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Intolerable Asymmetry and Uncertainty: Congress Should Right the Wrongs of the Civil Rights Act of 1991

William R. Corbett
Louisiana State University Law Center, bill.corbett@law.lsu.edu

INTOLERABLE ASYMMETRY AND UNCERTAINTY: CONGRESS SHOULD RIGHT THE WRONGS OF THE CIVIL RIGHTS ACT OF 1991

WILLIAM R. CORBETT*

I. Introduction

The Supreme Court decided two cases during the 2019-20 term resolving the standards of causation required to prove violations of two anti-discrimination statutes.[1] Those decisions, *Comcast Corp. v. National Ass'n of African American-Owned Media*[2] and *Babb v. Wilkie*,[3] exacerbate the state of asymmetry in employment discrimination law regarding standards of causation required to prove violations of the federal employment discrimination laws. Furthermore, *Comcast* affects employment discrimination law in a second deleterious way by perpetuating, and perhaps escalating, the uncertainty regarding the proof frameworks applicable to intentional discrimination claims under the various statutes. *Babb*, on the other hand, increases the asymmetry regarding causation but not the uncertainty regarding the applicable proof frameworks. *Babb* also offers a modicum of hope for a better way forward by providing an interpretation of statutory language regarding standards of causation that may offer Congress an option for ameliorating the current situation.

The Supreme Court also decided another case in which the majority opinion and a dissenting opinion discussed the standards of causation applicable to Title VII—*Bostock v. Clayton County*.[4] In that historic decision, the Court held that Title VII covers sexual orientation and transgender status.[5] Embedded within the majority and dissenting opinions

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* Frank L. Maraist, Wex S. Malone, and Rosemary Neal Hawkland Professor of Law, Paul M. Hebert Law Center, Louisiana State University. I am grateful to Professors Rebecca White, Sandra Sperino, and Charles Sullivan for reading and commenting on a draft of this Article.

1. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1019 (2020); Babb v. Wilkie, 140 S. Ct. 1168, 1171 (2020). The Court also denied certiorari in a case raising the issue of the appropriate standard of causation under the Americans with Disabilities Act. Murray v. Mayo Clinic, 934 F.3d 1101, 1107 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2720 (2020).
2. 140 S. Ct. 1009 (2020).
3. 140 S. Ct. 1168 (2020).
4. 140 S. Ct. 1731 (2020).
5. *Id.* at 1754.

are discussions of standards of causation. Because the Court was not choosing between standards of causation or proof frameworks in that case, *Bostock* did not worsen the problem of asymmetry. Further, it did not substantially increase uncertainty about which causation standard and which proof framework apply under particular statutes. However, the Justices' discussion of causation does demonstrate how fundamental the Court believes causation is to resolving issues under discrimination statutes.

Employment discrimination law has been plagued by two persistent problems: asymmetry regarding the applicable causation standard and the closely related issue of uncertainty regarding applicable proof frameworks. Both of these problems stem from Congress's amendment of some employment discrimination statutes by the Civil Rights Act of 1991[6] and the Supreme Court's subsequent interpretations of what Congress did and what it intended by those amendments.[7]

Speaking of Congress, the House passed a bill[8] and the Senate had a companion bill pending[9] in the 116th Congress in 2019-20, the Protecting Older Workers Against Discrimination Act ("POWADA"),[10] that attempts to rectify the lack of uniformity in causation standards. The bill has a good heart, but the solution that it proposes is inadequate to repair these salient problems.

The first problem with the POWADA is that, while the latest version of the Act would adopt a uniform standard of causation across the employment discrimination statutes, it is unlikely that the "motivating factor" standard selected by the POWADA would achieve the result intended by proponents of the bill. "Motivating factor"[11] has been a

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6. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

7. *See infra* Sections II.B & II.C.

8. Protecting Older Workers Against Discrimination Act, H.R. 1230, 116th Cong. (2020).

9. Protecting Older Workers Against Discrimination Act, S. 485, 116th Cong. (2019).

10. This Article discusses the versions of the POWADA introduced in the current Congress and in the 2009-10 Congress where it was first introduced. Versions have also been introduced in intervening sessions. *See* Laurie A. McCann, *The Age Discrimination in Employment Act at 50: When Will It Become a "Real" Civil Rights Statute?*, 33 A.B.A. J. LAB. & EMP. L. 89, 92–93 (2018).

11. "Motivating factor" is seldom defined. What we know is that it is a standard of causation that is less demanding (lower) than but-for causation. The Court has described the statutory "motivating factor" standard as a "relaxe[d]" standard compared with but-for causation. E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015); *see*

standard in Title VII since the 1991 amendments,[12] but the addition of this standard has been accurately described by Professor Charles Sullivan as a "noble failure."[13] Moreover, adding a "motivating factor" standard to all of the employment discrimination statutes, while preserving the causation standards already in them, would create uncertainty about the interaction of the two causation standards within a statute, as it has done with Title VII.[14] The *Babb* decision provides an opportunity for further consideration of the best uniform causation standard.

The second problem with the POWADA is that it does not resolve the uncertainty regarding which proof framework is applicable to any given individual disparate treatment claim, an issue that is interwoven with the

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also infra note 14. The term was first used in the context of employment discrimination by the plurality in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The plurality borrowed both that term and the mixed-motives analysis of which it was a part from a case analyzing First Amendment protection—*Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). In the *Price Waterhouse* plurality opinion, Justice Brennan wrote as follows: "[W]e mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." *Price Waterhouse*, 490 U.S. at 250. One of the disagreements between the plurality and the O'Connor concurrence in *Price Waterhouse* was about the appropriate standard of causation for the mixed-motives analysis. The plurality used "motivating factor," *id.* at 249–50, but Justice O'Connor argued that a more demanding standard of causation was required in order to shift the burden of persuasion, and she selected "substantial factor," *id.* at 265 (O'Connor, J., concurring). Interestingly, the Court in *Mt. Healthy* did not seem to distinguish between "motivating factor" and "substantial factor," but rather used them interchangeably. 429 U.S. at 576. Congress selected "motivating factor" when, in the Civil Rights Act of 1991, it inserted the mixed-motives analysis in Title VII.

12. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (codified as amended in scattered sections of 42 U.S.C.).

13. Charles A. Sullivan, *Making Too Much of Too Little?: Why "Motivating Factor" Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357, 400 (2020) [hereinafter Sullivan, *Making Too Much*].

14. Regarding Title VII, the Supreme Court has said that the addition of the "motivating factor" standard in the Civil Rights Act of 1991 relaxed or lessened the but-for standard embodied in the "because of" language in the Civil Rights Act of 1964. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 348–49 (2013). It is unclear, however, how the two standards in Title VII apply and interact in any given case. *See, e.g.*, White v. Baxter Healthcare Corp., 533 F.3d 381, 396–97 (6th Cir. 2008), *cert. denied*, 556 U.S. 1235 (2009).

standard of causation.[15] This uncertainty has existed since the Court's interpretation of the 1991 Act in *Desert Palace, Inc. v. Costa*.[16]

The most recent POWADA bills also have a provision[17] that hints, unintentionally,[18] at another option that very well may be the best revision of the law—dispensing with causation standards[19] and proof frameworks. Instead, courts would evaluate employment discrimination cases under the standards used in civil litigation for determining whether the evidence satisfies the burdens of production and persuasion.

The POWADA was destined not to become law in 2020. Even if the Senate had passed the POWADA, the White House had suggested that the President would veto the Act because of possible unforeseen consequences—whatever that means.[20] The bill has not been reintroduced in Congress as yet in 2021.

Although the *Comcast* and *Babb* decisions have somewhat worsened the state of employment discrimination law, they and the POWADA offer some hope for an improvement—for a righting of the wrongs done both by and to

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15. *See infra* Section II.A.

16. 539 U.S. 90 (2003). *See infra* Section II.B.

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> . . . In establishing an unlawful practice under this Act, including under paragraph (1) or by any other method of proof, a complaining party—
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> "(A) may rely on any type or form of admissible evidence and need only produce evidence sufficient for a reasonable trier of fact to find that an unlawful practice occurred under this Act . . . ."

Protecting Older Workers Against Discrimination Act, H.R. 1230, 116th Cong. § 2(a)(1) (2020); Protecting Older Workers Against Discrimination Act, S. 485, 116th Cong. § 3(a)(1) (2019).

18. The POWADA bills are intended to adopt a uniform "motivating factor" standard across statutes. *See* H.R. 1230; S. 485 § 2(b)(1).

19. Although Title VII and other discrimination statutes require that discrimination be "because of" of a particular protected characteristic, that phrase does not necessarily mean but-for causation. But the Court has held that it does. See *infra* Section II.C. for a discussion concerning *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), and *University of Texas Southwest Medical Center v. Nassar*, 570 U.S. 338 (2013). See also *infra* Section II.C for a discussion about the problems with focusing on causation standards in employment discrimination law.

20. *See* Jaclyn Diaz, *Age-Bias Bill Passed by House as White House Threatens Veto*, BLOOMBERG L. (Jan. 15, 2020, 6:14 PM), https://news.bloomberglaw.com/daily-labor-report/age-bias-bill-passed-by-house-as-white-house-threatens-veto.

the Civil Rights Act of 1991. Congress should substantially amend and enact the POWADA[21] to address the asymmetry and uncertainty in the law.

Part II of this Article examines the Civil Rights Act of 1991 and the Supreme Court's interpretations of the Act in *Desert Palace*, *Gross v. FBL Financial Services, Inc.*,[22] and *University of Texas Southwestern Medical Center v. Nassar*,[23] which initiated the asymmetry and uncertainty. Part III considers the version of the POWADA introduced in Congress a decade ago in the aftermath of *Gross* and the version in the 2019-20 congressional session. Part IV considers the Supreme Court's decisions in *Comcast* and *Babb* and their ramifications for the asymmetry of causation standards and uncertainty regarding proof structures. This Part also considers briefly the discussion of causation in the *Bostock* opinions. Part V discusses amendments to the POWADA that would present Congress with a law that repairs much of the asymmetry and uncertainty in employment discrimination law. In conclusion, this Article urges enactment of such a law.

II. Desert Palace, Gross, *and* Nassar*: The Wrongs Done by and to the Civil Rights Act of 1991*

The state of employment discrimination law is a mess. The focus on standards of causation, the lack of uniformity among the statutes, and the uncertainty regarding which proof framework applies to particular claims render this area of law unnecessarily difficult to understand.[24] There are many negative ramifications that make this a problem worth addressing.

