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# IN DEFENSE OF *MCDONNELL DOUGLAS*: THE DOMINATION OF TITLE VII BY THE AT-WILL EMPLOYMENT DOCTRINE

CHUCK HENSON<sup>†</sup>

## INTRODUCTION

It has been said that within Title VII of the Civil Rights Act of 1964, Congress gave the moral principle of “equality” a foundation in national law.<sup>1</sup> Taken as a statement of Title VII’s purpose, such purpose anchors the persistent belief that Congress intended Title VII as a radical and permanent departure from the past. De jure and de facto discrimination and the rule of employment-at-will represent the past. Title VII

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<sup>1</sup> Robert Brookins, Hicks, *Lies, and Ideology: The Wages of Sin Is Now Exculpation*, 28 CREIGHTON L. REV. 939, 940 (1994) (“Title VII molded the basic moral principle of equal treatment into a national policy to eliminate employment discrimination.”); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 210 (1993) (“In passing Title VII of the Civil Rights Act, Congress stressed that equal employment opportunity is a basic right in this country. The legislature noted that the other civil rights the Act guaranteed would be meaningless without the right to ‘gain the economic wherewithal to enjoy or properly utilize them.’” (quoting H.R. REP. NO. 88-914 (1964))).

represents the achievement, or at a minimum, the path to the colorblind meritocracy envisioned at the time of its creation by dealing with chronic issues of unemployment, underemployment, segregation in employment, and unequal pay.<sup>2</sup> Title VII, however, has not served this purpose.<sup>3</sup> Those who believe that Congress had such a purpose for Title VII blame *McDonnell Douglas Corp. v. Green*<sup>4</sup> (“*McDonnell Douglas II*”) and the Supreme Court for emasculating Title VII in disparate treatment cases.<sup>5</sup> *McDonnell Douglas II*, however, is not responsible for the

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<sup>2</sup> Referring to the proposed Title VII of the Civil Rights Act, key legislators recognized that voting rights, school desegregation, and the desegregation of public accommodations had little meaning in the absence of jobs:

The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one's pockets are empty. The principle of equal treatment under law can have little meaning if in practice its benefits are denied the citizen.

H.R. REP. NO. 88-914, pt. 2, at 26 (1963). Unemployment, employment by occupation, and wage statistics showed nonwhite unemployment at more than twice the rate of white unemployment. *Id.* at 27–28.

<sup>3</sup> For example, in 1979, the continuing employment disparity led the United States Supreme Court to describe the purpose of Title VII as opening to blacks previously foreclosed employment opportunities, which was a foundation to the Court's decision to permit short-term private affirmative action in *United Steelworkers of America v. Weber*, 443 U.S. 193, 194 (1979). The Court in *Weber* specifically noted that the unemployment rates had not changed since Title VII became law in 1964: “The problem that Congress addressed in 1964 remains with us. In 1962, the nonwhite unemployment rate was 124% higher than the white rate.” *Id.* at 204 n.4. “In 1978, the black unemployment rate was 129% higher.” *Id.* Historically, black unemployment rates have continued to be twice as high as white unemployment rates. See U.S. Dep't of Labor, *Data Retrieval: Labor Force Statistics (CPS)*, BUREAU LAB. STAT., <http://www.bls.gov/webapps/legacy/cpsatab2.htm> (check box for “unemployment rate” under “not seasonally adjusted” column for the “White” and “Black or African American” subcategories; then select “Retrieve data”) (last modified July 8, 2015).

<sup>4</sup> 411 U.S. 792 (1973).

<sup>5</sup> The difficulty in proving disparate treatment is seen as a problem of interpretation rather than a fundamental problem with Title VII's structure. See also Judith Olans Brown et al., *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1487–88 (1997) (“Most recently, in 1992, we demonstrated how the federal courts, and particularly the Supreme Court, had significantly weakened Title VII of the Civil Rights Act of 1964 by construing procedural rules in a consistently pro-defendant manner.” (footnote omitted)); Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 315 (2010) (“Plaintiffs have a hard row to hoe in proving unlawful discriminatory bias. Without the smoking gun document, the blatant biased statement, or other direct evidence, plaintiffs must rely on a variety of factual circumstances to weave a story that convinces the fact-

weakness of disparate treatment claims. *McDonnell Douglas II* is the consequence of the course set by Title VII's authors: the Eighty-eighth Congress. What has gone unacknowledged if not unrecognized is the domination of the at-will employment doctrine ("Doctrine") over the creation of Title VII by the Eighty-eighth Congress and the Supreme Court's interpretation of Title VII. Despite the rhetoric,<sup>6</sup> because of the Doctrine's influence, Title VII did not supplant employment-at-will; Title VII was conceived in the shadow of employment-at-will. By design, Title VII is just an exception to the Doctrine. The Court's interpretation of Title VII conforms to its design. Thus, Title VII

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finder that an employer's actions constitute unlawful discrimination." See generally William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. REV. 81 (2009); Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109 (2007); Sandra F. Sperino, *Flying Without a Statutory Basis: Why McDonnell Douglas Is Not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743, 746 (2006); Jeffrey A. Van Datta, "Le Roi Est Mort; Vive Le Roi!": *An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa into a "Mixed Motives" Case*, 52 DRAKE L. REV. 71 (2003).

<sup>6</sup> See generally Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279 (1997). Professor Selmi has observed that the Supreme Court cannot see anything but the kind of discrimination that brought on the Civil Rights Act of 1964. See *id.* at 284, 335 ("Once the signs denominating 'colored' and 'white' facilities were taken down, it has been difficult for the Court to understand what legal problem remained."). Both Title VII's legislative history and the Court's pronouncements about Title VII's purpose are rich sources of rhetoric. See, e.g., *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984) ("The dominant purpose of the title, of course, is to root out discrimination in employment."); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982) ("The 'primary objective' of Title VII is to bring employment discrimination to an end . . ."); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 348 (1977) ("The primary purpose of Title VII was to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." (internal quotation mark omitted)); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977) ("The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment . . ."); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 (1976) ("The Act prohibits *All* racial discrimination in employment, without exception for any group of particular employees . . ." (emphasis added)); *Johnson v. Ry. Express Agency, Inc.* 421 U.S. 454, 457-58 (1975) ("It creates statutory rights against invidious discrimination in employment and establishes a comprehensive scheme for the vindication of those rights."); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) ("Congress enacted Title VII . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin."); *McDonnell Douglas Corp. v. Green (McDonnell Douglas II)*, 411 U.S. 792, 801 (1973) ("Title VII tolerates no racial discrimination, subtle or otherwise.").

has performed its intended and less heroic purpose of driving only the worst forms of discrimination out of the workplace or underground.

The purpose of this Article is to describe the actual relationship between the Doctrine and Title VII as implemented in the Court's disparate treatment decisions. Title VII and the Doctrine are not separate forces warring with each other. The at-will employment doctrine guided the Court's Title VII disparate treatment jurisprudence, giving the maximum possible latitude to employers because that was the Eighty-eighth Congress's intent.

Part I of this Article describes the at-will employment doctrine as part of the constitutionally protected freedom of contract.<sup>7</sup> This Article argues that the Doctrine's amazing power derives in part from its longevity but mainly from its status as a constitutionally protected freedom.<sup>8</sup> As to the latter point, this Article argues that a trilogy of Supreme Court decisions, *Lochner v. New York*,<sup>9</sup> *Adair v. United States*,<sup>10</sup> and *Coppage v. Kansas*,<sup>11</sup> emphasized the inviolability of the Doctrine and that future efforts to create new rights for employees necessarily resulted in weak exceptions to the Doctrine.<sup>12</sup> With due deference to the

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<sup>7</sup> As described in Part I, the Eighty-eighth Congress and the Court's statements and actions support the proposition that the at-will doctrine is a form of freedom of contract protected by the Fifth and Fourteenth Amendments, which provided the context for the crafting of a statutory limitation on that freedom in the form of Title VII.

<sup>8</sup> See *infra* Part I.

<sup>9</sup> 198 U.S. 45 (1905).

<sup>10</sup> 208 U.S. 161 (1908).

<sup>11</sup> 236 U.S. 1 (1915).

<sup>12</sup> The fact that the *Lochner* decision's hands-off stance to social legislation that impacts *laissez faire* economics has been repudiated does not appear to have impacted the point of *Lochner*: Individual liberty is a paramount constitutional concern encompassing all of the elements of the Doctrine. See generally *Lochner*, 198 U.S. 45. In *West Coast Hotel Co. v. Parrish*, the majority made a specific point that the legislation it approved—Washington state's minimum-wage law for women—impacted only what would be paid, not who would be hired or fired. 300 U.S. 379, 396–97 (1937) (“This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living.” (internal quotation mark omitted)). The more intimate personal decision of who would be hired, who would be fired, and for what reasons remained wholly intact.

repudiation of the principle of unfettered freedom of contract by the Court's 1937 decision in *West Coast Hotel Co. v. Parrish*,<sup>13</sup> employment-at-will remained untouched.

In Part II, this Article addresses the Doctrine's successful encounter with the National Labor Relations Act ("NLRA"). In Part II, this Article argues that the Doctrine remained largely intact because of its dominant position vis-à-vis the new rights conferred by the NLRA. Moreover, the encounter between the Doctrine and the NLRA informed Title VII's creation and interpretation fifty years later. The earliest versions of Title VII were meant to copy all of the features of the NLRA, including a quasi-judicial body with broad investigative and enforcement powers. Because of the encounter between the Doctrine and the NLRA, Title VII was passed with a powerless Equal Employment Opportunity Commission ("EEOC").

In Part III, this Article follows the Doctrine's dominant role in the creation of Title VII and the Court's disparate treatment jurisprudence. The focus of Part III is the *McDonnell Douglas II* decision's key role in perpetuating employment at-will's domination of Title VII. This Article argues that what has been described as an "escalating subordination of federal employment discrimination law to employment at will"<sup>14</sup> does not fully credit the Doctrine's dominant position as the context for the creation and interpretation of federal employment discrimination law. The Doctrine's dominance accounts for how little Title VII could achieve in light of the Doctrine's impact on the Eighty-eighth

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<sup>13</sup> 300 U.S. 379.

<sup>14</sup> William R. Corbett, *The "Fall" of Summers, The Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks*, 30 GA. L. REV. 305, 311 (1996) [hereinafter Corbett, *The "Fall" of Summers*]. Professor Corbett, for example, argues that the turning point in favor of at-will happened after *McDonnell Douglas II*. Thereafter, there has been an escalation of subordination. William R. Corbett, *Of Babies, Bathwater, and Throwing out Proof Structures: It Is Not Time To Jettison McDonnell Douglas*, 2 EMP. RTS. & EMP. POL'Y J. 361, 366–67 (1998) [hereinafter Corbett, *Of Babies*]; Corbett, *The "Fall" of Summers, supra*, at 332 ("The Supreme Court's subordination of employment discrimination law and its policies to the employment-at-will doctrine can be traced to its *Furnco* opinion in 1978."). This Article argues that *McDonnell Douglas II* was the point where the Court first described Title VII's subordinate position to the Doctrine and that rather than an escalation, there has been clarification. See *infra* Part III.A.

Congress and how the Court, starting with *McDonnell Douglas II*, acted to preserve the broadest latitude for employer decision-making.

### I. AT-WILL EMPLOYMENT—DOCTRINE OF POWER

The Doctrine permits an employer to fire an employee at any time “for good cause, for no cause or even for cause morally wrong, without being . . . guilty of [a] legal wrong.”<sup>15</sup> The Doctrine is more than a bland description of the employer’s right to fire an employee. At-will employment is a doctrine of power.<sup>16</sup> The Doctrine draws its strength from several sources: its longevity,<sup>17</sup> its role in a capitalist economy,<sup>18</sup> and its relationship

<sup>15</sup> *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519–20 (1884).

<sup>16</sup> Corbett, *The “Fall” of Summers*, *supra* note 14, at 307 (describing at-will employment as “the ultimate manifestation” of power, property, and prerogative).

<sup>17</sup> The issue of when at-will became a legal baseline in the American view of the relationship between employer and employee has been the subject of some dispute. Some prominent scholarship points to Horace G. Wood’s 1877 treatise as the origin of the American doctrine and the genesis of its adoption as American law—thus “Wood’s Rule.” Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 125 (1976); J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 (1974). Other scholarship questions whether to credit Wood with announcing a new rule. Compare Shapiro & Tune, *supra* (“H.G. Wood . . . formulated the employment at will rule in his 1877 treatise on master-servant relationships . . .”), with Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of “Wood’s Rule” Revisited*, 22 ARIZ. ST. L.J. 551, 558 (1990) (“Horace Wood did not make up the rule of employment at will. He just told it like it was.”). Other scholars, most notably Professor Deborah A. Ballam, have convincingly shown that the idea of the terminability of employment-at-will has always been part of American law. Deborah A. Ballam, *The Development of the Employment At Will Rule Revisited: A Challenge to Its Origins as Based in the Development of Advanced Capitalism*, 13 HOFSTRA LAB. L.J. 75, 86 (1995) (responding to Professor Feinman’s conclusion that at-will became the rule in New York in the late 1890s and stating that “New York always followed the employment at will doctrine”); Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-at-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91, 94 (1996) (“[A]bsent a contract to the contrary, employers in this country have always had the ability to terminate employees at will.”).

