39 How. L.J. 797

Howard Law Journal

Spring, 1996

39 How. L.J. 797

LENGTH: 9937 words

CASE NOTE: Background Circumstances: An Elevated Standard of Necessity in Reverse Discrimination Claims Under Title VII

NAME: Peter Gene **Baroni** *

BIO:

* J.D., Cum Laude, Howard University School of Law, 1996; B.A., DePauw University, 1989.

SUMMARY:
... Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of race, color, sex, or national origin. ... Joining the District of Columbia Circuit, the Sixth, Eighth, and Tenth Circuits have held that background circumstances supporting an inference of discrimination are required in a prima facie case of reverse discrimination under Title VII. ... Harding argued that his true claim of superior qualifications set forth background circumstances sufficient to raise an inference of discrimination and establish a prima facie case of reverse discrimination. ... Judge Mikva's opinion in Harding contains three important parts that warrant discussion in this section: (1) his clarification of the parameters of background circumstances; (2) his finding that distinguishing between majority and minority plaintiffs' prima facie claims is necessary under Title VII due to historic race and gender disparities in our society; and (3) his determination that the background circumstances standard is not an additional hurdle for majority plaintiffs. ... In considering majority and minority plaintiffs differently, the background circumstances standard preserves the intent of Title VII at the prima facie level. ...

TEXT:
[*797]

INTRODUCTION

Title VII of the Civil Rights Act of 1964 [1] prohibits employers from discriminating on the basis of race, color, sex, or national origin. [2] A non-traditional application of Title VII concerns a claim by a "majority group" member complaining of unlawful employer discrimination in favor of women or ethnic minorities. [3] Some federal appellate courts distinguish a claim of "reverse discrimination" from a "traditional" claim of discrimination [4] by requiring a plaintiff to show a different element in the prima facie case. [5] The prima facie element at issue requires a minority plaintiff to point to their minority status to establish an inference of discrimination. [6] A majority plaintiff, on the other hand, must affirmatively establish "background circumstances" that support an inference of discrimination. [7] **[*798]**

This note will review the District of Columbia Circuit Court of Appeals' decision in Harding v. Gray, [8] which sets forth a detailed description of the requirements for a majority plaintiff to establish a prima facie case under Title VII. Part I outlines the development of "background circumstances" and its treatment as a substitute for minority status in a reverse discrimination case. Part II discusses the facts and procedural posture of Harding. Part III addresses Harding's holding: first, explaining and praising the Court's clarification of the background circumstances test; and, second, criticizing the confusing and contradictory rhetoric surrounding the court's holding.

I. DEVELOPMENT OF "BACKGROUND CIRCUMSTANCES"

A. The Traditional Disparate Treatment Case

Title VII of the Civil Rights Act of 1964 [9] prohibits "discrimination" in employment based on sex and race. The statute's neutral language has been relied on by majority plaintiffs to prevail in cases claiming reverse discrimination. [10] In McDonnell Douglas v. Green, [11] the Supreme Court set forth the framework governing a prima facie case of employment discrimination and the allocation of the burdens of proof for a disparate treatment case under Title VII. Under McDonnell and its progeny, [12] the plaintiff bears the initial burden of establishing a prima facie case of unlawful discrimination. [13] If the plaintiff makes that showing, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. [14] Finally, if the employer makes its showing, then the burden returns to the plaintiff to prove that the employer's proffered reason is pretextual. [15] **[*799]**

1. The Prima Facie Case

In the case of employment discrimination, where a member of a racial minority alleges racial discrimination, the Supreme Court requires the plaintiff to make a prima facie case by showing:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (ii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. [16]

These elements are flexible and must be adjusted to the facts of the particular case. [17] For example, in an action for discriminatory promotion practices, the prima facie elements differ slightly. The plaintiff must show that (1) she was qualified for the promotion; (2) she was considered for and denied the promotion; and (3) her rejection was under circumstances giving rise to an inference of discrimination. [18] The difference in this prima facie standard serves only to "eliminate[] the most common nondiscriminatory reasons for the plaintiff's rejection," [19] thus justifying a requirement that the employer come forward with an explanation. [20]

2. The Burden on the Employer-Defendant

If the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse action taken against the plaintiff. [21] The defendant's burden is merely one of production: to rebut the

presumption of discrimination raised by the prima facie case, the defendant need only produce admissible evidence setting forth a legitimate, nondiscriminatory reason for the adverse action against the plaintiff. [22]

If the defendant rebuts the prima facie case, the plaintiff bears the ultimate burden of persuading the finder of fact that he was a **[*800]** victim of discrimination. [23] To prove that the defendant's proffered reason was a pretext for racial discrimination, the plaintiff must do more than simply refute the defendant's reason - the plaintiff must also demonstrate discriminatory intent. [24] Pretext may be established by: 1) direct evidence of race or gender bias, such as statements that the plaintiff was fired because of his race or gender; (2) comparative evidence that non-minority employees with similarly poor work performance or employment records were retained while plaintiff was not; or (3) "statistical evidence showing that the employer had a pattern or practice of discrimination against persons of plaintiff's race" or gender. [25]

B. Proving Reverse Discrimination - Parker v. Baltimore & Ohio Railroad [26]

Although the aforementioned prima facie standard does not distinguish between "traditional" and "reverse" discrimination, the appropriate showing required of a plaintiff depends on whether the claim is one of traditional or reverse discrimination. [27] An inference of discrimination arises automatically if the plaintiff is a member of a minority class, is qualified for the promotion, is considered for the job, and is rejected. [28] If the plaintiff is a member of a majority group, however, no such inference is recognized by the District of Columbia Circuit. [29] **[*801]**

In Parker, the circuit court asserted that when a plaintiff is a member of a majority group, "it defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society." [30] Chief Judge Mikva, writing for the court, established a new prima facie evidentiary standard for a claim under Title VII asserted by a majority plaintiff. The new standard required a majority plaintiff claiming reverse discrimination to allege "background circumstances" supporting "the suspicion that the defendant is that unusual employer who discriminates against the majority." [31]