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21. Despite suggesting more extensive amendments, I do not suggest that the name of the bill be changed. The POWADA was so named because it is intended to overturn legislatively the Supreme Court's decision in *Gross*, 557 U.S. 167, requiring plaintiffs asserting claims under the Age Discrimination in Employment Act to prove but-for causation. However, it does more than that, amending most employment discrimination statutes to include a "motivating factor" causation standard. Although I propose more extensive amendments, my suggestions relate to causation standards, their associated proof frameworks, and achieving uniformity and certainty regarding those issues. Beyond the substance of the amendments, there is substantial appeal and political cover in the idea of giving older workers the same protections enjoyed by those covered by Title VII. *See infra* Section V.A.

22. 557 U.S. 167 (2009).

23. 570 U.S. 338 (2013).

24. Carter G. Phillips, an experienced attorney who regularly argues cases before the Supreme Court, expressed this idea: "I will say in 25 years of advocacy before this Court I have not seen one area of the law that seems to me as difficult to sort out as this particular

One certain ramification is the practical difficulty that attorneys and courts encounter muddling through these cases every day.[25] A second potential ramification is a risk that discrimination law—which is so incomprehensible and which itself discriminates among the levels of protection afforded to different groups—will be perceived by citizens as unfair. For example, Title VII employs a relaxed standard of causation and provides two proof frameworks to plaintiffs suing for color, race, sex, religion, or national origin discrimination.[26] The Age Discrimination in Employment Act, on the other hand, requires plaintiffs alleging age discrimination to prove the more stringent standard of but-for causation without the benefit of the mixed-motives framework.[27] When the law is not symmetrical, citizens may not understand why anti-discrimination law discriminates. Borrowing from George Orwell, people may wonder why all people covered by employment discrimination laws are equal, "but some are more equal than others."[28] Employment discrimination law is a complex body of law, but it has been made unnecessarily inscrutable. A third consequence is that courts and attorneys obfuscate, as they seemingly must

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one is." Transcript of Oral Argument at 29, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009) (No. 08-441), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/08-441.pdf.

25. *See, e.g.*, Jones v. Okla. City Pub. Schs., 617 F.3d 1273, 1278–79 (10th Cir. 2010) (discussing uncertainty about whether pretext analysis applies to ADEA cases); Weed v. Sidewinder Drilling, Inc., 245 F. Supp. 3d 826, 837 (S.D. Tex. 2017) (recognizing uncertainty about whether mixed-motive claims are viable under the ADA).

26. *See supra* note 14.

27. *Gross*, 557 U.S. at 175–76.

28. GEORGE ORWELL, ANIMAL FARM 112 (Harcourt, Brace & Co. 1946) (1945) (containing the memorable and oft-quoted line: "All animals are equal, but some are more equal than others"). Consider, for example, the Sixth Circuit's holding, subsequently reversed by the Supreme Court, that younger people are protected from age discrimination in favor of older people:

> [W]e do not share the commonly held belief that this situation is one of so-called "reverse discrimination." Insofar as we are able to determine, the expression "reverse discrimination" has no ascertainable meaning in the law. An action is either discriminatory or it is not discriminatory, and some discriminatory actions are prohibited by the law. . . . [T]he protected class should be protected; to hold otherwise is discrimination, plain and simple.

Cline v. Gen. Dynamics Land Sys., Inc., 296 F.3d 466, 471 (6th Cir. 2003), *rev'd*, 540 U.S. 581 (2004). Reverse discrimination is an area in which courts sometimes rail against asymmetry. *See, e.g.*, Lind v. City of Battle Creek, 681 N.W.2d 334, 335 (Mich. 2004) (rejecting distinctions in the analysis of reverse race discrimination claims).

under the law, the real issues of discrimination law with discussions of proof frameworks and standards of causation.[29]

Congress has enacted three principal employment discrimination laws: Title VII enacted in 1964,[30] the Age Discrimination and Employment Act ("ADEA") enacted in 1967,[31] and the Americans with Disabilities Act ("ADA") enacted in 1990.[32] Over five and a half decades, Congress has amended these laws several times in an effort to keep pace with the doctrinal developments in the Supreme Court. Among the amendments are the following: the Pregnancy Discrimination Act of 1978,[33] amending Title VII; the amendment to add the definition of religion to Title VII, including non-accommodation, in 1972;[34] the Civil Rights Act of 1991;[35] the ADA Amendments Act of 2008;[36] and the Lilly Ledbetter Fair Pay Act of 2009.[37] The Civil Rights Act of 1991 was the most ambitious and overarching of these amendments.[38] It overturned a number of Supreme Court decisions[39]

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29. Consider, for example, the Eleventh Circuit's explanation that the pretext framework did not focus the analysis on the real issue in a case involving comparative discipline of employees in *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011). I thank Professor Sandra Sperino for emphasizing this point. There are many examples. One recent and prominent example is the Supreme Court's seemingly superfluous discussion of causation standards in the historic *Bostock* decision. *See infra* Section IV.C.

30. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17).

31. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634).

32. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213).

33. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

34. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e(j)).

35. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

36. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. §§ 12101–03, 12111–14, 12201, 12205a, 12210).

37. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 U.S.C. and 42 U.S.C.).

38. Although one could make a case that the ADA Amendments Act of 2008 was the most dramatic change in a law, the Civil Rights Act of 1991 was more overarching because it changed more of the laws. Ironically, its most significant defect, subsequently revealed, was the Supreme Court's focus on the fact that Congress did not expressly amend the ADEA and the ADA in the same ways that it amended Title VII.

and created § 1981a, a freestanding section[40] which provides for damages and a concomitant right to a jury trial in intentional discrimination cases under Title VII (when unavailable under § 1981) and the ADA. While the 1991 Act addressed a number of problems in employment discrimination law and should be considered a positive development for civil rights advocacy in many ways, it also bred much of the asymmetry and uncertainty that currently exist in employment discrimination law. As one might expect, changes to the employment discrimination laws as significant as those effectuated by the 1991 Act constituted a politically charged and contentious endeavor[41] that required numerous compromises.[42] Such a product of compromise often has inherent problems. It is hard to believe, however, that a Congress that was trying to strengthen the discrimination laws intended the asymmetry and uncertainty that resulted. Nonetheless, the 1991 Act permitted Supreme Court interpretations that produced these results. Three particular decisions of the Court fomented most of the asymmetry and uncertainty that currently exits.[43] Before considering those decisions, some background on standards of causation[44] and proof frameworks[45] is in order.

A. Proof Frameworks and Causation Standards for Individual Disparate Treatment Claims

When Congress enacted Title VII in 1964, it included little explanation of how discrimination was to be proven and analyzed. The foundation upon

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39. H.R. REP. NO. 102-40, 102nd Cong., 1st Sess., at 2–4 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 694, 694–96 (noting the 1991 Act's intent to overrule several Supreme Court cases).

40. 42 U.S.C. § 1981a(a)(1)–(2).

41. The 1990 version of the bill was passed by Congress but vetoed by President George H. W. Bush. *See* 136 CONG. REC. 31,827 (1990) (recording receipt of President Bush's veto of the 1990 Act).

42. Consider, for example, that the version of the 1990 Act first introduced did not cap damages in § 1981a. *See, e.g.*, Lynn Ridgeway Zehrt, *Twenty Years of Compromise: How the Caps on Damages in the Civil Rights Act of 1991 Codified Sex Discrimination*, 25 YALE J.L. & FEMINISM 249, 250 (2014).

43. *See infra* Section II.B, II.C.

44. Standards of causation refers to the extent to which the discriminatory intent must cause the adverse employment action. The Supreme Court has interpreted the "because of" language in the employment discrimination statutes to require "but for" causation, which means that the adverse action would not have happened without the discriminatory intent. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176–77 (2009).

45. *See infra* note 49.

which the Court built was the statutory language "because of."[46] Under the scheme developed by the Court, proof and analysis of discrimination claims turn on categorization. The first step considers which general theory a claim is being brought under: disparate treatment (intentional discrimination) or disparate impact (unintentional discrimination).[47] Second, if a claim is categorized as individual disparate treatment,[48] the next step is determining the appropriate proof framework[49] with which to analyze the claim.

The disparate treatment proof frameworks are the most important constructs in employment discrimination law for two reasons. First, the vast majority of claims asserted under the federal employment discrimination laws are individual disparate treatment claims.[50] Second, the proof

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46. 42 U.S.C. § 2000e-2(a).

47. *See* Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (distinguishing claims of disparate treatment from claims of disparate impact). The Court has declared that there are only two theories of discrimination under Title VII. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2031–32 (2015). Disparate impact cases also are analyzed according to proof frameworks that differ according to the statute at issue. *See* Smith v. City of Jackson, 544 U.S. 228 (2005) (distinguishing the ADEA disparate impact framework from that established in Title VII by the Civil Rights Act of 1991).

48. Systemic disparate treatment claims are evaluated under a less rigid framework established in *International Brotherhood of Teamsters*, 431 U.S. at 336 (explaining that a plaintiff alleging systemic disparate treatment must "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure the regular rather than the unusual practice").

49. "Proof framework" refers to what must be proven, in what order, and on whom the burden rests at each stage. In announcing the *McDonnell Douglas* or "pretext" proof structure, the Supreme Court stated: "The case before us raises significant questions as to the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793–94 (1973).

50. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 989 (1991) (breaking down federal employment civil rights cases by plaintiff and showing that most cases are brought by individual plaintiffs alleging disparate treatment claims); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 1251, 1302 (1998) ("[B]y the end of the [1980s] the overwhelming majority of Title VII suits involved individual claims of disparate treatment discrimination brought by individual private litigants."); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 198 (2009) ("[T]he vast majority of discrimination claims in federal court . . . [are] individual disparate treatment cases."). It seems likely that the predominance of disparate treatment claims has increased since the enactment of the Civil Rights Act of 1991 because the 1991 Act made compensatory and punitive damages and jury trials available in intentional discrimination cases but not disparate impact cases. 42 U.S.C. § 1981a(a), (c).

frameworks guide court analyses of claims at dispositive stages of litigation, such as motions for summary judgment, motions for judgment as a matter of law, and jury instructions.[51]

Since 1989, there have been two proof frameworks applicable to individual disparate treatment claims. After the development of the *McDonnell Douglas* pretext structure[52] in 1973 and the *Price Waterhouse v. Hopkins*[53] mixed-motives structure[54] in 1989, lower courts adopted a basis

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51. The principal role of the frameworks is guiding the court's analysis of motions challenging the sufficiency of the evidence: summary judgment and judgment as a matter of law. One of the proof structures—mixed motives—also shapes jury instructions, but there is a split of authority regarding whether the pretext proof structure affects jury instructions. *Compare* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 (10th Cir. 2002) (holding that a pretext instruction is required where a "rational finder of fact could reasonably find the defendant's explanation false" and could infer that the defendant is covering up a discriminatory purpose), *and* Ratliff v. City of Gainesville, 256 F.3d 355, 364 (5th Cir. 2001) (reversing and remanding for a new trial because the district court failed to give the jury an inference instruction), *with* Conroy v. Abraham Chevrolet-Tampa, Inc., 375 F.3d 1228, 1234–35 (11th Cir. 2004) (holding that the failure to give the requested pretext instruction was not reversible error), *and* Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 789 (8th Cir. 2001) (concluding that the district court did not abuse its discretion by refusing to give a pretext instruction), *and* Fite v. Digit. Equip. Corp., 232 F.3d 3, 7 (1st Cir. 2000) (concluding that the district court is not required to give a pretext instruction telling the jury that a prima facie case coupled with pretext permits them to infer discrimination). Thus, one very significant uncertainty about the proof frameworks is at what stage of the litigation each is applicable. *See* Sandra F. Sperino, *Beyond* McDonnell Douglas, 34 BERKELEY J. EMP. & LAB. L. 257, 261–65 (2013) (explaining that circuit courts are split as to when in the litigation they apply the *McDonnell Douglas* burden-shifting framework).

52. The structure is as follows: at stage one, the plaintiff has the initial burden of production of proving a prima facie case, which establishes a rebuttable presumption of discrimination; at stage two, the burden of production shifts to the employer to produce evidence of a legitimate, nondiscriminatory reason; and at stage three, the burden of production shifts to the plaintiff to prove that the employer's legitimate reason is pretextual. The burden of persuasion on the ultimate issue of discrimination remains with the plaintiff throughout the analysis. *See, e.g.*, Tex. Dep't. of Cmty. Affs. v. Burdine, 450 U.S. 248, 252–56 (1981).

53. 490 U.S. 228 (1989).

54. There are two stages: at stage one, the plaintiff bears the burden of proving that discrimination was a motivating factor or substantial factor of the adverse employment action; and at stage two, the burden of persuasion shifts to the employer to prove that it would have made the same decision for a nondiscriminatory reason. Under the *Price Waterhouse* version, if the employer prevailed at the stage two "same-decision defense," it avoided liability. In the Civil Rights Act of 1991, Congress modified the *Price Waterhouse* version of the framework by selecting "motivating factor" as the standard of causation at stage one and providing that an employer's satisfying the burden of persuasion on the same-

for deciding which proof framework applied to a given disparate treatment claim. If a claim involved circumstantial evidence of discrimination, the *McDonnell Douglas* pretext framework applied.[55] If a claim included direct evidence, the mixed-motives analysis applied.[56] This "type of evidence" distinction was articulated by Justice O'Connor in her concurring opinion in *Price Waterhouse*.[57] Although the standard was criticized because of the amorphous distinction between circumstantial and direct evidence,[58] there was at least a basis of distinction.

The plurality and concurring opinions in *Price Waterhouse* articulated a second framework for analysis of individual disparate treatment claims.[59] Additionally, all *Price Waterhouse* opinions introduced the idea that it is crucial to identify the standard of causation that a plaintiff must satisfy to either win the case or shift the burden of persuasion to the defendant.[60] The plurality opinion declared that the Title VII statutory language "because of" does not require proof of but-for causation,[61] but Justice O'Connor's concurrence and the dissent disagreed.[62] In developing the two-part mixed motives framework, the plurality asserted that a plaintiff must first prove that discrimination was a "motivating part" (or motivating factor) in the decision to take adverse action.[63] That proof would then shift the burden of

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decision defense at stage two does not avoid liability, but instead limits the remedies available to the plaintiff. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B).

55. *See* Kenneth R. Davis, *Price-Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 875 (2004).

56. *See id.* at 873, 876; Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *Is Dead, Whither* McDonnell Douglas?, 53 EMORY L.J. 1887, 1910 (2004).

57. *Price Waterhouse*, 490 U.S. at 270–71 (O'Connor, J., concurring).

58. *See, e.g.*, Costa v. Desert Palace, Inc., 299 F.3d 838, 852–53 (9th Cir. 2002) (describing First Circuit Judge Selya's categorization of various circuits' approaches following *Price Waterhouse*), *aff'd*, 539 U.S. 90 (2003).

59. *See Price Waterhouse*, 490 U.S. at 258 (plurality opinion).

60. *See id.* at 237–38.

61. *Id.* at 240.

62. *See id.* at 262 (O'Connor, J., concurring) ("My disagreement stems from the plurality's conclusions concerning the substantive requirement of causation . . . ."); *id.* at 283 (Kennedy, J., dissenting) ("One of the principal reasons the plurality decision may sow confusion is that it claims Title VII liability is unrelated to but-for causation . . . .").

63. *Id.* at 258 (plurality opinion).

persuasion to the defendant to avoid liability by proving it would have made the same decision absent the discriminatory motive.[64]

The relationship between standards of causation and proof frameworks is important in the analytical scheme developed by the Court. Ironically, this is a fundamental principle that the Supreme Court seems to disregard or undervalue when deciding cases on proof frameworks, such as *Desert Palace*, and cases on standards of causation, such as *Nassar* and *Comcast*. The Court resolves questions about one matter without resolving questions about the other, creating problems for attorneys and courts struggling to understand the analysis applicable to claims.

Obviously, the mixed-motives framework incorporates standards of causation, as a plaintiff must satisfy a specified standard of causation in order to establish a prima facie case, and a defendant must disprove but-for causation in order to establish the same-decision defense.[65] The mixed-motives analysis simply bifurcates causation into two parts (motivating factor and same decision) and shifts the burden of persuasion to the defendant on the second part to disprove but-for causation.[66]

But it is not as obvious that a standard of causation is incorporated in the *McDonnell Douglas* pretext analysis. However, it seems reasonable that it must be given that the Supreme Court interprets the statutes as requiring proof of causation.[67] What purpose would the proof framework serve if a plaintiff could not satisfy the applicable standard of causation by successfully navigating the proof framework? When it announced the *McDonnell Douglas* pretext analysis, the Court did not declare that the framework embodied a standard of causation.[68] There are at least two

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64. *See id.* ("[T]he defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's [protected characteristic] into account.").

65. *See id.*

66. *See id.* at 283 (Kennedy, J., dissenting) (explaining that the plurality "adopts a but-for standard once it has placed the burden of proof as to causation upon the [defendant]"); *see also* Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 653 (2008) ("By proving 'motivating factor' causation, the plaintiff can shift the burden to the defendant on the issue of 'but-for' causation (to prove a lack of 'but-for' causation).").

67. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 238 (plurality opinion) (beginning analysis by establishing the "specification of the standard of causation" under Title VII).

68. However, the but-for causation standard was at least implicit before *McDonnell Douglas* was decided. *See, e.g.*, Robert Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235, 1258 (1988) (explaining that Supreme Court case law supports two theories of causation, one of which is but-for causation).

reasons for that omission. First, as the Court noted in *Comcast*, there was no debate about standards of causation at the time *McDonnell Douglas* was decided.[69] Second, as Professor Sullivan has explained, while "causation takes center stage in direct evidence decisions," in the pretext analysis, causation is subsumed in the inference drawn from the prima facie case.[70] The Court did, however, equate proof of pretext with but-for causation in its 1976 decision *McDonald v. Santa Fe Trail Transportation Co.*[71] Lower courts have thus understood the pretext analysis as incorporating but-for causation.[72]

In the Civil Rights Act of 1991, Congress incorporated a modified version of the *Price Waterhouse* mixed-motives analysis in Title VII. For the first part of the analysis, Congress provided that a plaintiff could establish an unlawful practice by demonstrating[73] that a protected characteristic was a "motivating factor" for an employment practice.[74] Congress chose the language "motivating factor" from the *Price Waterhouse* plurality opinion rather than "substantial factor" favored by the concurring opinions of Justices O'Connor and White.[75] The language

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69. *See* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1019 (2020) ("Because *McDonnell Douglas* arose in a context where but-for causation was the undisputed test, it did not address causation standards.").

70. Charles A. Sullivan, *Accounting for* Price Waterhouse*: Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1118 (1991).

71. 427 U.S. 273, 282 n.10 (1976).

72. *See, e.g.*, Foster v. Univ. of Md.-E. Shore, 787 F.3d 243, 249 (4th Cir. 2015) (stating that the *McDonnell Douglas* framework incorporates but-for causation).

73. The word "demonstrates" was defined by the Civil Rights Act of 1991 to mean "meets the burdens of production and persuasion." 42 U.S.C. § 2000e(m).

74. 42 U.S.C. § 2000e-2(m).

75. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (plurality opinion) (using "motivating part" language); *id.* at 265 (O'Connor, J., concurring) (using "substantial factor" language); *id.* at 259 (White, J., concurring) (using "substantial factor" language). It has been argued that the use of different causation terms by the plurality and concurrences was not intended to create different standards of causation. *See* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 508 (2006) [hereinafter Katz, *The Fundamental Incoherence*]. Indeed, the case from which the Court derived its analysis equated the two standards. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) ("[T]he burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' or to put it in other words, that it was a 'motivating factor' . . . ."). For her part, Justice O'Connor clearly intended a different standard of causation. She considered the plurality's "motivating factor" standard too lenient to justify a shift in the burden of persuasion to the defendant on the second stage of the framework—the

originally included in the bill was "contributing factor," but it was later changed to "motivating factor."[76] The House Report described this change as "cosmetic" and stated that it "w[ould] not materially change the courts' findings."[77] Congress also changed the analysis of *Price Waterhouse* by providing that the same-decision defense is not a complete defense to avoiding liability. Instead, liability is still imposed even if the employer satisfies its burden on the same-decision defense, and the defense merely limits the remedies that are available.[78]

B. Desert Palace*: The Court Interprets the Effect of the 1991 Act on the Proof Frameworks*

After the amendments to the 1991 Act, courts continued to decide which framework was applicable to a claim by applying the circumstantial/direct evidence distinction.[79] But in *Desert Palace, Inc. v. Costa*, the Supreme Court abrogated that distinction.[80] The Court held that a plaintiff asserting a Title VII individual disparate treatment claim is not required to present direct evidence in order to be entitled to a "motivating factor" jury instruction.[81] This meant that the mixed-motives analysis could be applied in cases involving circumstantial evidence. The Court reasoned that when Congress codified a modified version of mixed motives in the Civil Rights Act of 1991, it said nothing of direct evidence.[82] Even Justice O'Connor,

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same-decision defense. *See Price Waterhouse*, 490 U.S. at 266–67 (O'Connor, J., concurring); *see also* Palmer v. Baker, 905 F.2d 1544, 1548 & n.8 (D.C. Cir. 1990) (recognizing the different causation standards in the plurality and concurrences and opting for "substantial factor").

