

WHEN DIFFERENT MEANS THE SAME: APPLYING A DIFFERENT STANDARD OF PROOF TO WHITE PLAINTIFFS UNDER THE *MCDONNELL DOUGLAS* PRIMA FACIE CASE TEST

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INTRODUCTION

The idea that Whites,¹ in particular white males, are the new victims of discrimination is steadily gaining acceptance among white Americans.² While only 16 percent of white individuals claim to

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¹ This author uses the term "Whites" throughout this Article to refer to members of the majority race and uses the term "Blacks" to refer to members of the black race. This author prefers the term "Blacks" to the term "African Americans" because she believes that the term "Blacks" is more inclusive. This Article addresses race discrimination in employment, and this author recognizes that there are persons living in the United States who have "black" skin but who are not Americans and may experience similar forms of race discrimination in employment, *i.e.*, permanent residents. Additionally, this author finds that the term "Blacks" is better suited to contrast the term "Whites." "It is more convenient to invoke the terminological differentiation between black and white than say, between African-American and Northern European-American, which would be necessary to maintain semantic symmetry between the two typologies." Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1073 (1992).

² See Ronald Walters, *Affirmative Action and the Politics of Concept Appropriation*, 38 HOW. L.J. 587, 604 (1995) (noting that opponents of affirmative action have claimed that "some white males suffer a disadvantage from the implementation of affirmative action laws to such a degree that they have become a new 'oppressed class'"); Carol R. Goforth, 'What Is She?' *How Race Matters and Why It Shouldn't*, 46 DEPAUL L. REV. 1, 75 (1996) (noting that the perception that white males have been denied equal opportunities because of their race or gender "has become a cause *celebre* for conservative legal commentators and politicians"); C.E. "Chuck" Williams, *Affirmative Action Doesn't Involve Quotas/Initiative 200 — Preference or Prejudice*, THE COLUMBIAN, Nov. 1, 1998, at B11 (same); see also Joyce A. Hughes, "Reverse Discrimination" and Higher Education Faculty, 3 MICH. J. RACE & L. 395 (1998) (noting the same trends among white academics).

know someone who has been the victim of reverse discrimination,³ more than 70 percent of Whites are convinced that reverse discrimination is a rampant problem.⁴ Additionally, although reverse discrimination cases generally constitute a small percentage of filed discrimination cases, usually about 1 to 3 percent,⁵ that number is beginning to grow.⁶ In particular, the percentage of reverse discrimination claims brought by federal workers, the very workers for whom affirmative action has been the most successful,⁷ has increased significantly.⁸ For example, the number of reverse discrimination charges brought by white federal employees has almost doubled, rising from just 10 percent of the Equal Employment Opportunity Commission's ("EEOC") caseload in 1991 to 17.1 percent in 1996.⁹

As more Whites bring reverse discrimination cases, federal courts are increasingly confronted with the question of how to evaluate these cases under current discrimination law. The current framework for evaluating discrimination claims was set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*.¹⁰ Under the

³ In this article, "reverse discrimination" is defined as discrimination against persons belonging to groups that have traditionally been privileged by their race and/or sex in the United States.

⁴ See Williams, *supra* note 2, at B11. See generally Anne Laurent, *The Great Divide*, GOVERNMENT EXECUTIVE, April 1, 1996 (discussing the growing perception among Whites that they are wrongfully denied positions or promotions because of their race).

⁵ See David Hall, *Reflections on Affirmative Action: Halcyon Winds and Minefields*, 31 NEW ENG. L. REV. 941, 956 (1997); Williams, *supra* note 2, at B11 ("A U.S. Department of Labor report prepared by Rutgers Blumrosen found fewer than 100 cases of claimed anti-white discrimination among 3,000 cases processed by federal district and appellant [sic] courts between 1990 and 1994. In only six cases was there a finding of actual reverse discrimination."); see also Hughes, *supra* note 2, at 396-97 (stating that few reported cases involve reverse discrimination and that still fewer are judged meritorious).

⁶ See Ruth Larson, *Claims of Bias Rising in Agencies 17% of Complaints Last Year by Whites*, WASH. TIMES, Sept. 17, 1997, at A1; Laurent, *supra* note 4, at 12.

⁷ See Laurent, *supra* note 4, at 12 ("Women and minority men hold bigger percentages of white-collar jobs in government than in the workforce as a whole. The percentage of women in professional jobs last year was two and a half times what it was 17 years ago. African-Americans nearly doubled their presence in these occupations, while Asians and Hispanics nearly tripled theirs. Minorities nearly doubled their presence in the executive corps and women's proportion of top slots increased seven times . . .").

⁸ See Laurent, *supra* note 4, at 12 (discussing the increased instances of reverse discrimination cases lodged under Title VII).

⁹ See Larson, *supra* note 6, at A1; Laurent, *supra* note 4, at 14 ("After remaining steady since the late 1980s, [the] number [of reverse discrimination cases] has started to grow. Sex bias complaints filed by men averaged about a third of the total between 1988 and 1993 and race complaints by whites hovered around 20 percent of the total. Those numbers bounced in 1994, the year of the 'angry white male' political revolution. Men's complaints of sex bias jumped to nearly half of all sex discrimination claims. Race discrimination filings by whites climbed to 30 percent of the total.")

¹⁰ 411 U.S. 792 (1973). In *McDonnell Douglas*, the defendant McDonnell Douglas Corporation, fired the plaintiff, Percy Green, a black male, in an attempt to reduce its workforce. In response to this action, Green participated in illegal protests against McDonnell Douglas, claiming that his discharge and the company's general hiring practices were racially motivated.

McDonnell Douglas framework, a plaintiff establishes a prima facie case of race discrimination in employment by proving the following four factors: (1) that he belongs to a minority group; (2) that he applied for and was qualified for the position at issue; (3) that despite his qualifications, he was rejected; and (4) that after his rejection, the position remained open and the employer continued to seek applications from persons of his qualifications.¹¹ If the plaintiff establishes these factors, the court draws an inference of discrimination.¹² The burden then shifts to the employer, who must provide a legitimate explanation for rejecting the plaintiff's application.¹³ If the employer satisfies this burden, the plaintiff must show that the employer's reason is a pretext for discrimination to win his case.¹⁴

If strictly applied, the *McDonnell Douglas* prima facie case test ("McDonnell Douglas test") would eliminate all reverse race dis-

Approximately three weeks later, McDonnell Douglas sought a replacement for Green's position, and although Green re-applied for his former position, the company rejected his application. *Id.* at 794-96. Green then filed a formal complaint against McDonnell Douglas, claiming that the company refused to hire him because of his race and his involvement in the civil rights movement. *See id.* at 797. Upon reviewing the lower courts' decisions, the Supreme Court affirmed the Eighth Circuit's decision, finding for McDonnell Douglas on Green's protected activity claim. The Eighth Circuit found that Green's unlawful protests against McDonnell Douglas were not protected activities as defined in Section 704(a) of Title VII. *See id.* at 803. The Court also affirmed the Eighth Circuit's decision to remand Green's racial discrimination claim for trial. In so doing, the Court acknowledged the difficulties that plaintiffs have in showing direct proof of race discrimination and created a framework in which plaintiffs could use indirect evidence to prove discrimination based on race. *See id.* at 803-06.

¹¹ *See id.* at 802.

¹² *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981) ("The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection.").

¹³ *See Burdine*, 450 U.S. at 253-54 (noting that the burden on the defendant is only a burden of production, not a burden of proof).

¹⁴ *See id.* at 256 ("The plaintiff retains the burden of persuasion . . . [t]his burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."); *see also* *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). In *Hicks*, the Supreme Court explained that even where the plaintiff proves that the employer's proffered reason is false, the court is not required to find that discrimination has occurred. The fact finder may still find for the employer if he believes that the employer's actions were not motivated by race. *See id.* The decision in *Hicks* has been heavily criticized by academics and practitioners. *See, e.g.,* Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary's Honor Center v. Hicks, Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 184, 184 (1997) (arguing that the *Hicks* decision "will distort the fact-finding process and deprive victims of bias of a meaningful opportunity to enforce their rights to equal employment opportunity"); Deborah A. Calloway, *St. Mary's Honor Center v. Hicks: Questioning The Basic Assumption*, 26 CONN. L. REV. 997 (1994) (asserting that the *Hicks* decision was based on the erroneous belief that discrimination is either diminishing or eradicated and that such belief will unduly burden plaintiffs who are seeking redress under Title VII); Sherrie L. Coons, Comment, *Proving Disparate Treatment After St. Mary's Honor Center v. Hicks: Is Anything Left of McDonnell Douglas*, 19 J. CORP. L. 379 (1994) (arguing that *Hicks* will have dire practical consequences for employees who suffer illegal discrimination but have no direct evidence of discrimination).

crimination suits because a white individual could never prove the first factor of the test, that he was a member of a minority group.¹⁵ However, as the *McDonnell Douglas* Court noted, the standards set forth in *McDonnell Douglas* are “not necessarily applicable in every respect in differing factual situations.”¹⁶ Consequently, some courts have modified the first element of the *McDonnell Douglas* test to accommodate white individuals who bring reverse discrimination suits.¹⁷ These courts, however, disagree as to how to modify the first prong of the *McDonnell Douglas* test in reverse discrimination cases.

Some courts have modified the test to hold white plaintiffs to a different standard under the test’s first prong.¹⁸ To satisfy the test’s first prong before these courts, white plaintiffs must show background circumstances that suggest that their employer, “is that unusual employer who discriminates against the majority.”¹⁹ To accomplish this task, white plaintiffs can use one of two different methods. They can either (1) show that their “particular employer has some reason or inclination to discriminate invidiously against them;” or (2) demonstrate that the background circumstances particular to their employment situation indicate a discriminatory purpose.²⁰ For example, a

¹⁵ See *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 454 (7th Cir. 1999).

¹⁶ *McDonnell Douglas*, 411 U.S. at 802 n.13.

¹⁷ Courts have also modified the first element of the test for other groups. For example, in sex discrimination cases, a female claimant need only state that she is a woman rather than a member of a minority group. See *Burdine*, 450 U.S. at 254 n.6.

¹⁸ See, e.g., *Mills*, 171 F.3d at 456-57 (applying a different first prong of the *McDonnell Douglas* test to non-minority plaintiffs); *Taken v. Okla. Corp. Comm’n*, 125 F.3d 1366, 1369 (10th Cir. 1997) (same); *Harding v. Gray*, 9 F.3d 150, 152-53 (D.C. Cir. 1993) (same); *Murray v. Thistledown Racing Club*, 770 F.2d 67 (6th Cir. 1985) (same).

The Tenth Circuit has also provided an alternative for white plaintiffs to state a prima facie case of discrimination in *Notari v. Denver Water Dept.*, 971 F.2d 585, 589 (10th Cir. 1992) (holding that a majority candidate may state a prima facie case of discrimination if he presents direct evidence of discrimination or indirect evidence sufficient to support a reasonable probability that, but for the plaintiff’s majority status, the challenged employment decision would have favored the plaintiff). See generally Brenda D. Luigi, Note, *The Notari Alternative: A Better Approach to the Square-Peg-Round-Hole Problem Found in Reverse Discrimination Cases*, 64 BROOK. L. REV. 353 (1998) (discussing the significance and impact of the *Notari* decision on the Title VII reverse discrimination landscape); Bridget E. McKeever, Case Note, *Tenth Circuit Provides Alternative For Majority Plaintiffs to State a Prima Facie Case Under Title VII: Notari v. Denver Water Department*, 34 B.C.L. REV. 440 (1993) (same).