<sup>18</sup> The economic rationale for the Doctrine has been consistent: “[T]ermination at will is the law’s development of a fundamental principle of the economy.” Feinman, *supra* note 17, at 118.

to freedom.<sup>19</sup> Of these sources of power, the Doctrine, as a constitutionally protected freedom of contract, provides a direct link to Title VII's creators.<sup>20</sup>

Of the “freedoms” in American law, a central freedom is individual autonomy. In contrasting types of freedom, for example, Eric Foner juxtaposes the autonomy of the individual, liberal freedom with Republican freedom.<sup>21</sup> Liberal freedom as personal autonomy shields economic activity from governmental interference.<sup>22</sup> Republican freedom represents willingness to subordinate personal autonomy to the public good.<sup>23</sup> According to Foner, “Individual self-fulfillment, unimpeded by government, would become a central element of American freedom.”<sup>24</sup> This form of freedom manifested in the workplace in the mid-1800s as factories and unskilled labor supplanted small workshops and skilled artisans. Individuals exercised their freedom by entering into voluntary agreements to work for employers.<sup>25</sup> Employers exercised their freedom by agreeing to the employment and setting its terms.<sup>26</sup>

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<sup>19</sup> ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 8 (2006) (“The public good was less an ideal to be consciously pursued by government than the outcome of free individuals’ pursuit of their myriad private ambitions.”) (describing the distinction between competing ideologies of freedom at the time of the American Revolution, thereby highlighting what would become the dominant concept of freedom).

<sup>20</sup> Senators debating Title VII in April 1964 specifically raised an employer’s right to hire and fire at-will as a reason not to pass Title VII. *See* 110 CONG. REC. 7253 (1964) (statement of Sen. Ervin) (“The bill is designed to compel employers to hire nonwhites in specific cases, whether they wish to hire them or not; is it not?”); *id.* at 7257 (statement of Sen. Ervin) (“I want those who are engaged in business to be allowed to determine whom they shall employ. . . . I believe in free enterprise—not bureaucratic control of business. The pending bill would remove the power from employers to hire, promote, and discharge their own employees.”); *id.* at 7267 (statement of Sen. Morton) (“The right to fire, it seems to me, is an important right.”) (noting that the abridgment of that right because individuals thought they had been discriminated against would lead to the downfall of American industry).

<sup>21</sup> FONER, *supra* note 19.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 7–8.

<sup>24</sup> *Id.* at 20. Professor Richard A. Epstein makes the same argument: Personal autonomy equals freedom. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 3 (1992) (“An antidiscrimination law is the antithesis of freedom of contract, a principle that allows all persons to do business with whomever they please for good reason, bad reason, or no reason at all.”).

<sup>25</sup> FONER, *supra* note 19, at 59.

<sup>26</sup> *Id.*

As a central element of American freedom, between 1890 and 1910, it has been said that "at-will" began to take on the name of "freedom of contract."<sup>27</sup> The Court's 1905 decision in *Lochner v. New York*<sup>28</sup> set the stage for employers by invalidating a New York labor law that prohibited employers of bakers from requiring bakers to work more than sixty hours per week on the grounds that the law violated the Fourteenth Amendment's liberty interest of freedom of contract.<sup>29</sup> The *Lochner* Court determined that "[t]here is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker."<sup>30</sup> Indeed, the *Lochner* majority strongly signaled its disagreement with the idea of any interference in the terms on which people might agree to purchase and sell labor.<sup>31</sup>

The *Lochner* Court also crafted its decision as if employers and employees were equal bargaining partners.<sup>32</sup> The Court maintained this pretense of equality in two *Lochner*-era labor cases: *Adair v. United States*<sup>33</sup> and *Coppage v. Kansas*.<sup>34</sup> In *Adair*, the Louisville & Nashville Railroad Company fired a locomotive fireman solely because of his union membership. The termination involved a federal law applicable to railway employers prohibiting them from discriminating against employees because of union membership.<sup>35</sup> In other words, the statute created a protected class based on voluntary union

<sup>27</sup> Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. 85, 116 (1982).

<sup>28</sup> 198 U.S. 45 (1905).

<sup>29</sup> *Id.* at 52-53 ("The right to purchase or to sell labor is part of the liberty protected by [the Fourteenth Amendment] . . .").

<sup>30</sup> *Id.* at 57.

<sup>31</sup> *Id.* at 63 ("This interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase."); *id.* at 61 ("Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddling interferences with the rights of the individual . . ."). As Justice Holmes's dissent recognized, *Lochner* went well beyond working-hour limits for bakers in establishing laissez-faire as the economic theory of the Constitution. *Id.* at 75 (Holmes, J., dissenting).

<sup>32</sup> *Id.* at 61 (majority opinion) ("The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best . . .").

<sup>33</sup> 208 U.S. 161 (1908).

<sup>34</sup> 236 U.S. 1 (1915).

<sup>35</sup> *Adair*, 208 U.S. at 167-69.

membership and curtailed the employer's right to terminate employment because of union membership. The *Adair* Court recognized that freedom of contract was a liberty interest under the Fifth Amendment and held the federal law prohibiting the termination of an employee because of union membership unconstitutional because of the at-will nature of the employment.<sup>36</sup> In doing so, the Court gave the following description of the nature of the at-will employment relationship:

[I]t is not within the functions of government . . . to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. . . . In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract *which no government can legally justify in a free land*.<sup>37</sup>

In 1915, the *Coppage* decision amplified the *Adair* holding by rendering unconstitutional state legislation that impinged on at-will prerogatives when the issue involved union membership.<sup>38</sup> Moreover, the *Coppage* Court elevated at-will employment to the highest rank of constitutional liberty and property interests.<sup>39</sup> In *Coppage*, the employer fired an employee because he refused to sign a contract to leave his union.<sup>40</sup> The State of Kansas prosecuted the termination under a state statute making it unlawful for any employer "to coerce, require, demand, or influence any person or persons to enter into any agreement, either written or verbal, not to join or become or remain a member of any labor organization or association, as a condition of such person or persons securing employment, or

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<sup>36</sup> *Id.* at 175–76.

<sup>37</sup> *Id.* at 174–75 (emphasis added). Equally noteworthy, given the protections that were ultimately granted on the basis of voluntary or involuntary class membership in the National Labor Relations Act and Title VII, the *Adair* Court implied that class-based legislation was iniquitous and likely never within Congress's Commerce Clause powers. *Id.* at 179–80.

<sup>38</sup> *Coppage*, 236 U.S. at 26.

<sup>39</sup> *Id.* at 14.

<sup>40</sup> *Id.* at 7.

continuing . . . employment."<sup>41</sup> The Court held the state law unconstitutional under the Fourteenth Amendment.<sup>42</sup>

The most striking feature of *Coppage* is the extent to which the Court elevated at-will employment in the spectrum of constitutional freedoms and the complete denigration of the existence of any constitutional protection for membership in a union. In defense of the at-will principle the Court declared:

The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. *Chief among such contracts is that of personal employment*, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; *for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.*<sup>43</sup>

As to any protection that might be afforded union membership, the Court determined, "if freedom of contract is to be preserved, the employer must be left at liberty to decide for himself whether [union] membership by his employee is consistent with the satisfactory performance of the duties of the employment."<sup>44</sup> Indeed, true freedom of contract required employers to know through open and frank dealings whether an employee belonged to a union,<sup>45</sup> and for an employer to demand that an employee abjure unionism as a condition of employment "is not to ask him to give up any part of his constitutional freedom."<sup>46</sup>

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<sup>41</sup> *Id.* at 6.

<sup>42</sup> *See id.* at 13.

<sup>43</sup> *Id.* at 14 (emphasis added).

<sup>44</sup> *Id.* at 19.

<sup>45</sup> *Id.* at 20 ("And the liberty of making contracts does not include a liberty to procure employment from an unwilling employer . . .").

<sup>46</sup> *Id.* at 21. The *Coppage* Court's discussion of the employer's right to know whom he employed deserves some emphasis. In 1915, it was perfectly appropriate for an employer to ask about union involvement and fire an employee for refusing to quit the union. In other words, disloyalty to the employer fit within the fair exercise of the employer's freedom because of the at-will doctrine. In 1973, the Court in *McDonnell Douglas II* discussed disloyalty as a legitimate nondiscriminatory reason for refusing to hire Green. *See* discussion *infra* Part III.B.

Although the Court's 1937 decision in *West Coast Hotel v. Parrish* diluted the full strength of Lochnerian freedom of contract that flows through *Adair* and *Coppage*, it left the most intimate aspects of the decision to hire and fire wholly intact. Repudiating but not overruling *Lochner*, the *West Coast Hotel* Court declared that freedom of contract was not unfettered.<sup>47</sup> On the other hand, in declaring that a minimum wage law was not an unconstitutional deprivation of liberty, the Court clarified that setting a minimum wage was not an infringement on the right to hire or fire at-will: "This statute does not compel anybody to pay anything."<sup>48</sup> The statute only set the minimum wage if a willing buyer and seller of labor made an agreement.<sup>49</sup> This language paraphrases the *Coppage* Court's declaration that "the liberty of making contracts does not include a liberty to procure employment from an unwilling employer."<sup>50</sup> After *West Coast Hotel*, the ability to hire and fire at will remained constitutionally protected.

## II. THE DOCTRINE ENCOUNTERS THE NATIONAL LABOR RELATIONS ACT—A DRESS REHEARSAL FOR TITLE VII

The New Deal's National Labor Relations Act<sup>51</sup> ("NLRA") challenged the complete domination of the constitutional right of freedom of contract in the form of the at-will employment doctrine.<sup>52</sup> The NLRA's apparent onesidedness seemed to repudiate the principles of *Adair* and *Coppage* by creating an imbalance in the complete equality of right to set the terms of a labor bargain.<sup>53</sup> Regardless of whether Congress intended the complete repudiation of *Adair* and *Coppage*,<sup>54</sup> the 1937 *NLRB v.*

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<sup>47</sup> *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391–92 (1937).

<sup>48</sup> *Id.* at 396 (quoting *Adkins v. Children's Hosp.*, 261 U.S. 525, 570 (1923) (Holmes, J., dissenting)) (internal quotation mark omitted).

<sup>49</sup> *Id.*

<sup>50</sup> *Coppage*, 236 U.S. at 20.

<sup>51</sup> 29 U.S.C. §§ 151–69 (2012).

<sup>52</sup> Corbett, *The "Fall" of Summers*, *supra* note 14, at 318–20.

<sup>53</sup> See *supra* text accompanying notes 36–43.

<sup>54</sup> JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 44–66 (1983) (discussing how the NLRA's apparent onesidedness in favor of employees was balanced by certain limitations on protections for concerted activities, particularly the subjectivity which Congress invited the courts to employ in construing section 7 which made striking a legal form of bargaining over the terms of employment).

*Jones & Laughlin Steel Corp.*<sup>55</sup> and the 1938 *NLRB v. Mackay Radio & Telegraph Co.*<sup>56</sup> decisions showed that the NLRA was not really that much of a challenge for the Doctrine.<sup>57</sup>

In *Jones*, a divided Court upheld the NLRA as a proper exercise of Congress's Commerce Clause power.<sup>58</sup> However, *Jones* left *Adair* and *Coppage* in place.<sup>59</sup> Consistent with the *West Coast Hotel* decision, according to the *Jones* Court, the character of the NLRA, which did not attempt to compel agreements between employers and employees, made *Adair* and *Coppage* inapposite. In words that the Eighty-eighth Congress would echo almost fifty years later in defining the scope of the EEOC's authority under Title VII,<sup>60</sup> the *Jones* Court reassured employers of the limits of the NLRA and of the National Labor Relations Board ("NLRB"):

*The act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion.*<sup>61</sup>

*Jones*, on its face, guarantees not only the continued vitality of at-will, but promises that the Court would take a protectionist view of the at-will power.

<sup>55</sup> 301 U.S. 1 (1937).

<sup>56</sup> 304 U.S. 333 (1938).

<sup>57</sup> Both Professor Corbett and Professor Atleson discuss the tension between the at-will doctrine and the NLRA in decisions starting with *Mackay Radio* in 1938, but neither focuses on the Court's 1937 *Jones & Laughlin Steel Corp.* decision as the roadmap for what was to come.

<sup>58</sup> *Jones & Laughlin Steel Corp.*, 301 U.S. at 31–43.

<sup>59</sup> *Id.* at 45.

<sup>60</sup> See H.R. REP. NO. 88-914, pt. 2, at 29 (1963) ("Similarly, management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.")

<sup>61</sup> *Jones & Laughlin Steel Corp.*, 301 U.S. at 45–46 (emphasis added). The *Jones* Court also seemed to foreshadow and highlight its view of the narrow scope of the NLRA when it added, "It would seem that when employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge." *Id.* at 46.

A year later, in *Mackay Radio*, the Court honored its promise.<sup>62</sup> The Court protected the employer's right of selection and discharge by authorizing employers to offer permanent employment to strike-breakers, those who the NLRB could not require an employer to discharge in favor of returning economic strikers.<sup>63</sup> The key language identifying the Court's basic assumption about the NLRA is the Court's statement that, although the NLRA prohibits interference with the right to strike, "it does not follow that an employer . . . has lost the *right to protect and continue his business* by supplying places left vacant by strikers."<sup>64</sup>

The employer's "right to protect and continue his business" assumes an employer specific set of rights, which runs directly from *Lochner*, *Adair*, and *Coppage*. Although the rights may be camouflaged or appear under an alias,<sup>65</sup> the disguises of these employer-specific rights are reasonably penetrable. As to the scope of the right, it is so broad and powerful that no federal enactment can truly interrupt "the normal exercise of the right of the employer to select its employees or to discharge them."<sup>66</sup> Accordingly, rather than assuming that a new federal "right" requires the given context to make an accommodating adjustment, the reverse is true. New "right" is by nature fragile and the new "right" will be accommodated to give the existing constitutional freedom the broadest possible scope. The NLRA did not really challenge existing management prerogatives, and, as this Article argues below, by design, neither did Title VII.

