Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004) (specifying a "modified" *McDonnell Douglas* that articulated the plaintiff's burden at the third step as either showing pretext or that "the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor'" is a protected trait).

239. *See, e.g.*, Brown v. Wal-Mart Stores East, L.P., 969 F.3d 571, 577 (5th Cir. 2020) (characterizing the third step in a retaliation case as requiring a plaintiff to prove "pretext" by showing that a "discriminatory motive more likely motivated" the decision, or "that her employer's explanation is unworthy of credence").

240. *See, e.g.*, Burton v. Ark. Sec'y of State, 737 F.3d 1219, 1233–35 (8th Cir. 2013).

241. *See, e.g.*, Stalter v. Wal-Mart Stores, Inc., 195 F.3d 285, 290 (7th Cir. 1999) (finding employer's claim that it fired a worker for having eaten a handful of Doritos from an open bag in the lunchroom so disproportionate to the alleged offense that a jury could infer pretext).

242. *See, e.g.*, Fassbender v. Correct Car Sols., LLC, 890 F.3d 875, 887–90 (10th Cir. 2018).

243. *See, e.g.*, Ptasznik v. St. Joseph Hosp., 464 F.3d 691, 697 (7th Cir. 2006) (upholding grant of summary judgment to employer because employee "failed to show [the employer's] legitimate non-discriminatory reasons for firing her were pretextual" despite evidence plaintiff's supervisor repeatedly made disparaging comments about her age and her Polish national origin).

Dictionaries confirm that is the standard meaning of pretext, as used in ordinary speech.[244] And if the statutes required a plaintiff to prove "pretext," the courts' description of the plaintiff's burden would be quite reasonable.

But the statutes do *not* require a plaintiff to prove the employer's rationale is "pretext." The statutes simply require a plaintiff to prove that she was subject to one of the specified adverse employment actions "*because of*" a protected trait or protected activity.[245] Thus, although it is appropriate for courts to conclude that proving pretext will, in most circumstances, be sufficient to satisfy the statutory standard, the converse is not correct. That is, failing to prove pretext should not be deemed dispositive. As Part I explains, "because of" means that the trait or activity must be a but-for cause of a decision. This standard can be satisfied even if the employer's claimed justification is true, and even if it played a role in the decision, so long as a protected trait or action is *also* a cause of the action. The judicially-created pretext standard, by contrast, rests on the premise that there will only be one "true" cause of the decision—either the employer's rationale or a protected trait or activity. In other words, it functionally imposes a sole-causation standard.

D. THE MISSING ELEMENT: DISCRIMINATION

McDonnell Douglas burden-shifting is so established as the primary means by which a plaintiff is expected to prove disparate treatment that it can be easy to overlook a surprising omission—at no point in the burden-shifting process are courts explicitly instructed to consider evidence of discriminatory bias. The closest the test comes is the statement in *Burdine* that a plaintiff can satisfy her burden at the third step either by "persuading the court that a discriminatory reason more likely motivated the employer" or by discrediting the employer's claimed justification.[246] The Court has also indicated that once the first two steps are completed, "'the *McDonnell Douglas* framework—with its presumptions and burdens'—disappear[s,] . . . and the sole remaining issue [is] 'discrimination *vel non*.'"[247] But the impact of this statement is significantly blunted by the fact that courts still routinely

244. *See, e.g.*, *Pretext*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992).

245. *See, e.g.*, 42 U.S.C. § 2000e-2 (emphasis added).

246. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 256 (1981).

247. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142–43 (2000) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509).

characterize the test as including a third step, and the primary focus of analysis in that third step is "pretext."[248]

The absence of a step explicitly inviting evidence of discrimination is particularly striking since—unlike "member of a protected class" or "qualified" or "comparator" or "pretext"—the statutory language *does* explicitly reference discrimination; it is unlawful for an employer to "discriminate against" an individual because of a protected trait or protected activity.[249]

I do not mean to suggest that Title VII's statutory language, or other employment discrimination statutes with comparable language, necessarily requires a plaintiff to prove intentional bias. Although the Supreme Court and lower courts frequently refer to disparate treatment claims as requiring proof of "intent," the statute simply requires differential treatment "because of" a protected trait or protected activity.[250] Theorists have convincingly argued that where such differential treatment is proven, it is immaterial whether it may stem from unconscious or conscious bias, or indeed, from anything that would be called "bias" at all.[251] Likewise, the word "discriminate"

248. *See, e.g.*, Jones v. Okla. City Pub. Schs., 617 F.3d 1273, 1276 (10th Cir. 2010); Papelino v. Albany Coll. of Pharmacy, 633 F.3d 81, 92 (2d Cir. 2011).

249. 42 U.S.C. § 2000e-2(a)(1); 42 U.S.C. §2000e-3(a); *see supra* text accompanying notes 195–97 (explaining that both the status-based provisions and the retaliation provision use the words "discriminate against," although the former limits actionable discrimination to the "compensation, terms, conditions, or privileges of employment"). That said, it is not necessarily clear, as a textual matter, whether the "otherwise to discriminate against" language modifies the other unlawful actions listed in section 703(a) (i.e., "fail or refuse to hire or to discharge any individual"). *See* James A. Macleod, *Finding Original Public Meaning*, 56 GA. L. REV. (forthcoming 2021) (making this point); *cf.* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1740 (2020) (flagging this question and "accepting . . . for argument's sake" that "discriminate against" modifies the earlier verbs but not deciding the matter). However, that question does not affect the larger point made in the text; evidence of biased statements, epithets, or slurs made by the decisionmaker would logically inform the consideration of whether a firing or refusal to hire was made "because of" a protected trait or activity and also whether such firing or refusal to hire was an example of "discrimination" because of the trait or activity.

250. In *Bostock,* Justice Gorsuch arguably flags the extent to which the "intent" requirement might go beyond the statutory language by first defining discrimination and then stating that "[i]n so-called 'disparate treatment' cases like today's, this Court has *also* held that the difference in treatment based on sex must be intentional." *Bostock*, 140 S. Ct. at 1740 (emphasis added) (citation omitted).

251. *See, e.g.*, Eyer, *supra* note 23, at 38 (arguing a showing of intentional discrimination is not necessary under the but-for standard); *cf.* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 922–23 (1993) (characterizing conscious intent as the "touchstone" of the Supreme Court's disparate treatment case law but critiquing this approach and arguing for a standard that would recognize negligent discrimination).

can mean differential treatment without any reference to intent or cause, as well as differential treatment based on membership in a group.[252] For purposes of this project, it is not necessary to resolve which definition of discrimination is applicable, or the larger question of whether intent is required.

My point is much more basic. Where there *is* evidence of discriminatory bias, in the sense of prejudice against an individual based on a trait listed in the statute, it should inform whether a challenged action has been taken "because" of that trait. This is true even if the biased statements were not made in the specific context of the challenged decision. However, such evidence often falls into a gap between the various tests used to resolve such claims, and therefore is deemed of little importance, or even legally irrelevant.[253]

This problem arises from the decision tree used to resolve most employment discrimination claims. As a threshold matter, a court will determine whether a plaintiff has provided "direct" evidence of discrimination—i.e., an explicit statement by the decisionmaker that she relied on a protected trait or activity in making a decision.[254] If this evidence exists, the court does not apply *McDonnell Douglas* burden-shifting at all.[255] But cases with this kind of "smoking gun" evidence are, understandably, rare.[256]

Cases that lack direct evidence of discrimination are typically funneled through *McDonnell Douglas*.[257] The burden-shifting process will effectively identify one way to prove "differential" treatment—evidence that a similarly-situated comparator who does not share the relevant protected trait was treated differently. It also establishes the important principle that it is reasonable to infer that if an employer's proffered justification is untrue, it may well be covering up invidious

252. *Bostock*, 140 S. Ct. at 1740 (explaining that the word "discriminate" is typically defined to include both simply drawing a distinction, and the act or practice of drawing a distinction "categorically rather than individually" by quoting dictionary definitions encompassing both meanings without resolving which applies, but highlighting that the statute protects individuals rather than groups). Even the latter definition, focusing on differential treatment based on membership in a group, could encompass differential treatment caused by implicit or unconscious bias, as well as "intentional" bias.

253. *See infra* text accompanying notes 260–71.

254. *See, e.g.*, Young v. United Parcel Serv. Inc., 135 S. Ct. 1338, 1345 (2015).

255. *Id.*

256. *See, e.g.*, Zachary J. Strongin, *Fleeing the Rat's Nest: Title VII Jurisprudence After* Ortiz v. Werner Enterprises, Inc., 83 BROOK. L. REV. 725, 733 (2018).

257. *Young*, 135 S. Ct. at 1345.

bias.[258] But the test does not explicitly reference other ways that a plaintiff might prove discrimination. For example, it would *also* be reasonable to infer that if the relevant decisionmaker routinely uses epithets or slurs, or relies on stereotypical assumptions regarding a relevant trait, or has tolerated others doing so without signaling disapproval, that decisionmaker may hold bias that could infect an employment decision. This is likewise true if such bias is expressed by a supervisor or coworker whose assessment of the plaintiff helps spur the adverse action, even if that person is not the ultimate decisionmaker.[259]

Judges, however, have created a "stray remarks" doctrine, which holds that such biased statements are not only insufficient to constitute direct evidence, but also that they are irrelevant, as a matter of law, to assessing whether an employer's actions were discriminatory.[260] Thus, they are brushed aside in the context of summary judgment, and in cases that go to trial, they may be excluded from the jury's consideration entirely.[261]

Egregious examples abound. For example, in one case, the plaintiff alleged that in the months leading up to her termination, her supervisor repeatedly said she was "too Polish" and "too old."[262] The court held that these comments were not direct evidence because her supervisor did not make a comparable statement at the moment he fired her, and then they were held to have no relevance in assessing the legitimacy of the employer's claimed justification for its action under *McDonnell Douglas*.[263] In another case, an employee alleged his

258. *See* Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 147–48 (2000).