76. Zimmer, *supra* note 56, at 1946 (quoting H.R. REP. NO. 102-40, at 48 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 586).

77. *Id.* at 1946 n.233 (quoting 137 CONG. REC. H3944-45 (daily ed. June 5, 1991)).

78. 42 U.S.C. §2000e-5(g)(2)(B). The limitation is significant, leaving the plaintiff with no monetary remedy. *See, e.g.*, Katz, *The Fundamental Incoherence*, *supra* note 75, at 534–36 (discussing the inadequate remedies available when a defendant satisfies the same-decision defense).

79. *See, e.g.*, Costa v. Desert Palace, Inc., 299 F.3d 838, 852–53 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003); *see also* Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 663–64 (2000).

80. *See* 539 U.S. 90, 100 (2003) (treating direct and circumstantial evidence alike).

81. *Id.* at 101–02.

82. *Id.* at 98–99.

the creator of the evidence-based distinction, concurred, stating that Congress did not adopt that line of demarcation.[83]

The *Desert Palace* decision raised the question whether the *McDonnell Douglas* pretext framework survived the decision.[84] If it did, what was the new line of demarcation between the two frameworks? Subsequent Supreme Court decisions have indicated that the pretext analysis survived *Desert Palace*,[85] but no decision has suggested the new basis for deciding which framework applies. Most confounding is the fact that, without overruling *Desert Palace*, the Supreme Court has seemingly followed the lead of lower courts[86] and restored the direct/circumstantial dividing line.[87]

C. Gross *and* Nassar*: The Court Interprets the 1991 Act's Effect on Causation Standards*

Six years after *Desert Palace*, the Court decided *Gross v. FBL Financial Services, Inc.*[88] When the Court granted certiorari in *Gross*,[89] it appeared to be merely a sequel to *Desert Palace*. The Court seemed poised to answer a narrow question: whether *Price Waterhouse*'s direct/circumstantial evidence line between pretext and mixed-motives analyses still applied to

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

84. *See, e.g.*, Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 990–93 (D. Minn. 2003); Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 102–03 (2004); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 765–66 (2005); Jeffrey A. Van Detta, "Le Roi Est Mort; Vive Le Roi!": *An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 76 (2003); Zimmer, *supra* note 56, at 1929–32.

85. *See* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1350 (2015) (discussing pretext and citing *McDonnell Douglas* with approval); Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003) (stating that the only remaining question concerns pretext and quoting *McDonnell Douglas*).

86. *See, e.g.*, Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C., 778 F.3d 473, 475 (5th Cir. 2015) (bifurcating the path of the claim based on whether the plaintiff has direct or circumstantial evidence); Marable v. Marion Mil. Inst., 595 F. App'x 921, 924 (11th Cir. 2014) (explaining that the court uses the *McDonnell Douglas* framework when the plaintiff produces only circumstantial evidence).

87. *Young*, 135 S. Ct. at 1345 ("[A] plaintiff can prove disparate treatment either (1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or (2) by using the burden-shifting framework set forth in *McDonnell Douglas*.").

88. 557 U.S. 167 (2009).

89. 526 F.3d 356 (8th Cir.), *cert. granted*, 555 U.S. 1066 (2008) (mem.).

ADEA claims even though it no longer applied to Title VII claims.[90] Different treatment of the two employment discrimination laws was feasible because the Civil Rights Act of 1991, on which the Court focused its analysis in *Desert Palace*, did not amend the ADEA in the same way that it did Title VII.[91] However, the Court's decision in *Gross* turned out to be much more than a *Desert Palace* sequel, as the Court rendered a decision that answered a broader question.

The Court held that the "motivating factor" standard of causation and mixed-motives proof framework do not even apply to ADEA cases.[92] The Court reasoned that Congress amended Title VII through the 1991 Act to add the "motivating factor" standard of causation and the mixed-motives analysis, but it did not similarly amend the ADEA.[93] When Congress amends one statute but not another, "it is presumed to have acted intentionally."[94] The Court noted that the only standard of causation in the ADEA is the original "because of" language,[95] which the Court interpreted as necessarily meaning but-for causation.[96] Thus, the burden of persuasion is on the plaintiff to prove but-for causation, and the burden never shifts to the defendant.[97] Moreover, the Court rejected the argument that the *Price Waterhouse* version of the mixed-motives framework continued to apply to the ADEA.[98]

Having concluded that the ADEA requires proof of but-for causation, the Court in *Gross* would have created asymmetry, but not uncertainty. The Court went further, however, exacerbating uncertainty regarding proof frameworks. In a footnote detailing differences between the ADEA and Title VII, the Court noted that it had never decided whether the *McDonnell*

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90. *See* Kevin Russell, *Argument Preview:* Gross v. FBL Financial Services, SCOTUSBLOG (Mar. 30, 2009, 3:51 PM), https://www.scotusblog.com/2009/03/argument-preview-gross-v-fbl-financial-services/.

91. *Id.* (observing that the Petitioner acknowledged that Congress did not mention the ADEA when it legislatively overruled *Price Waterhouse* in the 1991 Act).

92. *Gross*, 557 U.S. at 180.

93. *Id.* at 174–75.

94. *Id.* at 174.

95. 29 U.S.C. § 623(a)(1)–(2).

96. *Gross*, 557 U.S. at 176.

97. *See id.* at 180.

98. *Id.* at 178–79.

Douglas proof framework applies to ADEA claims.[99] Although the Court had indeed noted this point in prior decisions, lower courts, interpreting the pretext analysis as embodying but-for causation,[100] had continued to apply it to ADEA claims.[101] The Court's holding in *Gross*—that the ADEA requires but-for causation—presented an opportunity to clarify that the pretext framework does incorporate but-for causation and is applicable to the ADEA. The Court declined to do so. Thus, *Gross* demonstrates the Court's apparent lack of either appreciation or concern about the practical difficulties it creates when it fails to attend to the relationship between causation standards and proof frameworks.

University of Texas Southwestern Medical Center v. Nassar[102] was a true sequel to *Gross*, although one that did not inevitably follow from it. In *Nassar*, the Court held that the motivating factor standard and the mixed-motives framework are not available under Title VII's anti-retaliation provision;[103] rather, but-for causation is required.[104] The Court's rationale was the same as in *Gross*.[105] The Court thus escalated the asymmetry by making a causation standard and proof framework that are applicable under the anti-discrimination provision of Title VII inapplicable under the anti-retaliation provision. The Court also discussed the relationship between "because of" and "motivating factor" in the anti-discrimination provision of

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99. *Id.* at 175 n.2 (first citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000); and then citing O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (1996)).

100. Although the Court did not declare in *McDonnell Douglas* itself that the framework measures but-for causation, it did suggest this proposition. McDonald v. Santa Fe Trail Transp. Corp., 427 U.S. 273, 282 n.10 (1976) (explaining that in the pretext context "no more is required to be shown than that [the protected characteristic] was a 'but for' cause").

101. *See, e.g.*, Nicholson v. Securitas Sec. Servs. USA, Inc., 830 F.3d 186, 189 (5th Cir. 2016) (applying the burden shifting framework in *McDonnell Douglas* and articulating a but-for causation requirement). *But see* Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 136–37 (2007) (positing that the *McDonnell Douglas* analysis, despite widespread belief to the contrary, does not prove but-for causation).

102. 570 U.S. 338 (2013).

103. *See id.* at 362 (requiring plaintiffs making a Title VII retaliation claim, 42 U.S.C. § 2000e-3(a), to establish but-for causation).

104. *Nassar*, 570 U.S. at 360.

105. *See id.* at 360–61 (relying on Congress's failure to amend the anti-retaliation provision, § 2000e-3(a), to include the "motivating factor" standard); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174 (2009) ("We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.").

Title VII: "For one thing, § 2000e-2(m) is not itself a substantive bar on discrimination. Rather, it is a rule that establishes the causation standard for proving a violation defined elsewhere in Title VII."[106]

D. The Wrongs Done by and to the Civil Rights Act of 1991

It was not inevitable that an act of Congress would be necessary to repair employment discrimination law. The Court could have interpreted the 1991 Act differently, as indicated by the dissents in *Gross* and *Nassar*.[107] The Court's mistake in *Desert Palace*, which was a unanimous decision,[108] was not its method of statutory interpretation. Rather, the Court failed to consider the ramifications of the decision on the determination of which of the two proof frameworks applies to any given individual disparate treatment claim—an omission that has not been remedied in the subsequent eighteen years. The Court's interpretations of the 1991 Act have not been unreasonable in terms of statutory interpretation.[109] They have, however, been deleterious from both a practice and policy perspective because the Court has opted for interpretations that have made employment discrimination law less comprehensible, more uncertain, and more asymmetrical.

The POWADA, as currently written, would right one of the wrongs (asymmetry of causation standards), but not in the best way. It would most likely also leave the more significant wrong (uncertainty regarding proof frameworks) unredressed. Congress, not the Court, should respond to these problems, particularly because the Supreme Court has created this situation based on its interpretations of Congress's Civil Rights Act of 1991. Congress can accomplish this by amending the POWADA bills and passing a law that would right both wrongs in clear language that does not permit alternative interpretations.

The need for congressional action is urgent for several reasons. First, the uncertainty regarding which proof structure applies to any given individual

106. *Nassar*, 557 U.S. at 355.