¹⁹ *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981). In *Parker*, the plaintiff, a white male, claimed that he was denied a promotion because of his race and sex. *Id.* at 1014.

²⁰ *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993) (noting that the plaintiffs had shown the existence of “background circumstances” by presenting evidence of schemes to fix performance ratings to their detriment, that the hiring system seemed rigged against them because it departed from usual procedures in an unprecedented fashion, and that they were passed over despite superior qualifications) (citations omitted); see also *Duffy v. Wolle*, 123 F.3d 1026, 1036-37 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1839 (1998) (applying a variant of the *McDonnell Douglas* test in a reverse discrimination case and holding that “background circumstances” could include situations in which the person ultimately hired was clearly less qualified than the

white plaintiff might satisfy the test's first prong by showing that he is a racial minority within his company or that a minority of his company's managers are White.²¹

While some courts choose to apply a different first prong to white plaintiffs under the test, other courts choose to apply the same first prong to white and black plaintiffs under the test. These courts view Title VII as requiring the application of the same test factors for all claims of employment discrimination and merely require white claimants to show that they are a member of a protected class.²² In other words, these courts require plaintiffs to simply show that they are a member of any race.

This Article argues that courts should apply a different first prong of the *McDonnell Douglas* test to white plaintiffs in reverse discrimination cases. More specifically, this Article argues that courts should apply the "background circumstances" test to race discrimination claims brought by white employees.²³ This is important because such application best adheres to the primary purpose of Title VII of the Civil Rights Act ("Title VII")²⁴ and the Supreme Court's treatment of the *McDonnell Douglas* test.²⁵ Part I of this Article ex-

plaintiff, the hiring authority expressed intense interest in hiring a woman, and there was a pattern of hiring women in the past).

²¹ See *Reynolds v. School Dist. No. 1, Denver, Colo.*, 69 F.3d 1523, 1534-35 (10th Cir. 1995) (finding that the plaintiff successfully showed background circumstances where she was the only white employee in the department and nearly all of the decision makers were Hispanic); *Parker*, 652 F.2d at 1017 (holding that background circumstances were present where a majority of the employees were black and "an overwhelmingly large proportion of the promotions" were of Blacks) (citations omitted); *Switzer v. Tex. Commerce Bank*, 850 F. Supp. 544, 548 (N.D. Tex. 1994) (holding that no background circumstances were present where the plaintiff failed to show that Whites were a minority of his company's managers).

²² See *Wilson v. Bailey*, 934 F.2d 301, 304 (11th Cir. 1991) (requiring non-minority plaintiffs only to show that they are members of a protected class); *Young v. City of Houston*, 906 F.2d 177, 180 (5th Cir. 1990) (same).

Other circuits have refused to address this issue altogether but have indicated that they would require white claimants merely to state that they are White. See, e.g., *Stock v. Universal Foods Corp.*, No. 93-1448, 1994 WL 10682, at *2 n.2 (4th Cir. Jan. 19, 1994), cert. denied, 513 U.S. 813 (1994) (deciding not to resolve the issue because the plaintiff could not satisfy all of the remaining three factors of the prima facie case); *Hannon v. Chater*, 887 F. Supp. 1303, 1312 n.41 (N.D. Cal. 1995) (same).

²³ This Article limits its arguments to those race discrimination cases brought by white claimants against white employers, as this author finds that cases involving claims brought by white claimants against minority employers are the "easy" cases. These cases would invariably constitute unusual background circumstances under the *McDonnell Douglas* "background circumstances" test. See *supra* text accompanying note 21.

²⁴ 42 U.S.C. § 2000e-2 (1994).

²⁵ Additionally, in making its arguments, this Article solely discusses and compares the employment situations of Whites and Blacks. Because Blacks have been the primary subjects of employment discrimination studies and audits, most of the studies used to support this Article's thesis address discrimination against Blacks only. Furthermore, this Article recognizes that, while many minority groups, i.e. Blacks and Latinos, encounter similar types of race discrimination in the workplace, they also experience such discrimination in significantly different

amines the plain language of Title VII, the statute's legislative history, and the Supreme Court's interpretation of the statute. In so doing, this Part maintains that, while Title VII is intended to protect all persons from race discrimination in employment, its primary purpose is to protect Blacks and members of other racially disadvantaged groups from such discrimination. Part I also explains the function of the *McDonnell Douglas* test. In so doing, this Part argues that the test's first prong is the most determinative part of the test and, as a result, should be modified to fit the facts of each case. Part II describes the current employment situation of Whites as compared to Blacks, and contends that, given such facts, it is reasonable for courts to apply a different first prong of the *McDonnell Douglas* test to white plaintiffs bringing reverse discrimination cases. Finally, Part III details the prospective harm that would be caused by applying the same *McDonnell Douglas* test to white plaintiffs. It further addresses the arguments against applying a different first prong of the *McDonnell Douglas* test to white plaintiffs. The Article concludes that courts should apply a different first factor of the *McDonnell Douglas* test to white plaintiffs in reverse discrimination suits because such application of the test ensures that Whites and Blacks are treated equally under the test.

ways. See Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as "Foreigners," and Social Change: Is the Law the Way to Go?*, 76 OR. L. REV. 347, 359-62 (1997) (describing how the discrimination against various racial and ethnic groups can differ); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 42 STAN. L. REV. 957, 958-60, 963 (1995) (same); cf. Leonard M. 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 (1997) (asserting that, among minorities, darker-skinned persons generally face more discrimination than lighter-skinned persons).

In an attempt to avoid grouping the experiences of all minorities together, this Article refrains from applying all of its arguments to all minorities. The very premise behind this Article is that the application of the test's first prong should be group-specific. For example, in a case brought by a plaintiff belonging to one minority group against an employer belonging to another minority group, this Article contends that a court would have to consider whether that plaintiff was disadvantaged by his race in that particular circumstance to apply the first prong properly. See *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1557 (11th Cir. 1990) (raising questions concerning the complexity of situations involving discrimination by one minority against another); see also *EEOC v. Consolidated Servs. Sys.*, 777 F. Supp. 599 (N.D. Ill. 1991), *aff'd*, 989 F.2d 233 (7th Cir. 1992) (same).

This Article is not suggesting that its arguments cannot be applied to cases involving parties of other races. Many of the arguments are applicable to cases involving other racial groups, particularly those involving Whites and Latinos. Indeed, because of the lack of studies concerning race discrimination in employment, this author has also used studies that detail the experiences of non-black minority groups with employment discrimination to support the Article's thesis.

I. UNDERSTANDING THE PURPOSE OF TITLE VII AND THE *MCDONNELL DOUGLAS* PRIMA FACIE TEST

To determine how courts should apply the first prong of the *McDonnell Douglas* test to white plaintiffs, one must first examine the statutory basis for the test, Title VII, as well as the Supreme Court's treatment of the *McDonnell Douglas* test. This Part evaluates the plain language²⁶ and the legislative history of Title VII and determines that the statute's primary purpose is to protect Blacks (and other minorities) from discrimination.²⁷ This Part also evaluates the Supreme Court's interpretation of the *McDonnell Douglas* test and concludes that the knowledge of a plaintiff's race and status in society or in his workplace are critical to the proper application of the test.

A. Acknowledging the Primary Purpose of Title VII

Title VII of the Civil Rights Act of 1964²⁸ reads in relevant part:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.²⁹

According to the plain language of Title VII, any person can be a plaintiff in an employment discrimination case. The statute does not exclude members of the majority or limit the protection of the Act to one particular racial group or to members of historically disadvantaged groups alone.³⁰ Its language allows all individuals to use the statute to protect themselves from employment discrimination as a matter of law.

²⁶ See *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 857 (1st Cir. 1998) ("The starting point for interpretation of a statute 'is the language of the statute itself.'") (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990)).

²⁷ Given the racial problems between Whites and Blacks at the time of the enactment of Title VII, the legislative history of Title VII discusses only race discrimination that occurs against Blacks in the workforce. It is clear, however, that Congress intended to focus on the protection of all disadvantaged minority groups. See Ramirez, *supra* note 25, at 958-59 ("When courts and legislatures first created race-conscious remedies in the 1960s, the United States was seen as a black and white society . . . [g]iven the relatively small number of nonblack persons of color, their inclusion in many color-conscious remedies was not problematic at the time."). For the purposes of this Article, this author argues only that the primary purpose of Title VII is to protect Blacks.

²⁸ 42 U.S.C. § 2000e (1994).

²⁹ 42 U.S.C. § 2000e-2(a)(1) (1994).

³⁰ See e. christi cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 446-47 (1998) (reviewing the legislative history of Title VII).

Although specific in many respects, the plain language of Title VII left some major issues for the courts to resolve.³¹ For example, the statute does not define the phrase "to discriminate . . . because of [an] individual's race,"³² nor does it state whether it would be discrimination under the plain language of Title VII for an employer to favor minority workers over white employees in order to remedy past discrimination against a minority group.³³ Consequently, an examination of the statute's legislative history is needed to ensure proper focus on the primary intent and goals of Congress when it passed the Act.³⁴ In applying any statute, courts must view that statute within its historical context.³⁵

The legislative history of Title VII reveals that while Congress intended the statute to protect all persons from employment discrimination, its primary purpose is to protect Blacks from such discrimination.³⁶ In enacting Title VII, Congress was particular about the ways in which Blacks, as compared to Whites, were treated in the workplace and in the job market. For example, Senator Hubert Humphrey, one of the Act's sponsors in the Senate, remarked:

The crux of the problem is to open employment opportunities for Negroes in occupations which have been traditionally

³¹ See Timothy N. Tack, Comment, *The Supreme Court's Review of Voluntary Affirmative Action by Public Employers: Applying Different Standards Under Title VII and the Constitution*, 26 WILLIAMETTE L. REV. 957, 960 (1990) (discussing the issues left unresolved by the statutory language of Title VII).

³² *Id.* at 962.

³³ *See id.*

³⁴ *See* U.S. v. Childress, 104 F.3d 47, 53 (4th Cir. 1996) ("If the language of the statute is unclear, the court may look to the legislative history for guidance in interpreting the statute."); *cf.* Joel Wm. Friedman, *Redefining Equality, Discrimination, and Affirmative Action Under Title VII: The Access Principle*, 65 TEX. L. REV. 41, 42 (1986) ("Although the provisions of Title VII contain numerous references to the term 'discriminate,' the statute does not define the term . . . [and] discrimination, of course, does possess a literal definition. In general usage, discrimination refers to conduct that makes or is based upon a distinction or differentiation. Such conduct is unlawful Title VII discrimination, however, only when and because it violates the statutory conception of equality. Accordingly, equality must be defined in the employment context in order to determine what actions constitute statutory discrimination.").

³⁵ *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 201 (1979) ("It is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.' The prohibition against racial discrimination in §§ 703(a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose."); *see also* Tack, *supra* note 31, at 962; Friedman, *supra* note 34, at 60-61; *cf.* Arnold v. United Parcel Serv., 136 F.3d 854, 858 ("The plain meaning of the statute's text must be given effect 'unless it would produce an absurd result or one manifestly at odds with the statute's intended effect.'") (quoting Parisi by Cooney v. Chater, 69 F.3d 614, 617 (1st Cir. 1995)).

