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Pretext: Forms and Functions in Employment-Discrimination, *Batson*, and Administrative-Law Claims

Erica Hudson

— Comment —

PRETEXT: FORMS AND FUNCTIONS IN EMPLOYMENT-DISCRIMINATION, *BATSON*, AND ADMINISTRATIVE-LAW CLAIMS

CONTENTS

INTRODUCTION

The idea of pretext came into the ambit of the judiciary early in American history. In *McCulloch v. Maryland*,[1] Chief Justice Marshall famously warned against the danger of "Congress, under the pretext of executing its powers, pass[ing] laws for the accomplishment of objects

1. 17 U.S. (4 Wheat.) 316 (1819).

not entrusted to the government."[2] Today, courts continue to grapple with how to confront pretextual explanations for decisions at issue in litigation. Courts have developed doctrines that guide inquiries into pretext in some contexts, specifically in the context of employment-discrimination[3] and discriminatory peremptory-challenge claims.[4] And some laws prescribe inquiries into pretext, such as fraud and money-laundering statutes.[5] However, outside of these discreet categories of claims, courts face confusion about when to inquire into pretext and what pretext even looks like. The Supreme Court's decision in *Department of Commerce v. New York*[6] brought the question of pretext into administrative law, throwing a wrench in an arena normally characterized by deferential, low standards of review.[7]

This Comment examines the different forms and functions of pretext across several areas of law and analyzes whether those differences make sense. Evidence of pretext in Title VII and *Batson* claims may look similar: proof of disparate treatment, statistics, and anecdotes all serve to establish pretext in these areas;[8] while a paper trail of the decision-making process supports a finding of pretext in the administrative context.[9] The purpose of pretext inquiries in each of these areas differs too—while Title VII claims and *Batson* claims seek to uncover illegal discrimination,[10] administrative pretext claims serve as a method of political accountability.[11] Beyond the different purposes of pretext across these areas of law, pretext is also subject to varying standards of proof, affecting the extent to which pretext is determinative of the outcome of a case.[12]

2. *Id.* at 423.

3. Throughout this Comment, I will use the labels "employment discrimination" and "Title VII" interchangeably to refer to causes of action arising under 42 U.S.C. § 2000e and to employment-discrimination claims arising under the Americans with Disabilities Act and the Age Discrimination in Employment Act, 2 U.S.C. § 1311.

4. Throughout this Comment, I will use the labels "discriminatory peremptory challenge claims" and "*Batson* claims" interchangeably to refer to claims arising under the framework set out in *Batson v. Kentucky*, 476 U.S. 79, 96–98 (1986).

5. *See, e.g.*, 18 U.S.C. § 1343.

6. 139 S. Ct. 2551 (2019).

7. *See id.* at 2574–75, 2577–78.

8. *See, e.g.*, Noyes v. Kelly Servs., 488 F.3d 1163, 1172 (9th Cir. 2007).

9. *Dep't of Com.*, 139 S. Ct. at 2575–76.

10. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 96–98 (1986).

11. *Dep't of Com.*, 139 S. Ct. at 2573.

12. *See infra* notes 154–72 and accompanying text.

While some of these differences comport with the purpose of pretext inquiries in each area, others could be updated to better reflect the purpose that inquiring into pretext serves. Part I of this Comment examines when courts inquire into pretext. Part II discusses what a finding of pretext looks like in Title VII, *Batson*, and administrative law cases. Part III analyzes the purpose of pretext inquiries in each of these areas and evaluates whether the differences in how pretext is treated are merited given its purpose in each area of law.

I. WHEN DO COURTS INQUIRE INTO PRETEXT?

Courts consistently inquire into pretext in two instances: (1) when a statute mandates that the court look into pretext behind a decision or law, and (2) when a statute makes no such mandate, but the circumstances create a situation where a decision-maker is able to "cover up" a discriminatory action by asserting a neutral justification.

A. Mandated by Statute

Prominent examples of statutes which demand pretext inquiries are found in the fraud context. This is because pretext is essentially an element of the crime. For example, under the federal wire-fraud statute,[13] the prosecution must prove that the defendant transmitted communications through interstate commerce "having devised or intend[ed] to devise any scheme or artifice to *defraud*, or for obtaining money or property by means of *false or fraudulent pretenses*, representations, or promises."[14]

In practice, a common application of the statute is to uncover illegal weapons purchases.[15] Another common application is in the tax-fraud context.[16] A less common application of the statute is to ferret out political pretenses for decisions of elected officials. For example, the Third Circuit affirmed the conviction of aides of the former governor of New Jersey under the wire-fraud statute after the aides caused lane closures on the George Washington Bridge, producing days of traffic gridlock in Fort Lee, New Jersey. The aides' stated reason for doing so, a traffic study, was pretext for punishing Fort Lee's mayor who was

13. 18 U.S.C. § 1343.

14. *Id.* (emphasis added).

15. *See, e.g.*, United States v. Kelerchian, 937 F.3d 895, 901–02, 906–07 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 2825 (2020) (affirming conviction for conspiracy to commit fraud where defendants planned to purchase machine-guns from a gun importer under the pretense that the weapons were intended for the county sheriff's department).

16. *See* United States v. Klein, 247 F.2d 908, 911–12, 921 (2d Cir. 1957) (affirming tax fraud conviction for concealing profits of defendants' whiskey business).

not supporting the governor's reelection bid.[17] Where pretext is a key part of the crime, as in this example, statutory interpretation will guide the pretext inquiry.

B. Not Mandated by Statute

Where a statute does not mandate an inquiry into pretext, courts have established doctrines that require pretext inquiries in certain contexts. Employment-discrimination claims and discriminatory-peremptory-challenge claims provide traditional examples.[18] Another example, albeit untraditional, is in administrative law.[19]

1. Employment Discrimination

Employment-discrimination claims, brought under Title VII of the Civil Rights Act,[20] are evaluated using a burden-shifting framework established by the Court in *McDonnell Douglas Corp. v. Green*.[21] Under the framework,[22] the plaintiff first must establish a prima facie case, which requires demonstrating that (1) she is a member of a protected class; (2) she "engaged in protected activity," such as applying for the job; (3) her employer "took adverse action against [her]"; and (4) "a causal relationship existed between the protected activity and the adverse employment activity."[23] After the plaintiff makes out a prima facie case, the burden of production shifts to the employer to put forth a nondiscriminatory reason for the action.[24] The plaintiff must then

17. United States v. Baroni, 909 F.3d 550, 555, 564 (3d Cir. 2018), *rev'd sub nom.* Kelly v. United States, 140 S. Ct. 1565, 1568–69 (2020) (reversing and remanding on the grounds that the object of the fraud conviction was not "property" within the definition of the statute and therefore was insufficient to support a property wire-fraud conviction).

18. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973); Batson v. Kentucky, 476 U.S. 79, 96–98 (1986).

