YOUNG V. UNITED PARCEL SERVICE, INC.: *MCDONNELL DOUGLAS* TO THE RESCUE?

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ABSTRACT

The Pregnancy Discrimination Act of 1978 can be interpreted in two obvious ways: one interpretation requires employers to make reasonable accommodations for pregnant employees, and the other does not require such accommodations. In Young v. United Parcel Service, Inc.*, the Supreme Court held that in some cases employees may be able to prove intentional pregnancy discrimination based on an employer's failure to make accommodations for the pregnant employee when the employer makes accommodations for other disabled employees. Rather than reaching this result by interpreting the statute to require reasonable accommodations, however, the Court held that plaintiffs with "indirect evidence" of discrimination may prove their claim using the pretext analysis developed by the Court in* McDonnell Douglas Corp. v. Green. *Under this analysis, the Court instructed that, after the first two stages of the analysis, a plaintiff could attempt to prove that the employer's legitimate, nondiscriminatory reason for denying an accommodation for a pregnant employee is pretextual, and this could be proven by demonstrating the significant and unjustified burden the employer's nonaccommodation policy imposes on pregnant employees. Although it seems that the Court resorted to* McDonnell Douglas *as a compromise to fashion a majority opinion, this essay contends that invocation of the* McDonnell Douglas *analysis was neither necessary nor prudent. There are two likely ramifications of the Court's use of the* McDonnell Douglas *analysis. The first is that the* Young *opinion is likely to resurrect the division of intentional discrimination claims between those based on direct evidence and those based on circumstantial evidence, with the claims in those two categories being analyzed differently. That is a distinction that the Court rejected in 2003 in* Desert Palace, Inc. v. Costa. *Second, the Court's resort to the* McDonnell Douglas *analysis refortifies a proof framework which arguably should not have survived the* Desert Palace

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decision and which has constrained the robust development of employment discrimination law by forcing evidence in most cases into proxy questions or categories that have only a tangential relationship to the ultimate issue of discrimination. Too many claims in employment discrimination law are forced into the McDonnell Douglas *analysis, which often serves to obscure the actual issues presented. Neither of the foregoing potential ramifications is a good development for employment discrimination law.* Young v. UPS *could—and should—have been resolved without resort to* McDonnell Douglas.

I. INTRODUCTION

In *Young v. United Parcel Service, Inc.*,[1] the Supreme Court confronted the meaning of pregnancy discrimination under the Pregnancy Discrimination Act of 1978 (PDA).[2] Specifically, the Court was called upon to decide whether an employer intentionally discriminated against a pregnant employee when that employer made accommodations in the form of temporary job reassignments for other employees who were temporarily unable to perform their jobs due to on-the-job injuries, disabilities covered by the Americans with Disabilities Act, or loss of certification, but did not offer any such reassignment to a pregnant employee who was disqualified from performing her job as a driver due to lifting restrictions. The case seemingly required the Court to interpret the meaning and relationship of the two clauses of the PDA.[3] The Court appeared to be put to the choice of two viable statutory interpretations—one that would require employers in some circumstances to provide reasonable accommodations to pregnant

1. 135 S. Ct. 1338 (2015).

2. Pub. L. No. 95-598, 92 Stat. 2679 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2012)).

3. The two clauses are separated by a semicolon. The first clause seemingly treats pregnancy discrimination as nothing more than a subset of sex discrimination, which would not encompass a duty on the part of the employer to make reasonable accommodations for pregnant employees. The second clause, on the other hand, seemingly requires something more than nondiscrimination on the basis of sex. The second clause can be interpreted as imposing a duty of reasonable accommodation because it states that pregnant employees are to be accorded the same treatment as a group of nonpregnant employees who have abilities and disabilities similar to those of pregnant employees. The PDA provides as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

42 U.S.C. § 2000e(k).

employees if they provide them to similarly situated nonpregnant comparators, and one that would treat pregnancy as merely a subset of sex discrimination and would not require reasonable accommodation regardless of the employer's accommodation of other similarly disabled nonpregnant employees. Remarkably, the Court did not approve either of these viable statutory interpretations. Yet it still found a way to vacate the summary judgment that had been granted in favor of the employer and remand the case. Eschewing the most likely statutory interpretations,[4] the Court was rescued by invoking the much-maligned[5] pretext proof framework developed in 1973 in *McDonnell Douglas Corp. v. Green*.[6]

The 6–3 decision by the Court in *Young* crafts a middle-ground, compromise analysis to keep alive a pregnant plaintiff's opportunity to prove intentional discrimination. It appears that in order to garner the votes for a majority opinion, the Court found it necessary to summon the *McDonnell Douglas* analysis, which requires compartmentalizing evidence of discrimination in a three-stage burden-shifting proof structure for which each part and the whole is only loosely related to the ultimate issue of discrimination. The majority's opinion likely will result in pregnancy accommodation claims surviving summary judgment and getting to the fact finder in numerous cases,[7] and consequently may prompt employers to grant accommodations for pregnancy to avoid protracted litigation.[8]

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4. The Court stated that it was opting for a third interpretation by imposing *McDonnell Douglas*. *Young*, 135 S. Ct. at 1353 ("The statute lends itself to an interpretation other than those that the parties advocate and that the dissent sets forth.").

5. The criticism of *McDonnell Douglas* has been ongoing and escalating for many years. *See, e.g.*, Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229 (1995); Jamie Darin Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law:* McDonnell Douglas*'s Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511 (2008); Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371 (1997).

6. 411 U.S. 792 (1973); *see also infra* text accompanying notes 19–26.