The circuit court based its heightened standard for a majority plaintiff on an interpretation of Supreme Court precedent addressing the application of Title VII. First, Judge Mikva asserted that the prima facie standard set out in McDonnell Douglas, which prescribes the minimal showing for a minority plaintiff absent direct evidence of discriminatory intent, was not an arbitrary lightening of the plaintiff's burden, but rather a procedural embodiment of the recognition that our nation has not yet freed itself from the legacy of hostile discrimination... "A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." [32]

Judge Mikva explained that the Supreme Court in McDonnell Douglas recognized that modifications in the prima facie standard "would be required to adapt it from the context of a discriminatory refusal to hire to other employment situations." [33] Finally, the court observed that

the original McDonnell Douglas standard required the plaintiff to show "that he belongs to a racial minority." Membership in a socially disfavored group was the assumption on which the entire McDonnell Douglas analysis was predicated, for only in that context can it be stated as a general rule that the "light of common experi- **[*802]** ence" would lead a factfinder to infer discriminatory motive from the unexplained hiring of an outsider rather than a group member. Whites are also a protected group under Title VII, but it defies common sense to suggest that the promotion of a black employee [alone] justifies an inference of prejudice against white co-workers in our present society. [34]

In Parker, the court found that background circumstances existed where "[a] majority of the [defendant's employees] were black, [] they received an overwhelmingly large proportion of the promotions," and one of the decision-makers in those promotions was black. [35] These facts established background circumstances suggesting the employer discriminated against white employees. [36]

Background circumstances were subsequently found to exist as well where the majority plaintiff alleged superior qualifications to the minority promotee, thereby raising an inference of discrimination. [37]

C. The Circuit Split over "Background Circumstances"

There is an ongoing battle among the circuits over whether to follow Parker's background circumstances test in reverse discrimination actions under Title VII. Joining the District of Columbia Circuit, the Sixth, [38] Eighth, [39] and Tenth [40] Circuits have held that background circumstances supporting an inference of discrimination are required in a prima facie case of reverse discrimination under Title VII. These courts apply the more burdensome standard in reverse discrimination cases based on their interpretation of Title VII and Supreme Court **[*803]** case law in the area. [41] These courts recognize this country's historical discrimination against minority groups, particularly blacks, by viewing majority and minority groups differently. Title VII's purpose is to ""eradicate discrimination throughout the economy and make persons whole for injuries suffered through past discrimination,'" [42] including combating historical employment discrimination against minorities. Consequently, minority plaintiffs need only point to their minority status to establish an inference of discrimination, while majority plaintiffs must establish more to create an inference of discrimination. [43]

Other courts, however, view Title VII through the lens of "plain meaning," and those courts generally reject the background circumstances standard because of the weightier burden majority plaintiffs must sustain under that test. For example, the Eleventh Circuit, in Wilson v. Bailey, [44] and the Fifth Circuit, in Young v. City of Houston, [45] refused to require "background circumstances" in reverse discrimination actions. These courts view the letter and intent of Title VII as requiring the same prima facie standard for all claims of employment discrimination, declining to distinguish Title VII's protection in traditional and reverse discrimination claims. [46]

The tension between legal rationales that argue for adoption or rejection of the background circumstances requirement is illustrated by Collins v. School District of Kansas City, [47] a district court case decided before the Eighth Circuit adopted the background circumstances test. In Collins, an unsuccessful male applicant for a management position in a school district brought a Title VII claim of **[*804]** reverse discrimination. [48] The court found that "because plaintiff is male and is

claiming that defendant unlawfully discriminated against him on the basis of his sex, he has satisfied the first element of the McDonnell Douglas prima facie case of discrimination." [49] Furthermore, because that element - establishing plaintiff as a member of a protected class - was the only prima facie element at issue, the plaintiff survived summary judgment simply by pointing out his gender. [50] Thus, Collins illustrates the difficulty in reconciling Title VII's neutral language with its underlying purpose, which has become a point of disagreement among the circuit courts. Disagreement on statutory interpretation plays a significant role in the split - added to, in large part, by the lack of a Supreme Court decision on point, and by what appears to be the Court's somewhat inconsistent interpretation of Title VII's purpose. [51]

II. HARDING V. GRAY - THE FACTS AND PROCEDURALPOSTURE

Casper E. Harding was hired as a carpenter by the United States Department of Health and Human Services [52] and was assigned to St. Elizabeth's Hospital in the District of Columbia, a public hospital operated by the federal government. [53] The plaintiff was promoted to carpenter leader within the Carpentry Shop of the Construction Section of the hospital in 1986. [54] While the job was designated "non-supervisory," Harding, in fact, led a group of three or more carpenters on work assignments. [55] The Construction Section of St. Elizabeth's Hospital had nine "shops," and each contained its own foreman. [56]

Prior to Harding's transfer to the Construction Section, the United States transferred its responsibility for the operation of St. **[*805]** Elizabeth's Hospital to the District of Columbia, under the Mental Health Services Act. [57] The District reorganized the Construction Section and consolidated the Carpentry and Upholstery Shops. [58] Prior to the consolidation, the Carpentry Shop Foreman had been Robert Waid, a white male, and the Upholstery Shop Foreman had been Acquanetta Haywood-Brown, a black female. [59] Both foreman positions were supervisory, and Waid and Haywood-Brown were in turn supervised by the General Construction Foreman, Vladimir Roubachewsky, a white male. [60]

As part of the consolidation, Waid was given the title Carpentry/Upholstery Shop Foreman, Haywood-Brown retained her previous job title and grade, and Harding retained his job as carpenter leader. [61]

On April 24, 1988, Waid was promoted, which left the Carpentry/Upholstery Shop Foreman position vacant. St. Elizabeth's Hospital posted a vacancy announcement, listing six qualifications for the successful applicant, the most important of which was the ability to supervise. This qualification was so important that St. Elizabeth's Hospital would not even consider a candidate without it. [62]

Four candidates applied for the Carpentry/Upholstery position: Harding, a carpenter leader; Haywood-Brown, the Upholstery Shop Foreman; Nathaniel Cary, a black, male carpenter; and Christopher Settle, also a black, male carpenter. [63] Haywood-Brown was the only applicant who had held a position defined as "supervisory" at St. Elizabeth's Hospital. [64]

Pursuant to the District of Columbia personnel regulations, a review panel evaluated the candidates and rated Harding, Haywood-Brown, and Cary "highly qualified." [65] Haywood-Brown received the highest rating, followed by Harding and Cary, who were given equal ratings. [66] The review panel forwarded its report to Vladimir