107. *Gross*, 557 U.S. at 180–82 (Stevens, J., dissenting) (referring to the majority's interpretation of the ADEA and the 1991 Act as "unnecessary lawmaking" and in "utter disregard" of Congress's intent); *Nassar*, 570 U.S. at 374–77 (Ginsburg, J., dissenting) (referring to the majority's interpretation of the 1991 Act as "strange logic" and observing other interpretations).

108. Desert Palace, Inc. v. Costa, 539 U.S. 90, 90 (2003).

109. *But see* Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 927–29 (2012) (arguing that the Court's interpretation in *Gross* of a statutory override was not reasonable).

disparate treatment case is a problem of great import, and its practical ramifications affect parties, attorneys, and judges on a daily basis. Second, it matters greatly that the law is actually comprehensible and that the principles and structures developed by the courts and Congress are reasonably tailored to describe and address the violations of law for which they are designed. Finally, the most recent version of the POWADA is the latest example of a failure of Congress and the Supreme Court to work together to develop law that is reasonably understandable, cogent, and usable. Although the Court is more to blame, Congress is in a better position to repair the law. Starting with the foundation of the POWADA and revising that bill in some significant way may provide an opportunity to effect such repair, particularly in light of the options provided by the Court in *Babb*.

III. The Protecting Older Workers Against Discrimination Act: A Bill to Install a Uniform Standard of Causation

The POWADA was first introduced in 2009[110] as a bill that would overturn the result in *Gross* and amend the ADEA to include the "motivating factor" standard and the mixed-motives framework.[111] The bill also aimed to avoid the mistake Congress made in the Civil Rights Act of 1991 of amending only one employment discrimination law. Instead, it provided that the causation standard and proof framework would apply to any federal employment discrimination law, any anti-retaliation provision, and any constitutional provision forbidding discrimination.[112] The bill would have made the ADEA symmetrical regarding causation standards and proof structures with Title VII, but it would have created the same uncertainty that exists in Title VII regarding which proof structure applies to a particular individual disparate treatment claim. In fact, the bill expressly stated that "[e]very method for proving either such violation, including the evidentiary framework set forth in *McDonnell-Douglas* . . . shall be available to the plaintiff."[113] The foregoing provision was the greatest flaw of the 2009 version of the POWADA. Like so many courts, the congressional drafters felt the need to pay homage to the *McDonnell Douglas* pretext analysis. In doing so, had the bill passed, they would have

110. S. 1756, 111th Cong. (2009); H.R. 3721, 111th Cong. (2009).
111. S. 1756 § 2; H.R. 3721 § 2.
112. S. 1756 § 2; H.R. 3721 § 2.
113. S. 1756 § 3; H.R. 3721 § 3.

codified the uncertainty regarding proof frameworks. Relatedly, the bill would not have addressed the uncertainty regarding the interaction between the two causation standards (but for and motivating factor) co-existing in the same statute—a problem existing in Title VII since the 1991 Act.[114]

The most recent version of the POWADA was introduced in Congress in 2019 and passed by the House in 2020.[115] This version differs from the prior iteration in several respects. It specifically amends particular provisions in the ADEA, Title VII, the ADA, the Rehabilitation Act of 1973, and anti-retaliation provisions rather than using catchall provisions referring to all federal employment discrimination statutes.[116] It also does not include a specific reference to the *McDonnell Douglas* analysis as its predecessor did.[117] Instead, its provisions state that plaintiffs may use any form or type of evidence, are required only to produce sufficient evidence for a reasonable fact finder to find an unlawful practice, and are not required to prove sole causation.[118] These provisions are significant improvements over those in the 2009 version of the POWADA. These provisions also give courts the latitude to interpret the Act as liberating individual disparate treatment analysis from the strictures of the proof frameworks.[119] However, the most recent version of the bill will almost certainly not produce that result, as the language does not expressly require that result. There is nothing to which courts cling more tenaciously than the proof frameworks, and most particularly the *McDonnell Douglas*

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114. *See supra* Section II.C.

115. Protecting Older Workers Against Discrimination Act, H.R. 1230, 116th Cong. (2020); *see also H.R. 1230-Protecting Older Workers Against Discrimination Act*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/1230/actions (last visited Jan. 5, 2021) (listing the bill as introduced in 2019 and passed in 2020).

116. H.R. 1230 § 2.

117. *See id.*; S. 1756, 111th Cong. § 3 (2009); H.R. 3721, 111th Cong. § 3 (2009).

118.

> . . . In establishing an unlawful practice under this Act, including under paragraph (1) or by any other method of proof, a complaining party—
>
> "(A) may rely on any type or form of admissible evidence and need only produce evidence sufficient for a reasonable trier of fact to find that an unlawful practice occurred under this Act; and
>
> (B) shall not be required to demonstrate that age or an activity protected by subsection (d) was the sole cause of a practice."

H.R. 1230 § 2(a)(1).

119. *See infra* Section V.B.2.

framework.[120] If Congress intends to dispatch with the pretext framework or both frameworks, it will need to do so expressly.

IV. Comcast *and* Babb *(and* Bostock*)*

The Court's 2020 decisions in *Comcast Corp. v. National Ass'n of African American-Owned Media*[121] and *Babb v. Wilkie*[122] exacerbate the problems initiated by *Desert Palace*, *Gross*, and *Nassar*. They draw on *Gross* and *Nassar* for the tenet that but-for causation is the default standard of causation in employment discrimination and other legislation.[123] The discussion of standards of causation in *Bostock v. Clayton County*[124] is somewhat enigmatic, as it seems peripheral to the issue the Court was deciding.[125] Nonetheless, the discussion does demonstrate how central the Court considers standard of causation to resolving issues under the discrimination statutes.

A. Comcast

Comcast involved a claim of discrimination under § 1981 of the Civil Rights Act of 1866.[126] It was not an *employment* discrimination claim. Section 1981 is a civil rights statute enacted by Congress in 1866 during Reconstruction.[127] The statue provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, [and] give evidence . . . as is enjoyed by white citizens."[128]

The plaintiff, an African American entrepreneur, owned media company ESN, which was comprised of seven television networks.[129] Comcast, a television network conglomerate, and ESN could not come to an agreement

120. *See supra* Section II.B.

121. 140 S. Ct. 1009 (2020).

122. 140 S. Ct. 1168 (2020).

123. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009) (holding that a plaintiff must prove but-for causation to prevail under the ADEA); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013) (holding that a plaintiff bringing a retaliation claim must prove that "his or her protected activity was the but-for cause of the alleged adverse action by the employer").

124. 140 S. Ct. 1731 (2020).

125. *See, e.g.*, *id.* at 1757 (Alito, J., dissenting) (accusing the majority of "spending many pages discussing matters [including causation] that are beside the point").

126. *Comcast*, 140 S. Ct. at 1013.

127. *See id.* at 1015.

128. 42 U.S.C. § 1981(a).

129. *Comcast*, 140 S. Ct. at 1013.

for Comcast to carry the ESN networks.[130] When ESN sued Comcast for race discrimination under § 1981, Comcast argued that its viewers preferred a different type of programing not offered by ESN.[131] The district court granted a 12(b)(6) motion, dismissing the action and holding that ESN had not plausibly pled but-for causation based on race.[132] The Ninth Circuit reversed, holding that the district court applied the wrong standard of causation to a § 1981 claim.[133] Instead, the Ninth Circuit reasoned, the district court should have applied the standard that race "played 'some role'" in the decision.[134] The Supreme Court granted certiorari and reversed the Ninth Circuit, holding that the trial court applied the correct standard of but-for causation.[135]

The Court began its analysis by observing that the default standard of causation, derived from tort law, is but-for causation.[136] The Court also noted that the "essential elements"—what a plaintiff must prove to prevail—remain the same throughout the litigation.[137] Thus, what a plaintiff must allege in her complaint is consistent with what she must prove at trial.[138] Section 1981 says nothing about standards of causation, and the Court found nothing in the statutory text, legislative history, or Court precedent to persuade it that § 1981 presented an exception to what the Court views as the default rule for statutory torts.[139]

The Court further declined the plaintiff's invitation to import the "motivating factor" standard from Title VII into § 1981.[140] First, the Court rejected the plaintiff's reliance on *Price Waterhouse v. Hopkins* because Congress superseded that decision with a statutory version of the "motivating factor" standard in the Civil Rights Act of 1991.[141] In the 1991

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130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* (citing Nat'l Ass'n of Afr. Am.-Owned Media v. Comcast Corp., 743 F. App'x 106, 107 (9th Cir. 2018) (mem.)).

135. *Id.* at 1014, 1019.

136. *Id.* at 1014.

137. *Id.* This should be a very significant point that would mandate some clarification regarding causation standards and proof frameworks, but I do not think that it will provoke such clarification. *See infra* text accompanying notes 159–60.

138. *Comcast*, 140 S. Ct. at 1014.

139. *Id.*

140. *Id.* at 1017–18.

141. *Id.* at 1017.

