Stripping Title VII Down to Its Bare Essentials: Uncovering an Employee-Friendly Employment Discrimination Law

*William R. Corbett**

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* Frank L. Maraist, Wex S. Malone, Rosemary Neal Hawkland, and Cheney C. Joseph Professor of Law, Paul M. Hebert Law Center of Louisiana State University. I thank my research assistants, Taylor Cherry and Seton Hulin, LSU Law Class of 2026, for their assistance in the preparation of this Essay. I am grateful to Dean Alena Allen and the LSU Law Center for a research stipend that facilitated my work on this Essay.

INTRODUCTION

The Supreme Court continued its textualist[1] scouring of Title VII of the Civil Rights Act of 1964[2] in its decision in *Ames v. Ohio Department of Youth Services*.[3] The Court unanimously decided that "majority-class" plaintiffs in reverse employment discrimination cases[4] do not have to introduce evidence of background circumstances to establish a prima facie case of disparate treatment discrimination under Title VII. The Court's interpretive approach is couched as pure textualism. The *Ames* decision follows slightly over a year after the Court's decision in *Muldrow v. City of St. Louis*,[5] in which the Court employed a textualist rationale to abrogate the various heightened standards applied by different circuits to describe the threshold for actionable adverse employment actions under Title VII.

Beyond those two decisions, Justice Thomas and Justice Gorsuch have made clear that they relish an opportunity to deploy textualism to wipe away

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1 Defining textualism is complicated because as an approach to statutory interpretation it has different meanings and strands. *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266–67 (2020) (describing the "formalistic textualism" employed in the majority opinion and the "flexible textualism" manifested in the dissenting opinions in *Bostock v. Clayton County*, 590 U.S. 644 (2020)). Professor Sperino describes textualism as the most restricted method of plain meaning statutory construction. Sandra F. Sperino, *Flying Without a Statutory Basis: Why* McDonnell Douglas *Is Not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743, 765–66 (2006); *see also* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 23 (1988) (describing textualism as being rooted in "a positivist claim that only the language actually adopted by the legislature is law"). This Essay will not probe further into the meaning, strands, or evolution of textualism as an approach to statutory construction. For purposes of this Essay, it suffices to say that the Justices claim to be employing the textualist approach in many of the recent employment discrimination cases.

2 Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

3 605 U.S. 303 (2025).

4 In his concurring opinion in *Ames*, Justice Thomas explained well the problems inherent in the terms "majority class" and "reverse discrimination." *Id.* at 315–19 (Thomas, J., concurring). Reverse discrimination claims often are defined as claims by members of a "majority class." Majority, however, is problematic because, for example, there are more women than men in the United States, but a reverse sex discrimination claim is understood as a claim by a man. *Id.* at 315. Moreover, what is a reverse religious discrimination claim, and what religion is the "majority"? *Id.* at 317. Reverse discrimination cases are better understood as claims by persons who have a protected characteristic against which discrimination has not been historically prevalent—e.g., Caucasian, white, male, born in the United States. *See* William R. Corbett, *Reverse Discrimination: An Opportunity to Modernize and Improve Employment Discrimination Law*, 79 U. MIAMI L. REV. 160, 174–75 (2024). "Protected class," although useful when discussing constitutional claims, is misleading when discussing employment discrimination. All races, colors, sexes, religions, and national origins are protected under Title VII.

5 601 U.S. 346 (2024).

the most significant and pervasive judicial gloss from Title VII[6]—the pretext framework of *McDonnell Douglas Corp. v. Green*.[7] This escalating textualist purge of employment discrimination law is fashioning a body of law that differs significantly from the one that has developed over six decades. If the Court continues scraping away judicial gloss, how will that body of law look? The result seems likely to be more favorable for employee-plaintiffs and far less favorable for employer-defendants than the law that existed before,[8] although not all decisions employing textualism will be favorable for employee-plaintiffs.[9] The most likely result is that far fewer cases will be resolved on defendants' motions for summary judgment, resulting in more claims either settling or going to trial. This Essay considers how the textualist approach of the Supreme Court has reshaped the law in recent decisions and how it may continue to do so.

I. *MULDROW* AND *AMES*: SCRUBBING OFF JUDICIAL GLOSS IN THE NAME OF TEXTUALISM

A. Muldrow*: Redefining Actionable Adverse Employment Actions*

Muldrow, a female police officer with the St. Louis Police Department, was transferred from her job as a plainclothes officer in the specialized Intelligence Division to a uniformed patrol job with no change in her rank or pay.[10] As a result of the transfer, she lost her deputy status with the FBI and an unmarked take-home vehicle along with some other benefits.[11] The new Intelligence Division commander wanted to replace Muldrow with a male

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6 *Ames*, 605 U.S. at 325–26 (Thomas, J., concurring, joined by Gorsuch, J.); Hittle v. City of Stockton, 145 S. Ct. 759 (2025) (Thomas, J., dissenting from the denial of certiorari, joined by Gorsuch, J.).

7 411 U.S. 792 (1973).

8 *See, e.g.*, Grove, *supra* note 1, at 274–75 (textualist constraints on judicial discretion "may be valuable for politically vulnerable communities"); *see also* Bostock v. Clayton County, 590 U.S. 644, 677–78 (2020) (asserting that a textualist approach can result in applying protective laws to groups that were politically unpopular at the time of the law's passage and extending to all persons the benefit of the law's terms).

9 For example, the Court in Stanley v. City of Sanford invoked textualist analysis to hold that a retiree who lost subsidized health care coverage because the employer changed the terms of coverage was not covered by the Americans with Disabilities Act. 145 S. Ct. 2058, 2063–65 (2025). The Court reasoned that the retiree did not satisfy the statutory definition—a "qualified individual" "who, with or without reasonable accommodation, can perform the essential functions of the employment position that [she] holds or desires"—because the statute's verb tense only reaches applicants or active workers, not retirees. *See id.* (quoting 42 U.S.C. § 12111(8)). Moreover, the different textualist approaches of the majority and the dissent in *Bostock* reached different results, although the majority's approach there produced a result favorable to employee-plaintiffs. *See* Grove, *supra* note 1, at 281–85.

10 Muldrow v. City of St. Louis, 601 U.S. 346, 350–51 (2024).

11 *Id.* at 351.

officer whom he thought would be a better fit for the "very dangerous" work in that division.[12] Muldrow then sued for sex discrimination. The district court granted summary judgment for the city because the transfer did not constitute a "'significant' change" in working conditions producing a "material employment disadvantage."[13] The Eighth Circuit affirmed because the transfer did not cause a "materially significant disadvantage."[14]

In *Muldrow v. City of St. Louis*,[15] the Supreme Court granted certiorari to address "whether an employee challenging a transfer under Title VII must meet a heightened threshold of harm—be it dubbed significant, serious, or something similar."[16] The Court began its analysis with the statutory language of Section 703(a)(1), which prohibits failing or refusing to hire, firing, or otherwise discriminating against an individual "with respect to . . . compensation, terms, conditions, or privileges of employment."[17] The Court identified the applicable statutory language as "discriminat[ing] against" an individual regarding "terms [or] conditions" of employment based on sex.[18] The Court explained that it has interpreted "terms [or] conditions" as covering more than "economic or tangible" injuries.[19] Thus, to state an actionable claim, the statutory text requires a plaintiff to show "some harm respecting an identifiable term or condition of employment."[20] However, the statute does not require that the harm be "significant," "serious," "substantial," or any other adjective imposing a "heightened bar."[21]

The City disagreed and raised three arguments regarding why the plaintiff should be required to show significant harm: an alternative statutory interpretation, precedent, and policy.[22] The Court's rejection of the City's policy argument is the most relevant because it exemplifies how plaintiff-favorable law can result from textualism. The City argued that abandoning a significant-injury requirement would open the floodgates of litigation.[23] But the Court rejected that conclusion, explaining that the statute requires some

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12 *Id.*

13 *Id.* at 352.

14 Muldrow v. City of St. Louis, 30 F.4th 680, 688 (8th Cir. 2022), *vacated and remanded*, 601 U.S. 346 (2024).

15 601 U.S. 346 (2024).

