Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof

Charles A. Sullivan
CIRCLING BACK TO THE OBVIOUS: THE CONVERGENCE OF TRADITIONAL AND REVERSE DISCRIMINATION IN TITLE VII PROOF

CHARLES A. SULLIVAN*

TABLE OF CONTENTS

INTRODUCTION ...................................... 1033
I. TITLE VII DISPARATE TREATMENT CLAIMS BY
   WHITES AND MALES .............................. 1039
   A. The Rule: Title VII Prohibits Race Discrimination 1039
   B. The Exception: Racial or Gender Preferences
      Are Permissible Under Valid Affirmative Action Plans 1040
II. PROVING AN INDIVIDUAL CASE OF
    REVERSE DISCRIMINATION .................... 1054
       A. The Parameters of the Debate .............. 1056
       B. What Are Background Circumstances? .... 1065
       C. Is an Affirmative Action Plan a Sufficient
          Background Circumstance? ............... 1071

* Professor of Law, Seton Hall Law School. B.A., Siena College, 1965; LL.B., Harvard Law School, 1968. I want to thank my co-authors, Michael J. Zimmer and Rebecca Hanner White, for graciously permitting me to draw on their work, as well as for their insightful comments on earlier drafts. I also thank my colleagues: Ed Hartnett, whose questions and observations pushed me further down the road than I was originally prepared to go; Michael Risinger, who believes he may, after a quarter of a century of trying, have taught me what a presumption is; Tristin Green, who helped me unpack several of my more confused thoughts; Thomas Healey, who provided some ingenious insights, which are reflected in the text; Michelle Adams who, among other contributions, demanded that I take a position; Erik Lillquist, who views my criticisms of the McDonnell Douglas proof structure as too wishy-washy; Mark Alexander for many thoughtful comments e-mailed from abroad; Timothy Glynn for suggesting what became the title of this piece and for his predictions, which were often far in advance of where the law actually was at any given time; and Carl Coleman and Kathleen Boozang who, among other contributions, ruthlessly corrected my grammar. I am also indebted to my research assistants, Mara Timourian, Seton Hall Class of ’04, Lauren Walter and Katherine Maskevich, both Seton Hall Class of ’05, for their invaluable help, not to mention patience, and Whitney Smith, Seton Hall Class of ’06, for getting me through the final stages of editing.
III. IS REQUIRING “BACKGROUND CIRCUMSTANCES” ITSELF REVERSE DISCRIMINATION? ........................................... 1080
   A. The Growing Rejection of the Test ...................................... 1081
   B. Coming to Grips with the Problem:
       Different Perceptions of Reality ........................................... 1084
   C. Coming to Grips with the Problem: Reality Itself ................. 1093
IV. IS “BACKGROUND CIRCUMSTANCES” CONSTITUTIONAL? ............ 1099
V. ELIMINATING FORMAL PROOF STRUCTURES FOR BOTH 
   TRADITIONAL AND REVERSE DISCRIMINATION CASES ................. 1118
VI. THE EFFECTS OF ADOPTING A “SUFFICIENT EVIDENCE” 
   APPROACH ........................................................................... 1129
CONCLUSION ............................................................................. 1134
INTRODUCTION

In a recent article in the Harvard Law Review, Professor Richard Primus suggests that the next great equal protection battle on the race front will be fought over whether limiting Title VII's disparate impact theory to racial minorities is constitutional. Although I have responded in the Northwestern University Law Review that the constitutional question can—and under normal principles of statutory interpretation and constitutional adjudication should—be avoided by the counterintuitive expedient of extending the disparate impact theory to whites, this Article takes issue with Professor Primus on another ground. That is, the next great equal protection battle on the race front may be fought not over disparate impact but instead over disparate treatment discrimination: whether Title VII's foundational proof structure for individual disparate treatment cases—the "McDonnell Douglas" prescription—is constitutional.

The McDonnell Douglas approach, which has been refined by a dozen Supreme Court cases and invoked in literally tens of thousands of lower court decisions in the thirty years since its announcement, was called into question by the Supreme Court's 2003 decision in Desert Palace, Inc. v. Costa. This Article considers the implications of Desert Palace for the McDonnell Douglas proof scheme, but adds an unusual perspective—the rising dissatisfaction in the lower

3. Individual disparate treatment is to be distinguished from systemic disparate treatment, sometimes called pattern and practice cases. Systemic cases focus on either a policy alleged to be discriminatory, see, e.g., City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978), or a pattern of discrimination usually evidenced by statistics, see, e.g., Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977). By contrast, individual disparate treatment cases involve challenges to discrete employment decisions. Both kinds of intentional discrimination are to be distinguished from claims of disparate impact discrimination. Under that theory, which is developed in more detail in the Primus and Sullivan articles, supra notes 1-2, an employment practice that is shown to have an adverse disparate impact on protected groups will be found illegal unless the defendant demonstrates that it is justified by business necessity and related to the job in question.
5. 539 U.S. 90 (2003); see infra notes 372-83 and accompanying text.
courts with the application of formalized proof structures to reverse discrimination claims.

My central message is that the increasing judicial concern about the constitutionality of developing race-specific proof structures can be avoided by treating claims of discrimination by whites the same as claims by African Americans, and by freeing both from the McDonnell Douglas framework. Plaintiffs of any race should need merely to present evidence from which a reasonable jury could find race discrimination. This circling back to the obvious will permit severing the thick encrustation of precedents in both the traditional and reverse discrimination areas that comprise the Gordian knot of Title VII law. In addition, this is a kind of harmonic convergence of the increasing dissatisfaction with both McDonnell Douglas in traditional discrimination cases, and with the law's approach to reverse discrimination. I caution, however, that a return to the obvious will require developing new methods of proof if the new regime is to permit meaningful attacks on the endemic problem of discrimination.

The core question for reverse discrimination arises from the understandable reluctance of courts to infer racial discrimination against whites in circumstances in which they will readily infer racial discrimination against African Americans and other racial minorities. Indeed, lurking under the question of proof structures is the question, under the retrospective lens of present equal protection doctrine, of whether Title VII is constitutional, or at least how its constitutionality may be justified.

The last great equal protection battle recently ended with the defenders of affirmative action in education narrowly preserving the ability, under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964, to accord limited racial preferences in the pursuit of diversity. As anyone not on a desert island knows, the Supreme Court, in 5-4 votes in Grutter v. Bollinger and Gratz v. Bollinger, struck down the University of Michigan's admissions plan for the undergraduate program, but upheld Michigan Law

8. See id. at 275-76.
School’s more individualized program. Although the nation’s colleges must scurry to revise their admissions policies to conform to the new dispensation, Grutter marked the first majority in favor of affirmative action in decades. Yet, however important, Grutter is a very circumscribed opinion, and affirmative action remains constitutionally suspect in most areas other than education.

Lost in the massive national debate that crystallized in Grutter over the constitutionality of racial preferences in higher education is the parallel question of “reverse discrimination” in employment under Title VII. That topic is of increasing practical importance. Last year, the Eleventh Circuit affirmed a judgment of $17,000,000 to seven white librarians in their Title VII suit against the Atlanta Fulton Public Library System, and EEOC filings increasingly challenge reverse discrimination as opposed to traditional discrimination. Like the dispute over affirmative action/reverse discrimination...

9. See Grutter, 539 U.S. at 343. In a startling passage in Grutter, Justice O’Connor, the swing vote, suggested that the decision had a shelf-life of only twenty-five years. See id. (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”). That expectation, however, might prove optimistic as the Court remains poised (as admittedly it has been for a while) on the verge of several changes in personnel.


11. See Bogle v. McClure, 332 F.3d 1347 (11th Cir. 2003). The white plaintiffs had been transferred from the central library to various branches but had suffered no diminution in pay. Id. at 1354. More surprising than the verdict was the fact that it was founded entirely on claims of emotional harm resulting from “being transferred from meaningful, supervisory positions to dead-end, nonmanagerial jobs” for racial reasons. Id. at 1358. The jury awarded each plaintiff $1 million, but the court cut the award in half. Id. at 1359. The remainder of the judgment was punitive damages, which the court substantially upheld. See id. at 1359-60.

12. See 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, 993 n.2 (2000) (noting that “allegations of reverse discrimination have blossomed in various sub-cultures of our society”).

13. This Article uses the adjective “traditional” to describe discrimination claims of African Americans, other racial minorities, and women (certainly the primary intended beneficiaries of Title VII), as well as to distinguish these claims from “reverse discrimination” claims of whites and males.

As with many “back formations” (think analog clock), the alternatives to “reverse discrimination” seem problematic. For example, using “regular” or “normal” to describe what this Article calls traditional discrimination seems to validate that discrimination. Some writers use terms like “invidious” to describe traditional discrimination (with “benign” for reverse discrimination), but this phrasing suggests that reverse discrimination ought not to be impermissible, which is simply not the law. Although the use of “traditional” and “reverse...
discrimination for public entities under the Constitution, the question of reverse discrimination/affirmative action under Title VII has generated enormous controversy but has evolved very differently. Simply summarized, although Title VII in theory bars race discrimination against any race, it allows affirmative action racial preferences to a greater extent than does the Equal Protection Clause. 14

This results from the confluence of two phenomena. The first, and better known, is the Supreme Court's more permissive test for the validity of affirmative action plans under Title VII than under the Equal Protection Clause. Thus, although showing that an employer consciously uses race or gender to advance the employment opportunities of minorities and women may establish a prima facie case of disparate treatment discrimination, a valid affirmative action plan is a legitimate reason for the use of race or sex in employment decisions, and the standards for validity are relatively relaxed. 15 If the plan is valid, decisions taken pursuant to it are not discriminatory within the meaning of the statute. Accordingly, a discrimination is scarcely value-free, see Joyce A. Hughes, "Reverse Discrimination" and Higher Education Faculty, 3 MICH. J. RACE & L. 395, 414 (1998) ("The term [reverse discrimination] is 'covert[ly] ... [sic] political [and] ... should be removed from the vocabulary of any serious academician .... As it is currently used, it should be identified as an appeal to a particular political ideology or policy preference, rather than accepted as an expression which is neutral in tone....") (quoting Philip L. Fetzer, Reverse Discrimination: The Political Use of Language, 12 NAT'L BLACK L.J. 212, 212-13 (1993)), it has the advantage of clarity and, on balance, seems the best choice available.


14. This Article focuses on the governing legal principles, leaving more theoretical perspectives to another time. Such perspectives, particularly antisubordination theory, view discrimination against racial minorities and women as radically different than discrimination against white males. See, e.g., Ruth Colker, Anti-Subordination Above All: Sex, Race, and Equal Protection, 61 N.Y.U. L. REV. 1003, 1009 (1986) ("It is more invidious for women or blacks to be treated worse than white men than for men or whites to be treated worse than black women ... because of the differing histories and contexts of subordination faced by these groups."); Darren Lenard Hutchinson, "Unexplainable on Grounds Other than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence, 2003 U. ILL. L. REV. 615 (arguing that the Court should adhere to an anti-subordination theory of equality, such that the Court bases its constitutional rulings on the extent to which historically subordinated classes of people are affected). The law has nevertheless developed differently. See infra Part I.A.

15. See infra Part I.B.
reverse discrimination plaintiff making a systemic attack must prove both that she was disadvantaged by an affirmative action plan and that the plan is invalid.\textsuperscript{16}

The second phenomenon is less well recognized. In the past, lower courts had been reluctant to recognize discrete cases of racial preferences, i.e., individual cases where the employer did not seek to shield its action behind an affirmative action plan. A typical formulation was that a reverse discrimination plaintiff must have had “direct evidence” of discrimination against whites or, for a plaintiff forced to use circumstantial evidence, must have shown as part of her prima facie case “background circumstances” demonstrating that the employer was the “unusual employer” who so discriminates.\textsuperscript{17} Whether more demanding requirements for proving actionable reverse discrimination under Title VII as opposed to the Equal Protection Clause are a cause for celebration or consternation depends on the observer, but that courts were imposing these requirements was both clear and yet largely unnoticed.

More recently, however, there has been a shift toward making reverse discrimination attacks under the statute easier to mount. This has occurred on two fronts. First, the intersection of the Supreme Court’s approval of voluntary affirmative action plans with individual cases claiming reverse discrimination has become more complicated. In “first generation” cases, the plaintiff challenged a particular decision and the employer justified its action by reliance on an affirmative action plan. The litigation then proceeded on familiar grounds to determine if the plan was valid under criteria the Court had announced. In current second generation cases, however, typically neither side invokes the affirmative action plan.\textsuperscript{18} Rather, the plaintiff claims the plan is a sufficient “background circumstance”; by not claiming that she was denied an opportunity pursuant to the plan, plaintiff avoids having also to prove the plan was invalid. To prove racial discrimination in the first place, however, she argues that the existence of a plan (or, less concretely, a commitment to “diversity” or “equal employment opportunity”) is a “background circumstance” permitting her to establish more

\textsuperscript{16} See id.
\textsuperscript{17} See infra note 120 and accompanying text.
\textsuperscript{18} See infra p. 24.
readily her prima facie case of reverse discrimination. To what extent such a showing will be permitted needs to be addressed, especially in light of the possible concomitant disincentive for affirmative action plans. More surprising than plaintiffs avoiding challenges to affirmative action plans is that defendants, for reasons we will explore, rarely seek shelter behind such plans. Rather, they simply deny any racial preference in the first place.

The second front concerns the increasingly common challenges by reverse discrimination plaintiffs to the requirement that, absent direct evidence, they must show "background circumstances" that the employer discriminates against whites. They claim both that the requirement is incoherent and that the requirement itself constitutes reverse discrimination. That is, plaintiffs contend that they are being disadvantaged compared to minorities: whereas a minority bringing a "traditional" discrimination case makes out one element of her prima facie case by showing merely that she is a minority, a white plaintiff must satisfy the "additional" requirement of "background circumstances."

This Article explores these themes as follows. Part I first sketches the law's approach to reverse discrimination, that is, its position on both the validity of affirmative action plans and its approach to individual claims outside of the context of such plans. Part II turns to a more detailed treatment of individual disparate treatment reverse discrimination claims, seeking to ascertain what standards the lower courts have developed. The focus of this Part is on the background circumstances test, including whether an affirmative action plan is a background circumstance. Part III analyzes the emerging question of whether a requirement of background circumstances, or a similar test, is itself in some sense reverse discrimination. Part IV investigates the question of whether the background circumstances test is constitutional. Part V explores the alternatives to background circumstances in proving individual cases of reverse discrimination. In this setting, the Article considers the recent erosion of the McDonnell Douglas test by Desert Palace and explores whether a unified approach to all discrimination claims using the Desert Palace approach resolves a host of problems.

19. See id.
CIRCLING BACK TO THE OBVIOUS

for Title VII litigation. Finally, Part VI considers the implications of this new world of proof for both traditional and reverse discrimination claimants.

I. TITLE VII DISPARATE TREATMENT CLAIMS BY WHITES AND MALES

A. The Rule: Title VII Prohibits Race Discrimination

Early in its history, the Supreme Court held that Title VII barred discrimination against whites, not merely discrimination against African Americans and other racial minorities. In McDonald v. Santa Fe Trail Transportation Co.,\(^{20}\) white plaintiffs claimed they had been disciplined more severely than African American employees involved in the same incident of theft from their employer. Although the district court had found no claim stated because the discrimination was against whites, the Supreme Court held that Title VII protects everyone, without regard to race, from employment discrimination because of race:

Title VII of the Civil Rights Act of 1964 prohibits the discharge of "any individual" because of "such individual's race." Its terms are not limited to discrimination against members of any particular race.... 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 Negroes and Jackson white.\(^{21}\)

Based on the reasoning of Santa Fe, men are protected by Title VII against sex discrimination because the statute was not drafted to protect merely the historic victims of discrimination.\(^{22}\) Further,

\(^{21}\) Santa Fe, 427 U.S. at 278, 280 (citation omitted) (quoting 42 U.S.C. § 2000e-2(a)(1) (2000)). The Court dismissed language from an earlier case, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), describing a plaintiff's proof as requiring that "he belongs to a racial minority." The Santa Fe Court stated that the requirement "of this sample pattern of proof was set out only to demonstrate 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." Santa Fe, 427 U.S. at 279 n.6.
\(^{22}\) See, e.g., Maitland v. Univ. of Minn., 260 F.3d 959, 964-65 (8th Cir. 2001); Quick v. Donaldson Co., 90 F.3d 1372, 1377 (8th Cir. 1996).
despite language in 42 U.S.C. § 1981 that was more susceptible of being construed to protect minorities only, the Court held that the statute also precludes discrimination against whites.\textsuperscript{23} The language guaranteeing rights “enjoyed by white citizens”\textsuperscript{24} emphasizes the racial nature of the discrimination prohibited and does not limit those who can invoke its protections.\textsuperscript{25} In sum, all employees are protected from race discrimination under Title VII and § 1981, and from sex discrimination under Title VII.

B. The Exception: Racial or Gender Preferences Are Permissible Under Valid Affirmative Action Plans

This reasoning suggests, of course, a pure color- (and sex-) blind model under the statute, but things were not to be so simple. A footnote in \textit{Santa Fe} stated that the defendant “disclaims that the

\begin{itemize}
\item \textsuperscript{23} Santa Fe, 427 U.S. at 295-96. The main thrust of 42 U.S.C. § 1981(a) is to prohibit race discrimination in contracts: “All persons ... shall have the same right in every State and Territory to make and enforce contracts ... and to the full and equal benefit of all laws ... as is enjoyed by white citizens....” 42 U.S.C. § 1981(a) (2000). This has generally been interpreted to include all employment, although some lower courts have viewed at-will employment, at least in some states, as not contractual, and, therefore, not within § 1981. See generally Joanna L. Grossman, \textit{Making a Federal Case out of It: Section 1981 and At-Will Employment}, 67 BROOK. L. REV. 329, 341-45 (2001) (reviewing cases); Harry Hutchison, \textit{The Collision of Employment-At-Will, Section 1981 & Gonzalez: Discharge, Consent and Contract Sufficiency}, 3 U. PA. J. LAB. & EMP. L. 207 (2001) (same).
\item \textsuperscript{24} 42 U.S.C. § 1981(a).
\item \textsuperscript{25} Santa Fe, 427 U.S. at 287. Although § 1981 prohibits “race” discrimination, what constitutes racial discrimination may be different under that statute than under Title VII. Some cases that, under Title VII, would be treated as national origin discrimination, will be treated as racial discrimination under § 1981. In \textit{Saint Francis College v. Al-Khazraji}, 481 U.S. 604 (1987), the Court held that an Arab, who would now be considered a Caucasian, could challenge actions by his white-dominated employer as race discrimination because he would have been considered a member of a separate race when § 1981 was enacted shortly after the Civil War. See id. at 612-13. The Court stated:

\begin{quote}
Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.... If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin [Iraq], or his religion, he will have made out a case under § 1981.
\end{quote}
\textit{Id.} at 613 (footnote omitted). Thus, § 1981 prohibits race discrimination in contracts, including employment contracts, with race defined according to the understanding of the Congress that enacted it in 1866.
\end{itemize}
actions challenged here were any part of an affirmative action program," and the Court emphasized that "we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted." This suggested the possibility of a gaping hole in the color-blind model, which became a reality when the Supreme Court upheld voluntary affirmative action plans under Title VII. It approved limited racial preferences in *United Steelworkers of America v. Weber* and limited gender preferences in *Johnson v. Transportation Agency, Santa Clara*

---


27. Where an affirmative action plan is imposed by a state actor, it will be subject to both Title VII analysis and constitutional review. Because equal protection analysis is far more stringent, see infra notes 266-69 and accompanying text, an affirmative action plan that satisfies the Equal Protection Clause is likely to satisfy Title VII. One exception is diversity, which has recently been found to be a compelling interest under the Constitution, see infra notes 307-14 and accompanying text, but may not suffice under Title VII. See infra notes 84-89 and accompanying text.

There can also be complications when a consent decree (or, for that matter, a litigated decree) is involved. *Martin v. Wilks*, 490 U.S. 755 (1989), as modified by the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(n) (2000), permits nonparties to attack employment decisions taken pursuant to prior decrees because they are not bound by them. See generally CHARLES A. SULLIVAN, MICHAEL J. ZIMMER, & REBECCA HANNER WHITE, 2 EMPLOYMENT DISCRIMINATION: LAW AND PRACTICE § 12.20[E] (3d ed. 2002); Andrea Catania & Charles A. Sullivan, *Judging Judgments: The 1991 Civil Rights Act and the Lingering Ghost of Martin v. Wilks*, 57 BROOK. L. REV. 995 (1992); Cynthia L. Fountaine, *Due Process and the Impermissible Collateral Attack Rule in Employment Discrimination Cases: An Analysis of Section 108 of the Civil Rights Act of 1991*, 58 U. PITT. L. REV. 435 (1997). For example, in *Donaghy v. City of Omaha*, 933 F.2d 1448 (8th Cir. 1991), the employer had an affirmative action plan and was also bound by a consent decree. See *id.* at 1456. The court found that the affirmative action plan "did not dictate the employment decision that Donaghy, [the employee], ha[d] standing to challenge." *Id.* Rather, that decision was taken pursuant to the consent decree. *Id.* Although Donaghy could "challenge the validity of employment decisions made pursuant to a consent decree," *id.* at 1457, he was unable "to prove that the race-conscious measures taken pursuant to the consent decree were invalid because the consent decree (1) did not serve a remedial purpose, or (2) was not tailored narrowly enough." *Id.* at 1458.

28. Affirmative action concepts developed under Title VII apply to § 1981 claims alleging reverse discrimination. If an affirmative action plan is valid under Title VII, therefore, actions based upon it will not violate § 1981. A plan that is invalid under Title VII, however, will not excuse racially motivated decisions challenged under § 1981. See *Schurr v. Resorts Int'l Hotel*, Inc., 196 F.3d 486, 498-99 (3d Cir. 1999); Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate, 295 F. Supp. 2d 1141, 1165 (D. Haw. 2003).

cases that continue to define the legality of affirmative action plans under the statute.\textsuperscript{31}

In Weber, the Court broadly upheld "affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."\textsuperscript{32} In that case, the private employer and the union representing its workers reached a national collective bargaining agreement that included a special provision for on-the-job training for craft jobs.\textsuperscript{33} Before this plan, incumbent employees had not been considered for skilled craft jobs unless they had previous craft experience.\textsuperscript{34} Because the unions representing those crafts historically had excluded blacks, few had the requisite craft


\textsuperscript{31} It has been argued that the Civil Rights Act of 1991, enacted after both Weber and Johnson, precludes voluntary affirmative action plans altogether. The new statute amended Title VII by adding section 703(m), which provides "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (2000). Given that this provision makes no exception for affirmative action, some contend that the statutory language categorically precludes any employment action for which race, sex, etc., was a motivating factor, whether or not characterized as affirmative or benign. David A. Cathcart & Mark Snyderman, The Civil Rights Act of 1991, 8 LAB. LAW. 849, 876-80 (1992).

Reading the statute in that manner, however, is unjustified. Another provision of the 1991 Act makes clear that Congress did not intend it to prohibit affirmative action. Section 116 of the Act provides: "Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law." 42 U.S.C. § 1981 note (2000). Although the 1991 Act does not directly adopt the then-existing law of affirmative action, the clear suggestion is that existing precedents are valid. At the least, the statute envisions that some affirmative action plans are consistent with Title VII.

\textsuperscript{32} Weber, 443 U.S. at 209.

\textsuperscript{33} See id. at 197. The agreement was the result of the affirmative action duty imposed on government contractors. See generally James E. Jones, Jr., The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities, 70 IOWA L. REV. 901 (1985) (examining Executive Order 11,246 as the genesis of modern affirmative action plans); James E. Jones, Jr., Twenty-One Years of Affirmative Action: The Maturation of the Administrative Enforcement Process Under the Executive Order 11,246 as Amended, 59 CHI.- KENT L. REV. 67 (1982) (examining the evolution of the executive order enforcement process with regard to affirmative action); Debra A. Millenson, Whither Affirmative Action: The Future of Executive Order 11,246, 29 U. MEM. L. REV. 679 (1999) (discussing constitutional challenges to Executive Order 11,246 and examining the viability of government-mandated affirmative action programs in the twenty-first century). Yet, the Weber Court did not seem to consider this relevant.

\textsuperscript{34} Weber, 443 U.S. at 198.
experience. The new labor contract required each plant to set a goal of minority representation in each craft matching the minority population in the surrounding labor market. Participants in the training program were selected by seniority from among those qualified incumbent employees, with one minority employee to be selected for each white employee until the goal of minority representation was met. At the Louisiana plant in question in Weber, the minority goal in craft jobs was thirty-nine percent because the black work force in the area represented thirty-nine percent of the surrounding labor market. As few black incumbent employees had high seniority, the one-for-one selection system meant that the blacks selected for training had less seniority than some whites not selected. The plaintiff, Brian Weber, was one of those whites.

The majority examined the legislative history and the historical context leading to enactment of Title VII and concluded that the term "discrimination" as used in Title VII did not apply to race-conscious decision making pursuant to a valid affirmative action plan. First, the primary purpose in enacting the prohibition against discrimination in Title VII was "to open employment opportunities for [blacks] in occupations ... traditionally closed to them." To employ Title VII to foreclose voluntary efforts to provide such opportunities would frustrate that purpose. Second, because Congress expected that passage of Title VII would lead to voluntary compliance, the Act could not be interpreted to proscribe voluntary affirmative action. Third, section 703(), which provides that employers with racially imbalanced workforces are not required to grant preferential treatment, was the product of legislative

35. Id.
36. See id. at 199.
37. Id.
38. Id. at 198-99.
39. Id. at 199.
40. Id.
41. See id. at 201-07.
42. Id. at 208.
43. Id. at 203 (quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey)).
44. See id.
45. Id. at 204.
compromise\textsuperscript{47} that made it clear that Congress intended to permit, but not require, voluntary affirmative action.\textsuperscript{48}

The Court reaffirmed Weber in Johnson v. Transportation Agency, Santa Clara County, California,\textsuperscript{49} and extended it to affirmative action on behalf of women.\textsuperscript{50} The employer promoted a woman to the position of road dispatcher,\textsuperscript{51} making her the first woman in the 238 skilled craft worker jobs.\textsuperscript{52} Although Diane Joyce was qualified for the job, the district court found that her sex was the determining factor in her selection.\textsuperscript{53} A male, who scored two points higher on an interview, sued, claiming reverse discrimination.\textsuperscript{54} The Court rejected that claim after finding the affirmative action plan valid.\textsuperscript{55}

The Johnson opinion developed the standards for validity in more detail and even more permissively than had Weber; however, it laid down a counterintuitive litigation structure to address these cases. In the wake of Weber, many had viewed an affirmative action plan as an affirmative defense much like the bona fide occupational qualification defense (BFOQ)\textsuperscript{56} under Title VII.\textsuperscript{57} In BFOQ cases, the

\begin{footnotes}
47. See Weber, 443 U.S. at 205-06.
48. Id. at 206-07.
50. See id. at 641-42.
51. Id. at 624-25.
52. Id. at 621.
53. Id. at 625.
54. Id.
55. See id. at 641-42.
56. Section 703(e) of Title VII provides:
   Notwithstanding any other provision of this subchapter ... it shall not be an unlawful employment practice for an employer to hire and employ employees ... on the basis of ... religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise....
57. The BFOQ has been interpreted as a very narrow exception to the statute's basic nondiscrimination command. See Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991) ("The BFOQ defense is written narrowly, and this Court has read it narrowly."); Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (stating that BFOQ is "an extremely narrow exception to the general prohibition of discrimination on the basis of sex"); see also W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 412 (1985) (stating the same for BFOQ in context of Age Discrimination in Employment Act). See generally SULLIVAN, ZIMMER, & WHITE, 1 EMPLOYMENT DISCRIMINATION: LAW AND PRACTICE, supra note 27, § 3.05. There is no statutory BFOQ for race. See generally William R. Bryant, Note, Justifiable Discrimination: The Need
plaintiff has the burden of persuasion of proving discrimination, and the defendant then has the burden of persuasion as to the elements of the BFOQ defense.\textsuperscript{58} The BFOQ, therefore, is not a denial of discrimination; rather, it permits employers to justify conduct that is discriminatory.

