

# SHIFTING BURDENS: DISCRIMINATION LAW THROUGH THE LENS OF JURY INSTRUCTIONS

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**Abstract:** This Term, in *Gross v. FBL Financial Services, Inc.*, the U.S. Supreme Court held the *Price Waterhouse* burden-shifting framework inapplicable to Age Discrimination in Employment Act (“ADEA”) claims. This Article finds the *Gross* Court’s rationales for repudiating *Price Waterhouse v. Hopkins* unpersuasive. Although the crux of the Court’s argument is that it is too confusing to instruct a jury on the burden-shifting framework, in actuality, there is no evidence that burden-shifting instructions are unduly confusing. In fact, *Gross* will exacerbate a different sort of confusion: that which arises when a jury must resolve two claims under different burden frameworks. At best, then, the *Gross* Court’s concerns over judicial administration are a wash. They fail to justify the Court’s departure from the 20-year-old *Price Waterhouse* precedent. The Article therefore considers the possibility that the Court’s decision in *Gross* was driven by policy views about the nature and merit of ADEA claims, or of employment discrimination claims more generally. By shifting the balance in ADEA and perhaps other employment discrimination cases without articulating a persuasive reason for doing so, the Court may have laid the groundwork for Congress to revisit the question—thus opening the way for a more explicitly policy-based overhaul of the burden frameworks.

## INTRODUCTION

Under the framework set by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green* and *Texas Department of Community Affairs v. Burdine*, an employment discrimination plaintiff bears the burden of proving that discrimination was the determinative factor in the challenged

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\* © 2010, Catherine T. Struve, Professor, University of Pennsylvania Law School. Although I serve as a reporter for a committee that has drafted model jury instructions for use in civil cases in the Third Circuit, this Article reflects only my own views and not those of the committee. I thank Stephen Burbank, Kevin Clermont, and Stephen Subrin for comments on drafts, and participants in a University of Pennsylvania ad hoc workshop for suggestions on the project. I am grateful to Melinda Harris for excellent research assistance and to the librarians in the Manuscript Division of the Library of Congress for their assistance with my research in the papers of Justice Harry A. Blackmun.

employment decision.<sup>1</sup> But under an alternative framework that burden can shift: in 1989 a fractured Supreme Court held that upon a showing that the plaintiff's protected status (such as sex) played a motivating (or substantial) part in the employer's adverse action, the burden would shift to the employer to prove that it would have made the same decision even if the plaintiff had not had that protected status (e.g., even if the plaintiff had not been a woman).<sup>2</sup> *Price Waterhouse v. Hopkins*—the case in which the Court adopted this test—was seen as a double edged sword: on one hand, plaintiffs' advocates liked the idea of shifting the burden to the defendant to prove the same-decision defense, but on the other, they criticized the decision for immunizing some employment decisions in which discrimination was found to have played a role.

*Price Waterhouse* came to be grouped with a number of other Supreme Court decisions—all viewed as too defendant-friendly—to which Congress responded in the Civil Rights Act of 1991 ("the 1991 Act").<sup>3</sup> The 1991 Act adopted the *Price Waterhouse* framework but modified it by making the same-decision defense relevant to remedies rather than to liability.<sup>4</sup> Congress added a provision, now codified at 42 U.S.C. § 2000e-2(m), stating that "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established 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."<sup>5</sup> Congress also amended Title VII's enforcement framework by adding a provision, codified at 42 U.S.C. § 2000e-5(g)(2)(B), that sets a limit on reme-

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<sup>1</sup> See *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 807 (1973).

<sup>2</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion). In the interests of brevity, the description at this point in the text glosses over divisions among the *Price Waterhouse v. Hopkins* plurality and the concurrences of Justices O'Connor and White. For the term "motivating part," see *id.* at 244, 258. For the term "substantial factor," see *id.* at 259 (White, J., concurring in the judgment); *id.* at 276 (O'Connor, J., concurring in the judgment). For a discussion of the justices' internal debates over these terms, see *infra* notes 121–139 and accompanying text. For a discussion of Justice O'Connor's reference to "direct evidence," see *infra* notes 143–149.

<sup>3</sup> See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 2, 29, 42 U.S.C.). The 1991 Act listed as one of its purposes "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id.* § 3 (set forth as a note following 42 U.S.C. § 1981 (2006)).

<sup>4</sup> See *id.* § 107(a), § 703(m).

<sup>5</sup> 42 U.S.C. § 2000e-2(m) (2006).

dies.<sup>6</sup> Section 2000e-5(g)(2)(B) states that “[o]n a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor,” the court may grant declaratory relief, certain injunctive relief, and attorney’s fees and costs attributable to the § 2000e-2(m) claim, but “shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).”<sup>7</sup> In sum, a motivating-factor showing under § 2000e-2(m) establishes liability, while a same-decision showing by the defendant under Section 2000e-5(g)(2)(B) limits the plaintiff’s remedies.<sup>8</sup>

*Price Waterhouse* and the 1991 Act left questions in their wake. Should either the *Price Waterhouse* burden-shifting or the statutory burden-shifting framework apply outside the context of Title VII discrimination claims? Although a number of courts concluded that *Price Waterhouse* did apply to other discrimination (and retaliation) claims, courts generally viewed §§ 2000e-2(m) and 2000e-5(g)(2)(B) as more restricted in their reach.<sup>9</sup> And assuming that either the statutory or the *Price Waterhouse* burden-shifting scheme was available for a particular type of claim, what sort of showing was necessary to qualify a case for a burden-shifting instruction? Relying on Justice O’Connor’s concurrence in the judgment in *Price Waterhouse*, some courts restricted mixed-motive burden-shifting to cases featuring “direct evidence” of a discriminatory motive.<sup>10</sup> This distinction was heavily criticized, however, and in the 2003 *Desert Palace v. Costa* decision the Supreme Court held that under §§ 2000e-2(m) and 2000e-5(g)(2)(B) the “motivating factor” showing could be made by either direct or circumstantial evidence.<sup>11</sup>

Because the *Desert Palace* holding addressed only the statutory mixed-motive framework, it left unclear whether the same approach should apply under the *Price Waterhouse* mixed-motive framework that courts applied to claims other than Title VII discrimination claims. Onlookers expected the Court to tackle this issue when it granted the

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<sup>6</sup> *Id.* § 2000e-5(g)(2)(B).