19. *See, e.g.*, Dep't of Com. v. New York, 139 S. Ct. 2551, 2574–75 (2019).

20. 42 U.S.C. § 2000e. Employment-discrimination claims may also be brought under the Age Discrimination in Employment Act and the Americans with Disabilities Act. 2 U.S.C. § 1311.

21. 411 U.S. 792, 802–05 (1973).

22. This framework is applicable when the plaintiff seeks to establish an employment-discrimination case using circumstantial evidence. Where there is direct evidence on the matter, the test "is whether retaliation was a substantial or motivating factor in the decision making process." Farrar v. Stratford, 537 F. Supp. 2d 332, 354 (D. Conn. 2008) (quoting Talada v. Int'l Serv. Sys., Inc., 899 F. Supp. 936, 955 (N.D.N.Y. 1995)).

23. Price v. Thompson, 380 F.3d 209, 212 (4th Cir. 2004), *abrogated on other grounds by* Foster v. Univ. of Md. E. Shore, 787 F.3d 243, 249 (4th Cir. 2015); *McDonnell Douglas Corp.*, 411 U.S. at 802; *see also Foster*, 787 F.3d at 253.

24. *McDonnell Douglas Corp.*, 411 U.S. at 802.

demonstrate that the employer's reason was pretext for discrimination.[25] At all times the plaintiff bears the burden of persuasion.[26] A finding that the employer's stated reason for the adverse action was pretextual does not necessarily mean that the plaintiff will prevail because, as part of her burden of persuasion, the plaintiff must also prove that the actual reason for the action was discriminatory.[27]

The *McDonnell Douglas* burden-shifting framework was originally applied to claims alleging discriminatory failure to hire under Title VII.[28] However, since the framework's inception, courts have applied it to uncover pretextual motives in other discrimination claims under Title VII, including retaliation,[29] termination,[30] and failure to promote.[31] The *McDonnell Douglas* burden-shifting framework has also been applied to discrimination claims under other federal laws which prohibit employment discrimination, such as the Age Discrimination in Employment Act[32] and the Americans with Disabilities Act.[33]

2. *Batson* Claims

Discriminatory-peremptory-challenge claims brought pursuant to the Fourteenth Amendment, are also evaluated using a framework to uncover pretextual motives. As established by the Court in *Batson v. Kentucky*,[34] to establish a prima facie case of discrimination, the defendant must show that (1) "he is a member of a cognizable [protected] group," (2) "the prosecutor has exercised peremptory

25. *Id.* at 804.

26. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993) (quoting Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981)).

27. *Id.* at 524 ("That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the fact-finder to answer . . . .").

28. *McDonnell Douglas Corp.*, 411 U.S. at 802.

29. *See, e.g.*, Foster v. Univ. of Md. E. Shore, 787 F.3d 243, 252 (4th Cir. 2015).

30. *See, e.g.*, *St. Mary's Honor Ctr.*, 509 U.S. at 506, 508, 542 (1993).

31. *See, e.g.*, Levias v. Tex. Dep't of Crim. Just., 352 F. Supp. 2d 751, 767–68 (S.D. Tex. 2004).

32. *See, e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) ("This Court has not squarely addressed whether the *McDonnell Douglas* framework . . . applies to ADEA actions. Because the parties do not dispute the issue, we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here."); Koteras v. Briggs Equip., Inc., 854 F. App'x 583, 584–85 (5th Cir. 2021) (applying McDonnell Douglas burden-shifting framework to ADEA claim).

33. *See, e.g.*, Sampson v. Methacton Sch. Dist., 88 F. Supp. 3d 422, 434 (E.D. Pa. 2015).

34. 476 U.S. 79 (1986).

challenges to remove from the venire members of the defendant's [protected group]" and, (3) "these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their [protected status]."[35] In making this showing, the defendant may rely on the fact that a peremptory challenge, by its nature, allows "those to discriminate who are of a mind to discriminate."[36] After the defendant establishes a prima facie case, the burden of production shifts to the prosecution to provide a neutral explanation for his use of a peremptory challenge to strike the venire member.[37] Thereafter, the trial judge has the duty to determine whether the prosecutor's proposed reasons are the real reasons for the peremptory challenge, or whether they are merely pretextual and the prosecutor actually exercised the peremptory challenge on the basis of race, sex, or another protected characteristic.[38] While the prosecutor's explanation does not have to rise to the level of an explanation for a challenge for cause,[39] some courts have held that it must be "clear and reasonably specific"[40] and cannot simply state that he struck the juror on account of her race, nor can it merely affirm that he struck the juror in good faith.[41]

3. Administrative Law

The Supreme Court forged into new territory in its decision in *Department of Commerce v. New York*,[42] in which Chief Justice Roberts held that the Department of Commerce's stated reason for including a citizenship question on the 2020 census, which was to enforce the Voting Rights Act, was "contrived" (i.e., mere pretext)[43] for

35. *Id.* at 96.

36. *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

37. *Batson*, 476 U.S. at 97.

38. Foster v. Chatman, 578 U.S. 488, 512–14 (2016).

39. *Batson*, 476 U.S. at 98.

40. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 258 (1981).

41. *Batson*, 476 U.S. at 97–98.

42. 139 S. Ct. 2551 (2019).

43. *Id.* at 2575–76. In this section of the opinion, Chief Justice Roberts does not use the word "pretext" in concluding that the agency's explanation was "contrived," although it appears in the syllabus, *id.* at 2557, and throughout the Court's summary of the District Court's holding, *id.* at 2564, 2569, 2573, 2574. *See also* Dep't of Com. v. New York, 339 F. Supp. 3d 144, 152 (S.D.N.Y. 2018). Therefore, for the purposes of this Comment, I have assumed that the Chief Justice's use of the word "contrived" holds the same meaning as "pretextual."

its actual reason.[44] The case was accordingly remanded to the agency to come forward with a better explanation for its decision.[45]

While there was no established framework for the pretext inquiry in this case, as in employment-discrimination or peremptory-challenge cases, it is possible to dissect the Chief Justice's reasoning and separate it from his arbitrary-and-capricious inquiry under the Administrative Procedure Act ("APA"). In reviewing whether the decision to add the citizenship question was arbitrary or capricious under the APA, the Chief Justice concluded that it was not, reversing the District Court's finding.[46] The Chief Justice restated the arbitrary and capricious inquiry as a "determin[ation] only [of] whether the Secretary examined 'the relevant data' and articulated 'a satisfactory explanation' for his decision, 'including a rational connection between the facts found and the choice made.'"[47] The Secretary analyzed the Census Bureau's report on various ways to improve the collection of citizenship data, which included two main methods: (1) use administrative records alone, or (2) reinstate a citizenship question on the census and supplement that data with administrative records.[48] The Census Bureau recommended the first method, which would not have required a citizenship question on the census.[49] However, where the Bureau conceded that both methods "entailed tradeoffs between accuracy and completeness," the Secretary properly "considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his decision" to choose the second method.[50] The Court held that this was a "reasonable exercise of discretion" to which the District Court should have deferred.[51] Four other Justices agreed that the action was not arbitrary and capricious.[52]

In a separate analysis, the Court affirmed that the stated reason for the Department of Commerce's decision, to enforce the Voting Rights Act, was pretextual.[53] The Court based its decision on the steps the Secretary took leading up to the decision to pursue the citizenship

44. *Dep't of Com.*, 139 S. Ct. at 2574–75.

