The Confusion of *McDonnell Douglas*: A Path Forward for Reverse Discrimination Claims

*Christian Joshua Myers**

ABSTRACT

It is no secret that Title VII of the Civil Rights Act of 1964 is one of the most significant pieces of legislation ever passed by the United States Congress. Fiercely debated and enacted during the Civil Rights Movement of the 1960s, Title VII prohibits employers from engaging in various forms of discrimination within the workplace. For instance, employers may not unlawfully consider race, color, religion, sex, or national origin in employment decisions. Given *Bostock v. Clayton County*'s recent extension of Title VII's protections to lesbian, gay, bisexual, transgender, and queer workers, this Article posits that evaluating Caucasian workers' "reverse discrimination" claims is the next great battle to ensue under Title VII. The United States Supreme Court rightly observed that Title VII's protections apply with equal force to Caucasians. But there is an absence of Court precedent, accompanied with conflicting views among the federal appellate courts, about how Caucasians prove their reverse discrimination claims under Title VII. The federal appellate courts' lack of consensus results from the Supreme Court's seminal opinion in *McDonnell Douglas Corp. v. Green*, which permits a plaintiff to establish a rebuttable inference of discrimination through a prima facie case. The prima facie case initially requires a showing of one's racial minority status. Observing the obvious issue of Caucasians not being racial minorities, some federal courts require Caucasians to instead provide "background circumstances" or "sufficient evidence" for a prima facie case. Others entirely reject the background circumstances requirement and permit Caucasians to proceed similarly to racial minorities. Noticeably, the background circumstances test has not been imposed upon racial minorities. This Article critiques and justifies

* J.D., University of Virginia School of Law. B.A., B.M., James Madison University. I would like to thank Professors George Rutherglen and Rip Verkerke for providing me with informative comments. Last, but certainly not least, I thank my family for motivating me. The views expressed herein and any editorial mistakes are exclusively my own.

the background circumstances test for reverse discrimination claims on historical, legal, and theoretical bases but recognizes it raises constitutional concerns under equal protection jurisprudence. This Article then explores constitutional resolutions to the background circumstances test but concludes that the judge-made doctrine should be abandoned to completely insulate Title VII from judicial review. As a final observation, this Article examines the consequences of eradicating the background circumstances requirement and replacing it with a holistic assessment of the prima facie case.

CONTENTS

INTRODUCTION

Racial discrimination within the workplace is unlawful under Title VII of the Civil Rights Act of 1964 (Title VII).[1] This is an unremarkable proposition likely finding unanimous support among attorneys, law students, legal academics, and jurists. Under Title VII, another uncontroversial proposition is plaintiffs may pursue employment discrimination claims[2] using a burden-shifting framework laid down in *McDonnell Douglas Corp. v. Green*.[3] *McDonnell Douglas* allows plaintiffs to establish a rebuttable presumption of race discrimination through a prima facie case showing:

> (i) [T]hat he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after

1. 42 U.S.C. § 2000e–2(a)(1) (2018) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]").

2. Title VII provides recourse for two types of claims: disparate treatment and disparate impact. "Disparate-treatment cases present 'the most easily understood type of discrimination[.]'" Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (quoting Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)). Disparate treatment claims assert "an employer has 'treated [a] particular person less favorably than others because of' a protected trait." *Id.* (alteration in original) (quoting Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 985–86 (1988)). Those claims are authorized by 42 U.S.C. § 2000e–2(a). Disparate impact claims seek to eradicate "[employment] practices that are fair in form, but discriminatory in operation." *Ricci*, 557 U.S. at 583 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)). These claims were later added to Title VII by the Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074 (codified at 42 U.S.C. § 2000e–2(k)(1)(A)). This Article addresses how Caucasians establish a prima facie case for disparate treatment claims.

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

> his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[4]

If plaintiffs establish the presumption, plaintiffs' former employers may rebut it with evidence of a "legitimate, nondiscriminatory reason" for their adverse decision.[5] After employers proffer a reason, plaintiffs can then overcome it by proving the reason is a pretext for unlawful discrimination, meaning that the employers' purported legitimate, nondiscriminatory reason is false and a shield for discriminatory animus.[6] Plaintiffs always retain the burden of persuasion during the burden-shifting inquiry and must show intentional discrimination.[7]

These principles are firmly rooted in Title VII law and widely employed by litigants in countless cases, yet there remains widespread disagreement about how Caucasians establish a prima facie case under *McDonnell Douglas*'s original formulation.[8] The problem is generated by the racial minority prong.[9] In subsequent cases, the United States Supreme

4. *Id.* at 802.

5. *Id.*

6. *Id.* at 804. *See also* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143–44 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506–11 (1993); Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 252–53 (1981).

7. *See Reeves*, 530 U.S. at 143 (quoting *Burdine*, 450 U.S. at 253).

8. *See* Frederick v. City of Portland, No. 95–35389, 1996 WL 583641, at *3 (9th Cir. Oct. 10, 1996) ("Currently, there is a circuit split concerning requirements for a prima facie case of reverse race discrimination."); Lucas v. Dole, 835 F.2d 532, 534 n.9 (4th Cir. 1987) (observing the D.C. Circuit imposes a higher standard upon Caucasians and "[o]ther courts have refused to apply a higher burden"). *Compare* Hammer v. Ashcroft, 383 F.3d 722, 724 (8th Cir. 2004) (employing the background circumstances test to a Caucasian's prima facie case), *and* Harding v. Gray, 9 F.3d 150, 153–54 (D.C. Cir. 1993) (same), *and* Parker v. Balt. & Ohio R.R., 652 F.2d 1012, 1017–18 (D.C. Cir. 1981) (same), *with* Iadimarco v. Runyon, 190 F.3d 151, 158–61 (3d Cir. 1999) (employing a "sufficient evidence" test for Caucasians alleging disparate treatment), *and* Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1325 n.15 (11th Cir. 2011) (rejecting the background circumstances requirement).

9. *McDonnell Douglas*, 411 U.S. at 802.

Court held that Title VII applies to Caucasians[10] using the "same standards"[11] developed for African-Americans.[12]

Seemingly bucking the Court's preference for the "same standards" among Title VII claimants, some federal courts require Caucasians to establish a prima facie case by providing "background circumstances" or "sufficient evidence" of race discrimination, substituting for *McDonnell Douglas*'s racial minority prong.[13] These federal courts justify a heightened burden for Caucasians because the "light of common experience"[14] compels a higher evidentiary burden for "reverse

10. In this Article, the author uses "Caucasian" to refer to individuals of the majority race, while "African-American" refers to individuals of the minority race. *But see* Angela Onwuachi-Willig, *When Different Means the Same: Applying a Different Standard of Proof to White Plaintiffs Under the* McDonnell Douglas *Prima Face Case Test*, 50 CASE W. RSRV. L. REV. 53, 53 n.1 (1999) ("[Angela Onwuachi-Willig] uses the term 'Whites' throughout this Article to refer to members of the majority race and uses the term 'Blacks' to refer to members of the black race. This author prefers the term 'Blacks' to the term 'African Americans' because she believes that the term 'Blacks' is more inclusive."). The author further uses "Caucasian" and "African-American" to conform with recent terms used by the Supreme Court and recognizes the Court has also used the terms "white" and "black." *See* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2207, 2212 (2016) (using the terms "Caucasian," "African-American," "Asian-American," and "Hispanic" for accessing an affirmative action program under the Fourteenth Amendment); Ricci v. DeStefano, 557 U.S. 557, 586 (2009) (using the terms "black," "Hispanic," and "white" in a Title VII analysis). The author further recognizes there are other minorities within the United States of America, including, but not limited to, Asians, Hispanics, Native-Americans, etc. *See* KAREN R. HUMES, NICHOLAS A. JONES & ROBERTO R. RAMIREZ, U.S. CENSUS BUREAU, C2010BR-02, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 3 (2011), https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf [https://perma.cc/7CLH-9JJE].

11. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976).

12. *Id.* at 278–85.

13. *See Ashcroft*, 383 F.3d at 724; *Iadimarco*, 190 F.3d at 158–61; *Harding*, 9 F.3d at 153–54; *Parker*, 652 F.2d at 1017–18. *See also* Schaffhauser v. United Parcel Serv., Inc., 794 F.3d 899, 903 (8th Cir. 2015); Farr v. St. Francis Hosp. & Health Ctrs., 570 F.3d 829, 833 (7th Cir. 2009); Zambetti v. Cuyahoga Cmty. Coll., 314 F.3d 249, 255 (6th Cir. 2002); Notari v. Denver Water Dep't, 971 F.2d 585, 588–89 (10th Cir. 1992); GEORGE RUTHERGLEN, MAJOR ISSUES IN THE FEDERAL LAW OF EMPLOYMENT DISCRIMINATION 11 (Kris Markarian ed., 5th ed. 2012) ("The first element, membership in a minority group, simply does not apply to claims of reverse discrimination.").

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

discrimination"[15] claims as discrimination against the majority is rare and unusual.[16]

Other federal courts reject alterations to *McDonnell Douglas*'s framework for Caucasians.[17] They largely reason that imposing a heightened requirement solely on Caucasians is discriminatory itself and at odds with the Court's decision in *McDonald v. Santa Fe Trail Transportation Co.*[18] They further lambast the background circumstances standard as developing an amorphous, unworkable standard for federal courts to use for resolving reverse discrimination claims. Under this view, *McDonnell Douglas*'s racial minority prong becomes a nullity and formality of standing.[19]

The lack of Supreme Court guidance concerning reverse discrimination claims has not only led to differing views among the federal courts but also among legal commentators.[20] At one end of the spectrum, some fully defend the background circumstances requirement,

---

15. For ease, this Article uses the term "reverse discrimination" to classify claims brought by racial majorities, i.e., Caucasians. Its use of "reverse discrimination" is mirrored by others. *See* Peter Gene Baroni, Note, *Background Circumstances: An Elevated Standard of Necessity in Reverse Discrimination Claims Under Title VII*, 39 HOW. L.J. 797, 797 n.4 (1996); Shirley W. Bi, Note, *Race-Based Reverse Employment Discrimination Claims: A Combination of Factors to the Prima Face Case for Caucasian Plaintiffs*, 2016 CARDOZO L. REV. DE-NOVO 40, 41–42; David Michael McConnell, Comment, *Title VII at Twenty–The Unsettled Dilemma of "Reverse" Discrimination*, 19 WAKE FOREST L. REV. 1073, 1073 (1983); Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1033–34 (2004); Janice C. Whiteside, Note, *Title VII and Reverse Discrimination: The Prima Facie Case*, 31 IND. L. REV. 413, 413 n.2 (1998).

16. *Parker*, 652 F.2d at 220.

17. Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1325 n.15 (11th Cir. 2011); Byers v. Dall. Morning News, Inc., 209 F.3d 419, 426 (5th Cir. 2000); Wilson v. Bailey, 934 F.2d 301, 304 (11th Cir. 1991); Young v. City of Hous., 906 F.2d 177, 180 (5th Cir. 1990); Metoyer v. Am. Eagle Airlines, Inc., 806 F. Supp. 2d 911, 917–18 (W.D. La. 2011); McGarity v. Mary Kay Cosmetics, No. 3:96–CV–3413–R, 1998 WL 50460, at *3 n.24 (N.D. Tex. Jan. 20, 1998); Ulrich v. Exxon Co., U.S.A., 824 F. Supp. 677, 683–84 (S.D. Tex. 1993).

18. *Iadimarco*, 190 F.3d at 158; Barella v. Village of Freeport, 16 F. Supp. 3d 144, 159–61 (E.D.N.Y. 2014); Cully v. Milliman & Robertson, Inc., 20 F. Supp. 2d 636, 640–41 (S.D.N.Y. 1998); Collins v. Sch. Dist. of Kansas City, Mo., 727 F. Supp. 1318, 1319–23 (W.D. Mo. 1990).

19. *See Lockheed-Martin Corp.*, 644 F.3d at 1325 n.15; *Young*, 906 F.2d at 180; Bi, *supra* note 15, at 54; Ryan Mainhardt & William Volet, Note, *The First Prong's Effect on the Docket: How the Second Circuit Should Modify the* McDonnell Douglas *Framework in Title VII Reverse Discrimination Claims*, 30 HOFSTRA LAB. & EMP. L.J. 219, 239 (2012).

20. *Compare* Timothy K. Giordano, Comment, *Different Treatment for Non-Minority Plaintiffs Under Title VII: A Call for Modification of the Background Circumstances Test to Ensure that Separate is Equal*, 49 EMORY L.J. 993, 1023 (2000) (suggesting modifying the background circumstances requirement to "ensure that non-minorities enjoy equal and adequate protection under Title VII"), *and* Whiteside, *supra* note 15, at 432–36 (arguing for the elimination of the background circumstances approach), *with* Baroni, *supra* note 15, at 812 (stating that the background circumstances standard "preserves the intent of Title VII at the prima facie level"), *and* Onwuachi-Willig, *supra* note 10, at 71–80 (arguing that the background circumstances test "level[s] the playing field" between African-Americans and Caucasians).

emphasizing the need for a different prima facie case for Caucasians and contending that the requirement truly honors *McDonnell Douglas*'s mandates.[21] On the other end, others support eradicating the requirement, focusing on its discriminatory nature and the unfair retribution it imposes upon Caucasians who have not discriminated against minority groups.[22] In the middle, only one commentator supports the doctrine but proposes eliminating formal proof structures after examining the doctrine's constitutionality.[23]

This Article attempts to resolve the confusion surrounding reverse discrimination claims pursued under *McDonnell Douglas*, which is likely the next great battle to ensue under Title VII, especially after its recent extension to lesbian, gay, bisexual, transgender, and queer workers and the shifting demographic makeup of the country.[24] Given the Supreme Court's previous willingness to invoke legislative history,[25] Part II examines Title

21. *See* Baroni, *supra* note 15, at 810–12; Bi, *supra* note 15, at 49; Onwuachi-Willig, *supra* note 10, at 81.

22. *See* Bi, *supra* note 15, at 58–62; Giordano, *supra* note 20, at 1020; Whiteside, *supra* note 15, at 434. *Cf.* Scott Black, McDonnell Douglas' *Prima Facie Case and the Non-Minority Plaintiff: Is Modification Required?*, 1994 ANN. SURV. AM. L. 309, 349–53 (arguing against the background circumstances test because it does not consider the impact of affirmative action and minorities' new societal status).

23. *See* Sullivan, *supra* note 15, at 1098–129.

24. The Supreme Court recently resolved a circuit split by extending Title VII's protections to workers identifying as lesbian, gay, bisexual, transgender, or queer (LGBTQ). Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1738, 1754 (2020) (resolving a circuit split among the federal circuits and holding that LGBTQ workers may pursue claims under Title VII). This recent development evidences the Court's willingness to settle unresolved issues under Title VII, especially when there are differing views among the appellate courts impacting workers' substantive rights. *See generally* SUP. CT. R. 10(a) ("Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: (a) *a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter* . . . ." (emphasis added)); Karen M. Gebbia, *Circuit Splits and Empiricism in the Supreme Court*, 36 PACE L. REV. 477, 504 (2016) ("The Supreme Court typically reviews federal circuit court of appeals' decisions on certiorari to resolve either a split among the lower federal courts, an important question of federal law, or a constitutional or quasi-constitutional question."); Emily Grant, Scott A. Hendrickson & Michael S. Lynch, *The Ideological Divide: Conflict and the Supreme Court's Certiorari Decision*, 60 CLEV. ST. L. REV. 559, 561 (2012) ("Conflict has long been considered one of the primary reasons for granting certiorari because conflict 'offends the principle that, under one national law, people who are similarly situated should be treated similarly.'" (quoting Michael S. Shenberg, *Identification, Tolerability, and Resolution of Intercircuit Conflicts: Reexamining Professor Feeney's Study of Conflicts in Federal Law*, 59 N.Y.U. L. REV. 1007, 1020–21 (1984))).

25. *See* Cnty. of Washington v. Gunther, 452 U.S. 161, 171–76 (1981) (interpreting Title VII's legislative history for sex discrimination and its relationship with the Equal Pay Act); United Steelworkers v. Weber, 443 U.S. 193, 201–08 (1979) (examining Title VII's legislative history to conclude Congress did not prohibit employers from engaging in voluntary, affirmative action); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976) (reviewing Title VII's legislative history to hold Congress prohibited racial discrimination against Caucasians and African-Americans).

VII's historical enactment, focusing on legislative history implicating reverse discrimination. Part III then discusses the Court's development and refinement of *McDonnell Douglas* for discrimination claims using circumstantial evidence. It also explores the Court's approach to reverse discrimination by discussing and synthesizing *McDonald v. Santa Fe Trail Transportation Co.* and *Ricci v. DeStefano*.

After laying the groundwork, Part IV reviews the different judicial doctrines addressing Caucasians' prima facie case, including the background circumstances approach and alternatives to it. Part V outlines the justifications, objections, and resolutions to the background circumstances approach. After exploring its justifications, Part V addresses a strong constitutional objection to the doctrine[26] and provides a constitutional resolution.[27] Part V recognizes the importance and reasonableness of the background circumstances requirement but proposes replacing the judicially-created doctrine to fully insulate Title VII from any constitutional review. Part VI offers observations about eliminating the background circumstances approach. It chiefly argues that its absence will promote Title VII's purpose, and courts can resolve these claims with greater confidence under a new regime requiring a holistic assessment of reverse discrimination claims at the prima facie stage. Part VII provides a brief conclusion, reminding us that the question in any Title VII case, irrespective of race, is whether a jury should hear it. Thus, Part VII argues that the proposed regime coincides with traditional discrimination claims by focusing on whether there are facts supporting a finding of unlawful discrimination.

But see Bostock, 140 S. Ct. at 1749, 1752 ("Of course, some Members of this Court have consulted legislative history when interpreting *ambiguous* statutory language. 'Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it.' And as we have seen, no ambiguity exists about how Title VII's terms apply to the facts before us. . . . Certainly nothing in the meager legislative history of this provision suggests it was meant to be read narrowly." (emphasis in original) (citations omitted)).

26. The federal courts are painstakingly silent about the constitutionality of the background circumstances approach, but those voicing concern have done so tepidly. *See* Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 n.7 (6th Cir. 1994) ("We have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts."); Tappe v. All. Cap. Mgmt. L.P., 177 F. Supp. 2d 176, 182 (S.D.N.Y. 2001) (observing that the background circumstances approach "raise[s] a serious question because treating plaintiffs differently because of their race or sex triggers heightened constitutional scrutiny"). *See also* Zambetti v. Cuyahoga Cmty. Coll., 314 F.3d 249, 257 (6th Cir. 2002).

27. To date, only one commentator has attempted to address the constitutionality of the background circumstances approach. *See* Sullivan, *supra* note 15, at 1099–118. Other commentators have neither challenged nor justified this judicially-created doctrine on constitutional grounds. *See* Baroni, *supra* note 15, at 807–17; Bi, *supra* note 15, at 58–72; Giordano, *supra* note 20, at 1016–31; Onwuachi-Willig, *supra* note 10, at 71–86; Whiteside, *supra* note 15, at 428–43.