<sup>7</sup> *Id.*

<sup>8</sup> *See id.* §§ 2000e-2(m), 2000e-5(g)(2)(B).

<sup>9</sup> *See McNutt v. Bd. of Trs. of Univ. of Ill.*, 141 F.3d 706, 707 (7th Cir. 1998) (“By 1991, our circuit and courts across the country had begun to adopt the *Price Waterhouse* approach in all mixed-motive discrimination cases. The Civil Rights Act of 1991 rolled back the *Price Waterhouse* holding in certain types of discrimination claims.” (citation omitted)).

<sup>10</sup> *See infra* notes 155–158 and accompanying text.

<sup>11</sup> 539 U.S. 90, 101–02 (2003).

petition for certiorari in *Gross v. FBL Financial Services Inc.*, an Age Discrimination in Employment (“ADEA”) case that presented the question, “Must a plaintiff present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case?”<sup>12</sup> Instead, a narrow majority of the justices opted to moot the question by holding that *Price Waterhouse* burden-shifting is unavailable for ADEA claims.<sup>13</sup>

Part I of this Article argues that the rationales adduced in *Gross* are problematic.<sup>14</sup> One of those rationales is implausible, and the others all depend, for their persuasiveness, on the *Gross* Court’s effort to discredit *Price Waterhouse*. But the only reason explicitly cited in *Gross* for departing from *Price Waterhouse* is that burden-shifting jury instructions are too difficult to administer.<sup>15</sup> On its face, *Gross* seems to argue that burden-shifting instructions are inherently confusing; but the Court fails to support that assertion. The Court could have raised two other arguments concerning confusion, each of which is more serious.<sup>16</sup> First, confusion over the *applicability* of the *Price Waterhouse* burden-shifting instruction has been rampant.<sup>17</sup> *Gross* resolved this confusion for ADEA claims by holding that burden-shifting is never available.<sup>18</sup> This decision was an effective choice for eliminating this type of confusion, but it was not the only possible choice. Second, confusion will continue to arise for juries faced with the task of adjudicating multiple claims to which different burden frameworks apply. *Gross* if anything exacerbates this confusion.

In sum, Part I argues that the confusion arguments are at best a wash—which makes them a dubious basis for the *Gross* Court’s decision to reject the 20-year-old *Price Waterhouse* precedent.<sup>19</sup> Part II, searching for some better explanation, considers the possibility that the decision to reject burden-shifting in *Gross* reflects underlying views concerning policy and practice in age discrimination litigation, or in discrimination

<sup>12</sup> Petition for Writ of Certiorari at i, *Gross v. FBL Fin. Servs. Inc.*, 129 S. Ct. 2343 (2009) (No. 08-441), 2008 WL 4462099.

<sup>13</sup> See *Gross*, 129 S. Ct. at 2351.

<sup>14</sup> See *infra* notes 23–301 and accompanying text.

<sup>15</sup> See *Gross*, 129 S. Ct. at 2352.

<sup>16</sup> See Martin J. Katz, *Gross Disunity*, 114 PENN. ST. L. REV. 857, 884 (2010) (noting that “[t]here is nothing . . . difficult” about the *Price Waterhouse* burden-shifting framework, and that “[w]hat has been difficult about the burden-shifting framework has been figuring out when to apply it”).

<sup>17</sup> That is to say, there is confusion over what factual circumstances will trigger a burden shift in those types of cases that permit burden shifting.

<sup>18</sup> *Gross*, 129 S. Ct. at 2352.

<sup>19</sup> See *infra* notes 23–301 and accompanying text.

litigation more generally.<sup>20</sup> If such views did drive the decision, they operated under the surface of the opinion. For that reason, and because the Court did not provide the opportunity for full briefing on these issues, the decision in *Gross* fails to account for relevant policy considerations.

Part II concludes by considering the way forward in the aftermath of *Gross*.<sup>21</sup> It appears unlikely that the Court will soon engage in a full consideration of the policy concerns that might bear on the desirability of burden-shifting for employment discrimination claims. As in 1991, the matter is likely to rest with Congress. As of this writing, bills are pending in both Houses of Congress that would respond to *Gross* by applying the statutory burden-shifting mechanism to a broad range of federal discrimination and retaliation claims.<sup>22</sup> Ironically, by signaling its dissatisfaction with *Price Waterhouse* burden-shifting, the *Gross* Court may have spurred a broader adoption of the statutory burden-shifting framework.

### I. THE *GROSS* COURT'S FAILURE TO CARRY ITS BURDEN OF PROOF

The U.S. Supreme Court's 2009 decision in *Gross v. FBL Financial Services, Inc.* provided four related rationales for its decision to reject burden-shifting for ADEA discrimination claims.<sup>23</sup> First, it reasoned that Title VII's statutory burden-shifting mechanism does not apply to ADEA claims—a reasonable view, but one that did not resolve the applicability of non-statutory burden-shifting under *Price Waterhouse v. Hopkins*.<sup>24</sup> Next, it reasoned that the ADEA's language foreclosed the use of burden-shifting.<sup>25</sup> Whatever the merits of this argument, the Court had reached the opposite view concerning materially similar language in *Price Waterhouse*.<sup>26</sup> The *Gross* Court, recognizing that it was repudiating *Price Waterhouse*, explained that it was appropriate to do so because "it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply. For example, in cases tried to a jury, courts have found it particularly difficult to craft an instruction to explain its burden-shifting framework."<sup>27</sup> Finally, the

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<sup>20</sup> See *infra* notes 302–427 and accompanying text.