45. *Id.* at 2576.

46. *Id.* at 2571–72.

47. *Id.* at 2569 (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

48. *Dep't of Com.*, 139 S. Ct. at 2569.

49. *Id.* at 2570.

50. *Id.* at 2569–70.

51. *Id.* at 2570.

52. *See id.* at 2576–78 (Thomas, J., concurring in part); *id.* at 2596, 2606 n.15 (Alito, J., concurring in part).

53. *Id.* at 2575–76 (majority opinion).

question.[54] To begin with, when the Secretary first started taking action to reinstate the citizenship question, there was no indication that the purpose was to better enforce the VRA.[55] The Secretary reached out to multiple agencies (agencies that had nothing to do with the VRA) to elicit a request for citizenship data without success.[56] Finally, after the Secretary contacted the DOJ's Civil Rights Division directly, only then did the DOJ send a letter with the exact request that the Secretary elicited from them—to collect citizenship data by adding a question on the census.[57] The DOJ declined to participate thereafter, which the Court saw as "suggesting a lack of interest on DOJ's part."[58] Ultimately, it was clear to the Court that the Secretary "went to great lengths to elicit the request from DOJ (or any other willing agency)," indicating that "the VRA enforcement rational—the sole stated reason—seems to have been contrived."[59]

From this analysis, it is possible to glean a pretext-inquiry framework that may be applied in the administrative-law context. First, it is necessary to distinguish the arbitrary-and-capricious review from the pretext inquiry that the Court conducted. The arbitrary-and-capricious review focuses only on whether the agency reviewed "the relevant data" and made a rational choice based on that data.[60] The Justices came to different conclusions about whether the Secretary's decision was arbitrary and capricious, showing disagreement about how deferential the arbitrary-and-capricious standard should be.[61] However, the pretext inquiry can be separated from arbitrary-and-capricious

54. *Id.* at 2574–75.

55. *Id.* at 2575.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* Moreover, the Court added that the rationale was "incongruent" with "the agency's priorities and decisionmaking process." *Id.*

60. *Id.* at 2569 (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

61. The Chief Justice concluded that the Secretary's decision was not arbitrary and capricious where "[h]e considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for" choosing the method that the Census Bureau did not recommend. *Id.* at 2570. Conversely, Justices Breyer, Ginsberg, Sotomayor, and Kagan would have held that the action was arbitrary and capricious because the Secretary acted against the Census Bureau's recommended course of action and failed to give "adequate consideration to issues that should have been central to his judgment, such as the high likelihood of an undercount, the low likelihood that a question would yield more accurate citizenship data, and the apparent lack of any need for more accurate citizenship data to begin with." *Id.* at 2584, 2595 (Breyer, J., concurring in part).

review under either standard.[62] The Chief Justice's pretext finding concerns the decision that predated the stage of "review[ing] the relevant data" for the question of improving the collection of citizenship data. Rather, he inquired into the initial decision to *undertake that question at all* (before interpretation of data and the question of *how* the action is carried out even comes into play) and concluded that it is not explained by the "sole stated reason" the agency provided.[63]

In practice, it should be very rare that courts have the opportunity apply this pretext framework. The record presented by parties in *Department of Commerce* was unusually broad for administrative review.[64] Ordinarily, evidence as to how an agency decided to undertake an action would not be on the record because courts are "usually" barred from inquiring into "the mental processes of administrative decisionmakers."[65] The District Court invoked the exception to this rule, which allows "extra-record" discovery where there is a "strong showing in support of a claim of bad faith or improper behavior."[66] Thus, as the Chief Justice acknowledges, the case presented "unusual circumstances" where the Court had the entire paper trail to see the agency's decision-making process from its very inception.[67]

II. WHAT DOES A FINDING OF PRETEXT LOOK LIKE?

In the administrative-law context, pretext is evidenced by a disconnect between the "decision made and the explanation given," as exemplified by the paper trail in *Department of Commerce* showing that the Secretary elicited a request for the citizenship question from the Department of Justice.[68] In the employment-discrimination and peremptory-challenge contexts, evidence of pretext falls into several similar categories.

A. Employment Discrimination

In employment-discrimination cases, evidence of pretext can be divided into several categories. To establish pretext, the plaintiff "must

62. Justice Breyer acknowledged that the pretext inquiry differs from arbitrary-and-capricious review. *See id.* at 2595 ("In my view, the Secretary's decision—whether pretextual or not—was arbitrary, capricious, and an abuse of his lawfully delegated discretion.").

63. *Id.* at 2570–71, 2575 (majority opinion).

64. *See id.* at 2575.

65. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971); *see also* United States v. Morgan, 313 U.S. 409, 422 (1941).

66. New York v. U.S. Dep't of Com., 351 F. Supp. 3d 502, 634 (S.D.N.Y.) (2019).

67. *Dep't of Com.*, 139 S. Ct. at 2575–76.

68. *Id.*

identify such weaknesses, implausibilities, inconsistencies, or contradictions in [the employer's] proffered reasons that a reasonable person could find them unworthy of credence and hence infer that [the employer] did not act for the asserted non-discriminatory reasons."[69]

1. Statistical Evidence

In an employment-discrimination case, a plaintiff may use statistical evidence to support a finding of pretext.[70] Similar treatment of a number of employees with the same characteristic over a time period, for example, can evidence a pattern of discrimination.[71] In such a case, "the statistics must show a significant disparity and eliminate nondiscriminatory explanations for the disparity."[72] Additionally, the statistics must "be closely related to the issues in the case"[73] and demonstrate a pattern among "*comparable* individuals."[74] Thus, mass data sets that include individuals who were terminated for non-discriminatory reasons (i.e., for cause) should be narrowed to include only those individuals who suffered a similarly adverse employment decision, and were of comparable skill and prior performance.[75] Datasets that are too small will not have probative value,[76] and even probative statistical evidence may be insufficient, without more, to support the claim.[77]

2. General Biases

Often, a plaintiff's statistical evidence seeks to show a general bias held by the defendant employer. For example, in *Buchanan v. Tata*

69. Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781, 792 (7th Cir. 2007) (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000)).

70. *See* Noyes v. Kelly Servs., 488 F.3d 1163, 1172 (9th Cir. 2007).

71. *See, e.g.*, *id.* at 1172–73.