16 *Id.* at 353. The Court noted that different circuits use various phrases to describe the threshold for actionable adverse employment actions, such as "serious and material change" in the Eleventh Circuit and "objectively tangible harm" in the D.C. Circuit. *Id.* at n.1.

17 42 U.S.C. § 2000e-2(a)(1).

18 *Muldrow*, 601 U.S. at 354.

19 *Id.* (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998)).

20 *Id.* at 354–55.

21 *Id.* at 355.

22 *Id.* at 356.

23 *Id.* at 358.

injury, either in the terms or the conditions of employment, and that the injury be caused by a prohibited discriminatory motive.[24] A court may thus consider the relationship between the injury and the motive and find that a less harmful act is less indicative of discriminatory motive.[25] Even if its interpretation did open the floodgates, however, the Court reasoned that outcome would simply be the result of Congress's statute.[26] If Congress had wanted to impose a threshold for actionable claims, it could have drafted one, but the Court could not add one.[27]

The majority concluded that all a plaintiff must prove is that she has suffered some injury in the terms or conditions of employment that left her worse off, but not necessarily significantly worse off.[28] The Court remanded for reconsideration under the appropriate standard.[29]

Three Justices concurred. Justice Thomas disagreed with the principal opinion's conclusion that the Eighth Circuit's opinion necessarily indicated that it applied a heightened standard "in the form of a 'significance' test."[30] Nonetheless, he agreed that the case should be remanded to the extent that the appellate court's analysis was inconsistent with a "more-than-trifling harm requirement."[31] Justice Alito did not join the Court's "unhelpful" opinion because he discerned little substantive difference between the Court's approved standard and that used by the Eighth Circuit.[32] He did not think that a standard requiring "harm" or "injury" would provide helpful guidance to lower courts because those terms require "some degree of significance or substantiality."[33] Justice Kavanaugh, concurring, disavowed what he characterized as the principal opinion's new standard of "some-harm" beyond the harm of being transferred because of a protected characteristic.[34] Instead, he reasoned that a job transfer based on a protected characteristic is *per se* actionable under Title VII.[35] Although he did not espouse the majority's new standard, he thought it would arrive at the same result as his standard "in 99 out of 100 discriminatory-transfer cases, if not in all 100."[36]

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24 *Id.*
25 *Id.*
26 *Id.*
27 *Id.*
28 *Id.* at 359.
29 *Id.* at 360.
30 *Id.* at 360–61 (Thomas, J., concurring).
31 *Id.* at 362.
32 *Id.* at 362–63 (Alito, J., concurring).
33 *Id.*
34 *Id.* at 364 (Kavanaugh, J., concurring).
35 *Id.* at 365.
36 *Id.*

The *Muldrow* decision was a significant favorable shift in the law for employees and plaintiffs.[37] Applying a textualist approach, the Court rejected the judicial gloss of various iterations of heightened standards for actionable adverse employment actions. Justice Kagan's opinion for the Court expressly stated that the decision "lowers the bar Title VII plaintiffs must meet."[38] Consequently, many discrimination cases that would have been resolved on summary judgment because of heightened standards will now survive summary judgment.[39]

Another ramification is that some courts will find the *Muldrow* standard applicable to other discrimination cases beyond Title VII. The standard could be applied to the Age Discrimination in Employment Act ("ADEA"),[40] the Americans with Disabilities Act ("ADA"),[41] and Section 1981.[42] Courts may also find this standard is not limited to disparate treatment claims based on a discrete adverse employment action.[43] For example, the Sixth Circuit applied the standard to a hostile environment age discrimination claim in *McNeal v. City of Blue Ash*.[44] In *McNeal*, the Sixth Circuit explained that hostile environment harassment claims are based on the "same statutory language" as disparate treatment claims.[45] Thus, the court essentially superimposed the *Muldrow* standard on the once-daunting "severe or pervasive" standard

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37 *See, e.g.*, Jennifer D. Zumarraga & Annabella Tubbs, Muldrow v. City of St. Louis*: A Huge Win for Employees in Employment Discrimination Claims*, FLA. B.J., Nov./Dec. 2024, at 32.

38 *Muldrow*, 601 U.S. at 356 n.2.

39 Justice Kagan implied as much. *See id.* ("[M]any cases will come out differently. . . [t]he decisions described above are examples, intended to illustrate how claims that failed under a significance standard should now succeed."); *see also* Zumarraga & Tubbs, *supra* note 37, at 36–37 ("Hopefully, the decision regulates the amount of summary judgments doled out in employment discrimination cases and ensures even-handed Title VII application across circuits.").

40 *See, e.g.*, Milczak v. Gen. Motors, LLC, 102 F.4th 772, 787 (6th Cir. 2024) ("Because we rely on Title VII case law in the ADEA context, we apply that standard here."); McNeal v. City of Blue Ash, 117 F.4th 887, 900 (6th Cir. 2024), (applying the *Muldrow* standard to an ADEA hostile environment claim), *reh'g en banc denied*, No. 23-3180, 2024 WL 5074460 (6th Cir. Dec. 2, 2024).

41 *See, e.g.*, Cangro v. N.Y.C. Dep't of Fin., No. 23-CV-10097, 2024 WL 4582369, at *2 (S.D.N.Y. Oct. 25, 2024) ("[*Muldrow*] applies to discrimination claims brought under the ADA as well."), *appeal filed*, No. 24-3004 (2d Cir. Nov. 15, 2024). *But see* Strife v. Aldine Indep. Sch. Dist., 138 F.4th 237, 249 n.3 (5th Cir. 2025) (stating in a footnote that "*Muldrow* concerns *Title VII* discrimination cases, not ADA violations").

42 Anderson v. Amazon.com, Inc., No. 23-CV-8347, 2024 WL 2801986, at *10 (S.D.N.Y. May 31, 2024) ("As in the Title VII context, '[t]here is nothing in [§ 1981] to distinguish . . . between [adverse actions] causing significant disadvantages and [adverse actions] causing not-so-significant ones. And there is nothing to otherwise establish an elevated threshold of harm.'") (quoting *Muldrow*, 601 U.S. at 355).

43 *See* Zumarraga & Tubbs, *supra* note 37, at 34.

44 117 F.4th 887 (6th Cir. 2024).

45 *Id.* at 904.

applied to hostile environment claims.[46] The court stated the proposition as follows: "[W]hen we consider whether a hostile-work environment was severe or pervasive enough to violate Title VII, we effectively ask whether it left an employee 'worse off respecting employment terms or conditions.'"[47] Similarly, *Muldrow* may influence decisions on whether a plaintiff pursuing relief under the ADA in failure-to-accommodate claims must prove some harm beyond the failure to accommodate.[48] These examples demonstrate the potential for *Muldrow* to modify, and perhaps effectively supplant, other court-created "significant-harm" standards in employment discrimination law that have no foundation in the statutory language.[49] If that emerging trend continues, plaintiffs will benefit in the form of viable claims for hostile environment harassment, failure-to-accommodate, and perhaps others that would not have survived motions for summary judgment pre-*Muldrow*.

Beyond the substantive change in the law applicable to various types of discrimination claims, it is reasonable to predict that *Muldrow* will increase the volume of employment discrimination claims asserted.[50] The decision was widely reported as making it easier to pursue employment discrimination claims.[51] It seems likely both that more people will file charges and lawsuits and that more lawyers will take cases that they would have declined pre-*Muldrow*.

The textual approach of the Court in *Muldrow* stripped away judicial gloss that made it more difficult for plaintiffs to state viable claims. The

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46 *See id.*

47 *Id.* (quoting *Muldrow*, 601 U.S. at 355).

48 *See* Khorri Atkinson, *Supreme Court's Job Bias Test Clouding ADA Circuit Court Divide*, BL DAILY LAB. REP. (May 22, 2025, 12:22 PM), https://news.bloomberglaw.com/daily-labor-report/supreme-courts-job-bias-test-clouding-ada-circuit-court-divide [https://perma.cc/UZ2L-B5Z9].