Act, Congress amended Title VII to insert the motivating factor standard into the statute.[142] Although the 1991 Act also amended § 1981, it did not insert the "motivating factor" standard into that statute.[143] Thus, employing the interpretive tool invoked in *Gross* and *Nassar*, the Court reasoned that when Congress simultaneously amends one statue in one way and another in another way, the difference in language implies a difference in meaning.[144] The Court also rejected the argument that the statutory language to "make and enforce contracts" requires a motivating factor standard because it includes claims for contract process as well as contract outcomes.[145] The Court explained that it did not need to resolve whether § 1981 covers process claims because it did not find that "motivating factor" is necessarily the appropriate standard for process-based claims.[146]

The Court then explained that the plaintiff, unable to "latch onto" either *Price Waterhouse* or the Civil Rights Act of 1991, attempted to invoke the *McDonnell Douglas* pretext framework, arguing that it supported the analysis advocated for by the plaintiff.[147] The Court also rejected that argument.[148] It explained that *McDonnell Douglas* was decided at a time when the but-for causation standard was the undisputed standard in employment discrimination law.[149] Thus, the Court in *McDonnell Douglas* said nothing about the standard of causation.[150] The Court left unresolved whether the *McDonnell Douglas* proof framework may be relevant to analyzing a claim under § 1981, saying, "[w]hether or not *McDonnell Douglas* has some useful role to play in § 1981 cases," it provides no basis for adopting a "motivating factor" standard for evaluating the sufficiency of pleadings under § 1981.[151]

There is nothing surprising or remarkable about the *Comcast* decision or its rationale. The Court extended its default-rule rationale from *Gross*, *Nassar*, and other precedents to hold that the standard for § 1981 is but-for

142. *Id.*
143. *Id.* at 1017–18.
144. *Id.* at 1018; *see* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174–75 (2009); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 353 (2013).
145. *Comcast*, 140 S. Ct. at 1018 (quoting 42 U.S.C. § 1981(a)).
146. *Id.*
147. *Id.* at 1018–19.
148. *Id.* at 1019.
149. *Id.*
150. *Id.*
151. *Id.*

causation.[152] However, it is remarkable that the Court extended that rationale even in the absence of any statutory language suggesting a causation standard.[153]

In this way, the Court increased the asymmetry in employment discrimination law. One could argue that there was no increase because § 1981 now has a causation standard identical to all employment discrimination laws other than Title VII.[154] However, asymmetry between Title VII and § 1981 is more significant because claims of race discrimination are usually asserted under both statutes.[155] Now a factfinder will have to apply different standards of causation to the claims.[156] Before *Comcast*, courts did not conduct separate analyses.[157]

On the issue of proof frameworks, the Court increased both uncertainty and asymmetry by casually passing over whether the *McDonnell Douglas* pretext analysis is relevant to evaluating claims under § 1981.[158]

The discussion in *Comcast*—what a plaintiff must prove remains constant throughout the litigation—should provoke resolution of the relationship between the proof frameworks and standards of causation. It should also sound the death knell for the *McDonnell Douglas* framework. The elements a plaintiff must prove remain constant throughout the case. Thus, if a plaintiff's Title VII claim is analyzed under the pretext framework, which incorporates but-for causation,[159] on a defendant's motion for summary judgment, the jury cannot be given an instruction that

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152. *Id.*; *see* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009) (holding that a plaintiff must prove but-for causation to prevail under the ADEA); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013) (holding that a plaintiff bringing a retaliation claim must prove that "his or her protected activity was the but-for cause of the alleged adverse action by the employer").

153. I thank Professor Sperino for making this point.

154. Although the Court has not yet resolved the standard of causation applicable under the ADA, *see infra* note 205, it is likely but-for causation.

155. *See, e.g.*, CBOCS W., Inc. v. Humphries, 553 U.S. 442, 445 (2008) (explaining that the plaintiff brought claims of race discrimination under both Title VII and § 1981).

156. *See* Kilgore v. FedEx Freight, 458 F. Supp. 3d 973, 978 (N.D. Ill. 2020) (observing that Title VII and § 1981 claims have different causation standards).

157. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989) (providing that § 1981 claims should be evaluated under the same proof framework used for Title VII claims); Humphries v. CBOCS W., Inc., 474 F.3d 387, 403–04 (7th Cir. 2007) (applying the same prima facie requirements to Title VII claims and § 1981 claims).

158. *See supra* text accompanying note 151.

159. *See supra* text accompanying notes 65–72.

a plaintiff need prove only motivating factor.[160] Although *Comcast* should require resolution of uncertainty regarding proof frameworks and standards of causation, it is very unlikely that it will do so. The persistence of but-for causation and the pretext analysis for Title VII claims for eighteen years after *Desert Palace* suggests that for such a change to occur the Court must expressly mandate such outcomes rather than hint at them.

In one of the first post-*Comcast* opinions, *Kilgore v. FedEx Freight*,[161] the district court considered a defendant's motion for summary judgment on the plaintiff's claim of race discrimination under both Title VII and § 1981. The court explained that different standards of causation now apply to the two statutes after *Comcast*—motivating factor for Title VII and but-for for § 1981.[162] The court then brought some uniformity to the question by saying that the standard for summary judgment is the same: whether the evidence would permit a reasonable juror to find that the plaintiff suffered an adverse job action because of race.[163] Then the court proceeded to apply the *McDonnell Douglas* pretext analysis to the issue, making no distinction between the Title VII and § 1981 claims.[164] Was that correct after *Comcast*? We do not know. Furthermore, it seems the *Kilgore* court could have addressed the question by evaluating the evidence under the summary judgment standard that it articulated without invoking the pretext framework.[165]

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160. Numerous cases have suggested, incorrectly, that the pretext and mixed-motives analyses apply at different stages of the litigation, and thus it is not necessary to choose between them. *See, e.g.*, Costa v. Desert Palace, Inc., 299 F.3d 838, 856–57 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003) (asserting that *McDonnell Douglas* and mixed-motive frameworks apply in different phases of litigation); Griffith v. City of Des Moines, 387 F.3d 733, 735 (8th Cir. 2004) (discussing when in litigation the *McDonnell Douglas* framework applies and when a mixed-motive jury instruction is appropriate); White v. Baxter Healthcare Corp., 533 F.3d 381, 395–96 (6th Cir. 2008) (discussing that the plaintiff's burden of proof depends on the phase of litigation), *cert. denied*, 556 U.S. 1235 (2009).

161. 458 F. Supp. 3d 973 (N.D. Ill. 2020).

162. *Id.* at 975, 978.

163. *See id.* at 979.

164. *See id.* at 978–80 (explaining that the *McDonnell Douglas* framework applies to both Title VII and § 1981 claims and then applying this framework).

165. I will suggest below that this idea is a basis for radically reforming disparate treatment law by dispatching with the causation standards and proof frameworks. *See infra* Section V.B.2.

B. Babb

In *Babb*, the Court considered the standard of causation under the federal sector provision of the ADEA. That provision provides that personnel decisions "shall be made free from any discrimination based on age."[166] The government argued that a but-for causation standard based on the statutory text should be the default rule recognized in other employment discrimination decisions of the Court.[167] The district court, analyzing the claim under the *McDonnell Douglas* pretext framework, granted summary judgment in favor of the government.[168] On appeal, plaintiff Babb argued that it was a mistake to apply the *McDonnell Douglas* analysis to a mixed-motives claim.[169] The plaintiff argued that the federal sector provision does not require proof of but-for causation; instead, there is a violation if an employer considered age in the decision-making process.[170]

The Court began with the statutory language. Parsing the language, the Court concluded that there are two parts with two different causation standards: age must be a but-for cause of discrimination in the adverse employment action, but not a but-for cause of the personnel decision process itself.[171] Thus, the statute does not require proof that the decision would have come out differently if age had not been considered.[172] There is a violation if age plays *any part* in the decision.[173] The decision must be "made in a way that is untainted by such discrimination."[174]

The government's argument for a but-for causation standard was based on Supreme Court precedent, including *Gross* and *Nassar*, interpreting different language in other statutes as supporting the default rule of but-for causation.[175] The Court distinguished those decisions as interpreting different statutory language.[176]

The Court did not find it anomalous that Congress would hold the federal government to a more stringent standard in the federal sector provision than

166. Babb v. Wilkie, 140 S. Ct. 1168, 1171 (2020) (citing 29 U.S.C. § 633a(a)).
167. *Id.* at 1172.
168. *Id.* at 1171–72.
169. *Id.* at 1172.
170. *Id.*
171. *Id.* at 1173–74.
172. *Id.* at 1174.
173. *Id.*
174. *Id.*
175. *Id.* at 1175–76.
176. *Id.* at 1176.

it holds private employers and state and local governments. In other words, the *Babb* interpretation makes it easier for plaintiffs to prove age discrimination claims against the federal government than for plaintiffs to prove age discrimination against private employers and state and local governments.[177] The Court then turned to the interaction between the two causation standards that it found in the federal sector provision. A plaintiff proves a violation of the provision if he demonstrates that age was considered and resulted in unequal consideration.[178] But that showing entitles a plaintiff to only "injunctive or other forward-looking relief."[179] In order to be entitled to other remedies, such as reinstatement, back pay, compensatory damages, or other forms of relief related to the result of an employment decision, the plaintiff must prove but-for causation of the employment action.[180] The Court noted that this was similar to the remedies-matched-to-violations scheme developed by the Court for claims under § 1983 for violations of the Equal Protection Clause[181] and violations of First Amendment rights.[182] Although the Court did not say so, it also is similar to the bifurcated remedy structure in the statutory version of the mixed-motives analysis in Title VII created by Congress in the Civil Rights Act of 1991,[183] except it does not include the shifting burden of persuasion.[184]

Justice Thomas, dissenting, saw no basis for deviating from the default rule of but-for causation and engrafting a bifurcated remedial scheme from Supreme Court precedent that is unsupported by statutory language.[185]

While the Court's opinion in *Comcast* was not surprising, its opinion in *Babb* did include a couple of surprises. First, the Court had a long streak of

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177. *Id.* at 1176–77.

178. *See id.* at 1174 (explaining that an employer violates the ADEA by considering age even when that consideration did not result in any difference in outcome).

179. *Id.* at 1178.

180. *Id.* at 1177–78.

181. *Id.* at 1178 (citing Texas v. Lesage, 528 U.S. 18, 21–22 (1999)).

182. *Id.* (citing Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977)).

183. *See* 42 U.S.C. § 2000e-2(m) (stating that an unlawful employment practice exists "when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice"); 42 U.S.C. § 2000e-5(g)(2)(B) (limiting relief for claims brought under § 2000e-2(m) to declaratory relief and injunctive relief).

184. *See id.* § 2000e-2(m).

185. *Babb*, 140 S. Ct. at 1179 (Thomas, J., dissenting).

applying the default rule of but-for causation, and *Babb* broke that streak.[186] Second and most surprising, the Court engrafted a two-part causation standard onto statutory language that did not clearly require it. The adoption of a two-tier causation analysis is surprising in light of *Gross*. Although the shifting burden of persuasion in the *Price Waterhouse* mixed-motives analysis is a distinction from the analysis in *Babb*, the Court in *Gross* had shown antipathy for the two-tier analysis developed in *Price Waterhouse*. The Court stated in *Gross* that if *Price Waterhouse* were decided by the 2009 Court, it may not have developed that framework.[187]

Babb, recognizing a new standard of causation and essentially a new proof framework, exacerbated the asymmetry but not the uncertainty in employment discrimination law. The opinion also should provide Congress with food for thought about how to amend the employment discrimination statutes.