72. Fallis v. Kerr-McGee Corp., 944 F.2d 743, 746 (10th Cir. 1991).

73. Turner v. Pub. Serv. Co. of Colo., 563 F.3d 1136, 1147 (10th Cir. 2009); *see also* LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 848 (1st Cir. 1993) ("[A] company's overall employment statistics will . . . have little direct bearing on the specific intentions of the employer when dismissing a particular individual.").

74. Pippin v. Burlington Res. Oil & Gas Co., 440 F.3d 1186, 1198 (10th Cir. 2006) (quoting Rae v. Martin Marietta Corp., 29 F.3d 1450, 1456 (10th Cir. 1994)).

75. *Id.* at 1198.

76. *See, e.g.*, Fallis v. Kerr-McGee Corp., 944 F.2d 743, 746 (10th Cir. 1991) (stating that a data set of nine individuals is too small); Simpson v. Midland-Ross Corp., 823 F.2d 937, 943 (6th Cir. 1987) (finding that a set of seventeen individuals is too small without more context of the number of employees at large).

77. *See Simpson*, 823 F.3d at 944.

Consultancy Services,[78] the plaintiffs claimed a "pattern and practice of favoring" South Asian people for employment by providing that the employer's "workforce was between 72.32% and 78.91% South Asian . . . compared to 12.50% of the computer systems design and related services industry as a whole."[79] Additionally, documentary evidence suggested that the employer favored South Asian expatriates because they already had the requisite visa for the job.[80]

General biases have low probative value unless the plaintiff can establish a nexus between the general bias and the adverse employment decision. In *Timmerman v. U.S. Bank*,[81] the plaintiff alleged that her manager had "a general bias against older females."[82] The plaintiff put forth evidence that the manager had previously replaced older female employees with young men.[83] However, where the plaintiff failed to show that there was some connection between the employer's alleged general bias and its firing of the plaintiff specifically, this evidence did not demonstrate pretext.[84]

3. Disparate Treatment

Evidence of disparate treatment of similarly situated employees may support a finding of pretext. For example, in *Boumehdi v. Plastag Holdings*,[85] the plaintiff alleged that "she was the only employee in her department who was not paid for skipping her lunch break, who had her pay shorted consistently, and who did not receive a raise for her 2003 review."[86] The plaintiff identified a "similarly situated" co-worker who had the same supervisor and worked on the same machine and did not receive this treatment.[87] The court found that these facts could support a finding that the employer's justifications for the disparate treatment, a poor review score and stealing time, were pretext for sex discrimination.[88]

78. No. 15-CV-01696-YGR, 2017 WL 6611653 (N.D. Cal. Dec. 27, 2017).

79. *Id.* at *13–14.

80. *Id.* at *14.

81. 483 F.3d 1106 (10th Cir. 2007).

82. *Id.* at 1118.

83. *Id.* at 1113, 1118.

84. *See id.* at 1121; *see also id.* at 1115 ("Ms. Timmerman's circumstances are not remotely comparable to what occurred when Ms. Johnson did not rehire the female branch managers.").

85. 489 F.3d 781 (7th Cir. 2007).

86. *Id.* at 791.

87. *Id.*

88. *Id.* at 791–92 (holding that it was sufficient for a reasonable jury to find pretext).

4. Departing from Company Policy or Usual Procedure

Departing from company policy or usual procedure may support an inference of pretext.[89] In finding that an employer deviated from its policies, courts have required that the deviation be unique to the plaintiff and not one that affected all employees.[90] In *Ledbetter v. Alltel Corporate Services, Inc.,*[91] the employer failed to follow its own reclassification of pay-grade protocols contained in its company policy guide, forcing the plaintiff to remain at a lower pay grade than the rest of the management team following a reorganization.[92] The court found that the employer's stated reasons for this treatment, "uncertainty about the future of [plaintiff's] department and the need to cut costs following the reorganization," were pretextual, especially where the employer had "approved reclassifications for other employees" in accordance with company policy.[93]

5. Other Factors

Anecdotal evidence, such as age-related comments, may also support a finding of pretext.[94] Additionally, in the hiring context, a plaintiff's superior qualifications compared to the person who ultimately got the job can be indicative of pretext.[95] Lastly, where the employer provides conflicting or inconsistent explanations for its conduct, the court may infer pretext.[96]

Ultimately, a finding of pretext in the employment-discrimination context means that the court is not persuaded by the employer's proffered reason for the adverse employment action based on the evidence that the plaintiff puts forth. This evidence may include statistics, general bias against plaintiff's race, disparate treatment of

89. *See, e.g.*, Floyd v. State of Mo. Dep't of Soc. Servs., 188 F.3d 932, 937 (8th Cir. 1999) ("An employer's failure to follow its own policies may support an inference of pretext.").

90. *See id.* (explaining that deviation from company hiring policy did not support pretext finding where that deviation affected all candidates).

91. 437 F.3d 717 (8th Cir. 2006).

92. *Id.* at 720–21.

93. *Id.* at 722.

94. *See, e.g.*, Krodel v. Young, 748 F.2d 701, 710 (D.C. Cir. 1984).

95. Raad v. Fairbanks North Star Borough School Dist., 323 F.3d 1185, 1194 (9th Cir. 2003) (holding that evidence of a plaintiff's qualifications may alone establish pretext where the plaintiff's qualifications are "clearly superior" to those of the applicant selected for the job (quoting Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1492 (9th Cir. 1994))); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc) (concluding that pretext may be inferred where a "reasonable employer would have found the plaintiff to be significantly better qualified for the job").

96. *See* Nasti v. CIBA Specialty Chems. Corp., 492 F.3d 589, 594 (5th Cir. 2007).

the plaintiff compared to other similarly situated applicants or employees, the employer's failure to conform to usual company procedures, anecdotes of the employer's conduct, and a comparison between the qualifications of the plaintiff and the person ultimately selected for the position. The court may draw an inference of pretext where the employer puts forth inconsistent reasons for the adverse employment action. However, a finding that the proffered statement is pretextual (i.e., not the employer's *real reason*) may not be sufficient for a plaintiff to meet her burden of proving that the *real reason* was motivated by discrimination.[97]

B. Batson *Claims*

On a *Batson* clam, a finding of pretext may be evidenced by similar factors as employment-discrimination claims: statistical evidence of the number of jurors of a certain race struck;[98] disparate questioning of Black and white prospective jurors in the case;[99] and a comparison of the characteristics of jurors struck versus those not struck.[100] Additionally, courts examine the extent to which the State's actual voir dire examination reflects the race-neutral characteristics with which it is allegedly concerned.[101] A history of the prosecution's use of peremptory strikes in past cases may also be relevant in proving that the prosecution has engaged in a "pattern" of discriminatory strikes, giving rise to an inference of discrimination.[102] The ultimate inquiry is whether the prosecution was "motivated in substantial part by

97. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 523–24 (1993).

98. *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019).

