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The Return of the Technical *McDonnell Douglas* Paradigm

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THE RETURN OF THE TECHNICAL *MCDONNELL DOUGLAS* PARADIGM

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Abstract: For many anti-discrimination plaintiffs, the *McDonnell Douglas* paradigm will determine the success or failure of their claims. And yet, for decades, most lower courts have applied a technical version of *McDonnell Douglas*—under which plaintiffs invariably lose. Thus, instead of asking the factual question of whether the defendant's action was "because of" protected class status, the lower courts rely on a host of technical rules to dismiss even factually strong anti-discrimination claims.

This is not the first time the lower courts have attempted to adopt a technical version of the *McDonnell Douglas* paradigm. In the 1970s and 1980s, the lower courts applied similar technical rules—but to the disadvantage of discrimination *defendants*, not plaintiffs. Across a series of cases, the United States Supreme Court rejected these technical rules, reasoning that it is ultimately the factual question of discrimination that must control. Thus, the Supreme Court has already determined that it is the factual question of discrimination—rather than any technical rules engrafted by the lower courts on *McDonnell Douglas*—that must be dispositive in a discrimination case.

This history should have profound implications for the practice of anti-discrimination law today. The lower courts' technical approach to the *McDonnell Douglas* paradigm represents one of the most significant and pervasive obstacles to contemporary anti-discrimination enforcement. And yet, it is plainly inconsistent with the Supreme Court's existing case law. Remembering this history—and recognizing its significance—offers one of the most realistic opportunities for systematic anti-discrimination reform today.

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INTRODUCTION

The *McDonnell Douglas* paradigm is ubiquitous in modern anti-discrimination law. In the employment discrimination arena, more than 90% of cases exclusively raise claims of individual disparate treatment—and the *McDonnell Douglas* burden-shifting paradigm is the predominant way of proving such claims.[1] Areas such as housing discrimination, public accommodations discrimination, discrimination in government programs, and even Equal Protection claims are also often evaluated by the lower courts via the *McDonnell Douglas* paradigm.[2] Thus, the paradigm's familiar three-step approach—prima facie case, "legitimate, nondiscriminatory reason," pretext/ultimate issue of discrimination—pervades virtually every corner of anti-discrimination law.[3] If the *McDonnell Douglas* paradigm is broken, anti-discrimination law itself is in trouble.

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1. *See* ELLEN BERREY, ET AL., RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION PERPETUATES INEQUALITY 57–58 (2017); Michael J. Hayes, *That Pernicious Pop-up, the Prima Facie Case*, 39 SUFFOLK U. L. REV. 343, 343 (2006); *see also* Jessica Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 102 (2017).

2. *See, e.g.*, Rashdan v. Geissberger, 764 F.3d 1179, 1182 (9th Cir. 2014) (Title VI, federally funded programs); Lindsay v. Yates, 578 F.3d 407, 414 n.7 (6th Cir. 2009) (housing under the FHA); Fahim v. Marriott Hotel Services, 551 F.3d 344, 349–50 (5th Cir. 2008) (public accommodations under Title II); Harper v. Madison Metropolitan School Dist. 110 F. App'x 684, 686–87 (7th Cir. 2004) (Equal Protection claims).

3. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–05 (1972). For a more extensive discussion of the steps of the *McDonnell Douglas* paradigm and how they operate, see *infra* Part I.

And indeed, scholars have argued for years that the *McDonnell Douglas* paradigm has become deeply flawed.[4] Relying on a hyper-technical version of the *McDonnell Douglas* paradigm, the lower courts[5] routinely refuse to allow discrimination cases to reach a jury.[6] Such analyses rarely focus on the factual question of whether or not discrimination occurred, substituting technical rules for fair consideration of whether discrimination took place (or whether a reasonable jury could so conclude).[7] Although the *McDonnell Douglas* paradigm is supposed to be a *procedural* vehicle—intended merely to assist the fact-finder in answering the *factual* question of discrimination—its associated legal rules are treated instead as a substantive basis to dismiss claims.[8] Through this case-by-case application of the technical *McDonnell Douglas*

4. *See, e.g.*, SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 116–23 (2017) (describing the variety of problems with how the *McDonnell Douglas* test is applied, including the fact that it "may be used to dismiss" plaintiffs' claims via a variety of technical rules); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 752–53, 761 (1995); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2280–81, 2301 (1995); Marcia L. McCormick, *The Allure and Danger of Practicing Law as Taxonomy*, 58 ARK. L. REV. 159, 160–61, 180–85 (2005); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 229–30 (1993); Steven R. Semler, 32 HOFSTRA LAB. & EMP. L.J. 49, 49–51, 82–85 (2014); *see also infra* notes 13 & 57–66; *see generally* SANDRA F. SPERINO, *MCDONNELL DOUGLAS*: THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW 321–22 (2018) (collecting critiques).

5. Not all lower court judges take this type of technical approach. Indeed, some lower court judges—both liberal and conservative—have offered strong critiques of the application of the *McDonnell Douglas* paradigm in this fashion or, more fundamentally, of the paradigm itself. *See, e.g.*, Walton v. Powell, 821 F.3d 1204, 1210–12, 1214 (10th Cir. 2016); Coleman v. Doahoe, 667 F.3d 835, 862–63 (7th Cir. 2012) (Wood, J., concurring); Deny Chin & Jodi Golinsky, *Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 53 BROOK. L. REV. 659, 621–22, 672 (1998); Hon. David F. Hamilton, *Address to the AALS Section on Employment Discrimination Law*, 17 EMP. RTS. & EMP. POL'Y J. 195, 197–98 (2013); Hon. Timothy M. Tymkovich, *The Problem with Pretext*, 85 DENV. U. L. REV. 503, 522, 528–29 (2008). Nevertheless, it remains a common approach in the lower courts. *See supra* note 4; *infra* note 67. When I refer to the "lower courts" herein, I am referring to the general trend in the lower courts, rather than claiming that every lower court judge adheres to a technical rigid approach to the *McDonnell Douglas* paradigm—some do not.

6. *See* sources cited *supra* note 4; *infra* note 10; *infra* notes 57–67 (describing the difficulties *McDonnell Douglas* plaintiffs face in getting to a jury); *see also* Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577 (2001) (discussing "slicing and dicing" of discrimination claims).

7. *See* sources cited *supra* notes 4–5; *see also* SPERINO, *supra* note 4, at 320–21 (describing one federal judge's critique of the application of *McDonnell Douglas* as having become focused on technical rules rather than on the ultimate question of discrimination).

8. *See* sources cited *supra* note 7; *see also* Malamud, *supra* note 4, at 2273–74; Semler, *supra* note 4, at 87–88.

paradigm,[9] the lower courts have effectuated a quiet revolution in anti-discrimination law, rendering it very difficult for victims of discrimination to seek relief.[10]

Unlike a high-profile United States Supreme Court decision, this quiet revolution has not resulted in extensive media coverage nor in successful calls for a Congressional override.[11] The myriad legal rules that comprise the technical *McDonnell Douglas* paradigm—rigid formulations of the prima facie case, demands for "nearly identical" comparators, doctrines like the stray remarks doctrine, honest good faith belief rule, and others—are not headline-grabbing and largely have not permeated the public consciousness.[12] And while scholars have recognized the problem, most of the solutions they have suggested, including abandonment of the *McDonnell Douglas* paradigm, do not appear imminent.[13] Thus, even as the application of technical legal rules via the *McDonnell Douglas*

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9. I use the term "the technical *McDonnell Douglas* paradigm" throughout this piece to signify judicial approaches that permit the legal rules engrafted on the *McDonnell Douglas* paradigm to supersede the factual question of whether disparate treatment took place. So understood, one critique of the argument herein (that such approaches must be rejected) might be that it renders the *McDonnell Douglas* paradigm essentially irrelevant, since its rules may never supersede the factual question of discrimination.

This is accurate. But it is the Supreme Court that has held (in the context of defendants) that the factual question of discrimination must at all times remain dispositive in a *McDonnell Douglas* case, regardless of the its legal framework. Thus, if there is an objection to the treatment of the *McDonnell Douglas* paradigm as mere window dressing, it is one that arises from the Supreme Court's existing reasoning, not the even-handed application of that reasoning to defendants and plaintiffs alike.

10. *See* sources cited *supra* note 4; *infra* note 55; *see generally* Katie Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1276–77 (2012) (describing the very low litigation success rates of discrimination plaintiffs generally).

11. *Cf.* McGinley, *supra* note 4, at 203–06 (contrasting the lack of public attention to the misuse of summary judgment—a problem Professor McGinley presciently attributed to misapplication of the *McDonnell Douglas* paradigm—with the substantial attention paid to certain Congressionally overridden Supreme Court decisions).

12. The doctrines listed here are just a few examples of the wide variety of technical legal rules that the lower courts apply. See Part I, *infra* for a more extensive discussion.

13. Professor Sandra Sperino has been among the most long-standing and thoughtful critics of the operation of the *McDonnell Douglas* paradigm, suggesting a variety of ways to eliminate or limit its harmful effects on anti-discrimination law. *See, e.g.*, SPERINO, *supra* note 4, at 332–34; Sandra Sperino, *Beyond McDonnell Douglas*, 34 BERKELEY J. EMP. & LAB. L. 257, 270–71 (2013); Sandra Sperino, *Flying Without a Statutory Basis: Why McDonnell Douglas is Not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743, 801–05 (2006); Sandra Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 87–90, 115–24 (2011). My argument herein offers a new angle on an old problem but should be seen as fully consonant with the prior work of Sperino and other scholars and judges calling for the paradigm's abandonment or limitation. For other scholars and judges calling for the paradigm's abandonment, see, for example, Coleman v. Donahoe, 667 F.3d 835, 862–863 (7th Cir. 2012) (Wood, J., concurring); Chin & Golinsky, *supra* note 5, at 672; Davis, *supra* note 4, at 761; Malamud, *supra* note 4, at 2236–38, 2317–20; McCormick, *supra* note 4, at 191; Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371, 398 (1997); Tymkovich, *supra* note 5, at 528–29.

paradigm continues to widely disadvantage discrimination plaintiffs in the lower courts, it is far from clear that a solution is at hand.

This Article suggests that a solution to this common problem exists—and indeed has been hiding in plain sight in the history of the Supreme Court's *McDonnell Douglas* jurisprudence. This is not the first time that the lower courts have attempted to impose technical legal rules under the rubric of the *McDonnell Douglas* paradigm.[14] And, the Supreme Court amply considered—and rejected—such a technical approach.[15] Ultimately, the Supreme Court made clear across a series of cases that it is the factual question of discrimination that must control the outcome of *McDonnell Douglas* cases, rather than any technical rules the lower courts may adopt.[16] Under the Supreme Court's doctrine, the *McDonnell Douglas* paradigm is simply a "procedural device"—one which may aid in considering the factual question of discrimination, but that does not (and cannot) supplant the fundamentally factual question that the federal anti-discrimination laws ask.[17]

Of course, the lower courts' first attempt to impose technical rules via *McDonnell Douglas* largely burdened discrimination defendants, not discrimination plaintiffs.[18] Unlike today, where it is *plaintiffs* whose factually viable claims are rejected based on technical legal rules, discrimination *defendants* were historically the party that saw their factual arguments subordinated to technical legal rules. Perhaps for this reason, the Supreme Court's decisions rejecting the first "technical *McDonnell Douglas* paradigm" have not been generally treated as relevant to the contemporary problem of plaintiff-disadvantaging technical *McDonnell Douglas* approaches.[19] But examination of the history of these earlier cases demonstrates that the Supreme Court considered virtually identical arguments, in the context of very similar technical rules, and decided decisively in favor of a factually (not technically) focused *McDonnell Douglas* approach.[20]

This insight should have profound implications for the practice of anti-discrimination law today. Taking seriously the history of the first technical *McDonnell Douglas* paradigm—and the rationales on which it

14. *See infra* Part II.

15. *See infra* Part II.

16. *See infra* Part II.

17. *See* St. Mary's Honor v. Hicks, 509 U.S. 502, 518–21 (1993).

18. *Id.*

19. *See generally* sources cited *supra* note 4 (not extensively focusing on the Supreme Court's prior *McDonnell Douglas* jurisprudence as foreclosing the lower courts' technical anti-plaintiff rules).

20. *See infra* Part II.

was rejected—broad swaths of the plaintiff-unfavorable doctrine in the lower courts ought to be deemed illegitimate.[21] Moreover, rather than fighting against an endless succession of technical—and individually seemingly trivial—judicial moves, discrimination plaintiffs can (and should) focus their attention on the categorical illegitimacy of the technical *McDonnell Douglas* paradigm.[22] Instead of technical rules, the outcome of each *McDonnell Douglas* case should ultimately turn on a factual question: whether the plaintiff was subjected to discrimination (or, in the case of summary judgment, whether a reasonable jury could so conclude).

The time is ripe for this type of major rethinking of the *McDonnell Douglas* paradigm. As scholars such as Professor Sandra Sperino have pointed out, critiques of the technical aspects of the *McDonnell Douglas* paradigm are already extant among some lower court judges.[23] Indeed, a few circuits have already adopted alternatives designed to ensure that ultimately the factual question of discrimination is not lost.[24] Therefore, some lower court case law already embraces the perspective that the technical *McDonnell Douglas* is problematic—and may offer models for how to practically ensure that the factual question of discrimination remains dispositive.[25]

Eliminating the lower courts' technical approach to the *McDonnell Douglas* paradigm would not remove all of the many obstacles that exist to anti-discrimination enforcement.[26] But such a move could nevertheless have a substantial impact on plaintiffs' ability to successfully bring anti-discrimination claims. Currently, an immense number of discrimination cases are dismissed by judges at summary judgment based on the application of technical rules associated with the *McDonnell Douglas* paradigm.[27] Such judgments are justified by technical legal rules that have little relationship to the factual question of whether discrimination actually took place.[28] While some such cases would not survive summary

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21. *See infra* Part III.

22. *See infra* Part III.

23. *See* SPERINO, *supra* note 4, at 317–21.

24. *Id.* at 330–32.

25. *Id.* Note also, however, that experience with these lower court approaches also suggests how "sticky" technical *McDonnell Douglas* rules can be, carrying over even to frameworks nominally adopted to correct for the courts' inappropriately technical focus under *McDonnell Douglas*. *See infra* notes 267–269 and accompanying text.

26. As the extensive literature on this subject confirms, there are many other potential barriers to discrimination plaintiffs' success. For my prior work on other obstacles that employment discrimination attorneys may face, see, for example, Eyer, *supra* note 10, at 1276–79.

27. *See* sources cited *infra* note 55.

28. *See infra* Part I.

judgment even if the technical *McDonnell Douglas* paradigm were eliminated, others surely would.[29] And, given the very large number of plaintiffs adversely affected by the lower courts' technical approach to the *McDonnell Douglas* paradigm, even a modest change in how judges decided dispositive motions could meaningfully affect civil rights enforcement.[30]

Moreover, eliminating the technical *McDonnell Douglas* paradigm would also increase transparency in ways that could promote more profound shifts in anti-discrimination advocacy and attitudes. Currently, the technical *McDonnell Douglas* paradigm serves to obscure the courts' pervasive defendant-favorable normative judgments by hiding what is a fundamentally value-laden judgment—that no reasonable jury could conclude that discrimination took place—behind a series of technical moves.[31] This technical façade makes it enormously challenging to mobilize the moral concern necessary to shift public and judicial perceptions about (non-)existence of discrimination and the inadequacy of legal remedies to address it. Addressing the technical *McDonnell Douglas* paradigm would make plain the normative choices that courts are making and thus aid in the broader (and fundamentally more important) project of shifting public and judicial views regarding the adequacy of anti-discrimination enforcement today.[32] In short, while eliminating the technical *McDonnell Douglas* paradigm would not eradicate all of anti-discrimination law's limitations, it would mark an important step toward meaningful reform.

The foregoing issues are addressed by this Article in three Parts. Part I introduces the reader to the *McDonnell Douglas* paradigm and explains why its technical application has rendered it a central obstacle to the effective implementation of anti-discrimination law today. Part II turns to the prior defendant-disadvantaging version of the technical *McDonnell Douglas* paradigm and its consideration by the Supreme Court. As this Part describes, in this context the Supreme Court fully considered—and rejected—the rationales that undergird the revival of the modern technical *McDonnell Douglas*. Finally, Part III describes the implications of this history and suggests that taking seriously the denouement of the first

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29. For several examples, see, for example, the cases discussed *infra* notes 77–89 and accompanying text.

30. *See supra* note 1 and accompanying text.

31. *See supra* Part I.

32. Shifting such views is obviously critical to successful policy reform—but there are reasons to think that it may also be important to individual case outcomes. *Cf.* Eyer, *supra* note 10, at 1315–17 (describing how background beliefs about the commonality of discrimination can affect perceptions of the likelihood of discrimination in individual cases).

technical *McDonnell Douglas* paradigm may hold the key to one of the most important opportunities for contemporary anti-discrimination reform.

I. THE TECHNICAL *MCDONNELL DOUGLAS* PARADIGM AND THE FAILINGS OF MODERN ANTI-DISCRIMINATION LAW

When the *McDonnell Douglas* paradigm was first adopted in the eponymous case of *McDonnell Douglas Corp. v. Green*,[33] it was not immediately clear how ubiquitous—and problematic—it would eventually prove for anti-discrimination law. As one of the first Title VII cases to address an individual disparate treatment claim, *McDonnell Douglas* articulated the now-familiar three-step burden-shifting framework through which most modern disparate treatment plaintiffs bring their claims.

First, the plaintiff has to prove a simple "prima facie case," which the *McDonnell Douglas* Court held could be done by showing "(i) that [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [the plaintiff's] qualifications."[34]

Next, the defendant comes forward with a "legitimate, nondiscriminatory reason" (LNDR), for instance, a reason that is not discrimination for the adverse employment action.[35]

And finally, the Plaintiff must be given the opportunity to show that the

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33. 411 U.S. 792 (1973).

34. *McDonnell Douglas*, 411 U.S. at 802. This formulation of the prima facie case could not possibly apply in all discrimination cases, since it is, for example, facially inapplicable to firing cases. All of the circuits have recognized this, though they have responded differently. Some circuits have adopted different versions of the prima facie case for different contexts, while others have articulated a generalized version of the prima facie case. *Compare* Muhammed v. Sills Cummis & Gross, P.C., 621 F. App'x 96, 99–100 (3d Cir. 2015) (providing specific—and different—requirements for plaintiffs seeking to prove a prima facie case in the termination and reduction in force contexts), *with* Vega v. Hempstead Union Free School Dist., 801 F.3d 72, 83 (2d Cir. 2015) (stating the prima facie case in general terms as requiring a showing that the plaintiff (i) belongs to a protected class; (ii) is qualified; (iii) was subjected to an adverse employment action; and (iv) under circumstances that give rise to an inference of discrimination). As noted *infra*, some courts apply their circuit's particular formulations of the prima facie case rigidly, as if they set out the legal elements of a discrimination claim and will dismiss cases based on a failure to meet the specific requirements stated in circuit case law. *See infra* note 57 and accompanying text.