³⁶ *See* BARBARA R. BERGMANN, IN DEFENSE OF AFFIRMATIVE ACTION 90 (1996) (noting that Title VII's "primary purpose [is] to end segregation, to usher black people into full participation in the nation's economic life as employees and customers, and to ensure them the status of first class citizens"); Cunningham, *supra* note 30, at 446; Ramirez, *supra* note 25, at 958.

closed to them. This requires both an end to the discrimination which now prevails and an upgrading of Negro occupational skills through education and training. Neither task can be given priority over the other . . . Negroes cannot be expected to train themselves for positions which they know will be denied to them because of their color. Nor can patterns of discrimination be effectively broken down until Negroes in sizable numbers are available for the jobs to be filled. Title VII is designed to give Negroes . . . a fair chance to earn a livelihood and contribute their talents to the building of a more prosperous America.³⁷

Similarly, Representative William McCulloch, a leading Republican supporter of the Bill, noted, "National prosperity will be increased through the proper training of Negroes for more skilled employment together with the removal of barriers for obtaining such employment."³⁸ While the congressional debates extensively discussed the need to address discrimination against Blacks, they made no mention of discrimination against Whites, nor did they note such discrimination as a problem.

In essence, the congressional debates on Title VII show that Congress' primary concern was with the relegation of Blacks to low-skill jobs and the manner in which racial discrimination helped to perpetuate Blacks' low status in employment. The debates further indicate that Congress enacted Title VII primarily as a means for destroying old patterns of racial segregation and hierarchy³⁹ by opening

³⁷ 110 CONG. REC. 6548 (1964). Senator Humphrey was co-floor manager for H.R. 7152, the omnibus bill that became the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

³⁸ H.R. Res. NO. 914, 88th Cong., 1st Sess., pt. 2, at 28 (1963). Rep. Dent also remarked: Denial to the Negro of the right to be gainfully employed shuts off to him the opportunity for economic advancement. The right to be served in places of public accommodation is meaningless to the man who has no money. The opportunity for education in an integrated school or college is lost on a child who knows that, whatever his education, he is condemned to a life of unskilled and menial labor punctuated by periods of unemployment. If there is any single point at which the vicious circle which discrimination has drawn around the Negro must be broken, it is in the field of employment.

110 CONG. REC. 2602 (1964).

³⁹ See 110 CONG. REC. 6547-49 (1964) (statement of Sen. Humphrey); see also Weber, 443 U.S. at 202-03 (1979).

Congress provided statistics by the Department of Labor to support its act. Representative Emmanuel Celler, the Chair of the House Judiciary Committee and the Floor Manager of the Civil Rights Act in the House of Representatives, read the following:

Among male family breadwinners, the unemployment rate today among nonwhites is thre[e] times what it is among whites. While nonwhites represent approximately 11 percent of the total civilian workforce, they represent more than 25 percent of those who have been out of work for more than 26 weeks, the long-term unemployed. Furthermore, the discrepancy between the white and nonwhite unemployment is steadily growing greater. In 1947, the nonwhite unemployment rate was 64 percent higher than the white unemployment rate; in 1952, 92 percent higher; and in

“employment opportunities for Negroes in occupations that have been traditionally closed to them.”⁴⁰

Some individuals argue, however, that this interpretation of Title VII's *primary* purpose is inconsistent with Title VII's broad purpose to protect all persons from discrimination.⁴¹ This broad purpose to protect all persons from discrimination was articulated most clearly during the Title VII congressional debate over the distinction between race and color. During this debate, Representative Celler, the Chairman of the House Judiciary Committee and Floor Manager of the Civil Rights Act Debates in the House of Representatives, explained explicitly that the statute was meant to protect Whites from discrimination as well.⁴² Representative Celler stated:

If, for example, the International Longshoremen's Association . . . which is predominantly white, permitted no Negro members, they would come under this act. This situation is exactly the same if the colored International Longshoremen's organization . . . discriminated against a white person who is qualified for membership. Both are clear examples of discrimination. It works both ways.⁴³

The Supreme Court also endorsed this broad interpretation of Title VII in *McDonald v. Santa Fe Trail Transp. Co.*⁴⁴ In *McDonald*, two plaintiffs, both white employees of the defendant, filed a complaint against their former employer, alleging racial discrimination under Title VII.⁴⁵ The white employees claimed that they were discriminated against when their employer discharged them for misappropriating property while not discharging a black employee who had engaged in similar behavior.⁴⁶ The Supreme Court found for the plain-

1962, it was 124 percent higher. Nor are comparative unemployment rates the most significant indicators of the extent to which discrimination in employment affects racial minorities. Where the nonwhite are employed, it is generally in the lower paid and less desirable jobs. For example, 17 percent of the employed nonwhites have white-collar jobs; the corresponding proportion among whites is 47 percent. Fourteen percent of all employed nonwhites are unskilled laborers in nonagricultural industries; the corresponding proportion among whites is only 4 percent.

⁴⁰ 110 CONG. REC. 6548 (1964) (statement of Sen. Humphrey); see also *supra* text accompanying note 32.

⁴¹ See, e.g., Scott Black, McDonnell Douglas' *Prima Facie* Case and the Non-Minority Plaintiff: Is Modification Required?, 1994 ANN. SURV. AM. L. 319, 321-22 (1995) (arguing that courts should apply the same factors of the McDonnell Douglas test to both white and black plaintiffs); Janice C. Whiteside, Note, *Title VII and Reverse Discrimination: The Prima Facie Case*, 31 IND. L. REV. 413, 415-17 (1998) (same).

⁴² 110 CONG. REC. 2552 (1964) (statement of Rep. Celler).

⁴³ *Id.*

⁴⁴ 427 U.S. 273 (1976).

⁴⁵ See *id.* at 276.

⁴⁶ See *id.*

tiffs, asserting that Title VII protected Whites from discrimination under the “same standards” applicable to non-Whites.⁴⁷

Although these critics correctly note that Title VII has a broad purpose of protecting everyone, their concern that such purpose cannot co-exist with the narrower, primary purpose to protect Blacks is unwarranted. It is entirely possible to concentrate on enforcing Congress’ primary intent of protecting Blacks from race discrimination in employment, while still safeguarding all persons from such discrimination. In fact, the Supreme Court explained how these dual purposes were not in conflict in *United Steelworkers of Amer. v. Weber*,⁴⁸ a case decided three years after *McDonald*. In *Weber*, a group of white plaintiffs challenged a voluntary affirmative action program that called for the reservation of 50 percent of the openings in “in-plant” craft training programs for Blacks until the percentage of black craftworkers was commensurate with the percentage of Blacks in the local labor force.⁴⁹ The plaintiffs alleged that the program discriminated against them in violation of Title VII because it placed an unfair burden on Whites.

The Supreme Court rejected the plaintiffs’ claims. In so doing, the Court relied on the original purpose of Title VII: the integration of minorities into mainstream society and the destruction of old patterns of racial segregation and hierarchy.⁵⁰ The Court stated:

It would be ironic indeed if a law triggered by a Nation’s concern over centuries of racial injustice and intended to improve the lot of those who have ‘been excluded from the American dream for so long’ constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.⁵¹

In sum, the *Weber* Court, while recognizing that Whites can and do experience race-based employment discrimination, reinforced Congress’ primary intent to have Title VII serve as a medium for eradicating the structures that work to systematically discriminate against Blacks.⁵² Moreover, through its holding, the *Weber* Court made it

⁴⁷ See *id.* at 280.

⁴⁸ 443 U.S. 193 (1979).

⁴⁹ See *id.* at 197.

⁵⁰ See *id.* at 205, 208-09 (referring to the purpose gleaned from the congressional debates over Title VII).

⁵¹ *Id.* at 204 (citation omitted) (quoting 110 CONG. REC. 2552 (1964) (statement of Sen. Humphrey)).

⁵² The Supreme Court affirmed this principle in *Johnson v. Transp. Agency, Santa Clara County, California*, 480 U.S. 616 (1987) (noting that an employer’s voluntary affirmative action

clear that the phrase "same standards" in *McDonald* did not mean in the exact same way or by the exact same method. The *Weber* Court understood that such a facial interpretation of the word "same" would be contrary to Congress' primary purpose in enacting Title VII because this country's "past history of pervasive societal and institutional discrimination could not be remedied simply by declaring that all persons from now on would be treated equally."⁵³ First, attempts to equalize the playing field would have to be made.⁵⁴

B. Exploring the McDonnell Douglas Prima Facie Case Test and its Purpose

To apply the *McDonnell Douglas* test properly, courts, in addition to recognizing the primary purpose of Title VII, must also know and understand the reasoning behind the creation of the *McDonnell Douglas* test. This Part of the Article maintains that the sole purpose of the *McDonnell Douglas* test is to determine whether discrimination can be inferred from the facts, that the first prong of the test is crucial to this determination, and that, as a result, the first prong of the test should be modified to fit the facts of each case.

The Supreme Court gave its clearest explanation of the purpose of the *McDonnell Douglas* test in *Furnco Constr. Co. v. Waters*.⁵⁵ The Court stated:

plan can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace); see also Barbara J. Fick, *The Case For Maintaining and Encouraging the Use of Voluntary Affirmative Action in Private Sector Employment*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 159, 162 (1997) (stating that the "continuing applicability of the *Weber* and *Johnson* decision to private sector affirmative action plans has not been undermined by the Supreme Court's [later] rulings on the use of set-asides and minority preferences").

⁵³ Tack, *supra* note 31, at 964. See generally Fick, *supra* note 52, at 160-62.

⁵⁴ See Ramirez, *supra* note 25, at 958 (quoting President Lyndon B. Johnson as saying: "You do not take a person, who for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say 'you are free to compete with all the others,' and still justly believe that you have been completely fair.").

⁵⁵ 438 U.S. 567 (1978). In *Furnco*, three black bricklayers brought a race discrimination suit under Title VII, alleging that they had not been hired by the defendant because of their race. The defendant claimed to hire only persons whom its job superintendent knew to be experienced and competent in the relevant type of work or persons who had been recommended to the superintendent as such. *Id.* at 570. The district court found that the defendant's hiring practices were racially neutral, that such practices were a business necessity in that they were required for the safe and efficient operation of the defendant's business, and that the practices were not used as a pretext to exclude Blacks. *Id.* at 572-73. The Seventh Circuit heavily criticized the defendant's employment practices, stating that such practices were not the best procedures for ensuring that all applicants received a fair opportunity for employment, and reversed the district court's decision. *Id.* at 573-74. The Supreme Court reversed the Seventh Circuit, holding that the Court of Appeals could not impose different hiring practices on the defendant without first finding that the defendant's hiring practices were a pretext for discrimination. *Id.* at 577-78.

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. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.⁵⁶

In other words, the sole purpose of the *McDonnell Douglas* test is to answer one simple question: can unlawful discrimination against a plaintiff be inferred from the circumstances?

To answer this question, courts must carefully consider the test's first prong in each case.⁵⁷ Without considering this factor, a court cannot reasonably draw an inference of discrimination. After all, one cannot assume racial discrimination against a white individual simply because that individual is qualified for a job, applies for that job, is rejected, and the employer continues to seek applicants for that job. White individuals have not been historically denied positions for which they are qualified on the basis of race. History reveals, however, that many qualified black applicants have not been hired for jobs on the basis of their race alone.⁵⁸ It is this history of Blacks' racial disadvantage in the job market and in the workplace that makes it possible for a court to draw an inference of discrimination for black plaintiffs under the *McDonnell Douglas* test.⁵⁹

Thus, before applying the *McDonnell Douglas* test, courts should ask: is the plaintiff privileged or disadvantaged by his race under his particular circumstances?⁶⁰ If a plaintiff is disadvantaged by race, in

⁵⁶ *Id.* at 577.