C. Bostock

Bostock is a monumental decision in which the Court decided that sexual orientation and transgender status are covered by the language of Title VII as enacted in 1964: "because of . . . sex."[188] Standards of causation and proof frameworks seemingly would have little to do with resolution of that issue. Yet, the majority opinion and one of the dissenting opinions devote some attention to discussion of standards of causation.[189] While none of that discussion is likely to exacerbate or ameliorate the asymmetry or uncertainty issues discussed herein, it does demonstrate the central role that the Court sees standards of causation playing in the discrimination statutes.

In the majority opinion, Justice Gorsuch discussed the but-for standard, saying that the "because of" language incorporates that "simple" and "traditional" standard.[190] That was no revelation, of course, as the Court

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186. *Id.* at 1182 ("Today's decision is inconsistent with the default rule underlying our interpretation of antidiscrimination statutes and our precedents, which have consistently applied that rule.").

187. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 178–79 (2009).

188. 42 U.S.C. § 2000e-2(a)(1).

189. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1739–40 (2020) (discussing causation standards); *id.* at 1775 (Alito, J., dissenting) (arguing that the majority's discussion of causation standards is irrelevant to the essential question at issue).

190. *Id.* at 1739 (majority opinion).

already had declared that in *Gross* and *Nassar*.[191] The *Bostock* Court observed that but-for causation can be a "sweeping standard" because it does not require sole causation and instead imposes liability even if there is more than one but-for cause.[192] The Court also noted that the Civil Rights Act of 1991 added to Title VII a "more forgiving," meaning less demanding for the plaintiff, standard—"motivating factor."[193] Nonetheless, the Court declared that its analysis is not dependent on the "motivating factor" standard.[194] Indeed, the role that but-for causation played in the Court's analysis is to say that if sex is a but-for cause of discrimination, Title VII imposes liability and it does not matter that something else—such as to which sex one is attracted—is also a cause.[195]

Justice Alito's dissent, joined by Justice Thomas, finds the majority's discussion of but-for causation tangential to the issue before the Court, saying, "so what?"[196] The issue, according to the dissent, is whether Title VII imposes liability if sexual orientation or gender identity was a motivating factor in the employer's decision.[197] It seems that the dissent is correct that the discussion of causation standards diverts attention from the issue before the Court. To the extent that the standard of causation was relevant to that issue, the majority's focus on "because of" rather than "motivating factor" may have been appropriate, especially given that the Court was determining whether the language enacted in 1964 encompassed the characteristic at issue.[198]

Although not needed in the majority opinion, the discussion of standards of causation in *Bostock* does little to change the asymmetry and uncertainty issues that persist in employment discrimination law. It recognized the two standards that co-exist in Title VII, but it did nothing to clarify their interaction. The *Bostock* discussion does, however, highlight how central the Court believes causation standards are to resolving issues under the statutes. Moreover, it further ensconced the tort standard of but-for

191. *Id.* (first citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009); and then citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346, 360 (2013)). *See also supra* Part II.

192. *Bostock*, 140 S. Ct. at 1739.

193. *Id.* at 1739–40.

194. *Id.* at 1740.

195. *Id.* at 1742.

196. *Id.* at 1757 (Alito, J., dissenting).

197. *Id.*

198. *See id.* at 1738–40 (majority opinion) (examining the words of the statute as they would have been understood in 1964).

causation as the fundamental and default standard for the discrimination statutes.

V. Righting the Wrongs

A. The POWADA Approach—Overturning Gross *and* Nassar *and Providing for a Uniform "Motivating Factor" Standard*

The POWADA has been hailed as a proposal that would fix a major problem and asymmetry in discrimination law.[199] Specifically, plaintiffs alleging age discrimination under the ADEA must satisfy a different, higher standard of causation than those alleging discrimination based on color, race, sex, national origin, or religion under Title VII, as amended by the Civil Rights Act of 1991.[200] The AARP[201] and others[202] have argued that it is bad policy to require an age discrimination plaintiff to prove a higher standard of causation, thus making it more difficult for age discrimination plaintiffs to win cases. For example, one commentator decries the *Gross* decision as "le[aving] millions of older workers with scant protection from age discrimination in employment for the past decade."[203]

Although it has attracted less attention than *Gross*, the Court's opinion in *Nassar* exacerbated the problem by extending the holding of *Gross* by requiring Title VII retaliation plaintiffs to satisfy the more demanding but-for standard.[204] Although the Court has not yet addressed the issue, most

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199. *See, e.g.*, Patricia Barnes, *Finally, U.S. House Will Address Disastrous U.S. Supreme Court Ruling on Age Discrimination*, FORBES (Jan. 13, 2020, 1:16 PM EST), https://www.forbes.com/sites/patriciagbarnes/2020/01/13/finally-us-house-will-address-disastrous-us-supreme-court-ruling-on-age-discrimination/#17472e635efd.

200. *Id.*

201. *See* Kenneth Terrell, *AARP Urges Congress to Strengthen Age Discrimination Laws*, AARP (May 21, 2019), https://www.aarp.org/politics-society/advocacy/info-2019/powada-age-discrimination.html; GS STRATEGY GRP., PROTECTING OLDER WORKERS AGAINST DISCRIMINATION ACT NATIONAL PUBLIC OPINION POLL 4 (June 2012), https://www.aarp.org/content/dam/aarp/research/surveys_statistics/work_and_retirement/powada-national.pdf.

202. *See, e.g.*, Barnes, *supra* note 199; Editorial, *Age Discrimination*, N.Y. TIMES (July 6, 2009), https://www.nytimes.com/2009/07/07/opinion/07tue2.html (calling for Congress to overturn *Gross*).

203. *See* Barnes, *supra* note 199.

204. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013) (holding that a plaintiff bringing a retaliation claim must prove that "his or her protected activity was the but-for cause of the alleged adverse action by the employer").

lower courts extend the rationale of *Gross* to the ADA.[205] The POWADA would legislatively overturn *Gross* and *Nassar* and provide that the less stringent "motivating factor" causation standard applies to the federal employment discrimination laws.[206]

Gross and *Nassar* were bad decisions for employment discrimination law from both practice and policy perspectives. It would be beneficial for Congress to overturn those decisions and make a uniform causation standard applicable under all employment discrimination statutes. However, neither the 2019-20 bill nor its 2010 predecessor chose a standard that is likely to make plaintiffs much more successful.

It is now clear that "motivating factor" has been, in Professor Sullivan's words, "a noble failure."[207] The standard has not been used by plaintiffs or courts[208] as much as would have been anticipated,[209] and it does not appear that it has resulted in a noticeably improved success rate for plaintiffs.[210]

Why has motivating factor not transformed Title VII law? Sullivan posits three reasons: (1) "motivating factor" is too hard (or unfamiliar) a concept for judges and lawyers; (2) "motivating factor" is not too hard to understand, but too radical; and (3) plaintiffs opt out of urging its

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205. Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010) (applying "but-for" causation to ADA claims in light of *Gross*); Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 321 (6th Cir. 2012) (applying "but-for" causation to ADA claims in light of *Gross*); Gentry v. E. W. Partners Club Mgmt. Co., Inc., 816 F.3d 228, 234 (4th Cir. 2016) (joining the Sixth and Seventh Circuits in applying but-for causation in light of *Gross*). *But see* Hoffman v. Baylor Health Care Sys., 597 F. App'x 231, 235 n.12 (5th Cir. 2015) (stating that the "motivating factor" test rather than but-for causation applies to claims brought under the ADA); Siring v. Or. State Bd. of Higher Educ., 977 F. Supp. 2d 1058, 1063 (D. Or. 2013) (applying the "motivating factor" test to claims brought under the ADA).

206. Protecting Older Workers Against Discrimination Act, H.R. 1230, 116th Cong. § 2 (2020); Protecting Older Workers Against Discrimination Act, S. 485, 116th Cong. § 3 (2019).

207. *See* Sullivan, *Making Too Much*, *supra* note 13, at 400.

208. It is difficult to know whether plaintiffs are not urging application of motivating factor, courts are not accepting the arguments, or a combination. Presumably, it is the court, not the parties, that decides under which framework to analyze a claim. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n.12 (1989) (explaining that the district court must decide whether the case is a pretext or mixed-motives case).

209. Sullivan, *Making Too Much*, *supra* note 13, at 396.

210. *Id.* at 366 & n.42, 378.

application because it invokes the stage two same-decision limitation of remedies.[211] Those are all good explanations, yet there are others.

First, the Supreme Court, even before *Price Waterhouse*, regarded the employment discrimination statutes as statutory torts. In her *Price Waterhouse* concurrence, Justice O'Connor discussed tort causation standards and the underlying tort case law.[212] "Motivating factor" is not a tort law causation standard, and the Supreme Court and lower courts are comfortable importing tort principles into employment discrimination law, which in their view, creates statutory torts.[213]

Second, and more significantly, however, "motivating factor" anchors the mixed-motives proof framework in the discredited idea that discriminators typically are motivated by discriminatory impulses of which they are aware at the time of decision and on which they act. This is how the plurality explained "motivating factor" in *Price Waterhouse*.[214] The work of Professor Linda Hamilton Krieger and many other scholars has undermined the idea that most discrimination is the product of conscious motivation.[215] More generally, "motivating factor" embodies a fundamental misunderstanding of motives as causes of people's actions.[216]

Even if Congress wishes to lower the standard of causation in the plaintiff's prima facie case, it should be reluctant to embrace a standard of causation that describes neither the reality of how discrimination occurs nor how people make decisions and act.

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211. *See id.* at 383, 387, 396.

212. *Price Waterhouse*, 490 U.S. at 263–64 (O'Connor, J., concurring) (first citing Summers v. Tice, 199 P.2d 1, 3–4 (Cal. 1948); then citing Kingston v. Chi. & N.W.R. Co., 211 N.W. 913, 915 (Wis. 1927); and then citing 2 JOHN HENRY WIGMORE, SELECT CASES ON THE LAW OF TORTS § 153, 865 (1912)).

213. *See, e.g.*, Staub v. Proctor Hosp., 562 U.S. 411, 418 (2011). *See generally* Martha Chamallas & Sandra F. Sperino, *Torts and Civil Rights Law: Migration and Conflict: Symposium Introduction*, 75 OHIO ST. L.J. 1021, 1021–22 (2014); Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed-Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 88–92 (1991).

214. 490 U.S. at 250.

215. *See* Krieger, *supra* note 50, at 1279; *see also* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (suggesting that discrimination is often the product of unconscious bias).

216. *See* Gudel, *supra* note 213, at 80–82 (arguing that not all discriminatory acts have motives, so "disparate treatment cannot be identified by the presence of a certain motive").