I. TITLE VII'S HISTORICAL ENACTMENT AND REVERSE DISCRIMINATION

A holistic examination of reverse discrimination claims at the prima facie stage aligns with a legislative intent behind Title VII to reduce workplace discrimination against African-Americans (a minority group at the time of enactment) but not against Caucasians (the majority group at the time of enactment). As duly enacted by Congress,[28] Title VII's expansive language outlaws a myriad of discriminatory practices in the workplace.[29] Yet, Title VII neither defines the word "discriminate" or "reverse discriminate[,]"[30] nor does it detail how any plaintiff, regardless of race, proves a discrimination claim.[31] In the absence of such guidance from the statue,[32] one must ascertain Congress's legislative aims directly from Title VII's legislative history.[33] Title VII's legislative purposes are

28. *See* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431, 457 (1966).

29. 42 U.S.C. § 2000e–2(a)(1) (2018) ("It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his *compensation, terms, conditions, or privileges* of employment, *because of such individual's race, color, religion, sex or national origin*[.]" (emphasis added)); 42 U.S.C. § 2000e–3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.").

30. *See* 42 U.S.C. § 2000e; Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 295 (1982) ("While the statue's prohibitions are sweeping in their language, [T]itle VII does not define the term 'discriminate' or the causal connector 'because of.'"); Chuck Henson, *The Purposes of Title VII*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 221, 230 (2019) ("Title VII does not define 'discrimination.' It defines prohibited practices as 'unlawful employment practices.'"); Onwuachi-Willig, *supra* note 10, at 60 ("[T]he plain language of Title VII left some major issues for the courts to resolve. For example, the statute does not define the phrase 'to discriminate . . . because of [an] individual's race,' nor does it state whether it would be discrimination under the plain language of Title VII for an employer to favor minority workers over white employees in order to remedy past discrimination against a minority group."). Even though Title VII does not define "discrimination," the Civil Rights Act of 1991 clarified that an "unlawful employment practice" is any decision where race, color, religion, sex, or national origin is a "motivating factor." Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e–2(m)).

31. *See* 42 U.S.C. §§ 2000e–2 to 2000e–3.

32. *See* Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985))); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989) ("The starting point for our interpretation of a statute is always its language." (citation omitted)).

33. *See* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 106 (2007) (Stevens, J., concurring) ("Analysis of legislative history is, of course, a traditional tool of statutory construction."); Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) ("Legislative history materials are not generally so misleading that jurist should never employ them in a good-faith effort to discern legislative intent."); United States v. Gayle, 342 F.3d 89, 93–94 (2d Cir. 2003) ("Resort to authoritative legislative history may be justified where there is an open question as to the meaning of a word or phrase in a statute, *or where a statute is silent on an issue of fundamental importance to its correct*

embodied in committee reports, floor debates, and numerous statements from legislators within the United States House of Representatives and the United States Senate, the latter of which had a "titanic and protracted" debate.[34]

A. House Action of H.R. 7152

During the 88th Congress,[35] the House took up H.R. 7152, which contained Title VII, and commenced the process that would lead to Title VII's enactment.[36] On November 20, 1963,[37] the House Judiciary Committee provided its report on H.R. 7152 to the House, which recognized that the "[m]ost glaring" discrimination within the nation was

---

application." (emphasis added)). The lively debate about considering legislative history for statutory interpretation is beyond this Article. *Compare* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 31 (Amy Gutmann ed., 1997) ("As I have said, I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of the law."), *with* Robert A. Katzmann, *Statutes*, *in* THE EMBATTLED CONSTITUTION 311 (Norman Dorsen & Catharine DeJulio eds., 2013) ("Given that I have argued that courts should respect Congress's work product, it will not surprise you that I find legislative history, in reliable form, useful as I interpret statutes.").

34. Vaas, *supra* note 28, at 434–57. When confronted with race discrimination under Title VII, the Supreme Court has often focused upon the Senate's legislative history. *See* United Steelworkers v. Weber, 443 U.S. at 201–08; McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976). Given the stringent opposition to Title VII within the Senate, it is unsurprising the Senate's debates provide greater insight into Title VII in comparison to the House. *See* Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1453 (2003) ("The situation in the Senate was, if anything, worse than the House, given the fact that a filibuster allowed thirty-four senators to defeat a proposed bill."); George P. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 829–30 (1972) (observing that the Civil Rights Act of 1964 was immediately met with a filibuster in the Senate and required compromises for passage).

35. In the 87th Congress and 88th Congress, respectively, the House Labor and Education Committee issued reports on H.R. 10144 and H.R. 405, both of which were predecessors to Title VII and addressed the Equal Opportunity Act. H.R. REP. NO. 88-570, at 1 (1963); H.R. REP. NO. 87-1370, at 1 (1962). H.R. 10144 was stalled by the House Rules Committee and never received full consideration by the House, but H.R. 405 was incorporated into H.R. 7152 with modifications. *See* Sape & Hart, *supra* note 34, at 828–29 & n.21 (noting H.R. 10144 failed in the House because of President Kennedy's lack of support and opposition by conservative legislators on the House Rules Committee); Vaas, *supra* note 28 at 433–36 (observing H.R. 450 was modified and included within H.R. 7152). Nevertheless, because H.R. 10144 never became law and H.R 405 was modified for inclusion within H.R. 7152, the reports from the House Labor and Education Committees are not useful for discerning Title VII's legislative history. *See* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 118–28 (2012) (arguing for various rules when using legislative history, including a rule that one should not rely on the views of the "loser[s]").

36. H.R. REP. NO. 88-914, at 1, 9–15 (1963), *as represented in* 1964 U.S.C.C.A.N. 2391, 2391, 2401–08.

37. 109 CONG. REC. 22,550–51 (1963).

against African-Americans.[38] Although the report determined "[n]o bill can or should lay claim to eliminating *all of the causes and consequences* of racial and other types of discrimination against minorities[,]" it found it was "*possible and necessary for the Congress* to enact legislation which prohibits and provides the means of *terminating the most serious types of discrimination*."[39] It further explained Title VII's purpose is to "eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin."[40]

After issuance of the House Judiciary Committee's report, H.R. 7152 was referred to the House Rules Committee on November 27, 1963.[41] The House Rules Committee did not clear the bill for floor consideration until January 30, 1964, and it did so without any amendments.[42] During the floor consideration, over the objections of congressional opponents,[43] Title VII's proponents emphasized that it addressed African-Americans' high unemployment rates and the low rates of employment among African-American professionals, both of which were the inevitable effects of employment discrimination.[44] As bluntly stated by one supporter, Title VII confronted an unfortunate reality: "[T]he Negro is the last hired and the first fired."[45]

38. H.R. REP. NO. 88-914, at 18, *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2393.

39. *Id.* (emphasis added).

40. *Id.* at 26, *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2401.

41. 109 CONG. REC. 22,856–57 (1963). *See also* Vaas, *supra* note 28, at 437.

42. *See* H.R. REP. NO. 88-1119, at 1 (1964); Sape & Hart, *supra* note 34, at 829 n.27; Vaas, *supra* note 28, at 438.

43. Within the House, Title VII's opponents presented three arguments against its passage. First, some argued that Title VII was federal overreach and "would assume authority over the American people in a manner unmatched in modern history outside acknowledged dictatorships." 110 CONG. REC. 1617–20 (1964) (statement of Rep. Abernethy). *See also id.* at 1604, 1621 (statements of Rep. Selden and Rep. Grant). Second, others asserted that Congress could not "legislate people into liking one another," suggesting that federal legislation was an inappropriate means to foster racial relations. *Id.* at 1700–04 (statement of Rep. Winstead). This general sentiment was espoused by others who "d[id] no[t] believe new [f]ederal laws c[ould] legislat[e] social equality." *Id.* at 1675 (statement by Rep. Foreman). Lastly, some congressional opponents stated that Title VII was an infringement upon all citizens' property rights. *Id.* Ultimately, these sensational viewpoints were the "losers" of the civil rights debate, so they cannot carry legal weight when deciding upon Title VII's legislative aims. *See* Schwegmann Brothers. v. Calvert Distillers Corp., 341 U.S. 384, 394 (1951) ("The fears and doubts of the opposition are no authoritative guide to the construction of legislation"); Nourse, *supra* note 35, at 119 ("But losers' history should generate far more caution: surely the job of judges is not to aid legislative obstructionists.").

44. 110 CONG. REC. 1640–43 (1964) (statement of Rep. Ryan).

45. *Id.* at 2737 (statement of Rep. Libonati).

While the House's focus on African-Americans is clear,[46] its consideration of reverse discrimination claims is not.[47] Besides statements from Representative Celler, Chairman of the House Judiciary Committee, the House's debate is utterly devoid of reverse discrimination discussions under Title VII.[48] When opposing an amendment to prohibit discrimination on the basis of sex, Representative Celler emphasized Title VII would protect, in addition to African-Americans of both genders, "*white men and white women and all Americans*."[49] He further described Title VII as "all embracing."[50] Representative Celler's position contrasts with the bill's opponents who argued H.R. 7152 was "special legislation" exclusively for minorities.[51] Representative Celler's contrasting remarks thus show the congressional intent to protect all individuals.[52] Eventually, after the consideration of amendments[53] and a debate, the House passed H.R. 7152 with a roll-call vote of 290 to 130 on February 10, 1964.[54]

B. Senate Action of H.R. 7152

Despite substantial support in the House, H.R. 7152 was met with instant opposition in the Senate and required careful legislative maneuvering for successful passage.[55] The Senate's consideration included three distinct phases for H.R. 7152: (1) bypass of the Senate Judiciary Committee and obtaining floor consideration; (2) general debate concerning the merits; and (3) cloture and passage.[56]

---

46. RAYMOND F. GREGORY, THE CIVIL RIGHTS ACT AND THE BATTLE TO END WORKPLACE DISCRIMINATION: A 50 YEAR HISTORY 19 (2014) (observing Title VII was adopted because "it was consistent with the nation's ideals and principles" and to alleviate the "disparities that had developed between African American and white workers").

47. It is unsurprising the House did not substantially consider Title VII's impact on reverse discrimination claims because it was primarily concerned with navigating the procedural obstacles for passing the bill. *See* Rodriguez & Weingast, *supra* note 34, at 1464–68. Tellingly, the Supreme Court only identified one statement from the House when holding Title VII protected Caucasians. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976).

48. *See generally* 110 CONG. REC. 2578, 2601–05, 2726–27, 2733–35, 2737 (1964) (statements of Reps. Celler, Dent, Dowdy, Fuqua, Gathings, Libonati, Roybal, and Ryan).

49. *Id.* at 2578 (statement of Rep. Celler) (emphasis added).

50. *Id.*

51. *Id.* at 1691–92 (statement of Rep. Harris).

52. *Compare id.* at 2578 (statement of Rep. Celler), *with id.* at 1691–92 (statement of Rep. Harris).

53. *See* Vaas, *supra* note 28, at 438–44 (discussing and explaining the diverse amendments to Title VII, including an anti-communist provision and the addition of "sex" as a prohibited basis of discrimination).

54. 110 CONG. REC. 2804–05 (1964). *See also* Rodriguez & Weingast, *supra* note 34, at 1468; Sape & Hart, *supra* note 34, at 829 n.27.

55. Sape & Hart, *supra* note 34, at 829 (noting that H.R. 7152 "immediately prompted a major Southern-led filibuster in the Senate"); Vaas, *supra* note 28, at 443.

56. Vaas, *supra* note 28, at 443 (describing three parliamentary phases of the Senate's consideration of H.R. 7152).

During phase one,[57] the Senate spent weeks debating whether H.R. 7152 should be sent to the Senate Judiciary Committee, [58] which was notoriously known as the "graveyard of civil rights legislation."[59] The debate largely considered the justifications and objections for circumventing the Judiciary Committee. Nevertheless, opponents of the legislation pivoted to their substantive arguments against the bill's merits.[60] Eventually, on March 26, 1964, the Senate voted to bypass the Judiciary Committee, which initiated the process for the Senate to consider the merits of H.R. 7152.[61]

On March 30, 1964, the Senate proceeded with phase two[62] of its consideration by beginning the general debate.[63] During the debate, senators provided valuable statements that help to understand Title VII, including its scope and how to evaluate reverse discrimination claims. As one of the first senators to explain the bill's provisions, Senator Humphrey of Minnesota repeated Congress's motivation for enacting Title VII: "At

57. *Id.* at 443–44 (explaining the Senate's first phase as securing floor consideration of H.R. 7152).

58. Rodriguez & Weingast, *supra* note 34, at 1468–70; Vaas, *supra* note 28, at 443–45.

59. 110 CONG. REC. 6434–35 (1964) (statement of Sen. Javits referring to the Senate Judiciary Committee as the "graveyard of civil rights legislation"); CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 4 (1985) (referring to the Senate Judiciary Committee as the "graveyard of civil rights legislation"); Leigh McWhite, *Mr. Chairman: U.S. Senator James O. Eastland and the Judiciary Committee, 1956-1978*, 86 MISS. L.J. 941, 977 (2017) ("Both sides on that issue regularly referred to the committee as the 'graveyard of civil rights legislation,' and . . . [Chairman James Eastland of Mississippi] consistently referenced his leadership role during his reelection campaigns in the 1960s as one of the best means of protecting the segregationist interests of his white constituents."). *See also* Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 967 (2005).

60. *See* 110 CONG. REC. 5810–11 (statement of Sen. Stennis arguing "[T]itle VII would constitute a flagrant, unconstitutional, unauthorized, and unwise extension of Federal interference with and control of private business"). *See also id.* at 5968 (statement of Sen. Smathers declining to support Title VII and describing it as the "genocide title"); John G. Stewart, *The Civil Rights Act of 1964: Tactics I*, *in* THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 219 (Robert D. Loevy ed., 1997) ("Before long, however, the southern Democrats shifted the focus of the debate to more substantive matters and began a comprehensive attack on the controversial parts of the legislation . . . .").

61. 110 CONG. REC. 6415–17 (1964). *See also* Rodriguez & Weingast, *supra* note 34, at 1471; Vaas, *supra* note 28, at 444. On this same day, the Senate defeated a motion from Senator Morse, a civil rights proponent, who wanted to refer H.R. 7152 to the Judiciary Committee. 110 CONG. REC. 6418, 6455 (1964). Senator Morse wanted federal courts to have a formal report from the Judiciary Committee because, in his view, it would assist in interpreting the statute and in discerning congressional intent. *See id.* at 6418. Because of the defeat of Senator Morse's motion, there is no formal report from the Senate concerning H.R. 7152.

62. Vaas, *supra* note 28, at 443–46 (explaining the Senate's second phase was its general debate).

63. 110 CONG. REC. 6524, 6527–28 (1964). As just mentioned, even though the Senate's general debate began on this date, opponents to H.R. 7152 had already begun attacking the legislation's substance during phase one. *Id.* at 5810–11, 5968 (statement of Sen. Smathers and Sen. Stennis). Therefore, the general debate of phase two was appropriate for a robust defense of the legislation's merits. Vaas, *supra* note 28, at 443–44.

the present time Negroes and members of other minority groups do not have an equal chance to be hired, to be promoted, and to be given the most desirable assignments."[64] Recognizing the importance of employment in everyday life, he forcefully argued for Title VII's adoption, a portion of which is worth fully quoting:

> Fair treatment in employment is as important as any other area of civil rights. What good does it do a Negro to be able to eat in a fine restaurant if he cannot afford to pay the bill? What good does it do him to be accepted in a hotel that is too expensive for his modest income? How can a Negro child be motivated to take full advantage of integrated educational facilities if he has no hope of getting a job where he can use that education? We all know of cases where fine Negro men and women with distinguished records in our best universities have been unable to find any kind of job that will make use of their training and skills.[65]

According to Senator Humphrey, "Title VII is designed to give Negroes and other minority group members a fair chance to earn a livelihood and contribute their talents to the building of a more prosperous America."[66] Implicating the statute's scope, he emphasized that Title VII "encourage[s] hiring on the *basis of ability and qualifications, not race or religion*."[67] Concluding his remarks, Senator Humphrey emphatically declared that Title VII is "based on the premise that *no man should be denied employment because of the color of his skin*."[68] Although motivated to legislate because of African-Americans' lack of job opportunities, Senator Humphrey's concluding statements evidence an extension of Title VII's protections to all individuals, regardless of race.[69] Other senators shared Senator Humphrey's view about the broad reach of Title VII. For example, when responding to allegations contained within a negative advertisement entitled "One-Hundred-Billion-Dollar Blackjack, the Civil Rights Bill," Senator Allott of Colorado reiterated that "[T]itle VII . . . is designed to give *every man* the right to compete on equal terms for job opportunities, *without regard to his race* or religion."[70]

64. 110 CONG. REC. 6545, 6547 (1964).
65. *Id.* at 6547.
66. *Id.* at 6548.
67. *Id.* at 6548–49 (emphasis added).
68. *Id.* at 6551 (emphasis added).
69. *See id.* at 6549, 6551.
70. *Id.* at 6037 (emphasis added).

As the debate raged, Senator Case, a Republican from New Jersey,[71] and Senator Clark, a Democrat from Pennsylvania,[72] filed an interpretative memorandum of Title VII as its bipartisan floor managers.[73] Clarifying that Title VII does not require employers to "maintain a racial balance," they explained "discrimination is prohibited as to *any individual*" and "the question in each case [is] . . . whether *that individual* was discriminated against."[74] Shortly after filing the memorandum, Senator Clark filed a statement addressing numerous objections from Title VII's opponents.[75] Addressing the argument that "employers will lean over backwards to avoid discrimination, and as a result will discriminate against other employees," Senator Clark explained the Equal Employment Opportunity Commission would encourage an understanding of Title VII's mandate to "include[] the obligation *not to discriminate against whites*."[76]

During the debate, proponents within the Senate continued to espouse their understanding that H.R. 7152 provided broad protections for all citizens. For example, Senator Gore of Tennessee understood the bill's overall purpose as "assur[ing] *all citizens* of this country the full rights of citizenship."[77] Further, debating Title VII's merits against Senator Stennis of Mississippi, Senator Pastore of Rhode Island continued to echo this theme: "[I]nsofar as job opportunities are concerned, they shall be available *to all Americans regardless of racial origin, nationality, or color*."[78] Senator Williams of New Jersey addressed the concern that Title VII required employers to institute quotas for minorities, and he reiterated Title VII protected Caucasians:

> For some reason, the fact that there is nothing whatever in the bill which provides for racial balance or quotas in employment has not been understood by those opposed to civil rights legislation. . . . They persist in opposing a provision which is not only not contained in the bill, but is specifically excluded from it. *Those opposed to H.R. 7152 should realize that to hire a Negro solely because he is a Negro is*

71. James D. Donathen, Note, *Unit Seniority Systems and Civil Rights: The Need for Law Reform*, 5 J. LEGIS. 89, 92 (1978).