259. *Cf.* Staub v. Proctor Hosp., 562 U.S. 411, 418 (2011) (explaining the standard under which such bias by a subsidiary can give rise to a statutory violation). This problem, known as "cat's paw liability," is relatively common. The Supreme Court's only discussion of the issue arose under the statute prohibiting discrimination on the basis of military service, a statute which, like Title VII, includes explicit "motivating factor" language. This has given rise to confusion in the lower courts about how this doctrine interacts with causation doctrine. *See generally* Sandra F. Sperino, *Caught by the Cat's Paw*, 2019 BYU L. REV. 1219.

260. *See* Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 150 n.6 (2012) (collecting representative cases).

261. *See, e.g.*, Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 36 (1st Cir. 2001) ("[M]ere generalized 'stray remarks,' arguably probative of bias against a protected class, normally are not probative of pretext absent some discernible evidentiary basis for assessing their temporal and contextual relevance.") (emphasis omitted) (citations omitted).

262. Ptasznik v. St. Joseph Hosp., 464 F.3d 691, 695 (7th Cir. 2006).

263. *Id.* at 695–96.

supervisor had asked him "whether he had "a harem" or "rode camels around everywhere in Egypt," and repeatedly belittled him in front of coworkers and customers.[264] The comments were deemed to have "no connection to the decisional process," and thus characterized as irrelevant to the pretext analysis.[265] In a third case, multiple women complained about a male supervisor.[266] One alleged he commented on "all the female Barbie dolls" in the pharmaceutical industry, and suggested it was appropriate to "let the pretty girls go first."[267] She also said he called her the "pretty redheaded Lilly rep," and said doctors must love seeing her.[268] A second said he excluded her from a meeting with an important doctor because it was a "guys [sic] meeting."[269] The women, and a third co-plaintiff, alleged other ways in which they felt they were treated less favorably because of their sex, and, in some cases, their race as well.[270] The court, however, viewed each woman as largely isolated from the others, and held none had sufficient evidence to suggest discrimination.[271]

The stray remarks doctrine, as well as the formulation of the burden in the third step of *McDonnell Douglas* as proving *either* pretext *or* discriminatory intent, suggests that the two inquiries are unrelated. In fact, evidence of routinely biased comments by a supervisor should be grounds to question the credibility of a nominally legitimate nondiscriminatory rationale, particularly one that relies on subjective assessments of the plaintiff's work by the same decisionmaker. More generally, as Professor Kerri Lynn Stone has argued, this doctrine fails to comport with basic social science about how bias operates.[272] Nor is the problem limited to statutory antidiscrimination law; rather, as Professor Jessica Clarke shows, constitutional doctrine also often excludes statements of explicit bias.[273]

264. Elnashar v. Speedway SuperAmerica, LLC, 484 F.3d 1046, 1050 (8th Cir. 2007).

265. *Id.* at 1055.

266. Tourtellotte v. Eli Lilly, 636 F. App'x 831, 835 (3d Cir. 2016).

267. *Id.* at 835.

268. *Id.*

269. *Id.* at 838.

270. *Id.* at 835–39.

271. *Id.* at 842–46.

272. Stone, *supra* note 260, at 184–89.

273. *See generally* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 525–40 (2018).

These and similar critiques of the stray remarks doctrine are well-founded.[274] Here, too, there is a serious mismatch between the statute's mandate and *McDonnell Douglas.* Statements by a decision-maker expressing bias are obviously relevant to the statutory standard—i.e., whether an adverse action against a plaintiff was discriminatory. But it may be that at least part of the reason why courts routinely discount such evidence is that *McDonnell Douglas* burden-shifting never explicitly invites it.

The *McDonnell Douglas* test also fails to consider timing, outside of the retaliation context.[275] Close temporal proximity between an employer's learning of a protected trait that may not be generally evident (such as pregnancy, disability, or sexual orientation) and an adverse action could suggest that the adverse action happened "because of" the relevant trait. But the standard articulation of the *McDonnell Douglas* test used for status-based claims does not explicitly invite such analysis. Instead, under the stray remarks doctrine, courts generally deem discriminatory comments uttered even shortly before an adverse action to be too removed to be relevant to proving "pretext."[276] Professor Sandra Sperino highlights that this is part of a larger pattern of evidentiary inequality, in that courts will often consider evidence of employee misconduct even years earlier to be support for an employer's claimed legitimate justification.[277]

The Seventh and Eleventh Circuits developed an alternative to *McDonnell Douglas* that makes these gaps evident. Under this framework, typically used when a plaintiff cannot identify a comparator and thus cannot satisfy the prima facie case, courts assess whether the circumstantial evidence creates a "convincing mosaic" akin to "direct" evidence.[278] (The Seventh Circuit has since disclaimed the metaphor, but retained the basic idea.[279]) Courts typically identify

274. *See, e.g.*, SPERINO, *supra* note 25, at 209–13 (discussing additional critiques).

275. In the retaliation context, the standard articulation of *McDonnell Douglas* burden-shifting asks how soon the adverse action occurred after the plaintiff made a complaint or engaged in other protected conduct. *See, e.g.*, *id.* at 244–45.

276. *See* Sandra Sperino, *Evidentiary Inequality* (Jan. 28, 2021), https://ssrn.com/abstract=3775160 [https://perma.cc/QAK4-SFTZ].

277. *Id.*

278. *See, e.g.*, Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1327–38 (11th Cir. 2011) (applying the "convincing mosaic" standard after concluding plaintiff had failed to identify a sufficiently similar comparator); Rhodes v. Ill. Dep't of Transp., 359 F.3d 498, 504 (7th Cir. 2004).

279. *See infra* text accompanying note 345; *see also* Joll v. Valparaiso Cmty. Schs., 953 F.3d 923, 929 (7th Cir. 2020) (referencing these categories of evidence as relevant to assessing discrimination).

three categories of evidence that could help build the mosaic: (1) that similarly-situated persons were treated differently; (2) that an employer's rationale was pretextual; and (3) evidence of "suspicious timing, ambiguous statements . . . and other bits and pieces from which an inference of discriminatory intent might be drawn."[280] Notably, the only category that does not have a direct corollary in the standard *McDonnell Douglas* test is the third: suspicious timing, ambiguous statements, and other "bits and pieces from which an inference of intent might be drawn." Such evidence will often suggest an individual was subject to "discriminat[ion] against" her.[281] Refocusing on the operative language of the statute, rather than the judicially-created tests, helps make clear its salience.

III. INTEGRATING CAUSATION AND MCDONNELL DOUGLAS

Part I described the Supreme Court's careful consideration, based on relevant statutory language, of the causation standard that governs employment discrimination cases. It established that in most instances, a plaintiff is, at most, required to prove a protected trait or activity made a difference to the outcome. Under this standard, it should be irrelevant whether legitimate factors also played a role. Part II showed that *McDonnell Douglas*, by contrast, is premised on the (generally inaccurate) assumption that there will be only a single motive for a challenged decision, and that a plaintiff typically is expected to prove the employer's claimed rationale is false. These distinct approaches are difficult, if not impossible, to reconcile. This Part explains the tensions between them and argues that *McDonnell Douglas* and related judge-created doctrines must be clarified to conform to the statutory standard—or simply abandoned.

A. FALSE DICHOTOMIES

McDonnell Douglas is typically described as the appropriate method to use at summary judgment for what are known as "single-motive" cases that rely on "circumstantial" evidence.[282] A decision authored by Justice Gorsuch when he served on the Tenth Circuit highlights these limitations, in the context of arguing against exporting the test to a different statutory context:

280. *See* Lewis v. City of Union City, 934 F.3d 1169, 1185 (11th Cir. 2019) (en banc) (citing Silverman v. Bd. of Educ., 637 F.3d 729, 733–34 (7th Cir. 2011)).

281. 42 U.S.C. § 2000e-2.

282. Walton v. Powell, 821 F.3d 1204, 1211 (10th Cir. 2016).

> This court has expressly declined to employ *McDonnell Douglas* . . . in Title VII cases at or after trial because of the confusion and complexities its application can invite . . . . In the summary judgment context, too, where *McDonnell Douglas* is sometimes applied, it is *only* sometimes applied. We have used *McDonnell Douglas* in cases relying on circumstantial evidence but we will not use it in cases relying on direct evidence (and so have had to engage in the business of trying to police the often fine line between these kinds of evidence) . . . . And still then, in the narrow remaining class of (summary judgment, circumstantial-proof) cases, it may be that *McDonnell Douglas* is properly used only when the plaintiff alleges a "single" unlawful motive—and not "mixed motives"—lurking behind an adverse employment decision . . . .[283]

This exposition exposes the difficult, if not incoherent, distinctions the test calls on courts to make between "single-motive" and "mixed-motive" cases and between "circumstantial" and "direct" evidence. The deeper truth is that the embedded associations—of circumstantial evidence with "single-motive" cases and direct evidence with "mixed-motive" cases—are anachronistic relics of the way in which the doctrine developed. These are false dichotomies that should be repudiated in favor of a single standard based on the statutory language.

To understand why and how these associations developed, it is helpful to consider the historical context leading up to the watershed cases of *McDonnell Douglas* and *Price Waterhouse* in historical context. Prior to the enactment of Title VII, it was common—and, absent applicable state or local antidiscrimination law, legal—for employers to openly discriminate on the basis of race, sex, and other personal characteristics. Thus, for example, certain jobs were explicitly limited to white applicants,[284] or male applicants.[285] Even if an employer did not have a formal policy in place, decisionmakers could explicitly make decisions on the basis of these traits with impunity, or simply decline to provide any reason for a decision.[286]

Title VII made reliance on the protected traits illegal, aside from a limited exception for jobs in which an employer could prove that sex,

283. *Id.* at 1210–11 (citations omitted).