In stark contrast to this approach, \textit{Johnson} placed on plaintiffs the burden of persuasion of the invalidity of the employer's affirmative action plan.\textsuperscript{59} A valid plan, therefore, is not an affirmative defense to a charge of discrimination; rather, any preferences provided pursuant to a valid plan do not constitute discrimination in the first place, at least not "discrimination" within the meaning of Title VII. The justification for this is the triumph of history over logic: the Court perceived that Congress would not have wanted the statute to reach such conduct.\textsuperscript{60}


\textsuperscript{58.} See, e.g., \textit{Johnson Controls}, 499 U.S. at 200 ("We hold that Johnson Controls' fetal-protection policy is sex discrimination forbidden under Title VII unless respondent can establish that sex is a 'bona fide occupational qualification.'").

\textsuperscript{59.} \textit{Johnson}, 480 U.S. at 626-27:

Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid. As a practical matter, of course, an employer will generally seek to avoid a charge of pretext by presenting evidence in support of its plan. That does not mean, however, that reliance on an affirmative action plan is to be treated as an affirmative defense requiring the employer to carry the burden of proving the validity of the plan. The burden of proving its invalidity remains on the plaintiff. \textit{Id.}; see, e.g., \textit{Plott v. Gen. Motors Corp.}, 71 F.3d 1190, 1193 (6th Cir. 1995); \textit{Cerrato v. S.F. Cmty. Coll. Dist.}, 26 F.3d 968, 973 (9th Cir. 1994).

\textsuperscript{60.} \textit{See supra} text accompanying notes 41-48. This is not known even in the traditional discrimination context. No one seems to doubt that sex-differentiated dress and grooming codes constitute sex discrimination in an analytic sense, but the courts have resolutely refused to view such rules as discriminatory within the meaning of Title VII. See, e.g., \textit{Harper v. Blockbuster Entm't Corp.}, 139 F.3d 1385, 1387 (11th Cir. 1998) (holding that different hair length standards for men and women do not violate Title VII); \textit{Tavora v. N.Y. Mercantile Exch.}, 101 F.3d 907, 908 (2d Cir. 1997) (same); \textit{Willingham v. Macon Tel. Publ'g Co.}, 507 F.2d 1084, 1092 (5th Cir. 1975) (same). \textit{See generally SULLIVAN, ZIMMER, & WHITE, 2 EMPLOYMENT DISCRIMINATION LAW AND PRACTICE, supra note 27, § 7.05; Katharine T. Bartlett, Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality, 92 MICHL. REV. 2541 (1994) (arguing that community norms are too discriminatory to define workplace equality); Mary Anne C. Case, Disaggregating Gender from Sex and
A more complicated rationale might be that an intent to help traditionally excluded classes does not constitute the kind of intent that Title VII prohibits. There are other hints of such an approach in Supreme Court cases, even if judges, such as Posner, claim that an intent to favor X over Y necessarily embraces an intent to disfavor Y relative to X. An approach that looks to the motivation of the decision maker, however, rather than to whether he intended to treat differently on account of the prohibited characteristic, cuts against strong Court precedent that the intent that matters for statutory purposes is not animus but merely the intent to treat individuals differently on the basis of a prohibited trait.

Obviously, this paradigm benefits employers and disadvantages reverse discrimination plaintiffs because of the placement of the burden of proof. Perhaps as significant, however, it permits a court to acknowledge racial and gender preference without describing them as discriminatory. This might explain another puzzling aspect of Johnson. In assessing the case, the Court used the inferential method of proof established in McDonnell Douglas Corp. v. Green, even though Johnson adduced what would probably qualify under


61. See Martin v. Wilks, 490 U.S. 755, 788 (1989) (5-4 decision) (Stevens, J., dissenting) ("The fact that an employer is acting under court compulsion may be evidence that the employer is acting in good faith and without discriminatory intent.") (citations omitted).

62. See infra text accompanying note 188.

63. See City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978). Despite admitting that an employer's policy of requiring greater pension contributions from women than from men was rational and not motivated by animus but was based on the reality that women live longer than men, the Court wrote:

An employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the Act. Such a practice does not pass the simple test of whether the evidence shows "treatment of a person in a manner which but for that person's sex would be different." It constitutes discrimination....

Id. at 711 (quoting Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1170 (1971)); see also Johnson Controls, 499 U.S. at 199-200 ("[T]he absence of a malevolent motive does not convert a facially discriminatory policy [(a "fetal protection policy") into a neutral policy with a discriminatory effect.... The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a) and thus may be defended only as a BFOQ.").

64. See 411 U.S. 792, 802 (1973); infra notes 121-27 and accompanying text.
later precedents as "direct evidence" from the decision maker that the woman's sex had influenced the selection decision.\textsuperscript{65} Under the \textit{McDonnell Douglas} analysis, the Court viewed the employer's explanation that the employer had relied upon its affirmative action plan as a legitimate, \textit{nondiscriminatory} reason.\textsuperscript{66} At that point, the focus of the litigation shifted not to the basis of the challenged action (admittedly sex), but to whether the plan justifying that action was valid.\textsuperscript{67} On that issue, the reverse discrimination plaintiff had the burden of persuasion that the plan is invalid.\textsuperscript{68}

Given that this litigation structure presumably continues intact,\textsuperscript{69} a reverse discrimination plaintiff bears the burden of persuasion in

\begin{itemize}
\item[65.] See Johnson v. Transp. Agency, Santa Clara County, Cal., 480 U.S. 616, 625 (1987). The successful female candidate had contacted the agency's affirmative action coordinator, who in turn recommended to the decision maker that she be hired. That decision maker testified, "I tried to look at the whole picture, the combination of her qualifications and Mr. Johnson's qualifications, their test scores, their expertise, their background, affirmative action matters, things like that.... I believe it was a combination of all those." \textit{Id.}
\item[66.] \textit{Id.} at 626.
\item[67.] \textit{Id.}
\item[68.] \textit{Id.} at 627.
\item[69.] The continuing application of this proof structure is not free from doubt. \textit{Price Waterhouse v. Hopkins}, 490 U.S. 228, 258 (1989), altered the proof structure for traditional discrimination claims. See infra text accompanying notes 355-71. In her concurring opinion, Justice O'Connor asserted that the affirmative action proof structure should mirror that used for other disparate treatment claims. \textit{Price Waterhouse}, 490 U.S. at 279 (O'Connor, J., concurring). She explained that
\end{itemize}

the evidentiary framework I propose should be available to all disparate treatment plaintiffs where an illegitimate consideration played a substantial role in an adverse employment decision. The Court's allocation of the burden of proof in \textit{[Johnson]} rested squarely on "the analytical framework set forth in \textit{McDonnell Douglas}," which we alter today. \textit{Id.} (citation omitted). Thus, for Justice O'Connor, when a plaintiff (whether in a traditional or reverse discrimination case) has proven, by direct evidence that sex was a substantial factor for an employment decision, the burden of persuasion should shift to the defendant to prove it would have taken the same action in any event. \textit{See id.}

The three dissenting members agreed that the burden shifting approach developed in \textit{Price Waterhouse} should apply in affirmative action cases. \textit{See id.} at 293 n.4 (Kennedy, J., dissenting) ("[T]oday's decision suggests that plaintiffs should no longer bear the burden of showing that affirmative-action plans are illegal."). The \textit{Price Waterhouse} plurality, however, reserved the question. \textit{See id.} at 293 n.3 ("We disregard, for purposes of this discussion, the special context of affirmative action."). In the wake of \textit{Price Waterhouse}, lower courts have reluctantly refused to reject the \textit{Johnson} proof structure, although they have criticized it. \textit{See}, \textit{e.g.}, Bass v. Bd. of County Comm'rs, Orange County, Fla., 256 F.3d 1095, 1114-15 (11th Cir. 2001). This whole question, however, may have to be reconsidered in light of the Supreme Court's most recent encounter with the direct evidence question. \textit{See infra} notes 372-83 and accompanying text.
proving that a particular decision was either: (1) motivated by race and not taken pursuant to an affirmative action plan, or (2) motivated by race pursuant to an invalid plan.

Taken together, Weber and Johnson established two requirements that would validate an affirmative action plan, but did not explicitly rule out other justifications. First, the plan's use of race or sex must be aimed at remedying a "manifest imbalance" in a "traditionally segregated job category." Such an imbalance brings the affirmative action plan into alignment with the purposes of Title VII, which include breaking down historic patterns of discrimination. As the Court said in Weber, "[b]oth [Title VII and the challenged plan] were designed to break down old patterns of racial segregation and hierarchy. Both were structured to 'open employment opportunities for Negroes in occupations which have been traditionally closed to them.'" Weber did not focus on whether Kaiser itself had been implicated in discrimination in the past, thereby suggesting that past employer discrimination was not a necessary predicate for a valid plan.

Johnson went further in two respects. While Weber involved an affirmative action plan to aid black workers, Johnson extended the defense to plans that advance the employment opportunities of women. Further, over the strenuous objection of Justice Scalia, the majority explicitly rejected any requirement of prior discrimination by the employer as a basis for limiting voluntary affirmative action. An employer may adopt an affirmative action plan in the

70. Johnson, 480 U.S. at 631 (quoting United Steelworkers of Am. v. Weber, 443 U.S. 193, 197 (1979)).


72. The Court stated that the authority of an employer to undertake race-conscious affirmative action efforts did not depend on the threat of Title VII liability. Id. at 208 n.8. Justice Blackmun's concurrence was more direct in asserting that the employer's own past wrongful conduct was not necessary:

The sources cited suggest that the Court considers a job category to be "traditionally segregated" when there has been a societal history of purposeful exclusion of blacks from the job category, resulting in a persistent disparity between the proportion of blacks in the labor force and the proportion of blacks among those who hold jobs within the category. Id. at 212 (Blackmun, J., concurring) (emphasis added). Thus, an employer may redress societal "discrimination that lies wholly outside the bounds of Title VII." Id. at 214.

73. See Johnson, 480 U.S. at 642.

74. Id. at 630; see id. at 629 n.7.
absence of any prior discrimination on its own part; remedying the effects of societal discrimination will suffice. Both the language and the setting made this clear. Although there is a long and dishonorable history of racial discrimination by craft unions—the problem addressed in *Weber*—the problem addressed in *Weber*—the exclusion of women from roadwork jobs at issue in *Johnson* is the result of deeper, embedded societal expectations about women's proper role. This expansion of the sweep of affirmative action plans under Title VII is a major departure from equal protection doctrine.

As for the requisites of a valid plan, the *Johnson* Court observed that, when determining whether a manifest imbalance exists in a traditionally segregated job category, the proper comparison is between the percentage of minorities or women in the job category in the employer's workforce and the percentage of those workers in the relevant labor pool. A comparison with general population figures is appropriate only when the job involves skills found in or easily acquired by the general population. The Court regarded *Weber* as such a case. For skilled jobs, the appropriate comparison is to the relevant skilled labor pool. As *Johnson* involved skilled trade positions, the Court viewed the appropriate comparison to be that between the percentage of skilled craft workers in the employer's workforce (zero) and the percentage of women in the relevant labor market having the requisite skills. A valid plan,

---

75. See Stephen A. Plass, *Arbitrating, Waiving and Deferring Title VII Claims*, 58 BROOK. L. REV. 779, 795 (1992) ("The discriminatory purpose and effect of craft unionism is so well established that courts have taken judicial notice of it. Since slavery had for the most part only equipped blacks for menial jobs, organizing along craft lines effectively destroyed their eligibility for unionized employment opportunities.") (footnotes omitted).

76. See infra text accompanying notes 303-14.

77. See Int'l Bd. of Teamsters v. United States, 431 U.S. 324 (1977) (permitting a statistically-based disparate treatment attack on a pattern of discrimination, with the necessary intent inferred from the statistically significant discrepancy between the percentage of African Americans and Latinos employed as line drivers and various measures of their availability); see also SULLIVAN, ZIMMER, & WHITE, 1 EMPLOYMENT DISCRIMINATION: LAW AND PRACTICE, supra note 27, §§ 3.03-3.04 (discussing statistical proof).

78. See Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) (permitting a statistically-based disparate treatment attack on a pattern of discrimination, with the necessary intent inferred from the statistically significant discrepancy between the percentage of African Americans employed as teachers in the defendant school district and the percentage of African American teachers in the relevant labor market).

79. This focus has been criticized. Although looking at the disparity between representation of women or minorities in the employer's workforce and in the skilled labor
therefore, may not seek merely to match general population distributions without regard to possibly racially skewed distributions of skills. It is not clear, however, what level of disparity constitutes a "manifest imbalance." Although the imbalance need not be great enough to support a prima facie case of systemic disparate treatment under the Court's precedents, such proof will suffice. What lesser imbalance is necessary to satisfy Weber and Johnson's first prong has yet to be clarified, although some lower courts have been restrictive. Yet, in the wake of the Supreme Court's decisions, a number of affirmative action plans have been approved as consistent with Title VII.

pool makes sense when the question is one of intentional discrimination against that group, it is less obviously relevant when determining the legality of an affirmative action plan based on societal discrimination. Societal discrimination may well have resulted in a relatively low number of women or minorities in the skilled pool; thus, permitting affirmative action only when an imbalance exists between the employer's workforce and the skilled pool will narrow the situations in which affirmative action may voluntarily be used, even when the percentage of women or minorities in the particular jobs is low when compared to overall population figures. In short, permitting a comparison to general population figures seems more congruent with the theory endorsed in Weber and Johnson. See David D. Meyer, Note, Finding a "Manifest Imbalance": The Case for a Unified Statistical Test for Voluntary Affirmative Action Under Title VII, 87 Mich. L. Rev. 1986, 2021-22 (1989).

80. The key to Johnson in this regard was the gradual nature of the employer's goals. There were relatively few women with the requisite skills at the time the plan was created, but the plan envisioned female representation rising as more skilled women entered the labor market. Johnson v. Transp. Agency, Santa Clara County, Cal., 480 U.S. 616, 621-22 (1987).

81. See Van Aken v. Young, 750 F.2d 43 (6th Cir. 1984) (holding that Title VII was not violated by the City of Detroit's adoption of a voluntary affirmative action hiring program involving out-of-rank order hiring of females in preference to male applicants, where the record contained ample evidence of decades of intentionally discriminatory hiring practices by the city's fire department).

82. Several decisions have applied the "manifest imbalance" test to efforts by universities to achieve gender pay equity by providing raises to underpaid female faculty, although it is not clear that "manifest imbalance" has much relevance in this context. The decisions, however, have often found that the statistical studies used by the defendants did not establish the requisite imbalance to a sufficient degree of certainty to justify summary judgment for the employer. See Maitland v. Univ. of Minn., 155 F.3d 1013 (8th Cir. 1998); Smith v. Va. Commonwealth Univ., 84 F.3d 672 (4th Cir. 1996). In Hill v. Ross, 183 F.3d 586 (7th Cir. 1999), the court was especially pointed in finding the university's statistical analysis of manifest imbalance flawed: "What the University appears to have in mind is a world in which the absence of discrimination means that every department would exactly mirror the population from which its members are hired. But that is statistical nonsense." Id. at 591; see also Rudebusch v. Hughes, 313 F.3d 506, 521 (9th Cir. 2002) (considering only unnecessary trammeling because the plaintiffs did not attack the manifest imbalance jury finding).

83. See, e.g., Officers for Justice v. Civil Serv. Comm'n of S.F., 979 F.2d 721 (9th Cir.
An important, and as yet unresolved, issue is whether a voluntary affirmative action plan must be "remedial" to be lawful under Title VII. The plans in both Weber and Johnson were aimed at remedying a manifest imbalance in a traditionally segregated job category, and the Court's decisions in those cases addressed when such a remedial interest would support such a plan. The lower courts have not yet recognized other validating interests, such as diversity or prevention, but the Supreme Court's recent approval of diversity as a compelling state interest under the Equal Protec-

1992); Peightal v. Metro. Dade County, 940 F.2d 1394 (11th Cir. 1991) (upholding affirmative action plan under Title VII but remanding for determination of its validity under the Equal Protection Clause); Enright v. Cal. State Univ., No. 89-16391, 1991 U.S. App. LEXIS 8455 (9th Cir. Feb. 12, 1991) (upholding university's plan with respect to women). But see Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486 (3d Cir. 1999) (finding an affirmative action plan failed because it was not designed to correct a manifest imbalance in traditionally segregated job categories); Messer v. Meno, 130 F.3d 130 (5th Cir. 1997) (finding an affirmative action plan invalid because there was no showing of past discrimination); Hammon v. Barry, 826 F.2d 73 (D.C. Cir. 1987) (finding no manifest imbalance when department had been officially segregated for years in the past and statistical data did not address metropolitan area but only embraced Washington, D.C.). See also Bennett v. Arrington, 20 F.3d 1525 (11th Cir. 1994) (finding promotion plan was designed to redress manifest imbalances but was invalid as unnecessarily trammeling the interests of majority workers).

84. See Hill v. Ross, 183 F.3d 586, 588 (7th Cir. 1999) (noting this issue is unresolved).


86. The Third Circuit rejected a voluntary affirmative action plan not supported by a remedial interest in Taxman v. Board of Education of Piscataway, 91 F.3d 1547 (3d Cir. 1996), cert. dismissed, 522 U.S. 1010 (1997). The case arose from a decision of the school board, which needed to eliminate one teaching position in the high school's business department when two teachers had identical seniority. The board determined the two teachers were "equally qualified," and used race, in accordance with the district's affirmative action plan, to break the tie. Id. at 1551. That plan provided that, when candidates were equally qualified, the minority candidate was to be retained. Id. at 1550. At the time of the layoff, there was no under-representation of blacks in the Piscataway school system, and the board did not assert a remedial purpose for the plan. Id. Instead, the board relied upon a diversity rationale, reasoning that students would benefit from a racially diverse teaching staff. See id. at 1551-52.

The Third Circuit held that a nonremedial interest would not support an affirmative action plan under Title VII. Id. at 1550. The court read Weber and Johnson as permitting voluntary affirmative action only when a remedial interest is present. Id. at 1558. The Supreme Court agreed to hear Taxman, but the case settled after certiorari had been granted.

tion Clause may lead to recognizing justifications other than remedying manifest imbalances. Whether Title VII permits a voluntary affirmative action plan lacking a remedial purpose, therefore, remains an open, and important, question.

The second prong determining the legitimacy of an affirmative action plan under Weber and Johnson is that the plan not unduly trammel the interests of majority group members. The Court described three concerns of white workers, none of which was at stake in the Weber plan:

The plan does not require the discharge of white workers and their replacement with new black hirees. Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.

These three factors have become the litmus test for satisfying the second prong of not unduly trammeling the interests of white workers. Consequently, when a plan does not deprive an employee of a vested right, when it is not an absolute bar to majority workers' advancement, and when it is aimed at attaining, not maintaining, racial balance, it is likely to be held valid.

88. See infra notes 307-14 and accompanying text.

After Grutter, it would be possible for an affirmative action employment plan at Michigan designed to ensure diversity in the teaching cadre to pass muster under the Equal Protection Clause (assuming that it was narrowly tailored) yet to be struck down under Taxman's view of Title VII. Of course, it would also be possible for a plan to pass equal protection scrutiny under a diversity rationale and Title VII review under a manifest imbalance approach.

90. United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979) (citation omitted). The plan will be perceived as operating toward a goal of racial balancing if it is permanent.
91. See Aiken v. City of Memphis, 37 F.3d 1155 (6th Cir. 1994) (upholding an affirmative action plan in a police department promotional plan because it did not unduly trammel the rights of white police officers); Davis v. City & County of San Francisco, 890 F.2d 1438, 1448 (9th Cir. 1989) (affirming a consent decree settling a class action against the fire department for discriminatory hiring practices).
Most affirmative action plans focus on hiring and promotion, making them more easily defensible under the second prong of *Weber* and *Johnson*.92 *Weber* itself involved a training program that would not have existed except for a desire to address a manifest imbalance. Obviously, no one had automatic entitlement to it. Similarly, in *Johnson*, the plaintiff had no entitlement to the position but was one of several qualified applicants for the job. Moreover, the plan did not block the plaintiff from being promoted in the future, and he in fact received a promotion when another opening arose.93 The Court emphasized that no rigid quotas had been set but instead that sex was only one of several factors considered by the employer in deciding whom to promote.

An affirmative action plan used to determine layoffs, as opposed to hiring or promotion, is more difficult to justify under this prong. In *Firefighters Local Union No. 1784 v. Stotts*,94 the Court rejected a district court's attempt to modify a consent decree to protect minority workers from layoffs, a modification that would have conflicted with the collectively bargained seniority rights of white workers.95 Although *Stotts* was not a voluntary affirmative action case, it suggests that the Supreme Court will look skeptically upon an affirmative action plan that adversely affects the seniority rights of incumbent majority group members.96

In sum, the Title VII doctrine is easy to state: racial disparate treatment is illegal but racial preferences pursuant to a valid

---

92. But see Hill v. Ross, 183 F.3d 586, 592 (7th Cir. 1999) (finding that when a male's sex was the only reason he was not hired, the plan did not use "sex in a way that is narrowly tailored to the justification").


95. See id. at 572-73.

96. The *Taxman* case, discussed supra note 86, provides a useful comparison. The Third Circuit viewed using race as a tiebreaker to decide which teacher to layoff when seniority and qualifications were equal as unnecessarily trammeling the interests of the white plaintiff. See *Taxman v. Bd. of Educ. of Piscataway*, 91 F.3d 1547, 1654-65 (3d Cir. 1996). The burden of achieving the plan's goals fell on the shoulders of a tenured teacher. See id. at 1551. That situation is distinct from those before the Court in *Weber* and *Johnson*, in which no one lost a job or any position to which he was otherwise entitled.

Upholding a layoff for affirmative action purposes is particularly unlikely when the interest asserted for the plan is not a remedial one, as in *Taxman*. Approval of layoffs is uncertain even in the context of a plan adopted for remedial purposes. Even if the Court were to approve adoption of voluntary affirmative action plans for nonremedial purposes, upholding the application of such plans in a layoff context seems unlikely.
affirmative action plan do not constitute discrimination. Such a plan is valid if it addresses a manifest racial imbalance in an employer's workforce and does not unduly trammel the interests of whites, and perhaps on other grounds. The application of this doctrine through the proof process is another question entirely, a matter addressed in the next section.

II. PROVING AN INDIVIDUAL CASE OF REVERSE DISCRIMINATION

The preceding discussion focuses on systemic cases of reverse discrimination; that is, claims where the parties agree that the challenged preference is pursuant to an affirmative action plan. The proof structure of such claims is relatively straightforward. First, the plaintiff claims discrimination, and may or may not adduce the employer's plan as proof. Second, the employer either agrees, if the plaintiff has implicated the plan, or, if the plaintiff's proof has not put the plan in issue, the defendant itself satisfies a burden of pleading, or at most production, by justifying its actions as being pursuant to the plan. Third, the plaintiff carries the burden of persuasion by challenging the validity of that plan under the Supreme Court's structure.97

A variation occurs when the plaintiff claims that the employer acted pursuant to an affirmative action plan, but the employer denies so doing. A plaintiff might invoke the plan for fear that he will not be able to make out a prima facie case of discrimination without putting it into evidence. If this is the path taken, the first step is to decide whether the challenged decision was taken pursuant to a plan, as the law does not permit an employer to shield its plan from review merely by denying its applicability. For example, Bass v. Board of County Commissioners, Orange County, Florida98 found that an invalid affirmative action plan may constitute reverse discrimination, even when the employer "has

97. Taxman is precisely such a case. See supra note 86.

98. 256 F.3d 1095, 1110 (11th Cir. 2001) ("[A] defendant who in fact acts pursuant to an affirmative action plan cannot avoid judicial review of the plan by disavowing reliance upon it ....."); see also McQuillen v. Wis. Educ. Ass'n Council, 830 F.2d 659, 666 (7th Cir. 1987) ("If, as in the present case, the employer claims that its hiring decision was based on the applicants' relative qualifications, not an affirmative action program, a plaintiff must first establish that the employer was acting pursuant to an affirmative action plan before the plan's validity is placed into issue.").
sought no cover from its affirmative action plans (and, in fact, seems to distance itself from them)." 99 Accordingly, the first inquiry in such a case is whether the challenged action was taken pursuant to the plan in the sense that the plan "played a part in the employment decision." 100 Such a conclusion presumably shifts the question to whether the plan itself was valid—the traditional arena of contention. 101

The vast majority of reverse discrimination claims, however, are not framed to implicate the validity of affirmative action plans at all. They might be described as individual, rather than systemic, claims. The defendant does not attempt to justify its decision pursuant to any affirmative action plan; rather, it simply denies discriminating in the first place. The white (or male) plaintiff, furthermore, does not claim that the challenged action was taken pursuant to a plan. Santa Fe is the paradigm here—no affirmative action plan was invoked by either side.

It is somewhat surprising that the vast majority of reverse discrimination cases are brought outside of the Weber/Johnson framework. Obviously, a plaintiff would, if she could otherwise show discrimination, prefer to litigate free of the burden of proving an affirmative action plan invalid. Employers have a "safe harbor," however, when they act pursuant to a valid plan and might be expected to seek its shelter more readily. Of course, many employers may not have affirmative action plans or may have plans that do not contain the kinds of preferences approved by the Court. Yet, even employers with structured plans rarely seek to invoke them when facing a reverse discrimination suit. This might result from lack of confidence in the legality of such plans, skepticism about whether Title VII law will continue on the path marked out by Weber and

99. Bass, 256 F.3d at 1109.
100. Id. at 1110. Bass was framed as a Price Waterhouse case: "[T]he existence of an affirmative action plan, when combined with evidence that the plan was followed in an employment decision, is sufficient to constitute direct evidence of unlawful discrimination unless the plan is valid." Id.
101. One could argue that, should the employer not rely on the plan in the first place, the court should not consider the plan's validity under Weber and Johnson. Yet this would be correct only if the plan were an affirmative defense and thus waivable. Under the current structure, the plaintiff who chooses to challenge a decision as made pursuant to an affirmative action plan has the burden of proving the plan invalid. See supra note 59 and accompanying text.
Johnson, an unwillingness to up the ante in any individual case by putting the employer's broader workforce policies at issue, concern for employee morale, or simple public relations reasons. It is also possible that such plans are largely window dressing, and employers are reluctant to raise them as a shield to reverse discrimination claims for fear of exposing that reality. In any event, rarely is the systemic Weber/Johnson framework litigated at the insistence of either side. Rather, the vast majority of cases challenging reverse discrimination have been individual disparate treatment claims.