35. *McDonnell Douglas*, 411 U.S. at 802–03. Later cases have made clear that this reason need not be truly "legitimate"—it can be illegal, and even discriminatory, so long as it is not the specific type of discrimination alleged by the plaintiff. *See* Hazen Paper Co. v. Biggens, 507 U.S. 604, 611–12 (1993) (acknowledging that language in *McDonnell Douglas* can be taken to mean that the employer must produce a truly "legitimate" reason at Step Two, for example, one that at a minimum is not illegal, but finding that this reading "is obviously incorrect").

Defendant's reason was pretextual (i.e., false) and that the real reason was discrimination.[36]

As we approach the fifty-year anniversary of the doctrine, the *McDonnell Douglas* paradigm has been aptly described by Professor Sandra Sperino as "the Most Important Case in Employment Discrimination Law."[37] A tremendous number of plaintiffs bring their claims via the *McDonnell Douglas* paradigm—more than via any other anti-discrimination paradigm.[38] Reflecting its outsized dominance, *McDonnell Douglas* is the thirteenth most cited Supreme Court case *of all time*—cited 58,073 times in subsequent cases.[39] (In contrast, *Griggs v. Duke Power Co.*,[40] the foundational case for disparate impact doctrine, has been cited a mere 3,400 times in subsequent case law.)[41] Many administrative civil rights agencies also rely on the *McDonnell Douglas* paradigm to adjudicate claims, further expanding the reach of its influence.[42]

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36. *McDonnell Douglas*, 411 U.S. at 802–05. The courts' use of the term "pretext" has been inconsistent over the years, with the courts sometimes using the term to mean essentially all evidence of discrimination and at other times using the term to mean only "falsity" of the employer's LNDR. *Compare McDonnell Douglas*, 411 U.S. at 804–05 (apparently using the term to connote all evidence of discrimination), *with* St. Mary's Honor v. Hicks, 509 U.S. 502, 510–11 (1993) (treating pretext as connoting only the falsity of the employer's reason). At this juncture, the Supreme Court's decisions have made clear that it views the term "pretext" as connoting "falsity"—which, the Court has held, is sufficient to prove discrimination but does not require a finding of discrimination. *See St. Mary's Honor*, 509 U.S. at 510–11; Reeves v. Sanderson Plumbing, 530 U.S. 133, 146–47 (2000). The Court has also made clear that it is discrimination, rather than pretext, that is the plaintiff's required showing at Step Three—although, as described *infra*, some courts continue to erroneously impose on plaintiff's a requirement that the plaintiff show pretext in the sense of falsity. *See St. Mary's Honor*, 509 U.S. at 510–11; *see also infra* note 58 and accompanying text. I use the term "pretext" herein as the Supreme Court has clarified its usage today—to connote proof of falsity of the employer's LNDR.

37. *See generally* SPERINO, *supra* note 4.

38. *See* sources cited *supra* note 1.

39. See Westlaw citing references for *McDonnell Douglas Corp. v. Green.* 411 U.S. 792 (1972) (current as of Jan. 25, 2019). *See also* Lauren Mattiuzzo, *Most Cited U.S. Supreme Court Cases in Hein Online*: *Part III*, https://home.heinonline.org/blog/2018/09/most-cited-u-s-supreme-court-cases-in-heinonline-part-iii/ [https://perma.cc/9WHJ-GHPA] (as of 2018, listing *McDonnell Douglas Corp. v. Green* as the thirteenth most cited Supreme Court case).

40. 401 U.S. 424 (1971).

41. *See* Westlaw citing references for *Griggs v. Duke Power Co.* 401 U.S. 424 (1971) (current as of Jan. 25, 2019).

42. *See, e.g.*, U.S. Dep't of Hous. & Urban Dev. v. Marilyn Frisbee, HUDALJ No. 07-91-0027-1, at *6 (May 6, 1992), https://www.hud.gov/sites/documents/HUD-07-91-0027-1.PDF [https://perma.cc/6YFY-4922] (noting that the chief Administrative Law Judge (ALJ) of Housing Urban Development (HUD) adopted the *McDonnell Douglas* paradigm in Fair Housing Act cases, an approach that was affirmed in the courts); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., TITLE VI LEGAL MANUAL, ch. 6, (2017), https://www.justice.gov/crt/case-document/file/934826/download [https://perma.cc/RX5L-2RCA] (as part of the Department of Justice's responsibility for coordinating agency enforcement efforts under Title VI, discussing the *McDonnell Douglas* framework as a means of proving intentional discrimination, though noting that agencies are not bound by case law

This outsized significance of the *McDonnell Douglas* paradigm renders it highly important to the overall success of the contemporary anti-discrimination project. Because employment discrimination plaintiffs—and, to a lesser extent, housing, government services, and public accommodations plaintiffs—primarily bring their claims via the *McDonnell Douglas* paradigm, problems with that paradigm impact an enormous number of cases.[43] To the extent that the *McDonnell Douglas* paradigm has been transformed into an obstacle to anti-discrimination plaintiffs, rather than an aid, that problem strikes at the very core of anti-discrimination enforcement.[44]

As set out in the following Part, anti-discrimination plaintiffs—and organizations like the NAACP Legal Defense Fund (LDF) that represent them—originally did not see the *McDonnell Douglas* paradigm as an impediment to their success.[45] To the contrary, aided by a set of *anti-defendant* technical rules adopted by the lower courts, anti-discrimination advocates originally perceived the *McDonnell Douglas* paradigm as a doctrine of key importance for plaintiffs with only circumstantial evidence of discrimination.[46] For this reason, the LDF and other progressive actors fought hard to keep the *McDonnell Douglas* paradigm and the pro-plaintiff technical rules that the lower courts originally engrafted on it.[47]

But while the Supreme Court kept the *McDonnell Douglas* paradigm, it largely rejected the technical pro-plaintiff rules that the lower courts had originally attached to it.[48] By 1993, with the case of *St. Mary's Honor v.*

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interpreting the framework). As Professor Sperino has noted, states also often apply *McDonnell Douglas* under their state anti-discrimination laws, albeit sometimes in ways that differ materially from the federal application of the test. *See* SPERINO, *supra* note 4, at 311–16.

43. *See* sources cited *supra* notes 1–2.

44. *Id*.

45. *See infra* Part II.

46. *See infra* Part II.

47. *See infra* Part II.

48. *See infra* Part II. The one notable exception to this is that some lower courts will treat pleading of a *McDonnell Douglas* prima facie case as sufficient to defeat a motion to dismiss, even though pleading such a prima facie case is not required. *See, e.g.*, SPERINO, *supra* note 4, at 296. It is not clear if the Supreme Court would agree with this approach. The primary other rule that remains that benefits plaintiffs under *McDonnell Douglas* is that pretext can be a sufficient basis for a fact-finder to find discrimination—but the Supreme Court has made clear that that rule is not a technical one, but simply a matter of the common-sense factual inferences that can be made in any legal context where a party lies. *See* Reeves v. Sanderson Plumbing, 530 U.S. 133, 147–48 (2000). Finally, the requirement that a defendant come forward with a legitimate non-discriminatory reason has little meaning in view of liberal discovery rules—and courts virtually never award judgment to plaintiffs on that basis. *See* SPERINO, *supra* note 4, at 101; Chin & Golinsky, *supra* note 5, at 665–68 (as of 1998—twenty-five years after the *McDonnell Douglas* paradigm was created—finding that there "is

Hicks,[49] the Supreme Court had mostly dismantled those technical aspects of the *McDonnell Douglas* paradigm that favored plaintiffs.[50] And while the Court's reasoning appeared to require a doctrine that did not favor either party, the lower courts quickly adopted new technical rules—now disadvantaging discrimination plaintiffs.[51]

Today, the application of technical reasoning under the rubric of *McDonnell Douglas* to dismiss discrimination plaintiffs' claims is one of the most pervasive problems faced by those seeking to enforce the anti-discrimination laws.[52] It has become commonplace for the lower courts to "slice and dice" anti-discrimination plaintiffs' evidence and to order dismissal of claims on improbably technical grounds.[53] These technical glosses on *McDonnell Douglas* can take a wide variety of forms—and multiple glosses or techniques are often deployed in the course of rejecting a plaintiff's claims.[54] Each year, scores of cases are dismissed by judges relying on this hyper-technical version of the *McDonnell Douglas* paradigm.[55] Indeed, the "technical *McDonnell Douglas* paradigm" is

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not a single reported case in which a plaintiff prevails at the second step" because of an employer's inability or unwillingness to come forward with an LNDR). *But cf.* Figueroa v. Pompeo, 923 F.3d 1078, 1094–95 (D.C. Cir. 2019) (holding that the employer had failed to meet their step-two burden and that if the plaintiff proved a prima facie case on remand, they were entitled to prevail).

49. 509 U.S. 502 (1993).

50. *See supra* note 48.

51. *See* Part II. Indeed, already at the time that *St. Mary's Honor* was decided, the lower courts had begun to apply it in a technical, plaintiff-unfavorable way. *See* McGinley, *supra* note 4, at 229 (writing just prior to *St. Mary's Honor*, noting that the lower courts were using the *McDonnell Douglas* paradigm to defeat plaintiffs' claims at summary judgment).

52. *See supra* notes 26–30 and accompanying text.

53. The concept of "slicing and dicing" is one that I borrow from other anti-discrimination law scholars, who have long critiqued the phenomenon of "slicing and dicing" as problematic. *See, e.g.*, SPERINO, *supra* note 4, at 324 (discussing the phenomenon of "slicing and dicing" and describing how the *McDonnell Douglas* paradigm contributes to it); SPERINO & THOMAS, *supra* note 4, at 151–55 (describing "slicing and dicing" and how technical employment discrimination rules contribute to it); Zimmer, *supra* note 6 (original article discussing this phenomenon).

54. *See, e.g.*, SPERINO & THOMAS, *supra* note 4, at 85–86 (describing how multiple technical doctrines can come together to justify dismissal); *see also infra* notes 57–66 and accompanying text.

55. For example, in a recent survey of three months of Court of Appeals decisions invoking the *McDonnell Douglas* paradigm, fifty-six of sixty-three decisions resulted in a total loss for the plaintiff—and in only two cases applying a technical version of *McDonnell Douglas* did plaintiffs see any success. While this is far from a scientific sample, and dismissal may have been proper in some cases, it is evident that in many instances application of a technical version of *McDonnell Douglas* resulted in the dismissal of cases in which a reasonable jury could have concluded that discrimination occurred. *See, e.g.*, Nzabandora v. Rectors and Visitors of University of Virginia, 749 F. App'x 173, 175–77 (2018) (affirming an award of summary judgment based on a technical application of *McDonnell Douglas*, including ignoring evidence of discrimination because it was not "direct," applying the "same actor" rule, and treating the pretext determination as dispositive); Plaintiff Veronique M. Nzabandora's Memorandum in Support of Motion for Summary Judgment,

arguably at the very heart of a phenomenon that discrimination scholars have rightly decried: judges' use of summary judgment (and other procedural devices) to dismiss many potentially meritorious discrimination claims.[56]

The various technical arguments relied on by the lower courts are familiar to anti-discrimination law practitioners and include things like:

- rigid application of the prima facie case, for instance, treating the components of a particular statement of the prima facie case as if they were legal elements;[57]
- requiring the plaintiff to show "pretext" in the sense of the LNDR's falsity, even where there is strong

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Nzabandora v. Rectors and Visitors of University of Virginia (W.D. Va. 2017) (No. 3:17-cv-3) (plaintiff was called *inter alia* a "stupid African immigrant," was repeatedly told to drop her discrimination complaint, and was directly told "we have fired black people before like you"). The vast majority of the cases (sixty of sixty-three) were decided on summary judgment. A search was conducted in the Westlaw Federal Courts of Appeals Database, with the following search string: "((("mcdonnell douglas" /200 discrim!) ("mcdonnell douglas" /10 green)) and da(aft 9/30/2018 and bef 1/1/2019)."

56. For a remarkably explicit acknowledgment that the courts rely on *McDonnell Douglas* as a basis for awarding summary judgment against plaintiffs, see, for example, Lewis v. City of Union City, 918 F.3d 1213, 1226 (11th Cir. 2019) (en banc) (rejecting the plaintiff's proposed standard for comparators under *McDonnell Douglas* partly on the ground that it would not allow sufficient cases to be dismissed at summary judgment). For other sources documenting the use of *McDonnell Douglas* at summary judgment to dismiss cases at summary judgment, see*, e.g.*, sources cited *supra* note 55; Hamilton, *supra* note 5, at 197; McGinley, *supra* note 4, at 228–42; Malamud, *supra* note 4, at 2297–80.

Note that although jury trials were available early on for age discrimination cases, they only became available for most other protected categories with the passage of the Civil Rights Act (CRA) of 1991. Because the jury trial right of CRA 1991 was held to only apply prospectively (to conduct post-dating the enactment of CRA 1991), such a right became available roughly contemporaneously with the demise of the first technical *McDonnell Douglas* paradigm (that benefitting defendants) in *St. Mary's Honor v. Hicks*. 509 U.S. 490, 510–11 (1993); *see* Landgraf v. USI Film Products, 511 U.S. 244, 280–81, 286 (1994) (jury trial right of CRA 1991 is prospective only); *infra* Part II (discussing the demise of the first technical *McDonnell Douglas* paradigm in *St. Mary's Honor*). Thus, awards of summary judgment and judgment as a matter of law (JMOL)—devices which take cases away from jury fact-finders—have marked the primary way that the modern anti-plaintiff technical *McDonnell Douglas* paradigm has been implemented. *See, e.g.*, sources cited *supra* note 55; Hamilton, *supra* note 5, at 197. In contrast, the first technical *McDonnell Douglas* paradigm was a set of rules developed by the circuit courts primarily to control the conduct of the district courts as fact finders. *See infra* Part II.

57. *See, e.g.*, SPERINO, *supra* note 4, at 97, 133, 135, 145, 150; Clarke, *supra* note 1, at 116–18; Davis, *supra* note 4, at 753–58; Hayes, *supra* note 1, at 362–63, 370; Malamud, *supra* note 4, at 2292–94, 2296–98; McCormick, *supra* note 4, at 185; Semler, *supra* note 4, at 73; Smith, *supra* note 13, at 374. Many Supreme Court cases directly repudiate this approach. *See, e.g.*, Swierkiewicz v. Sorema, 534 U.S. 506, 512 (2002); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311–12 (1996); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253–54, 253 n.6 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576–77 (1978); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 357–58 (1977); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 n.6 (1976); McDonnell Douglas v. Green, 411 U.S. 792, 802 n.13 (1973); SPERINO, *supra* note 4 (making this observation).

affirmative evidence of discrimination[58];

- the stray remarks doctrine, under which discriminatory comments that are not directly related to the decision, or not made by a decision-maker, or distant in time, are ignored[59];
- the honest-belief rule, under which employers whose articulated LNDR is factually false must nevertheless be absolved if (in the court's view) the decisionmaker honestly believed the LNDR to be true at the time[60];
- the same-actor inference, which holds that there is a strong inference—perhaps conclusive—that discrimination did not take place where the same person hired and fired the plaintiff[61];
- requirements that the plaintiff identify a "nearly identical" comparator to prove discrimination, either as part of the prima facie case or in order to prove pretext[62];
- categorical rejection of the plaintiff's "subjective belief"

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58. *See, e.g.*, SPERINO, *supra* note 4, at 164; Semler, *supra* note 4, at 50, 64–68. For Supreme Court cases holding to the contrary, see*, e.g.*, *McDonald*, 427 U.S. at 282 n.10 (specifically noting that the plaintiff need not prove that the alleged reason was not a real reason, just that protected class status was a "but for" cause); St. Mary's Honor v. Hicks, 509 U.S. 502 (1993) (holding that it is the factual question of discrimination, not pretext, which is the ultimate inquiry in a *McDonnell Douglas* case); *see also McDonnell Douglas*, 411 U.S. at 807 (making clear there are many ways plaintiffs can meet their burden at Step Three, which are not limited to falsity of the LNDR, and include affirmative evidence of discrimination); *Burdine*, 450 U.S. at 256 (observing that a plaintiff can prevail at Step Three "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") (emphasis added); Patterson v. McLean Credit Union, 491 U.S. 164, 187–88 (1989) (emphasizing the variety of ways a plaintiff can meet her Step Three burden, not all of which are focused on the falsity of the LNDR, and which can include affirmative evidence of discrimination).

59. *See, e.g.*, SPERINO, *supra* note 4, at 204–09; SPERINO & THOMAS, *supra* note 4, at 60–69; Jessica Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 540–47 (2018); Natasha Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 347–51 (2010); Semler, *supra* note 4, at 72. For contrary Supreme Court cases, see, for example, Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 152–53 (2000) (reversing a lower court decision that had applied the stray remarks doctrine to disregard damning age-related remarks, and stating that the lower court impermissibly substituted its judgment for the jury's); SPERINO, *supra* note 4, at 205–07 (noting that the Supreme Court has "at least implicitly" rejected the stray remarks doctrine in several cases, including *Reeves*).

60. *See, e.g.*, SPERINO, *supra* note 4, at 217–21; SPERINO & THOMAS, *supra* note 4, at 73–78; Martin, *supra* note 59, at 351–52; Semler, *supra* note 4, at 77.

61. *See, e.g.*, SPERINO & THOMAS, *supra* note 4, at 69–72; Martin, *supra* note 59, at 318–19, 356–89.