72. *Id.*

73. 110 CONG. REC. 7212–13 (1964).

74. *Id.* at 7213 (emphasis added).

75. *Id.* at 7217.

76. *Id.* at 7218 (emphasis added). Senator's Clark statement is interesting if viewed alongside his blunt assessment about discrimination against Caucasians, which arose during his debate with Senator Ervin of North Carolina, an ardent opponent of Title VII: Mr. Ervin. Does the Senator from Pennsylvania claim that whites *are* discriminated against in employment on account of their race? Mr. Clark. *That is a pretty loaded question*. I must think that over. I believe I can safely say "no." *Id.* at 7222 (emphasis added).

77. *Id.* at 9083 (emphasis added).

78. *Id.* at 9793 (emphasis added).

> *racial discrimination, just as much as a "white only" employment policy.* Both forms of discrimination are prohibited by [T]itle VII of this bill. The language of that [T]itle simply states that race is not a qualification for employment. *Every man* must be judged according to his ability. In that respect, *all men* are to have an equal opportunity to be considered for a particular job.[79]

Collectively, these statements from Senators Gore, Pastore, and Williams extend Title VII's protections to Caucasians, undermining the central argument of Title VII's opponents[80] that the statute was only "special legislation."[81] In late May of 1964, Senators Dirksen and Mansfield introduced an amendment to H.R. 7152, better known as the Mansfield-Dirksen Amendment, which was a substitute for the entire civil rights bill.[82]

On June 8, 1964, H.R. 7152 finally entered phase three of the Senate's consideration when Senator Mansfield filed for cloture[83] to end the Southern Democrats' filibuster.[84] On this same day, the Senate resoundingly rejected an amendment that sought to strike the entirety of Title VII.[85] A day later, the Senate rejected an amendment limiting the application of Title VII to employers with 100 as opposed to twenty-five employees.[86] On June 10, 1964, the cloture was successfully invoked with a vote of seventy-one to twenty-nine.[87] Senator Dirksen also filed a second Mansfield-Dirksen Amendment, which replaced the first Mansfield-Dirksen Amendment and served as a substitute for H.R. 7152.[88] The second substitute passed on June 17, 1964, with a vote of seventy-six to

---

79. *Id.* at 8918, 8921 (emphasis added).

80. Similar to their House counterparts, the Title VII's opponents within the Senate also argued Title VII was only invented for minorities within the workplace. *See id.* at 9627 (statement of Sen. Talmadge describing Title VII as being for "special classes of people").

81. *Id.* at 1691–92 (statement of Rep Harris).

82. *Id.* at 11,926–35.

83. Cloture allows the Senate to overcome a legislative filibuster with sixty votes and limits the remaining time of debate on a pending bill. *See Glossary Term | Cloture*, U.S. SENATE, https://www.senate.gov/reference/glossary_term/cloture.htm [https://perma.cc/9EMT-9EYF]. *See also* Rodriguez & Weingast, *supra* note 34, at 1470 & n.179.

84. *See* 110 CONG. REC. 12,922 (1964). Senator Mansfield previously filed for cloture on June 6, 1964, but he withdrew his motion after there was a unanimous consent agreement to establish time limitations for amendments. *See* Vaas, *supra* note 28, at 446.

85. 110 CONG. REC. 13,073–74, 13,085 (1964).

86. *Id.* at 13,085–93. A few years later, Congress passed the Equal Opportunity Act of 1972, which extended Title VII's reach to employers with fifteen employees. Equal Opportunity Act, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (codified at 42 U.S.C. § 2000e(b) (2018)). *See also* Adam W. Aston, Note, *"Fair and Full Employment": Forty Years of Unfulfilled Promises*, 15 WASH. U. J.L. & POL'Y 285, 302 (2004).

87. 110 CONG. REC. 13,327 (1964).

88. *Id.* at 13,310. *See also* Vaas, *supra* note 28, at 445–46.

eighteen.[89] Two days later, on June 19, 1964, H.R. 7152 was finally passed the Senate by a with vote of seventy-three to twenty-seven.[90]

C. Return to the House, Presidential Signature, and Legislative Lessons

After surviving the Senate, H.R. 7152 returned to the House with the Senate's changes, and the House Rules Committee authorized a vote before the entire House.[91] The House passed the Senate's version of the bill with a vote of 289 to 126 on July 2, 1964.[92] On that same day, President Lyndon B. Johnson signed the Civil Rights Act of 1964 into law.[93]

There are three key lessons from Title VII's limited legislative history implicating reverse discrimination. First and foremost, Congress passed Title VII in response to widespread forms of employment discrimination suffered by African-Americans.[94] Congress believed that employment discrimination was an unnecessary hindrance upon the national economy, and its existence was evident by statistical disparities between African-Americans and Caucasians.[95] Secondly, despite being *motivated* to address racial inequalities, there is an overwhelming congressional intent for Title VII to protect all races from employment discrimination, including Caucasians.[96] Title VII's proponents repeatedly stated that it protected *individuals* within the workplace and used broad language to argue it applied to "*all* Americans,"[97] "*any* individual,"[98] or "*every* man."[99] Further, a congressional intent to protect all individuals from employment discrimination is a natural inference because Title VII's opponents lost the debate after arguing the statute was "special legislation" for African-Americans.[100] Finally, one may consider what Title VII's

89. 110 CONG. REC. 14,239 (1964). Six senators did not vote on the second substitute. *Id.*

90. *Id.* at 14,511.

91. Sape & Hart, *supra* note 34, at 830 & n.30 (observing H.R. 7152 was returned to the House after the Senate's passage and the House decided to vote on the Senate's version of the bill as opposed to engaging in a conference committee with the Senate); Vaas, *supra* note 28, at 457.

92. 110 CONG. REC. 15,897 (1964).

93. II LYDON B. JOHNSON, *Radio and Television Remarks upon Signing the Civil Rights Bill*, *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 842, 842–44 (1965). *See also* Vaas, *supra* note 28, at 457.

94. *See* H.R. REP. NO. 88-914, at 18, *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2393; 110 CONG. REC. 1640–43, 6547–48 (1964) (statements of Rep. Ryan and Sen. Humphrey).

95. *See* 110 CONG. REC. 1640–43, 6547, 7240–42 (1964) (statements of Rep. Ryan, Sen. Humphrey, and Sen. Case). Senator Fong of Hawaii lambasted racial discrimination within the workplace as creating a "fool's economy" and hindering the United States' international standing. *Id.* at 14,294, 14,297–98.

96. *See supra* pp. 11–17.

97. 110 CONG. REC. 2578 (1964) (statement of Rep. Celler).

98. *Id.* at 7213 (interpretative memorandum of Sen. Case and Sen. Clark).

99. *Id.* at 6037 (statement of Sen. Allott).

100. As discussed earlier, this Article rejects giving credence to the congressional debate's losers if legislative history is employed. *See supra* pp. 11–12 & note 41. Yet, the losers' views are instructive

legislative history does not show.[101] Title VII's legislative history suggests Congress did not consider how plaintiffs of *any race* should prove their discrimination claims, leaving that issue for court resolution.[102]

These legislative teachings inform the Supreme Court's jurisprudence under Title VII for reverse discrimination claims,[103] and they can similarly provide insight about utilizing the "background circumstances" approach. With these legislative considerations in mind, it is imperative to turn to the Supreme Court's application and interpretation of Title VII.

II. THE SUPREME COURT'S APPLICATION OF TITLE VII

Legislation is never perfect.[104] But federal courts are still equipped to apply and interpret statutes.[105] As the preceding section shows, neither Title VII's legislative history nor text reveals *how* African-Americans or Caucasians may prove their claims in federal court.[106] Undeterred by Title VII's silence, the Supreme Court developed a robust body of law to aid federal courts in analyzing employment discrimination claims. However,

---

about whether Congress refused to adopt a position. *See generally* Andrew Little, *Law as Teacher of Society: Reflections on Title VII After Fifty Years*, 33 J. LEGAL STUD. EDUC. 71, 87 (2016) ("[I]t was well understood at the time of the passage of the Civil Rights Act and Title VII that its legislative history would be a necessary element of later interpretation."); Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1644–45 (2014) ("Statutes are not made in narrative form, but oscillating political battle. Searching for legislative context should target disputed meanings with the least effort for the most illumination, with due attention to [C]ongress's procedures and *most importantly to the question of who won or lost the debate*." (emphasis added)); Paul E. McGreal, *A Constitutional Defense of Legislative History*, 13 WM. & MARY BILL RTS. J. 1267, 1298 (2005) ("To be clear, I am not arguing that every scrap of legislative history has equal importance. As with any other aspect of context, each piece must be weighed against the others to consider how well it describes the overall context of enactment.").

101. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2411–12 (2018); Small v. United States, 544 U.S. 385, 393 (2005); Andrus v. Shell Oil Co., 446 U.S. 657, 663 (1980).

102. *See supra* pp. 8–17.

103. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976).

104. *See* Daniel Abrams, Note, *Ending the Other Arm Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL'Y REV. 488, 518 (1992); Peter W. Salsich Jr., *Community Development–Some Reflections on the Latest Federal Initiative*, 19 ST. LOUIS U. L.J. 293, 326 (1975); Elwood Hain, Milliken v. Green: *Breaking the Legislative Deadlock*, 38 L. & CONTEMP. PROBS. 350, 364 (1974).

105. *See* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 293–94 (1989) (arguing that a legislative supremacy principle does not prevent courts from resolving statutory questions "when there are gaps in the legislative scheme"); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1482–84 (1987) (arguing for a dynamic approach to statutory interpretation that considers "current policies and societal conditions"); Richard A. Posner, *Statutory Interpretation–in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) ("I suggest that the task for the judge called upon to interpret a statute is best described as one of imaginative reconstruction. The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.").

106. *See supra* pp. 8–9, 16–17.

the Court's precedents have both caused and contributed to the debate surrounding reverse discrimination claims.

A. McDonnell Douglas *and Its Progeny: The Source of Confusion*

The first seminal case from the Court about proving discrimination claims under Title VII was *McDonnell Douglas Corp. v. Green*.[107] *McDonnell Douglas* sets forth a framework for Title VII claimants to substantively prove[108] their employment discrimination claims with circumstantial evidence as opposed to direct evidence.[109] In *McDonnell Douglas*, the plaintiff, Mr. Green, an African-American civil rights activist in St. Louis, Missouri, worked as a mechanic and laboratory technician for McDonnell Douglas Corporation, an aerospace and aircraft manufacturer.[110] Mr. Green was laid off during a general reduction in McDonnell Douglas's workforce.[111] He protested against his discharge and McDonnell Douglas's hiring practices, contending that both practices were racially motivated.[112] Mr. Green, along with others, first engaged in a "stall-in," which consisted of stalling cars on the roads leading to McDonnell Douglas's plant and blocking access for a morning shift change.[113] After the "stall-in," a "lock-in" occurred,[114] and occupants of the plant could not leave because chains and padlocks held the front door.[115] Although Mr. Green was aware of the "lock-in," the extent of his involvement was uncertain.[116] Weeks after the "lock-in," McDonnell

---

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

108. *Id. McDonnell Douglas* is primarily concerned with the presentation of evidence after the motion to dismiss stage. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510–11 (2002).

109. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1984) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979))); Hollander v. Am. Cyanamid Co., 895 F.2d 80, 85 (2d Cir. 1990) ("Because employers rarely leave a paper trail-or 'smoking gun'-attesting to a discriminatory intent, disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer." (internal citations omitted)); Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 546 (2018) (observing courts "slice and dice" employment discrimination claims into direct and circumstantial evidence cases); Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 954 (2016) (stating plaintiffs proceed under *McDonnell Douglas* to utilize circumstantial evidence and not direct evidence). *But see* Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 934 (2005) (arguing the distinction between circumstantial and direct evidence is "no longer appropriate" after the Supreme Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)).

110. *McDonnell Douglas*, 411 U.S. at 794.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 795.

115. *Id.*

116. *Id.*

Douglas issued a hiring advertisement for qualified mechanics, and Mr. Green applied for re-employment.[117] McDonnell Douglas declined to re-hire Mr. Green because of his participation in the "stall-in" and "lock-in."[118]

Mr. Green filed a complaint with the Equal Opportunity Commission (EEOC), arguing his former employer refused to re-hire him because of his race and civil rights involvement, decisions in violation of 42 U.S.C §§ 2000e–2(a) and 2000e–3(a).[119] The former section is Title VII's prohibition upon disparate treatment, and the latter section is Title VII's anti-retaliation provision for individuals engaging in protected activities against unlawful employment practices.[120] The EEOC did not make any finding as to Mr. Green's disparate treatment claim, but found merit to his retaliation claim and advised him of his right to sue in federal district court.[121] Mr. Green brought suit against McDonnell Douglas for disparate treatment and unlawful retaliation in the eastern district of Missouri.[122] The district court dismissed both of Mr. Green's Title VII claims, reasoning that the EEOC failed to make a determination about disparate treatment and participating in the stall-in and lock-in were not protected activities under Title VII.[123] On appeal, the Eighth Circuit affirmed the district court's findings concerning the lack of protected activities triggering Title VII's retaliation provision.[124] However, the Eighth Circuit reversed the district court's dismissal of Mr. Green's disparate treatment claim, holding that the court was not jurisdictionally foreclosed from hearing the claim because the EEOC never addressed it.[125] Additionally, the Eighth Circuit set forth a standard of proof to employ when analyzing

117. *Id.* at 796.

118. *Id.*

119. *Id.*

120. 42 U.S.C. § 2000e–2(a)(1) (2018) ("It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin*[.]" (emphasis added)); 42 U.S.C. § 2000e–3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . *because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter*." (emphasis added)).

121. *McDonnell Douglas*, 411 U.S. at 797.

122. Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 846 (E.D. Mo. 1970).

123. *McDonnell Douglas*, 411 U.S. at 797.

124. Green v. McDonnell Douglas Corp., 463 F.2d 337, 341 (8th Cir. 1972), *rev'd on other grounds*, 411 U.S. 792 (1973).

125. *Id.* at 342–44.

Mr. Green's disparate treatment claim.[126] McDonnell Douglas appealed to the Supreme Court.[127]

The Supreme Court first began its analysis by affirming the Eighth Circuit's view that the district court was not jurisdictionally foreclosed from considering Mr. Green's disparate treatment claim.[128] After that determination, the Court then addressed the "order and allocation of proof in a private, non-class action challenging employment discrimination."[129] The Court held that a plaintiff must first establish a prima facie case of racial discrimination by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[130]

If a plaintiff demonstrates a prima facie case, "[t]he burden must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[131] Assuming the employer provides a "legitimate, nondiscriminatory reason" for its decision, a claimant is then "afforded a fair opportunity to show that [the employer's] stated reason for [the employee's] rejection was in fact pretext."[132] During the pretext stage, a plaintiff must show the "presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision."[133]

When applying its burden-shifting framework, the Court found that Mr. Green successfully demonstrated a prima facie case.[134] Discussing Mr. Green's prima facie case, the Court noted McDonnell Douglas continued to seek mechanics after it rejected Mr. Green's job application and never disputed his qualifications for the same job he previously held.[135] McDonnell Douglas then provided a legitimate, nondiscriminatory reason by stating Mr. Green's participation in "unlawful conduct against it" was the reason for his rejection.[136] As to pretext, the Court emphasized Mr. Green needed an opportunity to provide "competent evidence"[137] that

126. *Id.* at 343–44.

127. *McDonnell Douglas*, 411 U.S. at 798.

128. *Id.* at 798–800.

129. *Id.* at 800.

130. *Id.* at 802. Importantly, the Court recognized that the formulation of a plaintiff's prima facie case depends upon the factual circumstances and is subject to alternation. *See id.* at 802 n.13.

131. *Id.*

132. *Id.* at 804.

133. *Id.* at 805.

134. *Id.* at 802.

135. *Id.*

136. *Id.* at 803–04.

137. *Id.* at 805 n.18.

McDonnell Douglas's legitimate, nondiscriminatory reason was actually "racially premised" because the district court did not permit him to make the showing.[138] Further, the Court opined that McDonnell Douglas needed to apply its professed rehiring criteria "alike to members of all races" if it were to prevail at the pretext stage.[139]

The result of the *McDonnell Douglas* framework is that it allows claimants to prove their claims with circumstantial evidence. Direct evidence always remains a viable option for Title VII claimants to bring claims of discrimination when they possess evidence supporting unlawful discrimination.[140] But *McDonnell Douglas* is a useful means to analyze employment discrimination claims when direct evidence from a damaging e-mail, phone call, or statement is nonexistent, which is often the case when dealing with sophisticated employers.[141]

In several subsequent decisions, the Court refined aspects of *McDonnell Douglas*'s burden-shifting framework to clarify that Title VII claimants are not always obligated to provide "additional, independent evidence of discrimination."[142] For instance, in *Texas Department of Community Affairs v. Burdine*, the Court emphasized that demonstrating a prima facie case of disparate treatment is "not onerous," but that Title VII claimants always retain the burden of persuasion of showing intentional discrimination.[143] The *Burdine* Court further explained that only the burden of production shifts to the employer to proffer a legitimate, nondiscriminatory reason, and the employer's failure to provide a legitimate, nondiscriminatory reason compels judgment for a plaintiff.[144]

---

138. *Id.* at 804–07.

139. *Id.* at 804. *McDonnell Douglas* is a foundational Title VII decision, but there is almost no discussion about Mr. Green after his case was remanded. On remand, the district court held that McDonnell Douglas Corp. showed its stated reasons were not pretext for racial discrimination, and its finding was upheld by the Eighth Circuit. *See* Green v. McDonnell Douglas Corp., 390 F. Supp. 501, 503 (E.D. Mo. 1975), *aff'd*, 528 F.2d 1102, 1106–07 (8th Cir. 1976). Thus, Mr. Green's claim was ultimately dismissed. *See id.*

140. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 256–57 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 10-166, § 107, 105 Stat. 1071, 1075, *as recognized in* Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 140 S. Ct. 1009, 1017–18 (2020).

141. *See* Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L.J. 559, 573–74 (2017) ("Plaintiffs can use circumstantial evidence to carry the burden of proving intentional discrimination without any 'smoking gun' proof that the decision maker deliberately decided to discriminate on the basis of a protected class, such as sex or race.").

142. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248 (1981).

143. *Burdine*, 450 U.S. at 253–54.

144. *Id.* at 254.