### III. AT-WILL'S DOMINATION OF TITLE VII

Title VII disparate-treatment jurisprudence favors the at-will employment principle of broad employer discretion. So, rather than a remedial statute, broadly construed to advance equality, Title VII is most accurately seen as a limited incursion on employer's discretion. Short of direct evidence of discrimination, "the normal exercise of the right of the employer

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<sup>62</sup> See generally *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

<sup>63</sup> *Id.* at 345–46. It is now axiomatic that *Mackay Radio* effectively distorted, if not destroyed, the NLRA's protection of the right to strike by depriving the economic strike of any potency. ATLESON, *supra* note 54, at 19.

<sup>64</sup> *Mackay Radio*, 304 U.S. at 345 (emphasis added).

<sup>65</sup> *Id.*; Corbett, *The "Fall" of Summers*, *supra* note 14, at 308.

<sup>66</sup> *Jones & Laughlin Steel Corp.*, 301 U.S. at 45–46.

to select its employees or to discharge them”<sup>67</sup> has not changed. In reality, Title VII was never more than “just another tort *exception* to employment at will.”<sup>68</sup>

### A. *At-Will's Domination of Title VII—Legislative History*

The Eighty-eighth Congress set Title VII's initial limits as an exception to the Doctrine in 1964. Most scholarship overlooks this fact, or fails to recognize its significance.<sup>69</sup> The holes in scholarship may also be “[b]ecause employment at will often is referred to by one of its many aliases, such as management prerogatives, it has not always been recognized.”<sup>70</sup> Nevertheless, the fact remains that Congress subordinated Title VII to at-will employment by specific intent *ab initio*.

The Eighty-eighth Congress literally stole the Court's lines from *Jones*, promising to protect “the normal exercise of the right of the employer to select its employees or to discharge them.”<sup>71</sup> Accordingly, as Title VII left the House of Representatives for the Senate in late 1963, Congress emphasized the limits on the EEOC and the scope of Title VII:

It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions. Similarly, management prerogatives, and union freedoms are to be left undisturbed to

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<sup>67</sup> *Id.* at 45.

<sup>68</sup> Corbett, *The “Fall” of Summers*, *supra* note 14, at 311. Title VII's status as an icon of the civil rights era seems to be responsible for the fact that very few acknowledge Title VII for what it is. Those who realize that *McDonnell Douglas II* is correct do so with anguish. *See generally* McGinley, *supra* note 1, at 231.

<sup>69</sup> Corbett, *The “Fall” of Summers*, *supra* note 14, at 312–14 (“[T]he hoary doctrine is on the offensive against federal employment discrimination law, rapidly regaining whatever territory was once taken from it by the federal statutes.”) (taking the perspective that the at-will doctrine is uncommonly resilient in the face of laws like Title VII and wondering at the source of the doctrine's strength). Professor Corbett is not commenting on the impact of at-will on the abysmal success rates of race and national origin discrimination cases under Title VII. Rather, the issue is more general, and Professor Corbett points out, but does not really define, the borders of the territory Title VII conquered by at-will.

<sup>70</sup> *Id.* at 308.

<sup>71</sup> *See Jones & Laughlin Steel Corp.*, 301 U.S. at 45–46; *see also supra* note 60 and accompanying text.

the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.<sup>72</sup>

This description of the primacy of at-will employment captures the narrow scope Congress intended for legitimate EEOC action and the narrow scope of Title VII itself. The use of well-known aliases, “management prerogatives,” and “internal affairs of employers” affirmed at-will as the dominant context in which Title VII should function. Should there be confusion about the “abuse” Congress intended Title VII to correct, “to the limited extent that correction is required” Congress defined “abuse” as “the most serious type[] of discrimination.”<sup>73</sup> This language is the better source for an accurate statement of purpose for Title VII; there is no rhetoric or wishful thinking—both of which, overtime, have superimposed a purpose unrelated to the mandate Title VII’s designers imbedded in its structure. The purpose of Title

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<sup>72</sup> H.R. REP. NO. 88-914, pt. 2, at 29 (1963).

<sup>73</sup> *Id.* at 18, 29. The Civil Rights Act of 1964 has no preamble stating its purpose, and neither do any of its component Titles. A statement of the purpose and content of the legislation that would become the Act comes from House Report 914, November 20, 1963 on House Resolution 7152. According to the report, “The bill, as amended, is designed primarily to protect and provide more effective means to enforce the civil rights of persons within the jurisdiction of the United States.” *Id.* at 16. The General Statement to the report describes the House Report:

H.R. 7152 . . . is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope.

No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.

It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination. This H.R. 7152, as amended, would achieve in a number of related areas. . . . [i]t would prohibit discrimination in employment . . . .

*Id.* at 18. The report’s section-by-section analysis of Title VII states: “The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin.” *Id.* at 26. See generally Selmi, *supra* note 6, at 284, 335. Professor Selmi has observed that the Supreme Court cannot see anything but the kind of discrimination that brought on the Civil Rights Act of 1964. *Id.* (“Once the signs denominating ‘colored’ and ‘white’ facilities were taken down, it has been difficult for the Court to understand what legal problem remained.”).

VII is not the eradication of employment discrimination in general. Title VII's purpose is the eradication of the most serious discrimination and the retention of employer discretion. Having outlined this purpose for Title VII, Congress assured that Title VII would remain true to its purpose by limiting Title VII's enforcement agency, the EEOC, and by failing to deal with the issue of causation in any way that would have created a truly new "right" beyond the Doctrine's reach.<sup>74</sup>

The form and function of the NLRB influenced Congress to minimize the power of the EEOC as an enforcement agency. For example, the initial proposal for what became Title VII was practically a carbon copy of the NLRA.<sup>75</sup> It included a quasi-judicial administrative body, like the NLRB, with power to adjudicate claims and enforce compliance.<sup>76</sup> Apparently mindful of arguments that the NLRB's powers unconstitutionally transgressed the Seventh Amendment,<sup>77</sup> however, legislators early and successfully advocated for a powerless EEOC.<sup>78</sup>

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<sup>74</sup> The author picked the form of the EEOC and the issue of causation as the issues that most readily expose the historical continuity of the at-will doctrine's influence on federal fair employment practices legislation. Given constraints of space, the author chose not to discuss the other manifestations of congressional intent to limit Title VII's impact on traditional management prerogatives and union freedoms such as the right to test, the preservation of union seniority, the prohibition against quotas, and the decision to limit Title VII to future wrongs. For a more detailed discussion of these issues, see generally Chuck Henson, *Title VII Works—That's Why We Don't Like It*, 2 U. MIAMI RACE & SOC. JUST. L. REV. 41 (2012).

<sup>75</sup> Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOK. L. REV. 62, 85 (1964).

<sup>76</sup> H.R. REP. NO. 88-914, pt. 2, at 29 (1963).

<sup>77</sup> In *Jones*, one of the challenges to the constitutionality of the NLRA was that the NLRB deprived employers of the right to a jury trial because the challenged NLRB order not only reinstated employees, but also granted them back pay. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937). The *Jones* Court reasoned that because the back pay award was incident to equitable relief the Seventh Amendment did not apply. *Id.* at 48–49.

<sup>78</sup> The author quotes legislative history when describing how the legislature rejected an EEOC that operated like the NLRB:

The historic safeguard of trial before an impartial judiciary would be abandoned in this bill by the majority in favor of hearings before a newly created NLRB-type administrative tribunal, with only a limited right of review in a court of appeals. It is unfortunate that the committee in its zeal to protect one civil right has seen fit, unnecessarily, to cast aside other fundamental and well-established rights which are at least of equal importance.

Henson, *supra* note 74, at 71 n.145 (internal quotation marks omitted). "We regard the modern development of trial by administrative tribunal as a threat to the

As to creating a new “right” beyond the Doctrine’s reach, Congress ultimately did nothing. Accepting the premise that “any or no reason” defines the Doctrine’s reach for hiring, promoting, and firing, a new “right” of equal or greater power needed to either limit the Doctrine’s application to white men or replace the Doctrine altogether if Title VII’s purpose was to eradicate employment discrimination in general. Exempting all but white males from the Doctrine was never proposed as a solution,<sup>79</sup> nor was replacing the Doctrine altogether.

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liberties of every citizen. It is a reactionary device in the truest sense of that word.” *Id.* (internal quotation marks omitted). By the time Title VII left the House of Representatives for the Senate in late 1963, the House had already emasculated the EEOC, limiting its role to investigation and conciliation. Discussing the reasons for depriving the EEOC of quasi-judicial powers, the representatives noted that their version of Title VII gave employers and unions “a fairer forum to establish innocence” with the federal judiciary as the final arbiter of discrimination. H.R. REP. NO. 88-914, pt. 2, at 29 (1963). The choice between a quasi-judicial EEOC and the federal judiciary has a peculiar significance in the protection of at-will’s primacy. A crusading EEOC could have ignored the common law given a broad mandate to eliminate employment discrimination. On the other hand, for judges, at-will was the context in which their decisions were regularly made. Accordingly, the designation of courts as the final authority on the existence of discrimination emphasized at-will’s primacy under the alias of “a fairer forum.” *See id.*

<sup>79</sup> Such a solution ran contrary to the idea of a colorblind meritocracy and would have called for the kinds of special treatment or favoritism for blacks that legislators expressly disavowed to preserve the ability to pass the Civil Rights Act of 1964 into law. *See Civil Rights Act of 1963: Hearings on H.R. 7152 Before the H. Comm. on the Judiciary*, 88th Cong. 2769 (1963) (noting that, when questioned about preferential treatment and quotas, Attorney General Robert F. Kennedy specifically testified that there was no intent “to grant any preferential treatment to Negroes”); 110 CONG. REC. 7253 (1964) (statement of Sen. Ervin) (“The bill is designed to compel employers to hire nonwhites in specific cases, whether they wish to hire them or not; is it not?”); *id.* (statement of Sen. Case) (“It does not require anybody to hire a particular individual. It does not require anybody to hire someone who cannot do the job necessary.”); *id.* at 7267 (statement of Sen. Ellender) (“It is obvious from this case and all that has gone before it that the Negroes are not interested in equal employment opportunity, but in effect desire preferred treatment.”). As the Senate prepared to vote on the final version of H.R. 7152, which would become the Civil Rights Act of 1964, Senator Williams caused his correspondence with one of the chief proponents of H.R. 7152, Senator Dirksen, to be printed in the Congressional Record. *Id.* at 14,329. Senator Williams asked Senator Dirksen three questions about whether Title VII required quotas. Senator Dirksen responded, “The Senate substitute bill expressly provides that an employer does not have to maintain any employment ratio, regardless of the racial ration in the community.” *Id.* (“Under the Senate substitute bill an employer is not required to hire any person who is less qualified than other job applicants. . . . The Senate substitute bill does not affect the right of an employer to discharge inefficient employees, regardless of their race and of the effect of the discharge on the racial balance in his employment.”); *id.* at 12,723 (noting that Senator Humphrey’s remarks concerning persistent claims that Title

Prior to 1963, Congress attempted one large-scale federal effort at creating a new employment right. That effort was the NLRA. The NLRA, however, did not replace the Doctrine. According to the *Jones* Court, at-will remained entirely whole unless and until the NLRB proved that the employer's decision was actually a pretext for intimidation or coercion related to the exercise of an employee's rights under the NLRA.<sup>80</sup> The Doctrine, therefore, remained the same with the minor addition of "except" where the NLRB proved that "any reason or no reason" was actually hiding an anti-union motivation. What the NLRA did provide for was the exercise of the freedom of contract where parties of more or less equal power could bargain to replace the Doctrine. That unions could convince management to agree to termination "for cause" and give up the right to termination for "any or no reason" was a creature of the voluntary agreement between management and labor under the NLRA's shadow, not a statutory carve-out or displacement of the Doctrine.<sup>81</sup>

To the degree that the NLRA was an example of how Congress might have created a specific replacement for the Doctrine, the Eighty-eighth Congress followed the NLRA's example and left the Doctrine intact despite two opportunities to limit the Doctrine's impact on Title VII. One opportunity to limit at-will's reach would have been defining discrimination in the text of the statute to require objective grounds for employment decisions. The second opportunity to limit the Doctrine would have been to describe causation so that every employment decision, from hiring to firing, had to be justified as being made for cause.

A definition of discrimination that would have made an employer liable for "nonobjective behavior" was proposed:

A simple definition is sufficient. Let us refer to employment discrimination as any nonobjective behavior on the part of an employer toward an employee or potential employee, which reflects some intuitive negative evaluation (prejudice) of the

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VII required racial balancing or preferential treatment had been addressed by the inclusion of a specific statement in Title VII that it did not require quotas or preferences).

<sup>80</sup> *Jones & Laughlin Steel Corp.*, 301 U.S. at 45-46.

<sup>81</sup> *Id.* at 45 ("The [NLRA] does not compel agreements between employers and employees. It does not compel any agreement whatever.").

employee's race to the extent that the employer, when confronted with a manpower need, will either not use the employee, underutilize him and/or undercompensate him.<sup>82</sup>

Congress did not adopt this definition.