⁵⁷ See Cunningham, *supra* note 30, at 452 ("In large measure, the inference of discrimination for the prima facie case exists because of the presumption of disadvantage in the workplace that is identified in the first prong inquiry. Adverse treatment of an individual whose identity is not privileged creates an inference of discrimination where that individual is qualified."); Calloway, *supra* note 14, at 1036-37.

⁵⁸ See *supra* Part I; see also *infra* Part II (discussing the history of employment discrimination against black job applicants, and its continued existence, despite the enactment of Title VII).

⁵⁹ See Calloway, *supra* note 14, at 1007-08 (noting that the underlying assumption on which the *McDonnell Douglas* test is based is that "discrimination exists in this society and that absent some other explanation, discrimination is the likely explanation for the adverse treatment regularly experienced by women and members of minority groups").

⁶⁰ See *id.*

particular because he is black, then a court can reasonably infer, given the history of racial discrimination in this country and proof of the last three factors of the *McDonnell Douglas* test, that such individual was discriminated against because of his race. On the other hand, if an individual is privileged, in particular if he is a white male, it is unreasonable to infer discrimination, even with proof of the last three factors of the test.⁶¹ This is because members of the majority as a whole, in particular white males, "have not been hindered in the workplace because of their race or sex."⁶²

In sum, in applying the first prong of the *McDonnell Douglas* test, courts cannot simply ignore the fact that the *McDonnell Douglas* Court first required an inquiry into a plaintiff's racial status. A plaintiff's qualifications for a job, his rejection for that job, and that job's vacancy are only three of the factors of the *McDonnell Douglas* prima facie case test. The Supreme Court did not add the first prong of the test for mere decoration. Without the first prong, the prima facie case test becomes nothing more than a standing requirement—whether the plaintiff belongs to a protected class.⁶³ According to the Court in *Furnco*, the test is meant to serve the greater purpose of determining whether discrimination can be inferred from the facts of the case.⁶⁴ It is unreasonable to make this determination without an inquiry into the plaintiff's racial status in the employment context or in his workplace.⁶⁵

Some argue, however, that it is unreasonable to infer discrimination under the *McDonnell Douglas* test even where history shows that the group to which a plaintiff belongs has been disadvantaged in employment. For example, in a memorandum to Justice Powell, Justice Stevens noted the following argument regarding the *McDonnell*

⁶¹ See *id.*; see also *Bishopp v. District of Columbia*, 788 F.2d 781, 786 (D.C. Cir. 1986); *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981). See, e.g., *Bhandari v. AT&T*, No. 85-1753, 1990 WL 13099, at *4 (D.N.J. 1990) (citing *Jones v. Slater Steels Corp.*, 660 F. Supp. 1570, 1575 (N.D. Ind. 1987) ("Although Title VII certainly prohibits discrimination against a majority group, it 'makes little sense, within the historical context of the Act, to infer discrimination against men in the same way that discrimination is inferred against women.'").

⁶² *Bishopp*, 788 F.2d at 786.

⁶³ See *Cunningham*, *supra* note 30, at 454-56 ("As of June 1997, the *McDonnell Douglas* opinion has been cited in the majority opinions of 42 Supreme Court decisions. The prima facie case was discussed in twelve of those forty-two cases. Not one Supreme Court majority opinion citing *McDonnell Douglas* uses the 'protected class' characterization in describing the individual disparate treatment prima facie case.").

⁶⁴ See *supra* text accompanying notes 55-56.

⁶⁵ *Id.*; see also *Cunningham*, *supra* note 30, at 452 (arguing that an investigation into the racial status of the plaintiff is necessary in order to make sense of the inference drawn under the first prong of the *McDonnell Douglas* test).

Douglas inference as it is applied to cases involving discrimination against women:

'[T]he facts (1) that an applicant is qualified and (2) that a person of the opposite sex was hired, do not in my judgment give rise to an inference of discrimination. [T]his year I rejected two qualified female [applicants for clerkships to the Supreme Court] and hired two qualified males. I do not believe those facts as applied to [this] year viewed separately were sufficient to establish a prima facie case of discrimination, yet under your opinion they are sufficient.'⁶⁶

Admittedly, there are some hiring situations, such as those where subjective standards play a strong role in the decision-making process, in which the *McDonnell Douglas* inference of discrimination will not be strong. However, the question here is not how strong or weak the *McDonnell Douglas* inference of discrimination is in a particular case but whether discrimination can be reasonably inferred in an action based upon proof of the traditional prima facie factors. Given the history of discrimination against women in the legal profession, in particular in the Supreme Court clerkship hiring process, it is not so clear that an inference of discrimination could not be reasonably drawn from the scenario described by Justice Stevens. While the Su-

⁶⁶ See Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2247-48 (1995) (quoting Memorandum from Justice Stevens to Justice Powell (Jan. 22, 1981), in Justice Powell, Draft Opinion 5 (*Burdine*) (Jan. 14, 1981) (citations omitted), in Thurgood Marshall Papers, Library of Congress, box 274, file 2)).

Title VII also protects women from discrimination in employment. The sex discrimination provision was added to Title VII as a ploy for defeating Title VII's prohibition on race discrimination. See *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 428 n.36 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) ("This Court - like all Title VII enthusiasts - is well aware that the sex discrimination prohibition was added to Title VII as a joke by the notorious civil rights opponent Howard W. Smith. But the joke backfired on Smith when the amendment was adopted on the floor of the House . . .") (citing Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INT'L & COMP. L. REV. 431, 441-42 (1996)); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1283-84 (1991) (same); see also Deborah Epstein, *Can A "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 409 n.62 (1996). But see Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 160 (1997) (arguing that Congress added sex as a result of subtle political pressure from individuals, who for varying reasons, were serious about protecting the rights of women).

This author recognizes that there can be problems in analogizing legal arguments regarding race and sex discrimination. See L. Camille Herbert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819 (1997) (arguing that analogizing sexual harassment standards to claims of racial harassment may erode the ability of victims of race-based harassment to prevail on legitimate claims). However, because this author believes that Justice Stevens' argument is also applicable in the race discrimination context, this author finds it appropriate to discuss a "sex-related" argument in this Article.

preme Court began to regularly hire law clerks in 1922,⁶⁷ its first true female law clerk, Margaret J. Corcoran, was not hired until 1966.⁶⁸ In fact, the two current female Justices, Sandra Day O'Connor and Ruth Bader Ginsburg, fell victim to discriminatory preferences for male law clerks on the Supreme Court. For instance, although Justice O'Connor graduated from Stanford Law School in the top of her class in 1952, she could not obtain either a Supreme Court clerkship or a job in a private law firm;⁶⁹ however, her male colleague and former classmate, Justice William Rehnquist, who also graduated at the top of his class, received a Supreme Court clerkship.⁷⁰ Likewise, although Justice Ginsburg graduated number one in her class from Columbia University Law School in 1959 and had been a member of the *Harvard Law Review* before transferring to Columbia,⁷¹ Supreme Court Justice Felix Frankfurter turned her down for a clerkship on the basis of gender, and every law firm to which she applied refused to employ her.⁷²

⁶⁷ See Mark R. Brown, *Gender Discrimination in the Supreme Court's Clerkship Selection Process*, 75 OR. L. REV. 359, 361 n.12 (1996). ("Justice Horace Gray hired the first law clerk in 1882, a former valedictorian from Harvard Law School, and paid him himself. In 1886, Congress agreed to provide each Justice \$1,600 annually for stenographic clerks.") (citing ELDER WITT, CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT 769 (2d ed. 1990)). In 1922, Congress appropriated funds for each Justice to hire one clerk at an annual salary of \$3,600. *Id.* (citations omitted). Today, the United States Code states: "The Chief Justice of the United States, and the associate justices of the Supreme Court may appoint law clerks and secretaries whose salaries shall be fixed by the Court." *Id.* (citing 28 U.S.C. § 675 (1988)).

⁶⁸ See *id.* at 362-63. Actually, the first female Supreme Court clerk was Justice William Douglas' wartime selection of Lucille Lomen in 1944. However, because of the special circumstances created by the war, which allowed many women to engage in traditionally male jobs, Ms. Lomen cannot be regarded as the first true female law clerk. *Id.* The low number of female law clerks between 1922 and 1966, when Ms. Corcoran was hired, is due in part to the low percentage of women in law school during this period. *Id.* For example, in 1965, women made up only 4 percent of law school graduating classes. See Amelia A. Craig, *Musing About Discrimination Based on Sex and Sexual Orientation as "Gender Role" Discrimination*, 5 S. CAL. REV. L. & WOMEN'S STUD. 105, 106 (1995) (compiling statistics of women's status in employment).

⁶⁹ See Ruth Bader Ginsburg, *Remarks on Women's Progress in the Legal Profession in the United States*, 33 TULSA L.J. 13, 14 (1997).

⁷⁰ See *id.*

⁷¹ See Mark S. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Gender Discrimination Against Women Partners*, 46 HASTINGS L.J. 17, 28 n.49 (1994); see also Craig, *supra* note 68, at 106.

⁷² Craig, *supra* note 68, at 106; see also Kende, *supra* note 71, at 28 n.49 ("[Justice Ginsburg finally] landed a position as a law clerk for a federal district court judge but 'as anyone familiar with the subject knows, . . . a man with those grades from that school could have gotten a clerkship in a [f]ederal appeals court, if not the United States Supreme Court.'") (quotations omitted).

Judge Phyllis A. Kravitch, a United States Appellate Judge for the Eleventh Circuit, also experienced gender discrimination while applying for a Supreme Court clerkship. Judge Kravitch graduated at the top of her class at the University of Pennsylvania Law School. However, when she interviewed for a Supreme Court clerkship, the Justice who interviewed her told her that he did not want to be the first Justice to hire a female law clerk. See Joseph Hoffmann, *A Tribute to the Honorable Phyllis A. Kravitch*, 13 GA. ST. U. L. REV. 353, 354-55 (1997).

Furthermore, recent studies show that women are significantly underrepresented as law clerks on the Supreme Court and that such discrepancies are not due to poor performance in law school or on law journals.⁷³ For example, Professor Mark Brown conducted a study that revealed that men comprised 99 percent of the Supreme Court law clerks in the 1960s, 89 percent in the 1970s, and 76 percent in both the 1980s and 1990s.⁷⁴ In comparing the percentage of male Supreme Court law clerks with the percentage of men at the 16 law schools that produce almost 90 percent of the Supreme Court's clerks, Professor Brown found that "during the 1970s the male clerkship rate was 13 percentage points higher than the male enrollment at elite law schools (89% versus 76%), 14 percentage points higher in the 1980s (76% versus 61%), and 18 percentage points higher in the 1990s (76% versus 58%)."⁷⁵ Additionally, Professor Jane Korn reported data which showed that, although 40 or more percent of all law school graduates in the 1990s were women, the percentage of female Supreme Court law clerks varied from a low of 15 percent to a one-time high of 36 percent.⁷⁶ More specifically, Professor Korn's study showed that women comprised 21 percent of Supreme Court law clerks in 1990 while 42 percent of law school graduates, 28 percent of the Supreme Court law clerks in 1991 while 43 percent of law school graduates, 15 percent of the Supreme Court law clerks in 1992 while 43 percent of law school graduates, 31 percent of the Supreme Court law clerks in 1993 while 42.5 percent of law school graduates, and 31 percent in 1994.⁷⁷

⁷³ See generally Brown, *supra* note 67.

⁷⁴ See *id.* at 364.