<sup>21</sup> See *infra* notes 400–427 and accompanying text.

<sup>22</sup> See generally S. 1756, 111th Cong. (2009); H.R. 3721, 111th Cong. (2009).

<sup>23</sup> See 129 S. Ct. 2343, 2348, 2350, 2352 (2009).

<sup>24</sup> *Id.* at 2348–49.

<sup>25</sup> *Id.* at 2350.

<sup>26</sup> See *infra* notes 57–64 and accompanying text.

<sup>27</sup> 129 S. Ct. at 2352.

*Gross* Court suggested—as support for its rejection of *Price Waterhouse*—that the 1991 Act foreclosed the continued application of *Price Waterhouse* to claims under the ADEA.<sup>28</sup>

Part I.A. analyzes these rationales and concludes that the linchpin of the *Gross* Court's analysis was its rejection of *Price Waterhouse*.<sup>29</sup> Absent a reason to depart from *Price Waterhouse*, the decision in *Gross* would be difficult to justify. Yet the only cited rationale for the departure was the notion that burden-shifting causes undue confusion.<sup>30</sup> Part I.B. considers three possible arguments concerning confusion.<sup>31</sup> It concludes that the claim stated in *Gross*—that burden-shifting instructions are too difficult to craft—is unsupported.<sup>32</sup> Two other types of confusion, however, deserve more serious consideration. First, there has been very real confusion over the *applicability* of burden-shifting instructions.<sup>33</sup> *Gross* puts this type of confusion to rest, but it was not the only way to do so.<sup>34</sup> Second, there is the potential for confusion when multiple claims go to a jury and different burden structures apply to different claims.<sup>35</sup> *Gross*, if anything, heightens the risk of that type of confusion.

#### A. *Gross's Anatomy*

To frame the analysis of *Gross*, it is useful to bear in mind that for 20 years a number of lower courts had assumed that *Price Waterhouse* burden-shifting was available in ADEA cases.<sup>36</sup> The *Gross* majority stated that it refused to “extend” the *Price Waterhouse* framework to ADEA claims—a wording choice that was presumably designed to underscore the fact that the *Price Waterhouse* holding concerned Title VII claims and not ADEA claims.<sup>37</sup> This is true, but it is also the case that both the *Price Waterhouse* dissent and the *Price Waterhouse* plurality discussed the new framework's application to ADEA claims (and other claims that would

<sup>28</sup> *Id.* at 2349, 2351 n.5.

<sup>29</sup> *See infra* notes 36–74 and accompanying text.

<sup>30</sup> *Gross*, 129 S. Ct. at 2352.

<sup>31</sup> *See infra* notes 75–301 and accompanying text.

<sup>32</sup> *See infra* notes 75–301 and accompanying text.

<sup>33</sup> *See infra* notes 108–208 and accompanying text.

<sup>34</sup> *See infra* notes 108–208 and accompanying text.

<sup>35</sup> *See infra* notes 277–301 and accompanying text.

<sup>36</sup> *See, e.g.*, *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 658 (7th Cir. 1991) (en banc) (citing *Burns v. Gadsden State Cmty. Coll.*, 908 F.2d 1512, 1517–18 (11th Cir. 1990) (per curiam) and *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568–69 (2d Cir. 1989)).

<sup>37</sup> *See Gross*, 129 S. Ct. at 2352.

be tried to a jury).<sup>38</sup> Complaining that the new framework would sow perplexity, the *Price Waterhouse* dissenters predicted that “[c]onfusion in the application of dual burden-shifting mechanisms will be most acute in cases brought under 42 U.S.C. § 1981 or the Age Discrimination in Employment Act (ADEA), where courts borrow the Title VII order of proof for the conduct of jury trials.”<sup>39</sup> The plurality responded that “[t]he dissent need not worry that this evidentiary scheme, if used during a jury trial, will be so impossibly confused and complex as it imagines. . . . Juries long have decided cases in which defendants raised affirmative defenses.”<sup>40</sup> Thus, at least seven justices viewed the decision as setting a framework for discrimination claims under statutes other than Title VII, including claims—such as ADEA claims—that carried the right to a jury trial.<sup>41</sup>

How, then, did the *Gross* Court reach the opposite conclusion?

### 1. The Inapplicability of Statutory Burden-Shifting

The Supreme Court’s holding in *Gross* that §§ 2000e-2(m) and 2000e-5(g)(2)(B) are inapplicable to ADEA cases was not inevitable, but it was unsurprising. By its terms, § 2000e-2(m) applies only to cases in which it is claimed “that race, color, religion, sex, or national origin was a motivating factor” for an employment practice—a list that does not mention age discrimination.<sup>42</sup> Section 2000e-5 is similarly inapplicable to ADEA actions.<sup>43</sup>

There is some evidence that during the drafting of the proposals that led to the enactment of the 1991 Act, some participants did consider whether the new statutory approach to mixed-motive claims should apply to ADEA claims.<sup>44</sup> For instance, Reginald Govan recounts his experiences “as a House Democratic staff member in the legislative process that culminated in the enactment of the Civil Rights Act of

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<sup>38</sup> See *Price Waterhouse*, 490 U.S. at 292 (Kennedy, J., dissenting); *id.* at 247 n.12 (plurality opinion).

<sup>39</sup> *Id.* at 292 (Kennedy, J., dissenting).

<sup>40</sup> *Id.* at 247 n.12 (plurality opinion).

<sup>41</sup> See *id.* at 292 (Kennedy, J., dissenting); *id.* at 247 n.12 (plurality opinion).

