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MCLE SELF-STUDY:

MCDONNELL DOUGLAS: THE END IS NEAR?

A duo of conservative U.S. Supreme Court Justices—Clarence Thomas and Neil M. Gorsuch—are leading an increasingly urgent charge to reverse or dramatically curtail *McDonnell Douglas Corporation v. Green*.[1] And it's with the most unlikely of urgings: They believe that the tripartite burden-shifting test set out in the case is too employer-friendly as they contend that it not only "requires a plaintiff to prove too much at summary judgment," but also that it "fails to encompass the various ways" in which a plaintiff could prove a claim.[2]

Justices Thomas and Gorsuch also criticize *McDonnell Douglas* for a host of additional reasons, arguing that it:

- Is not grounded in the text of Title VII or any other source of law—rather, it is a judicially manufactured doctrine and, as such, generates complexity and confusion that causes erroneous results;[3]

INSIDE THIS ISSUE

- Is incompatible with the summary judgment standard set forth in Federal Rule of Civil Procedure 56;[4] and
- Requires courts to draw and maintain artificial distinctions between direct and circumstantial evidence.[5]

These concerns have prompted Justices Thomas and Gorsuch to explicitly call for the U.S. Supreme Court to decide whether the *McDonnell Douglas* framework is an appropriate tool for evaluating Title VII discrimination claims at summary judgment.[6]

Like Justices Thomas and Gorsuch, Justice Brett M. Kavanaugh, when he served as a circuit court judge, also criticized the case holding, writing: "Disagreement and uncertainty over the content, meaning, and purpose of the *McDonnell Douglas* prima facie factors have led to a plethora of problems."[7] In that same opinion, he described the framework as an "unnecessary sideshow" that has "spawned enormous confusion and wasted litigant and judicial resources."[8]

THE ORIGINS OF *MCDONNELL DOUGLAS*

In 1964, Congress passed and President Lyndon B. Johnson signed into law Title VII of the Civil Rights Act[9] to prohibit employment discrimination based on race, color, religion, sex, and national origin. Relatively quickly, however, it became clear that when only circumstantial evidence was available—which was almost always the case—figuring out whether the actual reason that an employer illegally discriminated when firing or disciplining an employee was "elusive."[10]

In an effort to rectify the difficulties encountered in these circumstantial evidence cases and to ease the evidentiary burdens on employment discrimination plaintiffs, who rarely have access to direct evidence of discrimination,[11] Justice Lewis Franklin Powell Jr., writing for a unanimous U.S. Supreme Court in 1973, issued what was to become the most well-known employment law decision: *McDonnell Douglas Corporation v. Green*.[12] The case has become so prominent (and so pernicious to many) that it has been derisively referred to as "the 'kudzu' of employment law."[13]

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McDonnell Douglas was originally intended to address the order and allocation of proof in a bench trial[14] of a private, non-class action employment discrimination case in which the plaintiff lacked direct evidence of discrimination.[15] In the underlying failure to hire case, the U.S. Supreme Court established the now familiar three-step burden-shifting framework.

That framework specifies that:

1. The plaintiff must carry the initial burden of establishing a prima facie case of racial discrimination. The plaintiff can make this showing with evidence that he or she belongs to a racial minority, applied and was qualified for a job for which the employer was seeking applicants, and despite being qualified, was rejected—and after being rejected, the position remained open and the employer continued to seek applicants from people mirroring the complainant's qualifications.[16]

2. If the plaintiff succeeds in establishing a prima facie case, the burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for rejecting the employee.[17]

3. If the defendant carries that burden, then the plaintiff must have an opportunity to show that the employer's stated reason for the rejection was in fact pretext.[18] On the other hand, if the defendant is silent when the plaintiff establishes a prima facie case, "the court must enter judgment for the plaintiff."[19]

Although written in the context of a bench trial of a Title VII race discrimination failure to hire case, *McDonnell Douglas* has been routinely used at virtually every stage of every type of employment discrimination or retaliation case: pleading standards, motions in limine, jury instructions, appellate review of jury verdicts—and, most frequently, motions for summary judgment, despite the fact that the U.S. Supreme Court has never authorized its use on summary judgment.[20]