49 For example, in *Muldrow*, the Court expressly preserved the court-created significant-harm standard for retaliation claims in adverse employment actions. *See Muldrow*, 601 U.S. at 357–58. The Court defined the retaliation standard in *Burlington Northern & Sante Fe Railway Co. v. White* as "materially adverse" actions that may "dissuade a reasonable worker from making or supporting a charge of discrimination." 548 U.S. 53, 57 (2006).

50 *See, e.g.*, Corbett, *supra* note 4, at 163 n.11.

51 *See, e.g.*, Ann E. Marimow & Julian Mark, *Supreme Court Makes It Easier to File Workplace Discrimination Claims*, WASH. POST (Apr. 17, 2024), https://www.washingtonpost.com/politics/2024/04/17/supreme-court-employee-discrimination-muldrow-police/ [https://perma.cc/WX56-BGTG]; John Fritze, *Supreme Court Makes It Easier to Sue Employers for Job Transfers*, CNN (Apr. 17, 2024, 11:56 AM), https://www.cnn.com/2024/04/17/politics/supreme-court-makes-it-easier-to-sue-employers-for-job-transfers [https://perma.cc/7NVV-WUUA]; Kaelan Deese, *Supreme Court Unanimously Opens Door to More Workplace Bias Claims*, WASH. EXAMINER (Apr. 17, 2024, 11:02 AM), https://www.washingtonexaminer.com/news/justice/2969093/supreme-court-unanimously-opens-door-more-workplace-bias-claims/ [https://perma.cc/3P9M-AB3P].

Court's textual approach created a vastly more favorable employment discrimination law for employee-plaintiffs.

B. Ames*: Narrowing the Prima Facie Case Standard in Reverse Discrimination Cases*

Marlean Ames was a self-described heterosexual woman who was employed by the state department that controlled Ohio's juvenile correctional system.[52] She originally was hired by the department as an executive secretary and eventually received a promotion to be a program administrator.[53] In 2019, she applied and was selected to interview for a new management position in the Office of Quality and Improvement.[54] She alleged, however, that a lesbian woman was hired for the management position instead.[55] And shortly after her interview, "her supervisors removed [Ames] from her position as program administrator."[56] Ames accepted a demotion to her original job at the agency as a secretary, which was accompanied by a large pay cut.[57] Ames then claimed that a gay man was hired to take over her former program administrator position.[58] Ames subsequently sued the department under Title VII of the Civil Rights Act, asserting a discrimination claim based on the fact that "she was denied the management promotion and demoted because of her sexual orientation."[59]

The district court granted the employer's motion for summary judgment.[60] The district court analyzed the claim under the three-part framework of *McDonnell Douglas Corp. v. Green*[61]: (1) the plaintiff must produce evidence "establishing a prima facie case of racial discrimination"; then (2) the burden of production shifts to the defendant to produce evidence of a "legitimate, nondiscriminatory reason for the employee's rejection"; and then (3) the plaintiff may demonstrate that the employer's "presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision."[62] Because the claim before the court involved a claim by a member of a "majority group," an individual who identifies as heterosexual,[63] Sixth Circuit precedent required the plaintiff to go beyond

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52 Ames v. Ohio Dep't of Youth Servs., 605 U.S. 303, 306 (2025).
53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.*
59 *Id.*
60 *Id.*
61 411 U.S. 792 (1973).
62 *Id.* at 802–05.
63 *Ames*, 605 U.S. at 307.

the usual prima facie case. As a result, the plaintiff was required to present evidence of "'background circumstances' suggesting that the agency was the rare employer who discriminates against members of a majority group."[64]

The district court granted summary judgment for the defendant because Ames did not produce "background circumstances" evidence needed to satisfy her prima facie case.[65] A Sixth Circuit panel affirmed.[66] It explained that the type of evidence required to satisfy the background circumstances requirement is typically either showing "that a member of the relevant minority group . . . made the employment decision at issue, or with statistical evidence showing a pattern of discrimination by the employer against members of the majority group."[67] The panel affirmed summary judgment because Ames did not produce such evidence.[68] Concurring, Judge Kethledge expressed his disagreement with the background circumstances requirement, stating that the additional requirement "is not a gloss upon the 1964 Act, but a deep scratch across its surface. . . . [It] treats some 'individuals' worse than others—in other words, it discriminates—on the very grounds that the statute forbids."[69]

The Supreme Court granted certiorari, framing the issue as "whether, to satisfy that prima facie burden, a plaintiff who is a member of a majority group must also show 'background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.'"[70] The Court recognized the existence of a circuit split on the issue, noting that five circuits have either adopted or suggested agreement with adding the heightened background circumstances requirement to the *McDonnell Douglas* prima facie case step in reverse discrimination cases, thus making the evidentiary burden to survive summary judgment more onerous for majority-group plaintiffs.[71]

Most plaintiffs can establish a prima facie case if the individual "applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination."[72] Applying this precedent, the Court concluded that "the Sixth Circuit's 'background circumstances' rule cannot be squared with the text of Title

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64 *Id.*

65 *Id.* at 306–07.

66 Ames v. Ohio Dep't of Youth Servs., 87 F.4th 822, 824 (6th Cir. 2023), *vacated and remanded*, 605 U.S. 303 (2025).

67 *Id.* at 825.

68 *Id*. at 824.

69 *Id.* at 827 (Kethledge, J., concurring).

70 *Ames*, 605 U.S. at 305 (quoting Ames v. Ohio Dep't of Youth Servs., 87 F.4th 822, 825 (6th Cir. 2023)).

71 *Id.* at 308 n.1.

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

VII"[73] because its disparate treatment provision "draws no distinctions between majority-group plaintiffs and minority-group plaintiffs."[74] The Court emphasized that Title VII provides protection for discrimination "against *any* individual," not majority or minority groups.[75] Thus, the statute does not permit "courts to impose special requirements on majority-group plaintiffs."[76] The Court stated that "[its] precedents reinforce that understanding of [Title VII]".[77]

The Court further reasoned that the imposition of the background circumstances requirement "ignores [the Court's] instruction to avoid inflexible applications of *McDonnell Douglas*'s first prong."[78] The Court characterized the requirement of background circumstances as disregarding that instruction by "uniformly subjecting all majority-group plaintiffs to the same, highly specific evidentiary standard in *every* case."[79] The Court rejected the agency's argument that the background circumstances requirement is only "an application of the ordinary prima facie standard" because it contradicted the Sixth Circuit's explanation of a "failure to satisfy a heightened evidentiary standard."[80] The Court vacated the judgment and remanded the case "for application of the [*McDonnell Douglas*] prima facie standard."[81]

Justice Thomas wrote a concurring opinion, joined by Justice Gorsuch, in which he agreed with the majority opinion for rejecting the background circumstances requirement since it "lacks any basis in the text of Title VII."[82] He wrote separately to emphasize that the background circumstances requirement is "a paradigmatic example of how judge-made doctrines can distort the underlying statutory text."[83] After going through the difficulties

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73 *Ames*, 605 U.S. at 309.

74 *Id.*

75 *Id.* (quoting 42 U.S.C. §2000e-2(a)(1) (emphasis added)).

76 *Id.* at 310.

77 *Id.* (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976); Bostock v. Clayton Cnty., 590 U.S. 644, 659 (2020)).

78 *Id.*

79 *Id.* at 311. This assertion by the Court seems to be an overstatement. The addition of the background circumstances requirement to the prima facie case also can be seen as an example of courts following the Court's instruction to adjust the requirements of the prima facie case to the context of the particular case. *See, e.g.*, Livingston v. Roadway Express, Inc., 802 F.2d 1250, 1252 (10th Cir. 1986) ("When a plaintiff who is a member of a favored group alleges disparate treatment, the courts have adjusted the prima facie case to reflect this specific context by requiring a showing of 'background circumstances [which] support the suspicion that the defendant is that unusual employer who discriminates against the majority.'").

80 *Ames*, 605 U.S. at 312.

81 *Id.* at 306.

82 *Id.* at 314 (Thomas, J., concurring).

83 *Id.*

courts have encountered with applying the background circumstances requirement, Justice Thomas stated that the doctrine is "emblematic of the serious challenges that can arise when judges invent atextual requirements."[84] Justice Thomas then discussed "a second judge-made rule" involved in the case: the *McDonnell Douglas* framework.[85] This aspect of the concurrence is discussed in Part II.

