

## RECLAIMING MCDONNELL DOUGLAS

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### ABSTRACT

*This Article seeks to reclaim the promise of McDonnell Douglas and, in so doing, clear up the quagmire that has enveloped disparate treatment antidiscrimination law.*

*In recent years, McDonnell Douglas, the three-step burden-shifting framework at the foundation of disparate treatment law, has come under sustained and acrimonious attack. Legions of critics accuse the framework of placing unfair burdens on plaintiffs, being ineffective at addressing the types of discrimination that are most prevalent in the modern workplace, and undermining the effort to eradicate employment discrimination. At this point, the framework has few, if any, friends among commentators. However, the courts refuse to relent, often forcing unwilling plaintiffs to use this framework.*

*The ongoing battle in the courts over when plaintiffs must use this framework has resulted in a disparate treatment doctrine that has appropriately been referred to as a quagmire. And the Court's recent attempt to address this morass in *Desert Palace v. Costa* only made things worse.*

*This Article takes a new approach toward McDonnell Douglas: It defends the framework. While it argues that McDonnell Douglas should never be required, it also argues that the framework has been maligned. It is innocent of most of the charges leveled at it by its critics. In fact, it should be seen as a gift to disparate treatment law.*

*The arguments in this Article are not based on interpretations of *Desert Palace*, which have become common in the academy and which have*

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*been largely ignored by the courts. Nor does it seek unrealistic reform from Congress. Instead, these arguments proceed from a detailed understanding of causation articulated in an earlier article I wrote in the Georgetown Law Journal. This contextualization permits, for the first time, a careful exploration of exactly what McDonnell Douglas does and what it does not do.*

*This exploration not only refutes some persistent and widespread myths about McDonnell Douglas, such as the nearly universally held belief that this framework requires but for causation. It also clears up the doctrinal morass that has developed, making clear the proper role for McDonnell Douglas in current disparate treatment doctrine. But most importantly, it demonstrates that this framework should not be loathed by those who seek to eradicate employment discrimination. Rather, it should be embraced.*