Roubachewsky, the selecting official, who interviewed the three "highly qualified" candidates. [67] Roubachewsky chose Haywood- **[*806]** Brown for the position, and Roubachewsky's supervisor, Lawrence Whitney, another white male, approved the choice. [68]

Harding filed an action in the United States District Court for the District of Columbia, alleging that defendants unlawfully denied him the position he sought because of his race in violation of Title VII. [69] In his initial pleadings in the district court, Harding alleged that his qualifications were "superior to" those of Haywood-Brown, the successful black candidate. [70] He further claimed that such "superior" qualifications constituted sufficient background circumstances to give rise to an inference of discrimination. [71] The defendants moved for summary judgment, claiming that the plaintiff only alleged "equal" qualifications and therefore failed to meet his prima facie burden of showing background circumstances. [72] The district court agreed with the defendants and dismissed the case on the ground that Harding had failed to state a prima facie case of discrimination under Title VII. [73] Based on the district court's interpretation of the McDonnell Douglas-Burdine standard, in conjunction with the background circumstances prima facie standard required by Parker, [74] it found that Harding had only claimed he was "equally" qualified with Haywood-Brown and thus failed to meet the requisite prima facie burden. [75]

Harding appealed to the District of Columbia Court of Appeals, arguing that the district court misconstrued his claim as one of "equal qualifications" when he had properly claimed that his qualifications were superior to Haywood-Brown's. [76] Harding argued that his true claim of superior qualifications set forth background circumstances **[*807]** sufficient to raise an inference of discrimination and establish a prima facie case of reverse discrimination. [77]

The Court of Appeals reversed the district court's dismissal and remanded the case for trial. [78] The circuit court found that Harding had, in fact, claimed that he possessed superior qualifications and that such a claim is sufficient to meet the prima facie burden of showing background circumstances. [79] The circuit court further stated that the district court had misinterpreted Harding's qualification claims to be a demand for the rescission of the background circumstances element. [80] Harding, however, had actually intended his claim to be one of qualifications superior to Haywood-Brown. On remand, the district court again found for the defendants. [81]

III. HARDING V. GRAY - AN ANALYSIS OF THE BACKGROUND CIRCUMSTANCES STANDARD

In Harding, Chief Judge Mikva strengthened the background circumstances test he created twelve years earlier in Parker. Judge Mikva's opinion in Harding contains three important parts that warrant discussion in this section: (1) his clarification of the parameters of background circumstances; (2) his finding that distinguishing between majority and minority plaintiffs' prima facie claims is necessary under Title VII due to historic race and gender disparities in our society; and (3) his determination that the background circumstances standard is not an additional hurdle for majority plaintiffs. [82]

A. Judge Mikva's Opinion in Harding v. Gray

Mikva's opinion breaks down the background circumstances standard into two distinct categories that should provide a more cohesive guide to trial courts following

the standard. Each category defines the distinct factual circumstances that fulfill the background circumstances standards. **[*808]**

The first category of evidence the District of Columbia Circuit construed to be sufficient to show background circumstances is "evidence indicating that the particular employer at issue has some reason or inclination to discriminate invidiously against whites." [83] Claims that courts have found to fall into this category range from "superior qualifications" of a majority plaintiff who was not promoted to a minority who was promoted in his stead, [84] to a proposed affirmative action plan implemented by minority supervisors. [85]

The second category of evidence the District of Columbia Circuit has construed to be sufficient background circumstances is "evidence indicating that there is something "fishy' about the facts of the case at hand that raises an inference of discrimination." [86] The "facts of the case at hand" encompass the totality of the circumstances of the case, and those facts are not limited to the employer's background alone. [87] "Evidence about the "background' of the case at hand - including an allegation of superior qualifications - can be equally [as] valuable" in establishing a prima facie claim of reverse discrimination as evidence relating to the employer's background. [88]

The "fishy" facts category thus protects against sub-textual or unconscious prejudicial tendencies an employer might have, but which may not be established by looking at the employer's background alone. [89] Such prejudicial tendencies may be shown by looking at a **[*809]** factual circumstance in the majority plaintiff's background, such as superior qualifications compared to those of the minority candidate. [90] A rational employer would not promote such a less qualified employee because, viewed objectively, it would be inconsistent with that employer's business interest. Thus, this category uses the following objective standard:

[a] rational employer can be expected to promote the more qualified applicant over the less qualified, because it is in the employer's best interest to do so. And when an employer acts contrary to his apparent best interest in promoting a less-qualified minority applicant, it is more likely than not that the employer acted out of a discriminatory motive. The McDonnell Douglas/Burdine allocation of the burden of proof relies on this very presumption. [91]

Because employers do not act in a totally random manner, [92] an irrational hiring decision, such as the one discussed above, raises an inference of discrimination.

B. A Critique of Judge Mikva's Decision in Harding v. Gray

The Harding opinion couches its holding in the correct interpretation of Title VII, acknowledging the statute's purpose of eradicating employment discrimination against minorities. Unfortunately, the opinion concludes by confusing the background circumstances standard and contradicting the foundation upon which the standard rests.

1. Harding v. Gray's Strengths: The Necessity of Background Circumstances as an Acknowledgment of Past and Present Race and Gender Inequity Under Title VII

The background circumstances test accurately interprets Title VII and Supreme Court case law as requiring an elevated prima facie showing required of a majority plaintiff in a reverse employment discrimination claim. While Harding's interpretation of a

Title VII prima facie claim is persuasive, it must be considered in light of the Supreme Court's interpretations of the purposes of Title VII. **[*810]**

One of the Court's first in-depth examinations of Title VII in a reverse discrimination case came in McDonald v. Santa Fe Trail Transportation Company. [93] In McDonald, two white employees of a transportation company were discharged for misappropriating cargo, but a black employee who was charged with the same offense was not discharged. [94] The white employees brought an employment discrimination suit under Title VII, alleging that their employer discriminated against them on the basis of race. The Court held that Title VII applies to both majority and minority persons, without distinguishing one group from the other. [95] The Court conducted an exhaustive analysis of the language and legislative history of the statute, Supreme Court case law, and agency decisions in the area, and determined that "Title VII prohibits racial discrimination against [majority groups] upon the same standards as would be applicable were they [minorities]." [96] Thus, the Court rejected petitioner's argument that Title VII was enacted solely to protect the civil rights of blacks. [97] The Court found that as "unlikely as it might have appeared ... that white citizens would encounter substantial racial discrimination of the sort proscribed under the Act, the statutory structure and legislative history persuade us" that Title VII protects all citizens against discrimination in employment. [98]