The *Ames* decision is a favorable turn in employment discrimination law for plaintiff-employees, but not nearly as significant as *Muldrow*. First, the issue in *Ames* of evaluating "background circumstances" is limited to reverse discrimination cases,[86] whereas the holding in *Muldrow* that there is no heightened threshold for alleging an adverse employment action may apply in a wider array of cases.[87] Second, only a minority of circuits had adopted the background circumstances requirement in reverse discrimination cases. For those that did, numerous cases were resolved at the summary judgment stage because the plaintiffs did not present the background circumstances evidence needed to establish a prima facie case under the *McDonnell Douglas* analysis.[88] Because the heightened burden of satisfying the background circumstances requirement is gone, it is likely that some reverse discrimination plaintiffs in those circuits whose cases were resolved on summary judgment would survive now. Thus, the impact of *Ames* is favorable to plaintiff-employees in reverse discrimination cases, whereas *Muldrow* is favorable to plaintiffs in a broad range of discrimination cases.

As with *Muldrow*, the publicity and reporting of the *Ames* decision is likely to prompt the filing of more charges and lawsuits.[89] It seems likely that more males, Caucasians, and heterosexuals who experience adverse employment actions will pursue their claims in the aftermath of *Ames*, and perhaps more lawyers will be inclined to represent such plaintiffs.[90] This will further contribute to a recent increase in reverse discrimination cases

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84 *Id.* at 318.

85 *Id.* at 319.

86 *Id.* at 305–06 (majority opinion).

87 *See supra* notes 37–49 and accompanying text.

88 *See, e.g.*, Ames v. Ohio Dep't of Youth Servs., 87 F.4th 822 (6th Cir. 2023), *vacated and remanded*, 605 U.S. 303 (2025); Hammer v. Ashcroft, 383 F.3d 722, 724–25 (8th Cir. 2004); Gore v. Ind. Univ., 416 F.3d 590, 592–93 (7th Cir. 2005).

89 *See, e.g.*, Andrew Chung, *US Supreme Court Makes 'Reverse' Discrimination Suits Easier*, REUTERS (June 5, 2025, 1:30PM), https://www.reuters.com/business/world-at-work/us-supreme-court-revives-straight-womans-reverse-discrimination-case-2025-06-05/ [https://perma.cc/U2LJ-P6LZ].

90 *See* Ashlee C. Grant & Gabriel L. Trujillo-Lederer, *The Supreme Court 'Ames' to Clarify that All Discrimination Claims Must Be Treated Equally*, BAKERHOSTETLER (July 7, 2025), https://www.employmentlawspotlight.com/blogs/the-supreme-court-ames-to-clarify-that-all-discrimination-claims-must-be-treated-equally/ [https://perma.cc/2YXP-9DSK].

predating *Ames*.[91] Some attribute this increase[92] in part to the Court's elimination of affirmative action in higher education in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,[93] although that decision does not apply to affirmative action in employment.[94]

Ames, like *Muldrow*, is another instance of the Supreme Court's textualist approach to interpreting Title VII, stripping away judicial gloss and making employment discrimination law more favorable to employee-plaintiffs. Specifically, it is Justice Thomas's concurring opinion in *Ames* that may be the harbinger of the most dramatic pro-employee plaintiff shift yet, with roots in a textualist approach.[95]

II. IS *MCDONNELL DOUGLAS* NEXT?

A. Justice Thomas's Concurrence in Ames *and Dissent in* Hittle v. City of Stockton

After agreeing with the Court's rejection of background circumstances in his concurring opinion in *Ames*, Justice Thomas, joined by Justice Gorsuch, took aim at another such atextual court-created doctrine: the *McDonnell Douglas* framework—also known as the pretext framework—for analyzing individual disparate treatment claims.[96] Justice Thomas explained

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91 *See, e.g.*, Emilie Shumway, *8 Stories on the Rise of "Reverse Discrimination" Claims*, HRDIVE (Mar. 14, 2025), https://www.hrdive.com/news/7-stories-on-the-rise-of-reverse-discrimination/742481/ [https://perma.cc/5XSC-CG3Z] (compiling eight recent news articles that discuss recent reverse discrimination cases and DEI policies).

92 *See* Julian Mark, *Supreme Court Case Could Spark Rush of Reverse-Discrimination Claims*, WASH. POST (Dec. 5, 2023), https://www.washingtonpost.com/business/2023/12/05/supreme-court-diversity-equity-inclusion-muldrow/ [https://perma.cc/B5GR-URWK].

93 600 U.S. 181 (2023).

94 Although the Court is not bound to find that *Students for Fair Admissions*, a decision based on Title VI and the Equal Protection Clause, applies to affirmative action and racial preferences under Title VII, the Court may revisit and modify its test for the validity of affirmative action plans under Title VII. The current test for the validity of affirmative action plans under Title VII was developed by the Court in *Steelworkers v. Weber*, 443 U.S. 193, 209 (1979) (upholding "affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories") and *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987) (upholding the use of sex as a factor in employment affirmative action plans). The test for employment affirmative action plans has historically been more permissive than was the pre-*Students for Fair Admissions* test under the Equal Protection Clause. *See* 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, 1036 (2004).

95 *See* Ames v. Ohio Dep't of Youth Servs., 605 U.S. 303, 313 (2025) (Thomas, J., concurring).

96 *Id.* at 319–20.

that the *McDonnell Douglas* framework, too, is a judge-made doctrine[97] with no basis in the statutory text,[98] and it has been difficult for courts to apply.[99] He stated that in an appropriate case he would be willing to consider the continuing viability of the framework.[100] Indeed, he, again joined by Justice Gorsuch, had expressed enthusiasm earlier in the Court's Term for this transformative endeavor.[101]

Justice Thomas began his critique of *McDonnell Douglas* by noting that the framework was originally developed for courts to use in bench trials.[102] He then explained that there is no textual support for the framework in Title VII, and the Court made it "out of whole cloth."[103] He decried *McDonnell Douglas* as a judge-made doctrine that has amorphous bounds.[104] He stated that rather than approving its use for summary judgment, the Court has taken steps to limit the relevancy and applicability of the framework, but despite those steps, it has become the presumptive tool for resolving cases at summary judgment.[105] Thomas stated that he seriously doubts *McDonnell*

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97 Background circumstances became a judicially created doctrine only as an attempt to strengthen the easily satisfied prima facie case at the first stage of *McDonnell Douglas*. *See* Corbett, *supra* note 4, at 177–79.

98 *Ames*, 605 U.S. at 320 (Thomas, J., concurring); Sperino, *supra* note 1, at 762–90.

99 *Ames*, 605 U.S. at 325–26 (Thomas, J., concurring).

100 *Id.* at 326.

101 Regarding the importance and omnipresence of the *McDonnell Douglas* framework in employment discrimination law and beyond, see *infra* Section II.B.

102 *Ames*, 605 U.S. at 320 (Thomas, J., concurring). It is correct that *McDonnell Douglas v. Green* was a bench trial involving only a Title VII claim in 1973. The possibility of jury trials was added for most Title VII claims by the Civil Rights Act of 1991. Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1073 (codified at 42 U.S.C. § 1981a(c)). However, the fact that the framework was developed for use in bench trials does not suggest that the framework is inappropriate for analyzing summary judgment motions because judges alone analyze cases in both bench trials and summary judgment motions, with no role for juries.

103 *Ames*, 605 U.S. at 320.