7. A court already has relied on *Young* in this way. About a week after *Young* was decided, a federal district court denied the City of New York's 12(b)(6) motion to dismiss in a case based on failure to accommodate a pregnant employee, stating that the Supreme Court "recently dispelled any doubt that a plaintiff may bring a PDA claim based on her employer's failure to accommodate her pregnancy." LaSalle v. City of New York, No. 13 Civ. 5109 (PAC), 2015 WL 1442376, at *3 (S.D.N.Y. Mar. 30, 2015).

8. *See* Ann C. McGinley, Young v. UPS, Inc.*: A Victory for Pregnant Employees?*, HAMILTON AND GRIFFIN ON RIGHTS (Mar. 29, 2015), http://hamilton-griffin.com/guest-blog-ann-mcginley-young-v-ups-inc-a-victory-for-pregnant-employees/.

There is much fodder for discussion in the various opinions in *Young*.[9] The most discussed issue in the case may prove to be the Court's apparent merger of disparate treatment and disparate impact under the third prong of the *McDonnell Douglas* analysis,[10] although the Court appears to have adequately cabined its analysis to the small number of pregnancy discrimination claims that are wedged between the two clauses of the PDA.[11] Indeed, the interaction of disparate treatment and disparate impact is an issue that has occupied the Court's attention in some recent cases, including most conspicuously in 2009 in *Ricci v. DeStefano*.[12]

I wish to address neither the likely effect of the decision on pregnancy accommodation nor the majority's putative blending of disparate treatment and disparate impact. Rather, I will examine what may be the larger ramifications for employment discrimination law of the majority's flying in *McDonnell Douglas* to provide the rescue as a compromise rationale for the *Young* decision. It is unfortunate that the Court resorted to the *McDonnell Douglas* analysis to achieve this result. The Court suggested that the analysis it crafted likely was limited to the PDA context,[13] and even in that context, may be needed for only a short period of time.[14] Although the Court's variation on the *McDonnell Douglas* analysis for accommodation claims under the PDA may be supplanted by an analysis under the ADA Amendments Act, as the *Young* majority suggested, the Court's resort to the *McDonnell Douglas* pretext analysis is not likely to be insignificant or short-lived.

Contrary to the Court's assurances regarding the limited significance of the decision, invoking *McDonnell Douglas* to resolve whether the PDA imposes a duty of reasonable accommodation will likely have two negative ramifications for the larger body of employment discrimination law. First, the Court's use of the pretext analysis will probably rejuvenate the vexatious distinction between employment discrimination claims based on direct evidence and those based on circumstantial or indirect

9. The majority opinion was authored by Justice Breyer. Justice Alito wrote a concurring opinion, and Justice Scalia wrote the principal dissent, with Justice Kennedy also filing a dissenting opinion.

10. *See infra* text accompanying note 63.

11. *Young*, 135 S. Ct. at 1355 ("This approach, though limited to the Pregnancy Discrimination Act context . . . .").

12. 557 U.S. 557 (2009).

13. *Young*, 135 S. Ct. at 1355.

14. The Court suggested that the ADA Amendments Act of 2008, as interpreted by the Equal Employment Opportunity Commission (EEOC), may cover such cases arising after the effective date of that Act. *Id.* at 1348.

evidence.[15] That distinction is one the Court said it was laying to rest in 2003 in *Desert Palace, Inc. v. Costa*.[16] Second, the Court has refortified the *McDonnell Douglas* pretext analysis, which arguably should not have survived *Desert Palace*.[17] This proof framework, which requires that all evidence of discrimination be crammed into three categories, regardless of the suitability or fit, was featured by the Court in *Young* as a way to resolve a hard question in employment discrimination law. Neither of these likely ramifications will be a positive development in employment discrimination law, returning the law to nettlesome issues that should have been resolved in *Desert Palace*. The Court should be retiring *McDonnell Douglas* rather than invoking it as the panacea for hard issues. If I am correct about the legacy of *Young*, we will rue the day that the Court unnecessarily summoned *McDonnell Douglas* to the rescue.

II. PRELUDE TO *YOUNG V. UPS*: FROM MCDONNELL DOUGLAS TO DESERT PALACE

Much of the development of federal employment discrimination law in the courts and many of the Supreme Court's employment discrimination opinions have focused on the proof structures used to analyze individual disparate treatment claims.[18] The Supreme Court created two proof frameworks to analyze such claims. The Court first announced the pretext framework in *McDonnell Douglas Corp. v. Green*[19] in 1973. The *McDonnell Douglas* pretext framework is a three-part proof structure with shifting burdens of production. A plaintiff bears the initial burden of production to establish a prima facie case by proving (1) that he belongs to a protected class, (2) that he applied for and was qualified for the job, (3) that despite his qualifications, he was rejected, and (4) that the position remained open and the employer continued to seek applicants having the

15. *See infra* Part IV.A.

16. 539 U.S. 90, 101 (2003).

17. *See infra* Part IV.B.

18. The Court provided a primer on theories of discrimination in *Young*, explaining that disparate treatment is "a claim that an employer intentionally treat[s] a complainant less favorably than employees with the 'complainant's qualifications' but outside the complainant's protected class." *Young*, 135 S. Ct. at 1345. The Court also explained two other theories of discrimination—disparate impact, based on discriminatory effects of a facially neutral employment practice in which intent or motive is not required, and "pattern-or-practice" (also known as systemic disparate treatment), based on proof of intentional discrimination as the employer's standard operating procedure. *Id.*; *see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (explaining the differences between disparate treatment and disparate impact).