⁷⁵ *Id.* at 366-67. Professor Brown also analyzed a random sample of 1,000 clerks for the United States Court of Appeals. In this study, he found that the percentage of those positions held by women consistently lagged behind the percentage of women students at top law schools. See Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law School Faculty Hiring*, 97 COLUM. L. REV. 199, 286-87 n.260 (1997); see also Sarah E. Thiemann, *Beyond Guinier: A Critique of Legal Pedagogy*, 24 N.Y.U. REV. L. & SOC. CHANGE 17, 31-32 (1998) (finding that among NYU law students, with the exception of the judicial term for 1997-98, men have consistently received more clerkships than women).

⁷⁶ See Jane Byeff Korn, *Institutional Sexism: Responsibility and Intent*, 4 TEX. J. WOMEN & L. 83, 98-100 (1995); see also Jean C. Love, *Twenty Questions on the Status of Women Students in Your Law School*, 11 WIS. WOMEN'S L.J. 405, 411 n.21 (1997).

⁷⁷ See Korn, *supra* note 76, at 100 n.71. Women comprised 21% of Supreme Court law clerks in 1983 while 35% of law school graduates; 22% in 1984 while 37% of law school graduates; 22% in 1985 while 38% of law school graduates; 31% in 1986 while 39% of law school graduates; 23.5% in 1987 while 40% of law school graduates; 36% in 1988 while 41% of law school graduates; and 33% in 1989 while 41% of law school graduates. See *id.*

More recently, a debate regarding the scarcity of minority law clerks has emerged. The current President of the National Association for the Advancement of Colored People ("NAACP"), Kweisi Mfume, planned and participated in a protest of the Justices' hiring practices. He and 18 other individuals were arrested as they crossed a police barricade leading to the

However, even more important than recognizing the reasonableness of drawing an inference of sex discrimination in the Stevens scenario is an understanding that it would be unreasonable to draw such an inference if the scenario involved Justice Stevens' choosing two qualified female applicants over two qualified male applicants. Indeed, given the preferences that have traditionally been accorded to men in the Supreme Court hiring process, it would be irrational to draw this inference without proof of unusual background circumstances.

Furthermore, the fact that the inference of discrimination may be weaker in some cases involving the use of subjective criteria does not negate the importance of the *McDonnell Douglas* test. Indeed, one could argue that the *McDonnell Douglas* test serves a more important function in cases where subjective factors play a strong role in the decision-making process because discrimination is more difficult to prove in these cases. In fact, several studies show that these situations require special protection, as racial bias can filter into the subjective portion of the hiring process in a number of ways. Most specifically, the bias appears in the interview process, a process that generally precedes employer hiring decisions. For example, a psychological study of interview processes done at Princeton University demonstrates one of the ways in which interview processes are not racially neutral.⁷⁸

courthouse steps to give the Justices the resumes of qualified minority law school graduates. See Cliff Hocker, *No Justice, No Peace: Diversity Is Needed Among Law Clerks*, 12 NAT'L BAR ASSOC. MAG., Nov-Dec. 1998, at 26. Mfume stated, "[t]he fact that the nine justices who sit on the highest court in the land do not practice equal opportunity exposes a great deal of hypocrisy." *Id.*; cf. Randall Kennedy, *The Clerkship Question and the Court*, AMERICAN LAWYER, Apr. 1999, at 114. (noting that the paucity of minorities in the highest circles of the legal profession is a problem but asserting that it stems from many sources, "including the social inequities that effectively bar all too many blacks from any higher education . . . and customs and reflexes that make it more difficult for black law students to gain access to the valuable social networks that advance careers in the law").

Of the 394 law clerks hired by the current nine Justices, Blacks represent less than 2 percent, Asian-Americans represent 5 percent, and Latinos represent 1 percent. No Native Americans have ever clerked on the Supreme Court. See Linn Washington, Jr., *Bringing More Blacks To Clerking*, 13 NAT'L BAR ASSOC. MAG., Jan-Feb. 1999, at 34; Hocker, *supra* at 77 (citing similar statistics).

This fall, of the 35 clerks who will work for the sitting Justices, two are Black and three are of Asian heritage. This will be the largest number of minority clerks in recent memory. Court employees could not recall any recent term in which the Justices had employed more than three minority clerks. Randy Jones of the National Bar Association commented on the Justices' current hiring decisions, stating: "It's clear that our effort has had a positive effect on the hearts and minds of the justices. But we are far from done." *Supreme Court Hires Two Black Law Clerks*, JET, Sept. 27, 1999, at 4.

⁷⁸ See Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER J. 1, 21 (1994) (citing Mark Snyder, *Self-Fulfilling Stereotypes*, PSYCHOL. TODAY, July 1982, at 60, 65-67).

This study consisted of two steps. The first step involved interviews of both white and black job applicants by white undergraduates. Unknown to these undergraduate interviewers, the applicants were all associated with the project and were trained to behave consistently from interview to interview. The first step of the study reported that interviewers spent less time with black applicants and were less friendly and outgoing with black applicants.⁷⁹ The second step of the study began with interviews of white applicants by confederates of the experimenters. These confederates were trained to approximate the two styles of interviewing observed during the first step of the project.⁸⁰ After these interviews were finished, a panel of judges reviewed tapes and reported that white applicants subjected to the style previously accorded Blacks performed noticeably worse in the interviews than other white applicants.⁸¹ In sum, in cases concerning either the objective or subjective qualifications of an applicant, the history and experience of discrimination against Blacks in the workplace allows for the drawing of a reasonable inference of discrimination under the *McDonnell Douglas* test.

II. UNDERSTANDING WHITE PRIVILEGE AND THE REASONS FOR APPLYING A DIFFERENT STANDARD OF PROOF TO WHITE PLAINTIFFS UNDER THE *MCDONNELL DOUGLAS* PRIMA FACIE TEST

When one considers the function of the *McDonnell Douglas* test as explained in Part I, it becomes clear that courts must, in order to apply the test properly, have an understanding of the racial status of Whites as compared to Blacks in the employment context. This Part describes the current employment situation of Whites as compared to Blacks and contends that it is only reasonable for courts to apply a different first prong to white plaintiffs under the *McDonnell Douglas* test. First, this Part establishes that the employment differences between Whites and Blacks that sparked the enactment of Title VII still exist today. It then demonstrates how the perpetuation of these conditions is linked to employers' negative racial stereotypes of Blacks and employers' preferences for Whites on the job market. This Part also maintains that there is no reason to think that discrimination against Whites has increased such that courts can infer discrimination for Whites and Blacks based on the exact same factors in the *McDonnell Douglas* test.

⁷⁹ *See id.*

⁸⁰ *See id.*

⁸¹ *See id.*

The enactment of Title VII helped to influence the emergence of the black middle class in the 1970s and 1980s.⁸² The 1980s saw an increase in the numbers of Blacks in colleges and universities, black professionals, black managers, black administrators, and black homeowners.⁸³ Although there has been an increase in the number of black college students and black professionals since the enactment of Title VII, the position of Blacks in society, as compared to Whites, has not improved.⁸⁴ An examination of relevant statistics demonstrates this point.

First, statistics show that the ratio between the employment rate for Blacks and Whites have remained nearly the same since 1963. In 1963, the Department of Labor Census Report showed that the average rate of unemployment for Blacks was 10.9 percent, while the rate for Whites was less than half that—only 5.1 percent.⁸⁵ In 1997, the Department of Labor Census Report showed that the unemployment rate for Whites was again less than half that for Blacks—at 4.2 percent as compared to 9.4 percent.⁸⁶

Additionally, reports show that while a new black middle and educated class has emerged, this new class remains small in numbers.⁸⁷ For the majority of Blacks, little has changed. In fact, for

⁸² See WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 193-94 (1996).

⁸³ See *id.*

⁸⁴ See *id.* See generally BERGMANN, *supra* note 36 (arguing that despite the enactment of Title VII and similar initiatives, the situation of minorities in employment has not significantly improved).

⁸⁵ See 110 CONG. REC. 2604 (1964).

⁸⁶ See UNITED STATES DEP'T. OF LAB. BUREAU LAB. STAT., *EMP. AND EARNINGS* 9, Aug. 1997, at 9.

The unemployment ratio for White and Blacks remained the same during the years between 1963 and 1997. In fact, in 1988, the black unemployment rate was 2.57 times the white unemployment rate, which was the highest Black-to-White employment differential ever recorded. See Leroy D. Clark, *The Law and Economics of Racial Discrimination in Employment* by David A. Strauss, 79 GEO. L.J. 1695, 1701 (1991).

⁸⁷ The 1996 Statistical Abstract of the United States shows that, in 1995, Blacks made up only 4.7 percent of all engineers, 4.9 percent of all physicians, 1.9 percent of all dentists, 6.2 percent of all college and university professors, and 3.6 percent of all lawyers and judges. See U.S. DEP'T. OF COMM. STATISTICAL ABSTRACT OF THE U.S. 405 (116th ed. 1996). Additionally, the Glass Ceiling Commission Fact-Finding Report found that, in Fortune 1000 industrial corporations and Fortune 500 service corporations, 97 percent of senior level managers are White, 0.6 percent are Black, 0.3 percent are Asian, 0.4 percent are Latino, and 3 to 5 percent are women. See Fick, *supra* note 52, at 163 (citing GLASS CEILING COMMISSION, DEPARTMENT OF LABOR, *GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL* 9 (1995)).

This is not to say that the ameliorative, race-based remedies instituted during the Civil Rights Movement have been meaningless. In fact, this author contends that, without these remedies, Blacks would have experienced even less progress in employment. See generally Thomas E. Hanson, Jr., Note, *Rising Above the Past: Affirmative Action as a Necessary Means of Raising the Black Standard of Living as Well as Self-Esteem*, 16 B.C. THIRD WORLD L.J. 107 (1996) (detailing the merits of affirmative action).

many Blacks, socioeconomic conditions have worsened.⁸⁸ Statistics show that the economic gains of the Civil Rights Movement are concentrated among the highest quintile of Blacks.⁸⁹ William Julius Wilson, a sociologist at Harvard University, notes:

From 1975 to 1992 . . . while the average income of the lowest quintile of black families in the United States declined by 33 percent (from \$6,333 to \$4,255) and that of the second lowest quintile by 13 percent (from \$13,186 to \$11,487), the average income of the highest quintile of black families climbed by 23 percent (from \$55,681 to \$68,431) and that of the top 5 percent by 35 percent (from \$76,713 to \$103,827).⁹⁰

However, even more important than the disparities between the incomes of lower class and middle to upper middle-class Blacks are the disparities between the incomes of Whites and Blacks. Studies reveal that there is a substantial gap between the incomes of Whites and Blacks, even among the highest quintiles.⁹¹ Just as with the employment rates between Blacks and Whites, the wage gap between Blacks and Whites has also remained relatively the same since the enactment of Title VII. For instance, statistics show that the gap between the median adjusted income for Whites and Blacks was nearly the same in 1969 and 1991. In 1969, the median adjusted income for Blacks was 1.44 times the poverty line, or about 53 percent of that of Whites.⁹² In 1991, the median adjusted income for Blacks was 1.85, or about 52 percent of that of Whites.⁹³ Furthermore, in 1959, black males from ages 24 to 65 who had completed elementary school earned median incomes equal to 62 percent of their white counter-

⁸⁸ See generally WILSON, *supra* note 82, at 194-95.