<sup>42</sup> 42 U.S.C. § 2000e-2(m) (2006).

<sup>43</sup> See *id.* § 2000e-5(g)(2)(B) (addressing “claim[s] in which an individual proves a violation under section 2000e-2(m) of this title”).

<sup>44</sup> See Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 35 (1993).

1991.”<sup>45</sup> Govan recalls the work of a group that set out to draft proposed legislation responding to *Price Waterhouse* and other cases:

Given the long history of reliance on Title VII precedent to interpret the meaning of the Age Discrimination in Employment Act (ADEA), the drafting group discussed whether to make proposed amendments to Title VII applicable to the ADEA, and whether the failure to do so would leave courts free to apply *Wards Cove*, *Price Waterhouse*, and *Lorraine* to age discrimination claims.<sup>46</sup>

Govan’s account leaves unclear the upshot of the discussion.<sup>47</sup>

Some insight might be provided by a House Report on one of the versions the House considered in the negotiations leading to the enactment of the 1991 Act.<sup>48</sup> That report—in a section labeled “RELATIONSHIP TO OTHER LAWS MODELED AFTER TITLE VII”—states as follows:

A number of other laws banning discrimination, including the Americans with Disabilities Act of 1990 . . . and the Age Discrimination in Employment Act . . . are modeled after, and have been interpreted in a manner consistent with, Title VII. The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act.<sup>49</sup>

This House Report, however, concerned a prior version of the bill; some changes were made to the mixed-motives provision before its enactment as §§ 2000e-2(m) and 2000e-5(g)(2)(B).<sup>50</sup> In the end, this discussion in the House Report seems outweighed by the fact that §§ 2000e-2(m) and 2000e-5(g)(2)(B) do not treat ADEA claims. Accordingly, even prior to *Gross*, commentators had concluded that the

<sup>45</sup> *Id.* at 2 n.\*\*.

<sup>46</sup> *Id.* at 35 (footnote omitted).

<sup>47</sup> The passage quoted in the text is a full paragraph. The next paragraph commences: “Other proposals were not so easily dismissed.” *Id.* This transition leaves ambiguous just what was “dismissed.”

<sup>48</sup> *Cf.* H.R. REP. NO. 102-40 (II) (1991), reprinted in 1991 U.S.C.C.A.N. 694.

<sup>49</sup> *Id.* at 4 (footnote and citation omitted).

<sup>50</sup> See Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn’t Bark*, 39 WAYNE L. REV. 1093, 1168–69 (1993); John L. Flynn, Note, *Mixed-Motive Causation Under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements*, 83 GEO. L.J. 2009, 2048 (1995).

statutory burden shift did not apply to ADEA claims.<sup>51</sup> And even the dissenters in *Gross* agreed that the statutory burden shift does not govern such claims.<sup>52</sup>

## 2. The ADEA's Text

The *Gross* majority next focused on the ADEA's text, which prohibits employers from taking various actions "because of" an employee's age.<sup>53</sup> The *Gross* Court's textual argument depends on two steps. First, the Court determined that the statutory language directs the application of a "but for" causation standard.<sup>54</sup> Second, the Court held that *Price Waterhouse* burden-shifting is incompatible with such a standard.<sup>55</sup> As the *Price Waterhouse* opinions illustrate, neither of these two conclusions is inevitable, and it is only when the two conclusions are combined that they foreclose the sort of burden-shifting undertaken in *Price Waterhouse*.<sup>56</sup>

The *Price Waterhouse* Court confronted materially similar language: a Title VII provision prohibiting employers from taking various actions "because of" various employee attributes (including sex).<sup>57</sup> Justice Bren-

<sup>51</sup> See, e.g., Eglit, *supra* note 50, at 1106 ("[I]t seems analytically appropriate to conclude—even if one sympathetic to plaintiffs' concerns would question from a policy perspective the validity of all or parts of the analyses put forth in *Lorance*, *Price Waterhouse*, and *Wards Cove*—that those decisions have not been divested of their heavy analogical weight for ADEA courts, given Congress's failure to amend the ADEA to reject or curtail these rulings.").

<sup>52</sup> See *Gross*, 129 S. Ct. at 2356 (Stevens, J., dissenting) ("Because the 1991 Act amended only Title VII and not the ADEA with respect to mixed-motives claims, the Court reasonably declines to apply the amended provisions to the ADEA.").

<sup>53</sup> 29 U.S.C. § 623(a) provides, *inter alia*, that "[i]t shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age . . . ." 29 U.S.C.A § 623(a) (West 2008 & Supp. 2009) (emphasis added).

<sup>54</sup> See *Gross*, 129 S. Ct. at 2350 ("To establish a disparate-treatment claim under the plain language of the ADEA . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision.").

<sup>55</sup> See *id.* at 2351 ("It follows . . . that under § 623(a)(1), the plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action.").

<sup>56</sup> Indeed, as Justice Kennedy pointed out in *Price Waterhouse*, "the plurality's theory of Title VII causation is ultimately consistent with a but-for standard . . . ." 490 U.S. at 283 (Kennedy, J., dissenting).

<sup>57</sup> Then, as now, 42 U.S.C. § 2000e-2 provided in part that "[i]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a) (2006).

nan, writing for the plurality, probably would have agreed with the second of the *Gross* Court's propositions, but he rejected the first: The plurality concluded that the statutory language did *not* denote but-for causation.<sup>58</sup> The plurality presumably reasoned that if but-for causation was required, then—as *Price Waterhouse* contended<sup>59</sup>—a burden-shifting framework would be inappropriate. By contrast, Justice O'Connor's concurrence in the judgment in *Price Waterhouse* foreshadowed the first of the *Gross* Court's propositions while rejecting the second.<sup>60</sup> Justice O'Connor argued that even though “because of” denotes “but for” causation,<sup>61</sup> that conclusion need not foreclose burden-shifting: “The question for decision in this case is what allocation of the burden of persuasion on the issue of causation best conforms with the intent of Congress and the purposes behind Title VII.”<sup>62</sup> Justice White eschewed both these “semantic discussions” and relied simply on a precedent from the § 1983 context, *Mt. Healthy City School District Board of Education v. Doyle*.<sup>63</sup>

Although no five justices in *Price Waterhouse* agreed on a particular textual analysis, the fact remains that six justices held in that case that the “because of” language in Title VII permitted burden-shifting. It would be difficult to justify reaching a different conclusion concerning the same language in the ADEA without rejecting *Price Waterhouse*.