While courts have taken steps to "limit the relevancy and applicability of the *McDonnell Douglas* framework"[21] in most of these areas,[22] the framework continues to be widely used on summary judgment. As of 2019, according to one appellate court, "more than 57,000 court opinions have cited it. That's more than three cases a day (including weekends and holidays)" in the 45 years that the citations were tracked.[23]

CRITICISMS OF THE FRAMEWORK

Criticisms of the *McDonnell Douglas* framework as applied to the summary judgment context began shortly after the lower courts first incorporated it into their summary adjudication analysis. And those criticisms have picked up steam and grown louder with concerns now being expressed by not only three Supreme Court justices, but also innumerable lower court judges and commentators.[24]

Some of the criticisms include that it is:

- An "arcane and complicated" framework[25] that "only creates confusion and distracts courts from the ultimate question of discrimination;"[26]
- A "rat's nest of surplus tests" [27] that needlessly inflicts upon the courts and litigants "snarls and knots;"[28]
- An "allemande worthy of the 16th century;"[29] and
- So "deeply flawed"[30] that plaintiffs are often not able to satisfy the test, "even when there is ample evidence suggesting unlawful discrimination."[31]

The underpinnings for these criticisms broadly fall into four categories.

First, critics argue that *McDonnell Douglas* should be reversed in its entirety as is not grounded "in the text of Title VII or any other source of law" and that the Supreme Court "appears to have made it out of whole cloth."[32]

Second, detractors argue that, regardless of whether *McDonnell Douglas* is discarded, it should not be utilized on summary judgment, as Justice Thomas urged recently:

> My first concern is that the *McDonnell Douglas* framework is incompatible with the summary judgment standard set forth in Federal Rule of Civil Procedure 56.
>
> Rule 56(a) requires a court to grant summary judgment when the movant establishes that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. But, the language this Court has used to describe the *McDonnell Douglas* framework does not neatly track that rule. Namely, the framework does not speak in terms of genuine disputes regarding the facts. Instead, it speaks in terms of proving facts by the preponderance of the evidence. That difference is significant because a plaintiff need not establish or prove any elements—by a preponderance or otherwise—to survive summary judgment.[33]

> THE TIME ALSO SEEMS RIPE FOR SOMEONE TO SIMILARLY PETITION THE CALIFORNIA SUPREME COURT.

Third, skeptics, noting that the format is inapplicable to cases involving "direct evidence" of discrimination, argue that the courts are hopelessly "baffled" as to just what constitutes direct evidence (versus circumstantial evidence) for purposes of the *McDonnell Douglas* holding.[34]

Fourth, naysayers argue that *McDonnell Douglas* should not be utilized on summary judgment because it prevents meritorious cases from reaching trial by creating too high of a hurdle for plaintiff employees in that it:

- Fails to capture all the ways in which a plaintiff can prove a Title VII claim;[35]
- Inevitably results in courts relying on a host of technical rules to dismiss viable discrimination claims, and;
- Distracts from the ultimate question in employment discrimination cases: whether sufficient evidence was presented to prove that the employer was motivated by discriminatory animus.[36]

All of these criticisms are spot on. And so, unfortunately, what was originally intended to ease the burden on plaintiffs in proving employment discrimination has morphed into an unwarranted high hurdle that must be cleared to survive summary judgment.

In the seminal *Yale Law Review* article, "Losers' Rules,"[37] the Honorable Nancy Gertner squarely contends that the *McDonnell Douglas* framework no longer works. She argues that asymmetric decision-making—in which judges are encouraged to write detailed decisions when granting summary judgment but not to do so when denying it—is, in large part, the culprit. She claims this "encourages judges to see employment discrimination cases as trivial or frivolous, as decision after decision details why the plaintiff loses;" and "leads to the development of decision heuristics—the Losers' Rules—that serve to justify pro-defendant outcomes and thereby exacerbate the one-sided development of the law."[38]