284. *E.g.*, Ruth G. Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REFORM 397, 409 (1979); *cf.* Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971) (describing race-based segregation of jobs at a power plant prior to Title VII's effective date).

285. *See, e.g.*, Nicholas Pedriana & Amanda Abraham, *Now You See Them, Now You Don't: The Legal Field and Newspaper Desegregation of Sex-Segregated Help Wanted Ads 1965–75*, 31 L. & SOC. INQUIRY 905, 906 (2006).

286. *See*, *e.g.*, Stephen G. Bullock, *The Focal Issue: Discriminatory Motivation or Adverse Impact*, 34 LA. L. REV. 572 (1974).

religion, or national origin was a "bona fide occupational qualification."[287] By outlawing overt discrimination, Title VII greatly expanded economic opportunity for previously disadvantaged groups. But it did not end discrimination. One problem was that facially neutral hiring criteria—such as educational requirements or aptitude tests—often had the effect of disadvantaging minority groups.[288] The Court held that such policies, even if not adopted with discriminatory intent, were illegal unless the employer could prove that they were job-related and a business necessity.[289]

Some employers continued intentional discrimination without admitting that they were doing so.[290] This was particularly easy if an employer never had to justify its actions. *McDonnell Douglas* addressed this latter problem: What would be required to establish a violation of the statute where there was no direct evidence of discriminatory intent, only circumstantial evidence? By requiring an employer to articulate a justification for its decision, and then acknowledging that a claimed justification could nonetheless be a pretext covering up discriminatory intent, *McDonnell Douglas* provided a framework for organizing and analyzing evidence in such cases.[291] Furthermore, it established that if an employer dissembled regarding its justifications, it was reasonable to infer that the real reason for an action was discriminatory bias.[292]

In *McDonnell Douglas*, the Court framed the company's refusal to rehire Percy Green as based on a *single* motive: either (as the company claimed) Percy Green's illegal activities *or* (as Percy Green claimed) his race.[293] In the Court's words, these were "opposing factual contentions," and the issue on remand would be which was better supported by the evidence.[294] As discussed below, this

287. 42 U.S.C. § 2000e-2(e). The bona fide occupational qualification (BFOQ) defense cannot be used to justify discrimination on the basis of race or color.

288. *E.g.*, *Griggs*, 401 U.S. at 428–31.

289. *Id.* at 436. *Griggs* was not very explicit about the textual basis of its holding, although the Court later signaled that it understood the holding to rest on section 703(a)(2). *See* Connecticut v. Teal, 457 U.S. 440, 445–49 (1982). In any event, Congress later ratified the disparate impact doctrine explicitly, so whether or not it initially had a firm basis in the text, it clearly does at this point. *See* 42 U.S.C. § 2000e-2(k).

290. *See, e.g.*, Teamsters v. United States, 431 U.S. 324 (1977) (concluding that company continued pre-Title VII practice of discriminating on the basis of race and national origin long after the Act took effect).

291. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 (1972).

292. *Id.* at 804.

293. *Id.* at 801.

294. *Id.*

characterization is flawed. It was almost certain that the company's refusal to rehire Green was based, at least in part, on his illegal activities, even if it may have also been based on his race.[295] That said, in the absence of any "direct" evidence of discrimination, it is at least conceptually coherent, even if empirically incorrect, to suggest a challenged decision is based on *either* nondiscriminatory criteria *or* a protected trait.

This is different when there is "direct" evidence that an employment decision is based on a protected trait or activity. Under a single-motive framework, such a decision would—by definition—be illegal, other than the limited exception addressed in the BFOQ defense.[296] However, as *Price Waterhouse* illustrated, in many cases, there will be "direct" evidence of discriminatory bias, but reason to think legitimate nondiscriminatory factors also played a role.[297] This reality came to be known as "mixed-motive" cases, as the existence of "direct" evidence made it impossible to pretend that a court's job was discerning a single motive for a challenged decision. The association was further bolstered by Justice O'Connor's concurrence (which many circuits treated as providing the necessary fifth vote and thus controlling),[298] as it suggested the burden would only shift to the employer to prove that it would have taken the same action anyway in instances in which there was "direct" evidence.[299]

Price Waterhouse also solidified the idea that *McDonnell Douglas*, as then recently interpreted in *Burdine*, was concerned with ferreting out a single, illicit motive. According to the *Price Waterhouse* plurality, adopting the standard burden-shifting process in a "mixed-motive" case would "insist that *Burdine*'s framework perform work it was never intended to perform," in that it would "require a plaintiff who challenges an adverse employment decision in which both legitimate and illegitimate considerations played a part to pretend that the decision . . . stemmed from a single source—for the premise of *Burdine* is that *either* a legitimate *or* illegitimate set of considerations led to the challenged decision."[300] Justice White similarly opined that *McDonnell*

295. *See infra* text accompanying notes 303–05.

296. 42 U.S.C. § 2000e-2(e).

297. Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989).

298. *See, e.g.*, Erickson v. Farmland Indus., Inc., 271 F.3d 718, 724 (8th Cir. 2001) (characterizing the rule as coming from Justice O'Connor's "controlling concurrence" in *Price Waterhouse*).

299. *See Price Waterhouse*, 490 U.S. at 275 (O'Connor, J., concurring).

300. *Id.* at 247.

Douglas burden-shifting would be inapposite in a case including mixed motives.[301]

But this premise is flawed. Although it's true that the Court in *McDonnell Douglas* referred to "opposing factual contentions,"[302] *McDonnell Douglas* was almost certainly *also* a mixed-motive case, albeit one that lacked any direct evidence of discrimination. It was undisputed that Percy Green had participated in illegal actions against the company.[303] And it was equally clear that the company was not categorically opposed to hiring Blacks, and that Green was qualified for the position, since the company had hired Green in the past.[304] Accordingly, it seems very likely that Green's participation in the protests was a factor in the company's refusal to rehire him. It was probably even a but-for cause: If he had not participated in the protests, he would have been rehired. But race may *also* have been a but-for cause of the decision. This was suggested by the fact that white employees who had participated in similar illegal activity were treated more favorably.[305] In other words, the evidence suggested there may have been two independent but-for causes of the challenged action.

As this example makes clear, even in cases that rely on circumstantial evidence to try to prove discrimination, the evidence will often suggest there are multiple motivations for an employment decision. In fact, *McDonnell Douglas* burden-shifting almost guarantees this will be the rule rather than the exception. A plaintiff's prima facie case, and whatever additional evidence the plaintiff introduces at the third step of the process, is evidence suggesting discrimination. And whatever evidence the employer introduces to support its claimed justification is evidence suggesting a non-discriminatory rationale for the decision. Thus, in virtually all cases, the evidence will suggest there are multiple—i.e., mixed—motives.

301. *Id.* at 260 (White, J., concurring).

302. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

303. *Id.* at 794.

304. *Id.* at 802.

305. Green argued that numerous white employees who had participated in union-organized strikes and picketing resulting in traffic slowdowns were treated more favorably than he was. The Supreme Court opined that this evidence could suggest racial discrimination if the acts were of "comparable seriousness." *McDonnell Douglas*, 411 U.S. at 804. On remand, the trial court made a factual conclusion that union members' actions were not "comparable." Green v. McDonnell Douglas Corp., 390 F. Supp. 501, 503 (E.D. Mo. 1975), *aff'd*, 528 F.2d 1102 (8th Cir. 1976). Nonetheless, the point remains that there was significant evidence from which a reasonable fact finder might have concluded racial animus played a role in the refusal to rehire Green.

Nonetheless, it is common, particularly since *Gross*, for courts to assert that "mixed motive" cases are not cognizable under the ADEA, ADA, or any other statute that requires a showing of but-for causation.[306] This is, quite simply, incorrect. It is imperative that the Court address this confusion.

B. REAL TENSION

The previous Section exposed false dichotomies underlying the assumption that cases decided under *McDonnell Douglas* include only a single motive. But decades of decisions characterizing the "pretext" stage as requiring a plaintiff to disprove the employer's claimed rationale make clear that, *as applied*, the test does require narrowing actions down to a single motive. Thus, the judge-made doctrine functionally requires a plaintiff to prove sole-causation, whereas the statutory language simply requires but-for causation.

Until recently, courts have failed to grapple with this disconnect. That began to change after *Gross* and *Nassar*, as lower courts deciding age discrimination and retaliation claims indicated they were unsure "where" but-for causation fits within *McDonnell Douglas*. In both contexts, some courts held but-for causation applies to the final element of the prima facie case, and some have located the requirement at the pretext stage.[307] Some have flagged confusion, but deemed it unnecessary to resolve to decide the case,[308] or mentioned both, but failed to substantively engage with how they interact.[309]

306. *See, e.g.*, Foster v. Univ. of Md. E. Shore, 787 F.3d 243, 249 (4th Cir. 2015) ("Clearly, *Nassar* significantly altered the causation standard for claims based on direct evidence of retaliatory animus by rejecting the 'mixed motive' theory of liability for retaliation claims."); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010) ("[A] plaintiff complaining of discriminatory discharge under the ADA must show that his or her employer would not have fired him but for his actual or perceived disability; proof of mixed motives will not suffice.").

307. *See, e.g.*, *Foster*, 787 F.3d at 251 n.10 (collecting cases demonstrating a circuit split on retaliation claims); *see also* SPERINO, *supra* note 25, at 245–50 (collecting cases demonstrating a circuit split on retaliation claims); Green v. Town of East Haven, 952 F.3d 394, 403 (2d Cir. 2020) (stating but-for cause applies in the prima facie case in the ADEA context); Willard v. Huntington Ford, Inc., 952 F.3d 795, 810 (6th Cir. 2020) (stating but-for causation applies at the pretext step).

