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Because of Bostock

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BECAUSE OF *BOSTOCK*

*Noelle N. Wyman**

INTRODUCTION

On a below-freezing January morning, Jennifer Chavez, an automobile technician, sat in a car that she was repairing to keep warm while waiting for delayed auto parts to arrive.[1] Without intending to, she nodded off. Her employer promptly fired her for sleeping on the job. At least, that is the justification her employer gave. But Chavez had reason to believe that her coming out as transgender motivated the termination. In the months leading up to the January incident, Chavez's supervisor had told her to "tone things down" when she talked about her gender transition.[2] The repair-shop owner said that the transition made him "nervous" and could "impact his business," claiming that it had prompted a prospective employee to decline a job offer.[3] The owner had also instructed Chavez not to wear "a dress or miniskirt"[4] or "too feminine attire"[5] to and from work.

Before coming out as transgender, Chavez was an "excellent employee" with a spotless disciplinary history.[6] After coming out, things changed. The repair-shop management acted on advice from an attorney to begin writing up Chavez for issues "one at a time" with a "focus on work and performance."[7] The accidental nap may have been exactly the opportunity they needed.

Chavez brought suit under Title VII of the Civil Rights Act of 1964, alleging gender-identity discrimination. Chavez had "plenty of circumstantial evidence" of discriminatory intent.[8] But to prevail under the primary legal test applied in Title VII disputes, Chavez had to prove that the repair shop's proffered reason for her firing—sleeping on the job—was false.[9] This,

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1. Chavez v. Credit Nation Auto Sales, 49 F. Supp. 3d 1163, 1203 (N.D. Ga. 2014), *aff'd in part, rev'd in part*, 641 F. App'x 883 (11th Cir. 2016).
2. *Id.* at 1169.
3. *Id.* at 1170.
4. 641 F. App'x at 891.
5. 49 F. Supp. 3d at 1170.
6. 641 F. App'x at 891.
7. *Id.*
8. *Id.* at 890.
9. 49 F. Supp. 3d at 1174–75.

Chavez could not do, so her case was relegated to the second-tier "motivating factor" framework.[10]

Chavez's story illustrates a fundamental disconnect between what employment discrimination statutes prohibit and how courts enforce them. In *Bostock v. Clayton County*,[11] the Supreme Court extended civil rights protections to cover employment discrimination on the basis of sexuality and gender identity, a monumental advancement for LGBTQ+ equality. Until *Bostock*, employers believed they could—and did—openly discriminate against individuals for being transgender or gay. *Bostock* was the culmination of a decades-long battle to establish that this adverse treatment encompasses discrimination "because of . . . sex," which Title VII prohibits.[12]

But now a different challenge emerges. If the history of other marginalized groups gaining legal protections is any indication, discrimination will not spontaneously cease. It will just become less brazen.[13] The terrain will shift from questions of law and statutory interpretation to questions of fact and causation, with a new emphasis on proving that employers' actual reasons for firing, hiring, or otherwise disadvantaging transgender and gay workers were discriminatory. As the Court acknowledged in *Bostock*, "[s]orting out the true reasons for an adverse employment decision is often a hard business."[14] Indeed, it is more than a hard business. Proving employment discrimination is a labyrinthine endeavor, with notoriously dismal odds.

Despite the availability of federal antidiscrimination protections, the current landscape of Title VII litigation will impede many LGBTQ+ plaintiffs from succeeding on the sex discrimination claims they bring to court—just as it continues to impede plaintiffs from successfully challenging other prohibited forms of discrimination.[15] In the vast majority of Title VII cases,[16] courts analyze causation by applying the three-part burden-shifting framework established in *McDonnell Douglas Corp. v. Green*.[17] After a plaintiff

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10. *See* 641 F. App'x at 892 (remanding Chavez's claims to be tried under the motivating-factor standard). Whether Chavez even qualified for these negligible remedies was never resolved on the merits because in an unrelated action, the U.S. Securities and Exchange Commission seized the former employer's assets. *See* Sec. & Exch. Comm'n v. Torchia, 922 F.3d 1307, 1312 (11th Cir. 2019) ("In April of 2016, the district court froze [Credit Nation's] assets and appointed a receiver to facilitate the collection, sale, and distribution of assets to repay investors defrauded by Mr. Torchia."); them, *Jennifer Chavez: A Trans Woman Working in a Male-Dominated Industry | them.*, YOUTUBE (Oct. 25, 2018), https://youtu.be/qo7zUv7p7xk [https://perma.cc/7N9Z-JQ2S].

11. 140 S. Ct. 1731 (2020).

12. 42 U.S.C. § 2000e-2.

13. *See, e.g.*, Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 95–96, 99 (2003).

14. 140 S. Ct. at 1744.

15. *See infra* notes 43–79 and accompanying text.

16. *See infra* note 31 and accompanying text.

17. 411 U.S. 792 (1973).

states a prima facie case of discrimination, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for its actions. In the final stage, the plaintiff carries the ultimate burden of persuading the court that the employer's legitimate nondiscriminatory reason is merely pretext for discrimination.

The *McDonnell Douglas* test has made it increasingly difficult for plaintiffs to prove discriminatory intent or even to establish a strong enough inference for their claims to survive summary judgment.[18] Plaintiffs particularly struggle with proving pretext at the final stage, given various technical requirements and procedural hurdles that courts impose.[19] Unless courts meaningfully reform *McDonnell Douglas* or adopt a new legal test, most Title VII plaintiffs will never see their claims brought before a jury[20]—a right that Congress deemed critical for victims of employment discrimination.[21] As it stands, discrimination plaintiffs have abysmal success rates, faring "far worse than virtually every other category of federal litigants"—even habeas corpus petitioners.[22] Data from 2017 suggest that only 1% of federal employment discrimination and harassment claims succeed in court.[23]

This Essay argues that *Bostock* provides the basis for transforming or abandoning the *McDonnell Douglas* test. Title VII's prohibition on discrimination "because of" a protected trait invokes "but-for" causation: discrimination occurs if an employer takes an adverse action that, absent the protected trait, the employer would not have taken. As this Essay illustrates, the *McDonnell Douglas* test operates on the implicit assumption that an adverse employment action has only one but-for cause. By explicitly recognizing that adverse employment actions can have *multiple* but-for causes, *Bostock* throws *McDonnell Douglas* into question.