In carrying its burden, the employer must only produce "some evidence."[145]

After *Burdine*, in *St. Mary's Honor Center v. Hicks*, the Court clarified that the rejection of an employer's legitimate, nondiscriminatory reason does not compel judgment for a plaintiff because establishing pretext does not necessarily show intentional discrimination.[146] Instead, disbelief of an employer's legitimate, nondiscriminatory reason, coupled with a plaintiff's prima facie case, may permit a finding of intentional discrimination if the circumstances warrant.[147] Finally, in *Reeves v. Sanderson Plumbing Products, Inc.*, the Court considered *McDonnell Douglas* under the Age Discrimination in Employment Act of 1967 (ADEA).[148] Once again, the Court reiterated that, "[i]n appropriate circumstances," it is possible for a plaintiff to prevail by using their prima facie case and providing "sufficient evidence" that the employer's asserted reason is pretextual.[149] However, the Court also recognized that a plaintiff may not always win a case in this manner, especially if there is "uncontroverted independent evidence" that discrimination did not occur.[150]

Despite careful directives about applying *McDonnell Douglas*, the Court never explored the prima facie case's element requiring a "racial minority" status, which poses a problem for Caucasians.[151] But it has explained that the prima facie case is only a means to infer discrimination and not an "inflexible rule" that is "rigid, mechanized, or ritualistic."[152] But that observation is hardly surprising because *McDonnell Douglas* emphasized the prima facie case was malleable and subject to factual tailoring.[153] Nevertheless, to the unintended detriment of Caucasian plaintiffs, the Court has consistently enforced the racial minority or "protected class" prong of the prima facie case without calling it into doubt or otherwise questioning its viability.[154] Issues concerning the racial

145. Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 986 (1988).

146. *Hicks*, 509 U.S. at 511.

147. *Id.* at 511, 519.

148. *Reeves*, 530 U.S. at 138–40.

149. *Id.* at 147–48.

150. *Id.* at 148.

151. *See id.* at 142; *Hicks*, 509 U.S. at 506; Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 n.6 (1981).

152. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575–77 (1978).

153. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973).

154. *See id.* at 142; *Hicks*, 509 U.S. at 506; *Burdine*, 450 U.S. at 253 n.6. *See also Furnco Constr. Corp.*, 438 U.S. at 576. In the context of the ADEA, the Court unanimously held that an "utterly irrelevant factor" should not doom a prima face case because the central inquiry of the prima facie case is whether there exists "*evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discrimination criterion* . . . ." O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312–13 (1996) (emphasis in original) (quoting Int'l Brotherhood of Teamsters v. United

minority prong eventually reached the Court, and those issues implicated the extent to which Title VII protected Caucasians or, in the abstract, racial majorities.

B. McDonald*'s Expansion of Title VII's Reach*

In *McDonald v. Santa Fe Trail Transportation Co.*, the Court addressed the possibility of reverse discrimination claims under Title VII.[155] *Santa Fe* stands for the proposition that Title VII protects Caucasians from private employment discrimination.[156] As this was the Court's first reverse discrimination case, the facts are worth considering. In *Santa Fe*, L.N. McDonald and Raymond L. Laird were two Caucasian employees working for Santa Fe Trail Transportation.[157] Mr. McDonald and Mr. Laird, along with an African-American employee named Charles Jackson, "were jointly and severally charged with misappropriating 60 one-gallon cans of antifreeze which was part of a shipment Santa Fe was carrying for one of its customers."[158] Eventually, Mr. McDonald and Mr. Laird were fired, while Mr. Jackson was not.[159] After filing a grievance with a local union and complaint with the EEOC, Mr. McDonald and Mr. Laird filed suit in federal court against Santa Fe Trail Transportation and the union for unlawful discrimination under 42 U.S.C. § 1981[160] and Title VII.[161] The federal district court dismissed both claims when Santa Fe Trail Transportation moved to dismiss the complaint.[162] The court held that Section 1981 did not protect Caucasians, and it also concluded that Mr. McDonald and Mr. Laird failed to state a claim under Title VII because their employer dismissed them, but retained an African-American employee.[163] The Fifth Circuit affirmed the district court,[164] and the Supreme Court granted certiorari.[165]

Writing for the Court as its first African-American member, Justice Marshall addressed the extent Title VII protected Caucasians from

States, 431 U.S. 324, 358 (1977)). A prima facie case is generally concerned about creating an inference of discrimination as opposed to fulfilling a checklist. *See id.*

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

156. *Id.* at 278–80, 283.

157. *Id.* at 275.

158. *Id.* at 276.

159. *Id.*

160. Under 42 U.S.C. § 1981, it is unlawful to engage in discrimination in the creation and enforcement of contracts. 42 U.S.C. § 1981(a) (2018).

161. *Santa Fe*, 427 U.S. at 276.

162. *Id.* at 277. *See also* McDonald v. Santa Fe Trail Transp. Co., No. 71-H-891, 1974 WL 10598, at *2–4 (S.D. Tex. Jan. 4, 1974).

163. *Santa Fe*, 427 U.S. at 277–78.

164. McDonald v. Santa Fe Trail Transp. Co., 513 F.2d 90 (5th Cir. 1975), *rev'd*, 427 U.S. 273 (1976).

165. *Santa Fe*, 427 U.S. at 278.

employment discrimination and explicitly held that Title VII protected Caucasians "upon the same standards" that are applicable to racial minorities.[166] The Court first reasoned the plain terms of Title VII's status-based proscription, which outlaws discrimination against "*any individual . . . because of such individual's race*,"[167] are not limited to any "particular race."[168] The Court next observed that it previously interpreted Title VII "as prohibiting '[d]iscriminatory preference for *any* [racial] group, *minority or majority*.'"[169] The Court then provided "great deference" to the EEOC's interpretation of Title VII as outlawing private employment discrimination against Caucasians "on the same terms" that apply to racial minorities.[170] Lastly, the Court found that Title VII's protections for Caucasians was harmonious with its legislative history by relying upon the interpretative memorandum from Senators Clark and Case and statements from Representative Celler and Senator Williams.[171] For those collective reasons, the Court declared: "We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case *upon the same standards as would be applicable were they Negros and Jackson white.*"[172] As to the Section 1981 claim, the Court held that Section 1981 also protects Caucasians from racial discrimination in private employment because its reference to "white citizens" only describes the nature of the discrimination itself, and it "[met] the particular and immediate plight of the newly freed Negro slaves" who were deprived the rights of "white citizens."[173] The Court's first conclusion that Title VII protects Caucasians is fully supported by the broad language of Title VII's status-based prohibition[174] and Title VII's proponents who provide much of its legislative history.[175]

Overshadowed by the Court's central holding about Title VII's breath, there is an overlooked footnote in Justice Marshall's opinion directly implicating the racial minority prong of the prima facie case.[176] Within footnote six, Justice Marshall observed that the "racial minority" prong was only referenced to "demonstrate how *the racial character of the discrimination* could be established in the *most common sort of case, and*

166. *Id.* at 278–80.

167. 42 U.S.C. § 2000e–2(a)(1) (2018) (emphasis added).

168. *Santa Fe*, 427 U.S. at 278–79.

169. *Id.* at 279 (alteration in original) (emphasis in original) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

170. *Id.* at 279–80.

171. *Id.* at 280.

172. *Id.* (emphasis added).

173. *Id.* at 286–96.

174. *See* 42 U.S.C. § 2000e–2(a) (2018).

175. *See supra* pp. 10–20.

176. *Santa Fe*, 427 U.S. at 279 n.6.

not as an indication of any substantive limitation on Title VII's prohibition of racial discrimination."[177] Justice Marshall's footnote reasonably observes that the racial minority prong does not serve as a substantive bar for reverse discrimination claims under Title VII.[178] But, it also suggests, at least implicitly, that reverse discrimination cases may not be "the most common sort of case."[179] While his footnote is silent about the specific formulation of Caucasians' prima facie case, it seems to theorize the racial minority prong would not apply to Caucasians because the "racial character" of the discrimination is different.[180]

The resulting connotations of Justice Marshall's footnote are overlooked by *Santa Fe*'s central holding that Caucasians are protected by Title VII "upon the same standards as [are] applicable" to African-Americans.[181] The Court did not elaborate about how the "same standards" apply in reverse discrimination cases, nor did it explain the elements of Caucasians' prima facie case.[182] Conceivably, the Court used the phrase "same standards" to mean Caucasians could utilize *McDonnell Douglas*, and circumstantial evidence generally, when pursuing Title VII claims, which is likely the best reading given Justice Marshall's cautious footnote.[183] But, one could take a literal interpretation of "same standards" to require Caucasians and African-Americans to have identical prima facie cases under *McDonnell Douglas* and essentially ignore whatever the Court intended by its footnote.[184] Both views are merited, but the latter view sacrifices a holistic reading of *Santa Fe*. Notwithstanding the proper interpretation of "same standards," the Court would not consider another reverse discrimination case under Title VII until several decades later. This time, the Court addressed other nuances of the statute.

C. Ricci*'s Recent Approach to Reverse Discrimination Under Title VII*

In 2009, the Supreme Court returned to reverse discrimination claims in *Ricci v. DeStefano* but was primarily concerned with the relationship between disparate impact and disparate treatment claims as opposed to Caucasians' prima facie case.[185] Regardless, *Ricci* provides the Court's most recent approach to reverse discrimination claims and illustrates how such claims may arise in the future.

177. *Id.* (emphasis added).
178. *See id.*
179. *See id.*
180. *See id.*
181. *See id.* at 280.
182. *See id.* at 279–80, 279 n.6.
183. *See id.* at 280.
184. *See id.*
185. Ricci v. DeStefano, 557 U.S. 557, 557, 563, 576–80 (2008).

In *Ricci*, the City of New Haven, Connecticut, engaged in a promotion and hiring process for lieutenant and captain positions within its fire department (the Department).[186] New Haven's charter established a merit system, requiring applicants to take a job-related examination and the relevant hiring authority to fill a vacancy by selecting an individual who was a "top three scorer[]" from the examination.[187] As stipulated between the City of New Haven and a local firefighters union, the examination consisted of a written and oral component.[188] The written part consisted of 60% of an applicant's score, while the oral part was 40%.[189] New Haven hired an outside consultant to administer and develop both parts of the examination, and, during the examinations' development, the consultant oversampled minority firefighters in an attempt to avoid "unintentionally favor[ing] white candidates."[190]

The examinations were proctored in November and December 2003.[191] The examinations' results splintered among racial lines.[192] For the lieutenant examination, there were seventy-seven examinees, including forty-three Caucasians, nineteen African-Americans, and fifteen Hispanics.[193] Thirty-four candidates passed the lieutenant examination: twenty-five Caucasians, six African-Americans, and three Hispanics.[194] As there were eight vacancies for the lieutenant position, applying New Haven's rule of three, the top ten examinees were eligible for an immediate promotion, all of whom were Caucasian.[195] For the captain examination, there were forty-one candidates, including twenty-five Caucasians, eight African-Americans, and eight Hispanics.[196] Twenty-two candidates passed the captain examination: sixteen Caucasians, three African-Americans, and three Hispanics.[197] Under New Haven's rule of three, the top nine examinees were eligible for an immediate promotion, seven Caucasians and two Hispanics.[198] Given the racial disparities, New Haven's public officials expressed concerns to its consultant about the examinations being discriminatory and imposing a disparate impact upon

186. *Id.* at 563–64.
187. *Id.* at 564.
188. *Id.*
189. *Id.*
190. *Id.* at 564–65.
191. *Id.* at 566.
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*

minority candidates.[199] The consultant defended the examinations' validity, believing the disparities were attributable to "various external factors."[200]

New Haven officials held a series of tense public meetings to decide whether to formally certify the examinations' results.[201] During those meetings, the New Haven Civil Service Board (the CSB) heard arguments for and against certifying the examinations and entertained testimony from various experts.[202] New Haven's legal counsel consistently argued that the examinations' certification would violate Title VII's disparate impact provision, while Mr. Frank Ricci advocated for certifying the results.[203] At the conclusion of all the arguments, "the CSB voted on a motion to certify the examinations."[204] The CSB deadlocked two to two because of one member's recusal, resulting in a refusal to certify.[205]

The CSB's decision led to litigation brought by seventeen Caucasian firefighters and one Hispanic firefighter.[206] Accompanying their other statutory claims and a claim under the Fourteenth Amendment's Equal Protection Clause,[207] the plaintiffs brought suit for disparate treatment under Title VII after the EEOC issued their right-to-sue letters.[208] The defendants, including the City of New Haven, Mayor John DeStefano, and other local officials advocating against certification, asserted they possessed a "good-faith belief" that they would have violated Title VII's disparate-impact prohibition if they certified the examinations' results.[209] According to the defendants, they could not be held liable for violating Title VII's disparate treatment provision in their attempt to comply with the statute's disparate impact prohibition.[210] Both the district of Connecticut and Second Circuit granted summary judgment for the defendants, reasoning that the defendants did not possess discriminatory intent under Title VII or the Equal Protection Clause.[211] The Supreme Court granted certiorari to "interpret[] and reconcile[]" the disparate impact and disparate treatment provisions of Title VII.[212]

---

199. *Id.* at 566–67.
200. *Id.*
201. *Id.* at 567–74.
202. *Id.*
203. *Id.* at 567–68, 572–74.
204. *Id.* at 574.
205. *Id.*
206. *Id.*
207. *Id.* at 575.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 563, 576.
212. *Id.* at 576.

Proceeding under the assumption that New Haven "rejected the test results solely because the higher scoring candidates were white" and engaged in unlawful race discrimination, the Court began its analysis by describing its task: "We consider . . . .whether the purpose to avoid disparate-impact liability *excuses what otherwise would be prohibited disparate-treatment discrimination*."[213] Writing for the Court, Justice Kennedy first rejected polarizing arguments espoused by the petitioners and respondents.[214] He cast aside two of petitioners' positions: (1) it is never permissible for an employer to engage in disparate treatment to avoid disparate impact liability; and (2) an employer must *in fact* violate Title VII's disparate impact bar if it wishes to argue disparate impact compliance as a defense to a disparate treatment claim.[215] He then rebuffed the respondents' assertion that an employer's good-faith belief that its actions are necessary to comply with Title VII's disparate impact provisions is sufficient to justify "race-conscious conduct" against other employees.[216]

Instead of accepting the parties' arguments, the Court adopted a middle ground.[217] After relying upon and transferring its constitutional jurisprudence to solve the statutory question before it,[218] the Court held that an employer may engage in disparate treatment to "avoid[] or remedy[] an unintentional disparate impact," but only if the employer possesses a "strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."[219] In appropriate circumstances, the Court's holding permits an employer to engage in intentional discrimination against one group in order to avoid unintentional discrimination against another group.[220]

After enunciating a completely new standard of law, the Court proceeded to apply it to the case.[221] At the summary judgment stage, the respondents could only avail themselves of the defense if there was a strong basis in evidence that "the examinations *were not* job related and

213. *Id.* at 579–80.
214. *Id.* at 580–82.
215. *Id.* at 580–81.
216. *Id.* at 581–82.
217. *Id.* at 582–85.
218. *Id.* at 582–83.
219. *Id.* at 585.
220. *See id.*
221. *Id.* at 586–92. In dissent, Justice Ginsburg aptly noted the Court's decision applies a new legal principle, as opposed to remanding the case for the principle's application in the first instance, and deviates from its normal procedure. *Id.* at 631 (Ginsburg, J., dissenting). Quite telling, neither the majority nor any of the concurring opinions addressed her point. *See id.* at 587–608 (Scalia, J., concurring) (Alito, J., concurring).

consistent with business necessity, *or* if there existed an equally valid, less-discriminatory alternative that served the City's needs *but that the City refused to adopt*."[222] Either formulation is a way in which New Haven could have been liable for the examinations' disparate impact upon racial minorities.[223] Rejecting the notion that the "[f]ear of litigation" is sufficient to invoke the disparate-impact defense, the Court held that the respondents did not possess a strong basis in evidence the exams were not job related and consistent with business necessity, nor did they have a strong basis in evidence to suggest that there was an "equally valid, less-discriminatory alternative" New Haven "would necessarily have refused to adopt."[224] Given those conclusions, the respondents could not avail themselves of any defense to the firefighters' disparate treatment claims because there was no strong basis in evidence of disparate-impact liability.[225] Without a defense to refuse the examinations' certification, the Court ordered the entry of summary judgment in favor of the firefighters.[226]

Although there are arguable problems with the Court's reasoning[227] and disparate impact claims extend beyond the scope of this Article, *Ricci* provides three important ramifications for Caucasians' disparate treatment claims under Title VII. First, *Ricci* permits the utilization of constitutional doctrines for new legal issues under Title VII, including for reverse discrimination claims.[228] Essentially, federal courts may turn to constitutional doctrines when Title VII is silent.[229] Secondly, at least when the *Ricci* Court was partially composed of now deceased and retired members,[230] the Court was hesitant to adopt a legal standard unfairly

222. *Id.* at 587 (emphasis added) (citation omitted).

223. *See* 42 U.S.C. § 2000e–2(k)(1)(A), (C) (2018).

224. *Ricci*, 557 U.S. at 587–92.

225. *Id.* at 592.

226. *Id.* at 592–93.

227. For instance, the Court provided little, if any, discussion concerning the examinations consistence with business necessity. *See id.* at 587–89. Additionally, the Court seemed impermissibly to weigh the testimony of one of the experts appearing before the New Haven Civil Service Board (CSB). *Id.* at 591–92 ("The remainder of his remarks showed that Hornick's primary concern—somewhat to the frustration of CSB members—was marketing his services for the future, not commenting on the results of the tests the City had already administered." (citations omitted)).

228. *See id.* at 582–85.

229. *See id.*

230. Since *Ricci* was decided, Justices Kennedy and Scalia are no longer members of the Court. *See Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/A5MT-LZG5]. Justices Gorsuch and Kavanaugh were their replacements, and neither has voted upon a reverse discrimination case before the Court. *See id.* Justice Ginsburg, the dissent's author, passed away on September 18, 2020. Joan Biskupic & Ariane de Vogue, *Justice Ruth Bader Ginsburg Dead at 87*, CNN (Sept. 19, 2020), https://www.cnn.com/2020/09/18/politics/ruth-bader-ginsburg-dead/index.html [https://perma.cc/HT84-4UJK]. She was succeeded by Justice Amy Coney Barrett on October 26, 2020, who also has yet to vote on a reverse discrimination case. Joan

tipping the scale for Caucasian plaintiffs or their employers.[231] The Court seemed willing to provide employers with flexibility to make employment-related decisions, but employers may not walk free by disregarding Title VII's core purposes or hiding behind a "minimal standard" giving them unlimited discretion to make suspect decisions.[232] Lastly, as it concerns the merits of the firefighters' disparate treatment claim, the Court endorsed the ability of racial majorities to prove claims with direct evidence.[233] In the case of the Caucasian firefighters, the undisputed evidence was that New Haven refused to certify the test results solely because the higher-scoring candidates were Caucasian, which was explicitly because of race and outlawed by Title VII.[234]

McDonnell Douglas, *Santa Fe*, and *Ricci* are the bedrock cases guiding Caucasians under Title VII. These cases make clear that Title VII protects Caucasians from employment discrimination, and they can pursue claims under Title VII like other races.[235] They also support Caucasians' ability to use circumstantial and direct evidence during litigation.[236] Despite some foundational guidance from the Court, a question remains: *How* do Caucasian plaintiffs establish a prima facie case for race discrimination using *McDonnell Douglas*? As it remains unanswered by the Court, federal appellate courts have attempted to provide an answer.