A. The Parameters of the Debate

Although the illegality of traditional discrimination has been clear since the enactment of Title VII, the ensuing jurisprudence has largely been devoted to the meaning of "discriminate" and its proof structures. This has resulted in the development of two distinct theories of discrimination: disparate treatment and disparate impact.\(^{102}\) With respect to disparate treatment, the greater attention of the courts has focused not on what constitutes discrimination, but rather on how to prove that a particular employment action was discriminatory.\(^{103}\) Most of the Supreme Court decisions involve the question of how to prove individual disparate treatment, including McDonnell Douglas Corp. v. Green\(^{104}\) and its "circumstantial evidence" progeny,\(^{105}\) and the Price Waterhouse v. Hopkins\(^{106}\) "direct evidence" line of authority.\(^{107}\)

The extensive judicial development of proof structures in the context of traditional discrimination has not been matched in the

---

102. See generally SULLIVAN, ZIMMER, & WHITE, 1 EMPLOYMENT DISCRIMINATION: LAW AND PRACTICE, supra note 27, chs. 2-5.


105. There is a long line of Supreme Court cases elaborating on the McDonnell Douglas approach. The most significant are: Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

106. 490 U.S. 228 (1989).

107. See Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003); see also infra text accompanying notes 372-83.
reverse discrimination context, but there is increasing concern with this issue in the lower courts. The question of whether all races and both genders are protected by the statute, long resolved by the Supreme Court as we have seen, is analytically distinct from the question of how to prove that a particular action against a white or a male was discriminatory.

The lower courts are in agreement on only one point: a reverse discrimination plaintiff may prove her case by the "direct evidence" approach. For example, one court overturned summary judgment against the plaintiff, who had been denied a raise; the proffered statements by a decision maker sufficed to raise a genuine issue of material fact as to the motive. Those statements included, "I'm not going to pay him that, he's a white guy, isn't he?" and "If he were a woman or a minority, I would have to pay him, but I don't have to pay him." The decision maker refused to discuss the raise further, concluding, "I'm not going to pay him. He's just a white guy." Similarly, another court upheld a jury verdict for a male plaintiff in light of statements that the employer treated men differently from women. Such decisions parallel first generation traditional discrimination cases where admissions of discriminatory intent

108. See supra notes 20-25 and accompanying text.
109. E.g., Mills v. Health Care Serv. Corp., 171 F.3d 450 (7th Cir. 1999); see also Schoenfeld v. Babbitt, 168 F.3d 1257, 1268 (11th Cir. 1999) (holding that a male applicant may establish a prima facie Title VII claim by evidence of discriminatory animus tainting the hiring process, including a statement by a human resources official that could be construed as "tacit admission" that gender was a factor in the decision not to hire).
111. Id.; see also Justice v. Saint Augustine's Coll., No. 5:94-CV-792-BR(2), 1996 U.S. Dist. LEXIS 6090 (E.D. N.C. April 4, 1996) (holding that a white librarian made a prima facie case of reverse discrimination when the interviewer for a position he sought at a black college stated that he would allow the position to go unfilled rather than fill it with a white individual).
113. These statements included: (1) a female member of the management committee saying "we live in a patriarchal society, and men shirk their duties toward child raising. And because men have money, power and position, because they have penises, then this is the type of thing that happens as a result"; (2) the steering committee for employer's new women's health center preparing a draft mission statement that barred the employment of men, including male physicians; and (3) another male testifying that, when he complained about another employee's having thrown water in his face, he was told not to worry about it. When he asked what she would do in the event water was thrown at a female employee, he was told the person would probably be fired: "[W]e have different standards for men and women." Id. at 37 (quoting trial record).
made by unsophisticated employers were the primary means of proof.\textsuperscript{114}

Ironically, even this point of agreement raises serious questions (to which we will return) of what suffices as "direct evidence,"\textsuperscript{115} and whether the whole "direct vs. circumstantial" evidence debate, which originated with respect to claims of traditional discrimination in \textit{Price Waterhouse},\textsuperscript{116} has been undercut by the Court's recent decision in \textit{Desert Palace, Inc. v. Costa}.\textsuperscript{117}

Where "direct evidence" is not involved, the lower courts have been inconsistent, most having articulated different requirements for proof for plaintiff's prima facie case in reverse discrimination cases than in traditional discrimination claims.\textsuperscript{118} Where whites or men are "minorities" in the institution or occupation in which they work, the structure appears to work the same way as in the more typical situation when African Americans or women are the plaintiffs.\textsuperscript{119} Where a white worker sues a predominately white

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{114} See Slack v. Havens, 522 F.2d 1091, 1092-93 (9th Cir. 1975). Both social norms and fear of liability may have contributed to reduce dramatically the number of instances in which explicit racist comments are available to establish discrimination.
\item \textsuperscript{115} This has been a major source of confusion with respect to traditional discrimination claims. See generally Charles A. Sullivan, \textit{Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII}, 56 BROOK. L. REV. 1107 (1991); Robert A. Kearney, \textit{The High Price of Price Waterhouse: Dealing with Direct Evidence of Discrimination}, 5 U. PA. J. LAB. & EMP. L. 303 (2003); Mark C. Weber, \textit{Beyond Price Waterhouse v. Hopkins: A New Approach to Mixed Motive Discrimination}, 68 N.C. L. REV. 495 (1990). It has also arisen in reverse discrimination cases. See e.g., Langley v. Jackson State Univ., 14 F.3d 1070, 1075 (5th Cir. 1994) (offering no direct evidence: "At most, the record shows that Dr. Langley's supervisors were race-conscious to the extent that some felt uncomfortable with, and possibly even resented, Dr. Langley's presence at JSU, an historically black institution."); Young v. Houston, 906 F.2d 177, 180-81 (5th Cir. 1990) (avoiding deciding whether plaintiff's being referred to as a "white token" and "white faggot" constituted direct evidence of race discrimination).
\item \textsuperscript{116} See infra text accompanying note 365.
\item \textsuperscript{117} See infra text accompanying notes 372-83.
\item \textsuperscript{118} Some cases have applied usual Title VII analysis without noting any difference in reverse discrimination cases. See, e.g., Loeffler v. Carlin, 780 F.2d 1365 (8th Cir. 1985), rev'd on other grounds sub nom. Loeffler v. Frank, 486 U.S. 549 (1988).
\item \textsuperscript{119} See, e.g., Lincoln v. Bd. of Regents, 697 F.2d 928 (11th Cir. 1983) (affirming judgment against a predominately black university in action by white faculty member); Whiting v. Jackson State Univ., 616 F.2d 116, 123 (5th Cir. 1980) (making out a prima facie case since "he was in a racial minority at JSU"); Carter v. Cnty. Action Agency, Inc., 625 F. Supp. 199, 204 (M.D. Ala. 1985) (establishing a prima facie case when the "scenario ... was ... that of a white employee in a work environment populated and controlled, for the most part, by black persons"); Turgeon v. Howard Univ., 571 F. Supp. 679, 686 (D.D.C. 1983) (noting that in a
\end{enumerate}
\end{footnotesize}
institution, however, several circuits require different proof than would be required for an African American or a woman. A typical formulation is that, to establish a prima facie case, a reverse discrimination plaintiff must "present evidence of 'background circumstances' that establish that the defendant is 'that unusual employer who discriminates against the majority.'"\(^{120}\)

This modification stemmed from the theoretic underpinnings of the traditional Title VII individual disparate treatment case. *McDonnell Douglas Corp. v. Green*\(^{121}\) established a three-step analytical structure for what have come to be known as "indirect" or black institution, "a racially discriminatory environment will substitute for the first prong of the *McDonnell Douglas* criteria, membership in a racial minority"); Planells v. Howard Univ., No. 82-1173, 1983 U.S. Dist. LEXIS 15895, at *26 (D.D.C. June 28, 1983) (allowing the plaintiff to make out a prima facie case by showing "although he is white, he was cast in the position of a racial minority in his employment relationship with Howard University. In these circumstances, a racially discriminatory environment will substitute for the first of the *McDonnell Douglas* criteria, membership in a racial minority."). But see Boggs v. Kentucky, No. 95-6452, 1996 U.S. App. LEXIS 30332 (6th Cir. Nov. 20, 1996):

In cases such as this our circuit imposes a higher threshold of proof on a white plaintiff than on a plaintiff who belongs to a racial minority. The plaintiff in a reverse discrimination case must show that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." The reverse discrimination plaintiff must also demonstrate that he was treated differently from a similarly-situated member of a racial minority.

*Id.* at *9 (citations omitted).


121. 411 U.S. 792, 802 (1973).
"circumstantial" evidence cases. The first step is for the plaintiff to establish a prima facie case of discrimination, that is, to put in evidence that creates a presumption that the employer discriminated. When the plaintiff establishes such a case, the employer, at the second step, has the burden of putting into evidence a nondiscriminatory reason for the decision. Finally, the plaintiff will have the opportunity to prove that the reason provided by the employer was really a pretext for an underlying discriminatory motivation.

The significance of this structure has evolved over the years. McDonnell Douglas itself, therefore, not only detailed a four-pronged prima facie case for failures to hire, but also made clear that a prima facie case might be stated differently in other contexts. Furthermore, in a series of subsequent decisions, the Court held that the defendant has only a burden of production, and the plaintiff

---

122. For more than a decade after it was decided, McDonnell Douglas was the only game in town for individual disparate treatment cases. It was not until Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), that McDonnell Douglas or indirect, circumstantial evidence cases had to be distinguished from direct evidence, Price Waterhouse cases. See infra notes 355-71 and accompanying text. That distinction may have been eroded in the Court's last Term. See infra notes 372-83 and accompanying text.

123. In Texas Department of Community Affairs v. Burdine, the Court noted:

Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

450 U.S. 248, 254 (1981). The Court repeated this theme in St. Mary's Honor Center v. Hicks:

At the close of the defendant's case, the court is asked to decide whether an issue of fact remains for the trier of fact to determine. None does if, on the evidence presented, (1) any rational person would have to find the existence of facts constituting a prima facie case, and (2) the defendant has failed to meet its burden of production—i.e., has failed to introduce evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action. In that event, the court must award judgment to the plaintiff as a matter of law....


Professor Risinger believes it would be more accurate to describe this as a fixed standard of sufficiency rather than a "presumption." Although, as we will see, McDonnell Douglas has evolved over the years, it remains true that the prima facie case, if accepted by the factfinder, mandates judgment for the plaintiff if the defendant does not meet its burden of production. McDonnell Douglas, in essence, therefore, establishes that certain proof is sufficient for a judgment for plaintiff, whether or not the proof would permit inferring the underlying fact—that the defendant intended to discriminate.
at all times retains the burden of persuasion. The plaintiff's ultimate burden is to persuade the factfinder that the challenged decision was the result of discriminatory motivation. It is not enough for the plaintiff to prove that the defendant's asserted nondiscriminatory reason is pretextual (in the sense it is not the true reason), but the plaintiff must also show that it is a pretext concealing a discriminatory motivation—although the factfinder's disbelief of the asserted reason may be a basis for concluding that it disguised such a discriminatory motivation.

The first step of the McDonnell Douglas prima facie case required very little proof. Although the Court framed this step as a four-pronged test, it also recognized that its formulation would have to be modified for other situations. As it has since been generalized, the prima facie case requires merely that a minority or woman has been denied an employment opportunity in circumstances where the most obvious innocent explanations—e.g., plaintiff's lack of qualifications or the absence of an opening—are inapplicable. As the Court explained in a later case, "[a] prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." It is not

---

124. Burdine, 450 U.S. at 256.
125. Id.
126. See St. Mary's Honor Ctr., 509 U.S. at 515 (1993) ("[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason.").
127. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.").
128. The plaintiff must establish:
   (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.
129. See infra note 144 and accompanying text.
130. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (citation omitted). The Court has not retreated from this view although it is important more as a heuristic than as a litigation principle. Once the defendant has put in evidence of its nondiscriminatory reason, the presumption disappears. St. Mary's Honor Ctr., 509 U.S. at 524. It might still be possible for the factfinder to decide for the plaintiff but, if so, it will do so because of inferences drawn from the evidence that supports the prima facie case and the implausibility of the defendant's
necessary for the plaintiff at the prima facie stage to negate all the possible, or even all the probable, legitimate reasons, much less is it necessary to adduce any more direct evidence.

This low threshold for the plaintiff’s prima facie case rested on the proposition—unremarkable when the case was decided—that employers frequently discriminate against blacks (or other minorities or women). Accordingly, a minority plaintiff was required to demonstrate only that the most common reasons for not being hired (or being fired) were not applicable in her case. Once the plaintiff’s proof ruled out those most common reasons, it was appropriate to infer that race was the reason for the employer’s action. Indeed, should it believe plaintiff’s proof, the factfinder was required to infer discrimination—unless the employer put into evidence other reasons (“legitimate nondiscriminatory reasons”) for its actions.

At that point, the employer would prevail unless the plaintiff could establish that those other reasons were not the actual reasons for the employer’s actions—that is, that they were pretexts for the actual race-related reason.

In most cases, the plaintiff’s proof that the reason put into evidence by the defendant was not the true reason is sufficient for (though it does not require) the factfinder to draw the inference that the true reason was the plaintiff’s race. This is partly because the failure of the defendant to put into evidence a credible nondiscriminatory reason may suggest that the real reason is discrimination,

---

131. See generally Deborah A. Calloway, St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption, 26 CONN. L. REV. 997 (1994) (pointing out the pervasiveness of discrimination in today’s society, which undermines the notion that discrimination has or is being eliminated). But see infra Part III.B (discussing how the basic assumption originally underlying McDonnell Douglas has deteriorated in recent years).

132. See supra note 123.


134. “Proof that the defendant’s explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.” Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000).

135. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party’s dishonesty about a material fact as “affirmative evidence of guilt.” Moreover,
and partly because the continued prevalence of discrimination in our society that suggests that, when other reasons are ruled out, prejudice is a natural inference, although perhaps not the only possible inference. Professor Zimmer, therefore, describes the \textit{McDonnell Douglas} approach as a process of elimination: as progressively more nondiscriminatory reasons are eliminated, discrimination becomes progressively more likely.

In contrast, where a white plaintiff challenges an employment decision against the typical white-dominated employer, it is more difficult to draw the inference that the employer acted because of discrimination against whites, even where the most common, legitimate reasons for the decision are negated. This reality underlies the notion that such a plaintiff must show something once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

\textit{Id.} (citations omitted).

136. Of course, the fact that the employer's supposed reason is found not to be its real reason suggests that the real reason is embarrassing and/or illegal—for example, racism.

137. Indeed, in extreme cases it may not be even a permissible inference:

This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory.

\textit{Id.} at 148.

138. See Michael J. Zimmer, \textit{Leading by Example: An Holistic Approach to Individual Disparate Treatment Law}, 11 KAN. J.L. & PUB. POLY 177, 177 (2001); Michael J. Zimmer, The New Discrimination Law: \textit{Price Waterhouse} is Dead, Whither \textit{McDonnell Douglas}? 16-19 (2004) (unpublished manuscript, on file with the author) [hereinafter Zimmer, The New Discrimination Law]. This may be a kind of Bayesian analysis. There are, of course, an infinite number of possible reasons for a particular decision, but there are relatively few likely reasons. The \textit{McDonnell Douglas} proof structure can be seen as requiring the plaintiff to rule out the most likely reasons as part of her prima facie case. Because these reasons are only a small subset of the possible reasons, although a larger subset of the possible likely reasons, the employer is required to set forth other reasons. If these are in turn ruled out, it may be fair to allow the trier of fact to conclude that probability favors an impermissible reason. Zimmer, The New Discrimination Law, \textit{supra}, at 19 n.40. See generally D. Michael Risinger & Jeffrey L. Loop, \textit{Three Card Monte, Monty Hall, Modus Operandi and "Offender Profiling": Some Lessons of Modern Cognitive Science for the Law of Evidence}, 24 CARDOZO L. REV. 193, 200 n.15 (2002) ("Bayes' Theorem deals with the sequential revision of probabilities from a starting point (the initial or prior probability) through the integration of new probability-affecting information.").
more than a minority plaintiff or a woman would show—that is, the white plaintiff must meet the "background circumstances" test.\footnote{139}{Sexual harassment cases may pose distinctive problems for reverse discrimination cases, which will not be further explored here. For example, the plaintiff in \textit{Pierce v. Commonwealth Life Insurance Co.}, 40 F.3d 796 (6th Cir. 1994), challenged the discipline meted out to him because of a subordinate woman's complaint of sexual harassment. \textit{See id.} at 799-800. He claimed that the alleged victim had engaged in equal or greater sexualized conduct but was not disciplined. \textit{See id.} at 799. The court rejected his claim because the two employees were not "similarly situated" in a very important respect: the plaintiff was a supervisor whose conduct could trigger liability for the company much more easily than could the conduct of a nonsupervisory employee. \textit{See id.} at 802-04. Analytically, this seems gender-neutral because a supervisor (male or female) could create such problems for an employer; however, the vast majority of harassment cases have involved male harassers.}

At least one court has been explicit about another function of this test: protecting employers by screening out less meritorious cases.\footnote{140}{\textit{Mills v. Health Care Serv. Corp.}, 171 F.3d 450, 457 (7th Cir. 1999).}

The fewer plaintiffs able to establish a prima facie case, the fewer cases will go forward requiring the employer to justify its decision before a jury.\footnote{141}{\textit{See Chad Derum & Karen Engle, The Rise of the Personal Animosity Presumption in \textit{Title VII} and the Return to "No Cause" Employment, 81 \textit{Tex. L. Rev.} 1177, 1182 (2003)} (arguing that courts increasingly view interpersonal problems as a result of personal animosity, and that such a presumption "bespeaks both a judicial inability, or at least refusal, to attend to unconscious bias and an ideological commitment to employment at will").}

At a more technical level, the background circumstances requirement developed from attempting to adapt the prima facie case as announced in \textit{McDonnell Douglas} to the reverse discrimination context. As that court originally formulated the rule, a traditional prima facie case is established by the plaintiff's 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.\footnote{142}{\textit{McDonnell Douglas Corp. v. Green}, 411 U.S. 792, 802 (1973).}

As \textit{Santa Fe} made clear, the first prong is not a requirement of the statute but merely a method of proof for a traditional discrimination case, and \textit{McDonnell Douglas} explicitly envisioned different formulations of the prima facie case in different contexts.\footnote{143}{\textit{See supra} note 21.
Because prong one is inapplicable to a white plaintiff, some modification was necessary for a reverse discrimination case. The choice of simply eliminating that prong for all claimants seemed unappealing for reasons we will explore. The "background circumstances" test, therefore, emerged as a substitute for the *McDonnell Douglas* first prong.

This background circumstances test has developed in ways that are not intuitively obvious; indeed, it has become more of a label than a test. Section B, below, explores the development of this concept, asking precisely what "circumstances" will suffice. Section C turns to the related but distinct question of whether, or when, an affirmative action plan is a sufficient background circumstance. In Part III, we turn to recent critiques of the background circumstances test. As we will see, these cases do not so much question the common sense of requiring something like background circumstances; rather, they doubt whether it is appropriate and/or constitutional to employ different tests for different races.

**B. What Are Background Circumstances?**

The notion of requiring "background circumstances" in *McDonnell Douglas* reverse discrimination cases originated in *Parker v. Baltimore & Ohio Railroad Co.* There, Judge Mikva justified substituting the *McDonnell Douglas* prong that a minority plaintiff

---

144. "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas*, 411 U.S. at 802 n.13.

145. See, e.g., *Mills*, 171 F.3d at 457 (stating that plaintiff must demonstrate "at least one of the background circumstances these other [cited] courts have alluded to"); *Taken v. Okla. Corp. Comm'n*, 125 F.3d 1366, 1369 (10th Cir. 1997); *Harding v. Gray*, 9 F.3d 150, 154 (D.C. Cir. 1993) (holding that "superior qualifications can provide a sufficient showing of background circumstances"); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985) (requiring a reverse discrimination plaintiff also show "that the employer treated differently employees who were similarly situated but not members of the protected group") (citations omitted); *Jasany v. U.S. Postal Serv.*, 755 F.2d 1244, 1252-53 (6th Cir. 1985) (invoking male clerk who was unable to make out a claim of reverse discrimination absent a showing that the Postal Service had a history of discrimination against males).

146. 652 F.2d 1012 (D.C. Cir. 1981). *Parker* relied on earlier circuit authority, *Daye v. Harris*, 655 F.2d 258 (D.C. Cir. 1981), upholding a reverse discrimination claim, but the *Daye* court neither used the background circumstances language nor focused on the elements of the prima facie case.
show he was a member of a racial minority with a requirement that a majority plaintiff show the requisite background circumstances:

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. Whites are also a protected group under Title VII, but it defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society. 147

Since *Parker*, courts have frequently invoked the notion in both race and sex 148 contexts, but they have often been no more explicit about what background circumstances suffice.

Only two points seem even relatively clear. First, a reverse discrimination plaintiff may successfully prosecute a Title VII claim using direct evidence. 149 When *Parker* announced the background circumstances test, the Court had not yet handed down *Price Waterhouse v. Hopkins*, which provided an alternative to *McDonnell Douglas*. In the reverse discrimination context, courts quickly used the *Price Waterhouse* direct evidence test as an alternative to

---

147. *Parker*, 652 F.2d at 1017.
148. See Archuleta v. 12th Jud. Dist., Probation Dep’t, Colo., No. 98-1204, 1999 U.S. App. LEXIS 3601, at **3-5 (10th Cir. Mar. 8, 1999) (holding that a male probation officer did not prove his Title VII claim of reverse gender discrimination because he failed to show that his supervisor discriminated against males, or that, if the officer had not been male, the supervisor would not have asked him to resign). In *Hudspeth v. Denver Water Dep’t*, No. 97-1180, 1998 U.S. App. LEXIS 6488 (10th Cir. Mar. 30, 1998), the court also applied the background circumstances requirement to a sex discrimination claim, finding no prima facie case established because plaintiff did not "establish background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority." *Id.* at *3 (quoting Notari v. Denver Water Dep’t, 971 F.2d 585, 589 (10th Cir. 1992)). A twist to the case was that Hudspeth was a black plaintiff who claimed that, as a black male, he was entitled "to the presumptions accorded to those belonging to a disfavored group." *Id.* at *4. The court disagreed, stating that plaintiff's discrimination claim was based on his gender; even though he was black, he was nonetheless a male and thus "a member of the historically favored majority with regard to gender." *Id.* "The two claims, race discrimination and sex discrimination, are separate claims, and the circumstances that determine the analysis to be applied to each claim do not overlap." *Id.*
149. See supra notes 109-17 and accompanying text.
background circumstances. Second, Parker's reasoning suggests that a minority- (or female-) owned or dominated employer is a sufficient background circumstance. The opinion's reference to "socially disfavored groups" might imply that there has to be a history of discrimination against the group of which plaintiff is a member. It is certainly possible, however, that Judge Mikva was referring merely to the tendency of "in" groups to disfavor "out" groups. Later courts have expressed this reasoning as requiring the plaintiff to show that he is a racial minority at his workplace. To this effect, some courts have quoted the Supreme Court's decision in City of Richmond v. J.A. Croson Co., suggesting that the Court's use of strict scrutiny was appropriate because a majority of the members of the city council that adopted the policy were African American.

150. See Parker, 652 F.2d at 1017.

151. See supra note 119. McDonnell Douglas involved "a black citizen of St. Louis." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 794 (1973). Although African Americans were obviously included in the Court's description of a "racial minority," it was not clear what other groups the Court had in mind. Subsequent cases have, without much analysis, allowed a wide range of groups to use the test, including Latinos and various subgroups of Asians. With respect to the inclusion of other groups in the race discourse, see generally Robert S. Chang, Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, 1 ASIAN L.J. 1 (1994) (advocating the inclusion of Asians); Juan F. Perea, The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought, 85 CAL. L. REV. 1213 (1997) (advocating the inclusion of members of races other than black and white); Deborah Ramirez, Multicultural Empowerment: It's Not Just Black and White Anymore, 47 STAN. L. REV. 957, 959 & n.9 (1995) (discussing "nonblack persons of color"); Janine Young Kim, Note, Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm, 108 YALE L.J. 2385 (1999) (arguing for the inclusion of Asian Americans in the national discourse on race).

Although McDonnell Douglas involved race, the McDonnell Douglas paradigm was quickly applied to the sex discrimination context, with the Court showing no hesitation about permitting women—a majority of the population although a minority in the workforce and concentrated in lower status, lower paid jobs—to use the prima facie case. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).

152. 488 U.S. 469, 495 (1989) ("[H]eightened scrutiny would still be appropriate in the circumstances of this case .... In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks.").

153. See also Reynolds v. Sch. Dist. No. 1, Denver, Colo., 69 F.3d 1523, 1534 (10th Cir. 1995) (finding background circumstances where plaintiff was denied a promotion when she was the only white employee in a Bilingual/ESOL department and nearly all decision makers were Hispanic).
Much less clear is whether the individual decision maker being of a different race or gender than the plaintiff is a sufficient background circumstance. At least one case has held yes, albeit while questioning the requirement of background circumstances. Another court squarely said no, although it found a prima facie case established for additional reasons and did not explain why the differences in races did not suffice. Most cases suggest no, by seeming to require something more than a difference in race between supervisors and employees to establish background circumstances.

In any event, the entire background circumstances approach is under increasing challenge. Harding v. Gray, handed down by the same District of Columbia Circuit that decided Parker, retreated from background circumstances, although it retained the label. It divided background circumstances into two categories. The first was “evidence indicating that the particular employer at issue has some reason or inclination to discriminate invidiously against whites,”—presumably what Judge Mikva had in mind originally. For this category, Harding cited cases involving minority supervisors and affirmative action plans or pressure to hire minorities. It also cited a case where minorities were overrepresented among those promoted. The second branch—“evidence indicating that

155. See Iadimarco v. Runyon, 190 F.3d 151, 156 (3d Cir. 1999); see also Reyes v. Cook County, No. 02 C 3920, 2004 U.S. Dist. LEXIS 12033 (N.D. Ill. June 30, 2004), where the court noted:

Ordinarily, the fact that all those in the decision process were of the same gender as the person selected would not lead to an inference of bias. Generally speaking, there is no presumption of actual bias in our law. On the other hand, there may be “old girls’ networks” just as there are “old boys’ networks.” To get to even a slight inference of bias for this there must be something more than a single gender selection board. Here, that something more was created by the problems associated with the application process....

Id. at ** 6-7.
156. 9 F.3d 150 (D.C. Cir. 1993).
157. Id. at 153.
158. See Bishopp v. District of Columbia, 788 F.2d 781, 786-87 (D.C. Cir. 1986); Lanphear v. Prokop, 703 F.2d 1311, 1315 (D.C. Cir. 1983).
159. See Daye v. Harris, 655 F.2d 258, 261 (D.C. Cir. 1981); see also Mills v. Health Care Serv. Corp., 171 F.3d 405, 457 (7th Cir. 1999) (“Mills points to ‘disproportionate hiring patterns’ favoring women at HCSC’s Quincy office. Between 1988-1995, nearly all promotions at the office went to women, and at the time the challenged hiring decision was made, females dominated the supervisory positions in the relevant office.”) (quoting record).
there is something 'fishy' about the facts of the case at hand that raises an inference of discrimination"—seems less a "background circumstance" than a broader validation of reverse discrimination suits, that is, departures from normal practices or favoring a less qualified minority over more qualified whites. Although Harding stated the two categories in conjunctive fashion, it went on to hold that the second circumstance alone could establish a prima facie case of discrimination. "Background circumstances' need not mean 'some circumstance in the employer's background.' On the contrary, other evidence about the 'background' of the case at hand—including an allegation of superior qualifications—can be equally valuable."