According to *Bostock*, an employment decision can be motivated by multiple outcome-determinative factors. When one of these factors is discriminatory—even if the other is not—discrimination is a but-for cause. The employer has violated Title VII. But under the *McDonnell Douglas* test, the employer can nonetheless escape liability: once an employer states a nondiscriminatory reason for its actions, *McDonnell Douglas* is often interpreted to require plaintiffs to *disprove* that explanation rather than asking whether an

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18. *See infra* notes 43–47 and accompanying text.

19. *See infra* notes 45–48 and accompanying text.

20. *See infra* Part I.

21. *See* Ross B. Goldman, *Putting Pretext in Context: Employment Discrimination, the Same-Actor Inference, and the Proper Roles of Judges and Juries*, 93 VA. L. REV. 1533, 1542 (2007) (citing legislative history of the Civil Rights Act of 1991).

22. Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1284 (2012).

23. *See* Sean Captain, *Workers Win Only 1% of Federal Civil Rights Lawsuits at Trial*, FAST CO. (July 31, 2017), https://www.fastcompany.com/40440310/employees-win-very-few-civil-rights-lawsuits [https://perma.cc/54CV-AB3W]. For earlier studies, see Eyer, *supra* note 22, at 1361 n.27 (collecting empirical studies).

independent discriminatory but-for cause exists.[24] In these scenarios, plaintiffs can at best establish that discrimination was a motivating factor—a secondary causation scheme under Title VII.

Despite the enduring challenges that marginalized employees like Chavez face in combatting workplace injustice, they can leverage *Bostock* as a starting point to expose the inconsistency between Title VII and *McDonnell Douglas*. In doing so, they could eventually prompt courts to overhaul or supplant the process of proving discrimination in disparate treatment litigation. Part I of this Essay details the evolution of *McDonnell Douglas*, describing how the pretext stage has become an insurmountable obstacle for many Title VII plaintiffs, and how the motivating factor standard fails plaintiffs as an adequate backup. Part II analyzes *Bostock*'s account of but-for causation under Title VII and highlights its conflict with the pretext stage of *McDonnell Douglas*. Part III explores ways to resolve this conflict, including options for abandoning or reforming *McDonnell Douglas*.

I. THE PROBLEM WITH *MCDONNELL DOUGLAS*

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate "because of . . . race, color, religion, sex, or national origin."[25] Title VII discrimination claims fall into several broad categories, including disparate treatment,[26] disparate impact,[27] hostile work environment,[28] retaliation,[29] and non-accommodation.[30] Disparate treatment claims comprise the

24. *See infra* Part I and Part II.

25. 42 U.S.C. § 2000e-2(a). If based on one of these protected characteristics, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," as well as "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee." *Id.*

26. Disparate treatment claims allege that an employee suffered an adverse employment action—such as being fired, not hired, or denied a promotion—because of a protected trait. 42 U.S.C. § 2000e-2(a).

27. Disparate impact claims allege that a facially neutral employment practice has a disproportionately negative impact on the basis of a protected trait. 42 U.S.C. § 2000e-2(k); *see, e.g.*, Ricci v. DeStefano, 557 U.S. 557 (2009).

28. Hostile work environment claims allege that "the workplace is permeated with discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (citation and quotation marks omitted); *see* 42 U.S.C. § 2000e-2(a) (prohibiting discrimination with respect to "conditions" of employment).

29. Retaliation claims allege that an employer retaliated against an employee "because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a); *see, e.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013).

30. Non-accommodation claims allege that an employer failed to "reasonably accommodate . . . an employee's or prospective employee's religious observance or practice without

majority of Title VII actions, and the heartland of disparate treatment litigation is the *McDonnell Douglas* burden-shifting framework.[31] This Part provides background on the evolution of the *McDonnell Douglas* test and how motivating factor liability has failed to produce a desirable alternative framework.

A. *The* McDonnell Douglas *Framework*

The *McDonnell Douglas* test proceeds like a "three-part minuet."[32] Under step one, plaintiffs must establish a prima facie case of discrimination by showing (1) that they are members of a protected class, (2) that they are qualified for the job, (3) that they suffered an adverse employment action, and (4) that similarly situated persons outside the protected class were treated more favorably.[33] Under step two, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason (LNDR) for the adverse action.[34] Courts construe this intermediary burden at step two as "exceedingly light."[35] Finally, under step three, plaintiffs must demonstrate that the LNDR was a pretext for discrimination.[36] Whereas the initial stages of *McDonnell Douglas* impose burdens of production, plaintiffs carry the ultimate burden of persuasion at step three.[37]

Since its creation, the *McDonnell Douglas* framework has been cited in over 100,000 cases and administrative decisions—about twenty-two times more than *Roe v. Wade*, which was decided the same year.[38] Prior to *McDonnell Douglas*, disparate treatment claims were "treated as any other civil suit," with plaintiffs carrying the burden of showing by a preponderance of the evidence that they suffered an adverse employment action because of a

undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j); *see, e.g.*, Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).

31. *See* Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 102 (2017); Katie Eyer, *The Return of the Technical* McDonnell Douglas *Paradigm*, 94 WASH. L. REV. 967, 968 (2019) ("In the employment discrimination arena, more than 90% of cases exclusively raise claims of individual disparate treatment—and the *McDonnell Douglas* burden-shifting paradigm is the predominant way of proving such claims.").

32. Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2232 (1995) (quotation marks omitted) (borrowing the "minuet" image from lower-court cases discussing disparate treatment analysis).

33. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). *McDonnell Douglas* articulated the elements of a prima facie case in the context of firing, but subsequent caselaw has adapted it to other employment actions.

34. *Id.* at 802.

35. Perryman v. Johnson Prod. Co., 698 F.2d 1138, 1142 (11th Cir. 1983).

36. *McDonnell Douglas Corp.*, 411 U.S. at 804.

37. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253–56 (1981).

38. Data is from Westlaw. As of April 10, 2021, *McDonnell Douglas* has been cited in 64,376 court cases and 36,202 administrative decisions. *Roe v. Wade*, 410 U.S. 113 (1973), has been cited in 4,291 court cases and 309 administrative decisions.

protected trait.[39] The *McDonnell Douglas* decision was the Court's response to challenges plaintiffs had faced in meeting this burden: by allowing employees to prove discrimination through circumstantial evidence, *McDonnell Douglas* attempted to address the difficulty of uncovering direct evidence of subjective motivations.[40] In a later opinion, the Court described the *McDonnell Douglas* burden-shifting framework as "designed to assure that the plaintiff [has] his day in court."[41] Unsurprisingly, the test was generally employee friendly in its early application.[42]

But as the century progressed, courts turned towards a new defendant-friendly application of *McDonnell Douglas*, and by the mid-1990s, the framework had evolved into a black hole for otherwise colorable claims.[43] The first and second steps of *McDonnell Douglas* are "easily met" in most cases, given that they only impose burdens of production.[44] Employees most often stumble at step three in their attempt to prove pretext.[45] Scholars and judges have offered various explanations to account for why surviving the pretext stage has become so challenging. Katie Eyer has highlighted the "technical glosses" lower courts impose on *McDonnell Douglas* to "dismiss many potentially meritorious discrimination claims."[46] These include,

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39. Taylor Gamm, *The Straw that Breaks the Camel's Back: A Final Argument for the Demise of the* McDonnell Douglas *Framework*, 86 U. CIN. L. REV. 287, 293 (2018).