### 3. Rejecting *Price Waterhouse*

As noted above, the *Gross* majority rested its rejection of the *Price Waterhouse* burden-shifting framework partly on the assertion that the framework is confusing for juries:

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<sup>58</sup> See *Price Waterhouse*, 490 U.S. at 240 (plurality opinion) (“We take these words to mean that gender must be irrelevant to employment decisions. To construe the words ‘because of’ as colloquial shorthand for ‘but-for causation,’ as does *Price Waterhouse*, is to misunderstand them.”); see also *id.* at 241 (“When . . . an employer considers both gender and legitimate factors at the time of making a decision, that decision was ‘because of’ sex and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.”).

<sup>59</sup> See Brief for the Petitioner at \*18, *Price Waterhouse*, 490 U.S. 228 (No. 87-1167), 1988 WL 1025858.

<sup>60</sup> See *Price Waterhouse*, 490 U.S. at 261–79 (O'Connor, J., concurring in the judgment).

<sup>61</sup> See *id.* at 262–63 (“I disagree with the plurality’s dictum that the words ‘because of’ do not mean ‘but-for’ causation; manifestly they do.”).

<sup>62</sup> *Id.* at 263.

<sup>63</sup> *Id.* at 259 (White, J., concurring in the judgment). For a discussion of *Mt. Healthy*, see *infra* notes 310–342 and accompanying text.

Whatever the deficiencies of *Price Waterhouse* in retrospect, it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply. For example, in cases tried to a jury, courts have found it particularly difficult to craft an instruction to explain its burden-shifting framework . . . . Thus, even if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims.<sup>64</sup>

In Part I.B., I conclude that this claim of jury confusion is unsupported.<sup>65</sup> To the extent that *Price Waterhouse* burden-shifting gives rise to confusion, I argue that the confusion arises from two other problems not specifically identified by the *Gross* Court, and I suggest that the *Gross* Court did not adopt the best strategy for ameliorating the confusion. For the moment, however, it suffices to note that this is the fulcrum of the Court's opinion: To justify its textual analysis of the ADEA, the Court was obliged to explain why *Price Waterhouse's* holding concerning the same language in Title VII was inapplicable; and to explain its repudiation of *Price Waterhouse*, the Court relied centrally on the notion that burden-shifting causes undue confusion.<sup>66</sup>

#### 4. The 1991 Act's Effect on Burden-Shifting for ADEA Claims

The Court did adduce one further basis for rejecting *Price Waterhouse*. in a footnote, the Court suggested that the 1991 Act itself forecloses the application of *Price Waterhouse* burden-shifting under the ADEA.<sup>67</sup> As noted above, the conclusion that the 1991 Act's burden-shifting scheme does not cover ADEA claims is neither surprising nor particularly controversial.<sup>68</sup> But the *Gross* majority went further, arguing that Congress's choice to provide for statutory burden-shifting in the Title VII context without doing the same for ADEA claims forecloses the continued application of *Price Waterhouse* burden-shifting to ADEA claims.<sup>69</sup> This step in the Court's argument is unpersuasive.<sup>70</sup>

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<sup>64</sup> *Gross*, 129 S. Ct. at 2352.

<sup>65</sup> See *infra* notes 79–107 and accompanying text.

<sup>66</sup> See *Gross*, 129 S. Ct. at 2352.

<sup>67</sup> See *id.* at 2351 n.5.

<sup>68</sup> See *supra* notes 42–52 and accompanying text.

<sup>69</sup> See *Gross*, 129 S. Ct. at 2351 n.5.

<sup>70</sup> For a thoughtful critique of this aspect of the *Gross* Court's reasoning, see Katz, *supra* note 16, at 871–72.

The *Gross* majority reasoned as follows: Congress amended both Title VII and the ADEA in the 1991 Act, but chose not to add to the ADEA any provisions similar to §§ 2000e-2(m) and 2000e-5(g)(2)(B).<sup>71</sup> The Court asserted that “[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally.”<sup>72</sup> In this instance, the *Gross* majority implied, Congress’s inaction indicated an intent to displace the use of *Price Waterhouse* burden-shifting in the ADEA context:

Congress not only explicitly added “motivating factor” liability to Title VII . . . but it also partially abrogated *Price Waterhouse*’s holding by eliminating an employer’s complete affirmative defense to “motivating factor” claims, see 42 U.S.C. § 2000e-5(g)(2)(B). If such “motivating factor” claims were already part of Title VII, the addition of § 2000e-5(g)(2)(B) alone would have been sufficient. Congress’ careful tailoring of the “motivating factor” claim in Title VII, as well as the absence of a provision parallel to § 2000e-2(m) in the ADEA, confirms that we cannot transfer the *Price Waterhouse* burden-shifting framework into the ADEA.<sup>73</sup>

Contrary to the *Gross* Court’s assertion, under *Price Waterhouse* motivating factor claims *were* already part of Title VII. The problem that Congress evidently sought to remedy was that the *Price Waterhouse* same-decision defense gave the employer a complete defense to liability, not just to damages. The 1991 Act changed that framework, for the purposes of Title VII claims, to one in which the employer’s same-decision defense merely limits certain types of remedies. To effectuate that purpose, it arguably would not have sufficed (*pace* the *Gross* majority) merely to add § 2000e-5(g)(2)(B)’s limits on remedies, because under *Price Waterhouse* if the defendant proved the same-decision defense one never *arrived* at the remedy stage.