Two other circuits have also applied what might be called the Harding "background circumstances or" approach. In the Eighth Circuit, Duffy v. Wolle applied Title VII analysis to plaintiff's Equal Protection Clause claim and held that "background circumstances" could include a clearly more qualified male plaintiff coupled with relatively thin evidence of preferences for women on the part of the selectors. This holding is another step away from

---

160. Harding, 9 F.3d at 153.
161. Id.; see also Sutherland v. Mich. Dep't of Treasury, 344 F.3d 603, 615 (6th Cir. 2003) (finding the requisite "background circumstances" where statistical evidence of promotion and hiring patterns reflected racial and gender preferences against the majority over a period of twenty years).
162. 123 F.3d 1026 (8th Cir. 1997).
163. Id. at 1036-37. The case was brought as a direct cause of action under Davis v. Passman, 442 U.S. 228 (1979), and Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), since Title VII did not reach the employment in question. See Duffy, 123 F.3d at 1033-34.
164. The Duffy court wrote:

Duffy has alleged three "background circumstances [to] support the suspicion that the [Panel] is that unusual employer who discriminates against the majority." These background circumstances are: (1) that McPhillips was substantially less qualified than Duffy; (2) Chief Judge Wolle had mentioned an interest by someone in the Administrative Office in the recruitment of a female; and (3) that two members of the Panel had usually hired female law clerks.
123 F.3d at 1037 (citation omitted). Although Duffy found a prima facie case, it did not find for plaintiff. Ultimately, it stressed variations in experience of the two candidates, and wrote both that "[i]dentifying those strengths that constitute the best qualified applicant is, however, a role best left to employers," and that

[i]t is inevitable that two candidates with a combined forty years of experience as probation officers will have different strengths. We do not see how the Panel's preference for McPhillips's depth of experience in the area of presentence
the intuitive meaning of background circumstances and more in line with the second approach of Harding.

The Tenth Circuit is more uncertain about whether it adopted a "background circumstances or" approach. Notari v. Denver Water Dep't, re reaffirmed that "the McDonnell Douglas presumption ... [of discrimination] is valid for a reverse discrimination claimant only when the requisite background circumstances exist," but went on to belie the "only" by holding that a claimant's failure to meet this burden would not end the court's inquiry. Although direct evidence would suffice, the court also approved of "indirect evidence sufficient to support a reasonable probability, that but for the plaintiff's status the challenged employment decision would have favored the plaintiff." To confuse matters even further, the court emphasized that a reverse discrimination plaintiff who uses this method in place of the background circumstances test was not entitled to rely on the presumption that is implicit in the McDonnell Douglas prima facie case analysis. In other words, it is not enough, under this alternative formulation, for a plaintiff merely to allege that he was qualified and that someone with different characteristics was the beneficiary of the challenged employment decision. Instead, the plaintiff must allege and produce evidence to support specific facts that are sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred.

  investigation over Duffy's breadth of experience in the areas of pretrial, supervision can be interpreted as pretextual for gender discrimination.

Id. at 1038.
165. 971 F.2d 585 (10th Cir. 1992).
166. Id. at 589.
167. Id. at 590.
168. Id.; see Mattioda v. White, 323 F.3d 1288, 1292-93 (10th Cir. 2003) (applying the "background circumstances" test in a reverse discrimination case and reaffirming the first branch of Notari against a claim it had been undermined by later Supreme Court cases; the second branch was not at issue). The Seventh Circuit has seemed to tilt toward the Notari "alternative formulation" approach. In Mills v. Health Care Service Corp., 171 F.3d 450 (7th Cir. 1999), it reaffirmed the use of direct evidence, and then stated that, where the majority plaintiff has no direct evidence and has failed to establish "background circumstances," he is required to produce "other indirect evidence sufficient to support a reasonable probability ... that but for [his] status [as a white male] the challenged employment decision' would not have occurred." Id. at 456 (citation omitted).
It seems likely that the plaintiff must prove something like background circumstances, even under this alternative formulation. In short, the phrase "background circumstances" is amorphous, and, even in the circuit that invented the term, seems to have departed from its most intuitive definition. It may mean merely "sufficient evidence" for the factfinder to infer discrimination, in which case it is unobjectionable, but it certainly has invited confusion. The one exception to this, at least at the outset, was the status of affirmative action plans as background circumstances. As we shall see, the courts initially held that such plans, at least if valid, were not sufficient for the first prong of the plaintiff's prima facie case. That rule, too, has undergone an evolution.

C. Is an Affirmative Action Plan a Sufficient Background Circumstance?

At first blush, it would seem that the existence of an affirmative action plan or similar policy statement, even a valid plan, would be strong evidence of "background circumstances" that an employer is the unusual employer that discriminates against whites. After all, any policy that suggested that blacks were overrepresented in a workforce would be a powerful basis for a traditional discrimination case, although it might alternatively be framed as "direct evidence." Similarly, an affirmative action plan, even if valid, certainly involves an "overrepresentation" of whites that is being addressed. Moreover, the popular perception on the part of whites is that affirmative action leads to discrimination against them.

169. See, e.g., Frank v. Xerox Corp., 347 F.3d 130, 137 (5th Cir. 2003) (holding that the fact that an employer's Balanced Workforce Plan, which indicated that African Americans were overrepresented in a particular office, was direct evidence of racial discrimination, at least when coupled with evidence that managers were evaluated on how well they complied with the balanced workforce objectives).

170. A valid plan would not permit overrepresentation of minorities compared to the relevant labor pool, but it would redress a current underrepresentation compared to that pool. Another way of stating this concept is that the current workforce has an overrepresentation of whites.

Early cases, however, rejected this view. *Parker v. Baltimore &
Ohio Railroad Co.*, \(^{172}\) which invented the background circumstances
requirement, arose in the context of an affirmative action plan. Mr.
Parker, a white male, filed suit in early 1979, after *Santa Fe* but
before *Weber*. He challenged 1976 and 1978 refusals to hire him as
discriminatory on race and sex grounds when blacks and women
were advanced in preference to him. \(^{173}\) After *Weber* was handed
down, Parker sought to amend his complaint to attack the defend-
ant’s affirmative action plan as invalid under that case. \(^{174}\) With
respect to the 1976 claim, the D.C. Circuit reversed both the district
court’s refusal to allow the amendment and its summary judgment
for the employer. \(^{175}\) The employer admitted that a preferential
transfer agreement operated with respect to women and minorities
for the position in question; \(^{176}\) thus, there was little doubt that an
affirmative action plan had an effect on plaintiff’s employment. Yet,
“[s]ince the record in this case d[id] not sufficiently illuminate
B&O’s practices to enable a court to decide whether they ‘unnecessar-
ily trammel the interests of the white employees,’ a genuine issue
of material fact remained unresolved ....” \(^{177}\)

As for the 1978 claim, “Parker ha[d] not yet demonstrated that
race was a factor in the 1978 hiring—although B&O conceded its
deliberate use of race and gender under the rubric of affirmative
action in 1976, the record reflect[ed] no such concession concerning
1978.” \(^{178}\) Parker, therefore, had to adduce evidence of intent to
discriminate. It was in this connection that the court formulated the

\(^{172}\) 652 F.2d 1012 (D.C. Cir. 1981).
\(^{173}\) *Id.* at 1014-15.
\(^{174}\) *Id.* at 1013.
\(^{175}\) *Id.* at 1016.
\(^{176}\) *See id.* at 1015.
\(^{177}\) *Id.* at 1016.
\(^{178}\) *Id.*
background circumstances requirement. In addressing the role of that plan in the background circumstances inquiry, Judge Mikva wrote:

If the court finds that evidence of B&O's unlawful consideration of race as a factor in hiring in [1976] ... justifies a suspicion that incidents of capricious discrimination against whites because of their race may be likely, Parker should not be required to adduce direct evidence that race was a factor in the 1978 hiring decision. If Parker's qualifications enable him to meet the other criteria of McDonnell Douglas, the burden of going forward would then shift to B&O to articulate a legitimate nondiscriminatory reason for its actions in 1978, in accordance with the usual McDonnell Douglas analysis.\footnote{179}

Although an affirmative action plan may be a sufficient background circumstance, the careful use of the word “unlawful” limits this statement to invalid plans. In a footnote, Judge Mikva went further: “We do not equate lawful affirmative action with discrimination against the majority, nor do we suggest that a lawful affirmative action program would in itself constitute suspicious circumstances sufficient to justify an inference of discriminatory intent under McDonnell Douglas.”\footnote{180} This view is consistent with the Weber/Johnson view that permissible preferences under valid plans are not discriminatory.\footnote{181} It nevertheless means that a reverse discrimination plaintiff may prove a prima facie case by raising and showing an invalid affirmative action plan, even one not implicated in the challenged decisions, but that is as far as Parker goes.\footnote{182} This conclusion seems in considerable tension with the rationale of requiring background circumstances in the first place. Both the “light of common experience” and the application of “common sense” suggest that an employer seeking to advance the positions of minorities and women by virtue of an affirmative action plan—valid or invalid—is the kind of “unusual employer” who is more likely to

\footnote{179. Id. at 1018 (emphasis added).}  
\footnote{180. Id. at 1017 n.9.}  
\footnote{181. See supra Part I.B.}  
\footnote{182. The quoted language in Parker may not go even this far—it permits the finder of fact to determine that earlier unlawful consideration of race is suspicious enough for the prima facie case but it does not require the trier of fact so to find.}
discriminate against whites and males. It might be argued that, although such employers are, almost by definition, more likely to favor minorities pursuant to a plan, this favoritism is not technically discrimination under Weber and Johnson, and such employers are not necessarily more likely to discriminate impermissibly. Although tenable, this argument necessarily suggests that employers are more familiar with the technicalities of Title VII law than seems plausible. However well drafted an affirmative action plan, it is likely to be translated “on the ground” into more generalized preference for minorities and women.183

The early authorities nevertheless favored the Parker approach, and some continue to do so, precisely because of the Supreme Court’s approval of affirmative action plans in Weber and Johnson. To allow a plaintiff to adduce the existence of such a plan as the basis for a prima facie case of individual disparate treatment would create a severe disincentive for such plans, contrary to the thrust of the Court’s decisions.184 An early Seventh Circuit decision, Ustrak

183. Anecdotal evidence, for example, suggests that even sophisticated law faculties do not often stop to consider whether permissible affirmative action goals have been met, thus precluding further efforts.

184. Some commentators read one early authority, Wilson v. Bailey, 934 F.2d 301 (11th Cir. 1991), as rejecting the background circumstances test entirely. See, e.g., Martha R. Mahoney, Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases, 76 S. Cal. L. Rev. 799, 816 (2003). Wilson is better interpreted, however, as permitting an affirmative action plan to be a sufficient background circumstance. Wilson involved an affirmative action plan implemented pursuant to a consent decree. See Wilson, 934 F.2d at 302-03. The two white plaintiffs had stipulated that the consent decrees were valid, and “they voluntarily limited their action to the question of whether the defendants’ conduct was mandated or consistent with the decree.” Id. at 303. The court then described a plaintiff’s burden under the first prong of McDonnell Douglas as showing that “he belongs to a class,” and the fourth prong as that “the job was filled by a minority group member or a woman.” Id. at 304. The suggestion might be that a reverse discrimination plaintiff is subject to no more stringent requirements than would a minority or female plaintiff. Yet, the context of the decision—whether the challenged decision was “mandated or consistent with” an affirmative action plan—may mean that background circumstances were already present, at least if an affirmative action plan constitutes background circumstances. This seems the better reading of the case. If the court had intended simply to equate traditional and reverse discrimination, it would have been simple to collapse the elements of the prima facie case so that it would be applicable to any plaintiff: a showing that the job was filled by a person of a different race (or the other sex) than the plaintiff. See also Shealy v. City of Albany, 89 F.3d 804, 805 (11th Cir. 1996) (repeating the language of Wilson that plaintiff need only show “he belongs to a class,” but, similar to Wilson, there was strong reason to believe race may have been a factor).

Beyond the prima facie case, however, Wilson was hostile to reverse discrimination claims. The defendant sheriff in that case had testified that “race and gender played a small role in
v. Fairman,\textsuperscript{185} made this point in rejecting a challenge by a white inmate to a prison's failure to select him for a paid position in the library.\textsuperscript{186} The plaintiff had been passed over in favor of an African American, and the prison operated under a consent decree requiring employment of blacks in various jobs in proportion to their numbers in the prison population.\textsuperscript{187} This was not enough. Judge Posner, with his usual cut-to-the-chase style, wrote:

\[\text{T}he\text{ }existence\text{ }of\text{ }an\text{ }affirmative\text{ }action\text{ }program\text{ }cannot,\text{ }standing\text{ }alone,\text{ }establish\text{ }that\text{ }an\text{ }employer\text{ }has\text{ }discriminated\text{ }against\text{ }whites;\text{ }otherwise\text{ }affirmative\text{ }action\text{ }would\text{ }be\text{ }illegal\text{ }per\text{ }se,\text{ }which\text{ }it\text{ }is\text{ }not.\text{ }The\text{ }consent\text{ }decree\text{ }in\text{ }this\text{ }case ... established a preference for blacks the lawfulness of which has not been questioned. A preference for blacks means, by the iron laws of arithmetic, a handicap for whites. Hence the existence of that handicap cannot by itself carry the day for a white who is complaining of racial discrimination; and that is all Ustrak has going for him in this case.\textsuperscript{188}

\footnotesize{his decision-making process,"} but claimed that other reasons also justified his decision, even though the successful candidates had been lower rated than the white plaintiffs earlier in the process and had lower test scores and more demerits. \textit{Wilson}, 934 F.2d at 304. The circuit court upheld as not clearly erroneous the district court's conclusion that race and gender were not dispositive factors. \textit{Id.} at 304-05. It rejected the plaintiffs' alternative argument that any consideration of race or gender was illegitimate. The court's entire discussion was: "The Supreme Court, however, in [Johnson] held that it was 'appropriate [to take] into account as one factor the sex of [the promoted individual] in determining that she should be promoted .... The decision to do so was made pursuant to an affirmative action plan that represents a moderate, flexible, case by case approach ...." \textit{Id.} at 305 (citation omitted) (quoting Johnson v. Transp. Agency, Santa Clara County, Cal., 480 U.S. 616, 641-42 (1987)). It was not clear whether the court was finding the challenged decisions valid under the affirmative action plan, or simply not discriminatory in light of the plan. \textit{Wilson} was decided before the Civil Rights Act of 1991. After that Act, it seemed clear that, once the defendant admitted that race and gender were factors, the defendant should have borne a burden of persuasion to demonstrate that he would have made the same decision in any event. \textit{See infra} notes 355-71 and accompanying text. At least, this would be clear unless a different rule is applicable to reverse discrimination claims. \textit{See supra} note 69 and accompanying text.

\footnotesize{185. 781 F.2d 573 (7th Cir. 1986).}
\footnotesize{186. See \textit{id.} at 576.}
\footnotesize{187. \textit{Id.}}
\footnotesize{188. \textit{Id.} at 577. The court cited Christensen v. Equitable Life Assurance Society of the United States, 767 F.2d 340 (7th Cir. 1985), which followed Parks in holding that "a lawful affirmative action program is not evidence of discrimination against the majority." \textit{Id.} at 343 (citing Parks v. Balt. & Ohio R.R. Co., 652 F.2d 1012, 1017 n.9 (D.C. Cir. 1981)). It explained: "National policy permits the use of voluntary affirmative action programs to remedy the}
More recent authority, however, suggests a more complicated rule: an affirmative action plan plus some other factor may be sufficient evidence of discrimination. But uncertainty exists as to what "plus" factors suffice, and the courts typically fail to state a rationale as to why a certain factor should be a "plus." The "plus" rule seems to have originated in the D.C. Circuit, which decided *Parker*, and can be summarized as holding that an affirmative action plan is not a sufficient background circumstance for a prima facie case by itself but may be sufficient in combination with other circumstances, including pressure on the hiring authority to employ minorities or plaintiffs' proof that they were all more qualified for the position than the black male who was chosen.\footnote{See *Lanphear v. Prokop*, 703 F.2d 1311, 1315 (D.C. Cir. 1983).} The D.C. Circuit, however, noted that it was uncertain as to "whether a lawful, promulgated affirmative action plan can ... provide a link in

legacy of discrimination. For 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."  \footnote{Id.}

After rejecting reliance on the consent decree, the *Ustrak* court found no other evidence of intentional discrimination:

At most the evidence shows that the librarian overrode a racial preference for whites and gave the job to a black. That does not show racial animus. The consent decree was not adopted for the protection of white prisoners. In a prison that is 80 to 90 percent black ... it would hardly be surprising, with or without a consent decree, if in a particular job classification that had only five or six jobs all were filled by blacks. If there were five jobs, one filled by a white, the percentage of blacks would be only 80 percent, less than their percentage in the prison, and the figure would rise only to 83 percent if there were six jobs .... Since medical science does not yet know how to divide a person, like a planarian, into viable portions, no inference that the blacks got more than relative merit entitled them to can be drawn from the fact that three rather than two of the vacancies were filled by blacks; there is no evidence that the black who filled the "white" slot was unqualified.

*Ustrak*, 781 F.2d at 576-77. Planaria are "a genus of the suborder Planarida of turbellarian worms, found in fresh or salt water or in moist earth, and having a flattened form."  \footnote{Oxford English Dictionary 959 (2d ed. 1991).}


190. See *Bishopp v. District of Columbia*, 788 F.2d 781, 783, 786-87 (D.C. Cir. 1986); see also *Herendeen v. Mich. State Police*, 39 F. Supp. 2d 899, 908 (W.D. Mich. 1999) (finding that allegations by white male state troopers that state police considered race and gender in promotions and sought to maintain a force reflecting the racial makeup of the population, together with allegations that their qualifications were superior to those of promoted minority and female candidates, stated a prima facie case of reverse discrimination).
a prima facie case that would justify the inference of discrimina-
tion."\textsuperscript{191}

Demonstrated pressure to hire minorities \textit{pursuant} to an
affirmative action plan seems no different from the plan itself. Yet,
such pressure, if not sheltered by the plan, would seem to satisfy the
background circumstances requirement: the defendant may be the
"unusual employer" who impermissibly discriminates against
whites. Moreover, because the defendant is not justifying that
pressure by an affirmative action plan, normal Title VII analysis
applies. A recent Eighth Circuit case, \textit{Wheeler v. Missouri Highway
& Transportation Commission},\textsuperscript{192} takes this approach. In upholding
a jury verdict for the plaintiff, the court rejected defendant's efforts
to equate Wheeler's evidence of pressure from upper level
management to hire females as evidence of the AAP. This is
inaccurate. Evidence of illegal and discriminatory motive to hire
on the basis of sex and not on the merits of the candidates is
distinct from evidence of a valid AAP. The basis of Wheeler's
argument was not that MHTC acted pursuant to the AAP, which
he conceded was valid, but that there was pressure from upper
management to hire females in violation of the AAP's commit-
tment to equal employment opportunity standards, which led to
the discriminatory hiring.\textsuperscript{193}

Presumably, the claim was that "upper level management," either
because they did not understand the limitations of their own
(presumably valid) affirmative action plan or for other reasons,
acted beyond company policy in encouraging hiring of women.
Plaintiff's evidence, independent of the plan, included "testimony of
two of the three interviewers that they felt pressure to recommend
the female employee because" of her gender.\textsuperscript{194} Of course, the
question then arises as to how one distinguishes pressure pursuant

\textsuperscript{191} \textit{Bishopp}, 788 F.2d at 784 n.3; \textit{see also} Plummer v. Safeway, Inc., No. 93-0316, 1995
circumstances when "plaintiff has provided no other substantiated circumstances that,
together with Safeway's affirmative action plan, could be viewed cumulatively to establish an
inference of discrimination").

\textsuperscript{192} 348 F.3d 744 (8th Cir. 2003), \textit{cert. denied}, 124 U.S. 2178 (2004).

\textsuperscript{193} \textit{Id.} at 749.

\textsuperscript{194} \textit{Id.}
to a plan from pressure unconnected to a plan. After all, most affirmative action plans stress outreach and inclusion, and "pressure" is an amorphous term. One can conceive of efforts that would likely fall outside of a plan, such as pressure to hire clearly unqualified women or pressure to hire women into jobs not governed by the plan, but it is not clear that is what the court had in mind.

A similar result has emerged from the Sixth Circuit. Though an early case may have implied that an affirmative action plan might be enough to satisfy the background circumstances prong of a reverse discrimination prima facie case, more recently that court has explicitly stated that "relevant facts may include whether the employer has been under external or internal pressure—for example, from affirmative action goals—to hire more minorities." The second kind of "plus" proof is evidence of the plaintiff's superior job qualifications as compared to the successful African American. Wheeler involved such testimony from one member of the selection panel, and a number of reverse discrimination cases have focused on this kind of proof. In the abstract, comparative qualifications seems like a sensible way to approach the

---

197. See Wheeler, 348 F.3d at 749.
198. For example, in Woods v. Perry, 375 F.3d 671 (8th Cir. 2004), the court stated: Woods alleges that he was better qualified for the Dakotas FMC position and that this is sufficient by itself in a reverse discrimination case to establish a prima facie claim .... It is inevitable that two candidates will have different education and work experience, and the choice of a qualified candidate with 15 more years of GSA work experience and a superior leadership rating over one with two extra years of formal education is not sufficient to show background circumstances.

Id. at 675-76; see also Evans v. Cleveland State Univ. Bd. of Trs., No. 90-3759, 1991 U.S. App. LEXIS 12218, at *10-11 (6th Cir. June 3, 1991) (ruling that the plaintiff chose improper comparator because supposed favored black was in a different academic department); Hamm v. Delta Air Lines, Inc., No. IP 99-0969-CT/G, 2001 U.S. Dist. LEXIS 2006, at *13 (S.D. Ind. Jan. 10, 2001) (holding that plaintiff's claim that he was treated less favorably by being disciplined did not establish a discrimination when the female who was not disciplined was found not to have engaged in inappropriate behavior.)
CIRCLING BACK TO THE OBVIOUS

discrimination question, whether by a traditional or a reverse discrimination plaintiff.\footnote{199} In traditional discrimination cases, innumerable plaintiffs have sought to have the court infer discriminatory intent from the claimed superior qualifications of the plaintiff as compared to her successful competitor.\footnote{200}

A third “plus” factor appeared in a recent Third Circuit case that addressed the significance of a “diversity memo” issued by a black supervisor shortly before the decision in question.\footnote{201} The court cautioned that “the memo is not, in and of itself, sufficient to establish a prima facie case of illegal discrimination. An employer has every right to be concerned with the diversity of its workforce, and the work environment.”\footnote{202} The court nevertheless found that a dispute as to whether the black supervisor had written the memo or merely distributed it over his signature as prepared by headquarters was itself probative of discrimination: a jury could find that the supervisor’s “attempt to deny authorship of the memo was consistent with Iadimarco’s allegations of bias.”\footnote{203} This is a truly remarkable exercise, for if the memorandum could not be indicative of bias,\footnote{204} how could bias be inferred from the fact that the supposed author and admitted distributor of the memorandum tried, presumably falsely, to distance himself from it? If the court’s conclusion makes sense, it is less because of the diversity memorandum per se than the fact that a black supervisor had acted against the white plaintiff.\footnote{205}

\footnotetext[199]{199. See generally Ernest F. Lidge III, The Courts’ Misuse of the Similarly Situated Concept in Employment Discrimination Law, 67 Mo. L. Rev. 831 (2002) (explaining that although a common way to show employment discrimination is through a comparator, courts tend to misuse the concept by defining it too narrowly).}

\footnotetext[200]{200. See, e.g., Anderson v. Bessemer City, 470 U.S. 564, 580 (1985) (“The District Court’s findings regarding petitioner’s superior qualifications and the bias of the selection committee are sufficient to support the inference that petitioner was denied the position ... on account of her sex.”).}

\footnotetext[201]{201. Iadimarco v. Runyon, 190 F.3d 151, 164 (3d Cir. 1999).}

\footnotetext[202]{202. Id. This case is notable less for its treatment of the diversity memo than for its rejection of the background circumstances test. See infra notes 211-12 and accompanying text.}

\footnotetext[203]{203. Iadimarco, 190 F.3d at 164.}

\footnotetext[204]{204. The memorandum is reproduced infra at note 214.}

\footnotetext[205]{205. It might be argued (indeed, Professor Lillquist does argue) that the writing of the memorandum is at least slightly stronger evidence of the mental state of the supervisor than if he had just distributed it on “orders from headquarters.” That is correct, but if the memorandum does no more than restate a commitment to diversity consistent with a valid affirmative action plan, as this memorandum did, it is hard to see why showing that the}
In summary, most courts deny that an affirmative action plan will, by itself, constitute a sufficient background circumstance. The more recent decisions, however, require little more than such a plan, and may in fact permit an affirmative action plan, by itself, to be a sufficient circumstance to meet this prong of plaintiff's prima facie case. In such cases, the defendant will be pressed to shelter the challenged decision by claiming it was made pursuant to the plan, forcing the plaintiff to prove that the plan is invalid.

III. IS REQUIRING "BACKGROUND CIRCUMSTANCES" ITSELF REVERSE DISCRIMINATION?

The preceding discussion demonstrates that "background circumstances" is more a label than a test and embraces a multitude of different approaches. The absence of coherent substantive content is sufficient reason to consider a different approach. Certainly some of the judicial dissatisfaction with the test stems from its amorphousness. What is surprising, however, is that the bulk of the criticism of background circumstances derives not from its lack of guidance to courts, but rather from the perception that requiring a white plaintiff to prove such circumstances, when not similarly requiring such proof from African Americans and other minorities, is itself unjustified, perhaps reverse discrimination.206

supervisor was the author changes its significance. The question, then, is whether the fact that the memo was written and denied shows a kind of guilty mind of someone who believes in impermissible discrimination, not merely preferences pursuant to a valid plan.

206. The argument may have been made most pointedly in a student Note discussing the question:

[1]Implying a higher standard upon reverse discrimination plaintiffs is fundamentally unjust. It is true that minorities and women have been subjected to discrimination on a massive scale. That fact does not, however, justify the imposition of a much higher standard upon other groups. The reverse discrimination plaintiff, who may bear absolutely no personal responsibility for discrimination against minorities and women, must meet a much higher burden because members of the same group have discriminated in the past. The value of Title VII and other antidiscrimination legislation is the prevention of discrimination. Title VII defines discrimination as treating employees differently "because of" the protected characteristics. Yet courts which impose the background circumstances requirement treat reverse discrimination plaintiffs differently "because of" those very characteristics.