19. 411 U.S. 792 (1973).

plaintiff's qualifications.[20] The Court noted in *McDonnell Douglas* that the elements of the prima facie case will vary with different factual situations.[21] If the plaintiff satisfies the burden of the prima facie case, the burden of production shifts to the defendant-employer to present a legitimate, nondiscriminatory reason for its actions.[22] Finally, if the employer satisfies its burden at the second stage, the burden of production shifts back to the plaintiff to prove that the employer's proffered reason is a pretext for discrimination.[23]

The *McDonnell Douglas* opinion announced the proof structure, but the mechanics and meaning of the analysis were not fully developed at that time. The Court found it necessary to explain the meaning and procedural effect of the second and third stages of the analysis in several subsequent cases. These decisions include *Texas Department of Community Affairs v. Burdine*,[24] *St. Mary's Honor Center v. Hicks*,[25] and *Reeves v. Sanderson Plumbing Products, Inc.*[26] The decisions helped to clarify the standards and burdens of proof under the pretext framework, but even these decisions did not make the pretext framework easily applicable in all employment discrimination cases. The Court eventually would develop a second framework for individual disparate treatment claims.

The court announced this alternative proof structure, mixed motives, in *Price Waterhouse v. Hopkins*.[27] Whereas the pretext analysis by design

20. *Id.* at 802.
21. *Id.* at 802 n.13.
22. *Id.* at 802–03.
23. *Id.* at 804.
24. 450 U.S. 248, 254–55 (1981) (explaining the defendant's burden at stage two).
25. 509 U.S. 502, 511 (1993) (explaining the effect of proof of pretext in a fully tried case).
26. 530 U.S. 133, 148 (2000) (explaining the effect of proof of pretext at summary judgment). The Supreme Court has never held that the pretext analysis is applicable to analyze ADEA cases, although it assumed so in *Consolidated Coin Caterers*, and lower courts have routinely applied it. *See* O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (1996) ("In assessing claims of age discrimination brought under the ADEA, the Fourth Circuit, like others, has applied some variant of the basic evidentiary framework set forth in *McDonnell Douglas*. We have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it."). In addition, the Court seems to have approved the applicability of the pretext analysis to disability discrimination claims under the ADA. *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 49 n.3 (2003). The *McDonnell Douglas* framework is also commonly adopted by courts to analyze claims under state employment discrimination laws. *See, e.g.*, Zaniboni v. Mass. Trial Court, 961 N.E.2d 155, 158 (Mass. App. Ct. 2012) (stating that the analysis applies to claims under Massachusetts employment discrimination law). Beyond employment discrimination law, the pretext analysis has been adopted to analyze other types of federal and state employment claims. *See, e.g.*, Sabourin v. Univ. of Utah, 676 F.3d 950, 958 (10th Cir. 2012) (applying analysis to a retaliation claim under the Family and Medical Leave Act); Eagen v. Comm'n on Human Rights & Opportunities, 42 A.3d 478, 487 & n.5 (Conn. App. Ct. 2012) (recognizing adoption of pretext analysis for various types of state employment law claims).
27. 490 U.S. 228 (1989).

identifies "the real reason" for the employment decision and rejects other reasons as pretext, the mixed-motives proof structure acknowledges that an employer may have considered multiple factors in making the employment decision and that the discriminatory reason is only one of those factors. In *Price Waterhouse*, the plurality opinion and Justice O'Connor's concurrence applied different standards to the plaintiff's prima facie case. The plurality held that the plaintiff must prove that the discriminatory factor was a "motivating factor" in the employer's decision, while Justice O'Connor and Justice White applied a "substantial factor" standard in their concurrences.[28] The opinions agreed that if a plaintiff proved a prima facie case, the burden would shift to the employer to prove that it would have made the same decision even without considering the discriminatory reason.[29] An employer that satisfied its burden on this affirmative defense would avoid liability under this framework.[30]

After *Price Waterhouse*, most courts adopted the substantial factor standard of the concurring opinions as the controlling standard of causation in the plaintiff's prima facie case.[31] However, Congress responded by enacting the Civil Rights Act of 1991, which clarified and adjusted the mixed-motives proof structure.[32] Congress codified "motivating factor" as the causation standard in the plaintiff's prima facie case rather than "substantial factor."[33] Congress also changed the analysis of *Price Waterhouse* by providing that the same-decision defense is not a complete defense, thereby avoiding liability. Instead, liability is still

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28. *Id.* at 276 (O'Connor, J., concurring); *id* at 259 (White, J., concurring). It has been argued that the use of different causation terms by the plurality and O'Connor concurrence was not intended to create different standards of causation. *See* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 508 (2006). *But see* William R. Corbett, *Babbling About Employment Discrimination: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683, 699 n.75 (2010). The case from which the Court derived the analysis equated the two standards. *See* Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 287 (1977).

29. *Price Waterhouse*, 490 U.S. at 246 & 258; *id*. at 279 (O'Connor, J., concurring).

30. *Id.* at 258.

31. *See, e.g.*, Palmer v. Baker, 905 F.2d 1544, 1548 n.8 (D.C. Cir. 1990) (recognizing the different causation standards in the plurality and concurrences and opting for "substantial factor"); *see also* Maya R. Warrier, Note, Dare *to Step Out of the* Fogg*: Single-Motive Versus Mixed-Motive Analysis in Title VII Employment Discrimination Cases*, 47 U. LOUISVILLE L. REV. 409, 414 (2008) (recognizing disagreement regarding the controlling standard, but stating that most courts opted for "substantial factor").

32. Pub. L. No. 102-166, § 107, 105 Stat. 1071 (1991) (codified at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2012)).