B. Two Better Ways—Learning from Babb *and the POWADA*

1. A Better Way (the Babb *Way): Mixing Minimal Causation and But-For Causation*

If a weakness of the POWADA is its adoption of a uniform motivating-factor standard of causation across the employment discrimination statutes, what is a better option? If Congress intended in the 1991 Act to adopt a standard of minimal causation,[217] as seems to be the case, then *Babb* offers a good option—"the decision is not made in a way that is untainted by such discrimination."[218] This formulation seems more concrete than others that might capture minimal causation, such as "played a role" or "contributing factor."[219] Furthermore, contrary to the Supreme Court's declarations in *Gross* and its progeny, the original "because of" language does not obviously or necessarily mean but-for causation as understood in tort law. The formulation that a decision must be untainted by discrimination seems consistent with the statutory language "because of" and the remedial purposes of the employment discrimination statutes. Because Congress likes to build on Supreme Court doctrine, *Babb* offers an option that might effectuate minimal causation better than "motivating factor" has.

Choosing the *Babb* standard, or any other interpretation of minimal causation, raises a second question that Congress must address. Does it wish to limit remedies if but-for causation is not proven? Doing so would be consistent with both *Babb* and the Title VII mixed-motives framework added by the Civil Rights Act of 1991. However, if Congress considers limiting remedies for failure to prove but-for causation, it would do well to consider that it may create a disincentive for plaintiffs to argue their cases under the lower causation standard. One of the disincentives to plaintiffs to argue that their Title VII claims come under the current "motivating factor" is the prospect of taking home no monetary relief (back pay, front pay, or compensatory or punitive damages) if defendants satisfy the burden of persuasion on the same-decision defense.[220] If Congress continues to choose that but-for causation must be proven for full remedies, it still could

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217. *See* Katz, *The Fundamental Incoherence*, *supra* note 75, at 503–06.

218. Babb v. Wilkie, 140 S. Ct. 1168, 1174 (2020).

219. Professor Gudel has argued that divining factors for actions is not a useful way of thinking about human decision making. *See* Gudel, *supra* note 213, at 101 ("[T]his Article's thesis is that there are no mixed motives cases. . . . [A]nd there are no factors to separate out. There is only the question of whether a given act is discriminatory.").

220. *See, e.g.*, Sullivan, *Making Too Much*, *supra* note 13, at 383.

make more complete relief available upon a plaintiff's proof of minimal causation. It could make back pay, front pay, and reinstatement or instatement available and require proof of but-for causation for compensatory and/or punitive damages. Or, Congress could make compensatory damages also available on proof of minimal causation and punitive damages available only upon proof of but-for causation. The latter approach would require a decoupling of compensatory and punitive damages in § 1981a, which currently caps the total of compensatory and punitive damages based on the number of employees of the defendant.[221] Congress would also need to specify which party has the burden of persuasion at the second stage of the analysis that incorporates but-for causation.

Congress should not add a minimal causation standard to the statutes without specifying the relationship between that standard and the original "because of" language that the Court has interpreted to mean "but for"—a mistake of the 1991 Act. Accordingly, Congress should amend the POWADA to declare that "because of" does not mean but for. The current bills include a provision stating that a plaintiff is not required to prove sole causation,[222] which could be changed to "but for."

Congress should take care not to replicate another mistake of the 1991 Act. That amendment added a causation standard to Title VII without addressing its effect on the proof frameworks. As discussed, causation standards and proof frameworks are linked.[223] Although the Court could have interpreted the Act to resolve this issue in *Desert Palace*[224] or a later case, it failed to do so. Congress needs to expressly state what it intends regarding proof frameworks. If it intends to preserve the *McDonnell Douglas* pretext analysis, it also should state the basis for deciding whether to use that analysis or the framework incorporating minimal causation. As I have argued before, Congress should, notwithstanding nostalgia, dispose of the pretext framework once and for all.[225] Just as with the current Title VII

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221. 42 U.S.C. § 1981a(b)(3).

222. Protecting Older Workers Against Discrimination Act, H.R. 1230, 116th Cong. § 2(a)(1) (2020); Protecting Older Workers Against Discrimination Act, S. 485, 116th Cong. § 2(b)(3)(B) (2019).

223. *See supra* Section II.A.

224. Costa v. Desert Palace, Inc., 539 U.S. 90 (2003); *see supra* Section II.B.

225. *See generally* William R. Corbett, Young v. United Parcel Service, Inc.: McDonnell Douglas *to the Rescue?*, 92 WASH. U. L. REV. 1683 (2015); William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. REV. 81 (2009).

mixed-motives framework, a new framework with minimal causation and a stage two remedies limitation is a suitable vehicle for proving and analyzing all disparate treatment claims. With a new framework using minimal causation at the prima facie case stage and but-for causation at the remedy-limiting second stage, there is no role left for a pretext framework that is understood as also incorporating but-for causation.

2. The Best Way: Dispatching with Causation Standards Altogether and Instead Using Sufficiency of the Evidence

A different, more radical, and best option is for Congress to take standards of causation and proof frameworks out of analysis of individual disparate treatment claims altogether. This approach would dispatch with constructs in employment discrimination law that have created endless problems without much benefit[226] and instead require courts and juries to evaluate evidence of discrimination under the standards applied to all civil litigation. The POWADA bill passed by the House in 2020 and the companion bill in the Senate include the following provision: "a complaining party . . . may rely on any type or form of admissible evidence and need only produce evidence sufficient for a reasonable trier of fact to find that an unlawful practice occurred under this Act."[227] This simple statement incorporates the sufficiency-of-the-evidence standard used on motions for summary judgment and judgment as a matter of law to determine whether a claim is permitted to proceed to the factfinder. Indeed, this is the standard articulated by one district court in its post-*Comcast* opinion, *Kilgore v. FedEx Freight*,[228] before it perfunctorily launched into the *McDonnell Douglas* analysis. The bill should be amended to say that plaintiffs are required to satisfy only the typical burden of production in civil actions—sufficient evidence for a reasonable juror to find for the plaintiff[229]—and the burden of persuasion (preponderance of the evidence)

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226. Some may protest that the proof frameworks, by creating special tenets and analyses for employment discrimination claims, have benefited civil rights advocacy and plaintiffs. A long history of problems with these structures demonstrates otherwise. *See, e.g.*, Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2324 (1995) ("The claim that we have 'special' rules for intentional discrimination cases creates a false 'sense of closure' — a false belief that the law has already taken extraordinary steps to assist Title VII plaintiffs.").

227. H.R. 1230 § 2(a)(1); S. 485 § 3(a)(1).

228. 458 F. Supp. 3d 973, 979 (N.D. Ill. 2020). *See supra* notes 161–65 and accompanying text.

229. *See, e.g.*, FED. R. CIV. P. 50.

to prevail on their claims.[230] To prevent courts from clinging to the *McDonnell Douglas* pretext framework, Congress would have to expressly abrogate it.

This approach is the best because it treats employment discrimination cases as other types of cases in civil litigation. It dispenses with the need to determine which standard of causation and which proof framework apply to any given case. It also obviates any need to characterize evidence as direct or circumstantial. The simple questions on motions for summary judgment and judgment as a matter of law would be whether the plaintiff has produced sufficient evidence for a reasonable juror to find discrimination. At the conclusion of the case, the fact finder would decide whether the plaintiff had proven discrimination by a preponderance of the evidence. This approach strips away all these artificial[231] constructs that were thought, when conceived, to be helpful to the fact finder in answering the ultimate question of whether there was discrimination.[232] Rather than helping, these devices have obscured the actual question.[233]

It is doubtful that Congress is willing to so drastically break from the structures created by the Supreme Court,[234] freeing employment

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230. *Cf.* Malamud, *supra* note 226, at 2324 (arguing that the Supreme Court should declare "that there are no preferential rules for individual discrimination cases—that the law will evaluate these discrimination claims like any other civil claims").

231. They are "artificial" because they are not the real issue in the case—whether there was intentional discrimination.

232. For example, the Supreme Court has explained that the *McDonnell Douglas* pretext analysis "progressively . . . sharpen[s] the inquiry into the elusive factual question of intentional discrimination." Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 255 n.8 (1981). It is telling that attempts to replace these cumbersome devices with substitute artificial devices have been ill-fated. For example, the Seventh Circuit had intended to free courts from distinguishing between direct and circumstantial evidence by saying that plaintiffs could prove discrimination by presenting a "convincing mosaic" of evidence. *See, e.g.*, Otiz v. Werner Enters. Inc., 834 F.3d 760, 764 (7th Cir. 2016). Because courts misunderstood "convincing mosaic" to be a new test that must be satisfied, the Seventh Circuit found it necessary later to explain that it was meant to be a helpful metaphor. *Id.* at 765 (collecting cases where courts had used "convincing mosaic" as a governing legal standard). Ironically, the court in *Ortiz* hastened to declare that the decision did not affect another artificial construct—the *McDonnell Douglas* pretext framework. *Id.* at 766.

233. Denny Chin & Jodi Golinsky, *Employment Discrimination: Moving Beyond* McDonnell Douglas: *A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 669 (1998) (stating that in the *McDonnell Douglas* analysis, "[c]learly, then, the inquiry into elusive factual questions is not being "sharpened").

234. As evidenced by the POWADA, Congress generally is inclined to tinker with the concepts and structures crated by the Court but not to dispense with them. Consider another

discrimination law of standards of causation and proof frameworks. However, stripping away all such artificial constructs and focusing on the actual issue, whether intentional discrimination occurred, would be the best repair of a body of law filled with unnecessary asymmetry, uncertainty, and complexity.

VI. Conclusion

Employment discrimination law has been beset too long by an intolerable level of asymmetry and uncertainty. Much of it stems from the Civil Rights Act of 1991 and the Court's interpretations of that Act. The proposed Protecting Older Workers Against Discrimination Act has been intended to ameliorate somewhat the state of the law. But the changes it would make, while improvements, are not adequate to address the problems. The *Comcast* and *Babb* decisions of the Supreme Court's most recent term exacerbated the situation, but *Babb* offers some hope of a better way forward. Congress should amend and enact the POWADA to end this state of intolerable asymmetry and uncertainty.

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example—Congress modifying the *Price Waterhouse* mixed-motives framework in the Civil Rights Act of 1991. *See supra* notes 73–78 and accompanying text.