Moreover, the *Gross* Court’s apparent assertion that the 1991 Act forecloses the applicability of *Price Waterhouse* burden-shifting to ADEA claims would seem to fly in the face of Congress’s overall intent in enacting the legislation. For one thing, as the *Gross* dissenters observed, “Congress emphasized in passing the 1991 Act that the motivating-factor test was consistent with its original intent in enacting Title VII.”<sup>74</sup>

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<sup>71</sup> See *Gross* 129 S. Ct. at 2351 n.5.

<sup>72</sup> *Id.* at 2349.

<sup>73</sup> *Id.* at 2351 n.5.

<sup>74</sup> *Id.* at 2356 (Stevens, J., dissenting).

For another, to the extent that Congress addressed the *Price Waterhouse* issue at all, it was to alter its framework—for the purpose of Title VII claims—in a way that was believed to make claims easier to prove. Such an intent would seem inconsistent with an intent to make ADEA claims *harder* to prove by removing the availability of *Price Waterhouse* burden-shifting.

In sum, this Part has identified four arguments at work in *Gross*. The argument discussed in Part I.A.1 is reasonable but inapposite. The argument discussed in Part I.A.4 is implausible. The argument discussed in Part I.A.2 depends for its persuasiveness on the decision to repudiate *Price Waterhouse*. And, as noted in Part I.A.3, the repudiation of *Price Waterhouse* rests centrally upon the contention that burden-shifting is unduly confusing. It is to that contention that I return in Part I.B.

### B. *Three Types of Confusion*

When assessing the contention that *Price Waterhouse* burden-shifting should be rejected because it causes undue confusion, it makes sense to begin with the type of confusion alluded to in *Gross*. Accordingly, Part I.B.1 examines the evidence for the *Gross* Court's assertion that *Price Waterhouse* burden-shifting instructions are inherently confusing.<sup>75</sup> Although this evidence is at best inconclusive, there are two other types of confusion that could ground a more persuasive critique of *Price Waterhouse*. Part I.B.2 examines one potent source of confusion—the difficulties of delineating when to give a burden-shifting instruction and when to give a burden-retaining instruction with respect to a type of claim concerning which burden-shifting is potentially applicable.<sup>76</sup> That sort of confusion is likely to afflict the judges charged with formulating (or reviewing) jury instructions. Part I.B.3 notes that *Gross's* application may extend beyond ADEA discrimination claims and briefly surveys the case's possible impact on other types of employment claims.<sup>77</sup> This analysis lays the groundwork for my examination, in Part I.B.4, of a different type of confusion—namely, that which arises when juries hear multiple claims that are subject to differing burden frameworks.<sup>78</sup>

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<sup>75</sup> See *infra* notes 79–107 and accompanying text.

<sup>76</sup> See *infra* notes 108–208 and accompanying text.

<sup>77</sup> See *infra* notes 209–275 and accompanying text.

<sup>78</sup> See *infra* notes 277–295 and accompanying text.

## 1. Are Burden-Shifting Instructions Inherently Confusing?

To inform our analysis of the *Gross* Court's jury-confusion rationale, it may be helpful to consider the sort of instruction that a court might have given in an ADEA mixed-motive case prior to *Gross*:<sup>79</sup>

In this case Mr. Jones is alleging that that Acme Corp. violated the Age Discrimination in Employment Act when it fired him. To win on this claim, Mr. Jones must prove both of the following by a preponderance of the evidence:

First: Acme fired Mr. Jones; and

Second: Mr. Jones' age was a motivating factor in Acme's decision.

In showing that his age was a motivating factor for Acme's action, Mr. Jones is not required to prove that his age was the sole motivation or even the primary motivation for Acme's decision. Mr. Jones need only prove that his age played a motivating part in Acme's decision even though other factors may also have motivated Acme.

If you find in Mr. Jones' favor with respect to each of the facts that he must prove, you must then decide whether Acme has proven by a preponderance of the evidence that it would have fired Mr. Jones regardless of his age. Your verdict must be for Acme if it proves by a preponderance of the evidence that it would have fired Mr. Jones even if his age had played no role in the decision.

Is this sort of instruction too confusing for juries? For comparison purposes, here is a "determinative factor" instruction (given in cases where burden-shifting does not apply):<sup>80</sup>

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<sup>79</sup> For the instructions actually given in *Gross*, see Joint Appendix at \*9–10, *Gross*, 129 S. Ct. 2343 (No. 080-441), 2009 WL 192466.

<sup>80</sup> The examples given in the text are deliberately simplified. For example, it is standard in a determinative-factor instruction to include a discussion of pretext. The instruction might state, for example: "Acme has stated that it fired Mr. Jones because he was careless in his work habits. If you disbelieve Acme's explanation for firing Mr. Jones, then you may, but need not, find that Mr. Jones has proved intentional discrimination."

Although it is common to distinguish between the burden-retaining and burden-shifting frameworks by referring to the "*McDonnell Douglas* framework" and the "*Price Waterhouse* framework," this shorthand should not be taken to suggest that burden-retaining instructions should include a discussion of the *McDonnell Douglas/Burdine* structure, under which the plaintiff sets out a prima facie case, the defendant articulates a legitimate non-discriminatory reason for the employment action, and the plaintiff rebuts the defendant's stated reason. That structure drops out of the picture at trial and there is no reason to discuss it in the jury instructions. See Gerrilyn G. Brill, *Instructing the Jury in an Employment*

In this case Mr. Jones is alleging that that Acme Corp. violated the Age Discrimination in Employment Act when it fired him. To win on this claim, Mr. Jones must prove both of the following by a preponderance of the evidence:

First: Acme fired Mr. Jones; and

Second: Mr. Jones' age was a determinative factor in Acme's decision.