104 *Id.*

105 *Id.* at 320–22. The assertion that the Court has taken steps to limit the relevancy and applicability of *McDonnell Douglas* is contestable. The Court has at least tacitly approved the use of the framework for summary judgment analysis. The Court has encountered the *McDonnell Douglas* framework used as the analytical tool for summary judgment motions, and it has not suggested that it is inappropriate in that context. *See, e.g.*, Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. 327, 340 (2020) ("For its part, *McDonnell Douglas* sought only to supply a tool for assessing claims, typically at summary judgment, when the plaintiff relies on indirect proof of discrimination."). Moreover, in *Young v. United Parcel Service, Inc.*, the Court used the *McDonnell Douglas* framework to fashion an analysis for failure to make reasonable accommodations for pregnancy. 575 U.S. 206, 228–29 (2015). One of the examples of limitation offered by Justice Thomas is the Court's holding that it does not apply in mixed-motives cases in *Price Waterhouse v. Hopkins*. *Ames*, 605 U.S. at 324 (Thomas, J., concurring) (citing 490 U.S. 228, 258 (1989) (plurality opinion)). However, Justice Thomas railed against the *Price Waterhouse* framework in *Gross v. FBL Financial Services, Inc.* 557 U.S. 167, 178–79 (2009). Moreover, Justice Thomas's opinion in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98–101 (2003), holding that direct evidence is not required

Douglas is a suitable tool for analyzing Title VII claims at the summary judgment stage because it requires courts to make the artificial distinction between direct and circumstantial evidence.[106]

Justice Thomas then leveled his two most damning critiques of *McDonnell Douglas*: First, the framework is incompatible with the summary judgment standard of Rule 56 of the Federal Rules of Civil Procedure;[107] and second, it does not take into account the many ways that a plaintiff can prove a Title VII claim.[108] Although the Author sees these two criticisms differently than Justice Thomas and sees them as intricately related, Justice Thomas's critiques do focus attention on the most important reasons to abandon the *McDonnell Douglas* framework.

Regarding inconsistency with the summary judgment standard, Justice Thomas said that the Court expressed the plaintiff's burden in the *McDonnell Douglas* framework in terms of preponderance of the evidence.[109] Although that statement is true of *Texas Department of Community Affairs v. Burdine*,[110] cited by Justice Thomas, and other cases involving fully tried bench trials, the Supreme Court also has explained how the analysis can be applied to summary judgment motions and motions for judgment as a matter of law, both of which are motions challenging the sufficiency of the evidence. In *Reeves v. Sanderson Plumbing Products, Inc.*,[111] the Court discussed application of the *McDonnell Douglas* analysis in an age discrimination case to a motion for judgment as a matter of law,[112] which

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to invoke the "motivating factor" standard of Section 703(m), should have been the death knell of the *McDonnell Douglas* framework, but the Court continued to permit its use, *see Young*, 575 U.S. at 213; Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003). If the Court was of the opinion that *McDonnell Douglas* was an inappropriate analytical framework for analyzing summary judgment motions, why has it let it persist and proliferate for decades?

106 *Ames*, 605 U.S. at 322 (Thomas, J., concurring). Courts consistently have stated that the *McDonnell Douglas* framework is applicable to cases in which there is only circumstantial evidence. That assertion is irreconcilable with the holding of *Desert Palace* that direct evidence is not necessary to invoke the statutory motivating factor standard. 539 U.S. at 98–101. However, even the Supreme Court has seemed to disregard the *Desert Palace* decision by resurrecting the direct evidence versus circumstantial evidence dichotomy. *See, e.g.*, *Young*, 575 U.S. at 213 (stating that a plaintiff can prove discrimination by proffering direct evidence or by using the *McDonnell Douglas* framework). Post-*Desert Palace*, courts should not be determining how to analyze a case based on whether it involves direct or circumstantial evidence, but they do. Justice Thomas is correct that abandoning the *McDonnell Douglas* analysis should end that artificial dichotomy once and for all, although it should have ended with *Desert Palace*.

107 605 U.S. at 322 (Thomas, J., concurring).

108 *Id.* at 323–24.

109 *Id.* at 323 (citing Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981)).

110 450 U.S. 248, 252–53 (1981).

111 530 U.S. 133 (2000).

112 *Id.* at 141–43.

invokes the same sufficiency-of-the-evidence standard as summary judgment.[113] The Court stated that "a plaintiff's prima facie case, combined with *sufficient* evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[114] Thus, although the Court created the *McDonnell Douglas* framework for courts to analyze disparate treatment claims in bench trials (before the Civil Rights Act of 1991), the Supreme Court and lower courts have adapted the pretext framework to the sufficiency standard for summary judgment. It is, after all, the court, not a jury, that is performing the analysis on a motion for summary judgment, just as it is the court performing the analysis in a full bench trial. Although the Author disagrees with Justice Thomas that the early discussions of plaintiffs being required to prove pretext by a preponderance of the evidence reveal a fatal flaw of inconsistency with the summary judgment standard, he is correct about that inconsistency for another reason, discussed next. Moreover, he is correct in saying that in many cases courts are applying *McDonnell Douglas* in ways that require plaintiffs to prove too much to survive summary judgment.[115]

Linking Justice Thomas's first criticism, inconsistency with the summary judgment standard, with his second, failing to account for the many ways plaintiffs may prove discrimination, reveals the way in which the *McDonnell Douglas* analysis becomes inconsistent with the summary judgment standard. Justice Thomas pointed out that the pretext framework does not account for all the ways that a plaintiff can prove a Title VII claim.[116] He offered the example that Section 703(m)[117] permits a plaintiff to prove that the protected characteristic was a "motivating factor" for the

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113 *Compare* FED. R. CIV. P. 50 (permitting judgment as a matter of law if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue"), *with* FED. R. CIV. P. 56 ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."). For cases discussing this similarity, see, for example, Axelson v. Watson, 999 F.3d 541, 546 (8th Cir. 2021); Chiddix Excavating, Inc. v. Colo. Springs Utils., 737 Fed. App'x 856, 859 (10th Cir. 2018). *See also* Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 376 (2010) ("The standard for judgment as a matter of law under the Federal Rules of Civil Procedure mirrors that of summary judgment.").

114 *Reeves*, 530 U.S. at 148 (emphasis added).

115 *Ames*, 605 U.S. at 322–23 (Thomas, J., concurring). Professor Sandra Sperino posited that the second stage of the *McDonnell Douglas* framework is inconsistent with the summary judgment standard. She argued that courts have applied the requirement that employers articulate a legitimate, nondiscriminatory reason in several ways that conflict with the summary judgment standard of Rule 56. In doing so, courts grant summary judgment for employers in many cases in which they should leave genuine disputes of material fact regarding discrimination for juries to decide. Sandra F. Sperino, *Irreconcilable:* McDonnell Douglas *and Summary Judgment*, 102 N.C. L. REV. 459 (2024).

116 *Id.* at 323–24.

117 42 U.S.C. § 2000e-2(m).

adverse employment action.[118] There lies the point. Why should a plaintiff ever be required by a court to produce sufficient evidence of the level of causation that the *McDonnell Douglas* framework measures? Whatever that level of causation is, whether it be sole causation or but-for causation,[119] it is more demanding than "motivating factor."[120] A plaintiff should always contend that she can survive summary judgment with sufficient proof that discrimination based on race, color, sex, religion or national origin was a motivating factor of the adverse employment action. Justice Thomas emphasized that the ultimate issue in a Title VII claim is whether the defendant intentionally discriminated against the plaintiff because of a protected characteristic.[121] Although Justice Thomas did not offer examples other than "motivating factor," his assertion that *McDonnell Douglas* does not capture the many ways a plaintiff can prove a Title VII claim is broader than that one example.

The inconsistency with the summary judgment standard is that all a plaintiff must do is produce sufficient evidence of "a genuine dispute as to any material fact" related to the allegation that the defendant was motivated to act based on a protected characteristic such as race or sex—not sufficient evidence of a prima facie case or sufficient evidence of pretext. *McDonnell Douglas* requires plaintiffs to cram their evidence of discrimination into the descriptors in the prima facie case and pretext stages of the analysis. Numerous courts have warned against such a rigid treatment of evidence.[122] The language of Title VII provides that the ultimate issue is discrimination because of a protected characteristic,[123] and it provides that the standard of causation is "motivating factor."[124] Properly applying the summary judgment standard requires a court to ask if a plaintiff has proffered sufficient

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118 *Ames*, 605 U.S. at 323 (Thomas J., concurring).

119 Justice Thomas refers to it as sole causation, *id.* at 324, and the Author agrees. However, the Court has said that the pretext analysis measures but-for causation, not sole causation. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976).