33. 42 U.S.C. § 2000e-2(m).

imposed even if the employer satisfies its burden on the same-decision defense, but the defense limits the remedies that are available.[34]

In the wake of *Price Waterhouse* and even after the Civil Rights Act of 1991, courts grappled with determining which proof structure—pretext or mixed motives—to apply in any given case. Most circuits seized upon the dividing line cited by the O'Connor concurrence: cases in which there was direct evidence of discrimination were analyzed under mixed motives, and circumstantial evidence cases were analyzed under pretext.[35] The courts of appeals developed various definitions and standards to distinguish direct from circumstantial evidence. An attempt to categorize the approaches of the various circuits labeled them the "classic approach," the "animus plus approach" and the "animus approach."[36] The tests were confusing and uncertain—described by a court that sought to put an end to the distinction as "chaos" and a "morass."[37]

No matter how vexatious the dividing standard may have been, as long as courts maintained a basis to distinguish between cases to be analyzed under pretext and those to be analyzed under mixed motives, it was reasonable, though challenging, for courts to continue using the two proof structures, and a rich body of case law developed under them. However, the Supreme Court seemingly upset this order when it held in *Desert Palace, Inc. v. Costa* that direct evidence is not required for a plaintiff to be entitled to a motivating factor jury instruction.[38] With that, the Court erased the line separating the cases analyzed under pretext and those analyzed under mixed motives. The Court based its holding on the fact that the language added by the Civil Rights Act of 1991 did not say anything about the "motivating factor" standard being limited to direct evidence cases.[39] Even Justice O'Connor, on whose *Price Waterhouse* concurrence the distinction was based, agreed that the 1991 Act had undermined the distinction.[40] The Court declined to say whether elimination of the dividing line meant that *all* disparate treatment cases

34. 42 U.S.C. §2000e-5(g)(2)(B). The limitation is significant, leaving the plaintiff with no damages.

35. Price Waterhouse v. Hopkins, 490 U.S. 228, 270–71 (O'Connor, J., concurring).

36. *See, e.g.*, Costa v. Desert Palace, Inc., 299 F.3d 838, 852–53 (9th Cir. 2002) (describing the categories developed by First Circuit Judge Selya), *aff'd*, 539 U.S. 90 (2003).

37. *Id.* at 851–53; *see also* Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 663 (2000) ("[T]he various definitions raise the question whether the courts' attempts to draw bright-line tests between direct and circumstantial evidence are really helpful at all.").

38. 539 U.S. 90, 101 (2003).

39. *Id.* at 99.

40. *Id.* at 102 (O'Connor, J., concurring).

were to be analyzed under the mixed-motives framework.[41] The lower courts were left with no guidance for deciding which framework to apply in any given case.

Desert Palace appeared to be a landmark development in the evolution of the proof frameworks both for what it clearly did and for what it could be read as implicitly doing. First, it expressly ended the division and analysis of employment discrimination claims based on the type of evidence (direct or circumstantial) on which they were based. This was a good development in employment discrimination law because the dividing line had proven to be chimerical. Second, *Desert Palace* could be read as inferentially displacing the *McDonnell Douglas* pretext analysis and leaving all individual disparate treatment claims to be analyzed under the statutory mixed-motives framework. Because *Desert Palace* did not establish a new basis of demarcation between cases to be analyzed under the two proof frameworks, some courts[42] and commentators[43] suggested or argued that the *McDonnell Douglas* framework was dead. Those arguments notwithstanding, the courts continued to use the pretext analysis, with most never mentioning that *Desert Palace* had erased the dividing line and thereby called into question the continuing viability of *McDonnell Douglas*.[44] Moreover, many courts continued to refer to the pretext analysis as being for cases based on circumstantial evidence and the mixed-motives analysis for cases based on direct evidence, saying that when a plaintiff presents *only* circumstantial evidence the case must be analyzed under the *McDonnell Douglas* analysis. The Fifth Circuit, for example, recently declared this division by identifying the two categories of evidence and the different analyses applicable to each in *Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C.*, although the court in a footnote mentioned some uncertainty about this dichotomy based on *Desert Palace*.[45] Although it certainly was arguable that the pretext

41. In fact the Court said it would not say: "This case does not require us to decide when, if ever, §107 applies outside of the mixed-motive context." *Id.* at 94 n.1 (majority opinion).

42. *See, e.g.*, Dare v. Wal–Mart Stores, Inc., 267 F. Supp. 2d 987, 990–93 (D. Minn. 2003).

43. *See, e.g.*, Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 102-03 (2004); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 765-66 (2005); Jeffrey A. Van Detta, *"*Le Roi Est Mort; Vive Le Roi!*": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 76 (2003).

44. *See, e.g.*, Johnson v. Maestri Murrell Prop. Mgmt., 555 F. App'x 309, 311–12 (5th Cir. 2014); Hamilton v. Oklahoma City Univ., 563 F. App'x 597, 600–01 (10th Cir. 2014); Vaughan v. Morgan Stanley DW Inc., 158 F. App'x 205, 207 (11th Cir. 2005).

45. 778 F.3d 473, 475 & n.3 (5th Cir. 2015); *see also* Marable v. Marion Military Inst., 595 F. App'x 921, 924 (11th Cir. 2014).

analysis survived *Desert Palace*, the courts that insisted upon maintaining the direct-circumstantial evidence dividing line were flouting the Court's decision in *Desert Palace*. However, perhaps they were simply ahead of their time, as the Court itself would rejuvenate the distinction in *Young*.

III. *YOUNG V. UPS*: FACTS AND COURT OPINIONS

Young was an air driver for UPS, where she had worked since 1999. Air drivers take packages and letters delivered by air, load them onto their trucks, and deliver them. UPS had a requirement that all drivers must be able to lift and handle packages weighing up to seventy pounds and to assist with packages weighing up to 150 pounds. When Young became pregnant, she was restricted from lifting over twenty pounds for the first twenty weeks of her pregnancy and over ten pounds thereafter. UPS informed her that she could not work at her driver job as long as she was under the lifting restriction. Young unsuccessfully argued to be permitted to continue in her driver job (because other employees had offered to assist her with lifting) or to do a light-duty job temporarily during her pregnancy. UPS had made such accommodations for other employees in three scenarios. First, UPS offered temporary transfers to light-duty jobs for workers who suffered on-the-job injuries. Second, under the terms of the collective bargaining agreement, UPS was required to give "inside jobs" to drivers who lost their certification by the Department of Transportation. Finally, UPS provided reasonable accommodations, including some job reassignments, for disabled employees pursuant to the Americans with Disabilities Act. After Young's request for accommodation was denied, she was placed on leave under the Family and Medical Leave Act, and when that leave expired, she took extended leave without pay and lost her group medical coverage.