The Eighty-eighth Congress also had the opportunity to limit the Doctrine when for cause became a part of the debate over how an applicant or employee might successfully achieve a job, promotion, reinstatement, and back pay, hereinafter "meaningful relief," in compensation for unlawful discrimination. To paraphrase, under an early version of section 706(g), a claimant could not receive meaningful relief if the adverse employment decision was "for any reason other than discrimination on account of race."<sup>83</sup> In a subsequent iteration, section 706(g) read that no court could award meaningful relief if the adverse employment decision was "for cause."<sup>84</sup> In its final iteration in the House, one of Title VII's sponsors amended section 706(g) to replace "cause" with "any reason other than discrimination on account of race."<sup>85</sup> In other words, an employer avoids an award of meaningful relief by having "any reason" for an adverse employment decision where a claimant cannot prove the decision was "on account of race."<sup>86</sup> This conclusion fits within Title VII's

<sup>82</sup> *Equal Employment Opportunity Hearings Before the Gen. Subcomm. on Labor of the Comm. on Educ. & Labor*, 88th Cong. 203–04 (1963) (testimony of Walter B. Lewis, Director, Job Development, Washington Urban League).

<sup>83</sup> STAFF OF H.R. COMM. ON THE JUDICIARY, 88TH CONG., REP. ON CIVIL RIGHTS ACT OF 1964 at 86 (Comm. Print 1963).

<sup>84</sup> H.R. REP. NO. 88-914, pt. 1, at 12 (1963).

<sup>85</sup> 110 CONG. REC. 2567 (1964). Representative Celler explained the amendment was made "to specify cause" to assure that a court "cannot find any violation of the act which is based on facts other—and I emphasize 'other'—than discrimination on the grounds of race." *Id.*

<sup>86</sup> The paucity of legislative history on this particular language in H.R. 7251 has been cause for confusion. The language could be read to mean that unless claimants proved that race, for example, was the only reason for the adverse decision, they would receive no meaningful relief. Once H.R. 7152 reached the Senate, an effort was made to clarify that a section 703 unfair employment practice arose "solely because of" a proscribed characteristic. 110 CONG. REC. 13,837–38 (1964). Senator McClellan of Arkansas proposed adding the language "solely" so that section 703 would not "be a dragnet, a catchall, to leave something uncertain for a court to interpret." *Id.* at 13,837 (internal quotation marks omitted). In support, Senator Long of Louisiana explained:

I cannot for the life of me understand why someone would want to insist on leaving out the word 'solely,' because my impression was that if it were desired to hire someone because he was a brother-in-law or a first cousin, a person could not complain that he failed to get the job because of his race.

purpose as described by Congress—the elimination of the worst kinds of discrimination and the preservation of the maximum extent of management discretion in decision making.

*B. The Doctrine's Domination of Title VII—Griggs and McDonnell Douglas II*

In 1973, the Supreme Court decided its first disparate treatment case, *McDonnell Douglas Corp. v. Green*.<sup>87</sup> In that case, the Court created the infamous burden shifting analysis. With minimum factual allegations, the prima facie case, a claimant could establish a rebuttable presumption of discrimination subject to an employer's assertion of a legitimate, nondiscriminatory reason for the adverse employment decision.<sup>88</sup> In light of the history of the Doctrine's dominant position, express legislative intent to maintain that dominance, and specific statutory language prohibiting the award of meaningful relief where race is not the only reason for an adverse decision, the burden shifting analysis and its results were inevitable.

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*Id.* Senator Lausche from Ohio agreed with Senator Long that the addition of the word solely was a mere clarification that the phrase "because of" really meant "only because of." See *id.* at 13,837–38. Because the Senate did not add the word solely to Title VII, it has been argued that sole causation could not have been Congress's intent. See Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 296–97 (1982). That argument, however, is based on the distinction between what the author calls meaningful relief, also known as affirmative relief, and injunctive or negative relief, or what the author calls meaningless relief: No injunctive relief under Title VII in this context would ever pay the rent or put food on the table. Nevertheless, proof in a mixed motives case would allow for injunctive relief; thus, the absence of sole causation was never a bar to all relief. Although the Senate rejected "solely because of," no Senator ever told the Senator from Louisiana that he misunderstood Title VII. See 110 CONG. REC. 13,837–38 (1964). In fact, amendments in the Senate actually diminished Title VII's ability to contest the at-will doctrine's domination of the employment relationship. See Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1471–72 (2003) (concluding that the primary work of the pivotal legislators in the Senate was to blunt the impact of Title VII on the north, where their constituencies dominated job opportunities, both management and labor, and discrimination was de facto rather than de jure).

<sup>87</sup> 411 U.S. 792 (1973).

<sup>88</sup> *Id.* at 802–03.

Nevertheless, *McDonnell Douglas II* has been and continues to be the subject of intense criticism. Among other reasons,<sup>89</sup> academics and jurists fault the Court for creating the burden-shifting device when there was no need.<sup>90</sup> This criticism ignores how the lower courts actually implemented their understanding of Title VII before 1973. They were already engaging in a method of analysis similar to burden shifting by giving due emphasis to the reasons employers voiced to defend their employment decisions and weighing the plaintiff's prima facie case in light of the employer's rationale.<sup>91</sup> The criticism also

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<sup>89</sup> Other principal criticisms of *McDonnell Douglas II* are that it diverts courts from the issue of discrimination, that there was no statutory basis for the Court's interpretation of Title VII and that it sets up an illusory distinction between direct and indirect evidence which makes disparate treatment cases unnecessarily difficult to prove. See Sandra F. Sperino, *Flying Without a Statutory Basis: Why McDonnell Douglas Is Not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743, 762 (2006); Timothy M. Tymkovich, *The Problem with Pretext*, 85 DENV. U. L. REV. 503, 519–24 (2007).

<sup>90</sup> This argument might be summarized as asserting that the parties, the district courts, and the circuit courts were doing just fine trying disparate treatment cases without the burden shifting format.

<sup>91</sup> See *Hodgson v. First Fed. Sav. & Loan Ass'n*, 455 F.2d 818, 822 (5th Cir. 1972) ("In discrimination cases the law with respect to burden of proof is wellsettled. The plaintiff is required only to make out a prima facie case of unlawful discrimination at which point the burden shifts to the defendant to justify the existence of any disparities."). *Hodgson*, an age-discrimination case, was unique in that the employer asserted legitimate nondiscriminatory reasons for failing to hire as affirmative defenses. See also *Parham v. Sw. Bell Tel. Co.*, 433 F.2d 421, 425 (8th Cir. 1970) ("To rebut testimony from specific black applicants for employment introduced by [the plaintiff], the Company produced evidence tending to show valid business reasons supporting its refusal to hire each of them."); *Aros v. McDonnell Douglas Corp.*, 348 F. Supp. 661, 667 (C.D. Cal. 1972) (concerning a defendant rebutting a prima facie case of sex discrimination based on hair length by asserting that failure to hire long-haired student interns was based on poor overall grooming and slack performance and defendant's decision to phase out the student program for business reasons); *Gates v. Georgia-Pacific Corp.*, 326 F. Supp. 397, 399 (D. Or. 1970) ("After the plaintiff's circumstantial evidence has made a prima facie case of discrimination, it was in order to look to the defendant for an explanation."). Admittedly, the early cases demonstrate a certain amount of confusion. In some cases, plaintiffs attempt to prove that race, age, or gender was the sole cause of the adverse employment action. Courts responded by finding that a proscribed characteristic only needed to be the principal cause. There appear to be no cases where a defendant formally assumed a burden of proof for their legitimate nondiscriminatory reason, except where, possibly in confusion, a defendant pled its reasons as an affirmative defense. See *Hodgson*, 455 F.2d at 822 (concerning an employer asserting legitimate nondiscriminatory reasons, that the job was too strenuous, and that the plaintiff agreed that the plaintiff was not qualified because the job was too strenuous, as affirmative defenses). Accordingly, as with the modern legitimate nondiscriminatory reason, courts merely required the defendant to

completely ignores the impact of *Griggs v. Duke Power Co.*<sup>92</sup> on disparate treatment cases. The *Griggs* decision interrupted the normal development of Title VII as a limited exception to at-will employment in disparate treatment cases. The reaction to *Griggs* in the lower courts required the Court's *McDonnell Douglas II* decision to realign disparate treatment jurisprudence with congressional intent and specific statutory language.

### 1. Any or No Reason—Disparate Treatment Before *Griggs*

In a number of pre-1973 disparate treatment cases,<sup>93</sup> lower courts highlighted Title VII's limited power to circumscribe employer decision-making: "It must be remembered that so far as the Civil Rights Act goes, the employer may discharge or refuse to reemploy *for any reason*, except discrimination or because of practices made unlawful under Title VII."<sup>94</sup> At-will was present under the alias of "for any reason." Reasons which defendants asserted as not discriminatory included nonviolent unlawful protest against an employer,<sup>95</sup> "inability" to get along with others,<sup>96</sup> "lax attitude" toward work,<sup>97</sup> reliance on bad

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respond to the plaintiff's case based on better access to the reasons for adverse employment action. *Id.* ("Once the plaintiff has made out his prima facie case we look to the defendant for an explanation since he is in a position to know whether he failed to hire a person for reasons which would exonerate him."); *Gates*, 326 F. Supp. at 399 ("After the plaintiff's circumstantial evidence has made a prima facie case of discrimination, it was in order to look to the defendant for an explanation. A defendant in these cases knows whether or not it failed to hire a person for reasons which would exonerate the defendant under 42 U.S.C. 2000e-5(g)."); *Marquez v. Omaha Dist. Sales Office*, 440 F.2d 1157, 1162 n.10 (8th Cir. 1971) ("It is obvious that plaintiff was refused, denied, reemployment because of her civil rights activity. The record reveals no other possible motive. The refusal of the Board to specify is silent witness to the discrimination." (quoting *Williams v. Sumter Sch. Dist. No. 2*, 255 F. Supp. 397, 403 (D.S.C. 1966)) (internal quotation marks omitted)).

<sup>92</sup> 401 U.S. 424, 436 (1971).

<sup>93</sup> The group of cases includes those under Title VII for race, national origin, and gender discrimination, and age discrimination under the Age Discrimination in Employment Act of 1967.

<sup>94</sup> *Green v. McDonnell Douglas Corp.*, 318 F. Supp. 846, 850 (E.D. Mo. 1970) (emphasis added); see also *Barnes v. Lerner Shops of Tex., Inc.*, 323 F. Supp. 617, 622 (S.D. Tex. 1971).

<sup>95</sup> *McDonnell-Douglas*, 318 F. Supp. at 850.

<sup>96</sup> *Barnes*, 323 F. Supp. at 622 ("It is apparent from the record that defendant's reasons for discharging plaintiff were motivated solely and simply by the plaintiff's inability to get along with her fellow employees and because of the lax attitude which she demonstrated in carrying out her duties."); see also *Tidwell v. Am. Oil Co.*, 332 F. Supp. 424, 435 (D. Utah 1971) ("Defendant characterizes the [evidence of friction with subordinates and supervisors] as the culmination of many problems

references from prior employers,<sup>98</sup> and a policy of hiring only internal candidates.<sup>99</sup> Courts recognized that these kinds of reasons for adverse employment action contained a level of subjectivity which might provide a safe harbor for discriminatory animus.<sup>100</sup> Consequently, and descriptive of the strength of at-will, no claimant successfully argued that subjectivity standing by itself was grounds for invalidating an employer's arguably subjective rationale for an adverse employment decision.<sup>101</sup>

The outcome of asserting these traditional at-will grounds for adverse employment action depended on the strength of the claimant's case in light of the employer's reason.<sup>102</sup> In some cases employers prevailed.<sup>103</sup> In some cases employers failed. They failed, not because their at-will reasons were questioned in some general sense, but because it was clear that the reason given was false or pretextual.<sup>104</sup> Had this method of decision making

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with plaintiff and a clear indication of sufficient inability to get along with others as to justify her termination.”).

<sup>97</sup> *Barnes*, 323 F. Supp. at 622; see also *Parham v. Sw. Bell Tel. Co.*, 433 F.2d 421, 428 (8th Cir. 1970).

<sup>98</sup> *Parham*, 433 F.2d at 428 (“Nothing in the record indicates that the [defendant’s] background investigation of [the plaintiff] was anything other than a good faith effort to explore his prior employment experience.”).

<sup>99</sup> *Gates v. Georgia-Pacific Corp.*, 326 F. Supp. 397, 399 (D. Or. 1970).

<sup>100</sup> In *McDonnell Douglas I*, for example, the Eighth Circuit specifically commented on subjectivity with reference to McDonnell Douglas’s stated reasons for refusing to rehire Green. *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 343 (8th Cir. 1972) (*McDonnell Douglas I*) (“Our prior decisions make clear that, in cases presenting questions of discriminatory hiring practices, employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination.”). In *Parham*, the defendant relied on negative references from prior employers. In approving the finding that failing the background check provided a legitimate nondiscriminatory reason to reject plaintiff, the Eighth Circuit noted that the EEOC’s investigatory report in the case “questioned the objectivity of the recommendation from [a prior employer], noting that it may have reflected racial bias.” *Parham*, 433 F.2d at 428 n.6.

<sup>101</sup> *Parham*, 433 F.2d at 428; *McDonnell Douglas II*, 411 U.S. 792, 803 (1973) (“The [Eighth Circuit] seriously underestimated the rebuttal weight to which [McDonnell Douglas’s] reasons were entitled.”).

<sup>102</sup> *Barnes*, 323 F. Supp. at 622 (“It is apparent from the record that defendant’s reasons for discharging plaintiff were motivated solely and simply by the plaintiff’s inability to get along with her fellow employees . . . . The burden of proving reasons apart from these was on the plaintiff. This she failed to do.”).