120 The Supreme Court has referred to "motivating factor" as a "relaxe[d]" and "more forgiving" causation standard than but-for causation. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 773 (2015) ("relaxe[d]"); Bostock v. Clayton County, 590 U.S. 644, 657 (2020) ("more forgiving standard").

121 *Ames*, 605 U.S. at 324 (Thomas, J., concurring) (citing Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981)).

122 *See, e.g.*, Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011) ("[E]stablishing the elements of the *McDonnell Douglas* framework is not, and never was intended to be, the sine qua non for a plaintiff to survive a summary judgment motion in an employment discrimination case."); *see also* Ortiz v. Werner Enters., Inc., 834 F.3d 760, 765 (7th Cir. 2016) ("Evidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself—or whether just the 'direct' evidence does so, or the 'indirect' evidence.").

123 42 U.S.C. § 2000e-2(a)(1).

124 *Id.* § 2000e-2(m).

evidence to produce a genuine dispute that a Title VII-protected characteristic was a motivating factor in the adverse employment action. Justice Thomas ultimately was correct to say that applying *McDonnell Douglas* to decide summary judgment motions is inconsistent with the summary judgment standard.

The final reason Justice Thomas gave for his assault on *McDonnell Douglas* was that it "has befuddled courts since its inception."[125] Although that is often said, the greater confusion has come in the years following *Desert Palace*, *Inc. v. Costa*,[126] which held that direct evidence is not required to invoke the "motivating factor" causation standard of Section 703(m).[127] Courts have struggled to determine whether to analyze motions for summary judgment cases under the *McDonnell Douglas* framework or the mixed-motives framework.[128]

Justice Thomas closed by reiterating that in a case squarely raising the issue, he would consider whether *McDonnell Douglas* is an appropriate tool for analyzing claims at the stage of summary judgment.[129] In the meantime, Justice Thomas declared that litigants and lower courts are free to proceed with cases without using the framework, as the Court has never mandated its use.[130] Rather, Rule 56 states the standard for resolving summary judgment motions, and courts are well equipped to apply it without a judge-made framework.[131]

Justice Thomas's assault on the *McDonnell Douglas* framework in his *Ames* concurrence was an elaboration of the arguments he made in his dissenting opinion, also joined by Justice Gorsuch, earlier in the Term in *Hittle v. City of Stockton*.[132] The Court denied certiorari in that case, but Justice Thomas presented the arguments for why he would have "revisit[ed] *McDonnell Douglas* and decide[d] whether its burden-shifting framework remains a workable and useful evidentiary tool."[133] The Ninth Circuit had

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125 *Ames*, 605 U.S. at 325 (Thomas, J., concurring) (citation modified) (quoting Griffith v. City of Des Moines, 387 F.3d 733, 746 (8th Cir. 2004) (Magnuson, J., concurring specially)).

126 539 U.S. 90 (2003).

127 *Id.* at 98.

128 Courts have followed different approaches to resolving this issue. Two circuits have developed an analysis that merges the pretext and mixed-motives frameworks. *See* Bart v. Golub Corp., 96 F.4th 566, 573 (2d Cir. 2024), *cert. denied*, 145 S. Ct. 173 (2024) (mem.); Rachid v. Jack in the Box, Inc., 376 F.3d 305, 310–13 (5th Cir. 2004). For a summary of the positions of the various circuits, see White v. Baxter Healthcare Corp., 533 F.3d 381, 398–99 (6th Cir. 2008).

129 *Ames*, 605 U.S. at 326 (Thomas, J., concurring).

130 *Id.*

131 *Id.*

132 145 S. Ct. 759 (Thomas, J., dissenting from the denial of certiorari).

133 *Id.* at 764.

affirmed in the case below, stating that the summary judgment record did not contain evidence raising genuine issues of material fact sufficient for the plaintiff to meet his burden to demonstrate that the defendants' legitimate nondiscriminatory reasons for firing him were a pretext for religious discrimination.[134] In his dissent from the denial of certiorari, Justice Thomas opined that the plaintiff had presented ample evidence to satisfy the summary judgment standard.[135]

B. Ramifications if McDonnell Douglas *Is Abrogated*

The votes of two Justices will not be enough to grant certiorari in a case challenging the viability of the *McDonnell Douglas* framework nor to garner a majority vote for the abolition of that overworked doctrine. However, what if Justice Thomas, the former EEOC Chair, and Justice Gorsuch persuade other Justices that a textualist interpretation of Title VII requires such a result? How significant would the fall of *McDonnell Douglas* be? It is likely that the change in employment discrimination law would be momentous. As Justice Thomas said, "some courts treat *McDonnell Douglas* as a substantive legal standard that a plaintiff must establish to survive summary judgment."[136] It is applied pervasively to analyze summary judgment motions.[137] *McDonnell Douglas* remains by far the most important decision and the most important analysis in disparate treatment law specifically and consequently in employment discrimination law generally.[138]

Justice Thomas stated in *Ames* that he thought the *McDonnell Douglas* standard was too high for plaintiffs to meet at the summary judgment stage.[139] He opined that the plaintiff in *Hittle* had produced sufficient evidence to survive summary judgment.[140] Although in the early years after its initial articulation, the Court described the framework as an aid to

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134 Hittle v. City of Stockton, 101 F.4th 1000, 1016–18 (9th Cir. 2024).

135 *Hittle*, 145 S. Ct. at 764 (Thomas, J., dissenting from denial of certiorari).

136 *Id.* at 761–62.

137 For three post-*Ames* examples decided within two months of one another, see, e.g., Jenny v. L3Harris Techs., Inc., 144 F.4th 1194, 1198 (4th Cir. 2025) (applying *McDonnell Douglas* to a summary judgment motion); Vincent v. Jefferson Cnty. Bd. of Educ., 152 F.4th 1339, 1351–52 (11th Cir. 2025) (same); Stelly v. Dep't of Pub. Safety & Corrs. La. State, 149 F.4th 516, 521–22 (5th Cir. 2025) (same).

138 *See generally* SANDRA SPERINO, *MCDONNELL DOUGLAS*: THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW (2018).

139 *Ames*, 605 U.S. at 322–23 (Thomas, J. concurring). Professor Sperino made a similar argument regarding a specific stage of the *McDonnell Douglas* analysis. She argued that many courts' interpretation and application of the second stage of the analysis results in the courts requiring plaintiffs to prove more than is required by Rule 56. *See* Sperino, *supra* note 115, *passim*.

140 *Hittle*, 145 S. Ct. at 764 (Thomas, J., dissenting from denial of certiorari).

plaintiffs,[141] Justice Thomas is correct that *McDonnell Douglas* generally has not been favorable to plaintiffs on summary judgment motions.[142] If they were liberated from the rigid requirements of the three-stage analysis and courts' insistence on prima facie evidence and pretext evidence, more plaintiffs should survive motions for summary judgment.[143] Courts would instead evaluate such motions by asking whether plaintiffs have produced sufficient evidence to create a genuine dispute of material fact regarding whether the defendant employer was motivated in part by race, sex, etc. to take the adverse employment action.[144]

It is worth noting, however, that even if the Court were to liberate the summary judgment analysis from the strictures of *McDonnell Douglas*, it would not produce employment discrimination law that is uniformly more favorable for plaintiff-employees. This is because the more relaxed standard of causation[145]—motivating factor—is seemingly available under only Title VII, and plaintiffs asserting discrimination claims under other employment discrimination statutes must satisfy the more demanding standard of but-for causation. When Congress amended Title VII via the Civil Rights Act of 1991, adding the "motivating factor" standard, it did not similarly amend the ADEA, the retaliation provision in Title VII, nor the ADA.[146] Applying a textualist approach, the Court in *Gross v. FBL Financial Services, Inc.*[147] held that it presumed Congress acted intentionally in amending one statute and not the other.[148] Accordingly, the Court refused to infer congressional

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141 *See, e.g.*, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("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))).

142 *See, e.g.*, Noelle N. Wyman, *Because of* Bostock, 119 MICH. L. REV. ONLINE 61, 63, 67 (2021).

143 *See supra* notes 108–124 and accompanying text.