40. *See, e.g.*, Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 256 (1993) (describing how "[b]ecause those who discriminate rarely admit to discrimination and almost never leave 'smoking gun' evidence in their files," the *McDonnell Douglas* Court established a framework for plaintiffs to "resort to subtle circumstantial evidence"); Sandra F. Sperino, *Into the Weeds: Modern Discrimination Law*, 95 NOTRE DAME L. REV. 1077, 1086 (2020) (describing how the *McDonnell Douglas* Court created the burden-shifting framework as a mechanism for "a plaintiff proceeding on a disparate treatment claim based on circumstantial evidence [to] prove his case"); Alexandra Zabinski, *Surviving the "Pretext" Stage of* McDonnell Douglas*: Should Employment Discrimination and Retaliation Plaintiffs Prove "Motivating Factors" or But-for Causation?*, 40 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 280, 284 (2019) (describing how the *McDonnell Douglas* Court was responding to "the difficulty of directly proving an employer's subjective motivation").

41. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (citation and quotation marks omitted).

42. *See* Eyer, *supra* note 31, at 987 (explaining that early on, "many circuits interpreted the paradigm in technical ways that aided discrimination plaintiffs").

43. Katie Eyer describes this shift as coinciding with *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), though "lower courts had [already] begun to turn toward a new, anti-plaintiff version of the paradigm." Eyer, *supra* note 31, at 1004.

44. Ross B. Goldman, *Putting Pretext in Context: Employment Discrimination, the Same-Actor Inference, and the Proper Roles of Judges and Juries*, 93 VA. L. REV. 1533, 1544 (2007).

45. *See id.* at 1544–45 ("[T]he vast majority of Title VII disparate treatment cases turn on the issue of pretext."); Timothy M. Tymkovich, *The Problem with Pretext*, 85 DENV. U. L. REV. 503, 506–07 (2008) ("Because a defendant almost always satisfies its burden of production, the third stage of the *McDonnell Douglas* framework—the pretext stage—becomes the most critical." (citation omitted)).

46. Eyer, *supra* note 31, at 978.

among others, the stray remarks doctrine (under which courts ignore peripheral discriminatory comments), the honest-belief rule (under which courts accept false LNDRs that employers genuinely believed to be true), and the same-actor inference (under which courts presume the same actor who hired an employee would not discriminatorily fire her).[47] It is no wonder that judges find the pretext prong "the most confusing."[48]

In light of the ever-expanding set of formulas and technicalities tripping up plaintiffs (and judges) at the pretext stage, *McDonnell Douglas* continues to drift further away from its original purpose of easing the process of proving discrimination. Chief Judge Tymkovich of the Tenth Circuit argues that applying the *McDonnell Douglas* framework "distracts the court from what it should be focusing its attention on: determining whether the plaintiff produced sufficient evidence of discrimination."[49] Similarly, Judge Chin of the Second Circuit explains that the test "invites juries and courts to lose sight of the ultimate issue by focusing their attention away from the existence or non-existence of evidence of discrimination."[50] Ultimately, many scholars and judges perceive the *McDonnell Douglas* framework as fundamentally broken. That is, it fails as a legal test for getting at the heart of Title VII's disparate treatment inquiry: whether intentional discrimination occurred.[51]

B. *Motivating Factor Liability*

In theory, Title VII plaintiffs have some flexibility in proving intentional discrimination. Codifying and expanding on the Supreme Court's holding in *Price Waterhouse v. Hopkins*,[52] Congress amended Title VII in 1991 to explicitly prohibit employment practices for which a protected trait "was a *motivating factor* . . . even though other factors also motivated the practice."[53] Thereafter, the statute took on a two-tier approach to causation: even when

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47. *Id.* at 979; *see also* Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 401 (2010) (highlighting a similar dangerous interplay of substantive "evidentiary-dilution devices" and their procedural reinforcements).

48. Denny Chin & Jodi Golinsky, *Moving Beyond* McDonnell Douglas*: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 666 (1998).

49. Tymkovich, *supra* note 45, at 522. Chief Judge Tymkovich explains that the test causes courts to over-compartmentalize evidence and artificially distinguish between direct and circumstantial evidence, among other faults. *Id.* at 519–22.

50. Chin & Golinsky, *supra* note 48, at 660; *see also* Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1224 (10th Cir. 2003) (Hartz, J., concurring) ("Rather than concentrating on what should be the focus of attention—whether the evidence supports a finding of unlawful discrimination—courts focus on the isolated components of the *McDonnell Douglas* framework, losing sight of the ultimate issue.").

51. *See, e.g.*, Eyer, *supra* note 31, at 980; Martin, *supra* note 47, at 401; Marcia L. McCormick, *The Allure and Danger of Practicing Law as Taxonomy*, 58 ARK. L. REV. 159, 161 (2005); Tymkovich, *supra* note 45, at 519.

52. 490 U.S. 228 (1989); *see* William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 375 (2017).

53. 42 U.S.C. § 2000e-2(m) (emphasis added).

discrimination was not a determinative factor for an adverse action, employers remained liable if discrimination was a *motivating factor*.