<sup>103</sup> *Id.*; see also *Parham*, 433 F.2d at 428; *Aros v. McDonnell Douglas Corp.*, 348 F. Supp. 661, 667 (C.D. Cal. 1972).

<sup>104</sup> In *Gates v. Georgia-Pacific Corp.*, the court acknowledged that a policy of only hiring internally “does not violate [Title VII].” 326 F. Supp. 397, 399 (D. Or. 1970). Yet, given the fact that the employer advertised openings outside of the company and filled an opening with a white internal hire whose “background was

continued an uninterrupted evolution, the Court would not have been required to put its imprimatur on burden shifting and the continuing vitality of at-will when it did. There was, however, an interruption: *Griggs v. Duke Power Co.*<sup>105</sup>

The need for Supreme Court intervention arose in 1973 because of how lower courts reacted to *Griggs*.<sup>106</sup> In establishing disparate impact as a viable cause of action under Title VII, the *Griggs* Court focused on the need for job related testing and policies and burdened the employer with showing business necessity for those tests and policies.<sup>107</sup> The decision seemed to authorize the transformation of disparate treatment in that, according to the Court, "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."<sup>108</sup> This declaration contains two concepts anathema to employment-at-will by (1) providing an objective basis for an employment decision and (2) shifting the burden to the employer to prove that objective basis. The following Section describes the attempt to invoke *Griggs* in disparate treatment cases.

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conspicuously unimpressive in comparison with that of the [black] plaintiff," the plaintiff prevailed. *Id.* at 398. In *Tidwell v. American Oil Co.*, the court did not question the validity of an employer's ability to terminate for failure to get along with others, or the basic proposition that a termination demonstrably carried out under standard operating procedure would negate an inference of discrimination. 332 F. Supp. 424, 435 (D. Utah 1971). The court found, however, that the employer hired the plaintiff to get a job done without regard to getting along with her subordinates and her termination "was [not] such a routine firing." *Id.*

<sup>105</sup> 401 U.S. 424 (1971).

<sup>106</sup> *Griggs* dealt with the impact of facially neutral job qualification policies, including educational requirements and job testing, in the specific context of a southern employer with a long history of segregating its black employees into the lowest paying menial jobs. Within that context, the Court pronounced that employment policies, specifically job testing, measure a person's ability to do a job rather than measuring the person. *Id.* at 436. According to the *Griggs* Court, Title VII disallowed those "employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432. In the context of job testing, the Court observed: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431. The last sentence of this footnote may be important enough to add to the body of the text. Effectively, it explains the caveat that disparate treatment carves out of the at-will doctrine.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 432.

## 2. Nullification of “Any or No Reason”—Disparate Treatment Under *Griggs*

Although the *Griggs* Court never explicitly contrasted “objective” with “subjective” reasoning for employment decisions, lower courts appear to have focused on *Griggs*’ coded description of objectivity: that employment procedures have a “manifest relationship to the employment in question.”<sup>109</sup> Lower courts, already sensitized to the issue of subjectivity in employer decision making,<sup>110</sup> took the “manifest relationship” requirement as their definition of “objective.” These courts also fixed on the words “employment practices” and “employment procedures” and expanded them beyond the *Griggs* disparate impact context. Thus, in disparate treatment cases, any standard company policy or procedure on hiring and promotion was now subject to challenge as insufficiently objective. Courts, particularly the Eighth Circuit, seemed to want employers to justify the existence

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<sup>109</sup> See, e.g., *Reid v. Memphis Publ’g Co.*, 468 F.2d 346, 350 (6th Cir. 1972). In *Reid*, a religious discrimination case, at issue was a company policy that required all employees to be available to work on Saturdays. *Reid*, a black Seventh-Day Adventist, refused to work on Saturday because of his religion. Although the case deals with the impact of the recent incorporation of the concept of religious accommodation and the employer’s affirmative defense into Title VII’s text through the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 701(j), 86 Stat. 103, the decision emphasizes *Griggs* as the force behind the Sixth Circuit’s decision to remand the case on the issue of reasonable accommodation. *Id.* In other words, given the specific language in Title VII, there was no need for the Sixth Circuit to rely on *Griggs*. It seems reasonable to conclude, therefore, that the Sixth Circuit believed that *Griggs* set a new global standard for employer decision making. Thus, the majority opinion equates the *Griggs* Court’s definition of business necessity with the statutory requirement of a reasonable religious accommodation, such that the business necessity for a policy informed the issue of reasonable accommodation. *Id.* Without establishing business necessity for the policy, there could be no argument for failing to make a reasonable accommodation. *Id.* If the policy did not pass the *Griggs* business necessity test, a failure to accommodate amounted to religious discrimination. In fear that the district court missed the point, a concurrence clarified:

To uphold such a policy and requirement the trial court must find that the employer has sustained his burden of demonstrating that such policy and practice is necessitated by the requirements of the employer’s business and find further that such policy and practice is applied equally to all employees.

*Id.* at 353 (Thomas, J., concurring). As with the Eighth Circuit, the Sixth Circuit takes the *Griggs* Court’s business necessity holding completely out of the disparate impact context.

<sup>110</sup> See *supra* Part III.B.1.

and application of their policies in ways that, contrary to Title VII's legislative history and design, threatened to undermine the scope and force of the Doctrine.

Immediately on the heels of *Griggs*, the Eighth Circuit decided the disparate treatment case *Marquez v. Omaha District Sales Office, Ford Division of Ford Motor Co.*<sup>111</sup> Marquez claimed that Ford had failed to promote him for fifteen years because of his national origin.<sup>112</sup> Ford asserted its nationwide policy that required Marquez, a grade-six manager, to have grade-seven management-time to qualify for promotion to a grade-nine management position.<sup>113</sup> Marquez had not been a grade-seven manager.<sup>114</sup> The trial court determined that, within the scope of the time covered by his EEOC charge, there was no evidence of discrimination.<sup>115</sup> There being nothing objectionable about Ford's policy; Marquez's only evidence of discrimination consisted of the fact that he was the only minority employee and that, although qualified, he had not been promoted to grade seven.<sup>116</sup> There was no evidence that Ford promoted someone less qualified over Marquez.<sup>117</sup>

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<sup>111</sup> *Marquez v. Omaha Dist. Sales Office*, 440 F.2d 1157 (8th Cir. 1971). The Court decided *Griggs* on March 8, 1971. See 401 U.S. 424. The Eighth Circuit decided *Marquez* on March 31, 1971. 440 F.2d 1157.

<sup>112</sup> *Marquez v. Omaha Dist. Sales Office*, 313 F. Supp. 1404, 1405 (D. Neb. 1970).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1406 ("Under these circumstances, where plaintiff because of his present lack of training is ineligible for a position and where there is absolutely no evidence that this present requirement of experience . . . is foreseeably discriminatory, it is the decision of the Court that plaintiff's complaint fails to state a cause for relief.").

<sup>116</sup> *Id.* at 1406.

<sup>117</sup> A concern existed about the perpetuation of the historical impacts of discrimination in company employment policies. *Griggs*, from one perspective, represents the strongest move by the Court to ratify the belief that Title VII, as a purely prospective measure, did too little to compensate for the obvious continuing impacts of historical discrimination. In what would be known after *Griggs* as disparate impact, at least one court before *Griggs* questioned the viability of facially nondiscriminatory policies that continued to exclude blacks. In *Gates v. Georgia-Pacific Corp.*, a black woman alleged disparate treatment in Georgia-Pacific's failure to hire her for a position in the advertising department. Georgia-Pacific filled three of four slots with white internal hires, one of whom "had no academic preparation for a career in accounting." 326 F. Supp. 397, 398 (D. Or. 1970). In contrast, Mrs. Gates was "academically the best prepared of any of the persons interviewed." *Id.* When Georgia-Pacific asserted a company policy of preferring internal candidates, the court responded:

Relying on its interpretation of *Griggs*, the Eighth Circuit ruled in favor of Marquez.<sup>118</sup> Out of context, the Eighth Circuit cited *Griggs* for the proposition that Title VII allowed for remedying the continuing effects of past discrimination.<sup>119</sup> This allowed the Eighth Circuit to revive Marquez's claim in that he, like the plaintiffs in *Griggs*, had been "frozen" in place.<sup>120</sup> The mere fact that the plaintiff, as the only minority employee in the district, had not been promoted in fifteen years became prima facie proof of discrimination.<sup>121</sup> The Eighth Circuit deemed Ford's promotion policy, standing alone, an insufficient legitimate nondiscriminatory business reason.<sup>122</sup> Ford's policy only explained the job requirements.<sup>123</sup> The Eighth Circuit required Ford to explain why it had not allowed Marquez to meet the job requirements by promoting him to grade seven,<sup>124</sup> to which Ford offered no explanation.

One year later, the Eighth Circuit decided *Green v. McDonnell Douglas Corp.*<sup>125</sup> ("*McDonnell Douglas I*") and created a rough draft of the burden-shifting analysis.<sup>126</sup> Although short-

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Such a policy, if it does not result in unlawful employment practices, does not violate the statute. However, this defendant has few, if any, Negro accountants or accounting clerks at the entry levels. A company policy of recruiting [from within] would result in de facto exclusion of Negroes from the better jobs whether the policy is intended to have that result or not.

*Id.* at 399.

<sup>118</sup> *Marquez*, 440 F.2d at 1163.

<sup>119</sup> *Id.* at 1160.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1159.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1162.

<sup>125</sup> *McDonnell Douglas I*, 463 F.2d 337 (8th Cir. 1972).

<sup>126</sup> *Id.* The Eighth Circuit's decision in *McDonnell Douglas I* represented such a dramatic statement against the at-will doctrine making it easy to misplace the link to *Marquez*. Indeed, *McDonnell Douglas I* builds on the groundwork the Eighth Circuit laid in *Marquez*. In *Marquez*, the Eighth Circuit refused to accept the mere existence of a facially neutral policy that resulted in Marquez being "frozen" in place and promotable. *Marquez*, 440 F.2d at 1160. Interstitially, this refusal represents dissatisfaction with the alleged neutrality of employer decision making. It also reflects the tension between the continued vitality of the Doctrine in the face of the *Griggs* Court's conclusion that Title VII contained a policy to remove unnecessary roadblocks to equal employment opportunity. In *McDonnell Douglas I*, the majority resolved this tension against the Doctrine by requiring employers to prove a substantial relationship between adverse employment decisions and the actual job requirements. *McDonnell Douglas I*, 463 F.2d at 344. Judge Lay, concurring, condemned the at-will doctrine in his homily on the evils of subjectivity:

lived, standing alone, the Eighth Circuit's *McDonnell Douglas I* decision represented Title VII's triumph over the at-will employment doctrine. Reminding readers that the Eighth Circuit stood against subjectivity, the court stated, "employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination."<sup>127</sup> The court specifically made objectivity the standard for employer decision making.<sup>128</sup> The Eighth Circuit based this conclusion squarely on the *Griggs* holding. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."<sup>129</sup> The Eighth Circuit also seemed to require an employer to prove an absence of discrimination, similar to the "business necessity" affirmative defense created in *Griggs*.<sup>130</sup> Thus, after a plaintiff presents a prima facie case of discrimination, "the burden passes to the employer to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job."<sup>131</sup> The Eighth Circuit married these elements into an

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Blind acceptance of any non-discriminatory reason offered by an employer in a fair employment case would always preclude correction of any discriminatory practices otherwise existing. It has generally been said that an employer may refuse to hire or decide to fire any employee for any reason he chooses. Civil rights legislation and case law dealing with discriminatory employment practices have added modification to these principles. Discriminatory motives even though they constitute only a partial basis for an employer's refusal to hire are not sanctioned.

*Id.* at 345-46 (Lay, J., concurring). *Marquez* also shows the Eighth Circuit demanding an employer to explain the nondiscriminatory basis for the result in *Marquez*. In *McDonnell Douglas I*, the Eighth Circuit amplified this demand to a specific requirement that "the employer to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job." *Id.* at 344.

<sup>127</sup> *Id.* at 343.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

<sup>130</sup> *Id.* at 344; see *Griggs*, 401 U.S. at 431.

<sup>131</sup> *Id.* In response to a request for rehearing and a very strong dissent, the majority replaced this language with: "However, an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer." *Id.* at 353. Nevertheless, the revised majority decision retained the language that really threatened an employer's ability to rely on non-job-related reasons for adverse employment action: "Our prior decisions make clear that, in cases presenting questions of discriminatory hiring practices, employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination." *Id.* at 352.

easy-to-prove prima facie case. Accordingly, once a claimant proved that he was black, qualified for the job opening, and denied a job which remained open or occupied by a white person, an employer's burden became proving the absence of discrimination in the same employment decision.<sup>132</sup> The Eighth Circuit effectively rewrote Title VII. It adopted a definition of discrimination analogous to the one Congress rejected and burdened the employer with proving reasons asserted for any adverse decision.

The Eighth Circuit's decision plainly contradicts congressional agreement that an employer never needs to prove the absence of discrimination, but that the claimant bears that burden.<sup>133</sup> None of the interested parties, however, took this position. Rather, the simplicity of the prima facie case, the apparent burdening of the employer with an affirmative defense, and the emphasis on objective job-related reasons for adverse employment action drove McDonnell Douglas's appeal to the Supreme Court.<sup>134</sup> In short, McDonnell Douglas believed that the decision effectively nullified the employer's right to make subjective hiring decisions.<sup>135</sup> Here, where "subjectivity" is the code word for the Doctrine, the Eighth Circuit's decision nullified that as well.