99. *Id.*

100. *See id.*; Taylor v. Jordan, 10 F.4th 625, 663 (6th Cir. 2021) (White, J., dissenting) ("Imagine that a prosecutor approaches voir dire guided by two primary goals, in order of importance: (1) to include as many jurors as possible who strongly favor the death penalty; and (2) to exclude as many [B]lack jurors as possible. In keeping with these goals, the prosecutor opposes the defendant's attempts to exclude [B]lack jurors expressing particularly favorable views of the death penalty while simultaneously seeking to exclude all other [B]lack jurors. The prosecutor's conduct would unquestionably be a *Batson* violation because jurors would be excluded solely on account of their race.").

101. *See Flowers*, 139 S. Ct. at 2249 ("A 'State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.'" (quoting Miller-El II v. Dretke, 545 U.S. 231, 246 (2005) (internal quotation marks omitted))).

102. *See Flowers*, 139 S. Ct. at 2233; Miller-El I v. Cockrell, 537 U.S. 322, 347 (2003); Batson v. Kentucky, 476 U.S. 79, 96–97 (1986).

discriminatory intent."[103] A finding of pretext will hinge on how convincing the judge finds the prosecution's race-neutral explanations,[104] so most defendants put forth evidence of several of these factors to highlight the underlying discrimination.[105]

For example, in *Flowers v. Mississippi*,[106] the Supreme Court found a *Batson* violation where the defense put forth evidence that the prosecution had struck forty-one out of forty-two "[B]lack prospective jurors that it could have struck."[107] Additionally, the defense showed that the prosecutor engaged in disparate questioning of Black and white prospective jurors, directing an average of twenty-nine questions to each Black prospective juror and one question to each white prospective juror, which the Court took as an effort to "try to find some pretextual reason—any reason—that the prosecutor can later articulate to justify what is in reality a racially motivated strike."[108] Furthermore, the defense demonstrated that the prosecution had struck a Black juror for knowing individuals involved in the case, despite her avid support of the death penalty, but did not strike white jurors who also knew people involved in the case.[109] Therefore, the prosecution's proffered reason for the peremptory strikes at issue—that they had connections with people in the case—did not comport with its action of striking Black jurors

103. Foster v. Chatman, 136 S. Ct. 1737, 1754 (2016) (quoting Snyder v. Louisiana, 552 U.S. 472, 486 (2008)).

104. *Id.* at 486 (Thomas, J., dissenting) ("The evaluation of a prosecutor's motives for striking a juror is at bottom a credibility judgment, which lies 'peculiarly within a trial judge's province.'" (quoting Hernandez v. New York, 500 U.S. 352, 365 (1991))).

105. *See, e.g.*, *Miller-El II*, 545 U.S. at 253. ("The case for discrimination goes beyond these comparisons [of jurors struck versus those not struck] to include broader patterns of practice during the jury selection. The prosecution's shuffling of the venire panel, its enquiry into views on the death penalty, its questioning about minimum acceptable sentences: all indicate decisions probably based on race. Finally, the appearance of discrimination is confirmed by widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude [B]lack venire members from juries at the time Miller–El's jury was selected"); *Flowers*, 139 S. Ct. at 2244 ("Four categories of evidence loom large in assessing the *Batson* issue in Flowers' case: (1) the history from Flowers' six trials, (2) the prosecutor's striking of five of six [B]lack prospective jurors at the sixth trial, (3) the prosecutor's dramatically disparate questioning of [B]lack and white prospective jurors at the sixth trial, and (4) the prosecutor's proffered reasons for striking one [B]lack juror (Carolyn Wright) while allowing other similarly situated white jurors to serve on the jury at the sixth trial.").

106. 139 S. Ct. 2228 (2019).

107. *Id.* at 2235.

108. *Id.* at 2248.

109. *Id.* at 2249.

with those connections, but allowing white jurors to serve.[110] Therefore, the Court determined that the Mississippi Supreme Court had clearly erred in not finding a *Batson* violation on these facts.[111]

Like in the employment-discrimination context, a pretext finding in a *Batson* claim reflects the court's disbelief that the prosecution's stated reason for the strike is the real reason. The prosecution's race-neutral reason may still be applicable or true. In fact, that reason could very well be those "of concern to a great many attorneys[,]" such as a prospective juror's familiarity with the case.[112] But where the race-neutral explanation is not the prosecution's real reason to dismiss the prospective juror—as shown by disparate questioning, a comparison between the juror struck and those not struck, and statistical or other evidence—the court may infer that its real reason is discriminatory.[113]

III. DIFFERENCES IN HOW COURTS TREAT PRETEXT – ARE THOSE DIFFERENCES MERITED?

There are two important differences in how pretext is examined in the peremptory, employment-discrimination, and administrative-law contexts. First, the purpose of the inquiries differs. Second, the extent to which pretext is determinative of a case differs.[114] Considering these differences in the established areas of employment discrimination and peremptory challenges informs how pretext should be treated in the administrative-law context after the *Department of Commerce* decision.

110. *Id.*

111. *Id.* at 2251.

112. *Id.* (Alito, J., concurring).

113. *See* Snyder v. Louisiana, 552 U.S. 472, 485 (2008) ("The prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent.").

114. A third difference in how pretext is examined across these areas is in mixed-motive cases. In the employment-discrimination context, a finding that one of the reasons for the adverse employment action was pretextual and race-based, but one was neutral, is still grounds for finding a violation of Title VII. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 100–01 (2003). But in the peremptory-challenge context, as long as the prosecution can prove that they would have struck the juror (for race-neutral reasons) even in the absence of race-based considerations, some courts would find that the discrimination claim fails. *See* 50A C.J.S. *Juries* § 466. This issue is outside the scope of this Comment, but it poses important considerations for how pretext is treated across other areas of law. *See generally* Lisa M. Cox, Note, *The "Tainted Decision-Making Approach": A Solution for the Mixed Messages* Batson *Gets from Employment Discrimination*, 56 CASE W. RSRV. L. REV. 769 (2006).

A. Purpose

The purpose of inquiring into pretext differs among these three areas of law, which is indicative of how courts should treat the inquires.

Employment discrimination and peremptory challenges may be grouped into the same category—the inquiry into pretext in both areas is for the purpose of ferreting out discriminatory motive for the action at issue. Employment-discrimination claims are governed by Title VII of the Civil Rights Act, which seeks to prohibit discrimination on the basis of race, religion, sex, or national origin; [115] or the Age Discrimination in Employment Act, which seeks to prohibit "arbitrary age discrimination in employment;" [116] or the Americans with Disabilities Act, which seeks "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[117] Similarly, a *Batson* claim was recognized "to eradicate racial discrimination [in violation of the Equal Protection Clause] in the procedures used to select the venire from which individual jurors are drawn,"[118] and was later extended to cover claims of discrimination based on gender.[119] In both instances, the purpose of the claims is to address a right of the individual not to be discriminated against, which is clearly made illegal in these contexts by federal law[120] and the Constitution.[121]

Pretext inquiries in administrative law differ from the employment and peremptory contexts in that the court's apparent purpose is to ferret out the *real reason* for the agency's action, not because the real reason is necessarily discriminatory,[122] but merely because the stated reason has been fabricated; it is not the genuine reason for the action.[123]

115. *See* 42 U.S.C. § 2000e-2(a)-(b) (2020); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) ("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."). The Court has held that the broad language of Title VII also protects employees against discrimination on the basis of sexual orientation, even though this may not have been what Congress intended to do when enacting the statute in 1964. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

116. 29 U.S.C. § 621(b) (2020).