62. *See, e.g.*, Suzanne Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 745–55 (2011); Charles Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 213–20 (2009); Hamilton, *supra* note 5, at 197–98, 200; Martin, *supra* note 59, at 345–47; Semler, *supra* note 4, at 73; *see also* Lewis v. City of Union City, No. 15-11362 (11th Cir. 2019) (en banc) (delineating all of the ways a comparator must be the same in order to satisfy the circuit's standards and support a prima facie case). The Supreme Court's decision in *McDonald v. Santa Fe Trail* seems to directly repudiate this approach. *See McDonald*, 427 U.S. at 283 n.11.

testimony that she was a good employee, on the grounds that it is self-interested and unreliable[63];

- dismissing evidence of pretext as an invitation for the court to sit as a "super-personnel department"[64];
- applying rigidly defined standards for where comparative qualifications can help prove pretext and thus discrimination[65]; and
- others.[66]

While the lower courts vary in their formulation and application of these technical doctrines, the practice of applying some version of such rules is widespread.[67]

Often lost in all of these technical twists and turns is the fundamental factual question of whether the plaintiff was actually subjected to discrimination.[68] Although, in theory, many "technical *McDonnell Douglas*" doctrines could be consistent with a fact-focused inquiry—if treated simply as one of many permissible inferences for the fact-finder to draw—their application in the case law almost never takes this form.[69]

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63. *See, e.g.*, Paul J. Sopher, Comment, *Matters of Perspective: Restoring Plaintiffs' Stories to Individual Disparate Treatment Law*, 84 TEMP. L. REV. 1031, 1053–57 (2012); *but cf. infra* Part II (detailing the Supreme Court's rejection of similar rules in the context of defendants); *Burdine*, 450 U.S. at 259–60 (reversing the lower court's rejection of the defendant's testimony as to its reason as only "unsubstantiated" and "subjective" assertions and requiring the lower courts to treat such testimony as sufficient at *McDonnell Douglas* Step Two).

64. *See, e.g.*, SPERINO, *supra* note 4, at 221–23; SPERINO & THOMAS, *supra* note 4, at 78–83.

65. *See, e.g.*, SPERINO, *supra* note 4, at 190–94; Martin, *supra* note 59, at 345–47. The Supreme Court's decision in *Ash v. Tyson* renders this approach at least questionable. 564 U.S. 454, 457 (2006).

66. The explosion of technical doctrines engrafted onto *McDonnell Douglas* is such that it is impossible to itemize all of its iterations. The listed doctrines are illustrative of the tendency of the courts to apply *McDonnell Douglas* in a hyper-technical way and to engraft it was technical doctrines.

67. *See* sources cited *supra* notes 57–65. Note that even in those circuits that have nominally disclaimed technical approaches to *McDonnell Douglas*, like the Seventh Circuit, technical rules have remained remarkably "sticky." *See supra* note 25.

68. *See supra* note 7. When I refer to the "factual question of discrimination" herein, I am referring to the question of discrimination as it is understood in the *McDonnell Douglas* context. Thus, the relevant question is one of individual disparate treatment—was the plaintiff treated differently "because of" their protected class status. While there are other possible conceptions of discrimination (such as disparate impact discrimination or reasonable accommodations), such conceptions are not included in the "factual question of discrimination" in the context of the *McDonnell Douglas* paradigm. In addition, though there is a good argument that the relevant standard of causation in most Title VII *McDonnell Douglas* claims should be the lower "motivating factor" standard, most courts do not approach the *McDonnell Douglas* paradigm in that way, treating the relevant standard as arising from Title VII's "because of" causation language. *See* SPERINO & THOMAS, *supra* note 4, at 111–18. For linguistic and analytic ease, I follow that common convention here. Note, however, that the arguments made herein would equally apply, even if the ultimate standard of causation in some or all *McDonnell Douglas* cases were treated differently—the question would still be whether the plaintiff had shown the factual question of discrimination, to the relevant standard of causation.

69. *See* sources cited *supra* notes 57–66.

Indeed, the primary context in which such doctrines are utilized—summary judgment *against* plaintiffs—is inherently inconsistent with such a "permissible inferences" approach.[70] Rather, courts have generally treated such doctrines as legal rules (rather than merely permissible factual inferences) and have ubiquitously relied on such doctrines to grant summary judgment against plaintiffs' discrimination claims.[71]

Under this technical legal approach to summary judgment, the fact that a reasonable jury might find that there was discrimination is treated as essentially irrelevant to the inquiry. As such, even cases with extremely compelling factual evidence have proven susceptible to dismissal under the technical *McDonnell Douglas* approach.[72] And because plaintiffs are typically not permitted to simply side-step *McDonnell Douglas* (and ask, for example, the court to directly resolve the question of whether or not they were terminated "because of" their race or sex), discrimination plaintiffs often find their evidence shoehorned into the technical *McDonnell Douglas* approach and then dismissed before or even after trial.[73]

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70. The use of such rules to grant summary judgment against plaintiffs is fundamentally inconsistent with conceptualizing them as permissive inferences for the fact-finder. If such inferences are only possible inferences to be considered in light of all the facts and circumstances, they should be left to the jury. Moreover, given that all factual inferences must be drawn in favor of the *non-moving* party at summary judgment, the use of these rules to find *against* the non-movant (drawing inferences against them) makes clear that these "rules" are treated by the courts as legal, rather than factual in nature. *See, e.g.*, SPERINO & THOMAS, *supra* note 4, at 158–61 (describing the summary judgment standards, and how courts evade them in discrimination cases by relying on technical legal doctrines instead of focusing on the factual issue of discrimination).

71. Specifically, these doctrines are used separately or in combination to hold that plaintiffs have not made out their prima facie case or have failed to prove pretext/the ultimate issue of discrimination. *See, e.g.*, SPERINO, *supra* note 4, at 298–301; SPERINO & THOMAS, *supra* note 4, at 158–61. Step Two of *McDonnell Douglas* is very rarely at issue on summary judgment, since virtually all employers can meet the burden of producing "some evidence" of a legitimate non-discriminatory reason. *Id*.

72. *See, e.g.*, Wallace v. Methodist Hosp. Sys., 217 F.3d 212, 222–23 (5th Cir. 2001); Taylor v. Virginia Union Univ., 193 F.3d 219, 232–33, 236, 249 (4th Cir. 1999) (en banc), *abrogated on other grounds by* Flame S.A. Freight Bulk Pte. Ltd., 807 F.3d 572 (4th Cir. 2015); Indurante v. Local 705, Int'l Bhd. of Teamsters, 160 F.3d 364, 365–66 (7th Cir. 1998); Youry v. Exec. Transp. Co., 2013 WL 4774447, *5–6 (E.D. Pa. Sept. 6, 2013).

73. *See, e.g.*, sources cited *supra* note 72; *see also* SPERINO & THOMAS, *supra* note 4, at 116 (noting that "many courts will only funnel circumstantial evidence cases through [the *McDonnell Douglas*] framework," even though "the *McDonnell Douglas* decision states that the burden-shifting framework is not the only way for workers to establish discrimination through circumstantial evidence"). In theory, plaintiffs raising race, sex, national origin or religion claims should be able to proceed under the "mixed motives" framework instead, but it remains the case that the mixed motives framework is relied on far less often. *See supra* note 1. Courts also recognize "direct evidence" as another path to proving discrimination, but as Sperino and Thomas note, it is rare that courts find such evidence to exist. *See* SPERINO & THOMAS, *supra* note 4, at 114–15. Finally, a few circuits have experimented with alternatives to the *McDonnell Douglas* framework that more directly focus on the factual question of discrimination. *See, e.g.*, SPERINO, *supra* note 4, at 330–32.

Although it is impossible to fully document the scores of cases in which the technical *McDonnell Douglas* paradigm has been applied, it is worth offering a few characteristic examples of the reasoning of such cases and the outcomes that result. For example, consider:

- *Taylor v. Virginia Union University*[74]: Lynne Taylor was a patrol officer at Virginia Union University (VUU) who was fired for conduct (fraternizing with students) that male officers often engaged in without consequence. There was ample evidence that her supervisor, Chief Wells, harbored bias towards women: he had called Taylor a "stupid bitch,"[75] stated directly that he would "never . . . send a female to the [Police] Academy," and sexually harassed multiple female subordinates.[76] And yet, the Fourth Circuit Court of Appeals concluded that Taylor had not even made out a *prima facie case* under *McDonnell Douglas* because she had not introduced proof of a comparator who engaged in virtually identical conduct.[77]
- *Youry v. Executive Transportation Co*.[78]: Pierre Youry was a limousine driver allegedly terminated because of an obscenity carved in the dashboard of his car. Youry alleged, and the employer did not dispute, that the obscenity was already there when his employer provided him with the vehicle. Youry's supervisor repeatedly used racial slurs to refer to Youry, calling him a "black bastard,"[79] a "black mother," and telling him directly "I never liked you black Haitians."[80] Indeed, Youry testified that his supervisor called him a "black bastard" during the very conversation in which Youry was terminated.[81] And yet the District Court granted summary judgment, defining pretext at Step Three of *McDonnell Douglas* as exclusively focused on showing that the reason given by the employer lacks factual support (something Youry

74. 193 F.3d 219, 232–33, 236, 249 (4th Cir. 1999) (en banc), *abrogated on other grounds by* Flame S.A. Freight Bulk Pte. Ltd., 807 F.3d 572 (4th Cir. 2015).

75. *Id.* at 227.

76. *Id.*

77. *Id.*; *see also id.* at 248 (Murnaghan, J. dissenting). The dismissal of Taylor's termination claim on this rationale was one of several arguably problematic adverse rulings against Taylor and her co-plaintiff on appeal.

78. No. 11-4103, 2013 WL 4774447 (E.D. Pa. Sept. 6, 2013).

79. *Id.* at *5–6.

80. *Id.* at *5–6.

81. *Id.* at *5–6.

could not demonstrate because he acknowledged the obscenity was in fact carved into the dashboard).[82]

- *Maybin v. Hilton Grand Vacations Co.*[83]: Carl Maybin was hired by Hilton Grand Vacations as a timeshare agent at age fifty-five and fired approximately two years later. Maybin testified that from the start, the Hawaii Director of Sales regularly made ageist comments about Maybin and the other the older sales agents, including statements that they "were too slow, can't learn, have a different way of doing things, are hard to teach new ways of sales, are too old to change, and don't have the energy necessary for sales."[84] The District Court awarded summary judgment, holding that Maybin's claim *must* fail because the so-called "the same actor inference" (i.e., the negative inference arising from the fact that the same person hired and fired the defendant) prevented an inference of discrimination at *McDonnell Douglas* Step Three.[85]
- *Wallace v. Methodist Hospital*[86]: Veronica Wallace was fired from her job as a nurse a month before she was about to take her third maternity leave. At trial, a witness testified that she had overheard plaintiff's supervisor stating directly that Wallace was terminated because "she's been pregnant three times in three years."[87] Wallace's supervisor had also made other remarks critical of Wallace's repeated pregnancies.[88] After a jury found in Wallace's favor, the Court of Appeals affirmed an award of judgment as a matter of law (JMOL) on the grounds that these statements were "stray remarks" under the circuit's doctrine and thus "not evidence of intentional discrimination."[89]

Cases like Taylor's, Youry's, Maybin's and Wallace's are common in the federal reports.[90] In such cases, courts pick and choose from among a

82. *Id.* at *5–6.

83. 343 F. Supp. 3d 988 (D. Hawaii 2018).

84. *Id.* at 990.

85. *Id.* at 993–98.

86. 217 F.3d 212 (5th Cir. 2001).

87. *Id.* at 222 (quotation omitted).

88. *Id.* at 225–26.

89. *Id.* at 222–24.

90. *See supra* notes 4–10 & 52–73 and accompanying text.

variety of technical circuit doctrines, but virtually always arrive at the same result—dismissal of the plaintiffs' claims.[91] Sometimes, as in *Taylor* or *Youry*, the courts give the steps of the *McDonnell Douglas* paradigm (prima facie case or Step Three/pretext) primacy and interpret them as having rigid requirements, ignoring other probative evidence of discrimination.[92] At other times, as in *Maybin*, they apply doctrines that have been engrafted by the lower courts onto the *McDonnell Douglas* paradigm that give legally dispositive weight to only partially probative facts.[93] In other cases, like *Wallace*, the courts rely on technical circuit rules like the stray remarks doctrine to dismiss even smoking gun evidence as "not evidence of intentional discrimination" and thus not relevant to the *McDonnell Douglas* inquiry.[94] In these cases, the factual question of discrimination is rarely meaningfully asked, abandoned in favor of a series of technical inquiries.[95]

As set out in the following Part, while this technical approach to the *McDonnell Douglas* paradigm is new in its application to plaintiffs, it is not new in form. Many of the plaintiff-unfavorable technical approaches that the lower courts apply today bear a striking resemblance to the defendant-unfavorable doctrines that the lower courts adopted in the early years of the *McDonnell Douglas* paradigm.[96] There, too, the lower courts reasoned that the technical steps of the *McDonnell Douglas* paradigm should be construed rigidly and should take primacy over the factual question of discrimination.[97] There too, the lower courts argued for decisive inferences to be drawn as a matter of law based on only partially probative facts.[98] Just as some plaintiffs' evidence is currently isolated and dismissed as insufficiently probative or reliable under legal rules attached to *McDonnell Douglas*, employers' reasons and evidence were isolated and dismissed for strikingly similar reasons.[99] And yet, the Supreme Court consistently rejected these defendant-burdening technical rules—reasoning that the factual question of discrimination must ultimately

91. *See supra* notes 4–10 & 52–89 and accompanying text.

92. *See, e.g.*, *Taylor*, 193 F.3d at 232–33, 236, 249; *Youry*, 2013 WL 4774447 at *5–6; *see also supra* notes 57–58 and accompanying text.

93. *See, e.g.*, *Maybin*, 343 F. Supp. 3d at 994–98; *see also supra* notes 60–61 and accompanying text.

94. *Wallace*, 271 F.3d at 222–24; *see also supra* notes 59 & 63–64 and accompanying text.

95. *See supra* notes 4–10 and accompanying text.

96. *See infra* Part II.

97. *See infra* Part II.

98. *See infra* Part II.

99. *See infra* Part II.

control.[100]

Thus, the battle over the technical *McDonnell Douglas* paradigm was already fought—and won by those urging it be rejected—more than twenty-five years ago.[101] The edifice of technical anti-plaintiff rules that the lower courts have adopted in their revival of the technical *McDonnell Douglas* paradigm is simply inconsistent with this history.

II. THE RISE AND FALL OF THE FIRST TECHNICAL *MCDONNELL DOUGLAS* PARADIGM

A. The Supreme Court's Initial Response to the First Technical McDonnell Douglas *Paradigm: Unanimous Rejection (1973–1982)*

From the start, the *McDonnell Douglas* paradigm was enmeshed in questions regarding the propriety of a technical, as opposed to a factual, approach to adjudicating discrimination claims. When the *McDonnell Douglas* paradigm was first recognized, the Supreme Court had recently decided *Griggs v. Duke Power Co.*[102]—a decision that was understood to embrace a technical legal approach to adjudicating discrimination.[103] The circuit courts had also begun to superintend the Title VII decisions of the district courts (then Title VII's exclusive fact finders) through a number of technical legal doctrines.[104] These technical doctrines—as well as aspects of *Griggs*' legal approach to discrimination—would soon be attached by the lower courts to the new *McDonnell Douglas* paradigm.

Indeed, *McDonnell Douglas Corp. v. Green*[105] itself was the result of a dispute over the propriety of such technical approaches. The District Court had issued a judgment against the plaintiff Percy Green—dismissing certain claims before and others after trial.[106] On appeal, the Court of Appeals had affirmed the judgment as to Green's retaliation

100. *See infra* Part II.

101. *See infra* Part II.

102. 401 U.S. 424 (1971)

103. *Id.* As described *infra*, many of the disputes over the first technical *McDonnell Douglas* paradigm related to whether elements of the disparate impact cause of action would be incorporated into adjudication of individual disparate treatment disputes. The Court consistently rejected lower court decisions that turned in this direction. *See infra* notes 118–133; *see also* Malamud, *supra* note 4, at 2264–66 (making a similar observation).

104. The rule at issue in *McDonnell Douglas* itself—expressing skepticism of employer's "subjective" reasons—was such a rule, predating the *McDonnell Douglas* paradigm. *See, e.g.*, Green v. McDonnell Douglas Corp., 463 F.2d 337, 343 (8th Cir. 1972).

105. 411 U.S. 792 (1973).

106. *See* Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 851 (E.D. Mo. 1970); Green v. McDonnell Douglas Corp., 299 F. Supp. 1100, 1102 (E.D. Mo. 1969).

claim but had reversed as to his race discrimination claim.[107] In instructing the District Court how to proceed on remand, the Eighth Circuit rejected a factual conception of discrimination, instead opining that "subjective" reasons for non-hiring are entitled to little or no weight (because they may mask prohibited prejudice).[108] Rather, McDonnell Douglas was, the court suggested, required to show an "objective" reason—one related to Percy Green's job competency—in order to prevail.[109]

Though the Eighth Circuit quickly issued a modified opinion—largely substituting the now-familiar *McDonnell Douglas* burden-shifting framework for its "objective" reasons requirement[110]—the Defendant successfully petitioned the Supreme Court for certiorari review.[111] But at the Court, neither the plaintiff (represented by *inter alia* the LDF) nor any of the Justices embraced the Eighth Circuit's original technical approach.[112] Instead, at the Department of Justice's urging, the Court unanimously adopted the now-familiar three-step *McDonnell Douglas* paradigm (prima facie case, legitimate non-discriminatory reason, pretext/ultimate issue of discrimination).[113] And though the Court's

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107. *See Green*, 463 F.2d at 341–43.

108. *Id.* at 353–54 (Johnsen, J., in supplemental dissent) (setting out the original wording of the Eighth Circuit's opinion—soon amended). It is not clear what exactly the Eighth Circuit meant by this, since the employer's reasons—that the plaintiff had participated in illegal protest activities directed at the company—wasn't "subjective" in the traditional sense of, for example, an employer relying on "leadership qualities" to decide who gets a job. It appears rather that the Eighth Circuit's dissatisfaction with the employer's reason rested on its failure to satisfy the requirements of *Griggs*—that it could not be shown (or at least had not been shown) to be related to the plaintiff's ability to do his job. *See id.* at 353–54.

109. *Id.*

110. Although the modified opinion continued to include some language suggesting that "subjective" reasons were to be afforded less weight, it eliminated those parts of the opinion that most clearly required the *employer* to show the reason was job-related—as opposed to requiring the *employee* to show discrimination. *See id.* at 352–53.

111. McDonnell Douglas Corp. v. Green, 409 U.S. 1036 (1973).

112. *See, e.g.*, Brief for Respondent at 29–34, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (No. 72-490) (complaining that "the modified majority opinion of the Court of Appeals bears no relationship to the issues discussed in Petitioner's argument," and declining to defend the *Griggs*-style requirement of the Eighth Circuit); *cf. id.* at 26–29 (defending the Court of Appeals' remarks about "subjective" standards but framing the issue in a way that left ambiguous whether the "subjective" nature of standards was simply one factor to be considered). As to the Justices, see, *e.g.*, Blackmun Conference Notes, McDonnell Douglas Corp. v. Green, 409 U.S. 1036 (1973) (No. 72-490) (on file with the Library of Congress in Harry A. Blackmun Papers, Box 167 [hereinafter Blackmun Papers]); Powell Conference Notes, McDonnell Douglas Corp. v. Green, 409 U.S. 1036 (1973) (1973) (No. 72-490) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, *available at* https://scholarlycommons.law.wlu.edu/casefiles/ [https://perma.cc/3F3T-PKXY] [hereinafter Powell Papers]).