144 The Civil Rights Act of 1991 added the "motivating factor" standard to Title VII, *see* 42 U.S.C. §2000e-2(m), and afterwards, the Supreme Court held that direct evidence is not required for the "motivating factor" standard to apply to a case. Desert Palace, Inc. v. Costa, 539 U.S. 90, 98–99, 101 (2003).

145 The Supreme Court has characterized motivating factor as a "more forgiving," Bostock v. Clayton Cnty., 590 U.S. 644, 657 (2020), "relaxe[d]," EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 773 (2015), or "lessened," Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 349 (2013), standard compared with the but-for causation standard.

146 *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174 (2009).

147 557 U.S. 167 (2009).

148 *Id.* at 174. *Gross* addressed only the standard of causation under the ADEA, but the same result seems almost certain regarding the ADA. *See* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010) (applying "but-for" causation to ADA claims in light of *Gross*); Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 321 (6th Cir. 2012) (same); Gentry v. E. W. Partners Club Mgmt. Co., 816 F.3d 228, 235–36 (4th Cir. 2016) (joining the Sixth and Seventh Circuits in applying but-for causation). *But see* Hoffman v. Baylor Health Care Sys., 597 Fed. App'x. 231, 235 n.12 (5th Cir. 2015) (applying "motivating factor");

intent to similarly amend the ADEA.[149] Thus, plaintiffs asserting claims under the ADEA, Section 1981,[150] and Title VII retaliation claims[151] must prove but-for causation. This is likely so for the ADA as well.[152] Yet, even the plaintiffs who must prove discrimination by a but-for causation standard would benefit from not being required to fit their evidence into the prima facie case and pretext stages of *McDonnell Douglas*.[153]

As with *Muldrow* and *Ames*, it is predictable that the abrogation of *McDonnell Douglas*, based on a textual approach, would improve the substantive law for plaintiff-employees and worsen it for defendant-employers. It likely would increase the number of claims asserted, enhance the willingness of attorneys to represent plaintiffs in such cases, decrease the number of summary judgments in favor of defendants, and increase the number of settlements and perhaps trials.

III. IF THE TEXTUAL PURGE CONTINUES, WHAT OTHER DOCTRINES MIGHT BE SCRUBBED?

McDonell Douglas could be the next judicially created doctrine to fall to textualism. It is not the only possible victim, however. If the most ubiquitous and important analytical tool the Supreme Court has created in employment discrimination law has become vulnerable, what else might a textualist Supreme Court strip away? Title VII is a lean statute on which the Supreme Court and courts of appeals have slathered judicial gloss.[154] There are numerous rules, inferences, and doctrines that have no textual support, and most of them favor defendant-employers rather than plaintiff-employees.[155]

Siring v. Or. State Bd. of Higher Educ., 977 F. Supp. 2d 1058, 1063 (D. Or. 2013) (same). But *Siring* was overruled by the Ninth Circuit's holding that but-for causation applies under the ADA in *Murray v. Mayo Clinic*, 934 F.3d 1101, 1105–06 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2720 (2020). Likewise, the Fifth Circuit's holding in *Hoffman* was questioned by a federal district court in the Fifth Circuit in *Burns v. Nielsen*, 506 F. Supp. 3d 448, 466 (W.D. Tex. 2020).

149 *Gross*, 557 U.S. at 174–75.

150 Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. 327, 341 (2020).

151 Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 351–53 (2013). Although *Nassar* involved a claim asserted under Title VII, the Court stated that the retaliation provision is a different section of Title VII (Section 704), which Congress did not amend to add "motivating factor." *Id.*

152 *See supra* note 148.

153 *See supra* note 115.

154 *See, e.g.*, Chavez-Lavagnino v. Motivation Educ. Training, Inc. 767 F.3d 744, 749 (8th Cir. 2014) ("Title VII's materiality requirement is a judicial gloss on the meaning of 'discrimination.'").

155 Professor Sperino explains that "[e]mployment discrimination law is riddled with doctrines that tell courts to believe employers and not workers." Sandra F. Sperino, *Disbelief Doctrines*, 39 BERKELEY J. EMP. & LAB. L. 231, 231 (2018). This includes, but is not limited

If the seemingly sacrosanct *McDonnell Douglas* becomes vulnerable, then so are other atextual doctrines the Supreme Court has created. One possibility is the framework for liability based on supervisor harassment that the Court articulated in *Burlington Industries, Inc. v. Ellerth*[156] and *Faragher v. Boca Raton*.[157] Under this framework, an employer is strictly liable for supervisor harassment if the harassment results in a "tangible employment action," such as firing or demoting.[158] However, if there is no alleged tangible employment action, the employer may try to prove a two-part affirmative defense to avoid liability.[159] The *Muldrow* decision, rejecting atextual heightened standards for actionable adverse employment actions,[160] should pose a threat to the judge-made "tangible employment action" that likewise finds no textual support in the statute.[161] Further, if judicial constructs of the Supreme Court are vulnerable, then doctrines created by lower courts, such as the stray remarks doctrine, the same-actor inference, and the same-class inference that have never been ratified by the Supreme Court are on precarious footing.[162]

Justice Thomas's dissatisfaction with how the *McDonnell Douglas* framework categorizes evidence[163] should in turn call into question courts' categorization of statements as either "direct evidence," which is probative of discrimination, or "stray remarks," which are generally less significant and in some cases irrelevant.[164] The direct evidence and stray remarks

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to, "the stray comments doctrine, the same decisionmaker inference, and the same protected class inference." *Id.*

156 524 U.S. 742 (1998).

157 524 U.S. 775 (1998).

158 *Ellerth*, 524 U.S. at 761, 765.

159 *Id.* at 765; *Farragher*, 524 U.S. at 807. In both cases, the Court explained that the two-part defense includes "(a) that the employer exercises reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

160 *See* Muldrow v. City of St. Louis, 601 U.S. 346, 353 (2024).

161 *See, e.g.*, Chambers v. District of Columbia, 35 F.4th 870, 875 (D.C. Cir. 2022) ("The plain text of Title VII requires no more. Any additional requirement, such as *Brown*'s demand for 'objectively tangible harm,' is a judicial gloss that lacks any textual support.").

162 *See generally* Sperino, *supra* note 155.

163 Ames v. Ohio Dep't of Youth Servs., 605 U.S. 303, 322 (Thomas, J., concurring) (arguing that the framework is incompatible with evaluating motions for summary judgment because "it requires courts to maintain artificial distinctions between direct and circumstantial evidence").

164 Different circuits have different approaches to this categorization dichotomy. *See* Wallace v. Seton Family of Hosps., 777 Fed. App'x 83, 90 n.9 (5th Cir. 2019) (discussing this dichotomy); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 581–83 (1st Cir. 1999) (explaining the three schools of thought for defining what constitutes "direct evidence"); *see also* Elissa R. Hoffman, Note, *Smoking Guns, Stray Remarks, and Not Much In Between: A*

dichotomy should have effectively ended with the Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*,[165] but it still persists in different forms, depending on the circuit.[166]

The same-actor inference is another doctrine created by the lower courts that has no textual foundation in Title VII.[167] The same-actor inference permits the factfinder to infer that a decisionmaker who made a favorable decision regarding an employee is unlikely to make a subsequent adverse decision based on discriminatory animus against the same employee, at least within some undefined timeframe.[168] The inference is problematic for many

Critical Analysis of the Federal Circuits' Inconsistent Application of the Direct Evidence Requirement in Mixed-Motive Employment Discrimination Cases, 7 SUFFOLK J. TRIAL & APP. ADVOC. 181, 204 (2002).