From 1977 to 1993, the percentage of Blacks with incomes below 50 percent of the amount designated as the poverty line (the measurement of "poverty" was \$14,335 for a four-person family and \$11,522 for a three-person family in 1993) increased from 9.3 percent of the total black population in 1977 to 16.7 percent in 1993. In 1977, fewer than one in every three poor blacks (29.9 percent) fell below half of the poverty-line amount, but by 1993 the proportion rose to more than half (50.4 percent).

Id.

⁸⁹ See *id.* at 195 (noting that, in 1992, the highest fifth of black families secured a record 48.8 percent of the total black family income).

⁹⁰ See *id.* at 196.

⁹¹ *Id.*; see also BERGMANN, *supra* note 36, at 37-38 (demonstrating that black men's inflation-adjusted incomes have declined relative to white men's since 1976). See generally Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 967-88 (1997) (demonstrating that the black middle class is worse off than the white middle class in numerous economic dimensions).

⁹² See SHELDON DANZIGER & PETER GOTTSCHALK, *AMERICA UNEQUAL* 73 (1995).

⁹³ *Id.* Also, in 1992, 33.3 percent of Blacks and 29.9 percent of Latinos lived in poverty as compared to 11.6 percent of Whites. See Stacey Patton, *Apologize For Slavery? Yes—With Deeds*, BALT. SUN, June 20, 1997, at A13.

parts. Among high school and college graduates, black males earned respective salaries of only 70 percent and 62 percent of those earned by similarly situated Whites.⁹⁴ Although the total wage gap between Blacks and Whites fell during the 1960s and 1970s, studies showed that this differential widened during the 1980s.⁹⁵ In 1995, reports revealed that black men's wages equaled 73 percent of white men's wages and that black women's wages equaled 63 percent of white men's wages.⁹⁶ Reports also showed that black women earned 83 cents for every dollar made by white women and that Latinas earned 71 cents for every dollar made by white women.⁹⁷ Lastly, reports indicated that Whites have accrued ten times more wealth savings and assets, such as homes—than Blacks and Latinos.⁹⁸

In sum, statistics reveal that Whites generally are more privileged than Blacks with regard to socioeconomic class and employment. Given this fact, it is unreasonable for courts to apply the same first prong of the *McDonnell Douglas* test to white and black plaintiffs who are bringing race discrimination cases. After all, the import of the first prong turns on whether the plaintiff is privileged or disadvantaged by his race under the circumstances. If Whites are generally privileged within the hiring context, it only makes sense to require a white plaintiff to show that he is disadvantaged because of his race in his particular circumstances before he can benefit from an inference of discrimination based on racial disadvantage.

Some argue that disparities in the employment and earnings of Blacks and Whites alone cannot necessarily be viewed as evidence of white privilege within the hiring context. Even beyond statistics, however, demonstrative evidence of discrimination exists. Over the years, researchers have conducted audits that suggest that Whites are privileged in the hiring context. A study by the Urban Institute dem-

⁹⁴ See Hanson, *supra* note 87, at 111-12.

⁹⁵ See Robert K. Toutkoushian, *Racial and Marital Differences in Faculty Pay*, 69 J. Higher Educ. 513, 514 (1998).

⁹⁶ See BERGMANN, *supra* note 36, at 38. In 1996, studies revealed that the median incomes for Black and Latino families were far less than that of Whites, \$26,500 and \$26,100 respectively as compared to \$47,100. See Jodi Enda, *White House report says affirmative action a success*, DENV. POST, Feb. 10, 1998, at C1. Asian families had the highest median income at \$49,100. See *id.* However, greater proportions of Asians live below the poverty level than Whites. See Michael Fletcher, *Race Board's Focus Turns to Economic Gap; Range of Explanations Offered for Disparity*, WASH. POST, Jan. 15, 1998, at A8.

Studies also show that the workplace is still highly segregated. A 1993 survey of workers showed that 40 percent of laborers, 91.5 percent of managers, 48.6 of professionals, 52.6 percent of technicians, and 86.4 percent of supervisors worked only with people of their race. See BERGMANN, *supra* note 36, at 37-38 (citing DONALD TOMASKOVIC-DEVEY, GENDER & RACIAL INEQUALITY AT WORK: THE SOURCES & CONSEQUENCE OF JOB SEGREGATION (1993)).

⁹⁷ See Sarah Wyatt, *Administration Urges Toughening of Equal Pay Laws*, CHARLOTTE GAZETTE, Apr. 3, 1998, at 6C.

⁹⁸ See Enda, *supra* note 96, at C1.

onstrated one of the ways in which Whites have been preferred on the job market. In 1990, the Urban Institute sent out pairs of auditors, one black, one white, to respond to newspaper advertisements for jobs in the Chicago and Washington D.C. area.⁹⁹ These test subjects were carefully matched in terms of experience, age, physical strength and size, and education. They were also trained such that attributes like demeanor, openness, articulateness, and energy level were as close to each other as possible.¹⁰⁰ Additionally, their biographies were created to make the pair identical in terms of a defined set of qualifications.¹⁰¹ Despite all of the similarities between the auditors, the study showed that the white auditors both advanced further in the hiring process and received job offers at a significantly higher rate than black auditors. In 20 percent of the cases, the white candidate advanced farther, and in 15 percent only the white candidate received a job offer.¹⁰²

These results are consistent with the results of a General Accounting Office (GAO) investigation examining employment discrimination against Latinos.¹⁰³ The GAO investigations involved sending pairs of Anglo and Latino job seekers to 360 employers in Chicago and San Diego. In 58 percent of the cases, the applicants were treated similarly, but in 31 percent of the cases, the Latino auditor encountered unfavorable treatment.¹⁰⁴ One example of such treatment took place in the following case: A pair of testers applied for a "counter help" job at a lunch service company. Both testers had similar work experience. The advertisement requested that interested applicants apply in person. The Latino applicant went in and told the manager that he wanted to apply for the job. The tester reported that the manager studied him and then told him that the position was filled. The white tester came in two hours later and told the manager

⁹⁹ See T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 339 (1992) (citing MARGERY AUSTIN TURNER ET AL., OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING 11, Urban Inst. Report 91-9, 1991).

¹⁰⁰ See *id.* at 339.

¹⁰¹ See *id.* at 340.

¹⁰² See *id.* The Urban Institute reported that its results were significant at the 99 percent confidence level. See Calloway, *supra* note 14, at 1030. The authors of the report speculated that their results underrepresented the problem of discrimination because their results were based on positions advertised in newspapers rather than in employment agencies where there are more opportunities for discrimination. *Id.* The authors also speculated that their study underrepresented discrimination because all of the auditors participating in the study were actually college students and were overqualified for the positions for which they applied. *Id.* at 1030-31. Furthermore, the qualifications of the black auditors were substantially higher than those of the average black applicant for entry-level jobs. *Id.* at 1031.

¹⁰³ See Aleinikoff, *supra* note 99, at 340 (citing GOVERNMENT ACCOUNTING OFFICE, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION (1990)).

¹⁰⁴ See *id.* at 340-41.

that he wished to apply for the job. The manager asked him to complete a short application, interviewed him for about three minutes, and hired him immediately.¹⁰⁵

The Fair Employment Council of Greater Washington ("FEC") also conducted employment testing studies of black and white job applicants in the D.C. area between 1990 and 1991.¹⁰⁶ The results of the FEC's study were similar to those of the Urban Institute's study. The FEC results indicated that the black testers were treated significantly worse than white testers 24 percent of the time and that Latinos were treated worse than Whites 22 percent of the time.¹⁰⁷ Job offers were given to 46.9 percent of the white testers but only 11.3 percent of the black testers.¹⁰⁸ In those cases where job offers were given to both black and white testers, Whites were offered higher wages 16.7 percent of the time.¹⁰⁹

In addition to these audits, other studies have shown that many employers favor Whites during the hiring process because of their perceptions of Blacks as being uneducated, lazy, dishonest, and uncooperative.¹¹⁰ Such discrimination is often referred to as statistical discrimination: "making judgments about an applicant's productivity, which are often too difficult or too expensive to measure, on the basis of his or her race, ethnic background, or class."¹¹¹ For example, one study completed by scholars Jomills Henry Braddock III and James McPartland revealed that "attitudinal traits are at least as important as educational training in hiring decisions for many jobs, especially jobs filled by high school graduates;" that the average employer perceives racial differences related to these attitudinal traits; and that such employers are more likely to avoid hiring Blacks and more likely to hire

¹⁰⁵ See *id.* at 340.

¹⁰⁶ See Fick, *supra* note 52, at 164 (citing Marc Bendick, Jr. et al., *Measuring Employment Discrimination Through Controlled Experiments*, 23 REV. BLACK POL. ECON. 25, 29 (1994)); see also MICHAEL FIX AND RAYMOND J. STRUYK, EDs., CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA (1993) (citing the same study).

¹⁰⁷ See Fick, *supra* note 52, at 164.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See generally Wilson, *supra* note 82, at 111-46 (documenting interviews with numerous employers in the Chicago area regarding negative perceptions of minority job candidates as a group). See, e.g., Joleen Kirschenman & Kathryn M. Neckerman, "We'd Love to Hire Them, But . . .": *The Meaning of Race for Employers*, in RACE AND ETHNIC CONFLICT: CONTENTING VIEWS ON PREJUDICE, DISCRIMINATION AND ETHNOVIOLENCE 115-23 (FRED L. PINCUS & HOWARD J. EHRlich, EDs. 1994).

¹¹¹ See WILSON, *supra* note 82, at 129. See generally Kirschenman & Neckerman, *supra* note 110.

Whites, particularly for jobs where attitudinal traits are important, because they perceive Blacks as higher risk employees.¹¹²

More recently, scholars Joleen Kirschenman and Kathryn Neckerman conducted a survey that exposed the manner in which racial stereotyping, especially among blue-collar employers, has led to statistical discrimination against Blacks and preferences for Whites in the job market.¹¹³ During this study, Kirschenman and Neckerman asked several employers whether they thought there were any differences in the work ethics of Whites, Blacks, and Hispanics.¹¹⁴ Out of these employers, 37.7 percent ranked Blacks last, 1.4 ranked Hispanics last, and not one ranked Whites last.¹¹⁵ Another 7.6 percent of these employers placed Blacks and Hispanics together on the lowest level, and 51.4 percent either saw no difference or refused to categorize in a straightforward way.¹¹⁶

In addition to these rankings, Kirschenman and Neckerman noted numerous comments made by employers which suggest that employers may favor white applicants in the employment process because of their negative perceptions of Blacks' work ethic and their positive perceptions of Whites' work ethic.¹¹⁷ For example, one employer stated: "For all groups, the pride [in their work] of days gone by is not there, but what is left, I think probably the whites take more pride than some of the other minorities."¹¹⁸ Another employer stated, "[t]he Polish immigrants that I know and know of are more highly motivated than the Hispanics. The Hispanics share in some of the problems that the blacks do [which include] exposure to poverty and drugs [and] lack of motivation."¹¹⁹ One employer even expressed his

¹¹² See Fick, *supra* note 52, at 166-67 (quoting Jomills Henry Braddock II & James M. McPartland, *How Minorities Continue to Be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43 J. SOC. ISSUES 5, 13 [1987]).

¹¹³ See Kirschenman & Neckerman, *supra* note 110, at 115-23.

¹¹⁴ *See id.* at 118.

¹¹⁵ *See id.*

¹¹⁶ *See id.* ("[Many of these employers] qualified their response by saying they saw no differences once one controlled for education, background, or environment, and that any differences were more the result of class and space."); see also Calloway, *supra* note 14, at 1029 (citing studies that reported that 62 percent of Whites consider Blacks to be less hard-working than Whites and that, compared to Jews, Blacks, Asians, southern Whites, and Whites in general, Americans perceive Latinos as second only to Blacks as being lazy and living off welfare rather than self-supporting).