The motivating factor test was designed to be easier for plaintiffs to meet than a but-for test—the causal paradigm typically applied to Title VII and other antidiscrimination laws.[54] Under most disparate treatment statutes, courts will find an outcome is "because of" a protected trait only if that outcome would not have occurred absent the trait[55]—that is, only if the protected trait was a but-for cause.[56] The motivating factor formulation does not require the protected trait to be a determinative (but-for) factor contributing to the outcome—only that it have *some* causal influence.[57] Thus, Title VII's inclusion of motivating factor liability *should* aid plaintiffs pursuing employment discrimination claims and allow them to escape the strictures of *McDonnell Douglas*.[58] Indeed, the majority of circuits have determined that *McDonnell Douglas* is "overly burdensome" and therefore "inappropriate" for adjudicating motivating factor claims.[59] Instead, most courts apply a separate framework or a modified *McDonnell Douglas*.[60]

Unfortunately, the motivating factor standard has proven itself a poor refuge from the perils of *McDonnell Douglas*. To begin, Title VII equips employers with a powerful remedy-limiting defense known as the "same decision" or "same action" defense. If an employer shows it would have taken the same action absent the protected trait—that is, if the protected trait was not a but-for cause—plaintiffs are entitled to only attorney's fees, not damages or backpay.[61] Nor can courts order employer-defendants to hire, reinstate, or promote successful plaintiffs that establish motivating factor causality but not but-for causality.[62]

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54. Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 503 (2006).

55. *Id.* at 494.

56. *See* Part II *infra*.

57. Katz, *supra* note 53, at 505; *see also id.* at 509 (equating motivating factor causation with "minimal causation").

58. *See* Charles A. Sullivan, *Making Too Much of Too Little?: Why "Motivating Factor" Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357, 360 n.15 (2020) (discussing early predictions that motivating factor liability would supplant *McDonnell Douglas*).

59. Quigg v. Thomas Cnty. Sch. Dist., 814 F.3d 1227, 1237 (11th Cir. 2016); *see id.* at 1238–39 (collecting cases from the other circuits).

60. *See, e.g.*, *id.* at 1239 (separate framework); Keelan v. Majesco Software, Inc., 407 F.3d 332, 341 (5th Cir. 2005) (modified *McDonnell Douglas*); *see generally* Thomas F. Kondro, *Mixed Motives and Motivating Factors: Choosing a Realistic Summary Judgment Framework for § 2000e-2(m) of Title VII*, 54 ST. LOUIS U. L.J. 1439 (2010) (cataloguing frameworks).

61. 42 U.S.C. § 2000e-5(g)(2)(B).

62. *Id.*

Further, how courts determine which framework to apply is a "muddled mess."[63] In practice, courts often—though not always[64]—apply *either McDonnell Douglas* or motivating factor analysis in a given case.[65] Anticipating this choice, plaintiffs frequently decide *against* framing their claims in the motivating factor framework.[66] At first, obvious reasons accounted for this behavior: most circuits required plaintiffs to prove discrimination was a motivating factor through direct evidence, which is rarely available in employment discrimination cases.[67] *McDonnell Douglas* was the better of two bad choices. But then, in *Desert Palace, Inc. v. Costa*, the Supreme Court held that plaintiffs can prove motivating factor liability through circumstantial evidence.[68] Widespread speculation emerged that *Desert Palace* meant *McDonnell Douglas*'s demise,[69] as it seemingly "erased the line separating the cases analyzed under pretext and those analyzed under mixed motives."[70]

Those predictions did not pan out. *McDonnell Douglas* emerged from *Desert Palace* more or less unscathed. In later cases, the Supreme Court continued to elevate *McDonnell Douglas*'s hold over disparate treatment jurisprudence, bolstering lower courts' predilection for applying *McDonnell Douglas* instead of motivating factor analysis.[71] As one scholar put it, courts have "held fast to *McDonnell Douglas* like a child with a favorite blanket."[72]

Judicial preferences aside, plaintiffs also still frequently "prefer to hitch their wagons to *McDonnell Douglas*."[73] As treacherous a ride as the *McDonnell Douglas* test may be, motivating factor territory can be just as daunting. Even when courts announce that they are undertaking motivating factor analysis, they sometimes apply the functional equivalent of but-for causa-

63. Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L.J. 559, 566 (2017).

64. *See, e.g.*, Ponce v. Billington, 679 F.3d 840, 845 (D.C. Cir. 2012) (holding that "a plaintiff may ultimately decide to proceed under both theories of liability").

65. *See, e.g.*, William R. Corbett, Young v. United Parcel Service, Inc.*:* McDonnell Douglas *to the Rescue?*, 92 WASH. U. L. REV. 1683, 1690 (2015) (discussing how "courts grappled with determining which proof structure—pretext or mixed motives—to apply in any given case"); Tymkovich, *supra* note 45, at 525–26 (discussing the choice between frameworks).

66. Sullivan, *supra* note 58, at 365–66, 396.

67. Tymkovich, *supra* note 45, at 511.

68. 539 U.S. 90, 92 (2003).

69. *See, e.g.*, Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 991–92 (D. Minn. 2003); William R. Corbett, McDonnell Douglas*, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199 (2003); Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 72 (2003).

70. Corbett, *supra* note 65, at 1690.

71. *Id.* at 1696 (discussing how in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015), the Court "elevate[d] the role of the *McDonnell Douglas* analysis in disparate treatment law, suggesting that almost any issue of discrimination, including particularly challenging ones, can be stuffed into the three-part framework").

72. Brake, *supra* note 63, at 598.

73. *Id.* at 396.

tion.[74] Further, the motivating factor route poses various strategic risks for plaintiffs. Judge Tatel of the D.C. Circuit explained that juries instructed on both theories of liability may be inclined to "split the baby," finding that discrimination was a motivating factor but that the employer would have made the same decision anyway.[75]

Sometimes, courts allow plaintiffs to run their claims through both tests: upon failing *McDonnell Douglas*, plaintiffs can have a go under the motivating factor proof structure.[76] Such was the case for Jennifer Chavez.[77] But plaintiffs whose claims have failed the *McDonnell Douglas* test may enter the motivating-factor framework at a disadvantage. For instance, in some cases, courts took a plaintiff's failure at the pretext stage of *McDonnell Douglas* to mean that the employer had met the same decision defense.[78] Therefore, Title VII's remedy-limiting provision automatically kicked in, preemptively cutting off the plaintiff from meaningful remedies.

All in all, motivating factor liability "has largely proven to be the revolution that wasn't."[79]

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As long as Title VII plaintiffs must voyage through the minefield of evidentiary and procedural obstacles characterizing current employment discrimination litigation, *Bostock* will not by itself remedy LGBTQ+ discrimination. However, *Bostock* has the unrealized potential to destabilize the *McDonnell Douglas* regime by exposing its inconsistency with Title VII's but-for causation standard. This would ease the process of proving discrimination for all Title VII disparate treatment plaintiffs.

II. PROVING DISCRIMINATION AFTER *BOSTOCK*

Courts interpret Title VII's prohibition on discrimination "because of" a protected trait as requiring plaintiffs to prove but-for causation in order to access full remedies.[80] In applying the *McDonnell Douglas* framework, courts

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74. *Id.* at 380–81.