The McDonald interpretation, however, was limited by the Supreme Court's decision three years later in United Steelworkers of America v. Weber, [99] upholding an employer's affirmative action plan against a Title VII challenge. [100]

In Weber, a majority plaintiff filed suit against his union and employer, challenging an affirmative action plan as being discriminatory against whites. [101] The Court denied the plaintiff's claim, holding that the affirmative action plan was lawful under Title VII. [102] The Court reasoned that the plain meaning of and the legislative history behind Title VII did not prohibit voluntary affirmative action plans [103] and **[*811]** further found that such a prohibition would contradict "Congress's primary concern in enacting ... Title VII of the Civil Rights Act of 1964[, that is] ... the plight of the [black person] in our economy." [104] Finally, the Court noted that it would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy. [105]

The foregoing interpretation of Title VII, viewed in light of the flexible, general standard for establishing a prima facie case of discrimination set forth in McDonnell Douglas, [106] logically requires altering the prima facie standard for a majority claimant. [107] Thus, the background circumstances test is directly rooted in Supreme Court case law that, taken together, interprets Title VII as a flexible, prophylactic measure applying to all citizens in different ways.

In Harding, Judge Mikva clearly defines the background circumstances test, specifying its exact components and providing examples of case law delineating its bifurcated application: [108] first, prima facie evidence indicating that the specific employer had reason to discriminate against majority applicants or employees; and second, prima facie evidence indicating that there is something "fishy" about the facts in the case raising an inference of discrimination. [109] Judge Mikva also **[*812]** reaffirms Parker's elevated prima facie standard for majority plaintiffs, concluding

that "background circumstances" means simply that in our society, where "reverse discrimination" is the exception, white plaintiffs must show more than the mere fact that they are white before their non-selection in favor of a minority candidate will raise an inference of discrimination. But the non-minority plaintiff who shows that he was better qualified for the position than the minority applicant whom the employer selected has done his job; he has stated sufficient background circumstances to establish his prima facie case. In this nation, where merit-based advancement is one of our highest values, there can be no other policy. [110]

The revised background circumstances standard set forth in Harding has been a compelling circuit precedent because it logically follows the letter and spirit of Title VII as interpreted by the Supreme Court. [111]

In considering majority and minority plaintiffs differently, the background circumstances standard preserves the intent of Title VII at the prima facie level. This preservation of distinct prima facie standards has acted as a buffer zone, protecting affirmative action plans from what could easily be deemed discrimination under the "color-blind" approach. [112] The color-blind prima facie standard may facilitate a future interpretation of Title VII, as a whole, as prohibiting affirmative action plans if an "immutable characteristic" such as race or gender is used in such a plan's operation. [113] The background circumstances prima facie standard guards against such a consequence by acknowledging, at the initial stage of a Title VII determination, the purpose of the statute: that majority and minority plaintiffs are viewed differently. Affirmative action plans, therefore, may also be viewed in an analogous manner - different than invidious discrimination - dis- **[*813]** crimination based on a remedial purpose. If the background circumstances standard is discarded and all plaintiffs are viewed the same, in a color-blind fashion, it will be easier for courts to hold that all forms of discrimination, including affirmative action plans, are impermissible. [114] Thus, the background circumstances standard may be one way to avoid the "ironic' demise of affirmative action plans as cautioned against by the Supreme Court in Weber. [115]

2. Harding v. Gray's Weaknesses: The Disingenuous Conclusion That the Background Circumstances Requirement is not an Additional "Hurdle" for Majority Plaintiffs

Although Judge Mikva's opinion in Harding is an important and necessary decision in 1990s civil rights jurisprudence, his rhetoric dilutes the logical underpinnings of his opinion. The opinion is dishonest when it proclaims that "the "background circumstances' requirement is not an additional hurdle for white plaintiffs." [116] On the contrary, majority plaintiffs must make an affirmative showing to establish an inference of discrimination, whereas minority plaintiffs need only point to their status as minorities. [117] Thus, the standard is necessarily more onerous for majority plaintiffs. [118] Judge Mikva likely wanted to avoid potential confrontation, and possible criticism by those members of the Supreme Court hostile to civil rights legislation, when he defined the background circumstances requirement as no more onerous a burden on majority plaintiffs. [119] This avoidance, however, may have dire consequences. **[*814]**

Judge Mikva's failure to acknowledge the truth behind background circumstances may lead to the premature demise of one of the most important stop-gap remedial measures in the history of our country - voluntary affirmative action programs. [120] The fallacious reasoning set forth in Harding to justify background circumstances may push wavering circuits to choose the Eleventh Circuit's approach, because it is

consistent with that Circuit's color-blind view of Title VII. [121]

The background circumstances requirement allows Title VII to operate as intended: as a statute enacted to eviscerate discrimination against blacks and women in the workplace. However, the elevated standard of necessity that the background circumstances standard creates for majority plaintiffs should be explicitly recognized for two reasons: intellectual honesty and establishment of a more clear legal standard. **[*815]**

First, intellectual consistency is one facet of the larger concept of rationality in judicial decision making. [122] This concept has been discussed in areas of both statutory and constitutional law. [123] Title VII interpretation should not be exempt from this doctrine of intellectual consistency and rationality. Judge Mikva's analysis, which on the one hand creates an elevated prima facie standard for majority plaintiffs, and on the other claims there is no greater burden for those same plaintiffs, deviates from this accepted standard of judicial reasoning. Discussions of intellectual consistency and rationality are well articulated in the recent Supreme Court debates over Establishment Clause interpretation. [124] Unless such a rational, consistent approach is taken in the interpretation and application of background circumstances, the operation of that standard will become as clouded as the murky waters surrounding Establishment Clause interpretation.