Young filed a charge of discrimination with the EEOC, alleging sex, race, and pregnancy discrimination.[46] In her subsequent lawsuit, she asserted claims for sex, race, and disability discrimination.[47] Young moved to dismiss voluntarily her race discrimination claim,[48] and the trial court granted summary judgment in favor of the defendant on her disability and sex discrimination claims.[49] Regarding the sex

46. Young v. United Parcel Serv., Inc., 707 F.3d 437, 442 (4th Cir. 2013), rev'd, 135 S. Ct. 1338 (2015).
47. *Id.*
48. *Id.*
49. *Id.*

discrimination claims, the district court granted summary judgment, reasoning that she did not produce direct evidence of discrimination and that she could not establish a prima facie case under the *McDonnell Douglas* framework because she did not identify a similarly situated comparator who was treated more favorably.[50]

The Fourth Circuit affirmed the granting of summary judgment. First, the court rejected the interpretation of the PDA's second clause as requiring employers to treat pregnant workers the same as similarly disabled nonpregnant workers by granting the same accommodations. The Fourth Circuit characterized that interpretation of the PDA as creating an impermissible "most favored nation"[51] status for pregnant employees.[52] The court refused to adopt a broad reading of the second clause, which would create a cause of action separate and distinct from a sex discrimination claim under section 703(a).[53] Second, the Fourth Circuit rejected the comments of a supervisor as direct evidence of employer discriminatory motive.[54] Finally, the court evaluated Young's claim under the *McDonnell Douglas* pretext framework and held, as the district court had, that Young could not establish a prima facie case because she produced no evidence that similarly situated employees outside the protected class received more favorable treatment.[55] The court did not find the other types of employees given temporary job reassignments to be appropriate comparators.

The Supreme Court majority opinion considered two interpretations of the second clause of the PDA. It rejected UPS's reading that the second clause does no more than define sex discrimination to include pregnancy discrimination because the first clause does that, and such an interpretation would render the second clause superfluous.[56] The majority also rejected the broader reading espoused by Young because the majority agreed with the Fourth Circuit that Congress did not intend, in enacting the PDA, to

50. *Id.*

51. *Id.* at 446. The term is borrowed from the lexicon of international trade, in which it describes "[a] method of establishing equality of trading opportunity among states by guaranteeing that if one country is given better trade terms by another, then all other states must get the same terms." *Most-Favored-Nation Status*, WEST'S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2008), *available at* http://legal-dictionary.thefreedictionary.com/Most-Favored-Nation+Status; *see also Principles of the Trading System*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited June 11, 2015).

52. *Young*, 707 F.3d at 446.

53. *Id.* at 447.

54. *Id.* at 449.

55. *Id.* at 450.

56. Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1352–53 (2015).

create a "most-favored nation" status for pregnancy.[57] Instead, the majority interpreted the second clause as permitting a plaintiff to prove a pregnancy discrimination claim with indirect evidence using the *McDonnell Douglas* analysis.[58] The majority described the analysis as proceeding in the following way. First, the plaintiff would establish a prima facie case by proving that she belongs to a protected class, she sought an accommodation, and the employer denied the accommodation, although it did accommodate others similarly able or unable to work. Next, the employer would give a legitimate, nondiscriminatory reason for denying the accommodation, but that reason normally could not be that accommodating pregnant women was more expensive or less convenient. Finally, the plaintiff would prove the employer's reason was pretextual, and a jury question could be created on this issue, by producing sufficient evidence that the employer's policy actually imposes a significant burden on pregnant women—a burden which cannot be justified by the given legitimate, nondiscriminatory reason and which permits an inference of discrimination. Furthermore, the plaintiff can establish a genuine issue of material fact regarding imposition of a significant burden at stage three by presenting evidence that the employer accommodates a large percentage of nonpregnant employees and fails to accommodate a large percentage of pregnant employees.[59]

Justice Alito, concurring in the judgment, did not rely on the *McDonnell Douglas* analysis to interpret the second clause, but instead offered an interpretation of the meaning of the second clause of the PDA that was also different from either of the two advanced by the parties. According to Justice Alito, an employer violates the second clause if it does not have a neutral business reason for treating pregnant employees differently than nonpregnant employees who are reassigned.[60]

The dissent authored by Justice Scalia argued that the majority and the concurrence erred by not accepting UPS's reading of the second clause of the PDA as adding nothing but clarity to the first clause, which simply defines pregnancy discrimination as a form of sex discrimination.[61] The dissent saw the second clause as capable of only the two interpretations advanced by the parties.[62] Because the majority's application of the

57. *Id.* at 1349.
58. *Id.* at 1353–54.
59. *Id.* at 1354–55.
60. *Id.* at 1359 (Alito, J., concurring).
61. *Id.* at 1363 (Scalia, J., dissenting).
62. *Id.* at 1364.