113. *See McDonnell Douglas*, 411 U.S. at 802–05; *see generally* Memorandum for the United States as Amicus Curiae at 9–15, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (No. 72-490) (suggesting a reading of the Court of Appeals' opinion virtually identical to that ultimately

opinion left open the possibility that technical rules might play a role in the operation of the paradigm, much of its language suggested that it was the factual question of racial discrimination that should be dispositive.[114]

Over the next decade, use of the "*McDonnell Douglas* paradigm" became ubiquitous, and disputes erupted in the lower courts regarding how it should be applied.[115] It was not obvious to all courts (or to all commentators) that the *McDonnell Douglas* paradigm was—as the Supreme Court would ultimately hold—simply a vehicle for "bring[ing] the litigants and the court expeditiously and fairly" to the factual question of discrimination.[116] Rather, many lower courts interpreted the doctrine as turning on legalistic determinations only impressionistically related to the factual question of disparate treatment.[117] Thus, many circuits interpreted the paradigm in technical ways that aided discrimination plaintiffs, permitting—or even requiring—liability in contexts where a defendant might not have factually engaged in disparate treatment.[118]

Four cases involving disputes over such technical rules came up to the Supreme Court in the decade following *McDonnell Douglas*.[119] And in each, the Court rejected the lower courts' defendant-burdening technical approach.[120] Thus, although some circuits continued to hold—as the

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adopted by the Court in *McDonnell Douglas*).

114. *See, e.g.*, *McDonnell Douglas*, 411 U.S. at 804–05 (describing the variety of forms of circumstantial evidence of race discrimination that might be relevant at Step Three, including but not limited to evidence that the employer's reason was not the real reason); *id.* at 805 n.18 (suggesting that the ultimate question was whether "the decision was in reality racially premised"); *cf. id.* at 805–06 (specifically repudiating the lower court's reliance on *Griggs* standards).

115. *See, e.g.*, Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, n.11, 86, 100, 110, 145 (1981); Miguel Angel Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1130–31 (1980); *see also infra* notes 119–133 and accompanying text.

116. *See* sources cited *supra* note 115; *see also* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (holding that the burden of proving discrimination rests with the plaintiff and that the *McDonnell Douglas* paradigm is simply a way of bringing "the litigants and the court expeditiously and fairly to this ultimate question"); US Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715–16 (1983) (same, and emphasizing that the question of whether discrimination took place is a factual one that ought not be treated differently than other issues of fact—even in the context of cases to which the *McDonnell Douglas* paradigm applies).

117. *See infra* notes 119–133 and accompanying text.

118. *See infra* notes 119–133 and accompanying text.

119. *See Burdine*, 450 U.S. at 248; Bd. of Trustees of Keene State Coll. v. Sweeney, 439 U.S. 24 (1978); Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); *see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977) (rejecting the employer's argument that the *McDonnell Douglas* prima facie case was a test that must be fulfilled in every case where an individual disparate treatment plaintiff seeks relief).

120. *See infra* notes 121–133 and accompanying text. *McDonald* involved a rule that ordinarily burdened defendants—that the focus ought to be on the substantive adequacy of the employer's

Eighth Circuit had in *McDonnell Douglas*—that the focus ought to be on the substantive adequacy of the employer's justification, the Court repeatedly rejected that approach.[121] In doing so, the Court reiterated that, "[t]he central focus of the inquiry in a [*McDonnell Douglas* case] is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'"[122] For this reason, "the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race."[123] Applying these principles, the Court repeatedly rejected decisions of the lower courts which focused on the substantive adequacy of the employer's LNDR, rather than simply its non-discriminatory nature.[124]

So, too, the Court rejected rigid lower court rules deeming certain employer evidence insufficiently dispositive or too subjective (and thus

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LNDR, rather than the factual question of disparate treatment—but in a circumstance where it had been applied to a plaintiff.

121. This focus on the substantive adequacy of the employer's reason took a variety of forms—including, for example, a focus on whether the employee had committed a serious offense as the ultimate issue, see McDonald v. Santa Fe Trail Transp., 513 F.2d 90 (5th Cir. 1975), requirements that employers adopt hiring policies having a lesser racial impact, see, for example, Waters v. Furnco Constr. Co., 551 F.2d 1085, 108889 (7th Cir. 1977), and refusal to accept "subjective" employer reasons or "subjective" employer testimony, see, for example, Burdine v. Tex. Dep't of Cmty. Affairs, 608 F.2d 563, 567–68 (5th Cir. 1979). It was also a remarkably persistent trend, continuing to show up in lower court opinions even after multiple Supreme Court decisions made clear the substantive adequacy of the employer's decision was not the focus in a *McDonnell Douglas* disparate treatment case. *See infra* notes 122–124; *see also* Figueroa v. Pompeo, 923 F.3d 1078, 1094–95 (D.C. Cir. 2019) (appearing to revive technical constraints on an employer's Step Two response similar to those that the Supreme Court has repeatedly rejected). It appears likely that this tendency in the lower courts arose at least in part out of a conflation of disparate treatment and disparate impact in some circuits' case law. *Id.*; *see, e.g.*, Brief Amicus Curiae for the Equal Employment Advisory Council at 9–12, Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981) (No. 79-1764) (observing that the Fifth Circuit's approach in *Burdine* appeared to arise out of a conflation of the disparate impact and disparate treatment methodologies). For cases where the Court repudiated lower court decisions that had focused at least in part on the substantive adequacy of the employer's reason—sometimes conflating that concern with the substantive adequacy of the employer's evidence, see Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). *See also* Westinghouse Elec. Corp. v. Vaughn, 450 U.S. 972 (1981) (granting, vacating, and remanding a case in which the trial court had found that there was not enough evidence to determine whether the production problems the plaintiff had were "serious enough" to carry the employer's burden at *McDonnell Douglas* Step Two).

122. *Furnco*, 438 U.S. at 577 (quoting Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)).

123. *Id. Furnco* is the case that most directly addressed this issue, though as described *supra* note 121, several other Supreme Court cases during this time frame also responded in part to the lower courts' treatment of the substantive adequacy of the employers' reasons as dispositive in the *McDonnell Douglas* context—always repudiating this approach.

124. *See supra* note 121.

off-limits).[125] Reasoning that "the employer must be allowed some latitude to introduce evidence which bears on his motive," the Court repeatedly reversed lower court decisions applying rules that would limit the range of employer evidence that could be considered.[126] Noting that the Plaintiff's prima facie case was not the equivalent of an ultimate factual showing of discrimination, the Court opined that even weak evidence of the employer's motive should be considered in assessing that ultimate factual issue.[127]

And finally, in the cases of *Board of Trustees of Keene State College v. Sweeney*[128] and *Texas Department of Community Affairs v. Burdine*,[129] the Court rejected the last vestiges of these constraints on the employer's LNDR and proof.[130] Holding that the lower courts were wrong to place a burden on the Defendant beyond simply "articulating" its legitimate non-discriminatory reason, the Court rejected the lower courts' rules requiring more.[131] Such rules had arisen out of the lower courts' concerns about the substantive inadequacy of employers' LNDRs and employers' unreliable proof (such as subjective employer testimony).[132] But the Supreme Court

125. *See Furnco*, 438 U.S. at 579–80 (holding that the circuit court was wrong to deem certain employer evidence off-limits for consideration, even though it might not be dispositive); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 513–14, 514 n.5 (1993) (emphasizing that it is important for a jury to be able to consider *all* available employer evidence in deciding whether, as a matter of fact, discrimination took place); *see also* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981) (reversing a lower court decision that had held that the employer did not meet their Step Two burden, in which the court had conflated the substantive and proof adequacy of the employer's reasons, including questioning the adequacy of the employer's "subjective" testimony as to the reasons); Westinghouse Elec. Corp. v. Vaughn, 450 U.S. 972 (1981) (granting, vacating, and remanding post-*Burdine* in relation to a similar lower court opinion).

126. *Furnco*, 438 U.S. at 580; *see also* sources cited *supra* note 125.

127. *Furnco*, 438 U.S. at 580; *see also* sources cited *supra* note 125.

128. 439 U.S. 24 (1978).

129. 450 U.S. 248 (1981).

130. This last issue could be characterized as less about technical rules that might distract from the ultimate factual question of discrimination, and more about who bears the burden of proof on that ultimate factual question. However, the issue of the burden of proof in fact was often bound up in the lower courts with issues about the substantive adequacy of the employer's given reason, and the weight permissible to be given to an employer's potentially self-serving subjective testimony. *See infra* note 132. Thus, reversal of the circuit court rules on this issue also implicated the substantive adequacy and evidentiary adequacy issues discussed above, and indeed in the case of *Burdine* arose out of a lower court opinion explicitly focused on those issues. *See* Burdine v. Tex. Dep't of Cmty. Affairs, 608 F.2d 563, 567–68 (5th Cir. 1979).

131. *See supra* notes 128–129.

132. *See, e.g.*, *Burdine*, 608 F.2d at 567–68 (concluding that an employer's "bald assertion[s]" and reliance on "subjective" evaluations was insufficient to meet their burden at Step Two); Vaughn v. Westinghouse Elec. Corp., 620 F.2d 655, 658–60 (8th Cir. 1980) (where there was conflicting evidence as to the veracity of the employer's Step Two reasons, and some of them rested on subjective criteria, concluding that the employer's Step Two burden had not been met).

rejected the idea that prophylactic legal rules to address such concerns could be adopted, holding instead that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[133]

None of these issues generated significant disputes among the Justices.[134] While ancillary issues produced dissension in a few cases, the Justices were, in the initial period following *McDonnell Douglas*, unanimous in rejecting the lower courts' embrace of technical *McDonnell Douglas* rules.[135] Indeed, internal records demonstrate that the Justices generally perceived the lower courts as simply wrong insofar as they adopted or applied technical rules in ways that distracted from the ultimate factual question of discrimination.[136]

Even plaintiffs' counsel (often in this era the LDF) generally did not offer a full-throated endorsement of the lower courts' technical approaches.[137] Rather, plaintiffs typically argued (at times perhaps less

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133. *Burdine*, 450 U.S. at 253.

134. As set out below, all of the cases except *Sweeney* were ultimately unanimous on the relevant issues, and generally did not produce even significant behind the scenes dissent. *See infra* notes 135–136. And in *Sweeney*, the Justices did not differ materially in relation to the proper standard—but only in relation to whether they thought the lower court had complied with it. *Compare* Bd. of Trs. of Keene State Coll. v. Sweeney, 439 U.S. 24, 25 n.2 (1978) (majority opinion articulating the view that the employer need only produce evidence of its legitimate non-discriminatory reason, and that the plaintiff at all times bears the burden of proof), *with id.* at 29 (Stevens, J., dissenting) (articulating a virtually indistinguishable standard); *see also infra* notes 135–136.

135. *See Burdine*, 450 U.S. 248 (1981); Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978); *Sweeney*, 439 U.S. 24 (1978); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); *supra* note 134 (noting that although *Sweeney* was not unanimous, the Justices agreed on the substantive standard—they just disagreed over whether the lower court had complied with it). Regarding the Justices' ancillary disputes on unrelated issues, see *McDonald*, 427 U.S. at 296 (Justices White and Rehnquist dissenting on the unrelated issue of whether § 1981 applies to private employment) and *Furnco*, 438 U.S. at 581–85 (Justices Marshall and Brennan, dissenting on whether the plaintiff should be permitted to pursue a disparate impact cause of action on remand).

136. *See, e.g.*, Powell Conference Notes, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (No. 75-260), *in* Powell Papers, *supra* note 112 (showing that many of the Justices perceived the Eighth Circuit's articulated standards as wrong, and none substantively defended them at Conference); Powell Conference Notes, Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978) (No. 77-369), *in* Powell Papers, *supra* note 112 (showing that none of the Justices defended the Seventh Circuit's technical approach in *Furnco*, and many disagreed with it at Conference); Brennan Conference Notes, Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978) (No. 77-369) (on file with the Library of Congress in William J. Brennan, Jr. Papers, Box I:432, folder 1) [hereinafter Brennan Papers]) (same); Blackmun Conference Notes, Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978) (No. 77-369), *in* Blackmun Papers, *supra* note 112, Box 273 (same); Powell Conference Notes, Tex. Dept. of Cmty. Affairs v. Burdine, No. 79-1764 (Dec. 12, 1980) *in* Powell Papers, *supra* note 112 (showing that none of the Justices defended the Fifth Circuit's technical approach in *Burdine*, and many of the Justices critiqued it at Conference); Blackmun Conf. Notes, Tex. Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981) (No. 79-1764) *in* Blackmun Papers, *supra* note 112, Box 329 (same).

137. *See infra* note 138 and accompanying text.

than candidly) that the lower courts' opinions were misconstrued by the defendants seeking review.[138] Thus, throughout the first decade of the *McDonnell Douglas* paradigm, there was little support at the Supreme Court level for a technical conception of *McDonnell Douglas*.[139]

B. Divides Over the First McDonnell Douglas *Paradigm Emerge on the Supreme Court (1983-1992)*

This began to shift in the early 1980s. In the 1980s (and into the 1990s), the LDF became increasingly staunch defenders of the remaining lower court doctrines that construed *McDonnell Douglas* technically.[140] And the liberal Justices on the Court shifted too—perhaps following the LDF's lead.[141] In short order, this led to the eruption of disputes on the Court regarding whether such technical approaches were permissible.[142]

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138. *See, e.g.*, Brief for Respondent at 29, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (No. 72-490) (NAACP authored brief for the plaintiff, complaining that the "modified opinion of the Court of Appeals bears no relationship to the issues discussed in Petitioner's argument," and not defending the *Griggs*-style requirement of the Court of Appeals). *Cf. id.* at 26–29 (defending the Court of Appeals' remarks about "subjective" standards, but framing the issue in a way that left ambiguous whether "subjective" nature of standards was simply one factor to be considered); Brief for Respondents, Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978) (No. 77-369) (NAACP authored brief for the plaintiff, predominantly arguing from the strong facts, instead of in support of the Court of Appeals' technical rules); Brief for the Respondent, Tex. Dep't of Comm. Affairs v. Burdine, 450 U.S. 248 (1981) (No. 79-1764) (brief for the plaintiff—authored by a private attorney—arguing in part in support of the Court of Appeals' approach); *see also* Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, McDonald v. Santa Fe Transp. Co., 427 U.S. 273 (1976) (No. 75-260) (in a case where the technical rule disadvantaged a plaintiff, but a "reverse discrimination" plaintiff, arguing that the technical rule was wrong, but that on these facts the evidence showed there was no discrimination).

139. *See supra* notes 134–138 and accompanying text.

140. *See infra* notes 153–159, 207–213 and accompanying text.

141. *See infra* notes 153–159, 207–213 and accompanying text. I use the term "liberal Justices" to connote the set of Justices who regularly during this time frame voted in favor of what could be perceived as liberal interests. During the relevant time frame (1983 through mid-1993), this included a block of three-to-four Justices, including at least Justice Harry Blackmun, Justice William Brennan (who left the Court in 1990), and Justice Thurgood Marshall (who left the Court in 1991). Sometimes joining these three were Justice Byron White (who drifted right during this time frame), Justice John Paul Stevens (who drifted left) and Justice David Souter (who joined the Court in the early 1990s). *See generally* Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 566 n.142 (2014) (discussing the drift of Justices Stevens and White specifically on race matters); *Ideological Leanings of United States Supreme Court Justices*, WIKIPEDIA, https://en.wikipedia.org/wiki/Ideological_leanings_of_United_States_Supreme_Court_justices [https://perma.cc/7J9R-73TJ] (showing the Martin-Quinn scores, a measure of ideological leaning, of the above Supreme Court Justices over time); *Members of the Supreme Court of the United States*, SUPREME COURT OF THE U.S., https://www.supremecourt.gov/about/members.aspx [https://perma.cc/JQ3S-NTZE] (showing the composition of the Court during the relevant time frame).

142. *See infra* notes 153–159, 207–213 and accompanying text.

Ultimately, these disputes were resolved in favor of a non-technical, factually focused *McDonnell Douglas* approach, but only after a decade of internal dissension and debate.[143]

These debates would eventually come to center on the lower courts' defendant-burdening technical rules at Step Three of *McDonnell Douglas*—rules that made a finding of pretext dispositive even in the absence of a factual finding of discrimination.[144] But they originally emerged in a case involving the technical application of *McDonnell Douglas* to disadvantage a *plaintiff*—then a more rare occurrence.[145] Thus, it was a case involving the lower courts' rigid application of the prima facie case—*United States Postal Service v. Aikens*[146]—that first led to significant disputes on the Court regarding the propriety of technical *McDonnell Douglas* approaches.

In theory, *Aikens* ought not to have been a controversial case. Aikens had introduced extremely strong evidence of discrimination—evidence that even the conservative Justices[147] agreed was enough to prove discrimination.[148] Moreover, the parties essentially agreed that the case should narrowly focus on how the technical prima facie case standard should be formulated and not on whether a technical approach was permissible in the first place.[149] But an amicus brief by the American

143. *See infra* notes 153–159, 207–213 and accompanying text.

144. *See infra* notes 153–159, 207–213 and accompanying text.

145. *See infra* note 146 and accompanying text.

146. 460 U.S. 711 (1983).

147. I use the term "conservative Justices" to connote the set of Justices who regularly during this time frame voted in favor of what could be perceived as conservative interests. During the relevant time frame (1983-mid-1993), this included a block of three-to-four Justices, including Justice William Rehnquist, Justice Warren Burger (who left the Court in 1986), Justice Antonin Scalia (who joined the Court in 1986), Justice Clarence Thomas (who joined the Court in 1991), and sometimes also Justice Sandra Day O'Connor (who joined the Court in 1981) and Justice Anthony Kennedy (who joined the Court in 1988). *See generally Ideological Leanings of United States Supreme Court Justices*, WIKIPEDIA, https://en.wikipedia.org/wiki/Ideological_leanings_of_United_States_Supreme_Court_justices [https://perma.cc/7J9R-73TJ] (showing the Martin-Quinn scores, a measure of ideological leaning, of the above Supreme Court Justices over time); *Members of the Supreme Court of the United States*, SUPREME COURT OF THE U.S., https://www.supremecourt.gov/about/members.aspx [https://perma.cc/JQ3S-NTZE] (showing the composition of the Court during the relevant time frame).