75. Ponce v. Billington, 679 F.3d 840, 845 (D.C. Cir. 2012); *see also* Sullivan, *supra* note 58, at 396; David Sherwyn & Michael Heise, *The* Gross *Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 931 (2010).

76. *See* William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. REV. 81, 87 (2009).

77. Chavez v. Credit Nation Auto Sales, LLC, 641 F. App'x 883, 889 (11th Cir. 2016) (holding that even though Chavez failed at the summary judgment stage under *McDonnell Douglas*, she could still pursue her claim under a motivating factor theory).

78. *See, e.g.*, White v. Verizon S., Inc., 299 F. Supp. 2d 1235, 1242–43 (M.D. Ala. 2003).

79. Sullivan, *supra* note 58, at 366.

80. *See, e.g.*, Burrage v. United States, 571 U.S. 204, 212–13 (2014) (discussing how "dictionary definitions" and the "ordinary meaning" of "because of" point to but-for causation); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013) (discussing how "because of" indicates but-for causation). As discussed in Section I.B *supra*, Title VII also imposes liability when a protected trait is a motivating factor in an adverse employment action—a significantly

should—in theory—be performing a but-for causal inquiry.[81] But in practice, plaintiffs can fail at step three of the *McDonnell Douglas* test even when they meet the but-for standard articulated in *Bostock*.

A. Bostock*'s Multiple-But-For Paradigm*

But-for causation inquiries consider whether an injury (e.g., an adverse employment action) would have occurred "but for" the existence of a certain causal factor (e.g., a person's sex). The standard "invokes the logical concept of necessity"—"[a] factor is necessary if, but for its existence, the outcome would not have occurred when it did."[82]

Though this starting principle is fairly uncontroversial as a matter of "textbook tort law,"[83] questions arise around the particularities of but-for causation in the antidiscrimination context. Of relevance here: can *multiple* but-for causes exist under a given proof scheme? Various courts and scholars have indicated "no" when it comes to employment discrimination.[84] A logical corollary is that Title VII plaintiffs can only prove but-for causation by showing that discrimination was the single dispositive factor in an employment decision—the single but-for cause. Under this model, but-for causation is regarded as a difficult standard to meet for proving discrimination—particularly when compared to the less exacting motivating factor standard. Accordingly, in the context of proving discrimination, but-for causation is generally thought to be "the most conservative" standard.[85]

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less restrictive standard than but-for causation. *See* Katz, *supra* note 54, at 503. However, the plaintiff's remedies are severely limited if the employer would have made the "same decision" anyway, *see supra* Section I.B, which is conceptually equivalent to but-for causation, *see* Katz, *supra* note 54 at 501–03, 502 n.45; Robert S. Whitman, Note, *Clearing the Mixed-Motive Smokescreen: An Approach to Disparate Treatment Under Title VII*, 87 MICH. L. REV. 863, 873 (1989). Therefore, with respect to disparate treatment actually subject to meaningful remedy, Title VII requires a showing of but-for causation.

81. *See* Malamud, *supra* note 32, at 2259.

82. Katz, *supra* note 54, at 501.

83. *Nassar*, 570 U.S. at 347.

84. *See, e.g.*, Mollet v. City of Greenfield, 926 F.3d 894, 897 (7th Cir. 2019) ("[T]he question in this case is not . . . whether [the protected activity] was *a* but-for cause of the adverse action, rather whether the protected activity was *the* but-for cause of the adverse action." (interpreting *Nassar*, 570 U.S. 338)); Chuck Henson, *Title VII Works-That's Why We Don't Like It*, 2 U. MIA. RACE & SOC. JUST. L. REV. 41, 83 (2012); Sullivan, *supra* note 57, at 368; Zabinski, *supra* note 40, at 293. *But see* Ponce v. Billington, 679 F.3d 840, 845-46 (D.C. Cir. 2012) (" '[S]ole' and but-for cause are very different. . . . [W]e never said . . . that a plaintiff in a *but-for* case must show that an adverse employment action occurred solely because of a protected characteristic. . . . [W]e hereby banish the word 'sole' from our Title VII lexicon.").

85. Tracy L. Bach, Note, *Gender Stereotyping in Employment Discrimination: Finding a Balance of Evidence and Causation Under Title VII*, 77 MINN. L. REV. 1251, 1264 (1993); *see also* David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 399 n.161 (1994).

But the *Bostock* decision embraces a different model of but-for causation in antidiscrimination law that recognizes the possibility of multiple but-for causes. I term this model the *multiple-but-for (MBF) paradigm*.

In *Bostock*, the Supreme Court considered three consolidated cases in which employees were fired for being gay or transgender.[86] Briefs supporting the plaintiffs argued that even assuming the statutory term "sex" referred exclusively to biological sex, the employees' biological sex was a but-for cause of their termination: "But for [Plaintiff] Zarda's and [Plaintiff] Bostock's male sex, their employers would not have objected to their dating men. But for [Plaintiff] Stephens' sex assigned at birth, her employer would not have objected to her sex presentation."[87] The employer-defendants objected that because sex and sexuality/gender identity are distinct concepts, they could not *both* be but-for causes.[88] Writing for the majority in *Bostock*, Justice Gorsuch dispelled this notion and embraced the MBF paradigm:

> Title VII's "because of" test incorporates the " 'simple' " and "traditional" standard of but-for causation. . . . [A] but-for test directs us to change one thing at a time and see if the outcome changes. . . . This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. . . . When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law.[89]

Justice Gorsuch's MBF paradigm follows the simple principle of *ceteris paribus*: it asks whether, with all else equal, a plaintiff would have suffered an adverse employment action if their sex, race, or some other protected trait had been different.

Justice Alito, in dissent, attempted to depict Justice Gorsuch's MBF paradigm as just a rephrased motivating factor test.[90] But the *Bostock* majority opinion takes care to dispel any false equation between the MBF paradigm and the motivating factor theory of liability. Justice Gorsuch emphasized that "because nothing in [the Court's] analysis depends on the motivating

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86. 140 S. Ct. at 1731.

87. Brief of William N. Eskridge Jr. and Andrew M. Koppelman as *Amici Curiae* in Support of Employees at 2, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623 & 18-107); *see also* Brief for Petitioner at 15, *Bostock*, 140 S. Ct. 1731 (No. 17-1618).

88. *See* Brief for Respondent, *Bostock*, 140 S. Ct. 1731 (No. 17-1618).