McDonnell Douglas pretext analysis requires a court to evaluate the effect of the employer's legitimate, nondiscriminatory reason, the dissent characterized the approach as "allowing claims that belong under Title VII's disparate-impact provisions to be brought under its disparate-treatment provisions instead."[63] Justice Scalia's dissent also took the Alito concurrence to task for its "text-free broadening" of the second clause.[64]

Justice Kennedy's dissenting opinion expressed agreement with Justice Scalia's dissent, which he joined, but also denounced indifference to the plight of pregnant women in the workforce.[65] Kennedy's dissent attempted to minimize the effect of interpreting the second clause of the PDA as Justice Scalia did by pointing out that there are other laws that may protect and assist working pregnant women, including the Family and Medical Leave Act and the ADA Amendments Act of 2008.[66] The Kennedy dissent agreed with the Scalia dissent that the majority's interpretation of the PDA risks conflating disparate treatment and disparate impact. Justice Kennedy added that the majority's analysis "injects unnecessary confusion into the accepted burden-shifting framework established in *McDonnell Douglas*."[67]

IV. CONFUSION ABOUT STATUTES, THEORIES AND PROOF STRUCTURES: WHEN IN DOUBT, LEAVE IT TO *MCDONNELL DOUGLAS*!

Young v. UPS is, in part, a microcosm of the development of federal employment discrimination law and how it has gone awry. Fifty years ago, faced with statutes that provide bare-bones prohibitions of discrimination based on specified characteristics, the Supreme Court and lower courts embarked on a large-scale case law development that focused on articulating theories of discrimination and, within those theories, proof structures or frameworks.[68] Recognizing the opinion's place in that lineage, early in the opinion, the *Young* majority set out a short primer on three theories of discrimination: disparate treatment, disparate impact, and pattern or practice (more properly, systemic disparate treatment).[69] The Court noted that Young alleged neither disparate impact nor pattern or

63. *Id.* at 1366.
64. *Id.*
65. *Id.* at 1366–67 (Kennedy, J., dissenting).
66. *Id.* at 1367–68.
67. *Id.* at 1368.
68. Many of the Supreme Court's employment discrimination decisions have been about the proof frameworks used to prove and analyze disparate treatment and disparate impact. *See supra* Part II.
69. *Young*, 135 S. Ct. at 1345.

practice.[70] The Court further explained that under the disparate treatment theory of discrimination, a plaintiff may prove discrimination either by direct evidence or by using the *McDonnell Douglas* analysis,[71] which, while technically correct, is misleading and unnecessary in light of the Court's decision in *Desert Palace* in 2003.

The *Young* majority flew in *McDonnell Douglas* to provide the rescue as a compromise rationale to fashion a majority opinion. Despite the majority's unusual assurances that this modified *McDonnell Douglas* analysis would be limited in both scope and time of application,[72] I think the invocation of *McDonnell Douglas* is by no means as innocuous as the majority suggests. Rather, the use of the pretext analysis reintroduces some vexing issues into employment discrimination law that should have been laid to rest in 2003, and it portends the continuing deployment of pretext analysis to resolve issues that do not belong in that framework, thereby stunting a more transparent and comprehensible development of employment discrimination law. First, it resurrects the problematic and once-rejected division between direct evidence and circumstantial evidence cases, even if under the new labels of direct evidence and indirect evidence (which likely is a distinction without a meaningful difference). Second, it once again elevates the role of the *McDonnell Douglas* analysis in disparate treatment law, suggesting that almost any issue of discrimination, including particularly challenging ones, can be stuffed into the three-part framework. Thus, lower courts will take their cue to analyze most intentional discrimination cases under *McDonnell Douglas*, no matter how poor the fit between the case and the pretext framework. Neither of these probable results will be good for employment discrimination law.

A. Did the Young Majority Forget or Ignore Desert Palace?

In *Young*, the Court majority seemingly followed the lead of lower courts and forgot or ignored the holding of *Desert Palace*, declaring that "a plaintiff can prove disparate treatment either (1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or (2) by using the burden-shifting framework set forth in *McDonnell Douglas*."[73] Later the Court states that "an individual pregnant

70. *Id.*
71. *Id.*
72. *See* text accompanying *supra* notes 13–14.
73. *Young*, 135 S. Ct. at 1345.

worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework."[74] How could the *Young* case be resolved this way twelve years after the Court decided *Desert Palace, Inc. v. Costa*?[75] The Court should have been aware it was contravening *Desert Palace*, as this was pointed out in an amicus brief filed by law professors and women's and civil rights organizations.[76]

In *Desert Palace*, the Court erased the dividing line between intentional discrimination cases relying on direct evidence and those based on circumstantial evidence by declaring that direct evidence is not required to bring a case under the mixed-motives framework.[77] Since *Desert Palace*, many courts steadfastly and repeatedly have indicated that they do not understand that decision to have erased the direct evidence/circumstantial evidence dividing line in discrimination law.[78] Some courts seemingly have tried to give effect to *Desert Palace* while fashioning an only slightly different dichotomy from that rejected in *Desert Palace*. Such courts say that when no direct evidence exists, plaintiffs may prove their cases by using the *McDonnell Douglas* indirect method, but the direct method requires plaintiffs to show the employer's illegal motive through either direct or circumstantial evidence.[79] Thus, those courts shifted from speaking of direct and circumstantial evidence to direct and indirect methods, while also incorporating the two kinds of evidence. Another analytic variation devised by some courts explains that the courts are not contravening *Desert Palace* because "direct" evidence is not the converse of circumstantial evidence.[80] Suffice it to say that lower

74. *Id.* at 1353.

75. 539 U.S. 90 (2003).

76. Brief of Law Professors and Women's and Civil Rights Organizations as Amici Curiae in Support of Petitioner, *Young* (No. 12-1226), 2014 WL 4536935.

77. *See supra* Part II.

78. *See supra* notes 44–45.

79. *See, e.g.*, Coleman v. Donahoe, 667 F.3d 835, 845 (7th Cir. 2012); Marich v. Sch. Town of Munster, Ind., No. 2:11-cv-96, 2015 WL 1865549, at *5-6 (N.D. Ind. Apr. 23, 2015).