308. *E.g.,* Heisler v. Nationwide Mut. Ins. Co., 931 F.3d 786, 794–95 (8th Cir. 2019). This case suggests, incorrectly, that but-for causation is actually a more stringent standard than *McDonnell Douglas*, but the court seems to be equating but-for causation to sole-causation.

309. *See, e.g.*, Zabala-De Jesus v. Sanofi-Aventis P.R., Inc., 959 F.3d 423, 428–29 (1st Cir. 2020); Hess v. Mid Hudson Valley StaffCo LLC, 776 F. App'x 36, 36–37 (2d Cir. 2019).

Bostock, however, demonstrates the issue is not simply "where" but-for causation fits. Rather, in clarifying the difference between but-for causation and sole causation, *Bostock* reveals the real question is whether the standard articulation of the pretext step can be reconciled with but-for causation at all.

An (unpublished) Ninth Circuit decision, issued just weeks after *Bostock*, highlights the issue and resolves it appropriately. First, the court relied on *Bostock* to emphasize that there can be multiple but-for causes of a decision, and that the evidence should be considered holistically.[310] The court drew a connection between this recognition and a level of flexibility in the pretext analysis, quoting earlier circuit precedent that "a plaintiff's burden to raise a triable issue of pretext is 'hardly an onerous one.'"[311] And then, since the facts suggested it was at least plausible that plaintiff's termination was retaliation for an earlier complaint, the court reversed the district court's grant of summary judgment.[312]

By contrast, the dissenting judge on the panel, who would have granted summary judgment, characterized the plaintiff's burden as an either-or proposition: "To win on a Title VII retaliation claim, employees must show that their engagement in protected activity—and not the employer's stated rationale—was the 'but-for' cause of their termination."[313] The dissent suggested *Bostock* was in tension with the Court's earlier causation decisions, such as *Nassar*.[314]

A Sixth Circuit case takes this flawed reasoning one step further, holding that *Bostock's* explication of the meaning of but-for cause—and the differences between but-for cause and sole cause—simply does not apply to the ADEA.[315] Quoting language from *Gross*, which stated that a plaintiff would need to prove "that age was *the* 'but-for' cause of a decision," the court held that *Bostock's* reasoning was limited to Title VII.[316] In other words, the court suggested, "because of" in Title VII means a plaintiff can win by showing a protected trait was *a* but-for cause of the decision, whereas "because of" in the ADEA requires a plaintiff to prove the protected trait was *the* but-for cause

310. Black v. Grant Cnty. Pub. Util. Dist., 820 F. App'x 547, 551–52 (9th Cir. 2020).

311. *Id.* at 551 (quoting Earl v. Nielson Media Rsch., Inc., 658 F.3d 1108, 1113 (9th Cir. 2011)).

312. *Black*, 820 F. App'x at 550–51.

313. *Id.* at 553 (Bumatay, J., dissenting) (emphasis added).

314. *Id.* at 554.

315. Pelcha v. MW Bancorp, Inc., 988 F.3d 318, 323–24 (6th Cir. 2021).

316. *Id.* at 323 (quoting Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177–78 (2009)) (emphasis added).

of the decision. This decision superseded the panel's original decision in the case, in which the court had said bluntly: "Under *Gross*, either a termination is motivated by age, or it wasn't."[317] Although the subsequent decision removed this sentence, it did not change its substance. In essence, the court articulated a standard that functionally required a plaintiff to prove age *was* the only cause of an adverse action. As Part I explains, this is simply incorrect. Although the Court in *Gross* used a definite article—"the"—when it should have used an indefinite article—"a"—it has long been established, both before and after *Gross*, that but-for cause is different from sole cause, and that there can be multiple but-for causes of an action or a decision.[318] That said, the confusion expressed by lower courts is not surprising, especially since common articulations of the "pretext" step suggest a plaintiff must disprove the rationale offered by the employer.

Since 2009, the Supreme Court has decided four cases by meticulously analyzing the causation standards under employment discrimination statutes.[319] But none of those decisions substantively engage with how to reconcile causation with *McDonnell Douglas*, beyond a passing statement in *Comcast* that *McDonnell Douglas* "arose in a context where but-for causation was the undisputed text."[320] In part, this reflects the procedural posture of the cases. *Gross* and *Nassar* were appeals from trial verdicts, and *Comcast* was an appeal from a motion to dismiss.[321] Even in *Babb* and *Bostock*, where the Court was reviewing decisions on summary judgment, the Court granted certiorari on narrow legal questions that did not raise directly how but-for causation relates to *McDonnell Douglas*.[322]

By clarifying that there can be multiple but-for causes for a decision, Bostock makes the tensions more apparent. This is why it is essential that the Supreme Court or circuit courts clarify that formulations of "pretext" that suggest a plaintiff must disprove the defendant's claimed rationale are incorrect, and also that under all of

317. Pelcha v. MC Bancorp., Inc., 984 F.3d 1199, 1205 (6th Cir. 2021), *superseded by Pelcha*, 988 F.3d 318.

318. *See supra* Parts I.A–C.

319. *See supra* text accompanying notes 72–78.

320. Comcast Corp. v. Nat'l Assoc. of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1019 (2020).

321. *Gross*, 557 U.S. at 170–71; Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 345 (2013); *Comcast Corp.*, 140 S. Ct. at 1013.

322. Babb v. Wilkie, 140 S. Ct. 1168, 1172 (2020); Bostock v. Clayton Cnty. 140 S. Ct. 1731, 1738 (2020).

the relevant employment discrimination statutes where but-for causation is applied, a plaintiff simply must prove a protected trait or activity was a but-for cause of the decision, not the only but-for cause of a decision.

Beyond the disconnect between but-for cause and common articulations of the pretext test, the *McDonnell Douglas* test—with its multiple distinct elements, disagreement about precisely what the various elements require, and the uncertainty about when it applies—creates unnecessary litigation at all levels of the courts. As early as 1979, the First Circuit observed that the "mechanics of the burden shifting in *McDonnell Douglas* . . . have caused no little difficulty among courts."[323] It is fair to say the situation has not improved.

C. "MIDDLE-DOWN" REFORM

Lower courts typically consider themselves to be bound to apply *McDonnell Douglas*, even if they find it unhelpful. A Tenth Circuit case illustrates this tension well. Judge Harris Hartz authored the panel decision, which employed *McDonnell Douglas*.[324] He also authored a separate opinion, which began: "I write separately to express my displeasure with the mode of analysis employed in the panel opinion (which I authored)."[325] In this separate opinion, he suggested *McDonnell Douglas* "only creates confusion" and "should be abandoned."[326] More typically, judges use concurrences[327] or law review articles to make such critiques, arguing that the test is inefficient, convoluted, and distracts courts from focusing on the real issue, which is whether a plaintiff can establish an action was based on illicit discrimination.[328]

323. Loeb v. Textron, Inc., 600 F.2d 1003, 1011 (1st Cir. 1979).

324. *See* Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1212 (10th Cir. 2003).

325. *Id.* at 1221.

326. *Id.*

327. *E.g.*, Nall v. BNSF Ry. Co., 917 F.3d 335, 350 (5th Cir. 2019) (Costa, J., concurring) (describing *McDonnell Douglas* as the "kudzu" of employment discrimination law, resistant to judicial efforts to curtail its spread); *see also* SPERINO, *supra* note 25, at 317–27 (collecting judicial criticism).

328. *See, e.g.*, Chin, *supra* note 218, at 677–78; Denny Chin & Jodi Golinsky, *Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 671–72 (1998); Timothy M. Tymkovich, *The Problem with Pretext*, 85 DENV. U. L. REV. 503, 519 (2008); *see also* Gertner, *supra* note 21(critiquing many of the subsidiary doctrines used in the doctrine).

Dissatisfaction with the test spans the ideological spectrum.[329] For example, before being named to the Supreme Court, Justices Kavanaugh and Gorsuch each wrote decisions highlighting the confusion caused by *McDonnell Douglas* and its disconnect from relevant statutory standards.[330] Similar criticisms have been made by prominent, liberal-leaning judges, including two frequently mentioned as leading candidates for a Supreme Court nomination by President Obama.[331]

Academic commentators have also long called for reform. In the 1990s, after the Court's series of decisions assessing the relevance of demonstrating pretext, Deborah Malamud wrote a comprehensive analysis of the doctrine as it stood then, and concluded it should no longer be used.[332] In the wake of *Desert Palace*, which held that plaintiffs could use either circumstantial or direct evidence under the motivating factor standard, many academic commentators argued (and expected) that the motivating factor standard would entirely replace *McDonnell Douglas*.[333] More recent scholarship continues to highlight problems with the standard,[334] as well as sub-doctrines such as the comparator requirement and the stray-remarks doctrine.[335]

329. All such critiques tend to emphasize the confusion and redundancies of the test. There is arguably more of an ideological split in the relevance that judges deem it appropriate to ascribe to establishing the employer's justification was pretextual if there is not additional evidence suggesting discriminatory intent.

330. *See supra* text accompanying notes 215 and 283. Judge Timothy Tymkovich, who authored a lengthy law review article critiquing the standard, was also on the list of potential nominees released by President Trump. See Tymkovich, *supra* note 328. *See Complete List of Donald Trump's Potential Nominees to the U.S. Supreme Court*, Ballotpedia, https://ballotpedia.org/Complete_list_of_Donald_Trump%27s_potential_nominees_to_the_U.S._Supreme_Court [https://perma.cc/4DXM-RRYS].

331. Judge Diane Wood, author of the *Coleman* concurrence discussed *infra* notes 340–52, and Judge Denny Chin, author of two law review articles criticizing the doctrine, see *supra* note 328, were each identified as potential Obama nominees. *E.g.*, Kristina Moore, *Nominee Analysis: Judge Diane Wood*, SCOTUSBLOG (May 20, 2009), https://www.scotusblog.com/2009/05/nominee-analysis-judge-diane-wood [https://perma.cc/U6C6-3KQC]; Jin Y. Hwang, *Time Is Right for an Asian Pacific American Supreme Court Nominee*, HILL (Feb. 19, 2016), https://thehill.com/blogs/congress-blog/judicial/269949-time-is-right-for-an-asian-pacific-american-supreme-court [https://perma.cc/2P4Q-6J7V] (suggesting Chin as a Supreme Court nominee).