### 3. Any or No Reason—*McDonnell Douglas II* Returns Disparate Treatment to Its Intended Course

The Eighth Circuit's nullification of at-will employment was the issue confronting the Supreme Court in *McDonnell Douglas v. Green*.<sup>136</sup> The Court responded by specifically reviving and

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<sup>132</sup> *Id.* at 344.

<sup>133</sup> 110 CONG. REC. 12,723–24 (1964).

<sup>134</sup> See *McDonnell Douglas II*, 411 U.S. 792 (1973).

<sup>135</sup> *McDonnell Douglas I*, 463 F.2d at 343.

<sup>136</sup> McDonnell Douglas presented the question as follows: "In Civil Rights cases involving allegedly discriminatory acts, should the defendant be precluded from offering subjective evidence to explain his motivation for those acts?" Brief for Petitioner at 2, *McDonnell Douglas II*, 411 U.S. 792 (1973) (No. 72-490), 1973 WL 159430, at \*2. Plaintiff Green presented the question as follows:

Whether the Court of Appeals erred, in including among the standards it enunciated for the guidance of the District Court on remand the admonition that "in cases presenting questions of discriminatory hiring practices, employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination."

Brief for Respondent at 3, *McDonnell Douglas II*, 411 U.S. 792 (No. 72-490), 1973 WL 172024, at \*3. Oddly, McDonnell Douglas spent this argument trying to

strengthening at-will employment. The Court's decision has several facets, including confining *Griggs* to disparate impact cases; formalizing the prima facie case of discrimination; resurrecting subjective reasons as legitimate and nondiscriminatory; clarifying the employer's duty to rebut but not prove; and providing a link between the instant decision and the legislative history of Title VII. All of these facets<sup>137</sup> worked to reaffirm the Doctrine's dominance.<sup>138</sup>

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establish that the "objectivity" rule usurped the provenance of the fact finder in cases where subjectivity of judgment was a key element of understanding the challenged decision. Brief for Petitioner, *supra*, at 34–39. It was in McDonnell Douglas's argument challenging the prima facie case holding that McDonnell Douglas focused the Court on the danger of Title VII becoming a for-cause termination statute. *Id.* at 28–30. McDonnell Douglas argued that section 706(g) specifically ratifies at-will decision making in that section 706(g) preserved employer rights to make nondiscriminatory business decisions on any basis with or without job-relatedness. Moreover, McDonnell Douglas argued that section 706(g) had once required for-cause termination but had been amended, and in striking the for-cause portion, "any employer action would expressly be beyond the pale of the Act if taken 'for any reason other than discrimination on account of race, color, religion or national origin.'" *Id.* at 28–29.

<sup>137</sup> As discussed *supra* in Part III.B.1, the prima facie case was never a real problem, as the concept was well understood in the lower courts. One is therefore led to wonder about the relevance of that part of the Court's decision. The race-baiting tenor of the petitioner's brief may have had an impact. *Id.* at 17, 20–22. More likely, the discussion of the employer's rebuttal case, legitimate nondiscriminatory reasons, and the fact that the employer has no burden of proof required the prima facie case as a counterpoint. Despite the race-baiting of McDonnell Douglas's briefing, McDonnell Douglas raised a significant issue; the Eighth Circuit did not explain the need for its prima facie case formula. *Id.* at 17. In other words, what was the relevance, standing alone, of Green's blackness? Although the Court largely adopted the Eighth Circuit's formula, the Court did not use its *McDonnell Douglas II* opinion to answer the question either. It was not until four years after *McDonnell Douglas II*, in *International Brotherhood of Teamsters v. United States*, that the Court used a footnote to begin explaining its reasoning for the prima facie case. 431 U.S. 324 (1977). According to that decision, the point of the prima facie case was to exclude the following:

[T]he two most common legitimate reasons on which an employer might rely to reject a job applicant [are] an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.

*Id.* at 358 n.44. In 1978, the Court again discussed the function of the prima facie case without answering the original question: What is the relevance of race standing alone? In *Furnco Construction Corp. v. Waters*, the Court explained the prima facie case as "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. . . . And we are willing to presume [discrimination] largely because we know from our experience that more often than not people do not act in a totally arbitrary manner." 438 U.S. 567, 577 (1978). The *Furnco* Court went on to say, "[W]e infer discriminatory animus

The Court commandeered the Eighth Circuit's prima facie case formula. In doing so, the Court addressed the issues of the employer's burden of proof and the quality of the evidence an employer could rely on to avoid liability. As described above, the Eighth Circuit created a prima facie case that allowed a claimant to establish actionable discrimination with no actual evidence of discrimination.<sup>139</sup> That version of the prima facie case represented a powerful proxy for proof of discrimination once coupled with a requirement that the employer, arguably, prove an objective job-related reason for an adverse decision. The Court appropriated the prima facie case but decoupled it from the other elements that made it so potent and potentially dangerous to the at-will employment doctrine. The Court's version of the prima facie case remained a proxy for discrimination,<sup>140</sup> but a

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because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." *Id.* at 580. The only rational conclusion to draw from the Court's use of "experience" and "common experience," is a common experience with discrimination. *See id.* at 577. To determine the significance of race standing alone, the Court's theory is that because employers overtly discriminated against blacks prior to Title VII, they continue to do so covertly after Title VII. Accordingly, one infers that race standing alone is the reason for an adverse employment action when a claimant establishes the other elements of the prima facie case. The importance of the prima facie case from this perspective is not that, as the Court has pointed out, it is easy to prove. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 270 (1989) ("The prima facie case established there was not difficult to prove."); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous."). The importance of the prima facie case was its potential for capturing covert discriminatory behavior, which might actually have made Title VII intolerant of any discrimination "subtle or otherwise." *McDonnell Douglas II*, 411 U.S. at 801.

<sup>138</sup> As to the Eighth Circuit's view that *Griggs* required all employment policies or practices to meet the objective job-relatedness standard, there is little to tell. The Court chose not to debate the point. By silently ignoring the issue, the Court made it go away. To assure distance between *Griggs* and the claimant in that case, the Court distinguished *Griggs* on its facts, including that all of the *Griggs* claimants were innocent victims and that Mr. Green was not. The Court in *McDonnell Douglas II* specifically distinguished *Griggs* because *Griggs* dealt with the disparate impact of standardized testing and the impermissibility of freezing blacks out of employment opportunities because of the continuing impacts of segregation. *McDonnell Douglas II*, 411 U.S. at 805–06. Moreover, the victims in *Griggs* had done nothing to deserve being excluded from employment opportunities. *Id.* Green presented a different picture because he engaged in illegal protest activity. *Id.* at 806. The distinction between disparate impact and disparate treatment after *McDonnell Douglas II* has been so clear that there are no Supreme Court cases reflecting an effort to tread that path again.

<sup>139</sup> *McDonnell Douglas I*, 463 F.2d at 344.

<sup>140</sup> *McDonnell Douglas II*, 411 U.S. at 802.

very fragile one. Rather than a burden of proof, an employer would only have to rebut the prima facie case in order to destroy it,<sup>141</sup> leaving the burden of proof with the claimant at all times<sup>142</sup> and as a final step, firmly saddling the claimant with the requirement to prove intentional discrimination based on a prescribed characteristic.<sup>143</sup> On the issue of the quality of the employer's rebuttal evidence, the Court implicitly commanded lower courts to defer to employers.<sup>144</sup> Explicitly, the Court stamped what the Eighth Circuit and the parties called "subjective" evidence as perfectly legitimate when it stated, "[T]he [Eighth Circuit] seriously underestimated the rebuttal weight to which [McDonnell Douglas's] reasons were entitled."<sup>145</sup>

Unlike the Eighth Circuit, the Supreme Court tied its decision to Title VII's legislative history, which affirmed the Doctrine's dominant role.<sup>146</sup> Legislative history validated the Court's position on the rebuttal weight employer reasons should receive. Without literally citing to the "management prerogatives" language, the Supreme Court created the paraphrase: "There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions."<sup>147</sup>

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<sup>141</sup> *Id.* at 802-06.

<sup>142</sup> *Id.* at 805 ("In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision."); *id.* at 805 n.18 ("[Green] must be given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for his rejection, the decision was in reality racially premised.").

<sup>143</sup> *Id.* at 805.

<sup>144</sup> *Id.* at 803-06. Examples of the Court's implied guidance to defer to the employer's reasons for adverse employment decisions include its discussion of an employer's right to discharge employees for unlawful activity directed against an employer by striking employees under the NLRA and highlighting past conduct and past loyalty as part of the broader list of legitimate reasons for personnel decisions.

<sup>145</sup> *Id.* at 803.

<sup>146</sup> *Id.* at 803-04.

<sup>147</sup> *Id.* at 801. The criticism of *McDonnell Douglas II* as having no link to legislative history overlooks this key language. Yes, the Court added a third party—the consumer—to the employer-employee relationship, which is confusing given the absence of any reference in the legislative history or the statute to a consumer-protection purpose. The logical explanation for the failure of *McDonnell Douglas's* critics to make the link is supplied by Professor Corbett's proposition that this

The at-will employment doctrine appears in *McDonnell Douglas II* under the guise of a “broad, overriding interest, shared by employer, employee, and consumer, [in] efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions.”<sup>148</sup> The statement reflects the restraint Title VII’s pivotal supporters required when they insisted that “management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible”<sup>149</sup> and that the “[i]nternal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.”<sup>150</sup> In subsequent cases, the Court explicitly linked its *McDonnell Douglas II* jurisprudence to legislative history, clarifying the dominant role of the Doctrine on the Court and the Court’s belief that the Doctrine dominated congressional decision making as well.<sup>151</sup>

There was never an “escalating subordination of . . . [Title VII] to employment at will.”<sup>152</sup> In disparate treatment cases, arguably since 1965, certainly since 1973, Title VII has always been subordinate to employment-at-will. Describing the relationship otherwise inaccurately suggests a status Title VII

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particular alias for employment-at-will made it hard to recognize. Corbett, *The “Fall” of Summers*, *supra* note 14, at 308.

<sup>148</sup> *McDonnell Douglas II*, 411 U.S. at 801. *Texas Department of Community Affairs v. Burdine* quotes this passage from *McDonnell Douglas II* and explains it by invoking “management prerogatives.” 450 U.S. 248, 259 (1981) (internal quotation mark omitted).

<sup>149</sup> H.R. REP. NO. 88-914, pt. 2, at 29 (1963).

<sup>150</sup> *Id.*

<sup>151</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (“Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers’ freedom of choice. This balance between employee rights and *employer prerogatives* turns out to be decisive in the case before us.” (emphasis added)); *id.* at 242 (“The statute’s maintenance of employer prerogatives is evident from the statute itself and from its history, both in Congress and in this Court.”); *Burdine*, 450 U.S. at 259 (“[Title VII] was not intended to ‘diminish traditional management prerogatives.’” (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979))); *Weber*, 443 U.S. at 206 (“Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that ‘management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible.’” (quoting H.R. REP. NO. 88-914, pt. 2, at 29 (1963)) (alteration in original)).

<sup>152</sup> Corbett, *The “Fall” of Summers*, *supra* note 14, at 305, 311.

never actually possessed.<sup>153</sup> The fact the Court regularly had to explain the meaning of *McDonnell Douglas II* in subsequent cases is not evidence of a resurgent at-will employment doctrine that had been suppressed. Rather, it is evidence that individual decision makers in lower courts have not, or could not, assimilate Title VII's limitations, or that litigants, usually claimants, refused to believe lower courts had gotten it right.<sup>154</sup>

To a great degree, the Court must accept responsibility for any confusion about Title VII's operative parameters in disparate treatment cases. *Griggs* created the environment that required *McDonnell Douglas II*.<sup>155</sup> *McDonnell Douglas II* contains the sweeping statement that Title VII tolerates no discrimination subtle or otherwise, yet gives employers back their right to engage in subjective decision making<sup>156</sup>—a well acknowledged

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<sup>153</sup> The earliest Title VII scholars recognized its weakness. Richard Berg, for example, wrote:

The enforcement procedures of the title, however, bear only too visibly the marks of compromise, and seem to me to contain serious deficiencies. It seems questionable that much can be accomplished through suits in federal court by persons aggrieved by acts of discrimination. The practical advantages will lie heavily with the defendants, and even where the evidence of discrimination is overwhelming, it cannot be expected that many complainants will undertake the burden of an individual suit.

Berg, *supra* note 75, at 96–97; *see also* Charles T. Schmidt, Jr., *Title VII: Coverage and Comments*, 7 B.C. L. REV. 459, 462–63 (1966) (“And compliance with the letter [of Title VII]—both in terms of coverage and substance—may very well impose inconveniences and require more imagination to enable the continuation of practices which exclude Negroes from employment, but the legislation, as presently conceived, can do little to effectively prohibit these practices.”).

<sup>154</sup> The failure of lower courts to heed *McDonnell Douglas II* arose from an unextinguished desire that the asserted legitimate nondiscriminatory reason be in some way objectively satisfactory. *See* *Burdine v. Tex. Dep't of Cmty. Affairs*, 608 F.2d 563, 567–68 (5th Cir. 1979); *Waters v. Furnco Constr. Corp.*, 551 F.2d 1085, 1089 (7th Cir. 1977) (citing *Reed v. Arlington Hotel Co.*, 476 F.2d 721, 724 (8th Cir. 1973)).