Second, the contradiction that results from Judge Mikva's rhetorical conclusion in Harding distorts the opinion's clarification of the background circumstances standard. Majority plaintiffs are told that they must establish background circumstances to meet their prima facie burden, then they are told such a showing is no greater a burden. This paradox blurs the line between the D.C. Circuit's prima facie standard and the Eleventh Circuits application of the McDonnell Douglas prima facie standard for majority plaintiffs. **[*816]**

The D.C. Circuit's most recent application of the background circumstances standard, in Harding, incorporates the intent and purpose of Title VII by acknowledging the different and necessarily more onerous prima facie burden for majority plaintiffs. However, the idea set forth in Harding's conclusion that the background circumstances standard is no greater "hurdle" for majority plaintiffs, seems to agree with the Eleventh Circuit view [125] and thereby creates confusion as to the proper prima facie showing necessary. This confusion may provide ammunition for circuits on the fence of the Title VII prima facie debate to side with the Eleventh Circuit, citing the language in Harding as support for embracing the color-blind prima facie standard. [126] These wavering circuits will be able to point to Harding's "no greater hurdle" conclusion as inconsistent with the "background circumstances" standard and consistent with the "color-blind" standard. In addition this confusing language might result in inconsistent findings by D.C. Circuit trial judges.

Judge Mikva's opinion attempts to have it both ways; equal treatment of majority and minority plaintiffs under Title VII with differing, yet no more onerous burdens for each. Title VII cannot, however, be applied differently to majority and minority plaintiffs without a more onerous burden to bear for majority plaintiffs because the "inference of discrimination" cannot be established by simply pointing to a majority plaintiff's race or gender. The historical, societal patterns of race and gender discrimination in employment that Title VII was enacted to combat did not and do not apply to majority plaintiffs. [127] Thus, the prima facie standards differ and must be more onerous for majority plaintiffs. The idea that there is no greater hurdle directly

contradicts the basic premise underlying Title VII and the background circumstances paradigm. Claiming majority persons need do no more than minority persons under the background circumstances standard is a fabrication that may appease certain Supreme Court Justices in **[*817]** the short run, but may facilitate the demise of affirmative action programs over time. [128]

CONCLUSION

The Harding Court's expansion and solidification of the background circumstances standard in reverse discrimination actions under Title VII is an important holding in 1990s civil rights jurisprudence. This standard respects the intent of Title VII by including past gender and race discrimination in the statute's implementation. The background circumstances element also insulates remedial measures, set forth by employers to combat historical race and gender disparities in the workplace, from judicial contravention.

But Harding failed to acknowledge that implicit in background circumstances is a more onerous burden for majority plaintiffs. An acknowledgment of this elevation will facilitate the standard's acceptance by other courts and will be intellectually consistent with the dictates of Title VII.

FOOTNOTES:

n1. 42 U.S.C. 2000e (1988).

n2. 42 U.S.C. 2000e-2 (1988).

n3. In this note, the term "majority" is defined as persons who are not generally considered to be members of an historically disadvantaged group. The term does not necessarily reflect a literal numerical majority, however; and while majority group members are generally white males, the term may also include white females. To remain consistent, this note refers to "majority plaintiffs" as those persons alleging Title VII violations who are not members of an historically disadvantaged group, and to "minority plaintiffs" as those persons alleging Title VII violations who are members of an historically disadvantaged group.

n4. A "reverse discrimination" claim refers to a Title VII discrimination claim by a majority plaintiff. A "traditional discrimination" claim refers to a Title VII discrimination claim by a minority plaintiff.

n5. See Harding v. Gray, 9 F.3d 150, 153 (D.C. Cir. 1993) (requiring "a white plaintiff to show additional "background circumstances [that] support the suspicion that the defendant ... discriminates against the majority'" (quoting Parker v. Baltimore & Ohio R.R., 652 F.2d 1012, 1017 (D.C. Cir. 1981)) (alteration in original)).

n6. Id. at 152-53.

n7. Id.

n8. Id. at 150.

n9. 42 U.S.C. 2000e (1988).

n10. See, e.g., McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-80 (1976) (white males entitled to Title VII protection); Martinez v. El Paso County, 710 F.2d 1102 (5th Cir. 1983) (discrimination in discharge of males); Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179 (7th Cir. 1982) (hiring discrimination against whites); Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966) (discrimination in discharge of whites); Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981) (hiring practices discriminated against males).

n11. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

n12. See St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

n13. See Burdine, 450 U.S. at 252-53. The prima facie elements must be met by a preponderance of the evidence. Id.

n14. Id.

n15. Id. at 253. In addition to proving that the employer's reason was pretextual, the plaintiff must also prove that it was pretextual for discriminatory reasons. Hicks, 113 S. Ct. at 2748-49.

n16. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

n17. Id. at 802 n.13.

n18. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Dougherty v. Barry, 607 F. Supp. 1271, 1283 (D.D.C. 1985), vacated in part, 869 F.2d 605 (D.C. Cir. 1989). The third element was fulfilled in Burdine by the plaintiff's being a woman, Burdine, 450 U.S. at 254 n.6; and in Dougherty by the "expressions of strong affirmative action sentiment with the Barry administration," Dougherty, 607 F. Supp. at 1283.

n19. Burdine, 450 U.S. at 254.

n20. Id. at 253-54.

n21. Id. at 254.

n22. Id. at 255.

n23. Id. at 255-56; see also Martin-Trigona v. Board of Trustees of the Univ. of the Dist. of Columbia, 668 F. Supp. 682, 692 (D.D.C. 1987) (following the same standard).

n24. Burdine, 450 U.S. at 257; St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2752-54 (1993) (holding that a Title VII plaintiff need not only prove the defendant's proffered reason to be pretextual or false, but also that such pretextual reasoning is discriminatory). For a discussion of Hicks and its ramifications, see Victoria A. Cundiff & Ann E. Chaitovitz, St. Mary's Honor Ctr. v. Hicks: Lots of Sound and Fury, But What Does it Signify?, 19 Employee Rel. L.J., 147 (1993-94).

n25. Bailey v. MCI Telecommunications Corp., 29 F.E.P. Cases (BNA) 1457, 1459 (D.D.C. 1982); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The same standards presumably apply when establishing pretext in a reverse discrimination claim. See McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-80 (1976) (finding that a reverse discrimination claim deserves the same protection under Title VII as does a traditional discrimination claim).