332. *See* Malamud, *supra* note 25, at 2311–13.

333. *See, e.g.*, William R. Corbett, McDonnell Douglas, *1973–2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199 (2003); Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643 (2007).

334. *See generally* sources cites *supra* note 25.

335. *See generally* sources cited *supra* notes 180 and 260.

Statements by individual judges or academics (including the author of this Article) may identify problems and suggest solutions, but they do not on their own transform doctrine. That requires clearer directives from a court empowered to set policy for itself and courts lower than it in the hierarchy. In the federal system, the circuit courts have such authority, which I have termed "middle-down" reform. And the Seventh Circuit has endeavored to address the false dichotomies and confusion caused by *McDonnell Douglas*. Its efforts to clarify and simplify the analysis in discrimination cases highlight both the possibilities and limitations of reform at the circuit court—rather than the Supreme Court—level.

As discussed earlier, in the 1990s, the Seventh Circuit began employing a "convincing mosaic" approach as an alternative to *McDonnell Douglas*.[336] This directed courts to assess whether the circumstantial evidence as a whole created a "convincing mosaic" akin to "direct" evidence. While this approach could have plausibly been used in all cases, it was not. Instead, litigants and courts continued to prioritize *McDonnell Douglas*, but, if there was any question as to whether a comparator would be deemed acceptable, or whether evidence would be considered direct, multiple tests would be applied.[337] As is probably obvious, this meant that briefs and decisions were often very repetitive, with the same or similar evidence being plugged into the distinct tests, and sometimes repeated within the same test.

In 2012, in a case called *Coleman v. Donahoe*, the lead opinion went through all of the steps of *McDonnell Douglas* on sex and race discrimination claims,[338] and it employed the "convincing mosaic" approach to address a separate retaliation claim.[339] In the process, the court painstakingly corrected common errors regarding application of the comparator prong of the prima facie case, and the misconception that evidence used to establish the prima facie case could not be "re-used" for the pretext step.[340] None of the judges on the panel dissented, but all three judges, including the author of the lead opinion, signed onto a concurrence that criticized the "snarls and knots that the current methodologies used in discrimination cases of

336. *See supra* text accompanying notes 278–280.

337. *See, e.g.*, Coleman v. Donahoe, 667 F.3d 835 (7th Cir. 2012) (applying multiple different tests).

338. *See id*. at 845–59.

339. *See id.* at 859–62.

340. *See id.* at 846–52, 857–59.

all kinds have inflicted on courts and litigants alike."[341] It argued "the various tests that we insist lawyers use have lost their utility," and suggested that it was time to "collapse all these tests into one."[342]

After *Coleman*, shifting panels of Seventh Circuit judges engaged in a striking conversation—conducted through a series of appellate decisions—as to the merits of moving to a single, simple standard. All of the active judges expressed support for rejecting the distinction between direct and circumstantial evidence and the "convincing mosaic" metaphor.[343] Some also suggested discontinuing, or at least firmly discouraging, use of *McDonnell Douglas*, but others opined that it was binding Supreme Court precedent that they had no power to disclaim.[344]

A case called *Ortiz v. Werner Enterprises, Inc.* brought this discussion to an end.[345] The Seventh Circuit instructed lower courts to abandon the "convincing mosaic" approach, overruled several prior precedents suggesting that the distinction between "direct" and "indirect" evidence had salience, and instructed lower courts that they should determine "whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's [protected trait] caused the discharge or other adverse employment action" by considering the "[e]vidence . . . as a whole . . . ."[346] This wording properly focuses analysis on the *statutory* requirement, rather than judicially-created tests. Indeed, it is quite similar to the reform I suggest in Part IV.

However, *Ortiz* did not try to reconcile this statutory-based standard with *McDonnell Douglas* (which, for the reasons stated in the previous Section, would be difficult).[347] Rather, it simply stated that

341. *Id.* at 863 (Wood, J., concurring).

342. *Id.*

343. *See* Ortiz v. Werner Enter., Inc., 834 F.3d 760, 764 (7th Cir. 2016) ("During the last decade, every member of this court has disapproved both the multiple methods and the search for mosaics."). Because *Ortiz* overruled earlier panel decisions, it was circulated before release to all of the active justices in the circuit; none favored a hearing en banc. *Id.* at 767.

344. *Compare* Morgan v. SVT, LLC, 724 F.3d 990, 997 (7th Cir. 2013) ("The [more unified 'direct' method], it seems to us, should be the default rule."), *with* Orton-Bell v. Indiana, 759 F.3d 768, 773 (7th Cir. 2014) ("While all relevant direct *and* circumstantial evidence is considered (in its "totality") in *both* methods, we do indeed consider the 'direct' and 'indirect' methods separately when reviewing summary judgment because we are not 'authorized to abjure a framework that the Supreme Court has established.'").

345. *Ortiz*, 834 F.3d at 764–65.

346. *Id.* at 765.

347. Below I discuss ways in which lower courts, or the Supreme Court, could

its new standard "does not concern *McDonnell Douglas.*"[348] The result has been that it is now common practice for district courts in the Seventh Circuit, and the Seventh Circuit itself, to discuss both *McDonnell Douglas* and *Ortiz*. One recent Seventh Circuit decision forgoes *McDonnell Douglas* and only applies *Ortiz*,[349] but more typically the analysis focuses primarily on *McDonnell Douglas*, and *Ortiz* is treated as an afterthought.[350] Thus, the reform effort has been, at best, a partial success.

The D.C. Circuit provides another example of circuit court efforts to address the confusion caused by *McDonnell Douglas*. As discussed above, in 2008, it declared the prima facie case an "unnecessary sideshow" so long as the defendant has articulated a legitimate rationale for its actions.[351] The D.C. Circuit did not simply *permit* lower court judges to forego this step. Rather, it directly instructed them to discontinue using this portion of the test.[352] Review of D.C. Circuit case law suggests that lower courts heeded this instruction. In the Circuit, district courts no longer address the prima facie case, other than assessing whether a plaintiff can show she suffered an adverse employment action that meets the statutory standard.[353] This is only a partial solution to the problems identified in this Article, as it does not address the mismatch between the pretext stage and but-for causation. However, it does illustrate that lower courts, if clearly instructed, can and will change their practices. Moreover, the Supreme Court has not interceded to require the D.C. Circuit to once again consider the prima facie case.

clarify aspects of the burden-shifting process to better accord with the statutory language, but ultimately I suggest that the cleaner and better solution may be to simply overrule *McDonnell Douglas*. *See infra* text accompanying note 362 and Part III.D.

348. *Ortiz*, 834 F.3d at 766. ("Today's decision does not concern *McDonnell Douglas* . . . .").

349. *See* Joll v. Valparaiso Cmty. Schs., 953 F.3d 923, 929 (7th Cir. 2020).

350. *See, e.g.*, Marshall v. Ind. Dep't of Corr., 973 F.3d 789, 792–93 (7th Cir. 2020) (discussing in detail why the plaintiff failed to establish a prima facie case because proposed comparators were insufficient and then cursorily concluding that "considering all the evidence in a single *Ortiz* pile," plaintiff also failed to show discrimination); Reymore v. Marian Univ., No. 1:16-CV-00102-SEB-DML 2017 WL 4340352 (S.D. Ind. Sept. 29, 2017) (indicating the court "struggle[s] to reconcile the Seventh's Circuit's clear preference for a single, simplified approach . . . with the continued . . . applicability of . . . *McDonnell Douglas*" and ultimately just applies *McDonnell Douglas*).

351. Brady v. Off. of Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008).

352. *Id.*

353. *See* cases cited *supra* note 217.

These two examples suggest circuit courts, at least, have more flexibility than they seem to perceive. Even if circuits are uncomfortable abandoning *McDonnell Douglas* entirely, they could adopt the articulation of the prima facie case that simply requires a plaintiff to identify "circumstances giving rise to an inference of discrimination"[354] rather than requiring a comparator, or follow the D.C. Circuit's approach and skip the prima facie case entirely.[355] At the third stage of the test, they could clarify that "pretext" is a term of art, and disclaim precedents suggesting a plaintiff must prove the employer's rationale to be false, since this is inconsistent with but-for causation.[356] They could stop using the "stray remarks" doctrine, and instead simply apply standard rules of evidence.[357] They could also make clear that evidence of discriminatory bias should be considered together with evidence undermining the employer's claimed rationale.[358]

And they could completely reject the distinction between so-called "single-motive" cases and so-called "mixed-motive" cases.[359] *Bostock* and other Supreme Court cases make clear that "mixed-motive" claims are cognizable under both a but-for causation standard and a motivating factor causation standard; the only difference is how big a role the relevant trait or conduct must play in the decision.[360] Relatedly, they could reaffirm that there is no reason to distinguish between circumstantial evidence and direct evidence; any admissible evidence can be used to prove a case under either causal standard.[361] Any or all of these steps would be an improvement over current practice.