<sup>155</sup> Although the Court at some point was likely to face the question of when circumstantial evidence amounted to proof of intentional disparate treatment, as argued in this Article, there is an obvious causal relationship that required the Court to address the question in 1973; *Griggs* led the Eighth Circuit, contrary to legislative intent, to limit employer discretion in disparate treatment cases to objective criteria, which required the Court to restore employer discretion to the full scope envisioned by the Eighty-eighth Congress.

<sup>156</sup> *McDonnell Douglas II*, 411 U.S. 792, 801, 803 (1973).

breeding ground for covert discrimination.<sup>157</sup> Nevertheless, the Court, single-mindedly, has kept Title VII confined and at-will dominant.

After *McDonnell Douglas II*, the Court in every other significant disparate treatment case reaffirmed at-will's dominant status in three ways. The Court conformed Title VII's actual impact to Congress's intention to eliminate only the worst forms of discrimination by formalizing the direct versus circumstantial evidence dichotomy. In so doing, the Court left claims of discrimination based on circumstantial evidence easy prey to the legitimate nondiscriminatory reason.<sup>158</sup> The Court also regularly confirmed that in order to rebut the prima facie case and dispel any inference of discrimination, the legitimate nondiscriminatory reason must be asserted, not proved.<sup>159</sup> Finally, the Court confirmed the scope of management prerogatives as inclusive reasons that may not have been asserted, so long as the claimant failed to ultimately show that adverse employment action occurred because of a proscribed reason.<sup>160</sup>

### C. *The Triumph of At-Will*

#### 1. The Direct Versus Circumstantial Evidence Dichotomy

Discrimination proved by direct evidence is, by definition, one of the "most serious types of discrimination."<sup>161</sup> *McDonnell Douglas II* made direct evidence cases impossible for employers to win because an employer could not avoid an award of

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<sup>157</sup> *McDonnell Douglas I*, 463 F.2d 337, 343 (8th Cir. 1972); *Brown v. Gaston Cnty. Dyeing Mach. Co.*, 457 F.2d 1377, 1382 (4th Cir. 1972) ("Courts have often observed that proof of overt racial discrimination in employment is seldom direct." (citing *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 422 (5th Cir. 1971))); *Marquez v. Omaha Dist. Sales Office*, 440 F.2d 1157, 1162 (8th Cir. 1971); *Holland v. Edwards*, 119 N.E.2d 581, 584 (N.Y. 1954).

<sup>158</sup> See *McDonnell Douglas II*, 411 U.S. at 802–03; see also *supra* Part III.B.

<sup>159</sup> *McDonnell Douglas II*, 411 U.S. at 802–03.

<sup>160</sup> *Burdine*, 450 U.S. at 259; *United Steelworkers v. Weber*, 443 U.S. 193, 206 (1979).

<sup>161</sup> H.R. REP. NO. 88-914, pt. 1, at 18 (1963). Professor Michael Selmi has argued that the Court appears only to be able to see the most overt discrimination, but he does not offer a complete explanation for why the Court gives that appearance. It is true that the Court can only perceive the grossest forms of race discrimination. The reason why, at least under Title VII, is that it is all Congress intended the Court to perceive as actionable race discrimination. Selmi, *supra* note 6, at 324–28, 335.

meaningful compensation by asserting a legitimate nondiscriminatory reason. Title VII's affirmative purpose directed this outcome.<sup>162</sup> Discrimination proved by any other means had to be balanced against Congressional intent to leave at-will in place.<sup>163</sup> That is exactly what the Court achieved in *McDonnell Douglas II*. The Court isolated discrimination based on circumstantial evidence and formalized the prima facie case as a proxy for intentional discrimination subject to the articulation of a legitimate nondiscriminatory reason.<sup>164</sup> The prima facie case is an eggshell. The legitimate nondiscriminatory reason is a fifty-pound sledgehammer. Disparate treatment cases like *McDonnell Douglas II* are supposed to be hard to win.

## 2. The Fragility of the Prima Facie Case—The Return of “Any Reason or No Reason”

It is axiomatic that the Court intended the prima facie case as a proplaintiff device.<sup>165</sup> It was easy to prove because it provided a proxy for intentional discrimination in a world where direct evidence of discrimination was becoming increasingly hard to come by.<sup>166</sup> Yet, as soon as an employer articulated a legitimate nondiscriminatory reason, regardless of plausibility, the proxy for intentional discrimination disappeared. If the *McDonnell Douglas II* Court's purpose really was proplaintiff, why create such a fragile proxy for intentional discrimination?

The fragility of the prima facie case cannot be explained by a single factor. Part of the explanation lies in the Court's need to distinguish between direct and circumstantial evidence cases, which would thereby achieve Title VII's actual purposes.<sup>167</sup>

<sup>162</sup> See *supra* Part III.A.

<sup>163</sup> *Weber*, 443 U.S. at 206 (“Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that ‘management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible.’”) (citing H.R. REP. NO. 88-914, pt. 2, at 29 (1963), reprinted in 1964 U.S.C.C.A.N. 2391).

<sup>164</sup> *McDonnell Douglas II*, 411 U.S. at 802–03.

<sup>165</sup> William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549, 1555 (2005); Corbett, *Of Babies*, *supra* note 14, at 377; Corbett, *The “Fall” of Summers*, *supra* note 14, at 332 n.134; McGinley, *supra* note 1, at 229.

<sup>166</sup> *McDonnell Douglas I*, 463 F.2d 337, 343 (8th Cir. 1972).

<sup>167</sup> See *supra* Part III.C.1 (discussing the direct versus circumstantial evidence dichotomy).

Another part of the explanation lies in the statutory requirement that a plaintiff prove intentional discrimination in order to receive meaningful relief.<sup>168</sup> Thus, a prima facie case under *McDonnell Douglas II* only creates a “legally mandatory, rebuttable presumption [of discriminatory intent].”<sup>169</sup> It does not “describe the plaintiff’s burden of producing enough evidence to permit the trier of fact to infer [discriminatory intent].”<sup>170</sup>

A proxy for intentional discrimination by definition cannot replace proof of intentional discrimination. So, the prima facie case would have to be fragile by necessity in order to compel a plaintiff to actually prove the ultimate issue of an employment action due to discrimination because of race. Another part of the explanation for the fragility of the prima facie case is its role in describing the limits of the at-will employment doctrine post-Title VII. Although this Article argues that, for practical purposes, in the absence of what would amount to direct evidence of discrimination, “any or no reason” continues to define the actual limits of employer discretion; the prima facie case invites employers to publicly ascribe some nondiscriminatory reason to an adverse employment action. In order to encourage employers to accept this invitation without risk to existing management prerogatives, the presumption of discrimination falls apart once a reason is given.

a. *“Any Reason”: The Articulation of a Legitimate Nondiscriminatory Reason and the Presumption of Legitimacy*

Although the Court in *McDonnell Douglas II* negated the Eighth Circuit’s effort to make the legitimate nondiscriminatory reason as much like an affirmative defense as possible, the Court used ambiguous language to do so. The Court’s lack of clarity spawned litigation to clarify the exact nature of the employer’s burden in disparate treatment cases.<sup>171</sup> The Court in *McDonnell Douglas II* used the term “burden shifting,”<sup>172</sup> but did not specify that the burden that shifted was one of production rather than

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<sup>168</sup> 42 U.S.C. § 2000e-5(g)(1) (2012).

<sup>169</sup> Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981).

<sup>170</sup> *Id.*

<sup>171</sup> See, e.g., *Burdine*, 450 U.S. at 249–50; *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575–76 (1978); *Bd. of Trs. of Keene State Coll. v. Sweeney*, 439 U.S. 24, 24–25 (1978) (per curiam).

<sup>172</sup> See *McDonnell Douglas II*, 411 U.S. 792, 802 (1973).

persuasion or proof. Moreover, the use of the euphonious word "articulate" to describe the employer's obligation to describe his reasoning had a significance of its own,<sup>173</sup> but the Court also failed to focus on the significance of that word choice. This lack of specificity and definition led to a failure to comprehend the true power of the mere articulation of a nondiscriminatory basis over a disputed employment action which, perhaps, ought to have been obvious because of the Court's pronounced rejection of the need for an objective rationale for an adverse employment decision. The Court's coded message intended for lower courts to apply the "any reason" principle of at-will employment, prohibiting only those reasons proscribed by Title VII.<sup>174</sup> A key piece of that message was that "any reason" really meant any reason, and the employer had no burden of proof or persuasion.

In *Furnco Construction Corp. v. Waters*,<sup>175</sup> the Court reinforced the *McDonnell Douglas II* message but again used inexact language to do so. In *Waters*, the Seventh Circuit rejected the employer's legitimate nondiscriminatory reason because it was "haphazard, arbitrary, and subjective."<sup>176</sup> The Supreme Court responded with the at-will employment message of *McDonnell Douglas II*: "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress[,] they should not attempt it."<sup>177</sup> In correcting the Seventh Circuit's misunderstanding of the employer's burden, the Court muddied the waters. "[I]t is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration . . . . To prove that, he need not prove that he pursued the course which would both enable him to achieve his own business goal . . . ."<sup>178</sup> The Seventh Circuit considered the goal to be the best hiring practices.<sup>179</sup> Here, as with "articulate" in *McDonnell Douglas II*, the Court suggests the employer's burden is not one of proof, but one of merely proving, despite the Court's repeated use of prove and proving.

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> 438 U.S. 567.

<sup>176</sup> *Id.* at 578.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 577.

<sup>179</sup> *Id.*

In the very next term, the Court decided, per curiam, *Board of Trustees of Keene State College v. Sweeney*.<sup>180</sup> This time, it was the First Circuit that confused the employer's burden. According to the First Circuit, on one hand, "in requiring the defendant to prove absence of discriminatory motive, the Supreme Court [in *McDonnell Douglas II*] placed the burden squarely on the party with the greater access to such evidence."<sup>181</sup> On the other hand, the First Circuit accurately quoted the *McDonnell Douglas II* decision's description of burden shifting: "The burden then shifts to the defendant to rebut the prima facie case by showing that a legitimate, nondiscriminatory reason accounted for its actions."<sup>182</sup> Again, the Court affirmed the *McDonnell Douglas II* at-will message and failed to offer complete clarification:

While words such as "articulate," "show," and "prove," may have more or less similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely "articulat[ing] some legitimate, nondiscriminatory reason" and "prov[ing] absence of discriminatory motive." By reaffirming and emphasizing the *McDonnell Douglas* analysis in *Furnco Construction Co. v. Waters* . . . we made it clear that the former will suffice to meet the employee's prima facie case of discrimination.<sup>183</sup>

*Sweeney* focuses on the action of "merely articulating" in contrast to "proving." It confirms that "merely articulating" meets the employer's burden. But, in contrasting that action with "proving," *Sweeney* made the important clarification that "merely articulating" was not "proving."

In *Texas Department of Community Affairs v. Burdine*,<sup>184</sup> the Court finally fully described the employer's burden to articulate a legitimate nondiscriminatory reason. For our purposes, *Burdine* is a reprise of *Sweeney*: The Fifth Circuit Court of Appeals burdened the employer with proving the legitimate nondiscriminatory reason.<sup>185</sup> This time, when the Court

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<sup>180</sup> 439 U.S. 24 (1978) (per curiam).

<sup>181</sup> *Id.* at 24 (emphasis omitted) (internal quotation marks omitted).

<sup>182</sup> *Id.* at 27 (emphasis omitted).

<sup>183</sup> *Id.* at 25.

<sup>184</sup> 450 U.S. 248 (1981).

<sup>185</sup> *Id.* at 252. The Court's problem with the Fifth Circuit's decision is only somewhat more involved:

The [Fifth Circuit] reaffirmed its previously announced views that the defendant in a Title VII case bears the burden of proving by a preponderance of the evidence the existence of legitimate

described the burden shifting, it carefully limited the use of the words “proving” and “prove” to the plaintiff’s prima facie case and to pretext.<sup>186</sup> With equal precision, the Court described the employer’s task. “[I]f the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant ‘to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.’”<sup>187</sup> Significantly, the Court clarified the power of merely articulating some legitimate nondiscriminatory reason by stating, “The defendant need not persuade the court that it was actually motivated by the proffered reasons.”<sup>188</sup>

In later cases, the Court reiterated that the legitimate nondiscriminatory reason need not be proved and need not be the actual reason.<sup>189</sup> This proposition merely restates the at-will employment doctrine. The Doctrine does not require an employer to justify its employment decisions at all. In observance of that principle, an employer has no burden of proof in disparate treatment cases. This conclusion is consistent with the legislative history and the text of Title VII.<sup>190</sup> Moreover, if an employer gives any reason for an employment action, that reason is presumptively legitimate, even if it is not the actual reason.<sup>191</sup>

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nondiscriminatory reasons for the employment action and that the defendant also must prove by objective evidence that those hired or promoted were better qualified than the plaintiff.

*Id.*

<sup>186</sup> *Id.* at 252–53. “The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Id.* at 253.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 254.

<sup>189</sup> *St. Mary’s Honor Ctr. v. Hicks (Hicks II)*, 509 U.S. 502, 528–29 (1993); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 278–79 (1989).

<sup>190</sup> *See supra* Part II.