117. 42 U.S.C. § 12101 (2020).

118. Batson v. Kentucky, 476 U.S. 79, 85 (1986).

119. J.E.B. v. Alabama, 511 U.S. 127, 128–29 (1996).

120. *See* 42 U.S.C. § 2000e-2(a)–(b) (2020).

121. *See* U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. V.

122. Dep't of Com. v. New York, 139 S. Ct. 2551, 2575–76 (2019) (affirming the district court's dismissal of plaintiffs' Equal Protection claim).

123. *Id.*

The purpose that the Chief Justice put forth for requiring a genuine explanation for an administrative decision is so that it "can be scrutinized by courts and the interested public."[124] Thus, whereas pretext inquiries in the former situations seek to unveil illegal action, in the latter situation, the pretext inquiry is for the purpose of political accountability.[125]

This is somewhat of a shift from the traditional purpose of judicial review of administrative decisions.[126] Under the APA, the standard for reviewing agency actions is usually construed as one similar to "rational basis" review.[127] Therefore, as long as the agency has provided some evidence of "reasoned decisionmaking,"[128] the court affords a great amount of deference to the agency's process, especially in regards to "product[s] of agency expertise"[129] and "the mental processes of administrative decisionmakers."[130]

B. Pretext as Determinative of a Case

A prominent difference regarding pretext across these three areas of law is how determinative a finding of pretext is for a case. In the peremptory-challenge context, a finding of pretext usually results in the court concluding that the strike was unlawful.[131] Conversely, in the employment-discrimination context, a finding of pretext does not

124. *Id.*

125. However, where an agency is explicitly allowed to have "both stated and unstated reasons for a decision," it is unclear how much political accountability is really going to come from a pretext inquiry into a stated reason. *Id.* at 2559. This may only be half the picture.

126. *See id.* (Thomas, J., concurring in part) ("The Court's holding reflects an unprecedented departure from our deferential review of discretionary agency decisions.").

127. *See* LEE MODJESKA, ADMINISTRATIVE LAW PRACTICE AND PROCEDURE § 6:14, at 218–19 (1982) ("Review of agency action . . . entails a highly deferential standard of review which presumes the validity of agency action and requires affirmance if the action is supported by a rational basis."); *see also* Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 290 (1974).

128. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983).

129. *Id.* at 43.

130. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

131. *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2241 (2019); Tracy M.Y. Choy, Note, *Branding Neutral Explanations Pretextual Under* Batson v. Kentucky*: An Examination of the Role of the Trial Judge in Jury Selection*, 48 HASTINGS L.J. 577, 580 (1997); David A. Stuphen, Note, *True Lies: The Role of Pretext Evidence Under* Batson v. Kentucky *in the Wake of* St. Mary's Honor Center v. Hicks, 94 MICH. L. REV. 488, 489–90 (1995).

always mean a plaintiff will prevail.[132] In the administrative-law context, a finding that an agency's explanation for an action was pretextual usually means that the plaintiff will prevail on its motion for extra-record discovery;[133] alternatively, a pretext finding after the record has already been expanded may result in the court setting aside the agency's action.[134]

In each of these areas, the proponent of the action maintains the burden of persuasion,[135] but a finding of pretext is not always sufficient to meet that burden. However, given that the pretext inquiries in employment-discrimination and *Batson* claims arise in contextually different areas, this varying treatment of pretext makes sense and may illuminate how evidence of pretext should be treated in administrative law.

1. Title VII and *Batson* Claims – Pretext vs. "Pretext-Plus"

In *St. Mary Honor Center v. Hicks*,[136] the Court determined that mere evidence of pretext is insufficient, by itself, to compel judgment for the plaintiff as matter of law in an employment-discrimination case.[137] Rather, evidence of pretext creates a permissive inference that allows, but does not require, the fact finder to conclude that the

132. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993) ("[A] reason cannot be proved to be a 'pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason.").

133. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2574 (2019) (explaining that an order granting extra-record discovery was "premature" but "ultimately justified"); Cook Cty. v. Wolf, 461 F. Supp. 3d 779, 796 (N.D. Ill. 2020) (following *Department of Commerce* and granting order for extra-record discovery on pretext grounds); *cf.* Dall. Safari Club v. Bernhardt, 518 F. Supp. 3d 535, 544 (D.D.C. 2021) (distinguishing *Department of Commerce* and denying motion for extra-record discovery where "each of the agency's stated reasons finds at least *some* support in the record" and "none of the [four] reasons contained in the DOI Memo are *so* lacking in credibility or *so* contradicted by other evidence as to suspect them to be contrived" (emphasis added)).

134. *Dep't of Com.*, 139 S. Ct. at 2574–76.

135. *See Amdt14.S1.4.1.4.2 Peremptory Challenges*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14_S1_4_1_4_2/ [https://perma.cc/HA2F-BZRA] (last visited Sept. 28, 2021) (stating that the opponent of a peremptory strike bears the burden of persuasion); *St. Mary's Honor Ctr.*, 509 U.S. at 507–08 (1993) (explaining that a plaintiff bears the burden of persuasion at all times in an employment-discrimination claim); Butte Cty. v. Chaudhuri, 197 F. Supp. 3d 82, 92 (D.D.C. 2016), *aff'd*, 887 F.3d 501 (D.C. Cir. 2018) (explaining that a plaintiff challenging an administrative action as arbitrary and capricious under Section 706(2)(A) of the APA bears the burden of persuasion).

136. 509 U.S. 502 (1993).

137. *Id.* at 515–18.

employer discriminated against the plaintiff in violation of Title VII.[138] Before this case, courts were divided on whether evidence of pretext compelled a judgment for the plaintiff. Some courts held that a finding of only pretext was sufficient,[139] while others required additional evidence showing discriminatory motive, referred to as the "pretext-plus" approach.[140] Acknowledging that the former approach may subject employers to Title VII liability unjustifiably, the Court in *St. Mary Honor Ctr. v. Hicks*[141] adopted the latter approach, explaining that

> Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of (in the context of the present case) race. That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct.[142]

Therefore, in order to prevail on an employment-discrimination claim, a plaintiff may have to put forth additional evidence of the employer's discriminatory motive.