n26. Parker v. Baltimore & Ohio R.R., 652 F.2d 1012 (D.C. Cir. 1981).

n27. See Harding v. Gray, 9 F.3d 150 (D.C. Cir. 1993); Logan v. Express, Inc., No. 92-4363, 1993 U.S. App. LEXIS 32656, at *8 (6th Cir. Dec. 10, 1993) (unpublished opinion); Donaghy v. City of Omaha, 933 F.2d 1448, 1458 (8th Cir. 1991) (requiring an elevated prima facie threshold in reverse discrimination cases where affirmative action program is in place), cert. denied, 502 U.S. 1059 (1992). But see Wilson v. Bailey, 934 F.2d 301, 304 (11th Cir. 1991) (choosing the same prima facie standard for majority plaintiffs as for minority or female plaintiffs, but recognizing its flexibility to fit the circumstances).

n28. McDonnell Douglas, 411 U.S. at 802.

n29. See Parker, 652 F.2d at 1016-18.

n30. Id. at 1017; see also Harding, 9 F.3d at 153 (stating that "invidious racial discrimination against whites is relatively uncommon in our society, and so there is nothing inherently suspicious in an employer's decision to promote a qualified minority applicant instead of a qualified white applicant"); Livingston v. Roadway Express, Inc., 802 F.2d 1250, 1252 (10th Cir. 1986) ("The presumptions in Title VII analysis that are valid when the plaintiff belongs to a disfavored group are not necessarily justified when the plaintiff is a member of an historically favored group.").

n31. Parker, 652 F.2d at 1017.

n32. Id. (quoting Furnco Constr. Corp. v. Walters, 438 U.S. 567, 577 (1978)).

n33. Id. at 1017.

n34. Id.

n35. Id.

n36. Id.; see also cases cited infra note 83.

n37. Harding v. Gray, 9 F.3d 150, 154 (D.C. Cir. 1993). Some courts have viewed Parker's different showing of qualification for majority plaintiffs (superior qualifications) and minority plaintiffs (equal qualifications) to be an impermissibly onerous burden on majority plaintiffs under Title VII. See, e.g., Collins v. School Dist. of Kansas City, 727 F. Supp. 1318, 1322 (W.D. Mo. 1990) (contending that Parker's background circumstances test "eviscerates McDonnell Douglas as applied in reverse discrimination cases, ... forcing the courts to take on the unseemly task of deciding which groups are "socially favored' and which are "socially disfavored.'" (citation omitted)).

n38. See Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985). But see Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 n.7 (6th Cir. 1994) (openly questioning the Court's earlier adoption of the background circumstances test in Murray by proclaiming "serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts").

n39. See Donaghy v. City of Omaha, 933 F.2d 1448, 1458 (8th Cir. 1991), cert. denied, 502 U.S. 1059 (1992).

n40. See Notari v. Denver Water Dep't, 971 F.2d 585, 588-89 (10th Cir. 1992).

n41. See Logan v. Express, Inc., No. 92-4363, 1993 U.S. App. LEXIS 32656, at *8 (6th Cir. Dec. 10, 1993); Notari, 971 F.2d at 588-89; Donaghy, 933 F.2d at 1458; Daly v. Unicare Corp., Civ. A. No. 94-6838, 1995 WL 251385, at *6 (E.D. Pa. Apr. 26, 1995); Groat v. Olympia Fields Ford Sales, Inc., No. 91-C-0606, 1993 WL 81356, at *3 (N.D. Ill. Mar. 18, 1993); Lemnitzer v. Philippine Airlines, Inc., 816 F. Supp. 1441, 1448 (N.D. Cal. 1992), aff'd in part, rev'd in part, 52 F.3d 333 (9th Cir. 1995).

n42. Landgraf v. U.S.I. Film Prods., 114 S. Ct. 1483, 1491 (1994) (quoting Ablemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975)).

n43. See, e.g., Wilson v. Bailey, 934 F.2d 301, 304 (11th Cir. 1991); Young v. City of Houston, 906 F.2d 177, 180 (5th Cir. 1990); Ulrich v. Exxon Co., 824 F. Supp. 677, 684 (S.D. Tex. 1993); Wiant v. Mobile County Personnel Bd., No. 91-0290-AH-S, 1992 WL 510313, at *5 (S.D. Ala. Mar. 5, 1992); Sinnovich v. Port Auth. of Allegheny County, No. 89-1524, 1992 WL 220829, at *4 (W.D. Pa. Mar. 2, 1992), aff'd, 37 F.3d 1498 (3d Cir. 1994); Collins v. School Dist. of Kansas City, 727 F. Supp. 1318, 1322 (W.D. Mo. 1990).

n44. Wilson v. Bailey, 934 F.2d 301 (11th Cir. 1991).

n45. Young v. City of Houston, 906 F.2d 177 (5th Cir. 1990).

n46. Wilson, 934 F.2d at 304 (although acknowledging flexibility in the McDonnell test); Young, 906 F.2d at 180.

n47. Collins v. School Dist. of Kansas City, 727 F. Supp. 1318 (W.D. Mo. 1990).

n48. Id. at 1319.

n49. Id. at 1323.

n50. Id.

n51. See infra notes 101-05 and accompanying text (detailing Supreme Court cases that acknowledge Title VII's purpose as being founded in remedying past discrimination against racial minorities). But see McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (holding that Title VII applies to both majority and minority persons, without distinguishing one group from the other); see also sources cited infra note 110 (arguing against standards that distinguish Title VII claims on the basis of the particular race of the plaintiff and defendant).

n52. Harding v. Gray, No. 90-1662, slip op. at 1-2 (D.D.C. Sept. 10, 1992) (district court order granting defendant's motion for summary judgment).

n53. Id.

n54. Harding v. Gray, 9 F.3d 150, 151 (D.C. Cir. 1993).

n55. Id.

n56. Id.

n57. Harding, No. 90-1662, slip op. at 2.

n58. Id.

n59. Id.

n60. Id.

n61. Id.

n62. Id.

n63. Harding v. Gray, 9 F.3d 150, 151 (D.C. Cir. 1993).

n64. Id.

n65. Id.

n66. Id.

n67. Id.

n68. Id.