A. The Growing Rejection of the Test

Most courts have rejected attacks on the background circumstances test as reverse discrimination with little discussion, essentially reasoning that the test simply recognizes the reality that "discrimination by employers against white men is a less common phenomenon than discrimination against minorities" and women.207 Other courts, however, have recently been more open to attacks on the doctrine.208 The Sixth Circuit, for example, questioned whether "the 'background circumstances' prong, only required of 'reverse discrimination' plaintiffs, may impermissibly impose a heightened pleading standard on majority victims of


208. The first court squarely to reject the test was Collins v. School District of Kansas City, Missouri, 727 F. Supp. 1318 (W.D. Mo. 1990), which held the background circumstances requirement "completely undermines the goal of McDonnell Douglas." Id. at 1321. The court stated that: "Under Parker, the other elements of the prima facie case are rendered meaningless because the requirement of showing the background circumstances is really a requirement that the plaintiff make an affirmative showing on the ultimate issue: Did the defendant unlawfully discriminate ...." Id. "[S]uch a radical alteration of the McDonnell Douglas framework" serves "to erect this arbitrary barrier which serves only to frustrate those who have legitimate Title VII claims." Id. at 1321-22. An earlier case, Commons v. Montgomery Ward & Co., 614 F. Supp. 443 (D. Kan. 1985), had criticized the test, but found the existence of the affirmative action plan enough to satisfy the background circumstances prong of the plaintiff's prima facie case. See id. at 446-47.

Since Collins, a number of district courts have expressed doubts about the background circumstances test. For instance, in Eastridge v. Rhode Island College, 996 F. Supp. 161 (D. R.I. 1998), the court stated:

[R]equiring a reverse discrimination plaintiff to show that the specific employer has displayed a pattern of discrimination against the majority in the past imposes a more onerous burden on such a plaintiff as compared to any plaintiff from any protected group. This is antagonistic to the very purposes of Title VII itself.

Id. at 166; see also Cully v. Milliman & Robertson, Inc., 20 F. Supp. 2d 636, 641 (S.D.N.Y. 1998) ("Absert binding authority to the contrary, this court must assume that McDonald means what it says: a Title VII case is a Title VII case on the 'same terms' for plaintiffs of all races."); Cunliffe v. Sikorsky Aircraft Corp., 9 F. Supp. 2d 125, 130 n.3 (D. Conn. 1998) (rejecting background circumstances test at summary judgment stage); Ulrich v. Exxon Co., 824 F. Supp. 677, 684 (S.D. Tex. 1993) (Declin[ing] to impose a heightened standard .... [s]eems more in keeping with the purpose behind the anti-discrimination statutes. The principal focus of the statutes is the protection of the individual employee, rather than the protection of the protected group as a whole."); Lind v. City of Battle Creek, 681 N.W.2d 334 (Mich. 2004) (overruling prior decision that had adopted background circumstances test).
discrimination."\textsuperscript{209} Although the question is not heightened \textit{pleading}, but rather heightened \textit{proof}, the thrust of the remark is more than a procedural objection.\textsuperscript{210}

More definitively, in \textit{Iadimarco v. Runyon},\textsuperscript{211} the Third Circuit rejected "background circumstances" entirely, indicating that

all that should be required to establish a prima facie case in the context of "reverse discrimination" is for the 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 trait that is protected under Title VII.\textsuperscript{212}

The case, which reversed the grant of summary judgment to the employer,\textsuperscript{213} could easily have been treated as one in which background circumstances were present. Evidence existed that the

\begin{itemize}
\item 209. Zambetti v. Cuyahoga Cmty. Coll., 314 F.3d 249, 257 (6th Cir. 2002); see also 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."). These cases are in obvious tension with \textit{Murray v. Thistledown Racing Club, Inc.}, 770 F.2d 63 (6th Cir. 1985). \textit{See supra} note 145.
\item 210. The point here is simply that these courts seem to see something questionable about framing proof structures differently in reverse discrimination cases as compared to traditional discrimination suits. The legitimacy of such an objection is taken up in Part IV infra.
\item 211. 190 F.3d 151 (3d Cir. 1999).
\item 212. \textit{Id.} at 161. Of course, this is but another way of recognizing that, even when the four prongs of \textit{McDonnell Douglas} are not met, a prima facie case is stated whenever there is sufficient evidence from which an inference of discrimination reasonably may be drawn.
\item 213. \textit{Id.} at 167. In addition to finding that plaintiff had established a prima facie case, the court held that defendant had not produced a sufficiently detailed non-discriminatory reason to satisfy its burden of production. The court stated that the defendant's simple statement that it did not believe the plaintiff was "the right person for the job" was insufficient:
\begin{quote}
The problematic nature of such an explanation is most easily seen in the context of discrimination against a minority or female applicant. Such an applicant may never be the "right person for the job" in the eyes of one who feels that the job can only be filled by a White male. The biased decision maker may sincerely believe that the White male who was offered the job was the right person, and minority and female candidates who were rejected were simply wrong for the job. The mere fact that one who discriminates harbors a sincere belief that he hired the "right person" can not masquerade as a race-neutral explanation for a challenged hiring decision. Such a belief, without more, is not a race-neutral explanation at all, and allowing it to suffice to rebut a prima facie case of discriminatory animus is tantamount to a judicial repeal of the very protections Congress intended under Title VII.
\end{quote}
\textit{Id.} at 166-67.
\end{itemize}
challenged decision was made or influenced by the fact that: (1) plaintiff's supervisor and the supervisor's supervisor were both black; (2) the other two comparable positions had been filled by whites, perhaps thereby creating a "need" for a black appointment; and (3) one of the supervisors had recently issued a memorandum that stressed the need for diversity. Collectively, these seem to comprise background circumstances under any definition of that term. If "fishiness" is a test, as in Harding, it may be important that the position was re-posted after only three of forty-one initial candidates, including plaintiff, were rated "superior" in every category, and the other two superior candidates took positions elsewhere.

The court nevertheless rejected the background circumstances test in favor of the "sufficient evidence" test. Some of the court's reasons suggest mere judicial housekeeping, such as the inaccuracy of the term "background circumstances" itself and the tendency of the test to require plaintiffs to assert proof as part of their prima facie case that is more properly analyzed as pretext proof. The court's resolution, however, follows immediately after its discussion.

214. See id. at 154-56. The memo provided:

As we proceed to fill vacancies, I want to ensure that very serious consideration is given to the issue of diversity—I cannot emphasize this point more strongly. The management teams in our plants should reflect the composition of our workforce and communities if we are to benefit from the contributions that minorities, women, and ethnic groups can bring to our decision making processes and the social harmony that this will instill in our work environment. Your personal commitment is needed—if there are any questions on this matter, please feel free to contact me.

Id. at 155. As we have seen, the court also found probative of discrimination the supervisor's denial that he had written the memo (if in fact he had). He claimed merely to have distributed over his name a memo written elsewhere in the organization. See supra text accompanying note 203.


216. ladimarco, 190 F.3d at 154.

217. See id. at 161-62.

218. "[W]e believe that the concept of 'background circumstances' is irremediably vague and ill-defined. For example, one of the alleged background circumstances here is that ladimarco was more qualified than Williams. That can hardly be termed a 'background circumstance,' unless that term is defined to include anything that suggests discrimination." Id. at 161.

219. "[T]he suggestion that a plaintiff must prove 'background circumstances' to establish that the defendant is a 'unique employer that discriminates against the majority' has a tendency to force the plaintiff to initially present proof that would otherwise only become relevant to rebut the employer's explanation of the challenged conduct." Id.
of the Sixth Circuit's objections in dicta to a "heightened standard" for reverse discrimination cases. 220 Combined with the clear background circumstances before it, the Third Circuit apparently found inappropriate any heightened standard and was not merely eliminating an inaccurate label. The court wrote: "Stating the prima facie case in terms of 'background circumstances' and the uniqueness of the particular employer is both problematic and unnecessary.... [M]any of the courts that have tried to apply such an analysis have concluded that it results in a heightened burden for the plaintiff despite" statements denying this reality. 221

B. Coming to Grips with the Problem: Different Perceptions of Reality

"Background circumstances" has become shorthand for a view of human relations in the United States. It proceeds from the belief that cross-racial discrimination is more common than intra-racial discrimination. Yet, the Supreme Court cautioned in Castaneda v. Partida 222 that "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." 223 Repeating that language more recently in Oncale v. Sundowner, 224 the Court also cited Johnson in rejecting a challenge to a valid affirmative action plan:

220. See id. at 163.
221. Id. at 161. The court returns to the "heightened standard" problem for reverse discrimination plaintiffs. See id. at 163. At this point, the opinion drops a fascinating footnote. Although the opinion is itself authored by Judge McKee, the footnote speaks of Judge McKee, in the third person, as disagreeing with the criticisms of the background circumstances test as raising an additional hurdle for white plaintiffs:
However, even though Judge McKee believes the [background circumstances] test to merely be a restatement of McDonnell Douglas, he concedes that it is just too vague and too prone to misinterpretation and confusion to apply fairly and consistently. He agrees that the approach the court adopts today allows for less confusion and more consistency than the Parker/Harding approach.
Id. at 164 n.10. The footnote, then, is in the nature of a concurrence with the judge's own opinion.
223. Id. at 499.
We did not consider it significant that the supervisor who made that decision was also a man. If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination "because of ... sex" merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.\footnote{Id. at 79 (citation omitted).}

In short, intra-racial or intra-gender discrimination occurs, if more rarely than cross-racial discrimination.

The reality of intra-group discrimination, however, seems largely inapposite to the task at hand. The issue is not whether whites discriminate against whites (or males against males): 

\textit{Santa Fe} (and \textit{Johnson}) recognized that possibility. Rather, the issue is what proof is needed such that a jury may permissibly conclude that the claimed discrimination in fact occurred.

There are two core problems underlying this debate. The first is differing perceptions of the relative probability of discrimination against whites and minorities. To the extent that \textit{Parker} was predicated on the belief that, in 1981, it was far more probable that blacks would be discriminated against than whites, the lower courts may be reassessing that belief more than two decades later. This question is addressed in this Section, which is followed by Section C and its focus on the relationship between perceptions of reality and reality itself. The second potential explanation, addressed in Section D, is that, irrespective of the facts "on the ground," our legal structure does not permit a formal racial distinction in proof of discrimination.

With respect to perceptions of reality, Professor Deborah Calloway has argued that retrenchment by the Supreme Court in Title VII cases reflects a change in the "basic assumption" underlying \textit{McDonnell Douglas}: discrimination, far from being common, is now viewed as rare.\footnote{See Calloway, \textit{supra} note 131, at 998.} In analyzing the Supreme Court's decision in \textit{St. Mary's Honor Center v. Hicks},\footnote{509 U.S. 502 (1993).} which upheld a factfinder's refusal to find discrimination even if it found the defendant's supposed nondiscriminatory reason to be pretextual, Professor Calloway wrote:

\textsuperscript{225} Id. at 79 (citation omitted).
\textsuperscript{226} See Calloway, supra note 131, at 998.
\textsuperscript{227} 509 U.S. 502 (1993).
*Hicks* is significant, not for its narrow legal holding, but for the attitude underlying that holding .... [T]his case is *not* about who bears the burden of proof. Instead, this case is about what evidence is sufficient to meet the plaintiff's burden of persuasion on discriminatory intent. What evidence makes it "more likely than not" that the defendant discriminated? The answer to this question depends on one's beliefs about the prevalence of discrimination. Whether a reasonable person (or judge) will be convinced that discrimination has been shown depends on whether he believes that discrimination is a logical inference in the absence of some other explanation for adverse conduct. The district court and the majority of the Supreme Court in *Hicks* reached their result, not because it was required by any formal legal rules, but rather because they just plain do not believe in that basic assumption.228

She then surveyed attacks on that basic assumption by legal academics, commentators, and lower court judges, and then turned to societal attitudes, concluding that the general public—those who will serve on juries—believe that discrimination against African Americans is largely a thing of the past.229

Professor Calloway's position has drawn substantial support,230 both in its analysis of the changes in the basic assumption and in its assessment that that change is unjustified by any dramatic decreases in the prevalence of discrimination against minorities and women.231 With respect to the basic assumption, for example, Michael Selmi agrees that the predicates for Supreme Court models, both for individual disparate treatment cases and in other contexts, are eroding,232 although he does not view the shift as being

228. Calloway, *supra* note 131, at 1008-09.

229. See *id.* at 1023-24.

230. See, e.g., William R. Corbett, *Of Babies, Bathwater, and Throwing out Proof Structures: It Is Not Time to Jettison McDonnell Douglas*, 2 EMPLOYEE RTS. & EMP. POL'Y J. 361, 371 (1998) ("Professor Calloway's ... 'basic assumption' reasonably describes the current situation in employment relations in the United States. Furthermore, to the extent the basic assumption may be overly broad in its description, it is important enough as a matter of policy that it should govern disparate treatment cases.")

231. The psychological predicates of such discrimination, however, may have shifted. See *infra* notes 237-40 and accompanying text.

as dramatic as does Professor Calloway.233 Similarly, Professor McGinley views courts as more likely to believe cronyism explains apparent preferences for whites,234 and Chad Derum and Professor Karen Engle see courts as more likely to believe personal animus explains disadvantages for minorities.235 These alternative explanations are increasingly replacing a presumption of discrimination in the courts.236 In other words, adverse decisions are more likely to be viewed as resulting from decision makers liking people who just happen to be white or disliking people who just happen to be black than being viewed as linked to race.

Even the strain of scholarship reflected in the writings of commentators like Professors Linda Krieger237 and Tristin Green238

is ultimately a factual determination—one that generally requires drawing an inference of discrimination based on circumstantial evidence,” the Supreme Court’s “models functioned properly only when the courts applying them were willing to see discrimination as a viable explanation for social and political conditions;” but, “[c]ombined with recent Supreme Court decisions in the affirmative action and voting rights contexts, the Hicks case signals a judicial presumption that discrimination no longer offers an explanation for otherwise unexplained racial disparities”) (footnotes omitted).

233. Selmi writes:

[I]t would be a mistake to see these cases as representing a dramatic shift from the Court's past practice or attitude. Rather, these cases are best seen as the culmination of the way in which the Court has defined discrimination over the last twenty years. Indeed, despite its rhetoric regarding the importance of ferreting out subtle discrimination, the Court has only seen discrimination, absent a facial classification, in the most overt or obvious situations—situations that could not be explained on any basis other than race. Whenever the Court found room to accept a nondiscriminatory explanation for a disputed act, it did so.

Id. at 284.


235. Derum & Engle, supra note 141, at 1227.

236. Id. at 1179.

237. See, e.g., Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161, 1164 (1995) (“Title VII jurisprudence ... while sufficient to address the deliberate discrimination prevalent in an earlier age, is inadequate to address the subtle, often unconscious forms of bias that Title VII was also intended to remedy. These subtle forms of bias, I suggest, represent today's most prevalent type of discrimination.”) (footnote omitted).

238. See Tristin K. Green, Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory, 38 HARV. C.R.-C.L. L. REV. 91, 92 (2003) (“Conceptualizing a form of discrimination in terms of discriminatory bias in workplace dynamics places much-needed emphasis on structural factors while making clear that both conscious and unconscious bias operate at multiple levels of social interaction, often resulting
may inadvertently contribute to undermining the basic assumption. The theme of this scholarship is that discrimination is no longer driven largely by conscious animus but rather reflects cognitive processing that is largely unconscious. Such scholarship argues that this phenomenon is actually more threatening to true equality than conscious animus because it is deeper rooted and more pervasive. There is currently some debate about whether such discrimination counts as "intentional" so as to fit within the prohibitions of the statute. If such cognitive processing does not count as racial intent, this strain of scholarship is very threatening to Title VII's reach.

in decreased opportunity for disfavored groups without producing a single, identifiable discriminatory decision or a perceptibly hostile work environment.

239. Although either explicit or implicit in most of the literature referred to in notes 237 and 238, supra, the debate is most pointed in the exchange between Amy L. Wax, Discrimination as Accident, 74 IND. L.J. 1129, 1132-33 (1999) (arguing that unconscious
Yet, even assuming, as I strongly believe, that disparate treatment that arises from unconscious processing is actionable, a possible unintended consequence of this research is reinforcement of notions that racial animus—the prime target of Title VII when it was enacted—is no longer a meaningful problem. Although Krieger and Green urge more sophisticated legal responses to the phenomenon they identify, the law might instead decide that, having largely eradicated conscious discrimination, its work is done. Indeed, at least one commentator, Amy Wax, has advanced this argument, claiming that the discrimination of the nature described by Krieger and Green cannot be effectively addressed by the legal system.\textsuperscript{240}

Further, the most pointed critique of Professor Calloway's argument seems to accept her premise—that the basic assumption discrimination that creates disparate treatment in the workplace should not be covered by Title VII framework, because such a method of preventing discrimination is not cost-effective), and Michael Selmi, Discrimination as Accident: Old Whine, New Bottle, 74 IND. L.J. 1233 (1999) (arguing that Professor Wax misunderstands the nature of unconscious discrimination, and suggesting that she places too much emphasis on employer costs and not enough on the costs to the victim).

Given the proof structures of Title VII, however, it will be rare that this issue, although fascinating, needs to be confronted by a court, as the factfinder must always infer underlying motive particularly in the case of defendant's denial. As a result, the jury need rarely determine whether the motive was conscious, unconscious, or somewhere in between; it need merely decide it was present. But see Susan Bisom-Rapp, Of Motives and Maleness: A Critical View of Mixed Motive Doctrine in Title VII Sex Discrimination Cases, 1995 UTAH L. REV. 1029 (discussing situations where an employment decision has both legitimate motives and discriminatory motives, and examining how courts deal with this mixed-motive problem). Should this Article's conclusion be taken seriously, the most likely way in which this issue will arise is in the context of motions to exclude plaintiff's expert testimony concerning cognitive processes incorporating discrimination, on the basis that such testimony is simply irrelevant, because such problems are beyond the reach of the statute.

\textsuperscript{240} According to Professor Wax:

[\text{E}xtending the framework created by existing antidiscrimination statutes to cover unconscious workplace disparate treatment is not a good idea because it is unlikely to serve the principal goals of a liability scheme—deterrence, compensation, insurance—in a cost effective manner. Holding employers liable will not deter the harm of unconscious disparate treatment unless employers and their agents can find ways to reduce that harm. The nature of the phenomenon of unconscious bias is such that there are no known steps that employers can reliably take to control biases that may distort the kinds of discretionary or subjective social judgments that must inevitably be made in the course of managing personnel in the modern workplace. For this reason, little or no cost-justified deterrence of unconscious bias can be expected to result from imposing liability on employers for this type of conduct.]

Wax, supra note 239, at 1132-33. In reply, see Selmi, supra note 239.
is no longer operative—but also questions whether it is (or ever was) justified as a description of reality. Professor Deborah Malamud writes of Professor Calloway:

"The central problem with this rhetoric—and with any effort to rely heavily on the "basic assumption" it identifies—is that it is by no means certain that any particular unexplained adverse act toward a woman or a member of a minority group is the result of discrimination. The question is whether, in the face of uncertainty, the legal system should use a mandatory presumption instead of requiring individualized proof. My conclusion—one I reach with great difficulty—is that the uncertainty is sufficiently great to render the use of a mandatory presumption unwise."^{241}

Professor Malamud's critique is consistent with a more general strain of evidence scholarship that views mandatory presumptions...

^{241} Deborah Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229, 2254-55 (1995). Malamud advances four reasons, one of which is discussed *infra* at text accompanying note 246. The other three reasons include, first, the basic assumption as predicated on "the expectation that absent discrimination, employment decisions are—and can be proven to be—fair and reasonable." *Id.* at 2255. Data from union grievance arbitration, public employment merit-system adjudications, and common law wrongful discharge cases, however, "strongly suggest that wrongful, or at least undefendable, employer actions are significant problems in the American workplace, even outside of the setting of actionable discrimination. I cannot accept the 'basic assumption' if it requires me to assume otherwise." *Id.* at 2257-58.

Second, the basic assumption is a unitary "credo," but discrimination is not a unitary phenomenon in American society. The likelihood of discrimination depends on a number of factors, including the protected group at issue, the sector of the economy, the type and size of employer, the degree to which the workplace is integrated, and the stage of the employment relationship. The assumption that discrimination is the cause of all unjustified actions against members of protected groups is unlikely to be equally justified in all of these varied circumstances.

*Id.* at 2257-58.

Third, Professor Malamud argues that the *McDonnell Douglas* proof structure requires more than proof "that race or gender played some part in the decision," which "would create, at best, a mixed motive case." *Id.* at 2259. She goes on to say that [b]elief that issues of race or gender are likely to play a role in arbitrary actions against members of protected groups does not entail the belief that such issues are likely to be the "but for" cause of arbitrariness across race and gender lines—which is the standard of proof ... under [*McDonnell Douglas*].

*Id.* (footnote omitted). This last argument seems substantially undercut by subsequent developments. See discussion *infra* notes 372-85 and accompanying text.
as inconsistent with our usual norms of factfinding.\textsuperscript{242} An exception to this norm is certainly possible, for example, when the presumed fact is usually true when the predicate facts are proven, but jurors systematically undervalue the chances of the presumed fact.\textsuperscript{243} Professor Malamud, however, disputes that the presumed facts do normally follow from the proven facts. Needless to say, Professor Malamud's position has generated its own critics.\textsuperscript{244}

\textsuperscript{242} McDonnell Douglas was decided at a time when Title VII cases were judge-tried, the remedies being viewed as essentially equitable. It was not until the passage of the 1991 Civil Rights Act that jury trials and legal damages became generally available in Title VII suits. See Sullivan, Zimmer, & White, 2 Employment Discrimination: Law and Practice, supra note 27, at 925-27. As a result, the Court in McDonnell Douglas was writing largely to structure the factfinding of judges. After the 1991 Act, judges' primary role was that of gatekeeper, deciding when a case gets to a jury and what evidence is submitted to the jury. Even Hicks, although reviewing a judge's factfinding in a bench trial, was decided after the jury trial became available in Title VII suits. This shift in the judicial role may explain in part the evolution of the McDonnell Douglas approach toward a more evidence-centered, less fixed rule of sufficiency analysis.

\textsuperscript{243} Suppose that, of every 100 cases where the \textit{prima facie} case is established and the legitimate nondiscriminatory reason is rebutted, in 90 cases the correct finding is discrimination in violation of Title VII. A mandatory presumption in such cases would lead to 10 false verdicts of violation. In the absence of a mandatory presumption, the number of false verdicts for defendants might fall to 5, but there might also be false verdicts against plaintiffs. If these numbered 20, there would be a net increase of incorrect verdicts from 10 to 25. Under these assumptions, a mandatory presumption would be justified if the core policy is error minimization. This argument, however, justifies a mandatory presumption only if the assumptions are themselves empirically supportable.

\textsuperscript{244} See, e.g., Corbett, supra note 230, at 371 (arguing that the McDonnell Douglas proof structure retains value for judicial analysis of Title VII claims and that it has been effective in eradicating discrimination in the employment arena); McGinley, supra note 238, at 482-83 (noting that psychological and sociological data support the creation of a mandatory presumption); John Valery White, \textit{The Irrational Turn in Employment Discrimination Law: Slouching Toward a Unified Approach to Civil Rights Law}, 53 Mercer L. Rev. 709 (2002) (proposing a slightly modified version of the McDonnell Douglas proof structure).

Professor Linda Hamilton Krieger summarizes Malamud as arguing that the prevalence of discrimination does not determine whether a particular action "can fairly be attributed to that cause." Linda Hamilton Krieger, \textit{The Burdens of Equality: Burdens of Proof and Presumptions in Indian and American Civil Rights Law}, 47 Am. J. Comp. L. 89, 120 (1999). She continues:

In essence, I would suggest, Malamud and Calloway are arguing over whether or not Title VII should still be viewed as "transformative law," or whether it is now more accurately characterized as "normal law," that is, law which seeks to enforce prevailing social norms against a small, deviant class of lawbreakers. If Title VII is properly seen as "normal law," than [sic] perhaps Professor Malamud is correct. But if it is still "transformative law," than [sic] Professor Calloway has the better argument.

\textit{Id.} at 120-21.
With respect to the courts merely following general public perceptions as to the decline in racial discrimination, Professor Stephen Plass has recently stressed the increasing belief in America—at least white America—that racial discrimination is a thing of the past:

Black presence in business and social settings and media images suggest that America is a place of racial cooperation where bigotry is an aberration.... Conspicuous consumption by blacks helps reinforce perceptions that American society has removed most barriers to equal opportunity and achievement. Significant and repetitive positive images of blacks tend to undermine a general contention that to be black is to be disadvantaged....

Although no one can generally demonstrate that it is better to be black, encountering black success as fact or fiction has served to magnify the plight of less privileged whites.245

In this connection Professor Malamud concurs about popular perceptions. She agrees with Professor Calloway "that what 'judges, juries, and members of this culture believe about the existence of discrimination in the workplace and perhaps in society in general' does not in fact conform to the factual premise of the 'basic assumption.'" Malamud vehemently disagrees, however, that this is a reason to return to the basic assumption, arguing that Professor Calloway "fails to acknowledge ... that deciding cases on the basis of a mandatory presumption that is inconsistent with contemporary beliefs about the nature of discrimination raises important questions about the perceived legitimacy of the enterprise."247

In short, the deterioration, if not demise, of the basic assumption—whether or not justified in the context of traditional discrimination cases—certainly explains the recent and increasing judicial

246. Malamud, supra note 241, at 2260.
247. Id. Corbett disagrees. He argues, first, that "both Professors Calloway and Malamud overstate, at least somewhat, the point that society does not believe that intentional discrimination is still common in the workplace" by focusing on affirmative action and the disparate impact theory of recovery. Corbett, supra note 230, at 374.
tendency to eliminate any "heightened" requirement for proof in reverse discrimination challenges.

C. Coming to Grips with the Problem: Reality Itself

Professor Calloway's argument is pitched on the belief that discrimination against racial minorities and women is a common, indeed, a pervasive, phenomenon. Although Professor Malamud does not deny that discrimination occurs frequently, and grounds at least part of her attack on the basic assumption on grounds of democratic legitimacy, most of her rebuttal challenges the prevalence of discrimination, at least as compared with other irrationalities and illegalities in the American workplace.

Deciding how prevalent discrimination is, much less whether it is sufficiently prevalent to justify the basic assumption, is a complicated matter, but it can fairly be said that the current state of the literature is consistent with the basic assumption where race is concerned. That is to say, the notion that whites frequently discriminate against blacks (and other racial minorities) is supported by numerous empirical studies, although not all are

248. See supra text accompanying note 247.
249. See supra note 241.
250. There is at least some empirical evidence that blacks also discriminate against blacks, although the study in question (tipping of cab drivers by passengers of different races) is very small and focused on a market radically different than the employment setting. See IAN AYRES, TO INSURE PREJUDICE: RACIAL DISPARITIES IN TAXICAB TIPPING (Yale Law School, Pub. L. Working Paper No. 50).
251. There has also been lively theoretical literature as to whether and how discrimination could survive in a competitive economy, originating with the work of Gary Becker who posits an employer "taste for discrimination" that overcomes competitive pressures to hire minorities and women. See GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 14 (2d ed. 1971); see also RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 27.1 (2d ed. 1977) (arguing that the incentive to maximize profits by exploiting a lower-paid labor force will lead even biased employers to hire minorities; in a competitive market, only the least discriminatory employers will survive); David Charny & G. Mitu Gulati, Efficiency Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for High-Level Jobs, 33 HARV. C.R.-C.L. L. REV. 57, 68 (1998) (arguing that, in high-level jobs, "difficulties in monitoring (or, equivalently, discretion by managers in evaluating workers) create powerful opportunities for discriminatory hiring and promotion"); Michael Selmi, The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects, 81 TEX. L. REV. 1249, 1251 (2003) (doubting whether Becker's theory is empirically supported); David A. Strauss, The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards, 79 GEO. L.J. 1619, 1622 (1991) (describing statistical discrimination,
focused on employment. Whether such discrimination is as or more common than the kind of irrationalities and other illegalities that Professor Malamud notes is, of course, another question. In light of current research, however, it would be hard to conclude that the basic assumption is irrational.