However, the fact that the Seventh Circuit was willing to suggest an alternative text-based standard but not disclaim *McDonnell Douglas*, and the fact that no circuit has adopted the D.C. Circuit's practice with respect to the prima facie case, suggest that without clear directives from the Supreme Court, many lower courts will feel bound to apply *McDonnell Douglas* burden-shifting. The Supreme Court could make the same reforms outlined above, while still

354. *See supra* text accompanying notes 205–206.
355. *See Brady*, 520 U.S. at 494.
356. *See supra* Part II.C.
357. *See supra* Part II.D; *see also* Sperino, *supra* note 276, at 57–61.
358. *See supra* Part II.D.
359. *See supra* Part III.A.
360. *See supra* Part I.D.1.
361. *See supra* Part I.D.2.

retaining the basic framework of *McDonnell Douglas* as a helpful mechanism for resolving at least some cases. This would be somewhat similar to harassment law, where the Supreme Court tried (with mixed success) to fashion a similar revision of prior doctrine.[362] However, *McDonnell Douglas* has a strong gravitational pull. Even if the Supreme Court were to reaffirm what the original case itself asserted—that is, that *McDonnell Douglas* offers *one* way, but not the only way to organize the evidence—it seems relatively likely that lower courts would continue to default to *McDonnell Douglas* as the preferred mechanism to resolve cases. This is essentially what has happened in the Seventh Circuit. But the Supreme Court also has a power that lower courts do not. It could simply instruct courts to no longer employ *McDonnell Douglas* burden-shifting.

D. STARE DECISIS AND ITS LIMITS

Calling for the Supreme Court to consider abandoning a case justifiably referred to as "the most important case" in employment discrimination law[363]—as well as a significant number of subsidiary precedents—is no small matter. Adherence with precedent is foundational to our judicial system. It helps ensure fairness, efficiency, and predictability in law.[364] It is also intended to promote impartiality, in that law is developed as a shared enterprise rather than according to the individual predilections of a particular judge. That said, as developed in the common law context, these values are balanced with the understanding that it is sometimes appropriate to modify past rules to reflect changing circumstances or more refined reasoning. In the statutory context, questions around updating or repudiating prior precedents are further complicated by the fact that courts are expounding on language enacted by a separate branch of government. Both courts and commentators often suggest that precedent in the statutory context should be subject to an enhanced or "super" stare decisis.[365] This is based on a premise that once a court has offered a

362. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753 (1998) (instructing lower courts to abandon the distinction between so-called "quid pro quo" and "hostile environment" claims in favor of simply examining whether a plaintiff has been subject to a tangible employment action).

363. *See* SPERINO, *supra* note 25.

364. *See generally* Widiss, *supra* note 45, at 867 n.26 (collecting sources discussing the theoretical rationales for adherence to precedent).

365. *See id.* at 867–71. That said, it is unclear whether *McDonnell Douglas* should be considered a statutory precedent. As Part II makes clear, it is not an interpretation of statutory language and it is not tied to a particular statute.

definitive interpretation of the language, Congress has the opportunity to respond if it disagrees. However, even in the statutory context, precedent is not set in stone.

The leading explication of when it is appropriate to overrule a statutory precedent is found in *Patterson v. McLean Credit Union* (itself an employment discrimination case).[366] In *Patterson*, the Court identified three factors that can justify overruling: (1) intervening development of the law has "removed or weakened the conceptual underpinnings from the prior decision . . . or [] the later law has rendered the decision irreconcilable with competing legal doctrines or policies;" (2) the precedent has proven confusing or unworkable; and (3) the precedent is "inconsistent with the sense of justice or with the social welfare."[367] The Court also sometimes suggests that precedents can be properly overruled simply on the grounds that they are demonstrably erroneous.[368]

In considering *McDonnell Douglas*, and the possibility of abandoning *McDonnell Douglas*, it may be helpful to distinguish *McDonnell Douglas* burden-shifting from *McDonnell Douglas* itself. That is, the original decision simply articulated a prima facie case of circumstantial evidence that could suggest discrimination, while also specifying that it would not necessarily be applicable in all factual scenarios, and suggested that a plaintiff should have an opportunity to show that an employer's claimed justification for an action was pretextual.[369] If *McDonnell Douglas* were simply cited for these propositions, it would be unproblematic. But *McDonnell Douglas* has come to mean something quite different: a convoluted and technical doctrine of functionally mandatory elements that has been created by courts based on close readings of the language of earlier decisions with minimal or no substantive anchoring in the statutory language itself. It is this technical paradigm, rather than the initial case, that is a good candidate for overruling.

As Sections III.A and III.B show, the development and clarification of causation doctrine—cases that are strictly grounded in the relevant statutory language, while *McDonnell Douglas* burden-shifting is not—has at least considerably weakened the underpinnings of *McDonnell*

366. 491 U.S. 164 (1989).

367. *Id.* at 173–74 (internal quotations omitted).

368. *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001) (describing critiques of this approach but ultimately concluding there may be some benefits to it as well).

369. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973).

Douglas burden-shifting. If the pretext stage is understood as requiring a plaintiff to show the employer's claimed justification is false, it is effectively a sole-cause standard, not a but-for cause standard, and thus irreconcilable with the statute. More expansive and flexible conceptions of pretext may not be strictly inconsistent, but they are definitely in tension with *Bostock* and similar cases. Where there is a tension between a statutory standard and a judicially-created doctrine implementing that standard, the separation of powers and the related concept of legislative supremacy mandates that the statutory law controls.

Second, as Part II and Section III.C show, fifty years of experience with *McDonnell Douglas* burden-shifting establishes that it is confusing, and arguably unworkable. There is no single consistent articulation of a "prima facie case," let alone all the sub-doctrines embedded in the prima facie case. Even where clear, the test is repetitive because many of the elements of the prima facie case are also relevant at the pretext stage. And since its requirements are not grounded in statutory language, a significant portion of briefs and decisions are devoted to issues that are (or at least should be) peripheral to whether a plaintiff can establish liability. This wastes judicial and litigant resources.

And third, *McDonnell Douglas* burden-shifting is outdated, arguably undermining modern senses of justice or social welfare.[370] To be sure, the test played an important role in early Title VII jurisprudence by clarifying that circumstantial evidence could be used to prove discriminatory bias, and that courts could probe the legitimacy of an employer's claimed justification for a challenged action. But the law, and workplaces, have changed dramatically in the half century since the decision was issued. As Professor Suzanne Goldberg has observed, the idea of a "comparator" made much more sense in (at least some) workplaces of the 1970s with "large, Tayloresque workplaces, where multiple workers engage[d] in tasks that [were] susceptible to relatively straightforward comparison."[371] In the modern workplace, hiring criteria and job responsibilities tend to be much more individualized, making it often extraordinarily difficult to identify relevant comparators who are deemed to be sufficiently similarly-situated.

The "protected class" language, and the idea of clearly identifying who is within or outside a protected class, is premised on a conception

370. *See Patterson*, 491 U.S. at 174.

371. Goldberg, *supra* note 180, at 755.

of fixed, stable racial, sexual, or other classifications that is increasingly anachronistic. For example, it is now common for individuals to claim multiracial identities, and they may shift their identities in different social contexts.[372] Likewise, in the 1970s, it would have been relatively straightforward to divide individuals into two groups on the basis of sex. Individuals now identify across a much more varied range of gender identities, including, at a minimum, men, women, transgender, and non-binary.[373] Moreover, the framework functionally assumes that discrimination will apply along a single identity trait—i.e., race *or* sex. The theory of intersectionality, as developed by Kimberlé Crenshaw and others, highlights that multiple facets frequently interact with identity to compound disadvantage.[374] Social science confirms intersectional discrimination is very real,[375] but courts have struggled to determine how to analyze such claims within the "protected class" framework.[376] If the statute itself included "protected class" language, courts would need to consider whether—and how—to apply such language to changing circumstances. But since the statute references individual traits rather than collective groups, refocusing on the language of the statute would address these problems.

IV. TEXT-BASED STANDARD

There is an easy and obvious solution to the problem identified in this Article. On summary judgment—as at the complaint stage, and at the jury charge stage—liability should be assessed with reference to the relevant statutory language. This Part proposes a text-based standard, discusses which aspects of existing case law developed under *McDonnell Douglas* would remain relevant under this standard, and then provides a detailed example to show how it would differ from existing practice.

372. *See, e.g.*, David R. Harris & Jeremiah Joseph Sim, *Who Is Multiracial? Assessing the Complexity of Lived Race*, 67 AM. SOCIO. REV. 614, 619 (2002) (finding that 12.4% of all youth provide inconsistent responses to questions regarding racial identity asked at school and at home).

373. *See, e.g.*, Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894 (2019).

374. *See generally* Crenshaw, *supra* note 198, at 144–51 (detailing the interplay between intersectionality and discrimination).

375. *See generally* Scheim & Bauer, *supra* note 7, at 226 (describing an intercategorical study of intersectional discrimination in "day-to-day" activities).

376. *Cf.* Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1049–51 (10th Cir. 2020) (discussing how the protected class should be defined in a "sex plus" age claim).

A. EXPLAINED

When ruling on a motion for summary judgment in a discrimination claim, a court should simply ask:

> Based on the totality of the evidence, could a reasonable factfinder conclude that it was more likely than not that the plaintiff was subject to an unlawful employment practice specified in the statute because of a protected trait or protected activity?[377]

Courts could use this standard to resolve so-called mixed motive claims, as well as so-called single motive claims. A court would consider all admissible evidence without needing to distinguish between direct or circumstantial evidence, nor between evidence based on "stereotypes" and other forms of evidence.

Some of the case law and agency guidance developed under *McDonnell Douglas* would retain significance, but only where tethered to the relevant statutory language. For example, courts would no longer use the "protected class" language; instead, they would simply assess whether a plaintiff could provide evidence of differential treatment based on one of the relevant protected traits. In most instances, the nature of the traits themselves is not at issue in a case. But courts could reasonably rely on earlier case law establishing, for example, that an individual who faces discrimination based on being a member of a Native American tribe can state a viable national origin discrimination claim,[378] or that an individual who faces discrimination because she is an atheist can state a viable religious discrimination claim.[379] While these decisions may have referenced the "protected class" language, they are functionally clarifying ambiguous statutory language and should retain salience under a statutory-focused standard.