89. *See Bostock* 140 S. Ct. at 1739 (citations omitted).

90. *Id.* at 1757 (Alito, J., dissenting) ("The Court observes that a Title VII plaintiff need not show that 'sex' was the sole or primary motive for a challenged employment decision or its sole or primary cause . . . . All that is true, but so what? In cases like those before us, a plaintiff must show that sex was a 'motivating factor' in the challenged employment action, 42 U.S.C. § 2000e–2(m)").

factor test, we focus on the more traditional but-for causation standard."[91] Therefore, following Justice Gorsuch's logic, Title VII plaintiffs can access the full host of Title VII remedies even if multiple causal factors provoked an adverse employment action—as long as at least one but-for cause is a protected trait.

Justice Gorsuch did not present his description of but-for causation as a new paradigm.[92] Rather, he interpreted preexisting authorities in employment discrimination law—including both Title VII itself and judicial precedents[93]—to support an MBF paradigm. But as the following Section demonstrates, embracing the MBF paradigm in the employment discrimination space could reshape or even undermine existing doctrine.

B. *Implications for* McDonnell Douglas

Justice Gorsuch's MBF paradigm has the potential to revolutionize the process of proving discrimination in Title VII disparate treatment cases. Most critically, it destabilizes *McDonnell Douglas*. In step three of the *McDonnell Douglas* test, most courts "requir[e] the plaintiff to show 'pretext' in the sense of the LNDR's falsity, even where there is strong affirmative evidence of discrimination."[94] In other words, plaintiffs will fail step three if they cannot prove that the LNDR is false. But under the MBF paradigm, because two determinative causes may be in play, a valid, non-pretextual LNDR can coexist with a discriminatory but-for cause.[95] This highlights a fundamental flaw in *McDonnell Douglas*: courts presume that the *McDonnell*

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91. *Id.* at 1740; *see also* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1014 (2020).

92. Taken outside the Title VII context, the MBF paradigm is not without precedent. For example, in a criminal-law case several years prior, Justice Scalia—Justice Gorsuch's predecessor (literally and jurisprudentially)—described the paradigm: "[I]f poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived." Burrage v. United States, 571 U.S. 204, 211 (2014). Indeed, Justice Gorsuch relied on this opinion in *Bostock*. 140 S. Ct. at 1739; *see also* Brief of William N. Eskridge Jr. and Andrew M. Koppelman as *Amici Curiae* in Support of Employees at 5, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623 & 18-107) (citing *Burrage* as precedent for the but-for paradigm taken up in *Bostock*).

93. For example, Justice Gorsuch cites *University of Texas Southwestern Medical Center v. Nassar,* 570 U.S. 338, 350 (2013), for the proposition that "[i]n the language of the law . . . Title VII's 'because of' test incorporates the simple and traditional standard of but-for causation." *Bostock*, 140 S. Ct. at 1739 (quotation marks omitted). In doing so, Justice Gorsuch imposes an interpretation of what *Nassar* meant by "but-for causation" (namely, the MBF paradigm).

94. Eyer, *supra* note 31, at 978–79; *see also* Jamie Darin Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law:* McDonnell Douglas*'s Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511, 530 (2008) ("[T]he *McDonnell Douglas* framework . . . seemingly requires the plaintiff to show that the illegal motive was the employer's one, true motive.").

95. *Bostock*, 140 S. Ct. at 1742.

Douglas framework tests for but-for causation, but its pretext step disregards the fact that there can be multiple but-for causes.

To borrow an example from Justice Gorsuch's *Bostock* opinion: Suppose an employer fires an individual *X* because she is female and a Yankees fan—two traits the employer finds objectionable. If *X* was not a Yankees fan, the employer would have stomached its sexism and kept her on the job. *X*'s baseball preferences therefore constitute a but-for cause. Still, according to Justice Gorsuch, the employment action constitutes "a firing 'because of sex' if the employer would have tolerated the same allegiance in a male employee."[96] Showing *X*'s sex is a *second* but-for cause—that the employer would not have fired *X* had she been a *male* Yankees fan—satisfies the standard of proof articulated in *Bostock*. However, under the current *McDonnell Douglas* framework, the employer would prevail in a lawsuit because its actions were also caused by a legitimate nondiscriminatory reason. *X*'s disparate treatment claim would fail step three of *McDonnell Douglas* because *X* would not be able to demonstrate that her baseball preferences were a false pretext (they were not).

Jennifer Chavez may have fallen victim to this dynamic. Assume that the courts were correct in concluding that the repair shop would not have fired Chavez had she not fallen asleep on the job. But suppose the shop also would not have fired Chavez had she not come out as transgender, even if she had fallen asleep. In this scenario, both the nap and her gender identity were but-for causes. Alter one, and Chavez would still be employed. Chavez should therefore be able to access Title VII's full remedies. But because she would be unable disprove her employer's LNDR, her claim would fail *McDonnell Douglas*.

How significant is the disjunction between *McDonnell Douglas* and Title VII's actual causation standard as articulated in *Bostock*? Very. The simplest iteration of *McDonnell Douglas* step three requires plaintiffs to prove that the employer's LNDR is pretext for discrimination.[97] But as mentioned in Section I.A, *supra*, lower courts sometimes add glosses that make it even harder for plaintiffs to prevail—such as requiring plaintiffs to prove that the LNDR is both pretext and just plain false,[98] to demonstrate that the defendant "did not honestly believe in" the LNDR,[99] or to "present evidence contradicting the core facts" of the LNDR.[100] In Chavez's case, the court required her to demonstrate "weaknesses, implausibilities, inconsistencies, incoherencies, or

96. *Id.* at 1742.

97. *See, e.g.*, Pribyl v. Cnty. of Wright, 964 F.3d 793, 796 (8th Cir. 2020); Hukman v. Sw. Airlines Co., 816 F. App'x 166, 167 (9th Cir. 2020); Kawahara v. Guar. Bank & Tr., 835 F. App'x 387, 389 (10th Cir. 2020); Jeffries v. Barr, 965 F.3d 843, 859–60 (D.C. Cir. 2020).

98. *See, e.g.*, Palencar v. N.Y. Power Auth., 834 F. App'x 647, 650–51 (2d Cir. 2020); Lewis v. Blue Bird Corp., 835 F. App'x 526, 530 (11th Cir. 2020); Zeng v. Tex. Tech Univ. Health Sci. Ctr. at El Paso, 833 F. App'x 961, 965 (3d Cir. 2020).

99. *See, e.g.*, Kuklinski v. Mnuchin, 829 F. App'x 78, 83 (6th Cir. 2020).