148. *See, e.g.*, U.S. Postal Serv. v. Aikens, 460 U.S. 711, 713 n.2 (1983) (opinion joined by all of the Court's conservatives, agreeing that Aikens had introduced enough evidence to prove discrimination). Aikens had introduced evidence *inter alia* that the primary decision-maker had repeatedly made racist remarks, including about Aikens, that blacks were consistently passed over for promotion, and that those promoted over Aikens had vastly inferior qualifications. *See generally* Brief for the Respondent, U.S. Postal Serv. v. Aikens, 460 U.S. 711 (1983) (No. 81-1044) (NAACP authored brief for the plaintiff, detailing the strong evidence of discrimination) [hereinafter Aikens Respondent's Brief].

149. *Cf.* Aikens Respondent's Brief, at 55–83 (focusing their argument entirely on the prima facie case issue, rather than arguing that the focus on the specific requirements of the prima facie case was

Federation of Labor and Congress of Industrial Organization (AFL-CIO)—arguing that the *McDonnell Douglas* paradigm had devolved into a series of technical rules and ought to be abandoned in favor of a factual approach—made *Aikens* the unlikely site for initial disputes to erupt over the technical *McDonnell Douglas* paradigm.[150]

Aikens might have been expected to support the ALF-CIO's call for the abandonment of the technical *McDonnell Douglas* paradigm, given that he had been burdened by such a technical *McDonnell Douglas* approach in the lower courts.[151] But the LDF, representing Aikens, did not welcome the AFL-CIO's call for the paradigm to be abandoned.[152] To the contrary, the LDF framed the AFL-CIO's argument as a wholesale attack on anti-discrimination plaintiffs.[153] Reasoning that Aikens himself had a "very unusual" case, insofar as there was explicit evidence that his supervisor was "racist," the LDF opined that for the vast majority of plaintiffs who have only circumstantial evidence, *McDonnell Douglas* remained essential.[154] Thus, the LDF called on the Justices to "unequivocally reject[] . . . [a]ny suggestion that *McDonnell Douglas* should be overruled or applied only to a limited category of cases."[155]

Like the LDF, the Court's liberal Justices also strongly opposed the

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erroneous given the overwhelming evidence of discrimination in the case); Brief for the Petitioner, U.S. Postal Serv. v. Aikens, 460 U.S.711 (1983) (No. 81-1044) (also focusing exclusively on whether the prima facie case was made out).

150. *See* Brief as Amicus Curiae and Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae at 7–12, 23–29, U.S. Postal Serv. v. Aikens, 460 U.S. 711 (1983) (No. 81-1044) [hereinafter Aikens AFL-CIO Amicus Brief].

151. *See* Aikens v. Bolger, No. 77-0303, 1984 WL 48949, at *6 (D.D.C. Feb. 1, 1984). Note that although the parties framed the case as focused on the District Court's technical requirements for the prima facie case, it is also possible to read the District Court opinion as also holding against the plaintiff on the bottom-line factual question of discrimination. *Id.* Even in that domain, however, the Court appeared to apply a technical conception requiring specific types of evidence to prove discrimination. Regardless, neither party focused on this issue significantly on appeal. *See generally* sources cited *supra* note 149.

152. *See infra* notes 153–155 and accompanying text.

153. *See, e.g.*, Aikens Respondent's Brief, *supra* note 148, at 55–67. This response was likely colored by the major disputes that had emerged by this juncture between the AFL-CIO and racial justice advocates in the area of seniority and the application of affirmative action. *See generally* DENNIS DESLIPPE, PROTESTING AFFIRMATIVE ACTION: THE STRUGGLE OVER EQUALITY AFTER THE CIVIL RIGHTS REVOLUTION 7–9 (2012) (describing the role of the AFL-CIO in promoting civil rights, and their turn in the 1970s against affirmative action). The tenor of the AFL-CIO's brief—which utterly ignored the plaintiff's strong evidence of discrimination and said he had not even made out a prima facie case—doubtless also contributed to the LDF's perception that the AFL-CIO's proposal was not a plaintiff-friendly one. *See* Aikens AFL-CIO Amicus Brief, *supra* note 150, at 13–14.

154. Oral Argument at 47:37, U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983) (No. 81-1044), *available at* https://www.oyez.org/cases/1982/81-1044 [https://perma.cc/8TGX-EB79].

155. *See* Aikens Respondent's Brief, *supra* note 148, at 67.

AFL-CIO's suggestion of limiting or abandoning *McDonnell Douglas*.[156] As such, when Justice Rehnquist drafted an initial opinion that favored Aikens but found the *McDonnell Douglas* paradigm inapplicable to his case,[157] all of the liberal Justices refused to join.[158] Justice Rehnquist's opinion held that Aikens had introduced sufficient evidence to prove the ultimate factual question of discrimination, not just a prima facie case—a holding that arguably put Aikens in a better position than Justice Marshall's draft dissent. But because the opinion also held that the *McDonnell Douglas* paradigm was inapplicable to a host of circumstances, the liberal Justices perceived it as an attack on the enforcement of anti-discrimination law.[159]

Faced with an inability to attract a majority, Justice Rehnquist ultimately revised his opinion to adopt a compromise position acceptable to all of the Justices, save Justice Marshall.[160] No longer repudiating the

156. *See infra* note 158 and accompanying text.

157. *See* Justice Rehnquist, Draft Opinion One (Dec. 9, 1982) at 8–9, *in* Lewis F. Powell, Jr., Supreme Court Case Files, *United States Postal Service Board of Governors v. Aikens*, https://scholarlycommons.law.wlu.edu/casefiles/622/ [https://perma.cc/X6NC-A6CB] [hereinafter Powell Papers – *Aikens*]); Justice Rehnquist, Draft Opinion Two (Jan. 14, 1983) at 8–9, *in* Powell Papers – *Aikens*, *supra* note 157.

158. *See* Memorandum from Thurgood Marshall, Assoc. Justice, U.S. Supreme Court, to William H. Rehnquist, Assoc. Justice, U.S. Supreme Court (Dec. 9, 1982), *in* Powell Papers – *Aikens*, *supra* note 157; Draft Dissent by Justice Marshall, (Jan. 11, 1983) at 1, *in* Powell Papers – *Aikens*, *supra* note 157, [hereinafter Marshall Aikens Draft Dissent]; Memorandum from William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, to Thurgood Marshall, Assoc. Justice, U.S. Supreme Court (Jan. 12, 1983), *in* Powell Papers – *Aikens*, *supra* note 157; Memorandum from Henry A. Blackmun, Assoc. Justice, U.S. Supreme Court, to Thurgood Marshall, Assoc. Justice, U.S. Supreme Court (Jan. 13, 1983), *in* Powell Papers – *Aikens*, *supra* note 157. As set out *infra* note 160, many of the Court's moderates also objected to the opinion, albeit for somewhat different reasons.

159. *Compare* Marshall Aikens Draft Dissent, *supra* note 158, at 9–13 (focusing on whether Aikens had made out a prima facie case only, though also noting in a footnote that he would also find the District Court holding that the defendant's explanation was not pretextual "clearly erroneous"), *with* Rehnquist Aikens 1st Draft, *supra* note 158, at 8–10 (holding that Aikens's evidence was sufficient to support an ultimate holding of discrimination, and remanding to the District Court on that issue). It appears clear that the liberals, like the LDF, viewed the preservation of the *McDonnell Douglas* paradigm as highly important for plaintiffs—not an unreasonable view given the then-open question of the impact of a finding of pretext. It may also be that like the LDF, the liberal Justices viewed Aikens's case—with its extremely strong evidence of discrimination—as aberrational and viewed the issue of most importance as the overarching legal framework for circumstantial evidence plaintiffs.

160. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); *see also* Memorandum from William H. Rehnquist, Assoc. Justice, U.S. Supreme Court, to John Paul Stevens, Assoc. Justice, U.S. Supreme Court (Mar. 3, 1983) at 1–2, *in* Powell Papers – *Aikens*, *supra* note 157; Justice Rehnquist, Alternate Draft Opinion (U.S. Postal Serv. Bd. of Governors v. Aikens) (Mar. 13, 1983) at 3–5, *in* Powell Papers – *Aikens*, *supra* note 157; Join Sheet (U.S. Postal Serv. Bd. of Governors v. Aikens) (n.d.), *in* Powell Papers – *Aikens*, *supra* note 157. For the concerns that led the Court's moderates to decline to join—depriving Justice Rehnquist of his majority—*see* Justice Powell, Draft Concurrence (U.S. Postal Serv. Bd. of Governors v. Aikens) (Feb. 17, 1983) at 3–4, *in* Powell Papers

applicability of the *McDonnell Douglas* paradigm as a whole, Justice Rehnquist's opinion for the Court instead focused on its erroneous application in the specific procedural posture of Aikens's case.[161] Noting that Aikens's case had been "fully tried on the merits," the Court opined that a focus on the prima facie case at this stage "unnecessarily evaded the ultimate question of discrimination vel non."[162] Rather, after the employer's LNDR has been articulated, a court should direct its attention to the factual question of "whether 'the defendant intentionally discriminated against the plaintiff.'"[163] Moreover, the Court emphasized, courts "should [not] treat discrimination differently from other ultimate questions of fact."[164]

But while *Aikens* was virtually unanimous and seemed to embrace a factually, not technically, focused understanding of *McDonnell Douglas,* the apparent agreement among the Justices masked substantial remaining divisions.[165] Although he published no opinion, Justice Marshall refused to join Justice Rehnquist's opinion for the Court in *Aikens*, concurring only in the judgment.[166] And Justice Blackmun, joined by Justice Brennan, published a concurring opinion that—while nominally agreeing that the ultimate issue in a *McDonnell Douglas* case was the factual question of discrimination—also stated that a technical showing of pretext, if present, must control.[167] Thus, although *Aikens* appeared to be yet another unanimous rejection of the technical *McDonnell Douglas* paradigm, it in fact represented the beginning of substantial divisions on

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– *Aikens*, *supra* note 157; Justice O'Connor, Draft Concurrence (U.S. Postal Serv. Bd. of Governors v. Aikens) (Feb. 22, 1983) at 1–2, *in* Powell Papers – *Aikens*, *supra* note 157.

161. *See infra* notes 162–164 and accompanying text.

162. *Aikens*, 460 U.S. at 713–14.

163. *Id.* at 715. This aspect of Supreme Court case law alone should mean that the *McDonnell Douglas* prima facie case should virtually never form the basis for dismissals of plaintiffs' claims, since as a practical matter, the employer virtually always comes forward with the LNDR by the time the case reaches dispositive motions (and often long before). *See, e.g.*, Brady v. Office of Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008) (recognizing this implication of *Aikens*). Nevertheless, many of the lower courts still contravene *Aikens* by granting summary judgment, and sometimes even judgment as a matter of law, based on the plaintiffs' failure to make out the prima facie case—despite the fact that the employer has articulated their LNDR. *Id.* at 493 (noting that courts "often wrestle with the question whether the employee made out a prima facie case" at summary judgment, despite the fact that under *Aikens*, "judicial inquiry into the prima facie case is usually misplaced").

164. *Aikens*, 460 U.S. at 716.

165. *See supra* notes 161–164 and accompanying text; *Aikens*, 460 U.S. at 716 (emphasizing that discrimination should not be treated differently from other ultimate questions of fact, even in the *McDonnell Douglas* context).

166. *See Aikens*, 460 U.S. at 717 (Marshall, J., concurring in the judgment).

167. *See id.* at 717–18 (Blackmun, J., joined by Brennan, J., concurring).

the Court.

In the decade following *Aikens*, these divisions continued to deepen behind the scenes, though they rarely surfaced. Most notably, during the 1988 Term, a series of cases demonstrated that the Justices remained divided and that their ideological alignment remained largely the same—despite an increasing trend in the lower courts towards *plaintiffs* being burdened with technical *McDonnell Douglas* rules.[168] In these cases, the Court's liberal Justices continued to adhere to a technical vision of the *McDonnell Douglas* paradigm—even in some circumstances where doing so seemed to burden plaintiffs.[169] In contrast, the Court's conservative Justices continued to align themselves largely with a flexible version of the *McDonnell Douglas* paradigm, under which the Court's focus must remain at all times on the ultimate factual question of discrimination.[170]

The most central case in which the Justices took up these issues was also ultimately the least momentous. *Harbison-Walker v. Brieck*[171] seemed on its face a straightforward case regarding what was required to defeat summary judgment in a *McDonnell Douglas* case.[172] But previewing a set of issues that would be resolved later in *St. Mary's Honor* and *Reeves v. Sanderson Plumbing*,[173] the Justices in *Harbison-Walker* divided sharply over what should be the implications of a finding of pretext.[174] Mirroring the arguments made by Justices Blackmun and Brennan in *Aikens*, some of the liberal Justices continued to insist that a finding of pretext was dispositive in a *McDonnell Douglas* case and required a finding in favor of the plaintiff.[175] In contrast, conservative

168. *See infra* notes 171–194 and accompanying text.

169. *See infra* notes 171–194 and accompanying text.

170. *See infra* notes 171–194 and accompanying text.

171. 488 U.S. 226 (1988).

172. *Id.*; *see also* Preliminary Memorandum from S.T., Law Clerk, to the Cert. Pool on Oct. 9, 1987 Conference, at 7–9 (circulated Sept. 23, 1987), *in* Blackmun Papers, *supra* note 112, Box 514 (framing the issue as the "narrow" one of what type of pretext evidence a plaintiff must introduce in order to survive summary judgment in an employment discrimination case).

173. 530 U.S. 133 (2000).

174. *See infra* notes 175–177 and accompanying text. Further complicating matters, the Justices at times conflated the questions of whether plaintiff proof of pretext (in the sense of falsity) was *sufficient* for a finding of discrimination with the distinctive question of whether it *required* a finding of discrimination. In theory, the latter question was not raised by *Harbison-Walker*, since the only question posed by an employer's summary judgment motion is whether the jury *could* find for the plaintiff based on pretext, not whether they are required to do so. Nevertheless, several of the liberal Justices addressed the case in terms of whether the fact-finder would be required to find for the plaintiff if they found pretext. *See* sources cited *infra* note 175.

175. *See, e.g.*, Justice Brennan, Case Notes (Harbison-Walker v. Brieck) (n.d.), *in* Brennan Papers, *supra* note 136, Box I:801; Justice Blackmun, Conference Notes (Harbison-Walker Refractories v.

Justices like Scalia complained that this "would rewrite the statute," which requires a plaintiff to "prove discrimination."[176] Although Justice Kennedy would (at Justice Brennan's urging) briefly attempt to devise "a rationale that would obtain a probable concurrence of the majority of the Court," the Justices would quickly—and virtually unanimously—decide to dismiss the case as improvidently granted.[177]

Though *Harbison-Walker* was dismissed as improvidently granted, two other cases during the 1988 Term would also force the Justices to grapple with the role of *McDonnell Douglas* and whether it should be understood as a technically or factually focused paradigm. The first of these—*Patterson v. McLean Credit Union*[178]—was a holdover from the 1987 Term and was principally divisive among the Justices for reasons unrelated to the appropriate application of the *McDonnell Douglas* paradigm.[179] Indeed, the Justices—though sharply divided on other issues—were unanimous that the district court had erred in instructing the jury that the plaintiff was required to prove she was "better qualified" than the person who received the promotion she sought (rather than simply proving "discrimination").[180] Noting that there were "various ways in which petitioner might seek to prove intentional discrimination," the majority reasoned (and the concurrence agreed) that it was error to "force[] [the plaintiff] to pursue any particular means of demonstrating . . . pretext[]."[181] Thus, in *Patterson*, the Justices were once again in agreement that the lower court's technical rule—here requiring a showing of superior qualifications in promotions cases—was erroneous.[182]

Brieck) (Nov. 2, 1988), *in* Blackmun Papers, *supra* note 112, Box 514.

176. *See, e.g.*, Justice Blackmun, Conference Notes (Harbison-Walker Refractories v. Brieck) (Nov. 2, 1988), *in* Blackmun Papers, *supra* note 112, Box 514.

177. *See* Harbison-Walker v. Brieck, 488 U.S. 226 (1988); Memorandum from Justice Kennedy to the Chief Justice and the Conference (Nov. 3, 1988), *in* Brennan Papers, *supra* note 136, Box I:801 (memorandum with handwritten marking making clear that Brennan encouraged Kennedy in his attempt to formulate a draft that would satisfy a majority of the Justices).

178. 491 U.S. 164 (1989).

179. *Patterson* became a highly controversial case when the conservative Justices on the Court called for briefing and reargument to reconsider whether § 1981 applied to private discrimination in contracts. *See* Patterson v. McLean Credit Union, 485 U.S. 617 (1988) (ordering reargument on the issue of whether § 1981 applies to discrimination in private contracts). While the Court ultimately reaffirmed that it does apply to private discrimination, the Justices were also divided over whether harassment claims could be actionable under § 1981. *See Patterson*, 491 U.S. at 175–85 (majority, holding that harassment was not actionable under § 1981); *id.* at 212–15 (Brennan, J., concurring and dissenting) (reaching the opposite conclusion).

180. *Patterson*, 491 U.S. at 187–88; *see also id.* at 215–18, 218 n.18 (concur and dissent, reaching very similar conclusion).

181. *Id.* at 188.

182. *See supra* notes 180–181 and accompanying text.

But the final case, *Price Waterhouse v. Hopkins*,[183] would once again see the Justices dividing over the technical *McDonnell Douglas* paradigm, largely along ideological lines. Presenting the question of whether a "mixed motives" paradigm should also be available—and if so, what form it should take—*Price Waterhouse* arguably did not require the Justices to address disputes over the proper form of the *McDonnell Douglas* paradigm.[184] A "mixed motives" burden-shifting framework had long existed in constitutional law, allowing the plaintiff to shift the burden to the defendant to *disprove* the causal impact of discrimination upon a showing of multiple motives (some discriminatory, some not).[185] And yet—as early applications of *McDonnell Douglas* itself had demonstrated—this was not the only possible way of legally evaluating claims in which there were multiple motives (including both discrimination and legitimate motives) at play.[186] Thus, it was certainly possible for the Court to embrace a "mixed motives" paradigm alongside *McDonnell Douglas*, even if the factual situations to which they applied might overlap.[187] But in *Price Waterhouse*, the defendant's briefs reasoned to the contrary, arguing that if *McDonnell Douglas* was sufficient to accommodate cases in which there were multiple motives, no

183. 490 U.S. 228 (1989).