80. *See* Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004). The Eighth Circuit explained this approach as follows:

> Thus, "direct" refers to the causal strength of the proof, not whether it is "circumstantial" evidence. A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the three-part *McDonnell Douglas* analysis to get to the jury, regardless of whether his strong evidence is circumstantial. But if the plaintiff lacks evidence that clearly points to the presence of an illegal motive, he must avoid summary judgment by creating the requisite inference of unlawful discrimination through the *McDonnell Douglas* analysis, including sufficient evidence of pretext.

Id.

courts, left with no basis to distinguish which disparate treatment cases get which analysis after *Desert Palace*, have tried different approaches that all approximate the pre-*Desert Palace* law. In doing so, the lower courts have facially, but not substantively, honored the holding of *Desert Palace* that the distinction between types of evidence does not determine the applicable analytical framework and is of little moment because direct evidence is not necessarily superior to circumstantial.[81]

In *Young*, the current Court showed how little it respects the *Desert Palace* decision. The use of different terms raises the possibility that the Court in *Young* is not reviving the pre-*Desert Palace* dichotomy, but instead is trying to follow lower courts in establishing a new guide for determining how to analyze disparate treatment cases, based on a distinction between "direct" evidence and "indirect" evidence, that is somehow different from the old divide between direct and circumstantial evidence.[82] This solution seems unlikely, and if that is what the Court was doing in *Young*, it did not make that clear. Moreover, adoption of such a new dichotomy would be troubling, because it would reintroduce nebulous standards used to make distinctions between amorphous categories of evidence that existed before *Desert Palace*. The putative new dichotomy would be as unfaithful to *Desert Palace* as would be reintroducing the circumstantial/direct dichotomy that *Desert Palace* abrogated.[83] Regardless of what the Court intended with its direct/indirect evidence distinction in *Young*, it likely resuscitated the importance of distinguishing between the different categories of evidence used to prove disparate treatment.

B. Back to the Future: Young Reanimates McDonnell Douglas

Over its forty-plus years, the *McDonnell Douglas* pretext framework has come under increasing criticism. The stage one prima facie case and the stage three pretext parts of the analysis have been exposed as artificial and not particularly probative of the ultimate question of discrimination.[84] The prima facie case has been discredited for its shifting and uncertain elements and its attenuated relationship to whether discrimination actually

81. In *Desert Palace*, the Court explained that circumstantial evidence is not necessarily inferior to direct evidence and, in some cases, circumstantial evidence is more persuasive than direct evidence. Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003).

82. *See id.*

83. *See supra* text accompanying notes 38–40.

84. *See, e.g.*, William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself*, 62 AM. U. L. REV. 447, 494–99 (2013).

occurred.[85] The pretext stage has raised questions regarding its substantive and procedural meaning, requiring clarification from the Supreme Court in *St. Mary's Honor Center v. Hicks*[86] and *Reeves v. Sanderson Plumbing Products, Inc.*[87] As it has developed, the third stage proof of pretext has been less helpful in answering the ultimate question of discrimination than the analysis originally seemed to promise.[88] Overall, the weakness of the framework is that it asks questions that may lead to a finding of discrimination, but the correlation between the analysis and the ultimate issue of intentional discrimination in any given case is tenuous.[89] Beyond the problems with the analysis itself, the courts' application of it has created additional problems. Rather than using the *McDonnell Douglas* analysis as a method of proof that is appropriate for some cases, the courts have come to treat it as a straightjacket into which the vast majority of disparate treatment claims must be forced, regardless of the fit.[90] At its inception and in its early life, the Court did not intend for the *McDonnell Douglas* framework to be so used.[91]

After *Desert Palace*, the Court left us with no way to allocate claims between pretext and mixed motives, and thus another reason to dispatch with the pretext analysis was added to the mounting criticisms of the aging framework. *Young* has negated the argument that *Desert Palace* implicitly eliminated the *McDonnell Douglas* analysis by erasing the type-of-evidence dividing line. Moreover, in *Young*, the Court sent the message that hard questions of employment discrimination law can be resolved by

85. *See, e.g.*, Smith, *supra* note 5, at 372–78 (describing the elements of the prima facie case as "moving targets" and criticizing the prima facie case as "only marginally related to the focus of the case"); *see also* Malamud, *supra* note 5, at 2282–2301 (discussing these and other problems with the prima facie case). The Supreme Court explained the rationale for inferring discrimination based on a prima facie case: If the two most common legitimate reasons for rejection of an applicant, lack of qualifications and lack of a vacancy, can be ruled out, an inference of discrimination is reasonable in the absence of other explanation. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

86. 509 U.S. 502, 509–11 (1993).

87. 530 U.S. 133, 146–49 (2000).

88. *See* Corbett, *supra* note 84, at 498–99.

89. *See, e.g.*, Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 94 (2011) (explaining that "[e]mbedded within the *McDonnell Douglas* inquiry are several sets of facts that masquerade as legal standards"); John Valery White, *The Irrational Turn in Employment Discrimination Law: Slouching Toward a Unified Approach to Civil Rights Law*, 53 MERCER L. REV. 709, 711 (2002) ("[M]ost commentators agreed that the artificial nature of the *McDonnell Douglas* proof structure, especially its very light prima facie case, was the root of the problem.").

90. *See* Corbett, *supra* note 84, at 501–05.

91. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.").

forcing them into the three stages of *McDonnell Douglas*. After *Young*, *McDonnell Douglas* is very much alive and well and commissioned to dominate disparate treatment analysis.

The area of employment discrimination and the law regulating it present many hard questions. It seems that the Court and courts would better develop the law by addressing those hard questions rather than forcing them into a proof framework, composed of surrogate questions, which have little to do with the issue. To illustrate, on remand, the plaintiff in *Young* may win the case or lose it. The result will be based on whether the fact finder chooses to infer or not to infer discriminatory intent of the employer. Such results still will not tell employers, employees, lawyers, and courts whether employers that provide accommodations to other disabled employees must provide them to pregnant employees. Plaintiffs making such claims presumably will win some and lose some. The law is left unclear, and a jury's finding of pretext or no pretext has little to do with the question presented. Making the issue of duty of accommodation a question of pretext is just that—a pretext.