The most compelling studies try to determine whether actual market participants tend to discriminate through the use of testers or other means. A dramatic recent example is an experiment performed by Marianne Bertrand and Sendhil Mullainathan to measure racial discrimination in the labor market by submitting fictitious resumes in response to help-wanted ads in Boston and Chicago newspapers. They randomly assigned "either a very African American sounding name or a very White sounding name" and reported the result:

[There was] significant discrimination against African-American names: White names receive 50 percent more callbacks for interviews. We also find that race affects the benefits of a better resume. For White names, a higher quality resume elicits 30

that is, "[a] rational employer will discriminate, even if no relevant actor has any discriminatory animus, if the employer concludes that race is a useful proxy for job qualifications"). However interesting these theories, for present purposes theoretic projections should be subordinate to empirical studies.

252. A variety of studies also show the likelihood of discrimination against women. See, e.g., Linda M. Blum, Between Feminism and Labor: The Significance of the Comparable Worth Movement (1991); Deborah Jones Merritt & Barbara F. Reskin, Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring, 97 Colum. L. Rev. 199 (1997); Martha Chamallas, The Market Excuse, 68 U. Chi. L. Rev. 579 (2001) (reviewing Robert L. Nelson & William P. Bridges, Legalizing Gender Inequality: Courts, Markets, and Unequal Pay for Women in America (1999)). Most of these studies are statistical in nature, but a recent empirical study is also suggestive. See Claudia Goldin & Cecilia Rouse, Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians, 90 Am. Econ. Rev. 715 (2000) (noting that, while not statistically significant, the data showed that blind auditions substantially increased the likelihood of success of female candidates); see also Christine Jolls, Is There a Glass Ceiling?, 25 Harv. Women's L.J. 1, 3-4 (2002) (discussing Goldin and Rouse's study).

253. This assumption, of course, does not directly rebut Professor Malamud's democratic legitimacy point, but it raises the stakes: Should a court refuse to apply a proof structure that it believes comports with reality because the majority of the citizenry do not share that view? See Corbett, supra note 230, at 375. This Article will not further explore the divide between science and democracy that such a position exposes. For Professor Malamud, of course, this is not a serious problem because she questions the basic assumption in its own terms. In any event, she proposes addressing any difference between perception and reality by the proof process itself, especially expert testimony. See Malamud, supra note 241, at 2261-62.
percent more callbacks whereas for African Americans, it elicits a far smaller increase. Applicants living in better neighborhoods receive more callbacks but, interestingly, this effect does not differ by race. The amount of discrimination is uniform across occupations and industries.... These results suggest that racial discrimination is still a prominent feature of the labor market.254

This study has results similar to a 1991 work by the Urban Institute that used matched pairs of black and white testers to study discrimination in entry-level positions in the retail and service trades advertised in Washington, D.C. and Chicago newspapers.255 The Institute found discrimination against young black job seekers. Although in most cases neither of the testers received an offer or both did, in the cases where only one received an offer, fifteen percent of the overall cases had the white tester successful, compared to five percent of the cases with a successful black tester.256


255. See MARGERY AUSTIN TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: DISCRIMINATION IN HIRING (1991); see also MARK BENDICK, CHARLES W. JOHNSON, & VICTOR A. REINOSO, MEASURING EMPLOYMENT DISCRIMINATION THROUGH CONTROLLED EXPERIMENTS (1993) (similar study reaching similar results).

256. TURNER ET AL., supra note 255, at 37. But see RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 55-58 (1992) (criticizing the 1991 study on a number of points). Epstein argues that covering only a small segment of the job market, and limiting the study to jobs advertised in newspapers, "destroys any possibility of randomization." Id. at 56. He also questions the assumption that differential hiring rates establish discrimination because it is impossible to be sure that the only difference between the black and white members of each pair was race. Id. at 57. He further stressed that "[t]he public sector is excluded from the entire sample, as are a disproportionate percentage of private firms with affirmative action programs." Id. It is not clear, however, whether this latter criticism does not, in fact, support the study's conclusion to the extent that, absent some affirmative action programs, discrimination exists. In another passage, Epstein's criticism seems less to deny discrimination than to defend it as rational:

The Institute also was unable to hold constant the relative cost to the firm of the two applicants. The point manifests itself in two ways. First, ... an important concern for a firm is how a given worker fits in. The ability to maintain cohesion within the firm and with a customer base may depend in part on the race of an employee. If these costs are higher in some settings for workers of one race than another, then we should expect to see some difference in hiring patterns. The differences need not all cut in the same direction, as is evident by the preferences that some black testers received in the Institute's own study. To
Outside of the employment relationship, Ian Ayres has also conducted a variety of empirical studies showing discrimination by retailers against consumers in automobile purchasing and other consumer contexts. Further, the extensive sociological research reported by such commentators as Krieger and Green, despite being largely conducted in the laboratory and dedicated to showing cognitive tendencies that tend to undervalue the qualifications and contributions of minorities and women, is certainly strongly suggestive that discrimination occurs in real world settings.

hold, as the Institute does, that the reasons for the discrimination are wholly irrelevant is to say that some costs are irrelevant as well.

Id.; see also Devon Carbado & Mitu Gulati, The Law and Economics of Critical Race Theory, 112 Yale L.J. 1757, 1791 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002)) (noting that “Epstein need not worry” because employers favor homogeneity of their workforces, at least in positions where teamwork is critical). According to Carbado and Gulati, “[i]n order to increase efficiency, employers have incentives to screen prospective employees for homogeneity, and, in order to counter racial stereotypes, nonwhite employees have incentives to demonstrate a willingness and capacity to assimilate.” Id. at 1762. Employers may, then, not discriminate on the basis of skin color per se, but on the basis of characteristics related to race and culture. See id. at 1171-72.

Finally, Epstein suggests that any discrimination against African Americans may, in fact, be due to Title VII:

If [employers] perceived that it would be more difficult to fire blacks once hired, then the cost of taking a black worker would be higher than that of taking a white worker. Again, that difference in cost could easily be translated into a lower level of offers for black workers.

EPSTEIN, supra, at 58.


258. See Green, supra note 238; Krieger supra note 237.

259. Michael Selmi writes of these and other studies:
Finally, Professors Alfred Blumrosen and Ruth Blumrosen have undertaken a major statistical study of the data that employers with more than fifty employees are required to submit annually to the EEOC on the EEO-1 Form. Looking at the data from 1975 through 1999, the authors found that, although minorities and women have made significant gains in employment since 1975, there was substantial recent statistical evidence of discrimination by those employers who filed data. For 1999, the study analyzed 160,297 reports filed by establishments with fifty or more employees operating in the Metropolitan Statistical Areas (MSAs) as defined by the Census Bureau. Viewing each MSA as a labor market, the study found considerable discrimination:

For 1999, 75,793 establishments discriminated against Minorities in at least one occupational category. This discrimination affected 1,361,083 Minorities who were qualified and available to work in the labor markets, industries and occupations of those who discriminated. These Minorities were 57% Black, 27% Hispanic, 9% Asian and 2% Native American. A “hard core” of 22,269 establishments appear to have discriminated over a nine-year period against Minorities. This

At the very least, they demonstrate the extent to which the persistence of discrimination in our society remains a contested issue. Those who would dismantle the traditional structures for drawing inferences of discrimination from circumstantial evidence ought to bear the burden of establishing that such evidence no longer supports findings of discrimination. That burden has yet to be satisfied.

Selmi, supra note 232, at 341-42.


261. The work force as a whole grew during this period, but “minorities increased their proportion of the EEO-1 Labor Force between 1975 and 1999 by more than 4.6 million workers.... The net inflow of minorities in the EEO-1 Labor Force was an additional seven million workers, nearly doubling the minority labor force of 1975.” Blumrosen & Blumrosen, Intentional Discrimination in Metropolitan America, supra note 260, at 26. Women also increased “by nearly 3.8 million workers. The net inflow of women was an additional 9 million women, more than doubling the female labor force of 1975.” Id. “More important, all groups increased their share of ‘better jobs’ as officials, managers, professionals, technical and sales workers.” Id. at xvi.
“hard core” is responsible for roughly half of the intentional discrimination we have identified.262

The authors concede that the use of MSAs as a parameter poses problems because some MSAs are huge and heterogeneous while some establishments with as few as fifty employees have much smaller employee recruitment areas.263

In sum, there is strong empirical support for believing discrimination against racial minorities and women is a relatively common occurrence. This suggests that the basic assumption is not irrational in traditional discrimination cases.264 By necessary implication, it also suggests that some version of the background circumstances test is justifiable from a factual perspective. After all, if, as the studies show, whites tend to devalue the credentials and performance of African Americans and other racial minorities, the necessary result is to favor majority applicants and workers. It would, in fact, be the “unusual employer” who is free from this tendency and discriminates against whites or males.

That, however, does not end the matter. Two questions remain. First, regardless of its rationality, is a different standard for reverse discrimination as opposed to traditional discrimination constitutionally permissible? This question is taken up in Part IV. Second, with all the pieces in place, what should the proper rule be?

262. Id. at 74. Similar results were found for women, as 29% of establishments discriminated against women in at least one occupational category. “Hard core” discriminators were defined as those “so far below average in an occupation that there is only one in one hundred chances that the result occurred by accident (2.5 standard deviations) in 1999 and in either 1998 or 1997, and in at least one year between 1991 and 1996, and was not above average between 1991 to 1999.” Id. at 95.

The study compared only establishments employing at least 50 workers and also required an establishment to have at least 20 employees in the occupational category assessed. It further required (1) “two other establishments with at least 20 employees in that occupation;” (2) “at least 120 employees in the occupation in the MSA;” and (3) “no establishment have more than 80% of the employees.” Id. at 30. These limitations were designed to ensure a labor market for such workers in the MSA, “and that no single establishment dominated the market.” Id. These exclusions resulted in the study covering many fewer than half of all employees. See id. at 29.

263. See id. at 36.

264. The discrimination in these studies may be conscious or the result of the kind of cognitive processing described by Professors Krieger and Green. Assuming that either kind of discrimination constitutes a violation of Title VII, the data support the basic assumption.
IV. Is "BACKGROUND CIRCUMSTANCES" CONSTITUTIONAL?

The subtext of the "heightened pleading" notion is that it is unconstitutional to apply different proof requirements for claims by whites, as opposed to those by African Americans and other racial minorities.\footnote{265} I previously dealt with a similar argument in connection with whether it would be constitutional to limit Title VII's disparate impact theory to African American and other racial minorities (and women) or whether the Constitution commands that theory also be available to white males.\footnote{266} In that piece, I recommended the counter-intuitive expedient of extending disparate impact to whites as a means of avoiding the question. Although the constitutional analysis will not be repeated in detail here, the earlier piece recounted the Supreme Court's unified theory for race-based government actions announced in \textit{Adarand Constructors v. Pena}.\footnote{267} Building on \textit{Richmond v. J.A. Croson},\footnote{268} which had applied strict scrutiny under the Fourteenth Amendment's Equal Protection Clause to a city's affirmative action program, the \textit{Adarand} Court held that all racial classifications by any government—state, local or federal—are to be strictly scrutinized. Announcing principles of "skepticism" (of the justifications for any racial classification, thus triggering strict scrutiny), "consistency" (the same standard of

\footnote{265} See, e.g., \textit{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."). Whether it is fair to describe the phenomenon as involving different requirements of proof for different races is addressed in note 277 and its accompanying text, infra.

\footnote{266} See \textit{Sullivan, supra} note 2, at 1544-55. The prior article focused mainly on disparate impact as applied to race, as does this piece. Although the scrutiny applied to gender classifications has become increasingly strict, racial classifications still entail the most exacting review. The standard for sex-based classifications is that they must serve "important governmental objectives," and the means employed must be "substantially related to the achievement of those objectives." United States v. Virginia, 518 U.S. 515, 524 (1996). Affirmative action in favor of women would thus seem to be easier to justify constitutionally than affirmative action based on race. In his dissent in \textit{Adarand Constructors v. Pena}, 515 U.S. 200 (1995), Justice Stevens pointed this out in criticizing the majority's decision to require strict scrutiny for race-based affirmative action plans. See \textit{id.} at 247. At least one circuit has applied strict scrutiny to race-based plans, while applying intermediate scrutiny to sex-based affirmative action. See \textit{Dallas Fire Fighters Ass'n v. City of Dallas}, 150 F.3d 438 (5th Cir. 1998).

\footnote{268} 488 U.S. 469 (1989).
review applies to classifications burdening any race), and "congruence" (the analysis is the same whether the governmental actor is state or federal), the Court swept all racial classifications into the same probing analytical framework.\textsuperscript{269}

After Adarand, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. Applying this approach to disparate impact limited to African Americans and other racial minorities, strict scrutiny seems unavoidable for reasons developed in the earlier article.\textsuperscript{270} As applied to the area of present concern—individual disparate treatment—Santa Fe's reading of Title VII to bar race discrimination, not merely discrimination against African American and other racial minorities, goes far toward immunizing the statute from equal protection attack.\textsuperscript{271} However, the issue is not entirely free from doubt because a facially neutral statute—like Title VII, as read by Santa Fe—may nevertheless violate equal protection if the underlying intent is to target a particular race.\textsuperscript{272} The argument would be that Title VII, although framed in neutral terms as a prohibition of all race discrimination, was motivated by an intent to assist African Americans (and perhaps other racial minorities), and passing a law intended primarily to benefit a particular race is itself suspect, even if the law is available to all races.

\begin{footnotesize}
\begin{enumerate}
\item Adarand, 515 U.S. at 223-24. The Court invoked the language of Croson: Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. Id. at 226 (quoting Croson, 488 U.S. at 493 (O'Connor, J., plurality opinion)).
\item Professor Primus advanced elegant arguments as to why so limiting disparate impact need not be deemed racial classifications. See Primus, supra note 1, at 503-16. Yet, they are ultimately unpersuasive. See Sullivan, supra note 2, at 1547-50.
\item Given the status of affirmative action at the time Santa Fe was decided, it is unlikely that constitutional concerns were a primary motivation for the Court. At that point, the only Supreme Court affirmative action decision, DeFunis v. Odegaard, 416 U.S. 312 (1974), had found a challenge to a law school's admissions program to be moot. Regents of University of California v. Bakke, 438 U.S. 265 (1978), would not be decided for two more years.
\item See, e.g., Gomillion v. Lightfoot, 364 U.S. 339 (1960) (invalidating city boundary drawn to exclude black voters); Yick Wo v. Hopkins, 118 U.S. 356 (1885) (holding that facially neutral ordinance administered to exclude Chinese from laundry business violated the Equal Protection Clause).
\end{enumerate}
\end{footnotesize}
This argument is suggestive of the debate concerning such measures as the Texas 10% Plan for admission into state universities.\textsuperscript{273} From this viewpoint, the motivation for the Texas plan is to assist African Americans and Chicanos, among other racial minorities, although the plan is on its face racially neutral. In the debates leading up to \textit{Gratz} and \textit{Grutter}, it was often assumed that the Texas approach would be permissible, suggesting at least this much of a different analysis of benign and invidious racial discrimination (despite \textit{Adarand}'s requirement of congruence).\textsuperscript{274} In \textit{Grutter} itself, Justice O'Connor cast mild doubt on such a view.\textsuperscript{275}

\begin{quote}
\textsuperscript{273} See generally Michelle Adams, \textit{Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans"}, 62 OHIO ST. L.J. 1729 (2001). Professor Adams noted:

When the state institutes a mechanism that attempts to create racial diversity in public higher education out of racial segregation in secondary education, it is fallacious to perceive that mechanism as just another affirmative action plan. Instead, it is more accurate to describe percentage plans as a reflection of current day educational apartheid.

\textit{Id.} at 1733-34; see also Brian T. Fitzpatrick, \textit{Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan}, 53 BAYLOR L. REV. 289, 293 (2001) (arguing that there is "a strong argument that this new admissions scheme should be subjected to strict scrutiny, that it fails strict scrutiny, and that it is therefore unconstitutional"); Kim Forde-Mazrui, \textit{The Constitutional Implications of Race-Neutral Affirmative Action}, 88 GEO. L.J. 2331, 2335-36 (2000) ("[U]nder the Court's decision to subject benign racial classifications to strict scrutiny, combined with the principle that legislative motivation is what counts for equal protection purposes regardless of a law's explicit terms, race-neutral affirmative action may be just as constitutionally vulnerable as race-operative programs.").

At one point in his disparate impact discussion, Primus acknowledges that a statute with a purpose to "break down inherited racial hierarchies and to integrate the workplace is at greater risk of being found to have an unconstitutional motive." Primus \textit{supra} note 1, at 536. Therefore, he considers whether a facially neutral law whose motivation is "at least in part to improve the position of traditional victim groups" is subject to strict scrutiny, and concludes not necessarily. \textit{See id.} at 539. In doing so, he relies on suggestions in affirmative action cases endorsing "race-neutral means ... improve the position of minorities," \textit{id.}, at least if race is not the "predominant motive[]." \textit{Id.} at 545. Yet, Primus himself views it as "disingenuous to say that Title VII is motivated partly by racial concerns and partly by economic efficiency concerns," because economic efficiency is merely a limit on the racial integration purposes of the statute. \textit{Id.} at 550.

\textsuperscript{274} See Hayden v. County of Nassau, 180 F.3d 42 (2d Cir. 1999) (upholding selective use of test segments in order to increase African American success rate); Byers v. Albuquerque, 150 F.3d 1271 (10th Cir. 1998) (upholding facially neutral promotion cut off score on a test aimed to increase minority and female representation).

\textsuperscript{275} In a passage considering the argument that such plans were preferable alternatives to the Michigan Law School's admissions policy, Justice O'Connor wrote:

The United States advocates "percentage plans," recently adopted by public undergraduate institutions in Texas, Florida, and California to guarantee admission to all students above a certain class-rank threshold in every high
Yet, even were Title VII to be subject to strict scrutiny under this analysis, the Court would recognize a compelling governmental interest in eliminating racial discrimination. Indeed, in a passage that could have been penned in connection with Title VII, Justice O'Connor, writing for the Court in *Adarand*, stressed that:

The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.... When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.\(^{276}\)

The color blindness of Title VII would seem to satisfy any concerns about the narrowly tailored nature of the prohibition.

In any event, even if Title VII's neutral prohibition of race discrimination is not constitutionally suspect, the present area of concern—different proof requirements for black and white plaintiffs—may be more problematic under the Equal Protection Clause.\(^{277}\)

school in the State. The United States does not, however, explain how such plans could work for graduate and professional schools. Moreover, even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university. We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.


The criticism of the background circumstances requirement reflects the view that it constitutes the kind of racial classification that would be suspect in almost any other setting. Yet, even assuming strict scrutiny, such exacting review is not necessarily fatal to a classification. Read to require background circumstances for whites only, the statute would still be constitutional were it to be justified by a compelling state interest.

With respect to whether the background circumstances requirement is subject to strict scrutiny, the classification in question is admittedly an odd one—a judicially imposed rule of proof rather than a legislative or executive decision. There seems no apparent reason, however, to exempt judge-made law from constitutional analysis, and the Court has held judge-made legal doctrines to be subject to Equal Protection Clause analysis. 

struck down a judicial decision that the “best interest of the child” standard precluded awarding custody to a father because the mother had entered an interracial marriage. The Court wrote:

The [trial] court correctly stated that the child’s welfare was the controlling factor. But that court was entirely candid and made no effort to place its holding on any ground other than race. Taking the court’s findings and rationale at face value, it is clear that the outcome would have been different had petitioner married a Caucasian male of similar respectability.

A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.
Although *Palmore* may be distinguishable from the present problem, the situations are not entirely distinct.\(^{281}\)

*Palmore* aside, the background circumstances rule certainly has the earmarks of a racial classification—a white plaintiff must use different evidence to prove the same wrong as an African American plaintiff. It is true that the ultimate question for both is the same—is the challenged employment decision discriminatory? The reality remains, however, that white and black plaintiffs are treated differently. Recall the elements of the prima facie case as stated by *McDonnell Douglas*:

(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.\(^{282}\)

Under any version of the background circumstances approach, the African American plaintiff (or other "racial minority") proves a prima facie case by these four elements, which include simply proving his racial identity. A white plaintiff, however, cannot get to the jury by the identical proof—including her racial identity. Rather, she must prove background circumstances. The point becomes transparent by a thought experiment of three candidates

held to be state action governed by the Fourteenth Amendment.” *Id.* at 432 n.1.

281. *See also Ex parte Devine*, 398 So. 2d 686 ( Ala. 1981) (striking down "tender years presumption" that custody of young children should be awarded to the mother as unconstitutional sex discrimination). Other courts have avoided constitutional challenges to common law doctrines, such as the rule that a wife takes her husband's domicile, by finding the common law to have changed. *See, e.g.*, Kerr v. Kerr, 371 S.E.2d 30 (Va. Ct. App. 1988) (stating that "the outmoded expectation that a wife is expected to follow her husband's change of abode is no longer applicable" when assessing a claim for desertion); *cf.* Geesbreght v. Geesbreght, 570 S.W.2d 427, 430 (Tex. App. 1978) (invalidating rule that wife acquired her husband's domicile under state's equal rights amendment); Craig v. Craig, 365 So. 2d 1298 (La. 1978) (invalidating state statute according husband the right to determine marital residence).

282. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). There is continued adherence to the first prong, even after *Santa Fe* made the notion of a "protected class" somewhat inapt. For example, the Court in *Hicks* wrote of plaintiff establishing a prima facie case: "Melvin Hicks met this initial burden by proving by a preponderance of the evidence that he was black and therefore a member of a protected class." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 527 (1993) (Souter, J., dissenting).
for a single position, an African American, an Asian, and a white. If all three are turned down and each proved his or her racial identity, the existence of the job opening, and that "after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications," the two members of racial minorities would have a prima facie case and the white would not.

As this example demonstrates, not merely as a matter of formal logic, but also in terms of outcomes, different requirements can produce different results. Of course, this example also demonstrates the artificiality of the prima facie case: although the employer might be compelled by the prima facie case of the two minorities to put in evidence a nondiscriminatory reason for its decision, proof that a white was also passed over would be evidence—perhaps very strong evidence on a motion for summary judgment or judgment as a matter of law—that its decision was not discriminatory. Perhaps even more pointed, it is hard to imagine a structured method of approaching claims of discrimination that does not embrace some kind of racial classification. In that sense, of course, some version of *McDonnell Douglas* seems unavoidable if courts employ structured proof to begin with.\(^2\)\(^8\)\(^4\) Traditional analysis would, however, view this kind of argument through the compelling interest lens, not as a rebuttal to the existence of a racial classification in the first instance.

In connection with the disparate impact question, Professor Primus raised elegant arguments as to why limiting disparate impact to racial minorities need not be viewed as a racial classification.\(^2\)\(^8\)\(^5\) For example, he contends that courts have not always treated government actions that seem analytically to be racial

---


284. It is, of course, not necessary that they do so. The thrust of Professor Malamud's article is that *McDonnell Douglas* should be abandoned, which would also eliminate the problem of different requirements in reverse discrimination cases. See *infra* notes 372-83 and accompanying text.

classifications as such. This is certainly true, and in many areas of the law a preliminary "characterization" may alter the analysis substantially. For example, characterizing something as "speech" rather than "conduct" will lead to very different results in most cases. In the antitrust context, "price fixing" is per se illegal, but not all conduct with the purpose or effect of setting prices is so characterized.

Professor Primus details a few cases in which indisputably racial classifications were not so characterized. He might have adduced cases in the present context where courts have rejected claims that the background circumstances test is discriminatory, albeit with little analysis. For example, one court, although liberalizing the background circumstances test, asserted that "[t]his requirement is not designed to disadvantage the white plaintiff, who is entitled to the same Title VII protection as a minority plaintiff." Courts thus have rejected attacks on the test without acknowledging they are drawing a racial line, and, to that extent, support Primus. The increasing attacks on the background circumstances test in the

286. As Professor Primus notes, "[r]ather than functioning as a formal means of determining what level of scrutiny should apply, the inquiry into the existence of a racial classification can be directed by normative judgments ... such that the classification question does little independent work." Id. at 514.


291. Harding v. Gray, 9 F.3d 150, 153 (D.C. Cir. 1993). But see Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 n.7 (6th Cir. 1994) (requiring plaintiff to show "background circumstances" but stating that the court had "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").
district courts, however, suggest that this position will be increasingly hard to maintain.

Rather, the courts applying some background circumstances test will, as they already have, justify the test as reflecting real differences between the races, that is, as a general matter, discrimination is more common against racial minorities than against whites. As we have seen, such a position is well-supported by the literature. Further, the passage of Title VII by Congress in 1964 implies a congressional determination to that effect, although the Court has not been very deferential to congressional findings of discrimination in recent years. Yet, not all realities justify racial classifications,

292. See supra Part III.C.
293. The confused, even chaotic, legislative history of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.), left the statute without the kind of preamble or statement of purposes that is common in more recent antidiscrimination laws. Further, there is no committee report on the bill as amended. Nevertheless, during the extended debates, including a famous filibuster in the Senate, a serious problem of discrimination in employment against African Americans was documented by the supporters. See generally 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 (2003) (advocating a new approach to the use of legislative history in statutory interpretation by looking at the passage of the Civil Rights Act of 1964 to identify how courts tend to resort to statements of the more extreme sides of any debate).
294. The major fault line in this area arose in the context of state Eleventh Amendment challenges to federal statutes that were defended as within Congress's power under § 5 of the Fourteenth Amendment to abrogate that immunity. Although the Court has occasionally recognized the validity of such abrogation, see Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (upholding the Family & Medical Leave Act), and Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (upholding Title VII), it has tended to reject federal legislation permitting private suits against the states as beyond the power of Congress under § 5. See, e.g., Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (invalidating the ADA's authorization of private suits against the state); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (same as to ADEA). A major issue in these cases is the extent to which the Court should defer to Congress on statutes intended to enforce the Fourteenth Amendment.

There is no comparable question of deference with respect to Title VII as applied to employers other than states. As originally enacted, Title VII reached only private employment and was predicated on the commerce power, not § 5. Although it arguably could have been justified under § 5, procedural obstacles led its sponsors to ground it on the Commerce Clause. See Rodriguez & Weingast, supra note 293, at 1469 (“To anchor the bill in Section 5, however, would mean that, as a matter of congressional practice, the bill would be referred to that civil rights graveyard, the Judiciary Committee. To circumvent this problem, the administration described the bill as grounded in Congress’s power to regulate interstate commerce.”). The result, however, is that no special deference under § 5 is due to congressional judgment. Title VII was amended in 1972 to bring the public sector within it, and this amendment is the basis for the Supreme Court’s decision in Fitzpatrick v. Bitzer that state Eleventh Amendment
and, in any event, this line of argument sounds more like a justification of the racial character of the classification than a denial that it constitutes one.