184. While some of the possible resolutions of *Price Waterhouse* would have turned on the proper understanding of the *McDonnell Douglas* paradigm, the actual resolution that the court settled on—recognizing a distinctive "mixed motives" burden-shifting paradigm—did not. *Cf.* Justice Blackmun, Handwritten Notes (Price Waterhouse v. Hopkins) (Oct. 29, 1988), *in* Blackmun Papers, *supra* note 112, Box 519 (pre-conference notes by Justice Blackmun, suggesting that mixed motives should be folded into the *McDonnell Douglas* paradigm, with the ultimate question on the merits being whether or not protected class status was a "subst[antial]" or "motivat[in]g" factor).

185. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

186. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) is the most striking example of this. In *McDonald*, the Supreme Court applied *McDonnell Douglas* to a disparate treatment case, despite the fact that the employer's "legitimate" motive—disciplining employees for theft—was undisputed to be a factor in the termination. *See id.* at 283–84. The Court reasoned that under *McDonnell Douglas*, race need not be the sole cause, only a "but for" cause. *Id.* at 282 n.10.

187. Indeed, this is effectively the regime that exists in most circuits today as to non-retaliation claims under Title VII, since most circuits have held that the bottom-line question in a *McDonnell Douglas* case is whether protected class status was a "but for" cause, not whether it was a sole cause. *See, e.g.*, Jones v. Okla. Pub. Sch., 617 F.3d 1273, 1277–79 (10th Cir. 2010) (in a *McDonnell Douglas* case, holding that "but for" causation, not "sole" causation is the standard); Miller v. Cigna Corp., 47 F.3d 586, 597–99 (3d Cir. 1995) (holding that "but for" rather than "sole" cause, was the standard in cases that do not qualify for mixed motives burden shifting). This means that, just like in *McDonald*, a plaintiff can prevail in a *McDonnell Douglas* case even where the employer's LNDR played a role in the outcome, so long as protected class status tipped the balance. *See McDonald*, 427 U.S. at 282 n.10. Thus, claims that involve both legitimate and illegitimate motives can be brought via either the *McDonnell Douglas* or the "mixed motives" paradigm. *See, e.g.*, Ponce v. Billington, 679 F.3d 840, 844–47 (D.C. Cir. 2012) (holding that cases involving both legitimate and illegitimate motives can be brought either via the *McDonnell Douglas* or the "mixed motives" paradigm).

additional paradigm should be available.[188]

This framing resulted in the curious spectacle of the Court's liberal Justices embracing a very technical, narrow, and plaintiff-unfavorable view of the *McDonnell Douglas* paradigm's operation in their plurality opinion embracing the mixed-motives paradigm.[189] Rather than a vehicle for ascertaining the factual question of whether discrimination took place—something that a plaintiff could prove even if the employer's reason was not proven false—the plurality instead portrayed *McDonnell Douglas* as a paradigm in which the plaintiff was required to prove the employer's reason was untrue.[190] They thus portrayed *McDonnell Douglas* as a rigid either/or affair in which the plaintiff either succeeded at Step Three in proving the employer's reason was entirely false, or they lost.[191]

In contrast, the conservative Justices in dissent (rejecting a separate mixed motives paradigm) embraced a far more flexible—and arguably far more plaintiff-friendly—vision of *McDonnell Douglas*.[192] Treating *McDonnell Douglas* as an "orderly and adequate way to place both inferential and direct proof before the factfinder for a determination whether intentional discrimination [took place]," the conservative dissenters argued that plaintiffs were *not* restricted at Step Three to showing the employer's reason to be false.[193] Rather, a plaintiff might also directly "persuade the court that the employment decision was motivated by discrimination"—something that did not require the plaintiff to show that the employer's reason was false or even to rule out that the employer's LNDR was a partial cause of the employment decision.[194]

As demonstrated by the 1988 Term, the divides that emerged in *Aikens* had not disappeared by the late 1980s—far from it. Rather, though the liberal and conservative Justices occasionally reunited to reject technical

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188. In other words, the defendant argued that if a *McDonnell Douglas* plaintiff could prevail, even where both discrimination and the employer's LNDR played a partial role, then no additional paradigm should be available. *See, e.g.*, Brief for Petitioner, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (No. 87-1167), 1988 WL 1025858, at *29–33.

189. *See infra* notes 190–191 and accompanying text.

190. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 240 n.6, 246–47, 247 n.12 (1989) (plurality opinion).

191. *Id.*

192. *See id.* at 284, 287–89 (Kennedy, J., dissenting).

193. *Id.* at 288.

194. *Id.* at 289; *see also id.* at 284 (dissent, noting that protected class status only had to be *a* cause, not a sole cause, under Title VII, meaning one that "either by itself or in combination with other factors . . . made a difference to the decision"); *supra* note 186 and accompanying text (observing that prior to *Price Waterhouse*, the Supreme Court had applied *McDonnell Douglas* to situations in which the employer's legitimate motivation had played a role, and had specified in those contexts that protected class status need only be a "but for" cause).

McDonnell Douglas rules, they increasingly viewed the paradigm differently. For the liberal Justices, the paradigm was one that they cast as a series of technical rules, potentially divorced from the ultimate factual question of discrimination. In contrast, the conservative Justices aligned themselves largely with a flexible, factually focused version of the *McDonnell Douglas* paradigm in which the factual question of discrimination remained the core concern at all times.

C. *The Demise of the First Technical McDonnell Douglas Paradigm in* St. Mary's Honor Center v. Hicks

It was against this backdrop that *St. Mary's Honor Center v. Hicks* came up to the Court in 1993.[195] At last, *St. Mary's Honor* squarely presented the issue raised by Justices Blackmun and Brennan in *Aikens*: whether a finding of pretext *required* a holding for the plaintiff in a *McDonnell Douglas* case.[196] The court of appeals in *St. Mary's Honor* had so held, reversing despite the district court's factual conclusion that—although the employer's proffered reasons were pretextual—discrimination had not been proven.[197] Progressive organizations and commentators viewed such a "pretext-mandates-judgment" rule as key to *McDonnell Douglas*'s utility, and thus saw the stakes of *St. Mary's Honor* as being very high.[198]

Indeed, many progressives believed that plaintiffs with only circumstantial evidence of discrimination would be hard-pressed to win their cases without the help of a technical rule that required a ruling in favor of the plaintiff when pretext was shown.[199] Absent a rule that required a finding for the plaintiff upon a showing of pretext, they reasoned that plaintiffs would be required to produce "direct" evidence of

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

196. *Id.*; *see also* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 717–18 (1983) (Blackmun, J., joined by Brennan, J., concurring).

197. *See* Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 492–93 (8th Cir. 1992).

198. *See, e.g.*, William H. Freivogel, *Discrimination Law Being Put to the Test Supreme Court Reviews Burden of Proof*, ST. LOUIS POST-DISPATCH, Apr. 20, 1993, at 01B, 1993 WLNR 601741; *see also infra* notes 208–211 and accompanying text (NAACP view in briefing); *infra* notes 219–223 and accompanying text (reactions during and after the fact).

199. *See infra* notes 200–201, and accompanying text. Note that part of this concern arose from the occasional conflation—on both sides—of the question of whether plaintiffs *could* prove the factual question of discrimination by proving the employer's LNDR false with the question of whether proving the employer's LNDR false *compelled* a finding of discrimination. *See, e.g.*, *Hicks*, 509 U.S. at 535 (Souter, J., dissenting). This issue was ultimately resolved by the Court's unanimous decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), holding that a permissive, but not mandatory, inference of discrimination arises from a finding of pretext.

discrimination or to disprove any possible employer reason "lurking in the record."[200] Although neither was a necessary consequence of a factual approach to *McDonnell Douglas*, both were perceived as such by many progressives—with some reason.[201] And because explicit proof of bias was rare and disproving all possible reasons was potentially impractical, progressives perceived the court of appeals' rule as of vital importance.

But Melvyn Hicks's own case arguably was a poor vehicle for addressing this set of concerns. Hicks himself had highly persuasive evidence of discrimination that extended far beyond proof that the employer's reason was false.[202] Indeed, there was a virtual smoking gun in Hicks's case: an internal memorandum in which the author explicitly opined that there were too many African Americans employed in positions of authority at the facility where Hicks worked.[203] In the three years that followed, Hicks and nearly every other African American supervisor were removed from positions of authority at the facility and replaced by white employees.[204] At trial, Hicks proved that the facility's proffered explanation for firing him was false, and there was no support in the record for *any* alternative explanation but race discrimination.[205] Thus, while there were clear flaws in the district court's opinion ruling against Melvyn Hicks, they most obviously resided in the court's *factual* conclusion (finding no race discrimination in the face of highly damning evidence), not its refusal to be bound by a finding of pretext alone.[206]

But because of the posture of the case—and because the court of appeals' ruling was perceived as an important one to preserve—virtually none of the argument by progressives at the Supreme Court focused on

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200. *See, e.g.*, Brief for Respondent Melvin Hicks at 25–37, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) (No. 92-602) (plaintiff's brief, authored by the NAACP) [hereinafter Hicks Respondent's Brief]; *Hicks*, 509 U.S. at 533–38 (Souter, J., dissenting).

201. The majority decision in *St. Mary's Honor* was arguably somewhat ambiguous on both of these issues, though its predominant argument—that discrimination is a factual question—was inconsistent with a rigid rule on either front. *See Hicks*, 509 U.S. at 533–38 (Souter, J., dissenting). The Court ultimately clarified this ambiguous language in *Reeves*, holding that proof that an employer's proffered LNDR is false is *sufficient* (without more) for a fact-finder to find discrimination, though it does not require such a finding. *Reeves*, 530 U.S. at 148.

202. *See infra* notes 203–204 and accompanying text.

203. *See* Hicks Respondent's Brief, *supra* note 200, at 2–3.

204. *Id.*

205. *See* Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1251–52 (E.D. Mo. 1991) (finding the defendant's LNDR was proven false, but reasoning without evidence that the crusade to fire him might have been "personally" rather than "racially" motivated). *Cf.* Hicks v. St. Mary's Honor Ctr., 90 F.3d 285, 290 n.6 (8th Cir. 1996) (on remand, noting that both of the decision-makers testified in post-remand depositions that they lacked personal animus towards Hicks).

206. *See supra* notes 203–205 and accompanying text.

the impropriety of the district court's factual holding.[207] Eschewing any argument that the district court's *factual* conclusion was clearly erroneous, the LDF, arguing for the plaintiff, focused its brief virtually exclusively on defending the technical rule that the circuit court had adopted.[208] Indeed, the LDF strongly defended the position that a finding of pretext, standing alone, demanded judgment in the plaintiff's favor.[209] Using a flow chart to illustrate its position, the LDF contended that there were only two reasons "in the case"—discrimination and the employer's LNDR.[210] As a result, once the plaintiff had proven the employer's LNDR false, the only reason remaining "in the case" was discrimination, and the plaintiff was entitled to win.[211]

Internally, the Justices divided along what were—by now—predictable lines. Reasoning that the employer should be in no better position from lying than they would be from silence, the liberals argued that *McDonnell Douglas* required a finding for the plaintiff where the employer's LNDR was proven false.[212] While acknowledging that *Aikens*—with its focus on the factual question of discrimination—seemed to counsel otherwise, the liberal Justices suggested that it should not control here.[213] The conservative Justices also followed their (by now) well-established approach to *McDonnell Douglas*, contending that the circuit court's technical rule was inconsistent with both *Burdine* and *Aikens* and must be reversed.[214]

It was the vision of the conservative Justices that prevailed. Writing for the Court, Justice Scalia rejected the notion that a finding of pretext compels judgment in favor of the plaintiff, even if the plaintiff has not persuaded the fact-finder of discrimination.[215] Opining that "[w]e have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines . . . *that the employer has unlawfully discriminated*," the majority rejected the notion that *McDonnell Douglas* required otherwise.[216] Characterizing the

207. *See, e.g.*, *infra* notes 209–212, 219–222.

208. *See* Hicks Respondent's Brief, *supra* note 200, at 13–36.

209. *See generally id.*

210. *Id.* at 8, 18.

211. *Id.* at 8, 13–18.

212. *See, e.g.*, Justice Blackmun, Handwritten Notes (St. Mary's Honor Ctr. v. Hicks) (Apr. 17, 1993), *in* Blackmun Papers, *supra* note 112, Box 625; Justice Blackmun, Conference Notes (St. Mary's Honor Ctr. v. Hicks) (Apr. 23, 1993), *in* Blackmun Papers, *supra* note 112, Box 625.

213. *See* sources cited *supra* note 212.

214. *See, e.g.*, Justice Blackmun, Conference Notes (St. Mary's Honor Ctr. v. Hicks) (Apr. 23, 1993), *in* Blackmun Papers, *supra* note 112, Box 625.

215. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510–11 (1993).

216. *Id.* at 514.

McDonnell Douglas paradigm as a mere "procedural device," the majority emphasized that cases like *Aikens* required that the focus at all times must be on the factual question of discrimination.[217] The Court concluded by reiterating *Aikens*'s view that—whatever role *McDonnell Douglas* may play in the "modes and orders and proof"—discrimination is a factual question that must be treated like other questions of fact.[218]

In contrast, in dissent, the liberal Justices strongly resisted the characterization of the *McDonnell Douglas* paradigm as a mere procedural device to aid in the resolution of the factual question of discrimination. Characterizing the majority as "cast[ing] aside" the *McDonnell Douglas* framework, the dissent described the framework as one in which the parties must proceed through a rigid series of technical stages to the ultimate question of whether the employer's reason was *pretextual*.[219] Rather than focusing on the *factual* question of discrimination, the dissent opined instead that the paradigm should be understood as "narrow[ing]" the issue at Step Three to the issue of pretext.[220] The dissent thus characterized *McDonnell Douglas* as a set of technical legal rules, not ultimately subservient to a factual assessment of whether discrimination took place.[221] Decrying the majority's decision to hold otherwise, the dissent predicted that the majority's approach would "greatly disfavor[]" plaintiffs with only circumstantial proof.[222]

In its aftermath, progressives—like the Court's liberal Justices—widely decried *St. Mary's Honor*, characterizing it as an "abandonment of civil rights remedies."[223] But, unlike earlier controversial Title VII decisions from the Rehnquist Court, no successful movement for congressional override ever materialized.[224] As a result, the vision of the *McDonnell Douglas* paradigm embraced by *St. Mary's Honor* (and in the

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217. *Id.* at 518–21.

218. *Id.* at 514, 524–25.

219. *Id.* at 526–30 (Souter, J., dissenting).

220. *Id.* at 529–30, 529 n.2.

221. *Id.* at 526–30.

222. *Id.* at 534.

223. Editorial, *New Direction for the NAACP*, BOS. GLOBE, July 19, 1993, at 10; *see, e.g.*, Herman Schwartz, *The Supreme Court Stays Hard Right.*, NATION, Oct. 25, 1993, at 452, 1993 WL 5139493 (characterizing *St. Mary's Honor* as "intellectually dubious" and as a part of a conservative campaign to judicially retrench civil rights); Viewpoints, *Overburdened; The Supreme Court Has Made it too Difficult to Prove Bias. The Congress Must Act.*, NEWSDAY, July 1, 1993, at 54, 1993 WLNR 393855 (describing the Supreme Court's opinion in *St. Mary's Honor* as "having overturned established civil rights law" and "ma[d]e it more difficult, if not downright impossible, for employees to win bias suits").

224. *See generally* McGinley, *supra* note 4, at 203–06 (describing the substantial attention paid to certain other overridden Supreme Court decisions).

two decades of opinions that preceded it) continues to control today. Contrary to the hopes of progressives in the 1980s—but, as set out below, very much of potential utility to plaintiffs today—*McDonnell Douglas* is, under controlling precedent, no more than a procedural device. Ultimately, it is the factual question of discrimination that must control, rather than any technical rules engrafted on it. As such, under *St. Mary's Honor*, there is no authority for the courts to impose rigid legal rules—on either party—under the rubric of the *McDonnell Douglas* paradigm.

III. IMPLICATIONS: TAKING *ST. MARY'S HONOR* SERIOUSLY

St. Mary's Honor marked the end point of the first technical *McDonnell Douglas* paradigm—that burdening defendants.[225] But even as *St. Mary's Honor* was being decided, already the lower courts had begun to turn toward a new, anti-plaintiff version of the paradigm.[226] Today, technical rules are just as widespread as they were before *St. Mary's Honor*.[227] But they almost exclusively burden plaintiffs, not defendants.[228] Just as during the era of the first technical *McDonnell Douglas* paradigm, such rules are often applied in ways that effectively supplant the factual question of discrimination.[229] Thus, just like forty years ago, it is common for *McDonnell Douglas* cases to be resolved in the lower courts on technical rather than factual grounds.

Debates regarding the propriety of this new anti-plaintiff iteration of the technical *McDonnell Douglas* paradigm often appear to assume that the lower courts write on a clean slate in its adoption. But they do not. From its inception, the *McDonnell Douglas* paradigm generated disputes regarding whether its associated technical rules should be permitted to distract from the ultimate factual question of discrimination—and the Supreme Court consistently and repeatedly held that they should not.[230] These disputes were long fought, deeply divisive, and fully debated on the Court.[231] In deciding *St. Mary's Honor* and the many cases that preceded

225. As noted, *supra* note 48, there are a few ways that the *McDonnell Douglas* paradigm could be characterized as still disadvantaging defendants via technical rules. But most of these have little actual relevance in practice.

226. *See, e.g.*, McGinley, *supra* note 4, at 229–33 (writing just prior to *St. Mary's Honor* that the lower courts were using the *McDonnell Douglas* paradigm in technical ways to defeat plaintiffs' claims at summary judgment).

227. *See supra* Part I.

228. *See supra* Part I.

229. *See supra* Part I.

230. *See supra* Part II.

231. *See supra* Part II.

it, the Court made a clear choice for a factually focused, non-technical version of the paradigm, instead of one under which technical rules may control.[232]

Many of these cases addressed defendant-burdening technical rules that are virtually indistinguishable from the technical rules that plague plaintiffs in the lower courts today. For example, *St. Mary's Honor* itself held that a *defendant's* liability does not turn on pretext, because the factual question of discrimination is the ultimate issue in a *McDonnell Douglas* case—and yet some lower courts today treat a *plaintiff's* failure to prove pretext as fatal to their claims.[233] So, too, cases like *Furnco Construction Corp. v. Waters*,[234] *Texas Department of Community Affairs v. Burdine*, and *McDonnell Douglas* itself rejected the idea that technical rules could render certain *defendants'* proof or arguments off-limits—and yet *plaintiffs* find their proof and arguments ignored under a host of technical circuit rules.[235] *St. Mary's Honor*, *Aikens*, *Furnco*, *MacDonald*, and others held that technical holdings are not *McDonnell Douglas*'s ultimate focus—and that defendants should win—*or lose*—based on the factual question of discrimination.[236] And yet, today, these admonitions are too often ignored by judges who treat the bottom-line factual question—of whether the plaintiff's evidence, taken as a whole, could support a finding of discrimination—as largely irrelevant.[237]

There is no reason why this double standard should be acceptable. The

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232. *See supra* Part II; *see also* Malamud, *supra* note 4, at 2273–74 (making a similar observation).