This is likewise true of the case law regarding "adverse action," at least to some extent. The primary operative language at issue in most individual disparate treatment cases under Title VII, 703(a)(1), sets out particular unlawful practices, such as "discharge" or "[failure] to

377. This is phrased as a general standard that could be used under most employment discrimination statutes. However, courts would need to be careful to apply the appropriate standard for unlawful employment practices, recognizing that it varies based on the statute. *See supra* text accompanying notes 190–196. Likewise, under Title VII status-based claims, a plaintiff could ask that the court assess this under a motivating factor standard rather than a but-for standard. *See supra* Part I.C.

378. *See, e.g.*, Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 154 F.3d 1117, 1120 (9th Cir. 1998).

379. *See, e.g.*, Young v. Sw. Sav. & Loan Ass'n, 509 F.2d 140, 143 (5th Cir. 1975).

hire".[380] It also proscribes "discrimination with respect to the "terms, conditions, or privileges of employment."[381] When resolving whether specific practices—such as a transfer without loss of pay—meet this standard, courts could properly consider existing case law. However, they should do so with the recognition that this calls for interpretation of the relevant statutory language, not simply a free-floating judicial construct. Courts might be expected to consider whether the interpretation of that language in Title VII should be consistent with interpretations of the same or similar language in other statutory contexts, such as the National Labor Relations Act.[382]

This same statutory standard could be used to resolve harassment claims. Indeed, it helps make clear that harassing conduct is a form of disparate treatment. Under harassment law, an employee generally must show that she has, because of a protected trait, been subject to severe or pervasive conduct that is both objectively and subjectively offensive.[383] Courts often treat this standard as a judicially-created rule, but the initial articulation was grounded in the statute. The Supreme Court indicated that the severe or pervasive standard established when harassing conduct was serious enough to be considered "[discrimination] . . . with respect to [the] . . . terms, conditions, or privileges of employment."[384] Reintegrating harassment into disparate treatment claims would help make clear that if an employee is subject to epithets or biased comments or unwanted touching, and also to a termination or other workplace action more typically recognized as an adverse action, all of the evidence should be considered together. In other words, the harassing conduct could and should inform analysis of whether a reasonable factfinder could conclude the termination was because of a protected trait. This would be true regardless of whether a court concludes that the harassing conduct itself meets the (arguably unduly onerous) severe or pervasive standard.[385]

380. 42 U.S.C. § 2000e-2(a).

381. *Id.*

382. *See, e.g.*, SPERINO, *supra* note 25, at 113–14.

383. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998).

384. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63 (1986).

385. My focus in this article is the fundamental mismatch between *McDonnell Douglas* and the statutory language. Since the "severe or pervasive" standard was grounded in the statute, and the statutory language itself is ambiguous, I think it would be reasonable for courts to reference existing case law on what constitutes actionable harassment under the approach I propose. However, I would separately support judicial or legislative reform to make a broader range of harassing conduct actionable.

In most cases, the key question would be: has a plaintiff been discriminated against "because of" a protected trait or protected activity?[386] In general, this would be evaluated under a but-for standard: could a reasonable factfinder conclude that if the protected trait were different, or if the protected activity had not occurred, the outcome would have been different? The key point here is that, as *Bostock* and other earlier decisions make clear, the court engaging in this analysis should recognize that there can be—and often are—multiple but-for causes of an action and that Title VII and other employment discrimination statutes simply require that a protected trait or activity is *one* of the but-for causes of the action.[387] A plaintiff bringing a status-based claim under Title VII could also request that the court apply the "motivating factor" standard instead of the "but-for" standard. In that instance, a court assessing an employer's motion for summary judgment would simply assess whether, based on the totality of the evidence, a reasonable factfinder could conclude that a protected trait was at least a "motivating factor," without necessarily resolving whether it rose to the level of a but-for cause.

The various categories of evidence typically advanced to satisfy elements of the *McDonnell Douglas* burden-shifting process could still be considered, but litigants and courts would no longer be expected to squeeze them into the steps of the test or be categorically barred from proceeding if they lack one of the elements. That is, an employer moving for summary judgment would still generally provide evidence in support of a nondiscriminatory rationale for its actions. This could include evidence of the relative qualifications of applicants for a position, or that the employee engaged in workplace misconduct or was a poor performer. And a plaintiff, opposing such a motion, would still marshal evidence supporting her claim that a protected trait was one of the causes of an action. This could include evidence undermining the employer's claimed justification, such as evidence that a similar-situated employee who differed on the basis of the relevant trait was treated differently, including experiencing less punitive action after a similar infraction; that a person involved in the decision routinely used slurs or relied on stereotypes related to the trait; or that a supervisor's attitude to an employee changed when she learned about a relevant protected trait or activity.

As in any other context, evidence referenced in support of, or in opposition to, a summary judgment motion should be assessed for

386. *See supra* notes 37–39 and accompanying text.

387. *See supra* Parts I.D, III.A.

relevance and ultimate admissibility.[388] But courts would not need to employ any special evidentiary rules specifically because it is an employment discrimination case. That is, courts would not need to—and should not—distinguish between so-called "direct" evidence and "circumstantial" evidence, nor suggest that different legal standards apply based on the kind of evidence submitted.[389] Nor should courts suggest a plaintiff would need to satisfy a prima facie case with elements that are not found in the statute. Instead, a court would simply assess whether, based on the totality of the evidence (and resolving all genuinely disputed facts in favor of the non-movant), a factfinder could find that a requisite adverse action happened "because of" a protected trait or activity.

Some existing case law developed under *McDonnell Douglas* and its progeny might be properly referenced to help make such judgments, but always with an eye towards the relevant statutory standard, not the body of judge-made doctrine that imposes substantive requirements beyond what the statute itself requires. For example, if either party presents evidence of a comparator who was treated similarly or differently, a court might refer to earlier judicial decisions suggesting such evidence is more persuasive when the employees are in similar job positions or have committed infractions of similar magnitude.[390] But under this approach, comparator evidence would simply be *one* kind of evidence that *could* be considered, rather than—as it is now in many circuits—a prerequisite to advancing the claim at all.

The stray remarks doctrine should be abandoned entirely. Instead, courts would simply assess evidence of biased or stereotyped comments under regular evidentiary rules.[391] To be sure, there might be cases in which a few "stray remarks," even if assumed to have been truly uttered, would be insufficient to convince a reasonable factfinder that a termination or other adverse action was based on a protected trait or activity. This would be particularly likely if the employer could provide convincing evidence of a non-biased justification for the action. In such cases, summary judgment would be appropriately

388. *See* FED. R. CIV. P. 56(c) ("[A] party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular materials in the record."); FED. R. EVID. 401 (outlining that evidence is relevant if it tends to make a fact of consequence more or less probable than it would be without the evidence).

389. *See supra* Part I.D.2.

390. *See, e.g.*, Coleman v. Donahoe, 667 F.3d 835, 846–52 (7th Cir. 2012) (discussing factors that make comparator evidence more persuasive).

391. *See* Sperino, *supra* note 276, at 58–62 (proposing this approach).

granted. However, the evidence itself would still be weighed in the mix, rather than deemed legally irrelevant.

Most importantly, the case law on the significance of showing "pretext"—or, more precisely, the case law on the significance of *failing* to show "pretext"—should be reassessed. As described above, *McDonnell Douglas* and subsequent cases such as *Burdine, Hicks*, and *Reeves* concerned what inferences could reasonably be drawn from evidence establishing that an employer's claimed rationale for an action is not convincing. The Court ultimately held that in most cases, one plausible inference is that an employer fabricated an excuse to cover up unlawful bias.[392] This reasoning is not specific to *McDonnell Douglas*; under a statutory-based standard it is equally true that this would be a plausible inference to draw from a showing of pretext.[393] Thus, in most instances, if a court were considering a summary judgment motion and the evidence suggests a reasonable factfinder could conclude that the employer's justification was false, summary judgment should be denied, even if there was no additional evidence of discriminatory intent.

However, the corollary is not correct. Under a but-for causation standard, properly applied, it is irrelevant whether an employer's claimed justification is a "true" cause of a decision, so long as the evidence presented shows a protected trait or protected activity could *also* be a cause of the decision. Accordingly, courts should abandon the idea that failure to prove "pretext" means that a plaintiff cannot succeed in her claim.

B. APPLIED

To illustrate how this standard would operate, and how it differs from existing practice, it is helpful to flesh out the example presented in Part I of a pregnant employee who is fired shortly after making a workplace mistake. Let us call this employee Anne, and specify that she is an accountant. She is fired by her employer in December. After discovery, the employer moves for summary judgment on Anne's sex discrimination claim. The key facts include:

392. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147–49 (2000) ("[D]iscrimination may well be the most likely alternative explanation [to the employer's justifications,] especially since the employer is in the best position to put forth the actual reason for its decision.").

393. In this respect, I disagree with some criticism of *McDonnell Douglas*, which has argued that inference is unwarranted or that the focus on pretext is an improper distraction from assessing whether one of the causes of a challenged action was discriminatory bias. *Cf.* Tymkovich, *supra* note 328, at 522 (making this argument).

In July, five months prior to the termination, Anne informed her boss that she was pregnant with her second child. The next day, she was entering her boss's office and overheard him on the phone saying, "And now that she's pregnant again—." At that point, he saw her and abruptly stopped the conversation.

In August, four months prior to the termination, Anne's boss transferred three of her major accounts to different accountants.

In October, two months prior to the termination, Anne walked into the breakroom for lunch. One of her coworkers told her they were all just taking bets on whether Anne would come back after her parental leave, and asked her if she wanted to go in on the pool. Anne got very upset, and said of course she was coming back. Her coworker said, "That's what girls always say, but then they find out that two kids is more than twice the work." Anne's boss laughed along with everyone else.

In December, Anne made a mistake on a significant report. This was the first time she had made this kind of error. Unfortunately, it was sent to the client, who complained. Anne was fired. This was a few weeks before her baby was due.