PLAUSIBLE ALTERNATIVES

In place of the overly-complicated, confusion-causing *McDonnell Douglas* framework, the chorus of critics argue

that the courts should treat employment discrimination and retaliation claims like tort claims. That is: The sole inquiry on summary judgment should be whether there is a genuine factual dispute that would allow a jury, if crediting the disputed facts in the plaintiff's favor, to conclude that the employer took the adverse action on account of the plaintiff's protected class or conduct.[39]

Alternatively, the U.S. Supreme Court could allow the continued use of the *McDonnell Douglas* framework—after clearing it of the "underbrush" and "snarls and knots" that have accumulated over the years—while making clear that plaintiffs can also survive summary judgment through "the traditional methods available in every type of case."[40]

As Justices Thomas and Gorsuch are practically begging the bar to petition the U.S. Supreme Court to decide whether the *McDonnell Douglas* framework is an appropriate tool for evaluating Title VII claims at summary judgment, the time also seems ripe for someone to similarly petition the California Supreme Court, which follows the *McDonnell Douglas* framework in discrimination and retaliation cases.[41]

ENDNOTES

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1. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
2. *See*, *Ames v. Ohio Dep't of Youth Serv.*, 145 S. Ct. 1540, 1548-1555 (2025)(Thomas, J. and Gorsuch, J., concurring); *Hittle v. City of Stockton*, 145 S. Ct. 759, 759-764 (2025) (Thomas, J. and Gorsuch, J., dissenting).
3. *Id.*
4. *Id.*
5. *Id.*
6. *See*, *Ames v. Ohio Dep't of Youth Serv.*, 145 S. Ct. at 1555.
7. *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 493 (D.C. Cir. 2008).
8. *Id.*
9. 42 U.S.C. §§ 2000e-16.
10. *Tynes v. Florida Dep't of Juv. Just.*, 88 F.4th 939, 944 (11th Cir. 2023) citing *Texas Dep't of Community Aff. v. Burdine*, 450 U.S. 248, 255 n.8 (1981).
11. *Id.*; *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987); *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Wright v. Southland Corp.*, 187 F.3d 1287, 1301 (11th Cir. 1999).
12. Katie Eyer, *The Return of the Technical McDonnell Douglas Paradigm*, 94 Wash. L. Rev. 967, 968 (2019), https://digitalcommons.law.uw.edu/wlr/vol94/iss3/2; ("The *McDonnell Douglas* paradigm is ubiquitous in modern antidiscrimination law").
13. *Nall v. BNSF Railway Co.*, 917 F.3d 335, 351 (5th Cir. 2019) (Costa, J., concurring).
14. Title VII did not provide for jury trials until 1991. *See* Civil Rights Act of 1991, 42 U.S.C. § 1981a(c)(establishing jury trial right).
15. The U.S. Supreme Court has held that *McDonnell Douglas* is "inapplicable" when the plaintiff relies on direct evidence to prove a claim. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).
16. Recognizing that "the facts necessarily will vary in Title VII cases," the U.S. Supreme Court cautioned that specific elements of the prima facie case would have to be adjusted based on differing factual situations. *McDonnell Douglas*, 411 U.S. at 802, n. 13.
17. This second step of the *McDonnell Douglas* framework has been criticized because: "Once a court declares that an employer has a legitimate and non-discriminatory reason, it makes it difficult to declare later in the analysis that the employer's reason might not be legitimate or might be discriminatory." Sandra F. Sperino, *Irreconcilable:* McDonnell Douglas *and Summary Judgment*, 102 N.C. L. Rev. 459, 462 (2024), https://scholarship.law.unc.edu/nclr/vol102/iss2/4.

18. *McDonnell Douglas*, 411 U.S. at 802. *See also*, *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 142 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

19. *Texas Dep't of Community Aff. v. Burdine*, 450 U.S. 248, 254 (1981).

20. *Ames v. Ohio Dep't of Youth Serv.*, 145 S. Ct. at 1552 ("Notwithstanding this Court's steps to limit *McDonnell Douglas*, it is now the framework that courts typically apply to determine whether the plaintiff has proffered sufficient evidence to survive summary judgment. The reason for this expansion is unclear. This Court has only once addressed the application of *McDonnell Douglas* to Title VII cases at summary judgment, and it held that the framework did not apply").