¹¹⁷ See generally Kirschenman & Neckerman, *supra* note 110, at 115-23.

¹¹⁸ *Id.* at 118.

¹¹⁹ *Id.* Below are just a few examples of the comments that Wilson cited in his book, *When Work Disappears: The World of the New Urban Poor*. One example consisted of the following statement by a manufacturer, who had no firsthand experience with black workers. He said that he heard:

[T]hey [black men] don't want to work, they don't want to do anything. I think that's a big part of it. I don't think anybody wants to admit it but I think that's primarily it . . . They're ignorant, they don't work, they

desire to maintain a predominantly white workforce for the sake of maintaining good relations among workers, stating that if he "had one [black worker] back there it might be okay, but if [has] two or more [he] would have trouble."¹²⁰

Reports not only reveal that race affects whether black and white individuals initially receive jobs from employers but which jobs they receive.¹²¹ For example, the results of a 1986 study on the effect of applicant race on job placement showed that white personnel officers tend to assign black male high school graduates to lower paying positions than those assigned to white male high school graduates.¹²² The study also found that, among college graduates, race was a significant determinant of a female's job status.¹²³ Additionally, the recent Texaco class action revealed some of the discrimination problems that Blacks face with opportunities for promotions in corporate America.¹²⁴ At Texaco, Black managers were constantly being forced to train Whites who received promotions despite the fact that the black managers had more experience, education, and seniority.¹²⁵

don't want to work . . . they got a real bad rap, and huh . . . nobody, I don't think anybody will come out and admit it, but I think that's the first thing they consider in a black applicant.

See WILSON, *supra* note 82, at 122.

Another example consists of the following statement by a manufacturer. In an interview, one employer admitted that racial employment discrimination against Blacks is not only influenced by racist stereotyping but also by employers' pure bias and prejudice against Blacks, stating:

Well, I don't know about their ability to hang onto the job, or retain it, but their ability to find them is probably rooted in the fact that there's, now I'm going to go back twenty years now, I think that today there's more bias and prejudice against the black man than there was twenty years ago. I think twenty years ago, fifteen years ago, ten years ago, white male employers like myself were willing to give anybody and everybody the opportunity, not because it was the law, but because it was the right thing to do, and today I see more prejudice and more racial bias in employers than I've ever seen before.

Id. at 129.

¹²⁰ Kirschenman & Neckerman, *supra* note 110, at 119.

¹²¹ See Fick, *supra* note 52, at 167 (citing Jomills Henry Braddock III et al., *Applicant Race and Job Placement Decisions: A National Survey Experiment*, 6 INT'L J. SOC. & SOC. POL'Y 3, 21 (1986)).

¹²² See *id.* (quoting Braddock et al., *supra* note 121 at 21). This study was conducted by the Center for Social Organization of Schools at Johns Hopkins University and was based on a national survey of 1101 personnel officers and other executives responsible for hiring.

¹²³ See *id.*

¹²⁴ See Angela Onwuachi-Willig, Book Review, *The Verdict on Roberts vs. Texaco*, 15 HARV. BLACKLETTER J. 228, 231-32 (Spring 1999) (detailing some of the difficulties faced by minority corporate employees at Texaco); see also Linn Washington, Jr., *Racism at Texaco*, PHIL. TRIB., Nov. 29, 1996, at 5A.

¹²⁵ See generally BARI-ELLEN ROBERTS, *ROBERTS V. TEXACO: A TRUE STORY OF RACE AND CORPORATE AMERICA* (1998) (discussing the hardships faced by minorities attempting to procure corporate promotions).

In sum, several studies suggest that Whites are privileged in the hiring and promotion context because of societal racism, employers' negative perceptions of the work ethic of minorities, their positive perceptions of the work ethic of Whites, and employers' fears of problems caused by having an integrated workforce. These studies add further support to this Article's argument that it is unreasonable to infer discrimination for white plaintiffs based solely upon the last three prongs of the *McDonnell Douglas* prima facie case test. Given the fact that the employment differences between Whites and Blacks have not changed between the 1960s and the 1990s and the information from audits and studies on racial stereotyping and discrimination, it is clear that Whites are privileged as compared to Blacks and other minorities within the employment context.¹²⁶ Because white job applicants are generally favored by employers, it makes no sense for courts to infer discrimination for white applicants absent a showing that their employer is that unusual employer who discriminates against the majority. In other words, there is little reason to think that employment discrimination against Blacks in employment has decreased or that employment discrimination against Whites has increased, such that courts should begin to evaluate the discrimination claims of Blacks and Whites under the same factors of the *McDonnell Douglas* test.¹²⁷

Furthermore, such evidence suggests not only that Blacks are deeply harmed by racial discrimination in the job market but also that competing Whites have benefited from such discrimination against Blacks, in particular from discrimination based on negative stereotypes of Blacks. As the D.C. Circuit stated in *Parker*, given the status of Whites as compared to Blacks in today's society, "it defies common sense to suggest that the promotion of a black justifies an inference of prejudice against white co-workers in our present society."¹²⁸

Moreover, an important question is raised as to whether the different prima facie case test for Whites is actually different at all. As previous sections have shown, equal treatment between Blacks and Whites does not always happen. The different test requires only that

¹²⁶ See Peter Gene Baroni, Case Note, *Background Circumstances: An Elevated Standard of Necessity In Reverse Discrimination Claims Under Title VII*, 39 How. L.J. 797, 810-811 (1996).

¹²⁷ See Walters, *supra* note 2, at 604-05 ("No evidence exists establishing that the dominant status of white males in the labor force has been seriously challenged by affirmative action.") (citations omitted).

¹²⁸ *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981); see also *Harding v. Gray*, 9 F.3d 150, 152 (D.C. Cir. 1993) ("Invidious discrimination against whites is relatively uncommon in our society, and so there is nothing inherently suspicious in an employer's decision to promote a qualified minority applicant instead of a qualified white applicant.").

Whites present evidence indicating that their circumstances in the field of employment are similar to those faced by Blacks on a regular basis. In other words, the "background circumstances requirement" merely substitutes for the black plaintiff's burden to show that he is a member of a racial minority. It is not meant to disadvantage Whites but rather to level the playing field.¹²⁹ The modified test for Whites is not different at all. It simply ensures that the circumstances for both traditional discrimination and reverse discrimination cases involving white employers are similar.

III. ADDRESSING THE POLICY REASONS FOR, AND ARGUMENTS AGAINST, APPLYING THE DIFFERENT TEST

Additionally, there are a number of policy reasons for choosing to apply the background circumstances test to white plaintiffs in reverse discrimination cases. First, if courts were to apply the same *McDonnell Douglas* test to white and black plaintiffs in discrimination cases, courts would undermine Supreme Court precedent, in particular the *Weber* and *Johnson* decisions which upheld the right of employers to voluntarily adopt affirmative action programs. Courts would do so by allowing Whites to more easily challenge affirmative action programs under the *McDonnell Douglas* framework. Normally, in the *McDonnell Douglas* framework, the burden remains on the plaintiff to prove discrimination; the employer need only articulate a non-discriminatory reason for not hiring or promoting the plaintiff. In reverse discrimination cases that involve a challenge to an affirmative action program, however, courts that apply the same test to both white and black plaintiffs require the employer to do more than simply articulate its reason for not hiring or promoting the plaintiff (that is, if the reason is that the selected individual was chosen pursuant to an affirmative action plan). Instead, these courts require the employer to produce evidence that its plan is a response to a conspicuous imbalance in its workforce or that its program is reasonably related to the plan's remedial purpose.¹³⁰ In sum, in these courts, any

¹²⁹ See *Harding*, 9 F.3d at 154 (stating that the "background circumstances" requirement is not an additional hurdle for white plaintiffs"). *But see* Baroni, *supra* note 126, at 815-17 (arguing that the "background circumstances" requirement is an additional hurdle for white plaintiffs and that the prima facie standards should be more onerous for white plaintiffs because the "historical, societal patterns of race and gender discrimination in employment that Title VII was enacted to combat did not and do not apply to majority plaintiffs") (citations omitted).

¹³⁰ See, e.g., *Commons v. Montgomery Ward & Company*, 614 F. Supp. 443, 448 (D. Kan. 1985) (refusing to allow an employer to use its affirmative action plan as a defense where the employer had not produced such evidence); see also *Collins v. Sch. Dist. of Kansas City*, 727 F. Supp. 1318, 1320-21 & n.1 (W.D. Mo. 1990) (adopting the *Setser* requirement that the employer in a reverse discrimination case must produce evidence of the need for an affirmative

white individual who files a reverse discrimination action can force an employer to defend its affirmative action plan, regardless of whether there is any hint of discrimination against Whites in the workplace.

This in effect places the institution of affirmative action under undue fire and may, in some instances, discourage employers from voluntarily adopting such programs, an act which was approved, supported, and encouraged by the Supreme Court in both *Weber* and *Johnson*.¹³¹ On the other hand, courts that apply the background circumstances test recognize that even the existence of an illegal affirmative action plan may not be a sufficient basis upon which to draw an inference of discrimination. Thus, these courts require a white plaintiff to show that the plan was applied in a way suggesting a tendency to discriminate against Whites to satisfy the requirements of the *McDonnell Douglas* test.¹³²

Second, the application of the same *McDonnell Douglas* test to white and black plaintiffs would deprive employers of the "screening out benefits" that the *McDonnell Douglas* test was intended to provide through the motions process.¹³³ For example, the district court in *Stock v. Universal Foods Corp.*¹³⁴ deprived an employer of such prima facie screening benefits when it applied the traditional prima facie case test to a plaintiff where there was not only no reason to believe that white males were discriminated against by the employer but where the circumstances suggested that there was pervasive discrimination against minorities. In *Stock*, a white male applicant, Stock, brought a reverse discrimination case to challenge the hiring of an allegedly unqualified black applicant. Stock sought a promotion at Universal Foods Corporation. Universal had a practice of recruiting its new employees by word of mouth, a hiring practice that resulted in

action plan in its workforce and evidence that the plan is reasonably related to its remedial purpose).

¹³¹ See *supra* text accompanying notes 48-54.

¹³² See, e.g., *McHenry v. Commonwealth of Pa. State Sys. of Higher Educ.*, No. 98-2468, 1999 WL 391373, at *10 (E.D. Pa. May 11, 1999) (holding that, even assuming that illegal affirmative action practices existed, i.e. the use of quotas, the plaintiff had failed to establish a prima facie case because he failed to show that such policies were relied upon in deciding not to hire him or other similarly situated white males, and thus failed to show a tendency on the part of his employer to discriminate against white males).

¹³³ See *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 457 (7th Cir. 1999). The prima facie burden of *McDonnell Douglas* allows employers to screen out unsubstantiated discrimination charges and to avoid unnecessary litigation and expense by allowing them to file a motion to dismiss or for summary judgment where the plaintiff cannot distinguish his case from the ordinary, legitimate kind of adverse employment action. See *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 134 (7th Cir. 1985).