"Determinative factor" means that if not for Mr. Jones' age, Acme would not have fired him.

Comparing the two instructions, one can see that they both present the question of but-for causation. The burden-shifting instruction, however, breaks the causation question down into two steps and shifts the burden to the defendant at the second step. It is not clear why this would be unduly confusing for juries. Juries in employment discrimination cases, like juries in other cases, may deal with a number of affirmative defenses on which the defendant has the burden of proof.<sup>81</sup> Moreover, if additional clarity is desired, the court can ask the jury to answer both of the two questions—motivating-factor and same-decision—on a special verdict form.<sup>82</sup>

In any event, the authorities the *Gross* Court cited in support of that assertion provide no evidence on the question.<sup>83</sup> Moreover, other available data do not permit us to measure in any systematic way whether a burden-shifting instruction confuses jurors.

As evidence that "courts have found it particularly difficult to craft an instruction to explain [*Price Waterhouse's*] burden-shifting framework," the *Gross* Court cited two sources: the Second Circuit's 1992

*Discrimination Case*, 1998 FED. CTS. L. REV. 2, 9; Susan K. Grebeldinger, *Instructing the Jury in a Case of Circumstantial Individual Disparate Treatment: Thoroughness or Simplicity?*, 12 LAB. LAW. 399, 419 (1997); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2323 (1995).

<sup>81</sup> A notable example is the employer's defense to liability in a hostile-environment case in which no tangible employment action was taken:

When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

*Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

<sup>82</sup> See Brill, *supra* note 80, at 4.

<sup>83</sup> See *Gross*, 129 S. Ct. at 2352.

opinion in *Tyler v. Bethlehem Steel Corp.* and a 1991 dissent by Judge Flaum in *Visser v. Packer Engineering Associates, Inc.*<sup>84</sup> Both sources had been similarly cited by the respondent in *Gross* for the proposition that “courts have found *Price Waterhouse* hard to implement in the jury trial context.”<sup>85</sup> Neither source supports the Court’s assertion.

The *Tyler* court did indeed refer to “the murky water of shifting burdens in discrimination cases.”<sup>86</sup> But this remark in *Tyler*—a case addressing a claim under New York’s Human Rights Law—likely referred to other doctrinal complexities. The court may, for example, have been alluding to the direct/circumstantial evidence dichotomy that the U.S. Supreme Court would later address in *Desert Palace v. Costa*,<sup>87</sup> or perhaps to the question of whether the 1991 Act’s statutory burden-shifting scheme should affect the interpretation of New York’s Human Rights Law.<sup>88</sup> In any event, it does not appear that the *Tyler* court was addressing the inherent difficulty of crafting a burden-shifting instruction. In fact, the *Tyler* court specifically approved a *Price Waterhouse* burden-shifting instruction:

[A]n instruction which allows the jury to determine (1) whether an illegitimate criterion was a substantial or motivating factor in an adverse employment decision, and (2) if so, whether the employer has met its burden of proving that the employment decision would have happened anyway, properly captures the import of the Human Rights Law (or ADEA, or title VII).<sup>89</sup>

In *Visser*, the Seventh Circuit, sitting en banc, held that the *Price Waterhouse* burden-shifting framework applied to ADEA cases, but it af-

<sup>84</sup> *Id.* at 2352 (citing *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1179 (2d Cir. 1992); *Visser*, 924 F.2d at 661 (Flaum, J., dissenting)).

<sup>85</sup> Brief for Respondent at \*33, *Gross*, 129 S. Ct. 2343 (No. 08-441), 2009 WL 507026; *accord id.* at \*33–34, \*33 n.25.

<sup>86</sup> *Tyler*, 958 F.2d at 1179.

<sup>87</sup> *See id.* at 1180 (noting that the defendant “claims that . . . *Price Waterhouse* requires the plaintiff to produce ‘direct evidence’ of discrimination before the defendant can be saddled with the burden of proving that the same action would have been taken even in the absence of impermissible factors . . .”); *id.* at 1183 (stating that the court’s “biggest problem” is “whether *Price Waterhouse* requires the plaintiff to show ‘direct evidence’ of discrimination as a precondition to shifting into mixed-motives analysis”).

<sup>88</sup> *See id.* at 1182 (“Because New York courts have in the past turned to federal law for guidance in administering the Human Rights Law, this amendment may have potential importance for future cases under the New York law. However, since New York courts have not yet spoken on the subject, we will not attempt to apply the new federal statute in this case.”).

<sup>89</sup> *Id.* at 1187.

firmed the grant of summary judgment to the defendant because it held that the plaintiff had failed to show that age was a “substantial factor” in his firing.<sup>90</sup> Judge Flaum dissented, arguing that summary judgment was inappropriate.<sup>91</sup> In the course of the dissent, Judge Flaum observed: “The difficulty judges have in formulating [burden-shifting] instructions and jurors have in applying them can be seen in the fact that jury verdicts in ADEA cases are supplanted by judgments notwithstanding the verdict or reversed on appeal more frequently than jury verdicts generally.”<sup>92</sup> Judge Flaum’s sole support for this contention was a 1987 note by a student, Kimberlye K. Fayssoux.<sup>93</sup> Interestingly, Justice Kennedy had cited the same student note in his *Price Waterhouse* dissent for the proposition that there was a “high reversal rate caused by [the] use of Title VII burden shifting in a jury setting.”<sup>94</sup>