n69. Harding v. Gray, No. 90-1662, slip op. at 3 (D.D.C. Sept. 10, 1992). Harding applied for medical disability due to osteoarthritis, a degenerative joint disease in May, 1989, shortly after the promotion decision had been made. Harding was unable at that time to bend, kneel, or lift anything above his waist, nor could he climb ladders or stairways without substantial pain; and his condition was likely to deteriorate to the point that he would be unable to fulfill his carpentry duties. In January, 1990 he retired on medical disability. In his Title VII suit, Harding argued that but for his denied promotion, he would not have had to retire, because his medical condition would not have prevented him from performing the minimal physical labor required of a Foreman at St. Elizabeth's. Id.

n70. Id. at 6.

n71. Id.

n72. Id.

n73. Harding v. Gray, 9 F.3d 150, 152 (D.C. Cir. 1993).

n74. Parker v. Baltimore & Ohio R.R., 652 F.2d 1012, 1017 (D.C. Cir. 1981).

n75. Harding, 9 F.3d at 154.

n76. Id. at 152. This issue is crucial because under the background circumstances test, a majority plaintiff must allege more than equivalent qualifications to meet his prima facie burden. A minority plaintiff in a Title VII action need only allege equal qualifications. Id.; accord Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 257 (1981).

Because the case was decided on summary judgment, the Court heard the appeal using a de novo standard of review. Harding, 9 F.3d at 151.

n77. Harding, 9 F.3d at 151.

n78. Id. at 154.

n79. Id. at 153-54.

n80. Id.

n81. Harding v. Hawkins, No. 90-1662 (NHJ) (D.D.C. filed Aug. 8, 1995) (unpublished opinion, on file with the Howard Law Journal) (district court order entering judgment for defendants).

n82. Harding v. Gray, 9 F.3d 150, 153-54 (D.C. Cir. 1993).

n83. Id. at 153.

n84. Id.

n85. See Bishopp v. District of Columbia, 788 F.2d 781, 786-87 (D.C. Cir. 1986). Other cases in the D.C. Circuit illustrating evidence of background circumstances include: Lanphear v. Prokop, 703 F.2d 1311, 1315 (D.C. Cir. 1983) (hiring authority went outside company to hire black worker, failed to review hiree's qualifications, and was under pressure to hire minorities in accord with affirmative action program being implemented); Daye v. Harris, 655 F.2d 258, 261 (D.C. Cir. 1981) (minority nurses over represented among promotees). Other circuits have recognized similar facts as sufficient to establish background circumstances. See Sims v. KCA, Inc., No. 93-2053, 1994 U.S. App. LEXIS 15065, at *9-*12 (10th Cir. June 17, 1994) (racially discriminatory comments and preferential treatment of employees based on race); Boger v. Wayne City, 950 F.2d 316, 325 (6th Cir. 1991) (administrative power struggle and dispute over implementation of affirmative action plan).

n86. Harding, 9 F.3d at 153; see also Daye, 655 F.2d at 260-61 (plaintiffs alleged "scheme" to fix performance ratings); Lanphear, 703 F.2d at 1315 (plaintiff was given "little or no consideration" for the promotion, and supervisor never fully reviewed qualifications of minority promotee); Bishopp, 788 F.2d at 786 (promotee was less qualified than four white plaintiffs and was promoted "over their heads ... in an unprecedented fashion"); see also Sims, 1994 U.S. App. LEXIS 15065, at *10-*12 (plaintiff alleged employer promoted inept co-worker based on his race); Boger, 950 F.2d at 325 (plaintiff alleged transfers of four white employees were part of a pattern to replace white employees with black employees).

n87. Harding, 9 F.3d at 153.

n88. Id.

n89. Id.

n90. Id.

n91. Id. (citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576-77 (1978) (holding that a court should ask whether discriminatory motivation is "more likely than not" and that employer who acts irrationally is presumed to have such a discriminatory motivation)).

n92. See Richard A. Posner, The Efficiency and the Efficacy of Title VII, 136 U. Pa. L. Rev. 513, 514 (1987) (the chief judge of the Seventh Circuit arguing that employers act pursuant to economic considerations in an effort to maximize gains over costs and that employment discrimination results in loss of competitive advantage).

n93. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

n94. Id. at 273.

n95. Id. at 278-79.

n96. Id. at 280.

n97. Id. at 287.

n98. Id. at 295-96.

n99. United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

n100. Id. at 203.

n101. Weber, 443 U.S. at 198.

n102. Id. at 207.

n103. Id. at 203.

n104. Id. at 202.

n105. Id. at 204 (citation omitted). Additional support for Weber's more progressive view of Title VII may be found in the Court's earliest cases addressing that statute. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (finding that "the language of Title VII makes plain the purpose of Congress 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." (citations omitted)); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (determining that "the objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."). But see Scott Black, McDonnell Douglas' Prima Facie Case and the Non-Minority Plaintiff: Is Modification Required?, 1994 Ann. Surv. Am. L. 309, 312-14 (1995) (citing this same line of cases for the argument that the background circumstances standard contravenes the color-blind intent of Title VII).

n106. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973).

n107. See Harding, 9 F.3d at 152-53 (holding that a reverse discrimination case requires an alternative prima facie standard under Title VII because of historical disparities between majority and minority workers in this country). The Harding court viewed this alternative standard as compelled by McDonnell Douglas to adapt the purpose of Title VII to the specific facts at hand - a reverse discrimination claim. Id.

n108. Id. at 153; see also supra notes 89-100 and accompanying text.

n109. Harding, 9 F.3d at 153; see also supra notes 89-100 and accompanying text.

n110. Harding, 9 F.3d at 154.

n111. See supra notes 108-114 and accompanying text.

n112. See United Steelworkers of Am. v. Weber, 443 U.S. 193, 230 (1979) (Rehnquist, J., dissenting) (arguing that preferences based on racial classifications - affirmative action programs - controvert the plain meaning of Title VII. "The evil inherent in discrimination against [blacks] is that it is based on an immutable characteristic, utterly irrelevant to employment decisions ... [This] discrimination ... becomes no less evil, simply because the person excluded is a member of one race rather than another."). Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 657 (1987) (Scalia, J., dissenting) (similarly condemning affirmative action programs fostered by Title VII); see also Black, supra note 105, passim (arguing for the abolition of the background circumstances standard because of the unnecessarily heightened prima facie standard it creates for majority plaintiffs in contravention of the intent of Title VII).