¹³⁴ 817 F. Supp. 1300 (D. Md. 1993), *aff'd*, No. 93-1448, 1994 WL 10682 (4th Cir., Jan. 19, 1994), *cert. denied*, 513 U.S. 813 (1994).

an almost completely white workforce. In early 1991, an audit by the Equal Employment Opportunity Commission ("EEOC") revealed violations of Executive Order 11246,¹³⁵ as well as various federal fair employment statutes and regulations. In an effort to remedy these violations, Universal developed and adopted an affirmative action program, which described its past deficiencies, new hiring policies, and hiring goals for fiscal year 1991.¹³⁶

In late August or early September of 1991, a position in Universal's maintenance department became available. Stock learned of the opening from a maintenance mechanic at Universal. The mechanic later recommended Stock to the Maintenance Superintendent, Ronald Miller, for an interview. Miller, who was unfamiliar with Universal's new affirmative action program, interviewed Stock, told Stock that he was impressed with his qualifications, and began arranging for a physical examination for Stock. When Dennis Cassidy, the Assistant Plant Manager, discovered that Miller had violated the company's affirmative action requirements by interviewing an applicant for a position before it was publicly advertised, he told Miller to advertise the position and interview other candidates as well.¹³⁷ Stock was informed of this need to advertise and interview more candidates. After advertisements were listed, it came to light that none of the initial interviewees were minority group members. Because Cassidy suspected that the absence of minority interviewees was not because of a lack of qualified minority applicants but because Miller was prejudiced and weeded out applicants who appeared on paper to be minorities, he urged Miller to find qualified minority applicants and to call them in for interviews. At no time did Cassidy tell Miller that he must hire a minority.¹³⁸

Eventually, Tyrone Anderson, a black male, was interviewed and subsequently hired for the maintenance mechanic position at Universal. Anderson had an excellent recommendation from his former employer. Even Miller, who admitted his prejudice against minorities, was impressed by Anderson's qualifications and decided that Universal should hire him. Additionally, on the job, despite the voiced

¹³⁵ See Exec. Order No. 11, 246, 3 C.F.R., 1965 Supp. 167 (1965), reprinted in 42 U.S.C. § 2000e app. at 538-41 (requiring that entities contracting with the federal government "not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin [and that such entities take] affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin"). *Id.*

¹³⁶ See *Stock*, 817 F. Supp. at 1302.

¹³⁷ See *id.* at 1303.

¹³⁸ See *id.*

prejudices of his co-workers,¹³⁹ Anderson impressed them with his quality work and amiable personality.¹⁴⁰

Stock nevertheless brought a reverse discrimination action against Universal, alleging that Anderson was unqualified for the position. In reviewing Stock's claim, both the district court and the court of appeals simply required that Stock show that he was a member of a protected class to satisfy the first prong of the *McDonnell Douglas* test.¹⁴¹ This occurred despite the fact that Universal had a history of discriminating against minorities, engaged in hiring practices, such as word-of-mouth hiring, that helped to exclude minorities from consideration for jobs at Universal, and had an admittedly prejudiced worker in charge of the hiring process for Anderson's position. All of these facts demonstrate a tendency by Universal to favor white applicants over black applicants. As a result, Stock was able to establish his prima facie case of discrimination, thus shifting the burden to Universal to articulate its reason for not hiring him. Fortunately, the district court found that Universal was entitled to summary judgment on Stock's claim on the ground that Stock could not show that Universal's reason for not hiring him was a pretext for discrimination.¹⁴² However, had Stock succeeded in showing that Universal's asserted reason for not hiring him was a pretext for discrimination, Universal would have been forced to expend many resources in a trial to defend its decision to hire Anderson.

Lastly, in choosing not to apply the background circumstances test, courts would in essence be embracing the principle of formal equality over the principle of substantive equality. "Formal equality" defines equality in terms of procedural symmetry. It requires that decisions be made without any reference to characteristics such as race.¹⁴³ "Substantive equality" defines equality in terms of distributive justice. It recognizes substantive differences that cause some persons to be more privileged or advantaged than others and acknowledges that like treatment may not result in those persons actu-

¹³⁹ *Id.* at 1304 n.6 (citing testimony that prior to Anderson's employment at Universal, the maintenance shop was all-white, and many of the employees in the shop referred to Blacks as "niggers").

¹⁴⁰ *See id.* at 1304.

¹⁴¹ *See id.* at 1306; *see also* Stock v. Univ. Foods Corp., No. 93-1448, 1994 WL 10682, at * 2 (4th Cir. Jan. 19, 1994).

¹⁴² *See id.* at 1308-09.

¹⁴³ *See* John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 KY. L.J. 9, 50-55 (1997); *see also* Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 818-19 (1990).

ally coming out equal in the end.¹⁴⁴ In the *McDonnell Douglas* context, the application of the same test factors to groups that are substantively unequal in terms of status and access to opportunity would result in a number of harmful effects. First, it would contradict and diminish the ideals and spirit of Title VII. As shown in Section I, Title VII was not enacted merely to enforce like treatment of all individuals but was instead enacted primarily as a means of improving the economic status of Blacks and other minorities.¹⁴⁵ As Fourteenth Amendment jurisprudence has shown, the like treatment of all individuals does little to change the subordination of minorities because it fails to recognize which groups are and have been traditionally powerful or powerless in society.¹⁴⁶ Second, such application would send a painful message to Blacks, who have often relied on courts to enforce their rights to equal opportunity, that courts do not recognize or understand the pervasiveness and the seriousness of current discrimination. It would also send an implicit message to Whites, whose privilege allows them to ignore the manner in which racism functions in society,¹⁴⁷ that discrimination against Blacks and other minorities is no longer a problem.

Some authors, however, have asserted arguments against applying a different first prong of the *McDonnell Douglas* test to white plaintiffs in reverse discrimination cases.¹⁴⁸ These critics of the background circumstances test argue that a different first prong should not

¹⁴⁴ Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1144 (1986); see also Friedman, *supra* note 34, at 48-51 (describing substantive equality as concerned with outcome rather than process).

¹⁴⁵ See *supra* Part I.A.

¹⁴⁶ See *Palmer v. Thompson*, 403 U.S. 217 (1971). The Supreme Court helped to maintain societal, racial hierarchy by applying the principle of formal equality to a legal challenge by Blacks to a city's segregated swimming pool. In that case, the city chose to close the pool rather than integrate it. The Supreme Court found that the city's action did not violate equality because Blacks and Whites alike were denied use of the pool. Had the Supreme Court applied the principle of substantive equality, as it did in *Loving v. Virginia*, 388 U.S. 1 (1967), it instead would have chipped away at the badge of inferiority that was placed upon Blacks in the city. See *Palmer*, 403 U.S. at 266-67 (White, J., dissenting).

In *Loving*, the Supreme Court rejected the State of Virginia's argument that its laws against interracial marriage did not violate the Equal Protection Clause because Blacks and Whites were treated equally under such laws. See generally *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁴⁷ See generally BEVERLY DANIEL TATUM, "WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?" AND OTHER CONVERSATIONS ABOUT RACE, 3-9 (1997) (citing Peggy McIntosh, *Unpacking the Invisible Knapsack: White Privilege*, PEACE AND FREEDOM, July/Aug. 1989, at 10-12); Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881 (1995) (analyzing how language makes white skin privilege invisible and stressing the importance of addressing privilege as well as oppression).

¹⁴⁸ See generally Black, *supra* note 41 (arguing that courts evaluating reverse discrimination cases cannot, without violating the spirit of Title VII, implement a different first prong of the *McDonnell Douglas* test); Whiteside, *supra* note 41 (same).

be applied to white plaintiffs in light of the dissolution of the barriers which minorities previously faced and the newfound role of affirmative action plans in the employment context.¹⁴⁹ More specifically, they contend that the use of the “higher” first prong wrongfully assumes that minorities “discriminate with less frequency than non-minorities.”¹⁵⁰ They also maintain that the newfound role of affirmative action plans in employment necessitates the use of the same first prong for white and black plaintiffs so that white plaintiffs may challenge the use of race in such programs more easily.

These counterarguments, however, are severely flawed. To begin, the use of the background circumstances test is not based on the premise that Blacks and other minorities discriminate less than Whites. All it does is recognize that minorities are not in a position to or do not have the power to discriminate against non-minorities as often as non-minorities do.¹⁵¹ In fact, courts that apply a different prong to white plaintiffs have acknowledged the fact that Blacks and other minorities are equally capable of discriminating against Whites by allowing white plaintiffs to prove the first prong by demonstrating that their employer is a minority or that a majority of their supervisors are minority.¹⁵²

Furthermore, the counterarguments regarding affirmative action programs are also unwarranted. First, such arguments are circular, as most affirmative action programs have come into existence only where an employer has historically discriminated against minorities or where there is a small minority presence.¹⁵³ Second, the mere existence of affirmative action programs alone does not indicate that Whites will be invidiously discriminated against because of their race. Blacks are still significantly underprivileged in the workplace, even in the federal government, where affirmative action programs have been the most successful. For example, although Blacks hold a greater share of white-collar government jobs than Blacks hold in the overall white-collar labor force, disparities between Blacks and Whites persist in average government grade levels.¹⁵⁴ Minorities still are found more frequently in clerical and technical government jobs, most of which top out at grade 9.¹⁵⁵ Minority men, except for Asians, remain stuck in the trainee and developmental levels of professional jobs at

¹⁴⁹ See Black, *supra* note 41, at 350.

¹⁵⁰ *Id.*

¹⁵¹ See *supra* Part II.

¹⁵² See *supra* text accompanying note 21.

¹⁵³ See Fick, *supra* note 52, at 159-60.

¹⁵⁴ See Laurent, *supra* note 4, at 13. The term “grade levels” refers to the federal government’s system for determining compensation and benefit levels for its employees.

¹⁵⁵ See *id.*

grade levels 5, 7, and 9 longer than white men.¹⁵⁶ Furthermore, while minorities hold 29 percent of all government jobs, they fill just 10 percent of non-political senior level posts.¹⁵⁷

Lastly, by allowing majority members to challenge affirmative action programs more easily, courts would be allowing white plaintiffs to attack some of the very programs which have helped Blacks to make progress within the field of employment—the primary goal of Title VII.¹⁵⁸ As the Supreme Court stated in *Weber*, “[i]t would be ironic indeed if a law triggered by a Nation’s concern over centuries of racial injustice and intended to improve the lot of those who have ‘been excluded from the American dream for so long’ constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.”¹⁵⁹

In sum, in order to ensure fairness, courts must apply a different first prong of the *McDonnell Douglas* test to white plaintiffs. Applying the same standards to Blacks and Whites is only fair if one presumes that Blacks and Whites are treated equally by employers. As previous sections have shown, equal treatment does not always occur. The background circumstances requirement ensures that the circumstances for both traditional discrimination and reverse discrimination cases brought against white employers are similar.

IV. CONCLUSION

The courts should not apply the same *McDonnell Douglas* test to white and black plaintiffs in Title VII race discrimination cases. The conditions that existed during the creation of both Title VII and the *McDonnell Douglas* test still exist to a great extent today. Thus, the same force that was needed to combat racial discrimination against minorities in 1964 and 1973 is still necessary for combating such discrimination today. More so, these dismal conditions raise an important question as to whether the different standard applied to Whites is actually different at all. The background circumstances requirement or the modified first prong “merely substitutes for the minority plaintiff’s burden to show that he is a member of a racial minority.”¹⁶⁰

¹⁵⁶ See *id.* at 16.

¹⁵⁷ See *id.*

¹⁵⁸ See *supra* Part I.A.

¹⁵⁹ 443 U.S. 193, 204 (internal citations omitted) (quoting 110 Cong. Rec. 2552 (1964) (statement of Sen. Humphrey)); see also *supra* Section I.B.

¹⁶⁰ *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993).