21. T. Tymkovich, *The Problem With Pretext*, 85 Denver U.L. Rev. 503, 507 (2008), https://digitalcommons.du.edu/dlr/vol85/iss3/2.

22. For example, the U.S. Supreme Court has held that the *McDonnell Douglas* framework is inapplicable at the pleading stage, *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508 (2002); and in deciding post-trial motions, *Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983). The Court has also held that the plaintiff does not need to satisfy the first step of the *McDonnell Douglas* framework at trial. *Id.* And the Court has strongly suggested that the *McDonnell Douglas* framework should not be referenced in jury instructions because it is too confusing. *Vance v. Ball State U.*, 570 U.S. 421, 444–445, and n. 13 (2013).

23. *Supra*, note 13 at 351 (Costa, J., concurring).

24. See, *Tynes v. Florida Dep't of Juv. Just.*, 88 F.4th 939, 949 (11th Cir. 2023) (Newsom, J., concurring); *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring); *Wells v. Colorado Dep't of Transp.*, 325 F.3d 1205, 1224-28 (10th Cir. 2003); *Griffith v. City of Des Moines*, 387 F.3d 733, 743 (8th Cir. 2004)(Magnuson, J. concurring); Sandra F. Sperino, *Irreconcilable:* McDonnell Douglas *and Summary Judgment*, 102 N.C. L. Rev. 459, 462 (2024), https://scholarship.law.unc.edu/nclr/vol102/iss2/4; Katie Eyer, *The Return of the Technical* McDonnell Douglas *Paradigm*, 94 Wash. L. Rev. 967 2019), https://digitalcommons.law.uw.edu/wlr/vol94/iss3/2; Mark A. Schuman, *The Politics of Presumption: St. Mary's Honor Center v. Hicks and the Burdens of Proof in Employment Discrimination Cases*, 9 St. John's J. Legal Commentary 67, 70 (1993), https://scholarship.law.stjohns.edu/jcred/vol9/iss1/5/; Sandra F. Sperino, *Flying Without a Statutory Basis: Why* McDonnell Douglas *Is Not Justified by Any Statutory Construction Methodology*, 43 Hous. L. Rev. 743, 746 (2006), https://scholarship.law.uc.edu/fac_pubs/235; Noelle N. Wyman, Because of Bostock, 119 Mich. L. Rev. 61, 63 (2021), https://repository.law.umich.edu/mlr_online/vol119/iss1/6; Denny Chin & Jodi Golinsky, *Employment Discrimination: Moving Beyond* McDonnell Douglas: *A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 Brook. L. Rev. 659 (1998), https://brooklynworks.brooklaw.edu/blr/vol64/iss2/7.

25. Deborah A. Widiss, *Proving Discrimination by the Text*, 106 Minn. L. Rev. 353, 376 (2021), https://scholarship.law.umn.edu/mlr/3299.

26. *Wells v. Colorado Dep't of Transp.*, 325 F.3d 1205, 1221 (10th Cir. 2003)(Hartz, J., concurring).

27. *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760, 766 (7th Cir. 2016).

28. *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring).

29. *Id.*

30. *Supra* note 12, at 969.

31. *Supra* note 25, at 357.

32. *Hittle v. City of Stockton*, 145 S. Ct. 759, 760-61 (2025) (Thomas, J., dissenting).

    See also, *Ames v. Ohio Dep't of Youth Serv.*, 145 S. Ct. 1548 & 1552 (Thomas, J., concurring)("the *McDonnell Douglas* framework lacks any basis in the text of Title VII"); Sandra F. Sperino, *Flying Without a Statutory Basis: Why* McDonnell Douglas *Is Not Justified by Any Statutory Construction Methodology*, 43 Hous. L. Rev. 743, 746 (2006), https://scholarship.law.uc.edu/fac_pubs/235; Mark A. Schuman, *The Politics of Presumption: St. Mary's Honor Center v. Hicks and the Burdens of Proof in Employment Discrimination Cases*, 9 St. John's J. Legal Commentary 67, 70 (1993) ("The *McDonnell Douglas* Court gave no justification or authority for its establishment of this structure of proof of illegal discrimination. The Court did not cite or discuss any passage from Title VII or any other part of the Civil Rights Act of 1964. Nor did the Court argue that any legislative history from the Act lent support to, or even suggested, such a set of rules."), https://scholarship.law.stjohns.edu/jcred/vol9/iss1/5.