233. *See* sources cited *supra* note 58. *Cf.* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 518–19, 524 (1993).

234. 438 U.S. 567 (1978).

235. *See* sources cited *supra* notes 59, 63–65. *Cf. Furnco*, 438 U.S. at 577–80 (rejecting the Court of Appeals' refusal to treat as an adequate LNDR an employer reason that did not maximize consideration of minority applicants and also holding the Court of Appeals erred in applying a categorical rule to disallow consideration of the employer's statistical evidence in an individual disparate treatment case); Tex. Dep't of Comm. Affairs v. Burdine, 450 U.S. 248, 256–57, 257 n.11 (1981) (rejecting Court of Appeals rule that had required the defendant to "persuad[e] the court that it had convincing, objective reasons for preferring the chosen applicant above the plaintiff"); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803–04 (1972) (criticizing the circuit court for suggesting that the employer's reason was entitled to "little weight" as a subjective, rather than objective reason).

236. *See, e.g.*, *St. Mary's Honor Ctr.*, 509 U.S. at 518–19, 524 (holding that the factual question of discrimination, not pretext, is the ultimate question in a *McDonnell Douglas* case); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714–16 (1983) (District Court erred in focusing on the *prima facie* case as dispositive once the employer came forward with LNDR, and should have focused on the ultimate factual question of discrimination); *Furnco*, 438 U.S. at 576–78 (noting that "[t]he central focus of the inquiry [in a *McDonnell Douglas* case] is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin'" and holding that the Circuit Court's focus on whether the employer's LNDR would adequately allow inclusion of minorities was inappropriate); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282–84 (1976) (holding that "all racial discrimination in employment" is prohibited by Title VII, and that the seriousness of the plaintiff's offense was not dispositive if disparate treatment had occurred).

237. *See* sources cited *supra* notes 7, 57–58, 60–62.

rationale underlying *St. Mary's Honor*, *Aikens*, and many of the cases that preceded them is that ultimately the question in a *McDonnell Douglas* case is a *factual* one: was the adverse treatment of the plaintiff "because of" race, sex, or another protected class status?[238] Those cases, moreover, hold that *McDonnell Douglas* is a mere "procedural device" designed to aid in this inquiry—and that where technical rules associated with it distract from the factual question, it is the technical rules that must recede.[239] While this reasoning was devised primarily in the context of defendant-burdening technical rules, it equally demands that plaintiffs be unburdened by the technical *McDonnell Douglas* paradigm today. If the courts "have no authority to impose liability upon an employer" based on judge-made technical rules (as opposed to a fact-finder determination of discrimination), surely they equally have no authority to absolve an employer of liability where a fact-finder determination of discrimination could be sustained.[240]

And indeed, to the extent the Supreme Court has had the opportunity to address the "second technical *McDonnell Douglas* paradigm," it has proven no more favorable to it than the first.[241] For example, in the 2000 case of *Reeves v. Sanderson Plumbing Products*, the Court—again unanimous—rejected the lower court's opinion granting JMOL to the defendant on the basis of a succession of technical circuit court rules.[242]

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238. *See, e.g.*, *St. Mary's Honor Ctr.*, 509 U.S. at 518–19, 524 (emphasizing that the ultimate question in a *McDonnell Douglas* case is the *factual* question of whether the employee was treated differently because of his protected class status); *Aikens*, 460 U.S. at 715–16 (same); *see generally supra* Part II.

239. *See* sources cited *supra* note 238.

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

241. *See infra* notes 242–245 and accompanying text; Sprint v. Mendelsohn, 522 U.S. 379, 387–88 (2008) (in a pretext/*McDonnell Douglas* case, holding that evidence of discrimination against other, non-plaintiff employees should be evaluated for admissibility on an individualized basis under Rules 401 and 403, and not subject to per se rules); *cf.* Flowers v. Mississippi, 139 S. Ct. 2228, 2235, 2250–51 (2019) (in the context of a *Batson* challenge, holding that the lower court erred in not assessing the question of discrimination in light of "all the facts and circumstances"). Note that *Young v. UPS* is an exception to the general trend on the Court toward rejection of technical *McDonnell Douglas* approaches, since it endorses a technical variant on the *McDonnell Douglas* paradigm—one benefitting plaintiffs—for some Pregnancy Discrimination Act claims. *See* Young v. United Parcel Serv., Inc., 575 U.S. __, 135 S. Ct. 1338 (2015). However, the Court has made clear that *Young* is limited to a narrow context—claims under the PDA (and, possibly, even further to accommodation claims under the "similar in their ability or inability to work" clause). *Id.* at 1355; *but cf.* Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L.J. 559, 600 (2017) (noting the illogic of the Court's attempt to cabin *Young* to the PDA context). The lower courts have generally resisted efforts to expand *Young* beyond the PDA context. *See, e.g.*, EEOC v. Catastrophe Mgmt., 852 F.3d 1018, 1025–26 (11th Cir. 2016).

242. *See* Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688 (5th Cir. 1999) (applying the stray remarks doctrine, as well as a number of other technical circuit rules, to dismiss the plaintiff's

In 2002, in *Swierkiewicz v. Sorema*,–[243] the Court rejected the Second Circuit's technical rule requiring the pleading of a *McDonnell Douglas* prima facie case. And in 2006, in *Ash v. Tyson Foods*,[244] the Supreme Court reversed another technical lower court opinion, reasoning that the circuit court's rigid legal rules were "unhelpful" to evaluating the plaintiff's claims of discrimination.[245]

In each of these cases, the lower courts dismissed potentially viable discrimination claims based on exactly the type of anti-plaintiff technical rules that now pervade application of the *McDonnell Douglas* paradigm (including, for example, stray remarks, rigid rules for considering comparative qualifications, rigid application of the stages of the *McDonnell Douglas* paradigm, and others).[246] And in each, the Supreme Court rejected the lower courts' rigid and decontextualized approach.[247] Most explicitly in *Reeves*, but implicitly in all of these cases, the Court reaffirmed that the inquiry in the *McDonnell Douglas* context is ultimately a factual one: was the plaintiff subjected to discrimination?[248] Thus, even

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evidence and find that JMOL was appropriate), *rev'd*, 530 U.S. 133, 150–53 (2000) (overturning the lower court's award of JMOL and criticizing its slicing and dicing of the plaintiffs' evidence under technical circuit rules); Zimmer, *supra* note 6, at 585–86, 589–92 (discussing the Supreme Court's decision in *Reeves*).

243. 534 U.S. 506, 510–12 (2002).

244. 546 U.S. 454 (2006).

245. *See id.* at 457; Ash v. Tyson Foods, 129 F. App'x 529, 533–34 (11th Cir. 2005) (applying a series of technical circuit rules to individually divide and reject the plaintiff's evidence on JMOL).

246. *See, e.g.*, *Reeves*, 197 F.3d at 692–94 (applying the "stray remarks" doctrine to ignore age-biased comments, because those comments "were not made in the direct context of Reeves's termination"); *Ash*, 129 F. App'x at 532–34 (applying a host of hyper-technical circuit rules to uphold JMOL, including circuit rules limiting relevant qualifications evidence to only that which demonstrated a "disparity . . . so apparent as virtually to jump off the page and slap you in the face"); Swierkiewicz v. Sorema, 5 F. App'x 63, 64–65 (2d Cir. 2001) (requiring the plaintiff to plead a *McDonnell Douglas* prima facie case of discrimination).

247. *Reeves*, 530 U.S. at 150–53; *Swierkiewicz*, 534 U.S. at 510–12; *Ash*, 546 U.S. at 455–58.

248. In *Reeves*, the Court's unanimous opinion repeatedly reiterates throughout that the bottom-line question in a *McDonnell Douglas* case is a factual one, and thus must be treated as such at JMOL. *See, e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146–47 (2000) (observing that the Court held in *St. Mary's Honor* that the fact-finder's role in a *McDonnell Douglas* case is ultimately to decide whether the "employer intentionally discriminated" and that pretext evidence can be a basis for that factual conclusion, thought it does not compel that conclusion); *id.* at 148 (making clear that because discrimination "should not [be] treat[ed] . . . differently from other ultimate questions of fact," each individual *McDonnell Douglas* case must be evaluated in light of all of the facts and circumstances to determine if JMOL is appropriate); *id.* at 153 (treating the ultimate question in a *McDonnell Douglas* case as the factual question of whether the defendant "intentional[ly] discriminated" and holding that the Circuit Court erred in "substitut[ing] its judgment concerning the weight of the evidence for the jury's"). In *Swierkiewicz*, the Court reaffirmed that the bottom-line question in a discrimination case is whether the plaintiff was terminated "on account" of his protected class status, and that that should thus be the relevant benchmark against which a motion to dismiss is evaluated. *See Swierkiewiecz*, 534 U.S. at 514; *see also id.* at 511–12 (noting that the *McDonnell*

as the lower courts have shifted towards plaintiff-unfavorable technical approaches, the Supreme Court has adhered to its vision of the *McDonnell Douglas* paradigm as a procedural vehicle that may not distract from Title VII's fundamentally factual bottom-line.[249]

But these Supreme Court holdings have had little effect. To date, most attacks on the plaintiff-unfavorable revival of the technical *McDonnell Douglas* paradigm have not taken place in the Supreme Court, but in the lower courts. And, such attacks have ordinarily taken the form of individualized critiques of the application of specific technical rules.[250] In a world in which scores of cases each year are dismissed under an ever-varying configuration of technical *McDonnell Douglas* rules, these challenges have failed to meaningfully affect the lower courts' hyper-technical approach.[251] Even where (as described above) the Supreme Court itself has reversed lower court decisions applying the new technical *McDonnell Douglas* paradigm, it has done so without critiquing the broader phenomenon.[252] As such, many lower courts have paid scant attention, continuing to apply the very doctrines repudiated by the Court.[253]

But the history recounted herein suggests that a more global approach is both warranted and feasible.[254] While the technical approaches that

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Douglas prima facie case is supposed to be flexible and that plaintiffs can prove discrimination in a variety of ways). And in *Ash*, the court held that uncontextualized legal rules could not provide the answer to whether the plaintiff's evidence was probative of discrimination. *See Ash*, 546 U.S. at 456 (noting that no per se rule could be stated regarding whether the use of the term "boy" was evidence of discrimination, and discussing the many contextual factors that might affect whether it was probative of bias); *id.* at 457–58 (criticizing the circuit court's rigid rule for when comparative qualifications are probative and declining to articulate an alternative standard).

249. *See* sources cited *supra* note 248.

250. The most obvious extant basis on which plaintiffs *could* challenge the technical *McDonnell Douglas* would be to urge the adoption of the Eleventh (and formerly Seventh) Circuits' "convincing mosaic" standard. But a search of trial court and court of appeals briefs shows only a handful of references to the standard in circuits other than the Seventh and Eleventh. *See* Westlaw Court of Appeals Briefs and Trial Documents Databases (search for "convincing mosaic"), https://www.westlaw.com/SharedLink/da9bdcdca3d5483fb484badf76e9a6f2?VR=3.0&RS=cblt1.0 (last visited Sept. 11, 2019).

251. *See generally* sources cited *supra* note 10.

252. *See* sources cited *supra* notes 242–245.

253. *See, e.g.*, SPERINO, *supra* note 4, at 207 (detailing the continued application of the stray remarks doctrine after *Reeves* and *Tyson*); Zimmer, *supra* note 6, at 592–600 (documenting the lower courts' failure to meaningfully retreat from the their technical approach to *McDonnell Douglas* after *Reeves*); Ash v. Tyson, 190 F. App'x 924 (11th Cir. 2006) (on remand, reaching the same conclusion, and relying on very similar technical reasoning). Note that this is not all that different from the first technical *McDonnell Douglas* paradigm, where it took many years, and many cases for the lower courts to abandon some of their rules limiting, for example, the types of employer reasons or evidence that could be considered. *See supra* Part IIA.

254. *See generally infra* notes 255–266 and accompanying text.

infect *McDonnell Douglas* today vary in form and by circuit, *any* decision that privileges technical legal rules over the search for the factual question of discrimination is inconsistent with the Supreme Court's holdings.[255] This is true of cases that decisively apply a rigid formulation of the prima facie case[256]; that require a showing of pretext in the sense of falsity (even in the presence of other evidence of discrimination)[257]; that disregard plaintiff evidence for a host of technical reasons[258]; that give dispositive weight to employer evidence which is, as a matter of fact, only partially relevant[259]; and more.[260] While each of these technical rules takes a different form, they all suffer from the same flaw: they seek to privilege a technical legal rule over the search for the factual question of whether discrimination took place.[261] Just as the Court spent decades repudiating such technical rules where they burden defendants, so too their current plaintiff-burdening iterations must fall. Ultimately, while the structure of *McDonnell Douglas* remains, the Supreme Court has admonished that it must not distract from the fundamentally factual question of discrimination.[262]

Some circuits' case law—most notably the Seventh and the Eleventh—provide models for what a *McDonnell Douglas* paradigm shorn of its technical rules might look like. For example, the Seventh Circuit has reminded us that the relevant question in a Title VII case "is simply

255. *See supra* Part II.

256. *See, e.g.*, Taylor v. Va. Union Univ., 193 F.3d 219, 232–33 (4th Cir. 1999) (en banc) (in a case in which the plaintiff's supervisor called her a "stupid bitch," stated directly that he would "never . . . send a female to the [Police] Academy" and sexually harassed his subordinates, applying a rigid version of the prima facie case to conclude that the plaintiff had not even made out a prima facie case of discrimination), *abrogated on other grounds by* Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

257. *See, e.g.*, Youry v. Exec. Transp. Co., 2013 WL 4774447, at *5–6 (E.D. Pa. Sept. 6, 2013) (in a case in which the decisionmaker had referred to the plaintiff as a "black bastard," and told the plaintiff "I never liked you black Haitians" shortly before terminating him, defining pretext at Step Three of the *McDonnell Douglas* paradigm as exclusively focused on showing that the reason given by the employer lacks factual support, and dismissing the plaintiff's race discrimination claim for failure to prove pretext).

258. *See, e.g.*, Wallace v. Methodist Hosp. Sys., 271 F.3d 212, 222–24 (5th Cir. 2001) (in a case in which the plaintiff's supervisor stated directly that plaintiff was terminated because "she's been pregnant three times in three years," affirming an award of JMOL on the grounds that this and other statements were "stray remarks" under the circuit's doctrine and thus "not evidence of intentional discrimination").

259. *See, e.g.*, Maybin v. Hilton Grand Vacations Co., 343 F. Supp. 3d 988, 994–98 (D. Hawaii 2018) (in a case in which the plaintiff's supervisor repeatedly commented that the plaintiff and other older sales managers "were too slow, can't learn, have a different way of doing things, are hard to teach new ways of sales, are too old to change, and don't have the energy necessary for sales," holding that the plaintiff's claim must fail because the so-called "the same actor inference" prevented an inference of discrimination at *McDonnell Douglas* Step Three).

260. *Id.*

261. *Id.*

262. *Id.*

whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action."[263] Similarly, the Eleventh Circuit (and previously the Seventh) has suggested that a plaintiff ought to prevail if they can demonstrate a "convincing mosaic of circumstantial evidence"—irrespective of the technical twists and turns of the *McDonnell Douglas* paradigm.[264]

Though the Seventh and Eleventh Circuits have cast their approaches as alternatives to *McDonnell Douglas*, their inquiries could as easily be cast as the fundamental question that a court ought to ask in a *McDonnell Douglas* case. Thus, a court considering whether a plaintiff had made out a prima facie case could not grant summary judgment or JMOL if, in the final accounting, a reasonable jury could find that the plaintiff's protected class status was a "but-for cause."[265] So too, a court considering whether to award summary judgment or JMOL on the basis of Step Three would simply canvass the evidence as a whole, asking whether it would truly be impossible for a reasonable jury to find discrimination. While the insights at the core of the *McDonnell Douglas* paradigm would remain relevant—most notably that pretextual arguments by a defendant can cause us to suspect guilt—the paradigm itself would no longer take precedence over the facts.[266]

But although the case law of the Seventh and the Eleventh Circuits may provide a model for how a *McDonnell Douglas* paradigm unburdened by technical rules might be formulated, it also provides a cautionary tale. In both the Seventh and the Eleventh Circuits, the technical rules originally engrafted onto *McDonnell Douglas* have in some cases simply migrated to the courts' application of the new nominally non-technical approach.[267]

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263. *See, e.g.*, Ortiz v. Werner Enters., 834 F.3d 760, 765 (7th Cir. 2016).

264. *See, e.g.*, Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011); *see also id.* (alternatively stating the standard as that the plaintiff should survive summary judgment "so long as the circumstantial evidence raises a reasonable inference that the employer discriminated . . . ."). The Seventh Circuit was the circuit that originated the "convincing mosaic" approach, but has since repudiated it, at least insofar as it is treated as a legal standard. *See Ortiz*, 834 F.3d at 764–65.

265. Some case law already takes essentially this approach. *See, e.g.*, Piviorotto v. Innovative Sys., Inc., 191 F.3d 344, 356–57 (3d Cir. 1999) (stating that the bottom-line standard for the prima facie case should be whether the plaintiff introduced "evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion").

266. *Cf.* SPERINO, *supra* note 4, at 333–34 (making a similar suggestion).

267. *See, e.g.*, Swyear v. Fare Foods Corp., 911 F.3d 874 (7th Cir. 2018) (after noting the circuit's non-technical approach, applying technical rules drawn from the *McDonnell Douglas* context to dismiss plaintiff's claims); Khowaja v. Sessions, 893 F.3d 1010 (7th Cir. 2018) (same); El-Saba v. Univ. of S. Ala., 738 F. App'x 640 (11th Cir. 2018) (applying technical rules from the *McDonnell Douglas* context even though the plaintiff had only argued under the "convincing mosaic" standard and treating them as dispositive of the "convincing mosaic" argument).