n113. Weber, 443 U.S. at 230-31 (Rehnquist, J., dissenting).

n114. See, e.g., Johnson, 480 U.S. at 657 (Scalia, J., dissenting) (condemning affirmative action programs fostered by Title VII and viewing all discrimination, even remedial affirmative action plans, as violative of Title VII).

n115. Weber, 443 U.S. at 204.

n116. Harding, 9 F.3d at 154.

n117. Id. at 153.

n118. Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 n.7 (6th Cir. 1994) (finding problems with the "more onerous background circumstances" standard for majority plaintiffs which it had already expressly adopted in Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985)).

n119. See infra notes 121-24 and accompanying text. An early Supreme Court case defined Title VII as prescribing blanket coverage, applicable to majority and minority employees equally. McDonald, 427 U.S. at 278-80; see also supra notes 93-95 and

accompanying text (discussing McDonald). Justices Rehnquist and Scalia have both written dissenting opinions agreeing with the opinion in McDonald and calling for a color-blind application of Title VII. See Weber, 443 U.S. at 230 (Rehnquist, J., dissenting) and Johnson, 480 U.S. at 657 (Scalia, J., dissenting). Judge Mikva may be attempting to placate today's more conservative Court and the attendant influence the above justices now wield; however, such appeasement should not constitute deception.

n120. See infra notes 121-24 and accompanying text.

n121. See supra notes 49-56 and accompanying text. Additionally, the Supreme Court's recent reversal of its own seven-year-old precedent interpreting the Eleventh Amendment of the United States Constitution provides an example of the need for clarity and consistency in judicial decision making. In Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996), the Court directly overruled its own decision in Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989). In Seminole Tribe, the Court changed its interpretation of the Eleventh Amendment from a narrow or plain meaning view, as set forth in Union Gas (construing the Eleventh Amendment's doctrine of state sovereign immunity as limited, to prohibiting diversity actions by citizens against states and allowing for Congressional abrogation of such immunity if intent is clearly shown), to a broad or subtextual view creating significant sovereign immunity rights for the States. Seminole Tribe, 116 S. Ct. at 1120-1135 (holding that state sovereign immunity power is superior to Congressional Commerce Clause power, thereby prohibiting Congressional abrogation even if intent is shown).

In Union Gas, Justice White's concurrence provided the final vote needed for a plurality of the Court to prevail. Union Gas, 491 U.S. at 57. However, Justice White's swing vote was ambiguous and contradictory. Justice White stated: "I agree with the conclusion reached by Justice Brennan ... that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning." Id. In Seminole Tribe's majority opinion, Justice Scalia seized on the "confusing" and "vague" concurrence of Justice White, in Union Gas, as one of the reasons for overruling that decision. Seminole Tribe, 116 S. Ct. at 1127; see also Andrew Gavil, Federal Courts Lecture, Howard Univ. Sch. of Law (Apr. 16, 1996) (on file at the Howard Law Journal). Thus, the inconsistent and unclear opinion of Justice White in Union Gas provided support for a contrary decision seven years later.

Similarly, Chief Judge Mikva's "background circumstances" conclusion in Harding and his contradictory rationale (that "background circumstances" creates a "no more onerous" legal burden on majority plaintiffs) may provide support for wavering circuits to reject that conclusion. While Judge Mikva's Harding opinion may be distinguished from White's Union Gas opinion in that it is not as facially vague, it nonetheless is analogous in its inconsistent rationale and conclusion. Additionally, the sharp divide among the circuits as to the "background circumstances" test is analogous to the sharp divide on the Supreme Court in Union Gas. Thus, a Seminole Tribe outcome may result among the circuits, pushing a majority to reject "background circumstances," supported by Judge Mikva's inconsistent and unclear Harding opinion.

n122. H. Jefferson Powell, Constitutional Investigations, 72 Tex. L. Rev. 1731, 1733 (1994) (noting that "[a] primary reason why ... judges construct doctrine out of discrete judicial decisions is to achieve intellectual ... consistency").

n123. See generally Moragne v. States Marine Lines, Inc., 398 U.S. 375, 401-02 (1970) (discussing the need for consistency in the vindication of federal policies, and removing the tensions and discrepancies that have resulted from inconsistent application of federal admiralty statutes); Missouri v. Jenkins, 115 S. Ct. 2038, 2074 (1995) (Souter, J., dissenting) (criticizing the majority opinion for an irrational and inconsistent decision based on issues that were briefed and argued before the Court); see also Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189 (1987). Fallon notes that, within the context of interpretation of constitutional law, surely contradiction and confusion would proliferate if the Supreme Court were to adopt whichever argument of constitutional theory best supported its conclusion in a particular case, without attending to the integrity of its own arguments and to the intellectual consistency of the general body of constitutional law. Id. at 1286.

n124. See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2242-43 (1993) (Souter, J., concurring in part and concurring in the judgment) (finding that the chaos surrounding the interpretation of the Free Exercise Clause of the First Amendment is a direct result of prior intellectually inconsistent and irrational Supreme Court decisions); see also Ira C. Lupu, Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion, 140 U. Pa. L. Rev. 555, 601-02 (1991) (finding that judges have an obligation to render rational opinions in order to "ensure intellectual honesty and consistency" in decision making, as contrasted with politicians who have no such mandate).

n125. This view is that the Title VII prima facie standard should operate the same for all claimants. See Wilson v. Bailey, 934 F.2d 301, 304 (11th Cir. 1991).

n126. Robert Weisberg, The Calabresian Judicial Artist: Statutes and the New Legal Process, 35 Stan. L. Rev. 213, 235 (1983) (stating that clear, intellectually consistent statutory interpretation provides the foundation upon which other judges in subsequent cases will respect and follow such decisions).

n127. See, e.g., Harding v. Gray, 9 F.3d 150, 153-54 (D.C. Cir. 1993); see also United Steelworkers of Am. v. Weber, 443 U.S. 193, 201-03 (1979) (citing statistical data establishing severe racial discrimination against blacks in employment).

n128. See supra notes 120-23 and accompanying text.