33. *Ames v. Ohio Dep't of Youth Serv.*, 145 S. Ct. at 1553 (Thomas, J., concurring). *See also*, *Hittle v. City of Stockton*, 145 S. Ct. 759, 761 (2025)(Thomas, J., concurring); Sandra F. Sperino, *Irreconcilable:* McDonnell Douglas *and Summary Judgment*, 102 N.C. L. Rev. 459, 468 (2024), https://scholarship.law.unc.edu/nclr/vol102/iss2/4.

    ("The second step of *McDonnell Douglas* is not consistent with the summary judgment standard. It requires judges to credit the defendant's evidence and to give that evidence a certain weight and place in the court's analysis of the plaintiff's claim. This happens even if a factfinder would not credit the defendant's evidence or would not give it the effect imagined by *McDonnell Douglas*").

34. *Wright v. Southland Corp.*, 187 F.3d 1287, 1288 (11th Cir. 1999)("This appeal presents a question that has baffled courts and commentators for some time: What constitutes

'direct evidence' of employment discrimination?"); *Sylvester v. SOS Children's Villages Illinois, Inc.*, 453 F.3d 900, 903 (7th Cir. 2006)("The distinction between direct and circumstantial evidence is vague").

35. *Wright v. Southland Corp.*, 187 F.3d 1287, 1300 (11th Cir. 1999)("It is possible for an employer to discriminate on the basis of a protected personal characteristic in a manner that does not allow the victim of the discrimination to establish the *McDonnell Douglas* presumption).

36. Taylor Gamm, *The Straw That Breaks the Camel's Back: A Final Argument for the Demise of* McDonnell Douglas *Framework*, 86 U. Cinn L. Rev. 287 (2018), https://scholarship.law.uc.edu/uclr/vol86/iss1/8.

37. Nancy Gertner, *Losers' Rules*, 122 Yale L. J. 109 (2012), https://nancygertner.com/sites/default/files/Losers%27%20Rules.pdf.

38. I*d.*

39. *See also*, *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring) ("Perhaps *McDonnell Douglas* was necessary nearly 40 years ago, when Title VII litigation was still relatively new in the federal courts. By now, however, as this case well illustrates, the various tests that we insist lawyers use have lost their utility. Courts manage tort litigation every day without the ins and outs of these methods of proof, and I see no reason why employment discrimination litigation (including cases alleging retaliation) could not be handled in the same straightforward way. In order to defeat summary judgment, the plaintiff one way or the other must present evidence showing that she is in a class protected by the statute, that she suffered the requisite adverse action (depending on her theory), and that a rational jury could conclude that the employer took that adverse action on account of her protected class, not for any non-invidious reason."); Gamm, *supra* note 36, at 311, ("In place of the complicated burden-shifting framework, employment law discrimination claims should be treated as any other tort claim. The sole inquiry would be whether a jury could conclude that the employer took the adverse action on account of his or her protected class, not for any non-invidious reason."); Sandra F. Sperino, *Irreconcilable:* McDonnell Douglas *and Summary Judgment*, 102 N.C. L. Rev. 459, 506 (2024), https://scholarship.law.unc.edu/nclr/vol102/iss2/4 ("A plaintiff should be to prevail on a claim of discrimination if the factfinder believes that the employer's articulated reason is pretext.").

40. Ruth I. Major, "*McDonnell Douglas*: The Oft-Misunderstood Method of Proof," The Fed. Lawyer (May 2012), p. 16, https://www.fedbar.org/wp-content/uploads/2012/05/le-may12-pdf-1.pdf.

41. See, *Guz v. Bechtel Nat'l, Inc.*, *24* Cal. 4th 317, 354 (2000) (applying *McDonnell Douglas* to a FEHA discrimination claim); *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1042(applying *McDonnell Douglas* to a FEHA retaliation claim).