III. THE ORIGINS OF THE BACKGROUND CIRCUMSTANCES APPROACH & ALTERNATIVE APPROACHES FOR REVERSE DISCRIMINATION CLAIMS AMONG THE FEDERAL COURTS

The Court has emphasized that Caucasians have every right to bring race discrimination claims under Title VII. Yet, the preceding section shows the Court has yet to fully consider the implications of *McDonnell Douglas*'s racial minority prong. In light of the Court's silence, lower courts decided to resolve the inherent tension between being Caucasian and alleging a racial minority status. In some cases, certain lower courts created different doctrines that are only imposed upon Caucasians.

Biskupic, *Amy Coney Barrett Joins the Supreme Court in Unprecedented Times*, CNN (Oct. 27, 2020), https://www.cnn.com/2020/10/27/politics/amy-coney-barrett-joins-supreme-court-unprecedented/index.html [https://perma.cc/KZ4E-9BXH].

231. *See Ricci*, 557 U.S. at 580–82.

232. *Id.*

233. *See id.* at 579–80.

234. *Id.*

235. *See id.* at 579–80; McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976).

236. *See Ricci*, 557 U.S. at 579–80; *Santa Fe*, 427 U.S. at 280.

A. The Background Circumstances Test in the Shadow of McDonnell Douglas

At the outset, the background circumstances requirement is only relevant when a claimant proceeds under *McDonnell Douglas*. If Caucasians possess direct evidence of discrimination, they can proceed with their claim like African-Americans or other racial minorities.[237] For example, in *Ondricko v. MGM Grand Detroit, LLC*, the Sixth Circuit concluded that a Caucasian female presented direct evidence of racial discrimination when her employer terminated her for a shuffling mishap at a casino and said: "I didn't want to fire Kim, how could I keep the white girl[?]"[238] Similarly, in *Foltz v. Urban League of Portland, Inc.*,[239] a federal court in the district of Oregon determined that an employer's statement that it "wanted an African[-]American in the position of Director of Youth and Family Services,"[240] a comment made before the Caucasian holding the position was terminated, constituted direct evidence of reverse

237. *See generally* Weberg v. Franks, 229 F.3d 514, 523–26 (6th Cir. 2000) (holding a Caucasian corrections officer presented direct evidence when the warden admitted that he terminated her "[s]imply because she was white and she was in a [B]lack housing unit"). Given the United States' history, it is unsurprising case law is far more replete with examples of direct evidence provided by African-Americans. *See* Equal Emp. Opportunity Comm'n v. Alton Packaging Corp., 901 F.2d 920, 922–25 (11th Cir. 1990) (observing there was direct evidence of discrimination when one manager stated: "[I]f it was his company, he wouldn't hire any [B]lack people," while the other said, "[Y]ou people can't do a—thing right"); Kendall v. Block, 821 F.2d 1142 (5th Cir. 1987) (suggesting a supervisor's use of the n-word was direct evidence if it was credible); Miles v. M.N.C. Corp., 750 F.2d 867, 874–75 (11th Cir. 1985) (concluding a manager's decision not to hire African-Americans because "[h]alf of them weren't worth a shit" constituted direct evidence). As the United States becomes more diverse, new cases about other ethnic groups will arise. *See* Akouri v. Fla. Dep't of Transp., 408 F.3d 1338, 1341, 1348 (11th Cir. 2005) (holding a Lebanese employee presented direct evidence for a failure-to-promote claim when the promoted employee explained that the supervisor told him "they are all white and they are not going to take orders from you, especially if you have an accent, and something like that").

238. Ondricko v. MGM Grand Detroit, LLC, 689 F.3d 642, 648 650–51 (6th Cir. 2012). In a perplexing decision, the Fifth Circuit refused to decide whether a supervisor's blatant racial remarks, consisting of calling an employee a "white token" and a "white faggot," qualified as direct evidence. *See* Young v. City of Houston, 906 F.2d 177, 180 (5th Cir. 1990). Not only does *Young* directly conflict with *Ondricko*, it also undermines the Supreme Court's seminal opinion of *Price Waterhouse v. Hopkins*, a decision where the Court considered sexist-based comments upon which employment decisions were made and reliance upon those comments were never disclaimed by the employer. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232–37, 251–52 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075, *as recognized in* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1017–18 (2020). It may be time for the Court to revisit the power of "smoking gun" evidence in employment discrimination cases, including the most persuasive forms of direct evidence and how it impacts employers' burden of proof.

239. Foltz v. Urb. League of Portland, Inc., No. CV-99-10-ST, 2000 WL 230222 (D. Or. Feb. 18, 2000).

240. *Id.* at *10.

discrimination.[241] Additionally, a federal court in the eastern district of Pennsylvania recently held that a Caucasian applicant, rejected by Thomas Jefferson University's Sidney Kimmel Medical College, alleged direct evidence of discrimination under Title VI[242] when an admissions director purportedly told the applicant she would receive admission if she were African-American and suggested she obtain a genetic test to inquire about her minority status.[243]

These cases are rare.[244] Employers' increased sophistication, attributed to robust human resource departments and legal counsel, means direct evidence of discrimination is often unavailable in most run-of-the-mill cases.[245] Therefore, like minority employees, Caucasian employees must often resort to relying upon circumstantial evidence using

241. *Id.* at *4–5, *10. The *Foltz* court perplexingly decided that referring to a plaintiff as a "fat, white, gay guy" was not direct evidence of reverse discrimination because it "did not specifically relate to [the employer's] desire to terminate [the plaintiff] because he [was] Caucasian," was not a racial epithet, and did not necessarily mean that the employer "harbored discriminatory animus towards Caucasians." *Id.* at *4, *9.

242. 42 U.S.C. § 2000(d) (2018). Because Title VI utilizes the same methods of proof as Title VII, direct evidence cases under Title VI are instructive for Title VII. *See* Rashdan v. Geissberger, 764 F.3d 1179, 1182 (9th Cir. 2014); Bryant v. Indep. Sch. Dist. No. I-38, 334 F.3d 928, 930 n.1 (10th Cir. 2003); Fuller v. Rayburn, 161 F.3d 516, 518 (8th Cir. 1998).

243. Katchur v. Thomas Jefferson Univ., 354 F. Supp. 3d 655, 659, 665–66 (E.D. Pa. 2019).

244. *See* Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 662 (9th Cir. 2002) (observing "direct evidence of employment discrimination is rare" (citation omitted)). There are also reverse discrimination cases premised upon gender using direct evidence. *See* Carey v. Mt. Desert Island Hosp., 156 F.3d 31, 37–38 (1st Cir. 1998) (holding a male presented evidence of discriminatory animus when a female member of a management committee stated that "we live in a patriarchal society, and men shirk their duties toward child raising[,]" and a female personnel director commented that "we have different standards for men and women"). Lastly, there is a body of law discussing when direct evidence is lacking for Caucasian claimants. *See* Rahn v. Bd. of Trs. of N. Ill. Univ., 803 F.3d 285, 288–90 (7th Cir. 2015) (holding a Caucasian claimant did not present direct evidence when a college dean stated that "he would not hire a white man into the department if qualified minority candidates were available," but the dean "did not make the decision to eliminate [the claimant] from consideration"); Martinez v. Cracker Barrel Old Country Store, Inc., 703 F.3d 911, 915–16 (6th Cir. 2013) (holding two statements did not constitute direct evidence of reverse discrimination when they required the fact finder to infer their meanings); Reilly v. TXU Corp., 271 F. App'x 375, 379–80 (5th Cir. 2008) (holding an interview panelist's statement that another panelist "ha[s] a diversity issue" was not direct evidence of discrimination); Grizzell v. City of Columbus Div. of Police, 461 F.3d 711, 715–17, 719 (6th Cir. 2006) (holding a discussion between a police chief and deputy chief concerning the presence of three African-Americans on an older, promotion-eligibility list did not constitute direct evidence when the deputy chief suggested using the list as a means to "diversify the rank of sergeant[,]" and the statement required an inference that the police chief agreed with and acted on the deputy's reasoning); Markowicz v. Nielsen, 316 F. Supp. 3d 178, 185, 189–90 (D.D.C. 2018) (holding a statement from an assistant director of the United States Secret Service was not direct evidence of reverse discrimination when he said: "[I]f there is a Black or a Hispanic on that qualified list, then we . . . have to promote them ahead of you[]" and was not the final decision-maker).

245. *See* Sullivan, *supra* note 15, at 1058 n.114.

McDonnell Douglas and sometimes show background circumstances as part of a prima facie case.[246]

Historically, the background circumstances test originated from the United States Court of Appeals for the District of Columbia Circuit in 1981.[247] In *Parker v. Baltimore & Ohio Railroad*, Mr. Parker, a Caucasian male, was employed with Baltimore and Ohio Railroad (B&O) as a conductor and trainman.[248] Mr. Parker began his employment in 1974, and he sought a promotion or transfer to locomotive fireman from 1975 to 1978.[249] Because Mr. Parker never obtained the position of locomotive fireman, he brought suit against B&O, alleging it engaged in unlawful discrimination on three different occasions in 1976, 1977, and 1978.[250]

Mr. Parker primarily argued that B&O used unlawful affirmative action and provided illegal hiring preferences to minority applicants.[251] B&O conceded it employed affirmative action, which included the consideration of race and sex, to remedy minorities' "underutilization" within its workforce in 1976.[252] B&O also had seniority modification agreements with unions, and the agreements permitted eligible minority applicants to obtain preferential transfers without the loss of their seniority status.[253] B&O never provided any additional details about its affirmative action policies, and a copy of the seniority modification agreement was never obtained.[254] In 1976, two African-American workers were eligible for a preference.[255] Two hired women were not eligible for a preference because they joined B&O after an eligibility date, but the date was "waived" for their benefit upon their hiring in 1976.[256] The trial court granted summary judgment in favor of B&O within a terse order.[257]

On appeal, the D.C. Circuit only considered Mr. Parker's claims for 1976 and 1978 because all of the locomotive fireman positions were filled by Caucasian males in 1977, and thus, B&O could not have discriminated against Mr. Parker on the basis of race.[258] For the 1976 positions, the court distinguished the Supreme Court's opinion in *United Steelworkers v.*

246. *See* Mastro v. Potomac Elec. Power Co., 447 F.3d 843, 851 (D.C. Cir. 2006); Lawrence v. Univ of Tex. Med. Branch at Galveston, 163 F.3d 309, 312 (5th Cir. 1999); Taken v. Okla. Corp. Comm'n, 125 F.3d 1366, 1368–69 (10th Cir. 1997).

247. *See* Parker v. Balt. & Ohio R.R., 652 F.2d 1012, 1017–18 (D.C. Cir. 1981).

248. *Id.* at 1013.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 1015.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 1013–14.

258. *See id.* at 1015.

Weber,[259] which concerned affirmative action plans under Title VII, and held that summary judgment was premature concerning the 1976 positions.[260] The court was concerned B&O relied upon its own "self-serving statements" about its affirmative action program, provided no information about its affirmative action policies, and defended the seniority modification agreements that were never entered into the record and only applicable to two employees.[261]

As to the 1978 positions, the court first observed that B&O did not invoke its affirmative action program, and Mr. Parker did not attack it.[262] Accordingly, Mr. Parker was forced to rely on circumstantial evidence using *McDonnell Douglas* for the 1978 positions.[263] After recounting a prima facie case's elements for African-American employees, the court determined that an "adjustment" needed to be made to Mr. Parker's prima facie case because he could not fulfill the racial minority prong as a Caucasian male.[264] It reasoned:

> Membership in a socially disfavored group was the assumption on which the entire McDonnell Douglas analysis was predicated, for only in that context can it be stated as a general rule that the 'light of common experience' would lead a factfinder to infer discriminatory motive from the unexplained hiring of an outsider rather than a group member.[265]

---

259. United Steelworkers v. Weber, 443 U.S. 193 (1979). In *Weber*, the Supreme Court held Title VII does not prohibit private employers from engaging in voluntary affirmative action, and it also set forth criteria for determining when affirmative action plans run afoul of Title VII. *Id.* at 207–09. To have a permissible affirmative action plan under Title VII, the Court held that it: (1) must seek to "eliminate conspicuous racial imbalance in traditionally segregated job categories"; and (2) cannot "unnecessarily trammel the interests of the white employees," such as requiring the discharge of Caucasians. *Id.* at 208–09. The Court eventually reaffirmed *Weber* and extended its reasoning to affirmative action plans for women. *See* Johnson v. Transp. Agency, 480 U.S. 616, 627, 641–42 (1987). Neither *Johnson* nor *Weber* have been formally abrogated or overturned by the Court, but some commentators have questioned its continued vitality after *Ricci v. DeStefano*, 557 U.S. 557 (2009). *See* Sachin S. Pandya, *Detecting the Stealth Erosion of Precedent: Affirmative Action After* Ricci, 31 BERKELEY J. EMP. & LAB. L. 285, 330 (2010) (arguing the *Ricci* Court "likely wrote the majority opinion in such a way as to erode *Weber* and *Johnson* by stealth to make it easier to later expressly limit the circumstances under which Title VII permits voluntary affirmative action plans"); Roberto L. Corrada, Ricci*'s Dicta: Signaling a New Standard for Affirmative Action Under Title VII?*, 46 WAKE FOREST L. REV. 241, 242 (2011) (arguing *Ricci* "left the door ajar for affirmative action plans under both constitutional and statutory standards"); George Rutherglen, Ricci v. DeStefano*: Affirmative Action and the Lessons of Adversity*, 2009 SUP. CT. REV. 83, 113 n.62 (observing *Weber* "was conspicuously not cited in any of the opinions in *Ricci*").

260. *Parker*, 652 F.2d at 1015–16.

261. *Id.* at 1016.

262. *Id.*

263. *Id.*

264. *Id.* at 1017.

265. *Id.*

Enunciating a new formulation to substitute for the racial minority prong, the court held "majority plaintiffs" could only avail themselves of *McDonnell Douglas*'s burden-shifting framework if "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority."[266]

Noticeably, the Court did not cite to Title VII's legislative history or any precedent from the Supreme Court in support of the background circumstances test, and Justice Marshall's footnote from *Santa Fe*[267] is conspicuously absent from the decision.[268] The Court even ignored explicit guidance from *McDonnell Douglas* emphasizing that the prima facie case was malleable and subject to tailoring.[269] Instead, the court only relied upon one of its prior cases[270]—which never mentioned a background circumstances test and reiterated that Caucasians are protected by Title VII[271]—to conclude that background circumstances exist when there is "evidence of a racially discriminatory environment" against Caucasians.[272] The *Parker* court declined to provide other scenarios satisfying the background circumstances test and did not decide whether Mr. Parker's case met the standard.[273] It thus left many questions about the doctrine's breadth unanswered. The court would not provide additional guidance until twelve years later.[274]

In *Harding v. Gray*, the D.C. Circuit returned to the background circumstances test and refined its contours for reverse-discrimination plaintiffs.[275] Mr. Harding, a Caucasian male, worked as a carpenter at St. Elizabeth's Hospital (St. Elizabeth's) in the District of Columbia.[276] As a carpenter, Mr. Harding worked within the carpentry shop of the construction section.[277] There were nine shops within the construction

---

266. *Id.* As it concerned affirmative action, the D.C. Circuit declined to suggest lawful affirmative action creates an inference of discrimination for Caucasian plaintiffs. *Id.* at 1017 n.9. This is an important insight because it essentially endorses a view that lawful affirmative action does not involve an invidious intent to discriminate, while unlawful affirmative action can support such an inference. *See id.*

267. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 n.6 (1976) (explaining that the racial minority prong "demonstrate[s] how *the racial character of the discrimination* could be established in the *most common sort of case, and not as an indication of any substantive limitation of Title VII's prohibition of racial discrimination*" (emphasis added)).

268. *See Parker*, 652 F.2d at 1017–18.

269. *See id.*

270. *Id.* (citing Daye v. Harris, 655 F.2d 258 (D.C. Cir. 1981)).

271. *Daye*, 655 F.2d at 262–63, 262 n.11.

272. *Parker*, 652 F.2d at 1017–18.

273. *Id.* at 1018.

274. *See* Harding v. Gray, 9 F.3d 150 (D.C. Cir. 1993).

275. *Id.* at 153–54.

276. *Id.* at 151.