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138. *Id.*

139. *See, e.g.*, Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3d Cir. 1987) ("If the plaintiff convinces the trier of fact that it is more likely than not that the employer did not act for its proffered reason, then the employer's decision remains unexplained and the inferences from the evidence produced by the plaintiff may be sufficient to prove the ultimate fact of discriminatory intent . . . ."), *cert. dismissed*, 438 U.S. 1052 (1987); Dister v. Cont'l Grp., 859 F.2d 1108, 1113 (2d Cir. 1988) ("[A] plaintiff may prevail upon a showing that the employer's given legitimate reason is unworthy of credence, that is, that the reason supplied was not the true reason for the unfavorable employment decision."); MacDissi v. Valmont Indus., 856 F.2d 1054, 1059 (8th Cir. 1988) ("As a matter of both common sense and federal law, an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred.").

140. *See, e.g.*, Keyes v. Sec'y of Navy, 853 F.2d 1016, 1026 (1st Cir. 1988) ("[I]t was plaintiff's burden not only to show that the defendants' proffered reasons for hiring someone else were apocryphal, but that those reasons were pretexts *aimed at masking sex or race discrimination*."); Hawkins v. Ceco Corp., 883 F.2d 977, 981 n.3 (11th Cir. 1989) ("Of course, merely establishing pretext, without more, is insufficient to support a finding of racial discrimination. The plaintiff must show he suffered intentional discrimination because of his race." (citation omitted) (citing Nix v. WLCY Radio/Rahall Commc'n, 738 F.2d 1181, 1184 (11th Cir. 1984))); *see also* Stuphen, *supra* note 131, at 503 (referring to the "pretext-plus approach").

141. 509 U.S. 502 (1993).

142. *Id.* at 523–24.

Conversely, in a *Batson* claim, if the court finds that the prosecutor's race-neutral reason for striking the juror was pretextual, that is sufficient to allow the defendant to prevail on the *Batson* claim as a matter of law.[143] In other words, evidence that a prosecutor lied about his real reason for striking the juror "is the legal equivalent to proof of intentional discrimination."[144] The defendant need not actually present proof of that discrimination beyond a prima facie showing.

Even though *Batson* claims have been modeled after Title VII claims since their inception,[145] it makes sense that the *Batson* framework does not conform to the standard of proof set out in *Hicks* claims for several reasons. First, on *Batson* claims, factfinders are not required to consider an employment relationship, which could give rise to many other nondiscriminatory factors that go into employment decisions, such as political, personal, or behavioral factors.[146] No relationship forms between a prosecutor and potential juror during voir dire, eliminating the potential that the strike was based on such external factors.

Relatedly, the scope of evidence available in a *Batson* claim is narrower than a Title VII claim.[147] All the court is able to consider is the defendant's prima facie showing—usually limited to characteristics of the potential jurors and statements from the prosecutor during voir dire—and the prosecutor's proffered reason for striking the juror.[148] Thus, where the available evidence is limited, the defendant may only be able to prove pretext.[149] Requiring proof of intentional discrimination would impose a much higher burden on the criminal defendant. Moreover, when making a prima facie showing of a *Batson* violation, the defendant is allowed to rely on the fact that a peremptory challenge is structured so as to allow "those to discriminate who are of a mind to discriminate."[150]

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143. *See, e.g.*, Tursio v. United States, 634 A.2d 1205, 1213 (D.C. 1993); Oliver v. State, 826 S.W.2d 787, 789–90 (Tex. App. 1992); *see also* Stuphen, *supra* note 131, at 489–90.

144. Stuphen, *supra* note 131, at 502; *see also* Snyder v. Louisiana, 128 S. Ct. 1203, 1212 (2008) ("The prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent.").

145. *See* Batson v. Kentucky, 476 U.S. 79, 94 n.18 (1986) (establishing a standard for prima facie showing of a *Batson* violation) (first citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); then citing Tex. Dept. of Cmty. Affs. v. Burdine, 450 U.S. 24 (1981); and then citing U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983))).

146. Stuphen, *supra* note 131, at 507.

147. *Id.*

148. *Id.*

149. *Id.* at 510.

150. *Id.* at 494.

Lastly, in a Title VII claim, an employer may be held liable for the actions of another—its employee who took the adverse action against the plaintiff—perhaps meriting a greater showing of intentional discrimination in order to impose liability.[151] Conversely, in a *Batson* claim, the prosecutor is not being held responsible for the actions of someone else, nor does he have to try to explain the actions of someone else; the court is examining the prosecutor's own explanation and statements made during voir dire.[152] Thus, it makes sense that a showing of pretext, by itself, is sufficient to prevail on a *Batson* claim but not on a Title VII claim.

2. Administrative Claims – Which Standard of Proof?

The Court's recent opinion in *Department of Commerce* has already precipitated claims of pretext alongside claims made under provisions of the APA.[153] What standard of proof should be applied to the pretext claims? Considering the factors scholars have used to distinguish the standards of proof in Title VII and *Batson* claims and how the administrative-law context differs from both of these areas, it is clear that a finding of pretext should be sufficient to prevail on a motion for extra-record discovery. But determining what standard of proof should be required to set aside an agency's decision as the Court did in *Department of Commerce* presents a more difficult question.

a. Motion for Extra-Record Discovery

On a motion to compel completion of the record or extra-record discovery, the scope of evidence available to the plaintiffs is usually quite narrow because "a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing

151. *Id.* at 507.

152. *Id.*

153. *See, e.g.*, Nat'l Urb. League v. Ross, 489 F. Supp. 3d 939, 980 (N.D. Cal. 2020) (granting motion for preliminary injunction where plaintiffs alleged that the administrative action was both pretextual and arbitrary and capricious under the APA); Cook Cnty. v. Wolf, 461 F. Supp. 3d 779, 795–96 (N.D. Ill. 2020) (relying on *Department of Commerce*'s pretext analysis to grant motion for extra-record discovery where "DHS's stated reason for promulgating the Final Rule [redefining 'public charge' as used in determining an immigrant's admissibility to the United States]—protecting the fisc—obscures what [plaintiff] alleges is the real reason—disproportionately suppressing nonwhite immigration."); Dall. Safari Club v. Bernhardt, 518 F. Supp. 3d 535, 544 (D.D.C. 2021) (distinguishing *Department of Commerce*'s pretext finding and denying a motion for extra-record discovery where none of the agency's stated reasons for failing to process plaintiffs' permit applications were "contrived").

administrative record."[154] Therefore, like with *Batson* claims, it makes sense that a plaintiff need only show evidence of pretext in order to prevail on the motion. Requiring any greater showing would create an extremely difficult hurdle for plaintiffs, given the limited administrative record that they would have available from which to glean some other motive underlying the pretextual explanation.[155]

Because motions for extra-record discovery are usually evaluated before a limited administrative record,[156] the standard in *Department of Commerce* actually sets the bar quite high for a plaintiff to prevail. Recall that the Chief Justice made the pretext finding in *Department of Commerce* on an already-expanded record, noting that extra-record discovery was ordered prematurely.[157] However, courts are applying the *Department of Commerce* pretext framework ("the sole stated reason . . . seems to have been contrived"[158]) on motions for extra-record discovery, when the existing record in front of the court is quite limited.[159] But the pretext finding in *Department of Commerce* was based on an already-expanded record, so it does not make sense to apply that framework to a not-yet-expanded record in order to expand it. Nevertheless, courts are using the decision in this way, probably because the Chief Justice's section analyzing pretext within the expanded recorded was intertwined with the "strong showing of bad faith" standard used to expand that record in the first place.[160]

Department of Commerce opened the possibility that a court could affirm an order granting extra-record discovery *post facto*, in light of

154. Dep't of Com. v. New York, 139 S. Ct. 2551, 2573 (2019) (citing Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 549 (1978)).