Young will empower courts to continue labeling cases as based on direct or indirect evidence, and then to force those labeled indirect into the pretext framework regardless of how poorly they fit into it.[92] *Young* itself is not well described as a circumstantial or indirect evidence case. The employer provided temporary job reassignments to some employees temporarily unable to perform their jobs but not to pregnant employees rendered temporarily unable to perform because of pregnancy.[93] Once the claim is forced into the pretext framework, it should be clear how inapt is the analysis.[94] In reality, there is no issue of pretext. The Court says that at this stage, the plaintiff may prevail by "providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden," which will permit the fact finder to infer intentional discrimination.[95] Justice Scalia's dissenting opinion characterizes the majority's articulation of what would happen at stage three of the *McDonnell Douglas* analysis as an "ersatz disparate-impact

92. The *McDonnell Douglas* pretext framework is more troubling in this regard than the mixed-motives analysis because the *McDonnell Douglas* series of surrogate questions is more restrictive than the more open-ended inquiry in the statutory mixed-motives framework—whether discrimination was a motivating factor in the employer's decision.

93. *Young*, 135 S. Ct. at 1344.

94. *See* McGinley, *supra* note 8 (discussing three reasons why *McDonnell Douglas* was not needed to analyze discrimination in the case).

95. Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1354 (2015).

test."[96] Perhaps. Whatever it is, it is not a showing of pretext because pretext has nothing to do with the facts of the case.

The *Young* case is reminiscent of many other cases presenting challenging but clear questions regarding discrimination in which courts dutifully forced them into a proof framework, usually and overwhelmingly the *McDonnell Douglas* framework, and thus obscured the real issue. Consider for example, *Burlington v. News Corp.*, a case in which a Caucasian news anchor was fired after his use of the word "n_ _ _ r" in a meeting to discuss whether the word should be used in a news report caused substantial racial unrest in the workplace.[97] The Caucasian plaintiff contended that he was disciplined for a nonderogatory use of the word, while many black employees who also used the word were not disciplined.[98] The court recognized the threshold question of which analysis it should apply—the *McDonnell Douglas* pretext analysis or mixed-motives.[99] The court said it was using both analyses,[100] but it posed the key question ostensibly under the pretext stage: "can an employer be held liable under Title VII for enforcing or condoning the social norm that it is acceptable for African Americans to say '[n _ _ _ _ r]' but not whites?"[101] Thus, the court identified the core discrimination issue in the case, one that merited careful consideration, but an issue that actually had little to do with the *McDonnell Douglas* analysis, although the court dutifully crammed it into the pretext stage. Examining that issue, the court concluded that African Americans indeed might tolerate use of the word by other African Americans and be insulted when the word is used by white people.[102] Nevertheless, the court found that even if such a social norm exists, it was the type of discriminatory social norm that Title VII was enacted to counter.[103] *Burlington* confronted an important discrimination issue and is an equally important holding, but the case had nothing to do with pretext.

Burlington, like *Young*, is a case of comparative treatment. As in *Young*, it presents a challenging but clear question to be resolved under discrimination law, and it is a question that becomes less stark and comprehensible when buried in the *McDonnell Douglas* analysis under the

96. *Id.* at 1366 (Scalia, J., dissenting).
97. 759 F. Supp. 2d 580, 585 (E.D. Pa. 2010).
98. *Id.* at 593–94.
99. *Id.* at 590–91.
100. *Id.* at 591.
101. *Id.* at 596.
102. *Id.* at 597.
103. *Id.*

guise of pretext. The Court in *Young* suggested that it was doing little harm because its analysis may have a short life, as future cases of the type may be decided under the ADA Amendments Act of 2008. However, the Court's approach of burying hard questions within *McDonnell Douglas* will empower courts to be weak.

V. CONCLUSION

The *Young* majority forgot the lessons of the past, and in so doing, it returned to the past. *Price Waterhouse v. Hopkins* taught that the *McDonnell Douglas* framework is not appropriate to address all types of cases, and so the Court created the mixed-motives analysis. *Desert Palace v. Costa* taught that the distinction between direct evidence and circumstantial evidence cases is not supported by the statutory language, but the Court did not explain what follows from eradicating that dividing line. *Desert Palace* should have announced the demise of *McDonnell Douglas*. Now in *Young*, the Court returns to the type-of-evidence dividing line and reinvigorates a proof framework that should have died.

Unwilling to treat the case as presenting a question of statutory interpretation that could go either of two ways, the Court chose to force it into a proof structure. That was an unfortunate decision that obscured the issue. From there, the Court could have placed it under the mixed-motives analysis with its prima facie case standard of "motivating factor" and the remedy-limiting same-decision defense. That proof structure is established by statute, and it permits a more open-ended inquiry without forcing evidence into a series of surrogate questions in three stages. The *Young* Court could have done that because *Desert Palace* held that the mixed-motives framework is not limited to cases involving direct evidence. Although not the best approach to resolving the case, the mixed-motives analysis would have permitted flexibility to discuss the relevant issues. Instead, *McDonnell Douglas* flew in to rescue the Court from having to answer a hard question of statutory interpretation.

The *Young* majority opinion may please nostalgia buffs and *McDonnell Douglas* fans, but it is bad law. Although the Court suggests the decision will have limited effect, I think the Court is wrong. *Young* divides intentional discrimination claims based on labeling of evidence and fortifies *McDonnell Douglas*, and neither development is good for employment discrimination law.