277. *Id.*

section and each had a separate foreman.[278] In 1986, Mr. Harding was promoted to carpenter leader, a nonsupervisory position below foreman, but was required to lead three or more carpenters.[279] Eventually, the District of Columbia, as opposed to the United States, began operating St. Elizabeth's and a reorganization took place.[280] The carpentry shop merged with the upholstery shop, creating a vacancy for carpentry/upholstery shop foreman in 1988.[281] Four candidates applied for the position: Mr. Harding; Ms. Haywood-Brown, an African-American female, who was the upholstery shop foreman; and two African-American males, both of whom were carpenters.[282] Ms. Haywood-Brown was the only candidate who held a supervisory position.[283]

After receiving the highest score from a review panel, Ms. Haywood-Brown was selected as the carpentry/upholstery foreman.[284] Mr. Harding eventually retired after he was diagnosed with osteoarthritis.[285] Mr. Harding then brought suit against St. Elizabeth's, alleging he was unlawfully denied the position of carpentry/upholstery foreman because of his race.[286] The district court granted summary judgment in favor of St. Elizabeth's, holding Mr. Harding did not allege any background circumstances by arguing his qualifications were *equal* to Ms. Haywood-Brown's.[287] Mr. Harding appealed to the D.C. Circuit, asserting the district court misconstrued his claim because he alleged his qualifications were *superior* to Ms. Haywood-Brown's.[288]

The D.C. Circuit began its analysis by emphasizing, in contrast to an "ordinary discrimination case," an inference of discrimination cannot arise when Caucasians are passed over in favor of qualified minorities.[289] As the court correctly observed from a historical standpoint: "Invidious racial discrimination against whites is relatively uncommon in our society, and so there is nothing *inherently suspicious* in an employer's decision to promote a *qualified minority applicant* instead of a qualified white applicant."[290] It then justified imposing the background circumstances

278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.* at 151–52.
286. *Id.* at 152.
287. *Id.*
288. *Id.*
289. *Id.* at 153.
290. *Id.* (emphasis added).

requirement upon Caucasian plaintiffs.[291] According to the court, the requirement substitutes for the prima facie case's racial minority and does not disadvantage Caucasians.[292]

Harding further clarifies the elusive meaning of background circumstances. The court separated background circumstances evidence into two categories: (1) "evidence indicating that the particular employer at issue has some reason or inclination to discriminate invidiously against whites";[293] and (2) "evidence indicating that there is something 'fishy' about the facts of the case at hand that raises an inference of discrimination."[294] To determine whether "fishiness" exists, the court held that a Caucasian's allegation or showing of superior qualifications over a minority competitor is sufficient.[295] As the court explained, if an employer acts contrary to its own interest by promoting an unqualified minority, "it is more likely than not that the employer acted out of a discriminatory motive."[296] Thus, Mr. Harding's allegation of superior qualifications satisfied the background circumstances test unless he eventually failed to show a genuine issue of fact.[297]

In sum, *Parker* and *Harding* recognize the historical reality of a lack of *invidious discrimination* against Caucasians and grapple with Caucasians' prima facie case in that context.[298] Both decisions honor Congress's primary motivation for passing Title VII, widespread workplace discrimination against African-Americans.[299] But at the same time, neither decision grapples with *Santa Fe*'s language mandating the "same standards"[300] apply to Caucasians in Title VII cases; nor do they rely upon Justice Marshall's footnote,[301] which arguably provides support for the test.[302] Nevertheless, *Parker* and *Harding* require Caucasians to plead *and* prove background circumstances to withstand a motion to dismiss or motion for summary judgment.[303] The failure to address the

291. *Id.*
292. *Id.*
293. *Id.* (citations omitted).
294. *Id.* (citations omitted).
295. *Id.* at 153–54.
296. *Id.*
297. *Id.* at 154.
298. *See id.* at 153; Parker v. Balt. & Ohio R.R., 652 F.2d 1012, 1017 (D.C. Cir. 1981).
299. *See supra* pp. 18–20.
300. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976).
301. *Id.* at 279 n.6 (explaining that the racial minority prong "demonstrate[s] how *the racial character of the discrimination* could be established in the *most common sort of case, and not as an indication of any substantive limitation on Title VII's prohibition of racial discrimination*" (emphasis added)).
302. *See Harding*, 9 F.3d at 153; *Parker*, 652 F.2d at 1017–18.
303. *Harding*, 9 F.3d at 153; *Parker*, 652 F.2d at 1017–18.

requirement can prove fatal.[304] As opposed to being "an additional hurdle" for Caucasians, the background circumstances test substitutes for the prima facie case's racial minority prong.[305] One can satisfy the test by showing either: (1) the employer possesses an "inclination to discriminate invidiously against whites";[306] or (2) there are facts "fishy" enough to raise an inference of discrimination.[307] Either category of evidence shows background circumstances.[308]

B. Other Applications of the Background Circumstances Test

The most obvious question about the D.C. Circuit's test is: What other factual scenarios or pieces of evidence fulfill the background circumstances test? *Harding* makes clear that Caucasians satisfy the test if they: (1) can show an employer has "some reason or inclination" to discriminate against Caucasians; or (2) allege or possess superior qualifications over a racial minority because preferential treatment favoring a less qualified minority is supposedly "fishy".[309] Building upon the D.C. Circuit's initial formulation, the Sixth,[310] Seventh,[311] Eighth,[312] and Tenth Circuits[313] have adopted the background circumstances test and detailed other factual scenarios satisfying the standard. A brief survey is in order.

Without citing any legislative history, the Sixth Circuit adopted the background circumstances approach with the belief Caucasians should

---

304. *See, e.g.*, Phelan v. City of Chicago, 347 F.3d 679, 685 (7th Cir. 2003) (holding a Caucasian failed to allege background circumstances and could not survive a motion to dismiss when (1) his superiors were Caucasian men and he was replaced with a Caucasian man; and (2) he could not show anything "fishy" about his termination).

305. *Harding*, 9 F.3d at 153–54; *Parker*, 652 F.2d at 1017–18.

306. *Harding*, 9 F.3d at 153.

307. *Id.*

308. *See* Mastro v. Potomac Elec. Power Co., 447 F.3d 843, 852 (D.C. Cir. 2006).

309. *Harding*, 9 F.3d at 153–54. The D.C. Circuit eventually held that a consent decree requiring affirmative action, coupled with a reluctance to discipline minority employees, may also constitute background circumstances. *See Mastro*, 447 F.3d at 852–53.

310. Martinez v. Cracker Barrel Old Country Store, Inc., 703 F.3d 911, 915 (6th Cir. 2013); Sutherland v. Mich. Dep't of Treasury, 344 F.3d 603, 614 (6th Cir. 2003); Zambetti v. Cuyahoga Cmty. Coll., 314 F.3d 249, 255 (6th Cir. 2002); Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985).

311. Farr v. St. Francis Hosp. & Health Ctrs., 570 F.3d 829, 833 (7th Cir. 2009); Henry v. Jones, 507 F.3d 558, 564 (7th Cir. 2007); Phelan v. City of Chicago, 347 F.3d 679, 685 (7th Cir. 2003); Mills v. Health Care Serv. Corp., 171 F.3d 450, 455–57 (7th Cir. 1999).

312. Schaffhauser v. United Parcel Serv., Inc., 794 F.3d 899, 903 (8th Cir. 2015); Hammer v. Ashcroft, 383 F.3d 722, 724 (8th Cir. 2004).

313. Taken v. Okla. Corp. Comm'n, 125 F.3d 1366, 1368–69 (10th Cir. 1997); Notari v. Denver Water Dep't, 971 F.2d 585, 588–89 (10th Cir. 1992); Livingston v. Roadway Express, Inc., 802 F.2d 1250, 1252 (10th Cir. 1986).

prove their claims "within the historical context" of Title VII.[314] To achieve that end, the Sixth Circuit permits a finding of background circumstances, showing an "unusual employer who discriminates against the majority,"[315] in the following situations: (1) the final decision-maker is an African-American;[316] (2) an employer unlawfully considered race in past decisions to the detriment of Caucasians, including through questionable affirmative action practices;[317] (3) a statistical comparison showing a disparity between specific positions within an employer's workforce and the qualified labor pool;[318] and (4) "evidence of ongoing racial tension in the workplace."[319] Background circumstances do not exist when Caucasians hold a majority of the jobs at issue;[320] or, if public sector positions are impacted, when public decision-makers are African-Americans.[321]

The Seventh Circuit embraced the background circumstances test to prevent Caucasian claimants from having a lesser prima facie burden than minorities and so employers could retain the prima facie case's "screening out benefits."[322] Under Seventh Circuit's view, background circumstances exist when an African-American boss fires Caucasian workers and replaces them all with African-Americans.[323] They are also shown when race is considered for employment decisions involving discipline, hiring, promotions, and work assignments.[324] Implicating affirmative action, the Seventh Circuit has explained that reverse discrimination is "not surprising": (1) if hiring authorities are "under pressure" to increase the proportion of minority groups under an affirmative action plan, judicial decree, or by internal superiors; or (2) when certain jobs are considered "traditional" for certain groups.[325] On the other hand, a prima facie case is

314. *See Murray*, 770 F.2d at 67.

315. *Id.*

316. Arendale v. City of Memphis, 519 F.3d 587, 603 (6th Cir. 2008) ("[I]n the context of reverse discrimination claims, that the mere fact that an adverse employment decision was made by a member of a racial minority is sufficient to establish [background circumstances].").

317. Romans v. Mich. Dep't of Hum. Servs., 668 F.3d 826, 831, 837 (6th Cir. 2012); Leadbetter v. Gilley, 385 F.3d 683, 692 (6th Cir. 2004); Zambetti v. Cuyahoga Cmty. Coll., 314 F.3d 249, 256 (6th Cir. 2002).

318. Sutherland v. Mich. Dep't of Treasury, 344 F.3d 603, 615–16 (6th Cir. 2003).

319. Treadwell v. Am. Airlines, Inc., 447 F. App'x 676, 678 (6th Cir. 2011) (citing Boger v. Wayne County, 950 F.2d 316, 324–25 (6th Cir. 1991)).

320. *Murray*, 770 F.2d at 67–68.

321. Toth v. City of Toledo, 480 F. App'x 827, 833–34 (6th Cir. 2012).

322. Mills v. Health Care Serv. Corp., 171 F.3d 450, 457 (7th Cir. 1999) (citation omitted).

323. Hague v. Thompson Distrib. Co., 436 F.3d 816, 822 (7th Cir. 2006).

324. Ballance v. City of Springfield, 424 F.3d 614, 618 (7th Cir. 2005).

325. Ineichen v. Ameritech, 410 F.3d 956, 960 (7th Cir. 2005) (citing Preston v. Wis. Health Fund, 397 F.3d 539, 542 (7th Cir. 2005)).

not established if (1) Caucasians are replaced by Caucasians;[326] (2) there are no allegations of superior qualifications;[327] or (3) one relies upon subjective beliefs about an employer's racial hiring without statistical evidence.[328]

The Eighth Circuit first enunciated the background circumstances test in the context of reverse gender discrimination.[329] Diverging from its sister circuits, the Eighth Circuit found background circumstances present when a female was "*substantially* less qualified," there was an interest to hire a female, and two members of an interview panel "usually" hired females.[330] For race, it held that hiring an African-American and an internal memorandum expressing an interest in minorities is sufficient.[331] To defeat a Caucasian's prima facie case, an employer can show (1) Caucasians were almost equally favored for certain positions; or (2) the hired minority possessed equal, if not superior, qualifications for the job.[332]

Reasoning a racial minority status is a predicate for *McDonnell Douglas*, the Tenth Circuit determined Title VII's presumptions are "not necessarily justified when the plaintiff is a member of an historically favored group."[333] As such, it finds background circumstances when Caucasians are minorities within their workplace and have racial minorities as supervisors.[334] By contrast, background circumstances are not present when Caucasians cannot show the final decision-makers were *exclusively* minorities.[335] Although it adopts the background circumstances test, the Tenth Circuit does not foreclose Caucasians' claims if they cannot meet the standard because it recognizes some employers may not have a history of discriminating against privileged groups.[336] Therefore, the Tenth Circuit allows Caucasians to also show a prima facie case if they "allege and produce evidence to support specific facts that are sufficient to support *a reasonable inference* that, but for

326. Good v. Univ. of Chi. Med. Ctr., 673 F.3d 670, 679 (7th Cir. 2012), *overruled on other grounds by* Ortiz v. Werner Enters., Inc., 834 F.3d 760 (7th Cir. 2016); Phelan v. City of Chicago, 347 F.3d 679, 685 (7th Cir. 2003).

327. *See* Gore v. Ind. Univ., 416 F.3d 590, 592–93 (7th Cir. 2005).

328. Marinich v. Peoples Gas Light & Coke Co., 45 F. App'x 539, 544–45 (7th Cir. 2002).

329. Duffy v. Wolle, 123 F.3d 1026, 1036–37 (8th Cir. 1997), *abrogated on other grounds by* Torgerson v. City of Rochester, 643 F.3d 1031, 1059 (8th Cir. 2011).

330. *Id.* at 1037 (emphasis added).

331. Hammer v. Ashcroft, 383 F.3d 722, 723–24 (8th Cir. 2004).

332. Woods v. Perry, 375 F.3d 671, 675–76 (8th Cir. 2004), *abrogated on other grounds by Torgerson*, 643 F.3d at 1059. *See also Hammer*, 383 F.3d at 723–24.

333. Livingston v. Roadway Express, Inc., 802 F.2d 1250, 1252 (10th Cir. 1986).

334. Reynolds v. Sch. Dist. No. 1, 69 F.3d 1523, 1534–35 (10th Cir. 1995).

335. Taken v. Okla. Corp. Comm'n, 125 F.3d 1366, 1368–69 (10th Cir. 1997).

336. Notari v. Denver Water Dep't, 971 F.2d 585, 590 (10th Cir. 1992).

plaintiff's status, the challenged decision would not have occurred."[337] A plaintiff does not satisfy the reasonable inference test by alleging unfair treatment[338] or if valid comparators are lacking.[339]

As a final observation, no federal court has held that a formal, *lawful* affirmative action plan is a background circumstance raising an inference of discrimination.[340] Excluding lawful affirmative action plans as background circumstances conforms with employers' ability to use voluntary affirmative action under Title VII.[341] Moreover, given that lawful affirmative action is not discrimination under Title VII,[342] permitting an employer's lawful policy to support an inference of unlawful conduct would be beyond reason. If lawful affirmative action plans supported inferences of unlawful discrimination, employers would be deterred from using them because they would expose themselves to liability from Caucasians for enacting such policies. Thus, federal courts adopting the background circumstances test have correctly decided that affirmative action is only a background circumstance when employers *questionably* use it for employment decisions.[343]

Naturally, this invokes the question of whether informal affirmative action can constitute a background circumstance for reverse discrimination. Unless the informal affirmative action plan is illegal, such as throwing out test scores in *Ricci*,[344] it is difficult to imagine how an informal, legal policy, which promotes an employer's autonomy,[345] is a

337. *Id.* (emphasis added).

338. Lyons v. Red Roof Inns, Inc., 130 F. App'x 957, 963 (10th Cir. 2005).

339. Mitchell v. City of Wichita, 140 F. App'x 767, 781 (10th Cir. 2005).

340. Christensen v. Equitable Life Assurance Soc'y of the U.S., 767 F.2d 340, 343 (7th Cir. 1985) (rejecting a Caucasian's attempt to use an affirmative action program as a background circumstance and observing that "[n]ational policy permits the use of voluntary affirmative action programs to remedy the legacy of discrimination[, and] [f]or the courts to discourage the use of such programs by treating them as evidence in themselves of the very discrimination they are designed to eradicate would be improper"); Parker v. Balt. & Ohio R.R., 652 F.2d 1012, 1017 n.9 (D.C. Cir. 1981) (declining to equate lawful affirmative action with discrimination against racial majorities and declining to suggest a lawful affirmative action plan is a background circumstance).

341. *See* Johnson v. Transp. Agency, 480 U.S. 616, 626–33, 640–41 (1987); Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 252–53 (1981); United Steelworkers v. Weber, 443 U.S. 193, 208 (1979); Shea v. Kerry, 796 F.3d 42, 56 (D.C. Cir. 2015).

342. *See Weber*, 443 U.S. at 208–09; Rebecca K. Lee, *The Future of Workplace Affirmative Action After* Fisher, 89 ST. JOHN'S L. REV. 597, 613 (2015); N. Jeremi Duru, *Fielding a Team for the Fans: The Societal Consequences and Title VII Implications of Race-Considered Roster Construction in Professional Sport*, 84 WASH. U. L. REV. 375, 425 n.322 (2006).

343. *See* Romans v. Mich. Dep't of Hum. Servs., 668 F.3d 826, 831, 837 (6th Cir. 2012); Ineichen v. Ameritech, 410 F.3d 956, 960 (7th Cir. 2005); Leadbetter v. Gilley, 385 F.3d 683, 692 (6th Cir. 2004).

344. *Compare* Ricci v. DeStefano, 557 U.S. 557, 574–75 (2009), *with* 42 U.S.C. § 2000e-2(l) (2018) (prohibiting the alteration of test scores on the basis of race, color, religion, sex, or national origin).

345. *See* Univ. of Pa. v. Equal Emp. Opportunity Comm'n, 493 U.S. 182, 198–99 (1990);

sufficient background circumstance. Title VII prohibits workplace discrimination.[346] It does not require employers to showcase their affirmative action policies or reasons for internal policy decisions.[347] Again, assuming the informal policy is lawful, it still defies logic for a lawful action to justify unlawful treatment. Accordingly, because federal courts have refused to qualify formal, lawful affirmative action plans as sufficient background circumstances, one can assume that federal courts would likewise extend the same reasons to *informal*, lawful affirmative action plans.

C. The Rejection of the Background Circumstances Test and a Protected-Class Requirement

Unlike the courts discussed in Section IV.B, some courts scrutinize the background circumstances test and decline to impose the background circumstances test upon Caucasians.[348] The First,[349] Fifth,[350] and Eleventh Circuits[351] reject altering Caucasian claimants' prima facie case and only ask them to prove they are a member of a "protected class" under Title VII. For instance, in *Young v. City of Houston*, a Caucasian brought suit for race discrimination against his employer when his supervisor allegedly told him that she did not "want any 'white tokens' in her department who weren't pulling their weight,"[352] and he was forced out of the department.[353] Construing the Caucasian's prima facie case without acknowledging *Parker* or *Harding*, the Fifth Circuit declared that Title VII claimants need only show they belong to "protected class."[354] The First Circuit has also stated that Title VII claimants need only show they are

---

Weber, 443 U.S. at 204–08. *See also* Sullivan, *supra* note 15, at 1115–16.

346. 42 U.S.C. § 2000e–2(a).

347. *See* 42 U.S.C. § 2000e–2(j).

348. The Fourth and Ninth Circuits have declined to either adopt or reject the background circumstances test. *See* Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 659–60 (9th Cir. 2002); Teehee v. Bd. of Educ., No. 96-15072, 1997 WL 312222, at *2 n.2 (9th Cir. June 10, 1997); Lucas v. Dole, 835 F.2d 532, 534 (4th Cir. 1987). The Second Circuit did not endorse the background circumstances test when an employer did not advocate its application, but it nevertheless concluded a Caucasian employee presented "sufficient evidence" to meet the background circumstances test if it applied. *See* Aulicino v. N.Y.C. Dep't of Homeless Servs., 580 F.3d 73, 80 n.5 (2d Cir. 2009).

349. Williams v. Raytheon Co., 220 F.3d 16, 18–19 (1st Cir. 2000); Akerson v. Pritzker, 980 F. Supp. 2d 18, 25 & n.2 (D. Mass. 2013); Duchesne v. Banco Popular De P.R., Inc., 742 F. Supp. 2d 201, 209 n.3, 212 (D.P.R. 2010).

350. Young v. City of Houston, 906 F.2d 177, 180 (5th Cir. 1990).

351. Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1325 & n.15 (11th Cir. 2011); Denney v. City of Albany, 247 F.3d 1172, 1183 (11th Cir. 2001).

352. *Young*, 906 F.2d at 179.

353. *Id.*

354. *See id.* at 180; Ulrich v. Exxon Co., U.S.A., 824 F. Supp. 677, 683–84 (S.D. Tex. 1993) (observing the Fifth Circuit does not impose background circumstances or allude to an "alternative, heightened test" for Caucasians).

"within a protected class."[355] Both the First and Fifth Circuits declined to provide any rationale for their implicit rejections of *Parker* and *Harding*.[356]

Similar to the First and Fifth Circuits, the Eleventh Circuit does not impose the background circumstances test.[357] But the Eleventh Circuit provides reasoning for rejecting the test. First, it adopts the premise that "[d]iscrimination is discrimination no matter what the race,"[358] embracing color blindness and rejecting all racial distinctions. Secondly, the Eleventh Circuit relies upon *Santa Fe* as excluding the concept of reverse discrimination, and, consequently, a different burden of proof for Caucasian claimants.[359] At least one other lower court has similarly relied upon *Santa Fe* to reject the background circumstances test.[360]

The protected-class requirement is a clear repudiation of *Parker* and *Harding* because it only requires Caucasians to establish their protected-class status on the basis of race and nothing more.[361] Caucasian plaintiffs must simply allege or prove they are Caucasian in order to satisfy the prima facie case's first element.[362] As *Santa Fe* explicitly provided Caucasians with protections under the Title VII,[363] the protected-class approach is, at best, a formality.[364] Further, under this standard, the background circumstances test is not imposed because no discernable difference between reverse and traditional discrimination exists.[365] Essentially, racial discrimination is racial discrimination.[366] This

---

355. Williams v. Raytheon Co., 220 F.3d 16, 19 (1st Cir. 2000) (holding that a Caucasian male established a prima facie case of gender discrimination because he was a member of a "protected class").