<sup>191</sup> Here, we see the other incursion Title VII made into the dominion of at-will employment. Prior to Title VII, an employer’s unbridled discretion did not even admit the question, “Why?” After Title VII, an employer had an incentive to provide some answer. A detailed review of the prima facie case, discussed *infra*, fully maps the miniscule proportion of territory the at-will doctrine gave up to Title VII on this issue. *Hopkins*, however, provides additional refinement by defining the level of deference courts were to give to an employer’s legitimate nondiscriminatory reason. *Hopkins*, 490 U.S. at 290. Justice White hinted at the legitimacy presumption when he took the position that, even in the face of proven illegitimate considerations, an employer’s subjective view of the outcome in the absence of such considerations “should be ample proof.” *Id.* at 261. Justice O’Connor’s response to Justice White amplified the legitimacy of the employer’s legitimate nondiscriminatory reason. According to Justice O’Connor, after a mixed-motives plaintiff shows that an illegitimate motive was a substantial factor in the adverse employment action, “[t]he

This conclusion reaffirms the *McDonnell Douglas II* message: Courts are not to dispute the relative subjectivity or objectivity of the articulated nondiscriminatory business reason.<sup>192</sup> Although there may be incentives for an employer to articulate the actual reason for any employment action,<sup>193</sup> maximizing “existing management prerogatives” militates against any requirement that the reason be the actual reason.<sup>194</sup> In the *McDonnell Douglas II* case, literally any reason is “entitled to the same presumption of good faith.”<sup>195</sup>

b. “Or No Reason”: Hidden Legitimate Nondiscriminatory Reasons

A complete discussion of the at-will employment doctrine’s domination of Title VII must deal with the second part of the traditional statement of the doctrine: “any reason, or no reason.” At first blush, *McDonnell Douglas* appears to prohibit an employer from escaping liability by remaining silent. The apparent requirement that an employer articulate some reason for its decision seems meaningless if an employer asserts no reason. That would be the case if burden shifting actually required an employer to state the actual reason for an adverse decision. As described earlier in this Article, this is emphatically not required by *McDonnell Douglas*. Moreover, consistent with the number of alter egos of at-will and coded messages from the

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employer has not yet been shown to be a violator, but neither is it entitled to the same presumption of good faith concerning its employment decisions which is accorded employers facing only circumstantial evidence of discrimination.” *Id.* at 265–66. The “presumption of good faith” described the true power of the presumptive legitimacy of the articulated reason regardless of subjectivity. *See id.*

<sup>192</sup> *McDonnell Douglas II*, 411 U.S. 792, 803 (1973).

<sup>193</sup> *Burdine*, 450 U.S. at 258.

<sup>194</sup> In *Hopkins*, for example, Justice O’Connor took the position that an employer would never have to state or prove the actual reason, unless the employee proved its case by direct evidence. This position is in line with at-will primacy by creating a special subset of the very small number of direct evidence discrimination cases already isolated by *McDonnell Douglas II*. Within that subset, an employer can give up the complete freedom of at-will and accept the burden of proving an affirmative defense. The benefit to the employer of giving some ground on at-will in this specific circumstance is that, in the conflict between direct evidence of discrimination and proof of a true, legitimate nondiscriminatory reason for an adverse employment decision, the employee wins an injunction and the employer wins the financial victory. The point here is that mere articulation of a reason, which may or may not be true, is such a small diminution of the at-will prerogative that is literally meaningless. *See supra* Parts I, II.

<sup>195</sup> *Hopkins*, 490 U.S. at 265–66.

Court, "or no reason" remained camouflaged within the pretext stage of *McDonnell Douglas*. When the Court revealed the existence of the "no reason" half of the phrase in *St. Mary's Honor Center v. Hicks*<sup>196</sup> ("*Hicks II*"), the Court reaffirmed that a court need not believe the articulated legitimate nondiscriminatory reasons and the employer need not have asserted the actual legitimate nondiscriminatory reason for its decision.<sup>197</sup>

It has been said that "*Hicks* reached a new level in the subordination of employment discrimination law."<sup>198</sup> To the contrary, *Hicks II* was foreshadowed in the Court's Title VII jurisprudence.<sup>199</sup> All of those decisions forthrightly state that the plaintiff has the burden to prove discrimination because of a proscribed characteristic.<sup>200</sup> Anything less than that standard required a finding in favor of the employer because of the inherent limitations imposed on Title VII by the need to preserve the maximum extent of management prerogatives and the statute's language limiting the recovery of meaningful relief to only those circumstances where any reason other than race was absent. *Hicks II*, accordingly, served to limit Title VII to its place as a narrow exception to the at-will employment doctrine. From that perspective, *Hicks II* is hardly objectionable given the Court's repeated although disguised admonition that the Doctrine dominates disparate treatment claims under Title VII. If *Hicks II* reached a new level, it was a new level of clarity.

Hicks, a black prison guard at St. Mary's Honor Center of the Missouri Department of Corrections, claimed his demotion and termination constituted disparate treatment under Title VII.<sup>201</sup> The trial judge found that Hicks had proved his prima facie case; St. Mary's had asserted two legitimate nondiscriminatory reasons, and Hicks had shown those reasons

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<sup>196</sup> 509 U.S. 502, 536-37 (1993).

<sup>197</sup> *Id.* at 509-10.

<sup>198</sup> Corbett, *The "Fall" of Summers*, *supra* note 14, at 341.

<sup>199</sup> *See supra* Part III.B.3 (discussing the *McDonnell Douglas II* restoration of at-will employment by reversing the Eighth Circuit).

<sup>200</sup> *See supra* Part III.C.2.a (explaining *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *Bd. of Trs. of Keene State Coll. v. Sweeney*, 439 U.S. 24 (1978) (*per curiam*); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *Hopkins*, 490 U.S. 228).

<sup>201</sup> *Hicks II*, 509 U.S. at 504-05.

to be pretextual.<sup>202</sup> The district court then proceeded to analyze the evidence under the *McDonnell Douglas II* decision's third stage for proof, "that race was the determining factor in defendant's decision."<sup>203</sup> Although the district court found ample evidence that the defendant "placed [Hicks] on the express track to termination,"<sup>204</sup> Hicks did not prove that the termination "was racially rather than personally motivated."<sup>205</sup>

The Eighth Circuit reversed the district court.<sup>206</sup> The Eighth Circuit took issue with the district court for assuming an unasserted reason for St. Mary's action: that the motivation was personal rather than racial.<sup>207</sup> Moreover, the court took the position that once Hicks, or any other defendants in this type of suit, proved that the articulated legitimate nondiscriminatory reasons were pretext, "defendants were in a position of having offered no legitimate reason for their actions."<sup>208</sup> Once a plaintiff proved, through pretext, that the defendant offered no legitimate nondiscriminatory reason, a plaintiff also proved discrimination.<sup>209</sup> In the context of the at-will employment doctrine, the Eighth Circuit's implementation of *McDonnell Douglas II* represented a significant territorial acquisition for Title VII. According to the Eighth Circuit, Title VII through *McDonnell Douglas II* modified the at-will employment doctrine such that "any reason" actually required the employer to state an ultimately persuasive reason, and "no reason" or silence, established either by literal silence or proof of pretext, did not survive.<sup>210</sup>

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<sup>202</sup> Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1250 (E.D. Mo. 1991) ("Pretext is a statement that does not describe the actual reasons for the decision." (citing *Mister v. Ill. C.G.R. Co.*, 832 F.2d 1427, 1435 (7th Cir. 1987))).

<sup>203</sup> *Id.* at 1251.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 1252.

<sup>206</sup> Hicks v. St. Mary's Honor Ctr. (*Hicks I*), 970 F.2d 487, 488 (8th Cir. 1992).

<sup>207</sup> *Id.* at 492. Showing that its thirst for objectivity was not dead, the Eighth Circuit even went so far as to question "whether such a hypothetical reason based upon personal motivation even could be stated and still be 'legitimate' and 'nondiscriminatory.'" *Id.* (emphasis omitted).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 493.

<sup>210</sup> *Id.* at 492. There is something Quixote-esque about the Eighth Circuit's position. *Hicks I* appears to be a reprise of the Eighth Circuit's *McDonnell Douglas I* effort to reimagine Title VII. For example, the conclusion that the legitimacy of the nondiscriminatory reason is contingent on its persuasiveness echoes the earlier quest for objective standards to justify an adverse employment action. The Eighth

Writing for the Court, Justice Scalia corrected the Eighth Circuit's misinterpretation of *McDonnell Douglas II*. The circuit court erred in equating an incredible reason with no reason and silence. According to Justice Scalia, rather than being in the same position they would have been had they remained silent, "[b]y producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, [St. Mary's] sustained their burden of production, and thus placed themselves in a 'better position than if they had remained silent.'" <sup>211</sup> This is true, as Justice Scalia explained, because the articulation of any reason dispelled the presumption of discrimination established by the prima facie case. <sup>212</sup>

A pretextual reason that amounts to no reason because it is unpersuasive is not the same as silence. This kind of "no reason" equally dispels the prima facie case presumption because it is more accurately viewed as "no good reason" or a "bad reason." Both of these conceptions of an incredible reason fall well within the acknowledged safe harbor of the presumptive legitimacy of "any reason." Accordingly, while a pretextual reason may allow a finding of discrimination, a pretextual reason does not compel a finding of discrimination because it does not necessarily show pretext for discrimination. <sup>213</sup>

On its face, *Hicks II* seems only to clarify that proving pretext is not enough in every case to also prove discrimination. Only somewhat less transparently, *Hicks II* confirms that there was nothing problematic about the trial court finding that St.

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Circuit made this effort despite the Court's specific statement in *Texas Department of Community Affairs v. Burdine* that "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons." 450 U.S. 248, 254 (1981). Moreover, showing a continuing thirst for invigorating Title VII with objective standards, the Eighth Circuit even went so far as to question "whether such a hypothetical reason based upon personal motivation even could be stated and still be 'legitimate' and 'nondiscriminatory.'" *Hicks I*, 970 F.2d at 492 (emphasis omitted). This occurred in spite of the early recognition given to personality conflicts as a legitimate nondiscriminatory reason, and the *Furnco* Court's sanctioning of "haphazard, arbitrary, and subjective" business reasons as legitimate under *McDonnell Douglas II*. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) (internal quotation marks omitted); see also *supra* Part I.

<sup>211</sup> *Hicks II*, 509 U.S. 502, 509 (1993) (emphasis omitted).

<sup>212</sup> *Id.* at 509–10.

<sup>213</sup> *Id.* at 511. In overcoming some awkward language from *Burdine*, Justice Scalia clearly described the pretext issue as one of being pretext for discrimination, which can only be shown if the reason for the adverse decision was false and if the true reason was discrimination. *Id.* at 515–16.

Mary's hid, through pretextual reasons, the actual reason for Hicks's termination: personality conflict. If one accepts that the action of articulating incredible reasons and remaining silent as to the actual reasons amounts to no reason, then St. Mary's escaped liability by giving no reason for Hicks's termination. This concept gave Justice Scalia not the least bit of trouble. Responding to the argument that allowing a reason to remain hidden, "lurking in the record,"<sup>214</sup> until discovered by a trial court unfairly hamstrung a plaintiff, Justice Scalia wrote, "It makes no sense."<sup>215</sup> The fallacy of that argument resides in the notion that a plaintiff must only refute articulated reasons under *McDonnell Douglas II*.<sup>216</sup> To the contrary, "Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of . . . race."<sup>217</sup> In other words, the requirement of proof of actual discrimination leaves "no reason" a vibrant attribute of the dominant at-will paradigm.

The question remains whether it is possible for an employer to literally assert "no reason" by remaining silent in a disparate treatment case. The answer is maybe. Although the prima facie case is just a proxy for intentional discrimination, wisdom dictates the proxy's destruction by the articulation of a legitimate nondiscriminatory reason. On the other hand, the failure to rebut the prima facie case still leaves the plaintiff with only a proxy for, but not proof of, intentional discrimination. Under *Hicks II*, a plaintiff with only a proxy for intentional discrimination is in no better position than a plaintiff with only proof of pretext: Neither is entitled to a finding of intentional discrimination as a matter of law.

Employers' continued articulation of legitimate nondiscriminatory reasons symbolizes Title VII's conquest of that much of the Doctrine's territory domain; employers now believe that they must offer an explanation for an adverse employment decision. The value of this belief as a symbol of Title VII's triumph, however, must be judged against the legitimate

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<sup>214</sup> *Id.* at 523.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 523–24. Although Justice Scalia did not cite to the statute for this statement, it is the substance of 42 U.S.C. § 2000e-5(g) (2012).

nondiscriminatory reasons' power to trigger the summary dismissal of a disparate treatment claim. In that regard, the Doctrine has taken on a new alias, and employers remain as empowered as ever.

#### CONCLUSION

It is easy to be disillusioned with the Court's apparent mismanagement of one of the civil rights era's landmarks. Among others, the Court is at fault for the disillusionment. The Court, for example, told us, "Title VII tolerates no discrimination, subtle or otherwise."<sup>218</sup> We chose to believe that statement. We also chose to believe that fifty years ago, something truly ground breaking occurred when the moral principle of equality became imbedded in federal law. Fifty years on, we need to make other choices. Mainly, we need to resist the urge to superimpose purposes on Title VII that the Eighty-eighth Congress never intended and therefore never built into Title VII. Congress's purpose for Title VII was the ending of the worst forms of discrimination and the preservation of the Doctrine. Since Title VII's purpose was not the eradication of all forms of employment discrimination, the Court, therefore cannot be at fault for reflecting Title VII's limited purpose in *McDonnell Douglas II*. There are no fixes for Title VII. It does the work it was designed to do under the Court's accurate stewardship. The Doctrine remains dominant. Since the Doctrine has always dominated Title VII, if there is a fix to be found, focusing on the Doctrine and its role in antidiscrimination law seems like a good place to start fixing antidiscrimination law.

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<sup>218</sup> *McDonnell Douglas II*, 411 U.S. 792, 801 (1973).