100. Hennessey v. Dollar Bank, FSB, No. 19-3964, 2020 WL 6791227, at *3 (3d Cir. Nov. 19, 2020) (alteration of original).

contradictions" in the repair shop's proffered reason for firing her—a burden that she failed.[101] Under all these iterations of the *McDonnell Douglas* test, the existence of an LNDR, such as baseball preferences or sleeping on the job, would defeat the employee's claim, even if discriminatory animus was also a but-for cause.

At one point, cases in the Seventh Circuit might have provided the exception. For several decades, the Seventh Circuit sidelined *McDonnell Douglas* for a "convincing mosaic of discrimination" test,[102] but it eventually abandoned the test in 2016.[103]

As this overview demonstrates, all current iterations of *McDonnell Douglas* step three conflict with *Bostock*. Some courts have begun to recognize and debate the implications of *Bostock*'s MBF paradigm. For example, a Ninth Circuit case critiqued a dissenting opinion's "unduly constrained reading of but-for causation," citing *Bostock* for the proposition that events can have multiple but-for causes and "the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision."[104] But courts have yet to address the conflict implicit between *Bostock* and the pretext stage of *McDonnell Douglas*.

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Justice Gorsuch's MBF paradigm recognizes the existence of outcome-determinative discrimination that *McDonnell Douglas*'s pretext stage prevents courts from remedying. The description of but-for causation enshrined in *Bostock* thereby demonstrates that the *McDonnell Douglas* framework does not effectuate the antidiscrimination goals of Title VII.

III. BEYOND *MCDONNELL DOUGLAS*

Calls to move "beyond *McDonnell Douglas*" permeate discourse on employment discrimination law.[105] But most have been pessimistic as of late, and none have called for courts to adopt an MBF paradigm in particular. As

101. Chavez v. Credit Nation Auto Sales, 49 F. Supp. 3d 1163, 1198 (N.D. Ga. 2014), *aff'd in part, rev'd in part*, 641 F. App'x 883 (11th Cir. 2016).

102. Troupe v. May Dep't Stores Co., 20 F.3d 734, 736–37 (7th Cir. 1994) (holding that employees may provide certain circumstantial "pieces of evidence" that are "none conclusive in itself but together compos[e] a convincing mosaic of discrimination"). Though the "convincing mosaic" theory of discrimination did not directly defy *McDonnell Douglas*, it provided plaintiffs with an alternative pathway for backing up disparate treatment claims and became a trademark feature of Title VII litigation in the Seventh Circuit for over two decades. *See* Sandra F. Sperino, *Beyond* McDonnell Douglas, 34 BERKELEY J. EMP. & LAB. L. 257, 265–66 (2013).

103. Ortiz v. Werner Enters., Inc., 834 F.3d 760, 765–66 (7th Cir. 2016). In *Ortiz*, the court "struck the death knell for the Convincing Mosaic," going so far as to overrule "all prior Title VII employment discrimination decisions . . . to the extent that the Convincing Mosaic was relied upon." Gamm, *supra* note 39, at 301–02.

104. Black v. Grant Cnty. Pub. Util. Dist., 820 F. App'x 547, 551–52 (9th Cir. 2020) (quoting Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020)).

105. Sperino, *supra* note 102, at 271.

recently as 2019, critics of the *McDonnell Douglas* test lamented that "[t]here are few reasons to believe that it will imminently be abandoned, nor does the Supreme Court's case law provide any obvious basis for arguing that it should be abandoned."[106] *Bostock* changes those odds. Justice Gorsuch's MBF paradigm can provide the basis for either abandoning or overhauling *McDonnell Douglas*.

If plaintiffs' attorneys can successfully convince courts to abandon the current *McDonnell Douglas* framework, what will succeed it? Two general directions are evident: abandoning the *McDonnell Douglas* test or fundamentally transforming it.

On one hand, courts could abandon *McDonnell Douglas* in favor of an approach that better adheres to the MBF paradigm. The most straightforward proposals advocate to trade in *McDonnell Douglas* for simpler preponderance-of-the-evidence or sufficiency-of-the-evidence approaches[107] and to evaluate all the evidence as a whole.[108] In the wake of *Desert Palace*, some suggest eclipsing *McDonnell Douglas* with a motivating factor framework, wherein courts would apply the same decision test to determine but-for causation.[109] More unconventional proposals include a "multiaxial approach"—a "contextual" and "multidimensional" model in which courts analyze the role of protected traits "interactively" across multiple axes, including "the individual self, the defendant employer, society, and the state."[110] Others would borrow causal standards from tort law.[111]

On the other hand, it may be possible to bring the *McDonnell Douglas* framework in line with the MBF paradigm by reimagining step three. Scholars have argued that modern interpretations of the *McDonnell Douglas* test misconstrue what step three actually requires.[112] And assuming that course

106. Eyer, *supra* note 31, at 1013; Henson, *supra* note 84, at 109.

107. Malamud recommends abandoning *McDonnell Douglas* for "an [o]pen-[e]nded [i]ntentional [d]iscrimination [s]tandard" in which proving intentional discrimination by a preponderance of the evidence is "the only relevant question." Malamud, *supra* note 32, at 2317–19. Chief Judge Tymkovich of the Tenth Circuit recommends abandoning *McDonnell Douglas* for "an ordinary sufficiency of the evidence approach" and "eliminat[ing] the artificial distinction between mixed motive and single motive Title VII cases." Tymkovich, *supra* note 45, at 528–29.

108. Chin & Golinsky, *supra* note 48, at 673.

109. *See, e.g.*, Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 992 (D. Minn. 2003).

110. Shirley Lin, *Dehumanization "Because of Sex": The Multiaxial Approach to the Rights of Sexual Minorities*, 24 LEWIS & CLARK L. REV. 731, 736–37 (2020).

111. *See generally* Brian S. Clarke, *A Better Route Through the Swamp: Causal Coherence in Disparate Treatment Doctrine*, 65 RUTGERS L. REV. 723 (2013) (proposing the "Necessary Element of a Sufficient Causal-Set" or "NESS" causal standard widely accepted in tort law).