Another argument is more elaborate.\textsuperscript{295} It would claim that the proof structure is really a cross-racial one, not one that favors either blacks or whites. That is, members of both races have a relatively easy prima facie case when they are suing cross-race employers. Because in most cases it is African Americans or other racial minorities suing white-dominated employers, \textit{McDonnell Douglas} controls most suits. In cases where whites sue black employers, the same proof structure would apply. Only when blacks or whites sue same-race defendants is a more onerous burden imposed because we do not expect intra-racial discrimination to be as common as cross-racial discrimination.\textsuperscript{296}

The conceptual objection, then, is that proof structures differ not because of the race of the plaintiff per se but rather on the respective racial identities of plaintiff and defendant.\textsuperscript{297} Although it seems sensible to believe that racial discrimination does not often occur within races,\textsuperscript{298} thus making such a distinction rational, it remains

\footnotesize
\begin{itemize}
\item \textsuperscript{295} I owe this ingenuous argument to Professor Thomas Healey and Dean Rebecca Hanner White.
\item \textsuperscript{296} There is some basis in the cases for such a view. See \textit{supra} note 120 and accompanying text.
\item \textsuperscript{297} A second-order problem is defining when an employer counts as dominated by a particular race. As we have seen, for example, the mere fact that the decision maker is black does not seem to constitute a background circumstance. See \textit{supra} text accompanying note 154.
\item \textsuperscript{298} Cf. Jones, \textit{supra} note 13. Professor Jones documents discrimination in favor of lighter-skinned African Americans as compared to darker-skinned members of that race both by whites and by other African Americans. See \textit{id.} at 1527-28; see also \textit{Falero Santiago} v. Stryker Corp., 10 F. Supp. 2d 93 (D. P.R. 1998). The \textit{Falero Santiago} court stated: Falero describes himself as a darker-skinned, or mulatto, Puerto Rican.... Cabrera's skin color, on the other hand, is admittedly white.... The fact that Cabrera skin is of a different color places him outside Falero's protected class, and is enough to satisfy the fourth element of plaintiff's prima facie case. Regardless of his "Puerto Ricanness," plaintiff has made out a prima facie case of discrimination on the basis of color. \textit{Id.} at 96; see also Walker v. Internal Revenue Serv., 713 F. Supp. 403 (N.D. Ga. 1989) (concerning darker-skinned supervisor alleged to have discriminated against lighter-skinned worker). The existence of this phenomenon, however, does not prove its pervasiveness.
\item As \textit{Falero Santiago} indicates, racial discrimination can also occur where ethnic or racial groups other than African Americans and whites are concerned. See generally Leonard M.
problematic to have legal rights turn on race. The obvious parallel is *Loving v. Virginia*\(^ {299}\) where the Court rejected the argument that a ban on miscegenation was not subject to equal protection challenge because both “white persons” and “colored persons” were barred from marrying members of the other race.\(^ {300}\) Of course, *Loving*, too, is distinguishable. Although both races were treated equally as a formal matter (neither being allowed to intermarry with the other), the Court’s basic objection was the ugly motives that prompted the law and the expressive consequences of it: the ban on miscegenation sent the social message that blacks were inferior. The white race was being preserved from racial contamination by mixture with inferior stock.\(^ {301}\) No such inference can be drawn from a rule that would view race discrimination as more likely in cross-race settings than in intra-race settings.

In any event, assuming that the background circumstances test is subject to strict scrutiny, some racial classifications have been upheld. As the quotation from Justice O’Connor’s opinion for the Court in *Adarand* indicates, when “race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the ‘narrow tailoring’ test this Court has set out in previous cases.”\(^ {302}\)

As to what governmental interests are compelling, *Wygant v. Jackson Board of Education*\(^ {303}\) unanimously held that race-conscious

---

Baynes, *If It’s Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 Denv. U.L. Rev. 131, 132 (1997). Professor Baynes defines racism by a Dark-Light Paradigm replacing the older Black-White Paradigm. The Dark-Light Paradigm is still binary, but it is more expansive than the older Black-White Paradigm because it transcends race and ethnicity to include all those members of American society who have very dark skin in the dark category. The dark category would include many Black Americans and some dark-skinned Latinos.

*Id.* at 132.

299. 388 U.S. 1 (1967).

300. “There can be no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races.” *Id.* at 11.

301. “The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.” *Id.*


decision making used to provide a remedy for the victims of proven discrimination was a sufficiently important governmental interest to withstand constitutional attack. In separate concurrences in Adarand, Justices Scalia and Thomas both believed that this was the limit of compelling interests, stating that racial classifications beyond those necessary to redress individuals who have been wronged by unlawful racial discrimination are forbidden. Although the Court has never subscribed to that view, a majority in Wygant did hold that an interest in remedying the effects of societal discrimination was not sufficiently compelling to satisfy strict scrutiny.

In short, the most obvious justifications (remediation of discrimination by the employer itself and remedying societal discrimination) had been, respectively, approved and rejected when the Court last year addressed another asserted compelling state interest for racial classifications—diversity in higher education. The Supreme Court's companion five to four decisions in Grutter v. Bollinger and Gratz v. Bollinger confirmed Justice O'Connor's prediction in Adarand that scrutiny could be strict without being fatal, which was not surprising, given that she was the key vote for upholding the Grutter affirmative action admission program.

Justice O'Connor, speaking for the Court in Grutter, which involved the University of Michigan Law School, said, "[t]oday, we hold that the Law School has a compelling interest in attaining a diverse student body." Surprisingly, the Court seemed unanimous on this point. In Gratz, which involved the University of Michigan's undergraduate school, Chief Justice Rehnquist cited plaintiff's

304. See id. at 286 (O'Connor, J., concurring in part and concurring in the judgment) ("The Court is in agreement that ... remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program.").
305. See Adarand, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment); id. at 240 (Thomas, J., concurring in part and concurring in the judgment).
306. See id. at 276 (opinion of Powell, J., joined by Burger, C.J., Rehnquist, J., and O'Connor, J.) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."); id. at 295 (White, J., concurring in judgment) ("None of the interests asserted by the Board, singly or together, justify this racially discriminatory layoff policy and save it from the strictures of the Equal Protection Clause.").
308. 539 U.S. 244 (2003).
309. Grutter, 539 U.S. at 328.
argument that diversity was not a compelling governmental interest but said, “for the reasons set forth today in *Grutter* ... the Court has rejected these arguments of petitioners.” Because none of the dissenting justices in *Grutter* and none in the majority in *Gratz* contested that holding, there is an odd unanimity on the Court that diversity is a compelling interest for an academic institution.

There is even strong support in Justice O'Connor's opinion in *Grutter* for diversity beyond higher education because she cited favorably certain amici briefs. With respect to large corporations, “[t]hese benefits [of diversity] are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” She also referred to the brief of military leaders

---

310. *Gratz*, 539 U.S. at 268 (citation omitted).

311. The lower courts have occasionally recognized other interests as compelling. For example, *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996), permitted a prison to prefer black correctional officers for lieutenant positions, *id.* at 921, explaining, “[t]he black lieutenant is needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp.” *Id.* at 920. *See also* *Petit v. City of Chicago*, 352 F.3d 1111, 1115 (7th Cir. 2003) (stating that police department “had a compelling interest in a diverse population at the rank of sergeant in order to set the proper tone in the department and to earn the trust of the community, which in turn increases police effectiveness in protecting the city”). *But see* Patrolmen's Benevolent Ass'n v. City of New York, 310 F.3d 43 (2d Cir. 2002), where the court stated: The mere assertion of an “operational need” to make race-conscious employment decisions does not, however, give a police department carte blanche to dole out work assignments based on race if no such justification is established.... *Strict* scrutiny by this Court requires more than the assumption that a racial classification is an appropriate response to a state interest. *Id.* at 52-53. Despite *Grutter*, *Croson*, and such cases as *Wittmer*, affirmative action can be constitutionally justified only in rare cases, and, as the split between *Grutter* and *Gratz* indicates, even agreement on a compelling interest leaves a serious question as to how narrowly tailored the preferences must be to satisfy strict scrutiny. *See generally* Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781 (1996) (considering what types of affirmative action programs would meet strict scrutiny's narrow tailoring requirement).

312. *Grutter*, 539 U.S. at 330. One brief was filed on behalf of sixty-five major corporations. *See* Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *Gratz* (No. 02-516), and *Grutter* (No. 02-241). The brief described the amici as global businesses that recruit at the University of Michigan or similar leading institutions of higher education. Collectively, *amici* have annual revenues well over a trillion dollars and hire thousands of graduates of the University of Michigan and other major public universities. *Amici* have a vital interest in who is admitted to our nation's colleges and universities, and what kind of education and training those students receive.
stressing the need to have "a highly qualified, racially diverse officer corps." This would seem to reinforce the acceptability of affirmative action under Title VII and add a possible justification for affirmative action plans under that statute.

How this principle bears on the question with which we are concerned is not clear. One could, in a very broad sense, justify requiring background circumstances for white plaintiffs as a means of acknowledging an interest in diversity. Aligning the question more closely with Grutter and Gratz, restricting disparate treatment claims by whites would tend to increase diversity because minorities would be more likely to be successful and, therefore, tend to diversify the employers in question. This seems a stretch in the abstract, however, and the sweep of Title VII far beyond the educational context would require straining the Court's decision to its utmost limits.

A more straightforward argument would be the necessity of eliminating intentional racial discrimination. Although eliminating racial discrimination by private actors may not be required by the Constitution, there is no doubt that such an interest is sufficiently compelling to justify congressional action. The cases are replete with the need to eradicate racial and other prohibited

---

Id. Other corporations, such as General Motors, filed their own amicus briefs. See, e.g., Brief of General Motors Corp. as Amicus Curiae in Support of Respondents, Grutter (No. 02-241).

313. Grutter, 539 U.S. at 331. A brief was submitted on behalf of twenty-nine "former high-ranking officers and civilian leaders of the Army, Navy, Air Force, and Marine Corps, including former military-academy superintendents, Secretaries of Defense, and present and former members of the U.S. Senate." Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents, Grutter (No. 02-241). Of course, private corporations are not subject to the Equal Protection Clause, although the military would be subject to it in theory, given Adarand's insistence on a unitary approach. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). Justice O'Connor's reference to "major American businesses," however, surely suggests that the Weber and Johnson holdings—that Title VII does not invalidate private affirmative action plans are still viable. See supra text accompanying note 312.

314. Taxman's grudging approach to statutory affirmative action is at least thrown into question, perhaps not merely because that case arose in the education context. See supra note 86.

315. In the Eleventh Amendment context, the Court has held that Title VII is a permissible abrogation of state immunity to private suit. See Fitzpatrick v. Bitzer, 427 U.S. 445, 447-48 (1976); see also Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 724-25, 730 (2003) (upholding private suit against state under the Family and Medical Leave Act). Both cases involved gender discrimination.
discrimination, and few have questioned the validity of the antidiscrimination project.

Assuming the interest is compelling, the narrow tailoring issue remains problematic. In *Gratz* and *Grutter*, the division within the Court was not over diversity as a compelling interest but whether the programs at issue were sufficiently narrowly tailored in achieving that diversity interest. In *Grutter*, the Court upheld the law school admissions program as narrowly tailored to the diversity objective; however, *Gratz*, dealing with undergraduate admissions, struck down that program as not tailored narrowly enough. The essential difference between the two programs was that the law school assessed the complete admissions file of each individual applicant, including membership in underrepresented minority groups; the undergraduate program, in contrast, essentially mechanically gave applicants who were members of underrepresented minority groups 20 points toward the 100 needed to earn acceptance, with other points earned for such factors as high school average and standardized test scores. The individual assessment that allowed the law school admissions committee to look beyond the numbers was lacking in the undergraduate admissions program.

As applied to requiring a white plaintiff, but not a black one, to show background circumstances, eliminating discrimination—in the sense of intentional discrimination on account of race—is a compelling interest. Current jurisprudence, however, would not support


317. But see Epstein, * supra* note 256, at 505 (concluding that modern civil rights laws are "a dangerous form of government coercion").


322. "[T]ruly individualized consideration demands that race be used in a flexible, nonmechanical way." *Grutter*, 539 U.S. at 334.

323. See *Gratz*, 539 U.S. at 271.
viewing as more compelling the elimination of discrimination against one race rather than another, although it might recognize that discrimination against racial minorities is more common than discrimination against whites.

Another potentially less restrictive alternative would be to permit expert witness testimony to substitute for a formal, racially-framed proof structure. The model for this may be the problem of cross-racial eyewitness identification. Some courts have approved either expert testimony or jury instructions about eyewitness testimony being less reliable in the cross-race setting than within races.

The real justification for being more restrictive with respect to the standards for disparate impact claims by whites than for claims by blacks is the confluence of two factors. The first is the perception that, in reality, discrimination by whites against whites is rarer, and therefore it is appropriate to require more proof that the unusual has occurred. This is a straightforward justification that essentially contends that the different proof structures are as narrowly tailored as possible. This argument would stress that background circumstances itself is a flexible test that tries to ensure that discrimination against whites is actionable when it is sufficiently plausible in the case at hand.

The second justification is another goal of, or at least limitation on, the antidiscrimination laws—intruding as little as possible into employer decision making in an essentially capitalist economy. The present Court has attempted to free employers to pursue efficiency as they see fit in a variety of ways. Perhaps most dramatically, in the disparate impact context, *Wards Cove Packing Co. v. Atonio*

324. In the prior exchange, both the present author and Professor Primus concurred that the disparate impact doctrine could not survive strict scrutiny, were it to be triggered under the pre-*Grutter* regime, although Primus was not so certain it would fall after that case. See Primus, supra note 1, at 586; Sullivan, supra note 2, at 1554-55.

325. See *Grutter*, 539 U.S. at 343.


watered down the requirement of *Griggs v. Duke Power Co.*\(^{328}\) that a policy with an adverse impact on minorities be justified by "business necessity."\(^{329}\) *Wards Cove* reformulated the inquiry away from "necessity" by merely asking "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."\(^{330}\) The Court stressed "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils,"\(^{331}\) including quotas for minorities.\(^{332}\) Although *Wards Cove* was later overturned by the Civil Rights Act of 1991,\(^{333}\) the Court's effort to free employers from the strictures of disparate impact was patent.

Even in the disparate treatment context, the Supreme Court's decisions are replete with references to preserving employer autonomy as a central goal of Title VII. For example, the plurality in *Price Waterhouse v. Hopkins* stated: "Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice."\(^{334}\) Another opinion wrote more broadly of the place of antidiscrimination laws in the national employment policy: "The ADEA, like Title VII, is not a general regulation of the workplace but a law which prohibits discrimination. The statute does not constrain employers from exercising significant other prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees."\(^{335}\) Lower courts have repeatedly sounded this theme.\(^{336}\) For example, literally

\(^{328}\) 401 U.S. 424 (1971).

\(^{329}\) See id. at 431.

\(^{330}\) *Wards Cove*, 490 U.S. at 659.

\(^{331}\) Id.

\(^{332}\) The Court's "host of evils" essentially referred to incentives for employers to adopt quotas to avoid disparate impact. See id. (cross-referencing to other portion of the opinion).


\(^{334}\) 490 U.S. 228, 239 (1989); see also Johnson v. Transp. Agency, 480 U.S. 616, 645 (1987) (Stevens, J., concurring) (citing prior decisions that recognized a congressional intent to preserve employers' discretion as much as possible); United Steelworkers of Am. v. Weber, 443 U.S. 193, 205-06 (1979) (referring to the legislative record of Title VII as supportive of employers' freedom of choice).


\(^{336}\) See, e.g., Russell v. Microdyne Corp., 65 F.3d 1229, 1238 (4th Cir. 1995) (repeating the
hundreds of cases recite some version of the slogan that courts do not sit as "super-personnel departments." A second example is the circuits that have approved a "do not second-guess the employer" instruction to make clear to juries in disparate treatment cases that the function of Title VII and other antidiscrimination laws is not to review employer decision making, other than to police against intentional discrimination. Finally, it may be significant that Justice O'Connor's decision in Grutter, albeit deciding a constitutional question, was driven in large part by her perception of a need to respond to efficiency concerns of the business and military communities.

As applied to the background circumstances requirement, perhaps the major function of that test, insofar as it makes it more difficult for white employees to make out a prima facie case, is to permit courts to grant summary judgment for employers without detailed analysis or criticism of the employers' supposed nondiscriminatory reason. In theory, of course, the prima facie case...
requirement spares employers the necessity of putting into evidence a nondiscriminatory reason for their decisions, but as a practical matter summary judgment motions are made after discovery, during which the employer will have produced its reasons. Yet, to the extent employment decisions are made with an eye on litigation rules, the background circumstances requirement reinforces the at-will rule by making it far less critical to have a defensible reason for the contemplated action. Perhaps more important, by raising the

believe that if majority plaintiffs have to show less to prove their prima facie burden than minorities ... employers lose the 'screening out benefits' that the prima facie test was intended to provide."

342. Although other minorities raise the numbers, and women may also use the McDonnell Douglas standard prima facie case, there would still be considerable utility for employers if the bar were set higher for white males than other groups. Census data suggests that white males make up 43% of the workforce and 97% of the top positions in the American economy. By contrast, blacks constitute only 10% of the workforce, and are concentrated in the least desirable jobs. David Benjamin Oppenheimer, Understanding Affirmative Action, 23 Hastings Const. L.Q. 921, 967 (1996).

343. Although the number of exceptions to the at-will rule has multiplied in the last forty years, at-will still remains the default position for American employment. Obviously, to the extent that employment discrimination laws—perhaps the primary but by no means the only exception to the doctrine—are more readily available, the at-will rule will suffer. See generally Richard A. Epstein, In Defense of the Contract at Will, 51 U. Chi. L. Rev. 947 (1984) (discussing arguments for and against the contract at will and arguing that standards of judicial soundness support the doctrine); Arthur S. Leonard, A New Common Law of Employment Termination, 66 N.C. L. Rev. 631 (1988) (discussing substantial recent changes in the law of employment termination and arguing that state courts should adopt a new underlying theory for deciding these disputes); Peter Linzer, The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory, 20 Ga. L. Rev. 323 (1986) (examining the law of at-will employment and arguing for the creation of tenure rights for employees in their job); Andrew P. Morriss, Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law, 74 Tex. L. Rev. 1901 (1996) (arguing that the at-will rule is preferable to legal attempts to control labor markets); Andrew P. Morriss, Developing a Framework for Empirical Research on the Common Law: General Principles and Case Studies of the Decline of Employment-At-Will, 45 Case W. Res. L. Rev. 999 (1995) (using principles for empirical research into the common law and applying these principles to assess the modern law of wrongful discharge's impact on the employment-at-will doctrine); Andrew P. Morriss, Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will, 59 Mo. L. Rev. 679 (1994) (reevaluating the historical origins of the employment-at-will rule in order to identify and recover the benefits of the rule); J. Wilson Parker, At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law, 81 Iowa L. Rev. 347 (1995) (articulating proposals for the expansion of tort and contract principles as a way of dealing with the problems of employment-at-will); Christopher L. Pennington, Comment, The Public Policy Exception to the Employment-at-Will Doctrine: Its Inconsistencies in Application, 68 Tul. L. Rev. 1583 (1994) (arguing that courts should use the public policy exception to the employment-at-will doctrine to remedy inconsistencies in the protections for employees).
barriers to potential reverse discrimination plaintiffs, it makes such suits much less likely in the first instance.

These two reasons reinforce one another—employers are freed of the constraints of defending most of their actions, while, if discrimination against whites is in fact as rare as the test envisions, few true victims of reverse discrimination will be disadvantaged. Further, to the extent that these justifications are accepted, it is hard to see how the rule could be more narrowly tailored. Whether these justifications, alone or in conjunction, will be found sufficient is hard to predict, in part because of the deficiencies of the background circumstances rule and in part because of the question of alternatives to it. These questions are taken up in the next section.

V. ELIMINATING FORMAL PROOF STRUCTURES FOR BOTH TRADITIONAL AND REVERSE DISCRIMINATION CASES

There are two alternatives to background circumstances. One, often attributed to the Eleventh Circuit, seems to eliminate any difference between traditional and reverse discrimination plaintiffs by requiring a white plaintiff merely to prove he is a member of a class, which appears to require only that he establish his racial identity, just as a “racial minority” must do under the McDonnell Douglas formulation. It is very doubtful, however, that such a rule actually applies even in the Eleventh Circuit. To the extent it does, it slights both of the justifications for the background circumstances test in the first place—the relative infrequency of discrimination against whites and the desire to free employers from the necessity of defending every decision.

The more attractive approach was taken by the Third Circuit in Iadimarco v. Runyon. Rejecting background circumstances entirely, the court simply asks whether, in a reverse discrimination case, the plaintiff has produced sufficient evidence from which the finder of fact may find discrimination. The attraction of this approach is that it sidesteps the intractable problem of what constitutes background circumstances and avoids the intellec-

344. See supra note 184.
345. 190 F.3d 151 (3d Cir. 1999); see supra text accompanying note 155.
346. See Iadimarco, 190 F.3d at 163.
347. See id. at 162-63 (describing background circumstances as “difficult, if not impossible”
tually disingenuous approach of courts that have continued to use the label while departing very far from what Judge Mikva had in mind. *Iadimarco* also permits, at least in the first instance, a court to avoid the hard question of the role of an affirmative action plan in making this determination. More generally, *Iadimarco* steps away from the *McDonnell Douglas* approach of formal proof structures, which is increasingly seen as a failed attempt to formalize the process by which judges make decisions about the sufficiency of the evidence. To the extent that recent developments in the traditional discrimination area have threatened that proof structure, the confusions in the reverse discrimination arena reinforce its collapse.

*Iadimarco* solves the problem of reverse discrimination by eliminating the source of the problem—the requirement of a formal proof structure (that in turn required formal treatment of race) instead of merely asking whether the evidence supported the requisite finding. It is true that, from a judicial housekeeping perspective, *Iadimarco* fails to provide the lower courts with any real guidance on how to resolve these issues, but it is not apparently worse at this task than the background circumstances test. Indeed, the only issue that seems to require a law decision, rather than fact analysis, is the role affirmative action plans will play in any factual determination. Further, the amorphousness of the test provides as little guidance to employers, thus undercutting, at least at the margin, the benefits of the at-will rule.

From another perspective, however, *Iadimarco* may have been prescient in its approach to the question of discrimination. As the Supreme Court's recent decision in *Desert Palace, Inc. v. Costa* suggests, even in traditional discrimination cases, a tilt away from the *McDonnell Douglas* formal proof structure toward a more gestalt analysis of whether there is a basis for the factfinder to find discrimination is precisely the approach *Iadimarco* took. Although

---

348. Professor Lillquist suggests that the whole *McDonnell Douglas* experiment is proof that such guidance is incredibly difficult to provide.
349. See infra text accompanying notes 211-12.
351. See id. at 101 (holding that "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex,
the lower courts are groping for this approach in the traditional discrimination context, \(^{352}\) and while earlier Supreme Court decisions

or national origin was a motivating factor for any employment practice" to get a mixed-motive instruction under Title VII).

352. One example is the "same actor" question. Courts have declined to infer a discriminatory intent when the person who hired a worker also discharged him within a relatively short period of time. The rationale is that, had the employer held biased views, he would not have hired the plaintiff in the first place. See, e.g., Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270-71 (9th Cir. 1996) (sex discrimination); Brown v. CSC Logic, Inc. 82 F.3d 651, 658 (5th Cir. 1996); Jiminez v. Mary Washington Coll., 57 F.3d 369, 378 (4th Cir. 1995) (race and national origin discrimination); Rand v. C.F. Indus., Inc., 42 F.3d 1139, 1147 (7th Cir. 1994); Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173, 174-75 (8th Cir. 1992); Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991) (disability discrimination); id. at 797 (citing John J. Donahue III & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 STAN. L. REV. 983, 1017 (1991)). Although originally described as a "presumption," it is now recognized to be more appropriately viewed as a "permissible inference" from the facts, together with whatever other facts might strengthen or weaken it. See Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1443 (11th Cir. 1998) ("[W]e decline to accord this 'same actor' factual circumstance a presumption that discrimination necessarily was absent ... [but] these facts may give rise to a permissible inference that no discriminatory animus motivated [the discharge.]"); Madel v. FCI Mktg., Inc., 116 F.3d 1247, 1253 (8th Cir. 1997) (implying that presumption is inappropriate where evidence of overt discrimination exists); Waldron v. SL Indus., Inc., 56 F.3d 491, 496 n.6 (3d Cir. 1995) (stating that the fact that hirer and firer are the same and discharge occurred shortly after hiring is merely evidence and should not be given any presumptive weight). See generally Anna Laurie Bryant & Richard A. Bales, Using the Same Actor "Inference" in Employment Discrimination Cases, 1999 UTAH L. REV. 225 (analyzing and criticizing the law and policies of the same actor inference); Julie S. Northrop, Comment, The "Same Actor Inference" in Employment Discrimination: Cheap Justice?, 73 WASH. L. REV. 193 (1998) (examining the same actor inference and urging restraint in its application). One decision, Johnson v. Zema Systems Corp., 170 F.3d 734 (7th Cir. 1999), concluded that the inference was unlikely to make a difference in many cases. Id. at 745.

Another example is the approach taken in the lower courts to the plaintiff's prima facie case in the reductions in force (RIFs) context. Although these cases tend to be cast in terms of adapting the McDonnell Douglas structure to the discharge setting, the courts may be groping toward a "sufficient evidence" approach. Because RIFs involve discharges, the first step courts had to take was to substitute plaintiff's proof that she was doing an apparently satisfactory job for the McDonnell Douglas prong requiring plaintiffs to show they were "qualified." See, e.g., Johnson v. Group Health Plan, Inc., 994 F.2d 543, 546 (8th Cir. 1993) (stating that, as part of her prima facie case, plaintiff must show that she was performing her job at a level that met her employer's expectations); Hong v. Children's Mem'l Hosp., 993 F.2d 1257, 1261-62 (7th Cir. 1993) (deciding that, as a component of her prima facie case, plaintiff must show that her performance on the job was adequate at the time of termination). Further, in RIFs, a number of employees are terminated simultaneously; thus, the legitimate, nondiscriminatory reason for termination—the need to reduce expenses—is apparent on its face. Because "positions" are being eliminated, the power of proof that the plaintiff is doing an apparently satisfactory job diminishes. Courts, therefore, have tended to require a plaintiff to produce "other evidence," such as identifying younger workers who were retained when she was discharged. See, e.g., Oxman v. WLS-TV, 846 F.2d 448, 455-56 (7th Cir. 1988). This looks
take small steps in this direction, Desert Palace holds out the promise of a more radical change.

To understand this, it is necessary to review briefly the history of the individual disparate treatment proof. As we have seen, McDonnell Douglas established a formal proof structure for most individual disparate treatment cases. McDonnell Douglas was predicated on the belief that employers would rarely admit illegal conduct and that, therefore, intent to discriminate, which was critical to this theory, had to be inferred from the circumstances of the case. As Professor Zimmer has pointed out, McDonnell Douglas is essentially a process of elimination: the plaintiff makes out a prima facie case by showing that the most likely nondiscriminatory reasons are not applicable and then, once the employer puts into evidence other nondiscriminatory reasons, by proving them to be pretextual, usually by showing that they are not true or, at least, that such reasons were not applied to members of the allegedly favored race. The notion that African Americans and other racial minorities were likely to be the victims of discrimination provided the rationale for inferring discrimination when legitimate reasons were shown to be inapplicable.

After 1989, this analysis was supplemented by a second method of proof in individual disparate treatment cases when the Court decided Price Waterhouse v. Hopkins, which created a separate method of analyzing individual disparate treatment cases based on so-called "direct" evidence of discrimination. In addition to the kinds

remarkably like moving toward a "sufficient evidence" approach in place of formal proof structures. See Montana v. First Fed. Sav. & Loan Ass'n of Rochester, 869 F.2d 100, 105 (2d Cir. 1989).