165 530 U.S. 133 (2000). In *Reeves*, the Court criticized the Fifth Circuit's decision below for discounting age-related remarks by a supervisor because "they 'were not made in the direct context of Reeves's termination.'" *Id.* at 152. The Court explained that on a motion for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure, which challenges sufficiency of the evidence just as a motion for summary judgment does, the Fifth Circuit did not apply the proper standard of review. *Id.* at 152. Rather, the Fifth Circuit was required to "draw all reasonable inferences in favor of the nonmoving party" and should not have discounted the age-related comments. *Id.* at 150. A commentator examined the origins and evolution of the stray remarks doctrine and concluded that *Reeves* supports the conclusion that the fact finder should be allowed to consider "stray remarks" and decide what weight to accord them. Laina Rose Reinsmith, Note, *Proving an Employer's Intent: Disparate Treatment Discrimination and the Stray Remarks Doctrine After* Reeves v. Sanderson Plumbing Products, 55 VAND. L. REV. 219, 256–57 (2002); *see also* Reid v. Google, Inc., 50 Cal. 4th 512, 540 (2010) ("*Reeves* indicates that even if age-related comments can be considered stray remarks because they were not made in the direct context of the decisional process, a court should not categorically discount the evidence if relevant; it should be left to the fact finder to assess its probative value.").

166 The Fifth Circuit, whose decision was reversed by the Supreme Court in *Reeves*, still adheres to the stray remarks doctrine. *See* Jackson v. Cal-W. Packaging Corp., 602 F.3d 374, 380 n.27 (5th Cir. 2010). However, the Fifth Circuit has remarked that post-*Reeves*, it now proceeds more cautiously when applying the doctrine. Russell v. McKinney Hosp. Venture, 235 F.3d 219, 229 (5th Cir. 2000).

167 *See* Sperino, *supra* note 155, at 236–38.

168 *See id.* at 237. For discussion of its application in different circuits, see Buon v. Spindler, 65 F.4th 64, 84–85 (2d Cir. 2023) (explaining that the Second Circuit has only applied the same-actor inference under the ADEA and not for Title VII claims, but reasoning that the inference may still be "highly relevant" on motions for summary judgment because of its ability to help shift the burden under step two of the *McDonnell Douglas* test); Blasdel v. Northwestern Univ., 687 F.3d 813, 820 (7th Cir. 2012) (stating that although the Seventh Circuit has rejected the same-actor presumption, the same-actor evidence in the case undermined the accusation that the actor had prejudice against women since he hired the female plaintiff "and did so with great enthusiasm").

reasons, including whether it applies only to age discrimination claims[169] or also to Title VII claims[170] and what procedural weight it should be given.[171]

Almost all the same criticisms can be made of the more ill-defined same-class inference, which appears in at least two forms. One is that a decision-maker who shares a protected characteristic with a plaintiff would not discriminate against the plaintiff because of that shared trait.[172] Another is that to establish a prima facie case of discrimination when the plaintiff is replaced or a position is filled, it must be by someone who does not share the plaintiff's protected characteristic.[173]

For these judicially created doctrines or inferences, it is reasonable to argue that the underlying evidence is relevant in many cases and can sometimes be quite probative. However, the text of the statute does not support the emergence of a more consistent and weightier treatment or rule. The Supreme Court addressed such a principle in *Sprint/United Management Co. v. Mendelsohn*,[174] in which the issue was the admissibility of evidence

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169 *See Buon*, 65 F.4th at 84.

170 *See, e.g.*, Hackett v. United Parcel Serv., 736 Fed. App'x 444, 451 n.2 (5th Cir. 2018) (discussing how the inference supports the conclusion that UPS's decision was not race-based discrimination); Tellepsen Pipeline Servs., Co. v. NLRB, 320 F.3d 554, 569 n.4 (5th Cir. 2003) (stating that the inference has been applied to race, gender, and age discrimination cases). *But see Buon*, 65 F.4th at 84 (stating that the Second Circuit has never explicitly determined if the inference is applicable to Title VII claims).

171 For example, the Second Circuit stated that the same-actor inference is "highly relevant" to summary judgment for Title VII claims, but not for motions to dismiss. *Buon*, 65 F.4th at 85. Furthermore, some courts term it a *presumption* rather than an *inference*, thus according to it significantly more weight and procedural effect. *See, e.g.*, *Hackett*, 736 F. App'x at 451 n.2 (stating that the same-actor inference created a "presumption that animus was not present where the same actor responsible for the adverse employment action either hired or promoted the employee at issue"); Spears v. Patterson UTI Drilling Co., 337 Fed. App'x 416, 421–22 (5th Cir. 2009) (stating that the same-actor inference creates a presumption, but not an irrebuttable presumption). *But see* McKinney v. Off. of Sheriff of Whitley Cnty., 866 F.3d 803, 814 (7th Cir. 2017) (rejecting the idea that the inference is a conclusive presumption); Antonio v. Sygma Network, Inc., 458 F.3d 1177, 1183 (10th Cir. 2006) ("'[S]ame actor' evidence gives rise to an inference, rather than a presumption . . . .").

172 Sperino, *supra* note 155, at 236–37, 237 n.33. *See, e.g.*, Drummond v. IPC Int'l, Inc., 400 F. Supp. 2d 521, 532 (E.D.N.Y 2005) ("[A] well-recognized inference against discrimination exists where the person who participated in the allegedly adverse decision is also a member of the same protected class."); Dungee v. Ne. Foods, Inc., 940 F. Supp. 682, 688 n.3 (D.N.J. 1996) ("The fact that the final decision maker and both interviewers are members of the plaintiff's protected class (women) weakens any possible inference of discrimination.").

173 *See, e.g.*, Bailey v. KS Mgmt. Servs., LLC, 35 F.4th 397, 402 (5th Cir. 2022) ("As part of her prima facie case, [the plaintiff] must establish she was replaced in the position by someone outside her protected class."). *But see* Ware v. City of Panama City, 762 Fed. App'x 949, 951 (11th Cir. 2019) ("A plaintiff can establish a *prima facie* case even if . . . his replacement is a member of the protected class.").

174 552 U.S. 379 (2008).

where a plaintiff claiming she was discriminated against because of her age sought to introduce evidence that five other employees also suffered age discrimination.[175] The defendant sought to exclude the evidence because none of the other employees worked for the plaintiff's supervisor.[176] The Supreme Court declined to adopt a rule regarding such evidence as being "*per se* admissible or *per se* inadmissible."[177] Rather, the relevance of such evidence depends on evaluating various factors, and Rules 401 and 403 of the Federal Rules of Evidence vest the district courts with determining admissibility.[178] The same principle should apply to many of the doctrines, inferences, and presumptions regarding evidence in employment discrimination cases. The text of the statutes simply does not support them, and the relevance, admissibility, and probative value will vary with the facts of the cases.

Justice Thomas, writing for the majority, asserted in *Sprint/United* that it is the district court's responsibility to decide questions of admissibility in each case.[179] That statement echoes his *Ames* concurrence in which Justice Thomas declared that district courts are "well equipped" to decide summary judgment motions without the aid of the *McDonnell Douglas* framework.[180]

CONCLUSION: EMPLOYMENT DISCRIMINATION LAW SHAPED BY A TEXTUALIST APPROACH

Although it is not uniformly true, generally the law that has developed in the courts over six decades under the employment discrimination statutes has been decidedly favorable to employer-defendants. It is little wonder that plaintiffs have a lower success rate in employment discrimination cases than in other types of civil litigation.[181] The Supreme Court's textualist approach to interpreting Title VII in recent years, however, is eviscerating some of the judicial doctrine lacking textual support that is favorable to defendants.[182] *Muldrow* and *Ames* are the most recent examples. Justice Thomas's *Ames* concurrence and *Hittle* dissent from denial of certiorari, in which he fires a textualist salvo at the *McDonnell Douglas* framework, may be a harbinger

175 *Id.* at 381–82.

176 *Id.* at 382.

177 *Id.* at 381.

178 *Id.* at 388.

179 *Sprint/United Mgmt.*, 552 U.S. at 388.

180 Ames v. Ohio Dep't of Youth Servs., 605 U.S. 303, 326 (Thomas, J., concurring).

181 *See, e.g.*, Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 127–31 (2009); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 558–61 (2001).

182 As stated earlier, the Author does not claim that the Supreme Court's textualism always yields law that is favorable to employees and plaintiffs. *See supra* note 9.

of what would be the most significant change in favor of employee-plaintiffs. Whatever comes next, it seems that textualism has become a tool for the Court to use to strip Title VII down to its statutory essentials, and the results are generally favorable for employee-plaintiffs.