In other cases, courts have noted the circuit's bottom-line non-technical alternative and yet have not performed any meaningful independent analysis.[268] Thus, any effort to refocus *McDonnell Douglas* on the ultimate factual question of discrimination—and strip it of its technical rules—will no doubt face challenges and will require vigilance in demanding that the inquiry be factual in nature.[269] Ultimately, implementing a truly non-technical *McDonnell Douglas* paradigm will require a fundamental shift in perspective from the lower courts—recognizing that decades of technical circuit authority has no relevance to the inherently individualized *factual* question of whether *this plaintiff* was subjected to discrimination.[270]

It may be difficult for some to envision what such a non-technical inquiry into the factual question of discrimination might look like—or to conceive that it is indeed possible for courts to apply such an inquiry. But in fact, as scholars such as Professors Sandra Sperino and Suzanne Goldberg have observed, anti-discrimination law already includes a large number of contexts in which courts conduct such a direct, factually

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268. *See, e.g.*, Smith v. Thomasville Georgia, 753 F. App'x 675, 689–91, 693–98 (11th Cir. 2018) (dismissing most of the plaintiffs' claims in a technical *McDonnell Douglas* analysis—noting the "convincing mosaic" standard only in a footnote, and not affording it independent analysis); *see also* Johnson v. Advocate Health & Hosps. Corp., 892 F.3d 887 (7th Cir. 2018) (after noting the Seventh Circuit's bottom-line standard, proceeding to apply the *McDonnell Douglas* analysis, and finding that the plaintiffs had not made out a prima facie case on virtually all claims, applying a rigid comparator standard, and not looking globally at the plaintiffs' evidence).

269. *Cf.* Malamud, *supra* note 4, at 2324 (noting the possibility that a doctrine focused just on the ultimate issue of discrimination could itself attract additional technical rules to allow the circuit courts to superintend the decisions of district courts).

270. Some might dispute this contention, arguing that these technical circuit rules *are* relevant to the factual question of discrimination, since—if they are conceived of as permissive inferences—they do bear some relationship to that factual question. For example, it may genuinely be less likely that discrimination took place if the same supervisor hired and fired a plaintiff or if the plaintiff lacks a close comparator. But as set out *supra* in notes 68–71 and accompanying text, that is not how such rules are ordinarily applied in practice, and to the extent they are so applied, they do not fall within my definition of a "technical" rule, see *supra* note 9. Perhaps more importantly, however, I contend that despite its intuitive appeal, there is little such case law can tell us *factually* in any individual case, since the infinite variety of surrounding facts and circumstances will inevitably mean that the significance of any particular circumstances is inherently contingent. For example, consider the case of a supervisor who hires an attractive woman, makes bigoted remarks behind her back, consistently suggests that she ought to wear short skirts and loosen up, and then fires her. Does the fact that the same supervisor hired and fired the woman make it any less likely that she was subject to discrimination? The folly of many of the technical rules that the lower courts have adopted is to imagine that the presence of some factor (for example, the same supervisor hiring and firing) has the same meaning in all cases, or that the courts can possibly catalog all of the surrounding considerations that might affect how it is interpreted in light of all of the unique evidence of the case. *Cf.* Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1083 (3d Cir. 1996) (noting that "[a] play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario").

focused inquiry.[271] As described above, the Seventh and Eleventh Circuits already have alternative models to *McDonnell Douglas* that—while not perfectly applied in every case—permit plaintiffs to proceed with a far more direct, factually focused approach to disparate treatment cases.[272] So too in harassment and stereotyping cases, federal courts across the country approach the question of whether disparate treatment was "because of" protected class status directly, without the aid of a host of technical rules.[273] The "motivating factor" and "direct evidence" approaches are also contexts in which the courts proceed far more directly to the factual question of discrimination, without the aid of technical rules.[274] Finally, in many circuits, use of *McDonnell Douglas* is primarily or exclusively restricted to summary judgment (and sometimes also JMOL), with the inquiry at other procedural stages taking a more direct, factually focused cast.[275]

This, of course, suggests that such a factual, non-technical approach should be equally plausible in the *McDonnell Douglas* context. But even if such a non-technical approach to *McDonnell Douglas* is indeed possible, one might reasonably ask whether it is sensible. After all, it is unclear what purpose remains for the *McDonnell Douglas* paradigm in a world where its structure and associated rules may not distract from the factual question of discrimination.[276] Indeed, it may seem almost inherently contradictory to suggest that the *McDonnell Douglas* paradigm should continue to exist—but effectively have no binding force. Why would we retain the edifice of

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271. *See* Goldberg, *supra* note 62, at 779–81; Sperino, *Beyond McDonnell Douglas*, *supra* note 13, at 261–71.

272. *See supra* notes 263–264 and accompanying text.

273. *See* Goldberg, *supra* note 62, at 779–81; Sperino, *Beyond McDonnell Douglas*, *supra* note 13, at 261–71.

274. *See* Sperino, *Beyond McDonnell Douglas*, *supra* note 13, at 265–67. Of course, the courts apply rigid technical rules to gatekeep entry into the direct evidence approach, with the result that direct evidence claims are virtually never permitted. *See supra* note 73. Motivating factor cases are also much less common than *McDonnell Douglas* claims at least in part because the Supreme Court has held that some protected classes do not have access to them. *See id.*; Gross v. FBL Fin., 557 U.S. 167 (2009); Univ. of Tex. Sw. Med. Ctr. v. Texas, 570 U.S. 338 (2013). There also are ongoing debates among plaintiff-side employment discrimination practitioners about whether it is ever desirable to present motivating factor claims to a jury, in view of the risk that the jury will "split the baby" and award no relief to the client under 42 U.S.C. § 2000e-5(g)(2)(b). *See generally* 42 U.S.C. § 2000e-5(g)(2)(b) (2012) (on a motivating factor claim, if the employer proves they would have taken the same action anyways, the client cannot receive any individualized relief).

275. *See* Sperino, *Beyond* McDonnell Douglas, *supra* note 13, at 261–65, 269; SPERINO & THOMAS, *supra* note 4, at 174 (observing that "[w]hen cases go to the jury, juries are not instructed on many of these frameworks," and arguing that "[i]f juries do not need to use many of the frameworks . . . judges should not need them either").

276. *Cf.* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 534 (1993) (Souter, J., dissenting) (suggesting that the majority's rejection of a requirement that a finding of pretext compel judgment for the plaintiff as having turned the *McDonnell Douglas* paradigm into a "misleading and potentially useless ritual").

McDonnell Douglas but give it no real meaning?

And indeed, it may well be that the time has come to question the utility of *McDonnell Douglas* itself.[277] As other scholars and judges have suggested, replacing *McDonnell Douglas* with a straightforward inquiry into the factual question of discrimination is one possible response to the technical *McDonnell Douglas* paradigm—and perhaps the most sensible one.[278] Divested of any ability for its structure or associated rules to interfere with the ultimate factual question of discrimination, it may be that no meaningful role for the *McDonnell Douglas* paradigm remains.

But one need not go so far to address the plaintiff-unfavorable technical approach to the *McDonnell Douglas* paradigm that many lower courts currently embrace. One need not call upon the courts to abandon the paradigm in order to argue that it cannot be applied in rigid and technical ways. One need not claim plaintiffs can proceed outside the paradigm to point out that its focus must always remain the ultimate factual question of discrimination. Just as defendants succeeded in persuading the Court to abandon the anti-defendant technical rules that once gave the *McDonnell Douglas* paradigm meaning—without ever persuading it to abandon the paradigm itself—so too plaintiffs today can do the same.

This is important because the *McDonnell Douglas* paradigm is both legally well-established and deeply entrenched in anti-discrimination practice.[279] There are few reasons to believe that it will imminently be abandoned, nor does the Supreme Court's case law provide any obvious basis for arguing that it should be abandoned. In contrast, there is ample basis under the Supreme Court's case law for arguing that the set of technical rules that burdens plaintiffs—the technical *McDonnell Douglas* paradigm—is impermissible.[280] While it may not be possible to entirely eliminate the *McDonnell Douglas* paradigm, there are strong legal arguments for why it must be applied equitably while it remains.

Of course, such equitable application would not eliminate all of the many obstacles that stand in the way of discrimination plaintiffs' success. Federal judges' negative attitudes regarding discrimination cases are well-

277. *See, e.g.*, Malamud, *supra* note 4, at 2236–38, 2317–20 (arguing that "the McDonnell Douglas-Burdine proof structure ought to be abandoned"); Sperino, *Rethinking Discrimination Law*, *supra* note 13, at 115–18 (suggesting a much more straightforward alternative to the current discrimination frameworks, including *McDonnell Douglas*); Tymkovich, *supra* note 5, at 528–29 (arguing with respect to *McDonnell Douglas* that "[i]t may now be time to replace the framework with a simpler, more direct method of determining the question of discrimination," focused on the sufficiency of the evidence).

278. *See* sources cited *supra* note 277.

279. *See supra* Part I.

280. *See supra* Part II.

documented and no doubt would continue to influence outcomes even were the technical *McDonnell Douglas* eliminated.[281] Overuse of summary judgment is common across many fields and almost certainly would continue to trouble the employment discrimination field.[282] Low-income and minority plaintiffs would continue to struggle to find lawyers, and discrimination plaintiffs from some identity groups would continue to face adjudicator biases in ways that adversely affect their likelihood of success.[283] The well-established reluctance of most Americans to interpret even compelling facts as discrimination would remain.[284]

But there are nevertheless reasons to believe that eliminating the technical *McDonnell Douglas* paradigm would make a difference. Most judges articulate a belief in following the law, and there is strong evidence to suggest that, indeed, the law matters (though other factors do too).[285] Currently that law (as set out in circuit precedent) tells judges that it is permissible, or even mandatory, to ignore the factual question of discrimination and to find against plaintiffs who fail to jump through a series of technical hoops.[286] Thus, even judges who are inclined to be

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281. *See, e.g.*, SPERINO & THOMAS, *supra* note 4, at 138–39 (observing that "[this] belief . . . that the federal courts are flooded with questionable discrimination cases . . . may affect how judges interpret the substance of the law. Indeed, federal judges have been taught how to eliminate discrimination cases from their dockets at judicial conferences"); Anand Swaminathan, *The Rubric of Force: Employment Discrimination in the Context of Subtle Biases and Judicial Hostility*, 3 MODERN AMERICAN 21, 26 (2007); Special Comm. on Race & Ethnicity, *Special Report of the Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race and Ethnic Bias*, 64 GEO. WASH. L. REV. 189, 303–06 (1996); Margaret Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 823–25 (2011).

282. *See, e.g.*, Suja Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 141 n.5 (2007) (collecting sources). Scholars have demonstrated especially high rates of summary judgment in the context of employment discrimination and other civil rights cases. *See id.*; Kevin Clermont & Stewart Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 128 (2009) (demonstrating that employment discrimination plaintiffs fare worse at summary judgment than other classes of plaintiffs).

283. *See, e.g.*, BERREY ET AL., *supra* note 1, at 109–29 (describing the difficulties that minority and low-income plaintiffs face in obtaining lawyers, and observing that "racial disparities in representation mean that the groups most affected by discrimination may be the least likely to have the resources to mount effective challenges in court"); Elizabeth M. Schneider, *The Dangers of Summary Judgment*: *Gender and Federal Civil Litigation*, 59 RUTGERS U. L. REV. 705, 709–15 (2007) (describing research demonstrating that summary judgment was especially likely to be granted in employment discrimination cases involving women); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 890–96 (2006) (describing the particularly dismal success rates in race discrimination lawsuits).

284. *See, e.g.*, Eyer, *supra* note 10, at 1293–302.

285. *See* David Klein, *Law in Judicial Decision-Making* at 236–41, *in* THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR (Lee Epstein & Stefanie A. Lindquist, eds. 2017); Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POL. SCI. 11, 24–25 (2013).

286. *See supra* Part I.

receptive to discrimination claims may feel constrained to find against discrimination plaintiffs, and those who are agnostic will be steered to an adverse result. Moreover, because of the highly formalistic way in which the inquiry is structured by existing caselaw, such judges may not ever ask *themselves* the question of whether, as a matter of fact, discrimination took place—or whether a reasonable jury could so conclude.

But even for those judges who are strongly committed to the perspective that discrimination happens rarely and that most discrimination claims are meritless, eliminating the technical *McDonnell Douglas* paradigm ought to affect some cases. Though scholars have identified a wide variety of factors that can affect judicial decision-making, most judges care about the perceived legitimacy of their decision-making and about making decisions that are consistent with the law.[287] If that law clearly said that the *McDonnell Douglas* inquiry must remain focused on the factual question of discrimination— without resort to any technical legal rules—then *all* judges would have greater difficulty justifying dismissals of discrimination claims. For stripped of their veneer of legal legitimacy, such decisions become far more transparent in their normative choices—to ignore compelling evidence of discrimination, and ultimately to protect discrimination defendants from having to face discrimination claims.

Moreover, it is important to remember that even small shifts in judicial behavior in this area could have a substantial impact by virtue of the very large numbers of cases that are affected by the technical *McDonnell Douglas* paradigm. Thousands of discrimination cases are dismissed each year at summary judgment, many by courts applying the technical *McDonnell Douglas* paradigm.[288] Small shifts in judicial behavior could thus plausibly result in dozens, if not hundreds, of discrimination cases reaching trial every year.[289] Moreover, such increasing enforcement risk would no doubt have cumulative effects on employer behavior, leading to deterrence results that reach beyond the results in individual plaintiffs'

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287. *See, e.g.*, Brian Z. Tamanaha, *The Realism of Judges Past and Present*, 57 CLEV. ST. L. REV. 77, 89–90 (2009); sources cited *supra* note 285.

288. Through careful empirical work, Professors Ellen Berrey, Robert Nelson, and Laura Beth Neilsen have demonstrated that 18% of employment discrimination cases end by virtue of employer-favorable awards of summary judgment. *See* BERREY ET AL., *supra* note 1, at 61 (statistic is inclusive of all case outcomes, including settlements). Currently, approximately 15,000 employment discrimination cases are filed per year, most of which raise *McDonnell Douglas* claims. *See* Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. REV. 1133, 1139 (2015); sources cited *supra* note 1.

289. If just 1% fewer cases were to terminate via summary judgment, an additional 1500 discrimination cases would proceed to trial annually. *See* sources cited *supra* note 288.

cases.[290] Ultimately, such deterrence may be the most important outcome that could be achieved, as it secures what most people desire, which is to be free from discrimination to begin with.[291]

Finally, even ignoring the possibility of differences in case outcomes, eliminating the technical *McDonnell Douglas* paradigm remains important. The evisceration of anti-discrimination law's substantive protections that has been wrought by the technical *McDonnell Douglas* paradigm has been largely invisible: to the public, to the Supreme Court, and to Congress. The technical *McDonnell Douglas* provides a veneer of legitimacy, founded in innumerable, highly specific technical legal rules that even experts have found it difficult to see through. As such, it allows to pass as legitimate, individualized, and unimportant what is in reality an illegitimate, widespread, and devastating judicial nullification of hard-fought anti-discrimination rights. Stripping such decisions of their technical façade would bring transparency to the pervasive normative choices that courts are making to foreclose relief to discrimination plaintiffs, even where discrimination may well have occurred.

And this transparency is important. Any effort to revitalize the substantive promise of anti-discrimination law will require the ability to persuade others—the courts, Congress, and most fundamentally, the public—that there is a genuine problem to be solved. But when the problem is obscured by scores of technical, apparently legitimate and seemingly unimportant legal rules, this possibility of persuasion becomes far more remote. Eliminating the technical *McDonnell Douglas* paradigm thus represents an important predicate to the type of broader organizing work that anti-discrimination reform requires.

In short, eliminating the technical *McDonnell Douglas* paradigm will not solve all of the problems of anti-discrimination law. But it is surely an important step forward. And it is a step that existing precedent demands. The Supreme Court has held that the *McDonnell Douglas* paradigm must always be tethered—not to a series of talismanic technical rules—but to the *factual* question the statute asks. And that question, for plaintiffs and defendants alike, is simply whether the plaintiff was treated differently "because of" their protected class status. It is time to bring that question back to the center of the *McDonnell Douglas* inquiry.

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290. *See, e.g.*, Stephen Burbank, Sean Farhang & Herbert M. Krtizer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 700–03 (2013) (describing the ways that private anti-discrimination enforcement can lead to wider deterrence of discrimination).

291. *Cf.* Katie Eyer, Brown*, Not* Loving*:* Obergefell *and the Unfinished Business of Formal Equality*, 125 YALE L.J.F. 1, 9–10 (2015) (noting that for most members of a protected group, "antidiscrimination law's benefits are felt, if at all, in its power to prevent discrimination").

CONCLUSION

For decades, the *McDonnell Douglas* paradigm has occupied an outsized role in the practice of anti-discrimination law. For the thousands of plaintiffs whose claims are channeled into the paradigm, its application *is* the reality of anti-discrimination law's protections. Today, such plaintiffs too often see their compelling evidence of discrimination ignored, dismissed, or deemed irrelevant through an endless succession of technical rules that the lower courts have engrafted on the doctrine.

But this hyper-technical approach to *McDonnell Douglas* contravenes what the Supreme Court has told us. In cases like *St. Mary's Honor*, *Aikens*, *Furnco*, and even *McDonnell Douglas* itself, the Supreme Court has repeatedly rejected a vision of the *McDonnell Douglas* paradigm that is "rigid, mechanized, or ritualistic."[292] Rather, the Court has held that *McDonnell Douglas* must act simply as a "procedural device" to assist in bringing the court and the parties to the final factual question of discrimination.[293] Ultimately, that factual question of discrimination, while "sensitive and difficult," may not be "treat[ed] . . . differently from other ultimate questions of fact."[294]

These holdings are profoundly inconsistent with the approach of many lower courts to the *McDonnell Douglas* paradigm today. Laden with technical rules, applied mechanically, the *McDonnell Douglas* paradigm has become its own talismanic inquiry.[295] The factual question of discrimination—whether the plaintiff was in fact treated differently "because of [their] race, color, religion, sex or national origin"—often does not receive meaningful consideration.[296] In short, the version of the paradigm that predominates in the lower courts is fundamentally at odds with the vision the Supreme Court's precedents embrace. Recognizing this inconsistency offers one of the most plausible and potentially impactful opportunities to reform anti-discrimination law today.

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292. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978); *see also supra* notes 106–114 (describing the rejection of technical rules in *McDonnell Douglas* itself).

293. *St. Mary's Honor Ctr.*, 509 U.S. at 521, 510–11; *see also Aikens*, 460 U.S. at 713–16.

294. *Aikens*, 460 U.S. at 716; *see also St. Mary's Honor Ctr.*, 509 U.S. at 524; Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000).

295. *See supra* Part I.

296. *Id.*