356. *See id.* at 18–19; *Young*, 906 F.2d at 180.

357. Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1325 & n.15 (11th Cir. 2011); Denney v. City of Albany, 247 F.3d 1172, 1183 (11th Cir. 2001).

358. Bass v. Bd. of Cnty. Comm'rs, 256 F.3d 1095, 1103 (11th Cir. 2001), *overruled in part on other grounds by* Crawford v. Carroll, 529 F.3d 961, 971–74 (11th Cir. 2008), *as recognized in* Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1325 n.15 (11th Cir. 2011).

359. *See id.*

360. Tappe v. All. Cap. Mgmt. L.P., 177 F. Supp. 2d 176, 181–82 (S.D.N.Y. 2001).

361. *Williams*, 220 F.3d at 18–19; *Young*, 906 F.2d at 179.

362. *See Williams*, 220 F.3d at 18–19; *Young*, 906 F.2d at 179; Akerson v. Pritzker, 980 F. Supp. 2d 18, 25 & n.2 (D. Mass. 2013); Duchesne v. Banco Popular De P.R., Inc., 742 F. Supp. 2d 201, 209 n.3, 212 (D.P.R. 2010).; Ulrich v. Exxon Co., U.S.A., 824 F. Supp. 677, 683–84 (S.D. Tex. 1993).

363. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279–80 (1976).

364. *See* Bi, *supra* note 15, at 53–54 (arguing the protected-class approach is only a standing requirement). *See also* Stabler v. Tyson Foods, Inc., C/A No. 5:17-cv-00143-MTT, 2018 WL 4976807, at *3 (M.D. Ga. Oct. 15, 2018) (holding a Caucasian plaintiff satisfied the protected-class requirement by alleging he was Caucasian); Thrower v. Yelda Mgmt. Co., No. 5:14-CV-02490-CLS, 2017 WL 735213, at *14 (N.D. Ala. Feb. 24, 2017) (same).

365. Bass v. Bd. of Cnty. Comm'rs, Orange Cnty., 256 F.3d 1095, 1103 (11th Cir. 2001), *overruled in part on other grounds by* Crawford v. Carroll, 529 F.3d 961, 971–74 (11th Cir. 2008), *as recognized in* Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1325 n.15 (11th Cir. 2011).

366. *Id.*

reasoning's dependence upon color-blindness makes distinctions on the basis of race per se invalid.[367]

D. The Sufficient Evidence Approach for Reverse Discrimination Plaintiffs

There is a middle ground between embracing the background circumstances test and entirely rejecting it. This solution, known as the sufficient evidence approach, has only been embraced by the Third Circuit in *Iadimarco v. Runyon*.[368] *Iadimarco* involved a Caucasian male's Title VII suit against the United States Postal Service when he was denied a position as an in-plant manager at another facility, the final decision-maker questionably denied his authorship of a diversity memorandum with his signature, and an African-American was given the position.[369] The court first rejected its Sixth, Seventh, Eighth, and Tenth Circuits' position that the race of a decision-maker by itself, although relevant, is sufficient to create an inference of discrimination.[370] Secondly, the court refused to adopt the background circumstances test.[371] The court reasoned that the doctrine is "problematic and unnecessary" because it imposes a heightened burden upon Caucasians, undermines *McDonnell Douglas*'s purpose, and is "irremediably vague and ill-defined."[372] The court instead required the Caucasian plaintiff to "present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a protected trait under Title VII."[373] In other words, Caucasians need only present "sufficient evidence" under the totality of the circumstances for a prima facie case.[374]

On the merits, the court found the Caucasian plaintiff presented sufficient evidence under the circumstances.[375] This included evidence that the selected African-American's application was submitted after the deadline, considerations and prerequisites were abandoned for the selected African-American, and the signatory of the diversity memo attempted to

367. *See* Bi, *supra* note 15, at 53 (observing "some federal courts interpret Title VII to be race-neutral"); Whiteside, *supra* note 15, at 434 (arguing that adopting the background circumstances doctrine defies Title VII by treating Caucasian claimants different based on race).

368. Iadimarco v. Runyon, 190 F.3d 151 (3d Cir. 1999).

369. *Id.* at 154–55, 164.

370. *Id.* at 159–60.

371. *Id.* at 161.

372. *Id.* at 161–62.

373. *Id.* at 161.

374. *Id.* at 163.

375. *Id.* at 164–65.

disclaim his authorship.[376] Under those facts, the Caucasian claimant easily showed his prima facie case.[377]

Similar to the protected-class requirement, *Iadimarco* represents a major departure from the background circumstances test. By providing an expansive means to thoroughly scrutinize reverse discrimination cases, it honors the purpose of a prima facie case: establishing an inference of discrimination. Despite its superior approach to allowing a Caucasian plaintiff to bring a prima facie case, *Iadimarco* remains overshadowed by the background circumstances test as numerous jurisdictions still follow *Parker* and *Harding*.

IV. JUSTIFICATIONS, OBJECTIONS, AND SOLUTIONS TO THE BACKGROUND CIRCUMSTANCES TEST FOR REVERSE DISCRIMINATION CLAIMS

The previous discussion exposes the differing burdens imposed upon Caucasian plaintiffs for the prima facie case's first prong. Despite historical arguments supporting the background circumstances test, there is noticeable silence about the strongest objection to the doctrine: its constitutionality. However, regardless of the constitutional question's outcome, there is another workable path forward for addressing reverse discrimination claims that conforms to the Supreme Court's precedents, the spirit of Title VII, and reality itself.

A. Justifications for a Heightened Burden on Reverse Discrimination Claimants

From one lens, the background circumstances test is rooted in America's history and the backdrop of Title VII's enactment. First, Congress enacted Title VII in response to workplace discrimination against African-Americans, not discrimination against Caucasians.[378] Thus, the doctrine attempts to further Congress's initial motivations by recognizing African-Americans as the original beneficiaries of Title VII's prescriptions.[379] Secondly, Title VII's legislative history shows congressional proponents were skeptical about discrimination against Caucasians,[380] especially since Caucasians benefited from employment discrimination.[381] The background circumstances test likewise

376. *Id.* at 164.

377. *Id.* at 165.

378. 110 CONG. REC. 6545, 6547–48 (1964) (statement of Sen. Humphrey); GREGORY, *supra* note 46, at 19.

379. *See* Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985).

380. *See* 110 CONG. REC. 7212–134 (1964).

381. *See id.* at 6547 (statements by Rep. Ryan and Sen. Humphrey).

acknowledges the strangeness of inferring discrimination against Caucasians because they are a "historically favored group" in American history[382] and not a "socially disfavored group."[383] As historically favored members, it is inequitable to allow Caucasians to continually reap benefits at the expense of minority groups still facing inequality. Those reasons give the background circumstances test much historical appeal.

The test also remains attractive because it reflects the current racial composition of America. Nationwide, data from the 2010 Census indicates Caucasians were approximately 72% of the total U.S. population, while African-Americans were approximately 13%.[384] Caucasians therefore exceed African-Americans by approximately 59%.[385] Most recently, data from the 2020 Census reveals Caucasians were approximately 62% of the total U.S. population, and African-Americans were approximately 12%.[386] Caucasians now only exceed African-Americans by approximately 50%, a 9% drop from 2010.[387] Despite their numbers decreasing as a percentage of the overall population,[388] it is unsurprising that Caucasians remain the racial majority within the national labor force.[389] Given population and labor force statistics, it is unsurprising that Caucasians retain power in the upper echelons of American society.[390] From a social policy perspective, it is questionable for a racial majority to engage in invidious discrimination against itself and undermine its own societal power and standing.[391] The background circumstances test imposes a heightened burden of proof because it presupposes Caucasians are unlikely to subvert their own

382. Livingston v. Roadway Express, Inc., 802 F.2d 1250, 1252 (10th Cir. 1986).

383. Parker v. Balt. & Ohio R.R., 652 F.2d 1012, 1017 (D.C. Cir. 1981).

384. *See* HUMES, JONES & RAMIREZ, *supra* note 10, at 4.

385. *See* HUMES, JONES & RAMIREZ, *supra* note 10, at 4.

386. Nicholas Jones, Rachel Marks, Roberto Ramirez & Merarys Rios-Vargas, *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. Census Bureau (Aug. 12, 2021), https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html [https://perma.cc/RF9P-CZ8N].

387. *See id.*

388. *See id. See also* Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. RACE & L. 127, 132 & n.18 (2000).

389. *See* U.S. BUREAU OF LAB. STATS., U.S. DEP'T OF LAB., REPORT 1088, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2019, 1 (2020), https://www.bls.gov/opub/reports/race-and-ethnicity/2019/pdf/home.pdf [https://perma.cc/TK87-NZ39].

390. *See* Dagmar Rita Myslinska, *Contemporary First-Generation European Americans: The Unbearable "Whiteness" of Being*, 88 TUL. L. REV. 559, 571 n.40 (2014) (observing Caucasian men continue to hold "[w]ealth and power" within American society (citations omitted)).

391. John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974) ("A White majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and deserts of Whites relative to those of others, or to overestimate the costs of devising an alternative classification that would extend to certain Whites the advantages generally extended to Blacks."). Dean Ely argues for a "special scrutiny" of reverse discrimination cases because nothing is "'suspect' in a constitutional sense for a majority, any majority, to discriminate against itself." *Id.* at 727.

interests. It imposes a heightened burden as the only means to screen for discrimination cases that are considered improbable. The background circumstances test thus attempts to reflect our current racial structure and the doubtful phenomena of reverse discrimination.

B. Constitutional Issues, Defenses, and Resolutions

The most forceful objection to the background circumstances test is its unconstitutional imposition of different evidentiary burdens solely due to race. Despite the historical and social appeal of the background circumstances test, governmental distinctions on the basis of race are subject to the equality guarantees of the Fourteenth Amendment's Equal Protection Clause [392] and the Fifth Amendment's Due Process Clause.[393] Judge-made doctrines are likewise subject those constitutional constraints.[394]

Harding made an implicit attempt to alleviate constitutional concerns of the background circumstances test by stating it is not an elevated burden upon Caucasians.[395] Dean Angela Onwuachi-Willig argues the test "level[s] the playing field" between African-Americans and Caucasians because Caucasians remain favored in employment decisions as evidenced by statistics.[396] She goes further to claim the test is "no[] different at all" from the racial minority prong.[397] However, her arguments ignore the practical difference the test imposes as an evidentiary burden, and she never addresses any of the constitutional ramifications of her view.[398] A minority plaintiff does not need discovery to opine about a racial status and likely possesses proof of it.[399] By contrast, a Caucasian plaintiff must engage in lengthy discovery with an employer defendant to uncover its "inclination" to discriminate against Caucasians or to find some other

---

392. *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 307–08 (2013); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007); Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003).

393. United States v. Windsor, 570 U.S. 744, 774 (2013) ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." (citations omitted)); Schweiker v. Wilson, 450 U.S. 221, 226 n.6 (1981) ("This Court repeatedly has held that the Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment." (citations omitted)).

394. *See* Palmore v. Sidoti, 466 U.S. 429, 431–32 (1984); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 267–68 (1964); Sullivan, *supra* note 15, at 1103 (arguing judge-made law is subject to constitutional review).

395. Harding v. Gray, 9 F.3d 150, 153–54 (D.C. Cir. 1993).

396. Onwuachi-Willig, *supra* note 10, at 74, 79–80.

397. Onwuachi-Willig, *supra* note 10, at 80.

398. *See* Baroni, *supra* note 15, at 814–17; Onwuachi-Willig, *supra* note 10, at 71–80.

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

"fishy" evidence.[400] At the front end and even after discovery, providing proof about a plaintiff's *own racial identity* is dramatically different than providing proof about an adversary's "inclinations" or "fishy" facts.[401] Caucasians must thus provide an employer's discriminatory intent or show something "fishy" at the prima facie stage and engage in an early pretext inquiry, while minorities are relieved of that burden until much later.[402] The different burdens are clear.[403]

Imposing different evidentiary burdens due to race inevitably subjects the background circumstances test, or even Title VII, to a strict scrutiny analysis under the Constitution.[404] Peter Gene Baroni boldly asserts the test is permissible because it furthers Title VII's purpose: "that majority and minority plaintiffs are viewed differently."[405] At a minimum, his position subjects Title VII's disparate treatment provision to a constitutional review because it would inherently require a higher burden of proof for Caucasian, but not racial minorities. One could even take his argument and use it as fodder to attack all of Title VII by arguing it was passed to benefit only African-Americans and nobody else.[406] Rejecting his view only questions the background circumstances test itself because it is the source of the racial distinction, not Title VII. Assuming Title VII's effectiveness,[407] Baroni's position should be rejected to confine the constitutional question to only the doctrine and avoid any constitutional review of Title VII.

Contextualizing the background circumstances test alleviates constitutional concerns. Federal courts sidestep constitutional questions when possible.[408] And "[c]ontext matters"[409] for discrimination claims

---

400. *Harding*, 9 F.3d at 153.

401. *Compare McDonnell Douglas*, 411 U.S. at 804–07, *with Harding*, 9 F.3d at 153.

402. *Compare McDonnell Douglas*, 411 U.S. at 804–07, *with Harding*, 9 F.3d at 153.

403. *See* Baroni, *supra* note 15, at 813 (arguing *Harding* is "dishonest" about the background circumstances doctrine); Bi, *supra* note 15, at 58–59 (concluding the background circumstances doctrine imposes unequal evidentiary burdens); Sullivan, *supra* note 15, at 1104–05 (observing that different requirements produce different results).

404. *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 307–08 (2013); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

405. Baroni, *supra* note 15, at 812.

406. Sullivan, *supra* note 15, at 1100. *See also* Charles A. Sullivan, *The World Turned Upside Down: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1545 (2004).

407. John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1429–31 (1986) (arguing Title VII places costs on discriminatory employers and increases total social welfare); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1081–82 (1995) (arguing anti-discrimination laws "correct the market failure of discrimination" and are not presumptively inefficient because behaviors are changed).

408. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 7 (1993); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 345 (1998).

409. Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

under the Constitution.[410] Currently, the background circumstances test is exclusively imposed upon Caucasians, and there is an absence of case law applying it to other racial groups.[411] However, it could apply whenever a workplace's racial majority sues its racial majority employer. This approach first considers the race of the claimant and then the employer's decision-makers or racial composition. If the race between the claimant and the employer or decision-maker are the same, then the background circumstances test would apply. If they are not the same, the test would not apply. In other words, one must decide whether there is cross-racial discrimination or intra-racial discrimination to justify an elevated burden of proof. For instance, the test would apply whenever a Caucasian worker, a racial majority member within his workforce, sues his Caucasian employer or decision-maker. It would also apply whenever an African-American worker, a racial majority member within his workforce, sues his African-American employer or decision-maker. This would work similarly for other races. In this context, reverse discrimination is discrimination occurring between the *same races* (Caucasian v. Caucasian; African-American v. African-American, etc.). The background circumstances test could apply equally to Caucasians and African-Americans if the racial context permits. This contextual proposal reduces constitutional concerns because the doctrine's application depends upon a racial context and not racial differences between claimants.[412]

If the above proposal is rejected, the doctrine itself would be subject to a strict scrutiny analysis under the Constitution.[413] The compelling government interest component of the strict security analysis must be carefully framed to avoid fundamental weaknesses. Strict scrutiny requires governmental decisions to be narrowly tailored in furtherance of a compelling government interest.[414] Conceptually, it is difficult to determine the compelling government interest because the background circumstances test is a judge-made doctrine addressing a burden of proof.[415] It is not a race-based decision concerning social policy from either an executive or legislative branch or a public institution.[416]

---

410. *Id.*

411. *See* Livingston v. Roadway Express, Inc., 802 F.2d 1250, 1252 (10th Cir. 1986); Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985); Harding v. Gray, 9 F.3d 150, 154 (D.C. Cir. 1993).

412. Professor Sullivan presents a similar argument about reframing the background circumstances test but does not suggest it precludes a constitutional review. *See* Sullivan, *supra* note 15, at 1107–08.

413. Sullivan, *supra* note 15, at 1102–03.

414. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

415. *See Livingston*, 802 F.2d at 1252; *Murray*, 770 F.2d at 67; *Harding*, 9 F.3d at 153–54.

416. *See* Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

Admitting this is an "odd" way to evaluate a judge-made doctrine,[417] Professor Charles A. Sullivan—the only commentator tackling this issue—argues diversity and eliminating private discrimination may be compelling governmental interests for the doctrine.[418] Professor Sullivan's proposed argument overlooks the nature of the governmental actor making the racial distinction and lumps all governmental actors together.[419] His argument also rests upon the extraordinary assumption that federal courts are legally capable of creating and bestowing burdens and privileges upon private actors through racial classifications, much like legislative or executive directives.[420] If federal courts are actually incapable of doing so,[421] Professor Sullivan's compelling interests fail outright because the federal judiciary could not even have an interest in remedying private employers' internal diversity or eliminating private discrimination. Under this argument, such interests dangerously venture beyond federal courts' limited jurisdiction.[422]

Instead, federal courts arguably have a compelling interest in creating burdens of proof to manage judicial efficiency essential to its democratic duties, which justifies the initial creation of *McDonnell Douglas* and gives credence to the background circumstances test.[423] The U.S. Supreme Court has recognized a compelling governmental interest in managing the electoral process.[424] It has also recognized a compelling interest in the fair administration of justice and functioning of the court system.[425] Even though governmental efficiency has constitutional limits,[426] these compelling interests inherently involve managing an internal process going to the heart of democratic governance. It would thus follow that federal courts have a similar compelling interest in formulating

417. Sullivan, *supra* note 15, at 1103.

418. Sullivan, *supra* note 15, at 1110–13.

419. Sullivan, *supra* note 15, at 1110–13.

420. Sullivan, *supra* note 15, at 1103.

421. This argument promotes a judicial-restraint philosophy, promoting a limited role of federal courts to certain controversies. *See* J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1, 8–9 (1981). Professor Stone provides an informative discussion about the selective use of judicial activism and judicial restraint by conservatives and liberals. *See* Geoffrey R. Stone, *Citizens United and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485, 490–98.

422. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." (citations omitted)).

423. *See* United States v. Anderson, 772 F.3d 662, 669 (11th Cir. 2014); Kirby v. Attorney Gen. for N.M., No. CIV 08-0887 JB/DJS, 2010 WL 11523886, at *5 (D.N.M. Dec. 30, 2010).

424. Eu v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 231 (1989) (citation omitted).

425. *See* Cox v. Louisiana, 379 U.S. 559, 562 (1965).