155. *See infra* text accompanying notes 157–62.

156. *Dep't of Com.*, 139 S. Ct. at 2574.

157. The Court in the *Department of Commerce* case said,

> We agree with the Government that the District Court should not have ordered extra-record discovery when it did. At that time, the most that was warranted was the order to complete the administrative record. But the new material that the parties stipulated should have been part of the administrative record—which showed, among other things, that the VRA played an insignificant role in the decisionmaking process—largely justified such extra-record discovery as occurred . . . . We accordingly review the District Court's ruling on pretext in light of all the evidence in the record before the court, including the extra-record discovery.

Id.

158. *Id.* at 2575.

159. *See, e.g.*, Cook Cnty. v. Wolf, 461 F. Supp. 3d 779, 795–96 (N.D. Ill. 2020).

160. 139 S. Ct. at 2573–74 (quoting Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 420 (1971)).

what the extra discovery revealed.[161] Because the pretext finding was made in this unique procedural posture, its application to other cases at a different procedural stage is questionable. Additionally, if it is taken as an interpretation of the "strong showing of bad faith" standard, it creates a high bar for a party to prevail on a motion for extra-record discovery where they must show, from a limited record, that the "sole stated reason" for the agency's action was "contrived."[162] Therefore, requiring only a showing of pretext to prevail on a motion for extra-record discovery (rather than pretext-plus) makes sense given the usually limited record before the court; the necessary showing of "pretext" should not rise to *Department of Commerce*'s requirement that the sole-stated reason was contrived, because that showing was derived from a large, detailed record that was already expanded.

b. Remand

Once the record has been expanded, there should be sufficient evidence from which plaintiffs could detect some ulterior motive, if one exists, in addition to the pretext concealing that motive, in accordance with the pretext-plus approach. Moreover, traditional deference to agencies supports a higher burden on the challengers of an agency action to persuade a court to set the action aside.[163] However, in practice, a pretext-plus approach may be difficult to apply.

The difficulty is rooted in the problematic question of what ulterior motive plaintiffs should allege—what is the "plus"? Put differently, what kind of ulterior motive is prohibited? Unlike Title VII and *Batson* claims, which seek to detect discrimination,[164] the pretext inquiry in an administrative-law context is for the purpose of political accountability, not necessarily to ferret out an illegal motive.[165] In *Department of Commerce*, the plaintiffs' unsuccessful Equal Protection claim alleged that the Secretary's decision to add the citizenship question was "motivated by discriminatory animus,"[166] but the Court did not allude to this being the motivation concealed by the "contrived" VRA enforcement explanation.[167] Rather, the fact that the VRA enforcement explanation was contrived, by itself, merited remand.[168] This makes sense, given that the statute supposedly governing the pretext claim,

161. 139 S. Ct. at 2556.

162. *See, e.g.*, Dall. Safari Club v. Bernhardt, 518 F. Supp. 3d 535, 541–43. (D.D.C. 2021).

163. *See Citizens to Pres. Overton Park*, 401 U.S. at 420.

164. *See supra* text accompanying notes 137–52

165. *See supra* text accompanying notes 122–25.

166. 139 S. Ct. at 2564–65.

167. *See id.* at 2574–76.

168. *Id.*

the APA, does not explicitly prohibit agency actions motivated by discriminatory intent as Title VII does in employment decisions and as *Batson* does in peremptory strikes. Rather, it only prohibits agency actions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[169]

Therefore, given that a pretext-plus approach is not applicable in an administrative-law context, a simple finding of pretext should be sufficient to meet the plaintiff's burden on a motion for extra-record discovery and, thereafter, to set aside the agency's decision. This approach would be in line with the Chief Justice's stated purpose of the inquiry: political accountability.[170] This standard would incentivize agencies to give truthful explanations for their decisions and refrain from concealing political motives, allowing the public to hold actors responsible for their decisions. Although agencies are allowed to rely on "*unstated* considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among other [factors]),"[171] their *stated* considerations should, at the very least, be genuine. Otherwise political accountability is impossible and, from the perspective of the judiciary, any review would be meaningless.[172]

CONCLUSION

Pretext takes on various forms and functions in the employment-discrimination, *Batson*, and administrative-law contexts. The purpose of inquiring into pretext in each of these fields differs—employment-discrimination claims and *Batson* claims are concerned with illegal discrimination, whereas administrative-law pretext claims are a tool for political accountability. These purposes should inform the extent to which a finding of pretext is determinative of a case. The size of the record available to a claimant when alleging pretext should inform whether the claimant is required to prove mere pretext, as in *Batson* claims, or pretext-plus, as in the case of employment-discrimination claims.

These factors also illuminate how pretext may be treated in administrative law after the *Department of Commerce* decision. First, mere pretext should be sufficient to prevail on a motion for extra-record discovery, but courts should consider that the *Department of Commerce* pretext finding was made on an already-expanded record. Accordingly, courts should be cautious in comparing the showing in *Department of Commerce*, where the agency's "sole stated reason" was

169. 5 U.S.C. § 706(2)(A) (2018).

170. 139 S. Ct. at 2573.

171. *Id.* (emphasis added).

172. *See id.*

"contrived,"[173] to other cases where only a limited record is available at the stage of a motion for extra-record discovery. Second, because the APA does not prohibit an underlying animus, like Title VII and *Batson* do in regards to discrimination, a mere finding of pretext (rather than pretext-plus) should suffice to merit remand to the agency, as exemplified by *Department of Commerce*. Ultimately, pretext has proven to be a powerful evidentiary tool to advance the purpose of Title VII and *Batson* claims, and its treatment in these contexts illustrates how pretext can be used in administrative law to further political accountability.

Erica Hudson[†]

173. *Id.* at 2575.

† J.D. Candidate, 2022, Case Western Reserve University School of Law; B.A., 2018, Saint Anselm College. Thank you to Professor Jonathan Entin for his guidance and encouragement throughout the writing of this Comment. An additional thank you to the Editors of Volume 72 for all their hard work in preparing this Comment for publication.