353. Hicks permitted, indeed required, an ultimate finding on the question of discrimination, although it did so at the end of the McDonnell Douglas proof structure not in lieu of it. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993). Reeves stressed that, in deciding on a motion for a judgment as a matter of law, the district court should determine whether a reasonable jury could find discrimination in light of all the evidence, with the inferences drawn most favorably for the plaintiff. See Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 150-51 (2000). Like Hicks, however, Reeves hewed closely to the McDonnell Douglas proof structure in analyzing that evidence. See id. at 142 ("This Court has not squarely addressed whether the McDonnell Douglas framework, developed to assess claims brought under ... Title VII ... also applies to ADEA actions. Because the parties do not dispute the issue, we shall assume, arguendo, that the McDonnell Douglas framework is fully applicable here.").

of circumstantial evidence that had long been used in *McDonnell Douglas* cases, the plaintiff in *Price Waterhouse* introduced written evaluations and other statements in the partnership process pointing to her gender as playing a role in the decision to deny her partnership. The employer, however, denied basing the decision on plaintiff's sex, instead insisting she had been denied partnership based on a lack of interpersonal skills. The trial court credited both Hopkins's and the firm's explanation for her partnership denial; it found that the firm had relied upon both Hopkins's sex and her interpersonal skills in denying her partnership. The Supreme Court viewed this as a "mixed motive" case, that is, one in which both legitimate and discriminatory reasons were implicated in the decision. Justice Brennan, writing for a plurality of four, said that plaintiff need only prove, by a preponderance of the evidence, that her race, gender, or other protected characteristic was a "motivating" factor in the challenged decision. Upon that showing, the burden of persuasion shifted to the defendant to try to avoid liability by proving, as an affirmative defense, that it would have made the same decision absent the discrimination. In a footnote, Justice Brennan suggested that this established an alternative to the *McDonnell Douglas* approach to individual disparate treatment cases.

To form a majority of the Court, however, it is necessary to look at the concurring opinion of Justice O'Connor. Her approach

356. She was described by one partner as "macho," another said she "overcompensated for being a woman," and a third advised her to take "a course at charm school." *Id.* at 235 (quoting defendant's exhibits presented at trial). Further, the partner who had been on the committee making the decision and who was charged with telling her that her bid to be a partner had been put on hold counseled her to "walk more femininely ... wear make-up, have her hair styled, and wear jewelry." *Id.*

357. *Id.* at 234-35.

358. *Id.* at 236-37.

359. *See id.* at 252.

360. *Id.* at 258.

361. *Id.*

362. *See id.* at 247 n.12 ("Nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a 'pretext' case or a 'mixed-motives' case from the beginning.... At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives.").

363. *See id.* at 261-79 (O'Connor, J., concurring). Justice White also concurred, *see id.* at 258-61 (White, J., concurring), but it seems clear that the narrowest holding of five members results from looking to Justice O'Connor's opinion. *See Marks v. United States, 430 U.S. 188*
differed from the plurality in two ways. First, she raised the bar by requiring the plaintiff to show that the impermissible factor, such as plaintiff's sex, was a "substantial," not just a "motivating," factor in the employer's decision. Second, she would require that, before being able to use the Price Waterhouse method of analysis, plaintiff must introduce "direct" evidence of discrimination. This "direct" evidence threshold made it clear that there were now two separate paths for analyzing individual disparate treatment cases.

Congress, in turn, modified Price Waterhouse in the Civil Rights Act of 1991 in two important ways. First, in § 2000e-2(m), it adopted Justice Brennan's articulation of the level that plaintiff must show to make out a case, providing that an unlawful employment practice exists when the protected characteristic is "a motivating factor." Second, in § 2000e-5(g)(2)(B), it narrowed the effect of the defendant's proof that it would have made the same decision even if it had not considered the impermissible motivating factor. Price Waterhouse held that such a finding would be a complete defense to liability. The new Act provided instead that a violation would occur whenever race or another prohibited ground was a motivating factor, but that plaintiff's remedies would be limited if the factor did not change the outcome. Congress did not explicitly address Justice O'Connor's direct evidence threshold for applying this method of analysis.

Although the amended statute provides that plaintiff establishes defendant's liability whenever she proves that sex or race is "a motivating factor," an issue in all disparate treatment cases, the lower courts nevertheless generally limited the application of

---

368. Price Waterhouse, 490 U.S. at 258.
369. Id.
sections 703(m) and 706(g)(2)(B) to cases involving direct evidence.\textsuperscript{370} Analytically, therefore, the first question in every individual disparate treatment case was whether plaintiff had direct evidence of the intent to discriminate. If the answer was yes, the \textit{Price Waterhouse} approach applied. If not, \textit{McDonnell Douglas} was the default analysis.\textsuperscript{371}

This approach lasted until June 2003, when the Supreme Court decided \textit{Desert Palace, Inc. v. Costa},\textsuperscript{372} adopting a plain meaning approach urged by commentators such as Professor Zimmer.\textsuperscript{373} In \textit{Desert Palace}, the Court read Title VII to permit a plaintiff to prove that discrimination was a motivating factor for a challenged decision without the need for direct evidence.\textsuperscript{374} Section 2000e-2(m) provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."\textsuperscript{375} The Court read this language to mean that

\[\text{[i]n order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that "race, color, religion, sex, or national origin was a motivating factor for any employment practice"…. [D]irect evidence of discrimination is not required ....}\textsuperscript{376}


\textsuperscript{371} The statutory structure, of course, creates a presumption, one known as an affirmative defense. That is, once the plaintiff proves that race is a motivating factor, she has proven defendant's liability. This proof, however, also creates a presumption of full relief, a presumption that can be rebutted by the defendant carrying the burden of persuasion that it would have made the same decision even if it had not been motivated by race.

\textsuperscript{372} 539 U.S. 90 (2003).


\textsuperscript{374} Desert Palace, 539 U.S. at 101-02.


\textsuperscript{376} Desert Palace, 539 U.S. at 101 (quoting 42 U.S.C. § 2000e-2(m)). Justice O'Connor concurred in the result, reasoning that the 1991 amendments had legislatively reversed her approach. See \textit{id.} at 102 (O'Connor, J., concurring).
The ramifications of Desert Palace are hard to gauge, but the broadest view is that the case collapsed all individual disparate treatment cases into one method of analysis, thereby effectively destroying McDonnell Douglas. It is true that the decision can be read more narrowly. For example, footnote 1 indicated that the Court was not deciding the impact of this decision "outside of the mixed-motive context." Because of this footnote, McDonnell Douglas remains in suspended animation, although its viability is suspect.

After Price Waterhouse and before Desert Palace, the distinction between Price Waterhouse and McDonnell Douglas cases had been framed in two ways. First, Price Waterhouse cases were "direct evidence" cases, while McDonnell Douglas applied to "circumstantial evidence" proof. Desert Palace explicitly erased this distinction because circumstantial evidence alone can prove liability using section 703(m)'s "a motivating factor" standard of liability. It is, therefore, no longer appropriate to speak of Price Waterhouse as "direct evidence" proof or of McDonnell Douglas as a "circumstantial" or "indirect" method of proof.

The second way of distinguishing the two methods of proof was by viewing McDonnell Douglas as involving a "single motive" (a discriminatory reason or a nondiscriminatory reason), while Price Waterhouse involved "mixed-motives." Finding a "single motive" based on the process of elimination is the core of McDonnell Douglas—to establish a prima facie case, plaintiff proves that the normal nondiscriminatory reasons do not apply to her case; defendant introduces evidence of a nondiscriminatory reason in rebuttal; plaintiff then introduces evidence that defendant's reason is not the true reason, asking the factfinder to infer that that reason is a pretext for discrimination. This process leads to the factfinder viewing the case as an either/or proposition: either the defendant's reason explains the decision or the plaintiff's claim of discrimination explains it.

In the wake of Desert Palace, however, this distinction, too, seems untenable. Price Waterhouse itself held that Congress did not

377. Id. at 94 n.1.
378. See supra notes 128-33 and accompanying text.
establish a sole cause standard under Title VII. Given that a but-for or determinative influence standard governs, plaintiff may win with a showing that is less than sole cause, that is, less than that discrimination was the "single motive." She wins even if the factfinder finds that another reason is involved, as long as discrimination is the but-for reason or the determinative influence. If, however, discrimination is a cause, or at least a sufficient cause to constitute a motivating factor, we are back to Desert Palace and plaintiff should prevail, subject to defendant's limiting her remedies if the jury finds the same decision would have been reached in any event.

In any discrimination case that gets to the jury, even in a purely circumstantial evidence case, it is certainly possible that the trier of fact will determine that both factors were present, rather than decide that one side is entirely correct and the other entirely wrong. Indeed, a decision that has generated substantial criticism


380. The first court to answer that question found that the "motivating factor" standard applied in a McDonnell Douglas "single motive" case. See Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987 (D. Minn. 2003). Having earlier found that plaintiff did not have evidence that could be characterized as "direct," the court followed Desert Palace and held that plaintiff was entitled to use section 703(m)'s "motivating factor" standard of liability. See id. at 989-91. [T]he plain language of the statute allows a plaintiff to prevail if he or she can prove by a preponderance of the evidence that a single, illegitimate motive was a motivating factor in an employment decision, without having to allege that other factors also motivated the decision.... Because the Civil Rights Act of 1991 unambiguously prohibits any degree of consideration of a plaintiff's race, gender or other enumerated classification in making an employment decision, it must also extend to single-motive claims.

Id. at 991. Important to the court was that this holding resonated with how the world worked: The dichotomy [between an action being based on the asserted reason or discrimination] produced by the McDonnell Douglas framework is a false one. In practice, few employment decisions are made solely on basis [sic] of one rationale to the exclusion of all others. Instead, most employment decisions are the result of the interaction of various factors, legitimate and at times illegitimate, objective and subjective, rational and irrational. The Court does not see the efficacy in perpetuating this legal fiction implicitly exposed by the Supreme Court's ruling in Desert Palace. When possible, this Court seeks to avoid those machinations of jurisprudence that do not comport with common sense and basic understandings of human interaction.

CIRCLING BACK TO THE OBVIOUS

2004]

from the plaintiff's bar, *St. Mary's Honor Center v. Hicks*, necessarily pointed in this direction because it permitted the factfinder to make any determination justified by the record. In *Hicks* itself, of course, the fact found was that the employer was motivated by personal animus, not discrimination. The Court's approval of any finding supported by the record, however, necessarily means that a jury could find that both impermissible and permissible reasons motivated a decision, even though the parties each claim only one motivation.

In short, *McDonnell Douglas* may be either doctrinally or functionally dead, at least if either party raises the issue.


382. *Hicks* implied that the trial judge was entitled to disbelieve both the plaintiff's claim of discrimination and the defendant's asserted nondiscriminatory reason. See id. at 524. The court below had determined that personal animosity, not discrimination, explained the adverse decision, even though the individual defendant denied such animosity. See id. at 508. The narrow holding of *Hicks* was that disbelief of the supposed nondiscriminatory reason was not necessarily sufficient; the trier of fact had to find not merely that the defendant's reason was pretextual but that it was a pretext for discrimination. See id. at 518-19; see also Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146-49 (2000) (acknowledging that disbelief of defendant's asserted reason will usually justify, although it does not compel, a finding of discrimination). The broader holding of the case, however, was that the trier of fact can make any determination justified by the record before it. See *Hicks*, 509 U.S. at 519. It would seem to follow necessarily that a jury could disbelieve both plaintiff's claim that discrimination entirely explained the challenged decision and defendant's claim that nondiscrimination entirely explained it.

383. Most commentators read *Desert Palace* as destroying *McDonnell Douglas*. See, e.g., William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?,* 6 U. PA. J. LAB. & EMP. L. 199, 212-13 (2003) ("*McDonnell Douglas* is dead for Title VII claims.... All cases now will be mixed motives because that structure has a lower standard of causation than the pretext but-for standard. Plaintiffs will object to any application of the higher but-for standard."). According to Professor Chambers:

[E]liminating the distinctions between the different types of cases suggests that all disparate treatment cases should be treated the same. The result of these decisions will likely be a reversion to an older litigation model in which trial judges are not given specific rules to use to resolve specific types of disparate treatment cases, but instead have substantial discretion to dispose of all types of disparate treatment cases as they see fit.

Although this is generally seen as beneficial to traditional plaintiffs, there may be downsides if *Desert Palace* becomes the uniform method of analyzing individual disparate treatment cases. First, district judges will have even more discretion in summary judgment dispositions, as the central question will reduce to one determination of whether a reasonable jury can find discrimination.\textsuperscript{384} It is not so clear that, on balance, this will be exercised in allowing discrimination cases to go to trial. Second, section 703(m) provides the “motivating factor” standard for liability, but one connected to section 706(g)(2)(B)’s same decision defense. On one hand, a jury finding that defendant discriminated may be unlikely to believe defendant’s proof that it would have made the same decision even if it had not discriminated; on the other, a jury may be tempted to “split the baby.” That would substantially limit plaintiff’s remedies. Ironically, then, if *McDonnell Douglas* survives it may be precisely because a risk-preferring plaintiff and a risk-preferring defendant might both choose not to invoke *Desert Palace* by asking for the instruction approved in that case but rather place all their eggs in the *McDonnell Douglas* either/or basket.

This development in traditional discrimination cases suggests a similar approach in reverse discrimination cases. The question is not whether the particular elements of a prima facie case have been met but rather whether the evidence permits a reasonable jury to infer discrimination. *Iadimarco* may reflect a convergence with *Desert Palace*, and a unified approach to all individual disparate treatment cases.\textsuperscript{385} Whether this is compelled by constitutional...
commands, given the amorphous nature of the background circumstances test even in those circuits that continue to use it, this result seems inevitable.

VI. THE EFFECTS OF ADOPTING A "SUFFICIENT EVIDENCE" APPROACH

In language broad enough to embrace both traditional and reverse discrimination, Desert Palace specifies that "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'" In very similar language, Iadimarro wrote:

[All that should be required to establish a prima facie case in the context of "reverse discrimination" is for the 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 trait that is protected under Title VII.]

The "sufficient evidence" approach abandons more structured methods of proof for a holistic assessment of the evidence in question. The McDonnell Douglas and background circumstances in reverse discrimination cases in Johnson. As we saw, the Court placed the burden of persuasion on the plaintiff once it was established that a particular challenged action was taken pursuant to an affirmative action plan. See supra note 59 and accompanying text. Although four Justices viewed this allocation of burdens as having been altered by Price Waterhouse, no subsequent decision has so held. See supra note 69. Desert Palace left this structure up in the air. Certainly, a reverse discrimination plaintiff should get to a jury if she adduces sufficient evidence for the inference of discrimination to be drawn. The case, however, did not address whether an affirmative action plan may be part of that evidence. Even where an affirmative action plan is put in issue—either because the plaintiff proves that the decision was taken pursuant to a plan or the defendant seeks to shelter the decision under a plan—the question remains whether the Weber/Johnson allocation of the burden of justification remains applicable to the reverse discrimination plaintiff.

387. Iadimarco v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999). This is but another way of recognizing that, even when the four prongs of McDonnell Douglas are not met, a prima facie case is stated whenever there is sufficient evidence from which an inference of discrimination reasonably may be drawn.
388. It therefore validates commentators such as Professor Zimmer who have been objecting to the "slicing and dicing" approach that current proof structures permit if not encourage. See Michael J. Zimmer, Slicing & Dicing of Individual Disparate Treatment Law,
tests both rest on predictions of human behavior (cross-racial discrimination is more common than intra-racial discrimination); "sufficient evidence" avoids the need to decide whether those structures are well-founded. This reformulation does not make the underlying problems disappear. Rather, it merely submerges them in the broader question of whether a case gets to the jury, in a summary judgment motion or a motion as a matter of law after the close of plaintiff's case, or whether a jury verdict for plaintiff will stand when a judgment as a matter of law is made after the verdict is rendered.

Put another way, the courts will still have to decide, in a traditional discrimination case, whether disproof by plaintiff of defendant's asserted nondiscriminatory reasons is sufficient, together with other evidence, to support a jury verdict for her. Similarly, in a reverse discrimination case, the judge will still have to decide whether there is sufficient evidence for the jury to find race discrimination when a white employee sues a white employer. In either case, the judge will be looking at her own view of the world in terms of the relative likelihood of discrimination to make that decision.

It is true that some issues will remain as legal ones, most notably those disposed of by evidentiary rulings. For example, in the reverse discrimination context, the question of the role of an affirmative action plan, "diversity memo" or the like will presumably be decided in terms of whether such evidence will be put before the jury. However that question is resolved, the reality will remain that judges' perceptions of the relative likelihood of different varieties of discrimination will determine what cases get to the jury in the first place and what jury verdicts will be allowed to stand. Of course, the jury perceptions of the likelihood of discrimination, as opposed to an infinite range of other human motivations and influences, will determine the verdicts in those cases they do decide.

Whether in the traditional or reverse discrimination context, this means that the new dispensation of "sufficient evidence" is less a panacea than an admission of failure of the system of proof struc-
ture to come to grips with the basic problem. Of course, that basic problem is the viability of Professor Calloway's basic assumption.\textsuperscript{389}

Inevitably, the response of the system must be to confront that reality. Because confronting it with structured proof schemes seems like a noble experiment on the brink of being abandoned, the alternative method is to address that reality the old-fashioned way: in the proof process itself. In short, traditional discrimination plaintiffs must introduce evidence in individual disparate treatment cases about the prevalence of discrimination. Perhaps the most obvious use of such testimony is to remind or convince the factfinder that discrimination is still prevalent (or is likely given the particular employment context) and, therefore, to convince them that discrimination is more likely than they might at first believe. More pointedly, such testimony could educate the jury about the continued operation of race animus, consciously held stereotypes or the more subtle operation results of racially-slanted cognitive structures. In that sense, a recent state court case got the answer exactly wrong. In \textit{Ray v. Miller Meester Advertising, Inc.},\textsuperscript{390} a state intermediate appellate court found that it was an abuse of the trial court's discretion to have admitted testimony of a professor on gender stereotyping.\textsuperscript{391} The court's statement to the contrary notwithstanding

\textsuperscript{389} See supra notes 226-31 and accompanying text.

\textsuperscript{390} 664 N.W.2d 355 (Minn. App. 2003).

\textsuperscript{391} In Ray, the Court noted that:

The essence of Borgida's testimony was a lexical definition of "stereotyping," coupled with an opinion that women are often held to a higher standard in the workplace and are judged more harshly and negatively than men if they do not meet that standard. Information about and commentary on gender issues is so abundant in our society that it has become a common stereotype that women receive disparate and often unfairly discriminatory treatment in the workplace. Part of the stereotype is that women might receive lower pay or fewer benefits than men for exactly the same work; that women may not be promoted at the same rate as men despite equal qualifications; that, because of their "femininity" they might not be suitable for "a man's work;" and that they are often expected to out-perform their male counterparts in order to achieve the same degree of respect and commendation as males. Gender stereotypes are the stuff of countless television situation comedies and are the focus of numerous media treatments on nearly a daily basis. It is unarguable that virtually all adults in our society know about gender stereotypes....

[Borgida's testimony] was not sufficiently helpful to the fact-finders to satisfy rule 702 requirements. The fact-finders heard evidence that Ray was treated differently from creative department male employees and that some pejorative gender statements were made about her. Borgida's expert testimony is hardly
ing, if the research so laboriously conducted by social scientists is to be believed, not only do cognitive schemas bias our judgments in racial, gender, and other ways, but they also bias our ability to recognize that our judgments are biased. Other courts have been more receptive to this kind of expert testimony, most notably a recent decision certifying a class action against Wal-Mart in large part based on such testimony.

In short, expert testimony may be necessary not only to remind or convince the factfinder that discrimination is still prevalent, but also because social science research suggests that judges and jury members may, themselves, be biased without knowing it, believing perhaps that such discrimination is a thing of the past. Without such testimony a jury might erroneously believe that a woman and/or minority would not be more likely than his or her male or white counterpart to be discriminated against in a particular

the type of evidence without which laypersons are incapable of forming a correct judgment. There is nothing in this case that shows directly or inferentially some insidious scheme or pattern of gender discrimination that can be uncovered only with the help of expert analysis, such as a statistical demonstration.

Id. at 365-66.

392. See Brian A. Nosek, Mahzarin R. Banaji, & Anthony G. Greenwald, Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site, 6 GROUP DYNAMICS: THEORY, RESEARCH, AND PRACTICE 101 (2002), available at http://projectimplicit.net/nosek/vpapers/harvestingGroupDynamics.pdf (last visited Aug. 29, 2004). Of course, the issue in _Ray_—whether the subject matter of expert testimony is so familiar to a jury that no purpose is served by having an expert—is scarcely the only issue in the admissibility of expert testimony. See generally Martha Chamallas, Listening to Dr. Fiske: The Easy Case of Price Waterhouse v. Hopkins, 15 VT. L. REV. 89 (1990) (exploring judicial resistence to social science research); John V. Jansonius & Andrew M. Gould, Expert Witnesses in Employment Litigation: The Role of Reliability in Assessing Admissibility, 50 BAYLOR L. REV. 267 (1995) (examining the use of expert testimony in employment litigation); see also Deborah Dyson, Note/Comment, Expert Testimony and “Subtle Discrimination” in the Workplace: Do We Now Need a Weatherman to Know Which Way the Wind Blows?, 34 GOLDEN GATE U. L. REV. 37 (2004) (examining the use of expert testimony with regard to the notion of subtle discrimination).

employment context, which might result in wrong decisions. It is precisely this proof that traditional discrimination plaintiffs must be prepared to put before juries if the sufficient evidence test is not to result in outcomes as bad or worse than those decried under the *McDonnell Douglas* or *Hicks* proof structures.\(^\text{394}\)

I add a personal note from the perspective of at least an occasional litigator of traditional discrimination cases. Racial discrimination, and to a lesser extent sex discrimination, has become so anathematized in our society that it is increasingly hard for juries (and even judges) to believe it occurs in the case before them. A finding of discrimination labels the employer not merely a wrongdoer, but also an evil person. Perversely, therefore, as the social norm against discrimination has become increasingly strong, there has been a corresponding increase in the difficulty of convincing a factfinder that a given defendant has engaged in such conduct.\(^\text{395}\)

This is particularly true as the level of education and status of the relevant actor increases; although we might anticipate continued bigotry in less educated classes, it is harder to accept that more educated individuals act from such motives. If this is, in fact, the reality, the need for expert testimony becomes even more urgent.

The prescription for reverse discrimination plaintiffs is more complicated. The continued tension of the authorization of affirma-

---

\(^{394}\) I am not the first to argue for greater use of expert testimony to overcome resistance by judges and juries to believe discrimination occurred. See Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 573 (2001).

\(^{395}\) There is some empirical evidence that supports the view that juries are less likely to find discrimination than other employment law violations. A study by Professor Oppenheimer reports that, excluding sexual harassment cases, there is a significant difference between plaintiffs' success rates in common law cases and statutory discrimination cases. Of 182 non-sexual harassment discrimination cases, "plaintiffs won seventy-four, a success rate of 41%," compared with a rate of 59% for common law cases. David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 535 (2003). "The difference between the plaintiff success rate in non-sexual harassment discrimination cases and common law wrongful discharge cases is statistically significant, as is the difference in discrimination case success rates between sexual harassment and non-sexual harassment cases." Id. at 535-36. Professor Oppenheimer's article explores a number of possible explanations, including but not limited to judge and juror bias. See id. at 553-66; see also Selmi, supra note 394, at 573 (suggesting that there are two ways in which plaintiffs may counteract judicial bias). Media treatment of discrimination litigation may also contribute to juror perceptions. See Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & POLY REV. 237 (2004).
tive action plans while prohibiting ad hoc discrimination creates an "ignore the elephant in the easy chair" problem for the courts for which no simple answer is possible. If Grutter loosens the judicial hostility to affirmative action, it is likely to be manifested in a revival, perhaps even an expansion, of Title VII's permission of such plans. In that context, to allow a plaintiff's proof that an employer has such a plan (when neither party claims that the challenged decision was taken pursuant to the plan), is to fly in the face of the public policy that recognizes the validity of affirmative action plans in the first place. Further, some of the proof that courts have sometimes looked to in the background circumstances context seems suspect. Increased hiring and promotions of minorities, for example, may simply reflect a successful affirmative action plan. In short, where an affirmative action plan is valid, it may or may not provide proof of discrimination against white plaintiffs external to the plan. Even if minimally probative, however, such evidence should be excluded as unduly prejudicial; jurors are likely to infer too much from the existence of the plan, given its limited evidential value where the plan itself is valid. On the other hand, there are situations where discriminating against whites seems both plausible and illegal—for example, where the business in question caters to a black clientele. In such cases, proof of these facts, with or without the need for an expert, should be "sufficient evidence" to get to a jury.

CONCLUSION

Iadimarco essentially deals with the confusion surrounding reverse discrimination cases by simply avoiding the issue. The questions that bedeviled the courts in deciding reverse discrimination cases—whether an affirmative action plan, or pressure to hire minorities, or the supervisor being of a different race is a sufficient

396. See supra notes 169-83 and accompanying text.
397. See, e.g., Ferrill v. Parker Group, Inc., 168 F.3d 468, 472 (11th Cir. 1999) (stating that employer's admission that it instructed its telemarketers to make calls to voters of the same race as the telemarketer was direct evidence of race discrimination and was sufficient to establish the plaintiff's prima facie case); see also Knight v. Nassau County Civil Serv. Comm'n, 649 F.2d 157, 162 (2d Cir. 1981) (holding that employer violated Title VII by assigning black plaintiff, because of his race, to conduct minority recruitment).
CIRCLING BACK TO THE OBVIOUS

circumstance—have not disappeared. Instead, they will be addressed in the context of either a motion in limine to exclude proof (for example, of the defendant’s affirmative action plan), or by a more gestalt district court judge’s decision whether to grant summary judgment or judgment as a matter of law or leave the question to the jury. To the extent that such judges believe reverse discrimination is a common phenomenon, presumably more cases will get to the jury.

Much the same could be said for Desert Palace and traditional discrimination cases. Although that decision was widely viewed as plaintiff-friendly, its ultimate impact will depend on how ready courts are to infer discrimination against minorities and women. If plaintiffs do not marshal, and convince courts to admit, proof of the continued pervasiveness of discrimination, indeed, of the insidiousness of discrimination as it has become less conscious and more a problem of cognitive processing, there will be even fewer verdicts for traditional plaintiffs.

In both contexts, perhaps the most important message of the preceding discussion is the disconnect between perceptions and reality. To the extent that judges and juries believe that traditional discrimination is, if not dead, at least rare, one would anticipate fewer verdicts for traditional plaintiffs. Similarly, to the extent judges and juries believe that reverse discrimination is common, one would anticipate more success for white and male plaintiffs. Further, because employers, at least on the margin, can be expected to internalize these realities as they develop, we can anticipate more caution in advancing minorities and women; there is less downside from refusing to do so, and more risk.

The response to a disconnect between perception and reality in the legal system is usually thought to be education. Traditional plaintiffs will have an increasing burden of educating juries, and even judges, about the continued pervasiveness of discrimination. Ironically, employers may also have an interest in doing so, at least when they are faced with reverse discrimination suits. Of course, employers have another strategy: they can seek to shield their decision behind affirmative action plans if they have confidence in the validity of those plans. Certainly, Grutter, although not directly controlling, provides some basis for an employer to do so.