426. *See* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 962 (1988).

burdens of proof, allowing them to efficiently assess, manage, and screen cases as part of a functioning democracy.[427] The background circumstances test could be justified under this view because it allows courts to carefully scrutinize reverse discrimination claims that are unlikely to occur within America's current social structure.

Assuming there is a compelling government interest, whatever that may be, the constitutional inquiry would still require the doctrine to be narrowly tailored.[428] One would need to show "'race-neutral alternatives' that are both 'available' and 'workable' 'do not suffice.'"[429] Professor Sullivan first admits the narrowly tailored requirement is "problematic."[430] He then claims that expert testimony is a less restrictive alternative to the doctrine.[431] Yet, there are still other less restrictive alternatives besides expert testimony. As recognized by Professor Sullivan,[432] and eventually argued here,[433] *Iadimarco*'s sufficient evidence approach, which examines all of the circumstances, does not impose a higher burden upon Caucasians.[434] Although it is unappealing to adopt,[435] the protected-class approach, which eviscerates the racial minority prong, is also an option.[436] Thus, there are at least two doctrines focusing on an inference of discrimination without making any racial distinctions. Normally, this would end the inquiry, and the background circumstances test would be declared unconstitutional.[437]

Professor Sullivan goes further, suggesting that to survive strict scrutiny one could argue the background circumstances test is narrowly tailored as possible because its higher burden targets the infrequency of discrimination against Caucasians.[438] But this argument changes the nature of the compelling interest to satisfy the narrow tailoring requirement. Professor Sullivan's compelling interest becomes screening for the rare phenomena of reverse discrimination and is no longer diversity or the elimination of private workplace discrimination.[439] It is hard to fathom how a higher burden helps to reduce, let alone eliminate, private workplace

427. Johnson v. Advocate Health & Hosps. Corp., 892 F.3d 887, 894 (7th Cir. 2018).

428. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

429. Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2208 (2016) (citation omitted).

430. Sullivan, *supra* note 15, at 1113.

431. Sullivan, *supra* note 15, at 1114.

432. Sullivan, *supra* note 15, at 1118–19.

433. *See infra* Part V.C.

434. Iadimarco v. Runyon, 190 F.3d 151, 158–61 (3d Cir. 1999).

435. *See infra* Part V.C.

436. *See* Bass v. Bd. of Cnty. Comm'rs, Orange Cnty., 256 F.3d 1095, 1103–04 (11th Cir. 2001), *overruled in part on other grounds by* Crawford v. Carroll, 529 F.3d 961, 971–74 (11th Cir. 2008), *as recognized in* Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1325 n.15 (11th Cir. 2011).

437. *See* Gratz v. Bollinger, 539 U.S. 244, 270–75 (2003).

438. Sullivan, *supra* note 15, at 1114.

439. Sullivan, *supra* note 15, at 1112–14.

discrimination because it would presumably disadvantage some claims from even being heard.[440] Likewise, it is equally difficult to imagine how imposing a higher burden on Caucasians relates to achieving diversity. The background circumstances test does not seek to diversify a workforce, a practice which is not considered discriminatory. Instead, it is concerned with creating an inference of intentional discrimination after litigation has started. Essentially, it is designed to solve cases, not to benefit private employers' workforces. To argue the background circumstances is narrowly tailored, in and of itself, must necessarily change the compelling interest at stake. Professor Sullivan's proposed argument thus accomplishes an end by ignoring the initial means employed to achieve it.

Admittedly, the constitutional solutions are unsatisfying, especially with the Court's growing emphasis on colorblindness.[441] The easiest way to avoid these constitutional pitfalls is to limit the background circumstances requirement to all forms of intra-racial discrimination. This would stop the theoretical exercise of defending the requirement on constitutional grounds.

C. A New Path Forward for Reverse Discrimination Claims

The background circumstances test has normative appeal and is rooted in reality, but it makes Title VII a target for legitimate constitutional attacks. Notwithstanding severability,[442] the strongest way to *fully insulate* Title VII from *any* constitutional review would be to eliminate the background circumstances test. Instead of alleging or proving background circumstances, a reverse discrimination plaintiff should be able to prove a prima facie case by presenting sufficient evidence to infer racial discrimination under the circumstances.[443] Put differently, the prima facie case for reverse discrimination claims should be subject to a totality of the circumstances standard supported by sufficient evidence.[444] Of course, some facts might be more important than others, but the racial context is

---

440. *See* John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks"*, 94 VA. L. REV. 1715, 1723 n.27 (2008) (observing parties with the burden of proof are disadvantaged).

441. *See generally* Bartlett v. Strickland, 556 U.S. 1, 21 (2009) ("Of course, the 'moral imperative of race neutrality is the driving force of the Equal Protection Clause,' and racial classifications are permitted only 'as a last resort.'" (citation omitted)).

442. The severability doctrine permits a federal court to invalidate only a portion of a statute it deems unconstitutional as opposed to invalidating the entire statute or an entire portion of a statutory section. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585–87 (2012); Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 931–35 (1983). Were the background circumstances test *mandated* by Title VII, at the minimum, Title VII's disparate treatment provision could be subject to a constitutional attack. *See Sebelius*, 567 U.S. at 585–87.

443. *See* Iadimarco v. Runyon, 190 F.3d 151, 158–61 (3d Cir. 1999).

444. *See id.*

always examined. This formulation avoids the constitutional question, honors the prima face case's purpose, and uses constitutional jurisprudence as suggested by *Ricci*.

A holistic assessment of a prima facie case does not heighten any burden upon Caucasians, thereby avoiding constitutional concerns. The prima facie case creates an inference of discrimination and its "precise requirements . . . can vary depending on the context."[445] It ensures there are sufficient facts to impose liability upon an employer if it declines to explain conduct that otherwise seems discriminatory.[446] Once, the Supreme Court stated the prima facie case concerns whether "an employee has adduced *sufficient evidence* to give rise to an inference of a discriminatory motive . . . ."[447] This burden is never "onerous" for four primary reasons.[448] First, as opposed to the amorphous background circumstances test, requiring Caucasians to provide sufficient evidence under the circumstances is explicitly sanctioned and used by precedent.[449] Secondly, it ensures that a prima facie case is not "onerous"[450] by not requiring a claimant to address an employer's motive or pretext at the forefront.[451] Third, it best serves the prima facie case's aims by focusing on an inference of discrimination under a set of facts, avoiding the "rigid, mechanized, or ritualistic" test the Court has cautioned against and is currently employed by the background circumstances' two prongs.[452] Lastly, it assists claimants possessing sufficient evidence of a discriminatory motive, but evidence failing to satisfy the background circumstances' two prongs.

The Court's decision in *Ricci* showed its willingness to adopt constitutional standards for Title VII's unanswered questions.[453] Under the Equal Protection Clause, the Court has placed the burden of proof upon public employers and universities, requiring them to produce "sufficient evidence" justifying their affirmative action programs.[454] Similarly, in the context of a prosecutor's racial use of preemptory strikes, the Court has

445. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

446. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506–11 (1993); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). *See also* O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312–13 (1996).

447. Bd. of Educ. of City Sch. Dist. of N.Y. v. Harris, 444 U.S. 130, 162 n.10 (1979) (Stewart, J., dissenting) (emphasis added).

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

449. *See O'Connor*, 517 U.S. at 312–13; *Harris*, 444 U.S. at 162 n.10.

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

451. *See supra* pp. 47–49.

452. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575–77 (1978). *See also* Sullivan, *supra* note 15, at 1129 (stating the sufficient evidence approach uses a "holistic assessment" of evidence).

453. Ricci v. DeStefano, 557 U.S. 557, 582–85 (2009).

454. Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 314 (2013); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986).

permitted criminal defendants to establish a prima facie case of discrimination by using a "wide variety of evidence, so long as the sum of the proffered facts gives 'rise to an inference of discriminatory purpose.'"[455] A sufficient evidence formulation is no novelty. If the Court is still willing to transfer constitutional rules into Title VII jurisprudence as it did in *Ricci*,[456] then a sufficient evidence approach has constitutional roots and may be utilized for evaluating Caucasians' prima facie case without creating constitutional questions.

Policy wise, a sufficient evidence formulation will aid racial minorities in the future. Statistics predict racial minorities will eventually become racial majorities within the United States by 2045.[457] Caucasians will thus become racial minorities by 2045.[458] The racial minority prong will inevitably create issues because, disregarding our historical perceptions, current racial minorities will not be racial minorities in the future. If the background circumstances test is concerned with discrimination against racial majorities,[459] current racial minorities will be subject to the background circumstances test once obtaining a majority status. A sufficient evidence approach anticipates the future. Regardless of the demographic winds, a sufficient evidence doctrine examines all of the facts, including the racial context, and would not subject current racial minorities to the background circumstances test's inflexible prongs. Instead, their prima facie cases will be holistically examined.

One could propose eliminating *McDonnell Douglas*'s racial minority prong and opt for the protected-class requirement, but this alternative is problematic for several reasons. First, the protected-class prong has been sparingly applied by the Court.[460] Secondly, it treats a claimant's racial

455. Johnson v. California, 545 U.S. 162, 169 (2005) (quoting Batson v. Kentucky, 476 U.S. 79, 94 (1986)).

456. *Ricci*, 557 U.S. at 582–85.

457. JONATHAN VESPA, LAUREN MEDINA & DAVID M. ARMSTRONG, U.S. CENSUS BUREAU, P25-1144, DEMOGRAPHIC TURNING POINTS FOR THE UNITED STATES: POPULATION PROJECTIONS FOR 2020 TO 2060, 6–7 (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p25-1144.pdf [https://perma.cc/XA4V-AMPK].

458. *Id.*

459. *See* Harding v. Gray, 9 F.3d 150, 153–54 (D.C. Cir. 1993); Parker v. Balt. & Ohio R.R., 652 F.2d 1012, 1017 (D.C. Cir. 1981).

460. *Compare* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1354 (2015) (using a protected-class prong), *with* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 & n.6 (1981) (not referencing a protected-class prong), *and* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (same).

characteristic as immaterial[461] and as a standing formality.[462] Only a careless attorney forgetting to plead or prove a client's race would fail it. Lastly, this option cherry picks the application of color-blindness. The protected-class prong initially ignores a claimant's race, but then realizes race matters for race discrimination claims, especially if racial comparisons are utilized. In contrast, the sufficient evidence approach honestly examines the facts when determining if an inference of discrimination arises.

V. THE CONSEQUENCES OF ELIMINATING THE BACKGROUND CIRCUMSTANCES APPROACH

Eliminating the background circumstances test would have practical consequences for reverse discrimination plaintiffs. Most obviously, its elimination would impact how the federal courts would formulate their prima facie cases. Rejecting the background circumstances test would lead to two other important outcomes: (1) preserving Title VII's focus on individual cases; and (2) enhanced judicial confidence when adjudicating reverse discrimination claims.

A. Preserving Title VII's Focus

Rooting out intentional discrimination within the workplace by examining individual claims is one of the chief lessons gleaned from Title VII's legislative history[463] and subsequent case law.[464] Again, Baroni asserts that Title VII's purpose is to treat majority and minority plaintiffs differently.[465] But his questionable conclusion fails to cite a single page of the Congressional Record[466] and ignores the legislative events surrounding Title VII's enactment. Although Congress was unquestionably motivated by the injustices of the 1960s,[467] Congress passed Title VII over the objections of congressional opponents decrying it as "special legislation," repeatedly emphasizing Title VII's protections extended to all racial groups.[468] Accepting Baroni's position would honor the congressional

461. *See* E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 452, 491 (1998) (arguing the protected-class requirement is a standing inquiry and ignores differences between privileged and unprivileged identities).

462. Bi, *supra* note 15, at 53–54.

463. *See supra* pp. 14, 16–17.

464. City of L.A., Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978) ("[Title VII's] focus on the individual is unambiguous.").

465. Baroni, *supra* note 14, at 812.

466. Baroni, *supra* note 14, at 812.

467. *See supra* pp. 10, 13–15.

468. *See supra* pp. 16–17.

losers' rejected position[469] and subject Title VII to a constitutional attack because the statute would require distinctions on the basis of race.[470] Baroni's position places Title VII in unnecessary jeopardy. To avoid such consequences, Title VII's core promise should be framed as evaluating cases *individually* to uncover unlawful discrimination.[471]

The background circumstances test limits individual assessments of reverse discrimination claims if Caucasians cannot satisfy either prong of the test's current formulation but otherwise possesses evidence of discrimination. For instance, suppose that a new employer, owned by a Caucasian, opens a business within a Caucasian area. Given the employer's novelty, there would be no evidence showing its past "inclinations" to discriminate against Caucasians or any racial group. Thus, the first prong of the background circumstances test could not be met. Next, imagine a qualified Caucasian applicant interviews with a three-person panel that is majority Caucasian[472] but is passed over for an equally qualified African-American from the area. At first glance, nothing seems "fishy" given the panel's makeup and both candidates are qualified. Now imagine that the Caucasian applicant interviews for a second time, with the same panel, and is again passed over for a qualified Asian-American. The employer's workforce is still majority Caucasian given the demographics of the labor market. From one perspective, there is nothing fishy if the panel is still predominately Caucasian, along with the employer's majority-Caucasian workforce. However, if one considers this *individual* Caucasian was passed over *twice*, and the employer has no affirmative action policy, the circumstances may create a prima facie case for this *individual* applicant. The background circumstances test would prohibit an individual assessment of the Caucasian's claim. A sufficient evidence standard would at least ensure the Caucasian applicant's claim is given an individual assessment for a prima facie case, furthering Title VII's core promise.

B. Enhancing Judicial Confidence

The background circumstances test currently depends upon personal and societal judgments that unquestionably vary from judge to judge, while a sufficient evidence approach encourages fairness by considering and weighing a prima facie case's facts.[473] Under the background

469. *See supra* p. 18 and note 97.

470. *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 307–08 (2013); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

471. *See supra* pp. 16–17.

472. Imagine the panel consists of two Caucasians and one African-American.

473. Bi proposes an elaborate "combination of factors" approach, which essentially asks courts to examine numerous factors for an inference of discrimination. *See* Bi, *supra* note 15, at 71–72. A

circumstances test, what is "fishy" invariably depends on a judge's background and beliefs. What may be "fishy" to one may not be to another.[474] The background circumstances test thus abandons objectivity since it heavily relies upon judges' subjective intuitions. By contrast, the sufficient evidence approach provides judges with discretion to decide which facts carry the day,[475] but a Caucasian plaintiff is the one who initially proffers the facts for consideration.[476] Examining all of the circumstances for sufficient evidence would likely increase judicial confidence because judges would not have to subjectively determine "fishiness" and could rather focus on objective facts.

The sufficient evidence approach also mirrors other judicial doctrines that lower courts already employ, making it judicially administrable.[477] For example, federal courts routinely examine whether there is sufficient evidence under the totality of circumstances to determine whether an individual is an employee under federal employment statutes.[478] They also use this test for Title VII claims implicating a hostile work environment and/or sexual harassment.[479] Federal courts employ a totality of the circumstances test under the Fourth Amendment to decide if police officers possess a reasonable suspicion to engage in investigatory stops.[480] As mentioned previously, they have also used this standard under the Equal Protection Clause.[481] There is no indication the concept of "fishiness" aids federal courts to decide disputes. Given federal courts' familiarity with evaluating factual circumstances, judicial confidence in adjudicating reverse discrimination claims would

---

sufficient evidence approach examining the circumstances is much simpler than Bi's complicated proposal. *See id.* 68–72.

474. *See* Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 344–51 (2012) (finding African-American judges dismiss employment discrimination cases at lower rates than Caucasian judges).

475. *See generally* Ashley G. Chrysler, Comment, *All Work, No Pay: The Crucial Need for the Supreme Court to Review Unpaid Internship Classifications Under the Fair Labor Standards Act*, 2014 MICH. ST. L. REV. 1561, 1605 n.310 (arguing a totality of the circumstances test gives judges "almost complete discretion" to determine how to examine factors and what factors to examine).

476. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973).

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

478. *See, e.g.*, Cleveland v. City of Elmendorf, 388 F.3d 522, 528–29 (5th Cir. 2004) (employing a totality of the circumstances test to determine volunteer status under the Fair Labor Standards Act); Lambertsen v. Utah Dep't of Corr., 79 F.3d 1024, 1028 (10th Cir. 1996) (applying the totality of the circumstances for employment status under Title VII).

479. *See, e.g.*, Rivera v. Rochester Genesee Reg'l Transp. Auth., 743 F.3d 11, 20 (2d Cir. 2014); Erickson v. Wisc. Dep't of Corr., 469 F.3d 600, 606 (7th Cir. 2006); Mendoza v. Borden, Inc., 195 F.3d 1238, 1246 (11th Cir. 1999).

480. *See, e.g.*, Navarette v. California, 572 U.S. 393, 396–97 (2014); United States v. Arvizu, 534 U.S. 266, 273 (2002).

481. *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 314 (2013); Johnson v. California, 545 U.S. 162, 169 (2005); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986).

likely enhance, especially when evidence is considered during summary judgment.

CONCLUSION

Title VII's promise to eradicate workplace discrimination is essential to foster equal opportunities for all. To enforce that promise, federal courts must vigilantly remember that every Title VII claimant must proffer circumstantial or direct evidence supporting a finding of intentional discrimination. *McDonnell Douglas*'s burden-shifting framework is an important tool for plaintiffs, regardless of race, to prove their discrimination claims with circumstantial evidence and to reach a jury, the ultimate arbiter of whether there was unlawful discrimination. Using the background circumstances test in that inquiry—despite its valid observations—possesses the ability to raise gut-wrenching questions about Title VII's constitutionality. This Article should not be misunderstood as arguing that the background circumstances test is normatively flawed or based upon a misconception of reality. Instead, it simply recognizes that accepting the doctrine comes at a cost—namely, the possibility of subjecting Title VII, or at least its status-based prescription, to a constitutional review. To avoid those constitutional questions in their entirety, eliminating or reforming the standard provides an easy solution. A reformation would include a totality of the circumstances and sufficiency of the evidence standard. Either option secures the continued viability of Title VII by fully insulating it from constitutional review. To be sure, reverse discrimination claims would remain subject to the rigors of *McDonnell Douglas*'s pretext stage. Accordingly, like traditional discrimination claims, the success or failure of reverse discrimination claims would ultimately depend upon whether the particular facts support a finding of unlawful discrimination.

McDonnell Douglas's confusion about reverse discrimination claims has caused consternation among the federal appellate courts. Although arguably undesirable from critics, eliminating or reforming the background circumstances approach would signal a continued commitment to examining discrimination cases on their merits, which avoids constitutionally scrutinizing an important piece of civil rights legislation. Further, it would evade a tense debate, in an already polarized nation, about the various experiences, expectations, and norms concerning racial relations within the workplace. But given the recent events sparking civil demonstrations about the treatment of African-Americans at the hands of law enforcement, treatment which has no doubt existed for centuries, perhaps this is a long overdue reckoning, and the background circumstances test is worth fully defending.