There are two potential comparators. One is Beverly, a woman with no children. Beverly is an analyst rather than an accountant, but she also reports to Anne's boss. In the prior year, she made a serious mistake in a presentation to a client, but she caught the mistake herself and corrected it. She was not penalized. Indeed, her boss patted her on the back and said, "Everyone makes mistakes. As long as you learn from this, and don't make the same mistake again, you don't need to worry."

The second potential comparator is Caleb, a male accountant who also reported to the same boss. He was fired the year before for making a mistake similar to Anne's. Discovery reveals, however, that Caleb had made that kind of mistake repeatedly. Two months before his termination he had been put on a performance improvement plan and warned that if he continued to make errors, he would be terminated.

Under *McDonnell Douglas* and its progeny, the evidence in this case would likely be analyzed in several separate tests—"sliced and diced"—to use Professor Michael Zimmer's term.[394] As a first step, Anne would need to make out her prima facie case: that she was a "member of a protected class," that she was "qualified," that she was

394. Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 596 (2001).

subject to an "adverse action", and that a similarly-situated person outside her protected class was treated differently.[395] The first element is straightforward; she is a woman. Moreover, since Congress amended Title VII to specifically indicate that pregnancy is a form of sex discrimination,[396] pregnant women are often treated as a distinct "protected class."[397] Regarding the adverse action, the termination would clearly be sufficient, but the transfer of accounts would not be. She would probably be deemed "qualified," in that she meets the objective requirements for the position, but the employer might challenge that point since it asserts that she is being terminated for a serious workplace mistake.

If this were being litigated in a circuit that requires a comparator as part of the prima facie case, the parties would spend a significant portion of their briefs arguing whether Anne could meet this requirement. Anne would point to Beverly, whose mistake had been treated as a learning opportunity, rather than cause for termination. First, a court would need to resolve whether Beverly is "outside" Anne's "protected class." Although they are both women, pregnant women are considered a distinct protected class; thus, Anne would probably be held to satisfy this threshold requirement, but the parties would both likely feel they had to at least address it. The harder question would be whether they are similar in other relevant respects. The seriousness of their errors was similar, but Beverly caught the mistake herself, whereas Anne's was discovered by a client who complained. Also, they have the same supervisor but different job titles. Under existing case law, these factors might or might not be deemed dispositive, depending on how exact a similarity the relevant circuit requires.[398] Likewise, the company would claim it was treating

395. *See supra* Part II.B.

396. *See* 42 U.S.C. § 2000e(k).

397. *See, e.g.*, Asmo v. Keane, Inc., 471 F.3d 588, 592 (6th Cir. 2006) (quoting Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 658 (6th Cir. 2000) ("[P]regnancy discrimination under Title VII [requires showing] '(1) she was pregnant, (2) she was qualified for her job, (3) she was subjected to an adverse employment decision, and (4) there is a nexus between her pregnancy and the adverse employment decision.'").

398. *Compare, e.g.*, Coleman v. Donahoe, 667 F.3d 835, 846 (7th Cir. 2012) ("So long as the distinctions between the plaintiff and the proposed comparators are not 'so significant that they render the comparison effectively useless,' the similarly-situated requirement is satisfied.") (citation omitted), *with* Lewis v. City of Union City, Ga., 918 F.3d 1213, 1225–26 (11th Cir. 2019) (explicitly rejecting the Seventh Circuit's "effectively useless" standard on the ground that it "departs too dramatically from the essential sameness that is necessary" and adopting instead a requirement that the comparators are "similarly situated in all material respects").

Anne the same as Caleb, who was male, to help bolster its claim that it had *not* discriminated. This would lead to a dispute over the significance of the fact that this was Anne's first mistake of this kind, whereas Caleb had made similar errors repeatedly.

After having argued all of these points, both parties would likely conclude that it was at least possible that Anne could satisfy the prima facie case. Accordingly, they would work through the rest of the burden-shifting process. The employer would easily meet its burden of articulating a legitimate nondiscriminatory rationale: Anne made a serious mistake and a client complained.

At the pretext stage, Anne would not be able to satisfy the standard formulation, which would require her to prove that the claimed justification is "false."[399] It is not false. She made the mistake. Moreover, it is reasonable to believe that her mistake may have been a precipitating cause in her being fired. This section of the brief would repeat many of the arguments made above, in reference to the comparators, as the company tried to prove that it was simply enforcing a sex-neutral employment policy.

Since Anne would not be able to establish the employer's rationale was pretextual, she would try to assemble evidence that could persuade the court that the action was nonetheless motivated by a "discriminatory reason."[400] She would reference the incident in the breakroom, overhearing her boss on the phone sounding unhappy about her pregnancy, and the fact that her boss took away her key accounts soon after she announced her pregnancy. But all of this evidence would likely be brushed aside as "stray remarks"[401] that are insufficient to support a claim of discrimination. The phone call and the transfer of the accounts were several months before the termination. Moreover, while she heard her boss referencing her pregnancy in the phone call, the words she heard were not clearly biased. As far as the breakroom incident, her boss (the decisionmaker) did not even make the relevant statements. If Anne were to try to claim that the breakroom incident, on its own, constituted harassment, she would fail; a single incident of off-color joking would not be considered sufficiently "severe or pervasive."[402]

399. *See supra* Part II.C.

400. *See supra* Part II.D.

401. *See supra* note 260 and accompanying text.

402. *See generally* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–23 (1993) (specifying that courts should assess the frequency and severity of the conduct and whether it is physically threatening or humiliating, but that a "mere offensive utterance" will not meet the standard).

In other words, under *McDonnell Douglas* and related sub-doctrines, the court would almost certainly grant summary judgment to the employer. Anne would lose her case.

But should she? Looked at as a totality, the evidence shows that as soon as Anne told her boss about the pregnancy, he started to treat her differently. She overheard him on the phone sounding unhappy about the second pregnancy and he abruptly ended the call as soon as he saw her. Shortly afterward, he took away three of her most important accounts. He did nothing to stop her coworkers from speculating about whether she would come back from parental leave. Rather, he joined them in laughing at the idea that she would. And when she made a mistake—admittedly a true mistake—she was fired, right before she was due to go out on leave. While another accountant had been fired for a similar offense, he had already been put on a performance improvement plan, while this was Anne's first error of this kind. It seems relatively obvious that, when all of the admissible evidence is considered together, a reasonable factfinder could conclude that but-for her pregnancy, she would not have been fired. In other words, under a standard based on the statutory language, summary judgment should be denied.

Altering the facts, however, shows summary judgment would still be possible in many cases. On this version of the facts, assume this was *not* Anne's first mistake of this kind. Rather, assume she had made similar errors repeatedly. Then in June, before she announced her pregnancy, Anne was placed on a performance improvement plan and warned that if she made another serious error, she would be terminated. This was standard company policy; the same process was used with Caleb, ultimately leading to his termination.

On this alternative version of the facts, it would be reasonable for a judge to conclude that—even considering the evidence suggesting Anne's pregnancy concerned her supervisor—no reasonable jury could conclude that her pregnancy caused the termination. If she had not made the mistake, but still had been pregnant, she would not have been fired. Indeed, her boss's statement to Beverly (that what was important was that she learn from the mistake and not repeat it) actually *bolsters* the employer's claim that it is applying a policy evenhandedly. Employees are warned the first time they make a mistake of this kind, but if they continue to do so, they are put on a performance improvement plan and may be terminated.

Note that even under a motivating factor standard, at least partial summary judgment would be available on these alternative facts.

Under that standard, it would probably be appropriate for a judge to hold a reasonable factfinder could conclude her pregnancy was a "motivating factor"[403] in the termination. In other words, maybe her pregnancy, and her boss's concern that she would not come back from leave, played at least some role in his decision to fire her. Moreover, from a policy perspective, Anne's boss should be told that he should not take adverse actions against an employee because she is pregnant, and he should try to stop—rather than join in—a conversation suggesting pregnant women or new mothers are insufficiently committed to work. But this does not change the evidence discussed above that suggests a reasonable jury would also conclude she would have been fired anyway, even if she had not been pregnant.

On these facts, a judge might properly deny summary judgment on liability, but grant summary judgment on the same-action defense. As a practical matter, the case would then likely settle for a relatively low amount, as the basis for a significant share of money damages would disappear.[404] The employer would probably refuse to admit liability, but hopefully its in-house counsel would realize it should provide additional training on pregnancy discrimination. Thus, Title VII's larger remedial purposes would be advanced.

CONCLUSION

This Article exposes fundamental tensions between the judge-created burden-shifting process used to resolve most employment discrimination cases, and the prohibition on discrimination found in the statutes themselves. Under *McDonnell Douglas*, a plaintiff must first satisfy a prima facie case that includes elements with no grounding in the statutory language, and then show that an employer's claimed rationale for its actions is pretextual. The process is premised on a (generally erroneous) assumption that there will only be a *single* cause of a challenged act—either a legitimate non-discriminatory rationale *or* unlawful bias—and that shifting evidentiary burdens between the plaintiff and the defendant can ferret out the "true" reason for the employer's action.

The statutory language, however, simply requires a plaintiff to prove that a protected trait or protected activity was *one* of the causes of the employer's action. Under the statutory language, it should be

403. *See supra* Part I.C.

404. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (providing injunctive and declaratory relief and attorney's fees might be available but precluding recovery of back pay and most other economic damages).

irrelevant whether legitimate factors play a role in the decision, so long as a factfinder could conclude a proscribed factor made a difference in the outcome. Relatedly, under the statute, there is no reason—and no basis—to distinguish between so-called "mixed-motive" and so-called "single-motive" cases.

There is a simple solution to this problem. Courts should assess the evidence in discrimination cases according to the language Congress chose: can a plaintiff prove that an unlawful act happened "because of" a protected trait or protected activity? While *McDonnell Douglas* may once have been a helpful tool, it has developed in ways that undermine the transformative promise of antidiscrimination law. Discrimination should be defined, and proven, by the text.