112. *See, e.g.*, Joss Teal, *A Survivor's Tale:* McDonnell Douglas *in A Post-*Nassar *World*, 55 SAN DIEGO L. REV. 937, 941–43 (2018). Notably, in *McDonald v. Santa Fe Trail Transportation Co.*, decided three years after *McDonnell Douglas*, the Court clarified in a footnote that the "pretext" step "does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies . . . no more is required to be shown than that race was *a* 'but for'

correction is feasible, there may be compelling reasons to preserve a burden-shifting framework as a procedural matter, insofar as it helps Title VII plaintiffs prevail in the absence of direct evidence.[113]

Either path forward would mark a significant improvement over the current *McDonnell Douglas* test. And despite *McDonnell Douglas*'s demonstrated tenacity, there is good reason to believe that the judiciary would welcome a change in disparate-treatment jurisprudence. Though this Essay focuses on challenges that plaintiffs face in proving discrimination, *McDonnell Douglas* has also been a headache for judges.[114] From its inception, *McDonnell Douglas* "has befuddled the [c]ourts."[115] Judges have described the burden-shifting framework as a "ping-pong-like match" that is "confusing and entirely unnecessary."[116] While serving on the Tenth Circuit, then-Judge Gorsuch characterized *McDonnell Douglas* as "jargon,"[117] highlighted questions about whether it was "helpful enough to justify the costs and burdens associated with its administration,"[118] and concluded that "the test has proven of limited value."[119] For all its flourish, *McDonnell Douglas* conscripts judges into a "tedious and tiresome" gymnastics that, "in the end, proves little and adds nothing."[120]

Putting aside *McDonnell Douglas*'s practical flaws and shortcomings, Justice Gorsuch's MBF paradigm also accords with the most natural reading of Title VII. As a purely textual matter, Title VII never mentions "pretext" or

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cause." 427 U.S. 273, 282 n.10 (1976) (emphasis added). Although this marked the first time the Court "imbued *McDonnell Douglas* with any causal meaning," Clarke, *supra* note 109, at 786 n.314, *McDonald* evidently missed its opportunity to inspire a sea change in but-for causation. Nevertheless, the *McDonald* Court's language is a promising indication that an MBF-compliant step three is possible—and perhaps even more faithful to the Court's own original interpretation.

113. Teal, *supra* note 112, at 944–45 ("*McDonnell Douglas* pretext evidence does not depend on expensive statistics, unlikely admissions, overheard statements, or differently treated comparators. . . . If *McDonnell Douglas* were done away with, or never existed in the first place, many plaintiffs lacking direct evidence—but victims of discrimination nevertheless—would lose any chance at a remedy. The framework forces employers to provide a reason for their actions and thus gives plaintiffs a tangible object to attack and discredit." (citations omitted)).

114. *See* Sperino, *supra* note 101, at 268 (describing "a growing judicial discomfort with the McDonnell Douglas test," stemming from "the complexity of the test, the way in which it distracts courts from the main discrimination inquiry, questions about how much work the test actually performs, and the way the test manifests uncertainty about judges' abilities to evaluate discrimination claims").

115. Griffith v. City of Des Moines, 387 F.3d 733, 746 (8th Cir. 2004) (Magnuson, J., concurring).

116. Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 53 (2d Cir. 1998).

117. Wilkins v. Packerware Corp., 260 F. App'x 98, 106 (10th Cir. 2008).

118. Barrett v. Salt Lake Cnty., 754 F.3d 864, 867 (10th Cir. 2014).

119. Walton v. Powell, 821 F.3d 1204, 1210 (10th Cir. 2016).

120. Chin & Golinsky, *supra* note 48, at 678.

any of the elaborate devices courts have planted into *McDonnell Douglas*.[121] Lower court judges have long protested that "[c]ourts are not empowered to impose an arbitrary and analytical scheme that contradicts the express, unambiguous language of the statute," and "[i]t is simply impossible to reconcile the ancient *McDonnell Douglas* paradigm with the clear language of the Civil Rights Act."[122]

A plethora of options exist to transcend *McDonnell Douglas*, whether by abandoning or transforming the test. Litigants and judges alike may welcome a change. By recognizing *Bostock*'s full implications, courts can begin to restore fairness and order in Title VII disparate treatment litigation.

CONCLUSION

In employment discrimination law, a striking disparity exists between the statutory protections available on the books and workers' ability to enforce them. Courts routinely deny remedies to Title VII litigants like Jennifer Chavez for failure to meet hypertechnical judge-made criteria, often without regard to whether or not discrimination occurred.

The evolution of the *McDonnell Douglas* test, a framework originally created to circumvent the challenge of proving employers' internal motives, has made it increasingly difficult for victims of discrimination to ever see their claims brought before a jury. For decades, a broad coalition of judges, scholars, and practitioners has advocated for abandoning *McDonnell Douglas*, all to no avail. But with *Bostock*'s holding that multiple but-for causes can exist, litigants have a newfound opportunity to oust "the evil stepsister of disparate treatment law."[123] They can argue that *McDonnell Douglas* contravenes Title VII by enabling courts to throw out claims (or at least cut off remedies) even when employers discriminate "because of" a protected characteristic.

The Civil Rights Act has been termed a "super-statute": a normatively powerful law that continues to reshape social, political, and institutional culture with new antidiscrimination principles.[124] Much is at stake in how courts interpret and apply Title VII's precepts. And *Bostock*'s MBF paradigm could have implications beyond Title VII, given that courts have applied the

121. *See* Sperino, *supra* note 40, at 1087; *see also* Malamud, *supra* note 32, at 2264 (describing the *McDonnell Douglas* test as a "quasi-legislative creation of a special proof structure").

122. Griffith v. City of Des Moines, 387 F.3d 733, 747 (8th Cir. 2004) (Magnuson, J., concurring).

123. Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 113 (2007).

124. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1237, 1242 (2001).

McDonnell Douglas test in cases involving other federal and state antidiscrimination statutes.[125]

The age-old burden-shifting framework and its modern embellishments are deeply embedded in disparate treatment jurisprudence. It will take effort to cleanse them from our legal system. But *Bostock* finally provides plaintiffs with an authoritative answer to *McDonnell Douglas*'s demands: "Title VII doesn't care."[126]

125. *See, e.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (Americans with Disabilities Act); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) (Age Discrimination in Employment Act); Moore v. Regents of Univ. of Cal., 248 Cal. App. 4th 216, 248 (2016) (California state law); Lyon v. Jones, 291 Conn. 384, 406–07 (2009) (Connecticut state law); Norton Healthcare, Inc. v. Disselkamp, 600 S.W.3d 696, 718 (Ky. 2020) (Kentucky state law); Hamburg v. N.Y. Univ. Sch. of Med., 62 N.Y.S.3d 26, 32 (2017) (New York state law).

126. Bostock v. Clayton County, 140 S. Ct. 1731, 1742 (2020).