There are two problems with the citation of Fayssoux’s note for the proposition that *Price Waterhouse* burden-shifting confuses juries. First, Fayssoux focused her analysis not on the mixed-motive/same-decision framework that would later be approved in *Price Waterhouse*, but rather on “the difficulties encountered in applying the *McDonnell Douglas* standard to age discrimination cases tried by jury.”<sup>95</sup> Second, although it is true that Fayssoux asserted that “a review of ADEA cases illustrates that the courts are overturning jury verdicts at an alarming rate[,]” Fayssoux cited no evidence that would permit a conclusion concerning the rate at which jury verdicts are overturned in ADEA cases.<sup>96</sup> Her body of evidence on the subject appears in two footnotes, which cite four cases in which a district court granted defendants’ J.N.O.V. motions;<sup>97</sup> eight cases in which lower-court denials of J.N.O.V. were reversed on appeal;<sup>98</sup> and five cases in which an appellate court affirmed the grant of J.N.O.V.<sup>99</sup> Leaving aside the fact that all these cases dated from the 1980s, the basic problem is that citing seventeen cases in which J.N.O.V. was granted tells us nothing about the *rate* at which jury

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<sup>90</sup> *Visser*, 924 F.2d at 658, 660, *abrogated by Gross*, 129 S. Ct. at 2352.

<sup>91</sup> *Id.* at 662 (Flaum, J., dissenting).

<sup>92</sup> *Id.* at 661.

<sup>93</sup> *See id.* (citing Kimberlye K. Fayssoux, Note, *The Age Discrimination in Employment Act of 1967 and Trial by Jury: Proposals for Change*, 73 VA. L. REV. 601, 601 & nn.14–15, 606 (1987)).

<sup>94</sup> *Price Waterhouse*, 490 U.S. at 292 (Kennedy, J., dissenting) (citing Fayssoux, *supra* note 93).

<sup>95</sup> Fayssoux, *supra* note 93, at 604.

<sup>96</sup> *Id.* at 615 n.90.

<sup>97</sup> *See id.* at 603 n.14.

<sup>98</sup> *See id.* at 603 n.15.

<sup>99</sup> *See id.*

verdicts are overturned in ADEA cases and, therefore, provides no basis for comparing that rate to the rate at which jury verdicts are overturned in other types of cases.

If the *Gross* Court had wished to examine data on reversals of jury verdicts in employment discrimination cases, there exist better data on that question—but it would be difficult to derive from those data any inferences concerning the functioning of *Price Waterhouse* burden shifting. For example, evidence is available concerning the rate of appellate reversals in employment discrimination cases that progressed all the way through trial.<sup>100</sup> Kevin Clermont, Theodore Eisenberg, and Stewart Schwab used a data set containing information on federal court employment discrimination cases to study dispositions on appeal during the period from 1987 to 2000.<sup>101</sup> They found that, for cases decided after trial, appeals were taken in 16.55% of the cases.<sup>102</sup> In those cases, the reversal rate varied dramatically depending on which side took the appeal: defendants obtained reversals in over 42% of their appeals, while plaintiffs obtained reversals in less than 7% of their appeals.<sup>103</sup> The authors point out that the defendants' reversal rate is unusually high (relative to almost all other types of cases), and that the plaintiffs' reversal rate is unusually low by the same measure.<sup>104</sup>

Do these figures reveal anything about *Price Waterhouse* instructions? The types of cases that the study included *could* have featured a *Price Waterhouse*-style burden-shifting instruction because they involved types of claims for which such a burden-shifting instruction is (or has been) sometimes used.<sup>105</sup> But not all cases go to the jury on a burden-shifting motivating-factor instruction; some (probably most) instead go the jury on a burden-retaining “determinative factor” instruction.<sup>106</sup>

<sup>100</sup> See Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 547, 554 display 3 (2003).

<sup>101</sup> See *id.* at 548–50.

<sup>102</sup> *Id.* at 551 display 1. In cases where the plaintiff won at trial, appeals were taken almost thirteen percent of the time, while in cases where the defendant won at trial, appeals were taken slightly over eighteen percent of the time. See *id.* Defendant wins at trial were considerably more frequent than plaintiff wins at trial. See *id.*

<sup>103</sup> See *id.* at 554 display 3.

<sup>104</sup> See *id.* at 556 display 4, 557–58 display 5.

<sup>105</sup> The “Jobs 442” case category that defined the data set included claims under Title VII, the Americans with Disabilities Act (“ADA”), the ADEA, the Family Medical Leave Act (“FMLA”), § 1981, and § 1983. *Id.* at 549.

<sup>106</sup> See Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse Is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1942 (2004) (asserting that “the vast majority of individual discrimination cases have been treated as *McDonnell Douglas* cases” rather than as *Price Waterhouse* cases).

Without knowing which type of instruction was employed in each case and without knowing whether a problem with the instruction was the cause for reversal on appeal, it is impossible to know whether the reversal rate reveals anything about problems with burden-shifting jury instructions. It is, however, possible to make an educated guess. In other work, Clermont and Schwab have found that employment discrimination plaintiffs do worse than other types of plaintiffs at each stage of federal litigation (not merely on appeal):

They manage many fewer happy resolutions early in litigation, and so they have to proceed toward trial more often. They win a lower proportion of cases during pretrial and at trial. Then, more of their successful cases are appealed. On appeal, they have a harder time upholding their successes and reversing adverse outcomes.<sup>107</sup>

In the light of these data, it would hardly be surprising to find that jury verdicts in ADEA cases are overturned more often than jury verdicts in general—and such a finding would not provide particular support for the view that confusion concerning a burden-shifting instruction was the explanation for decisions to overturn jury verdicts in ADEA cases.

In sum, even if the *Gross* Court had looked for better evidence concerning the effect of *Price Waterhouse* burden-shifting instructions, it seems doubtful that any such evidence would have come to light.

## 2. Confusion over Applicability of Burden-Shifting Instructions

Perhaps—although the *Gross* opinion did not mention it—the concern over administrability of *Price Waterhouse* burden-shifting stemmed instead from the difficulties courts have experienced in discerning when a case merits a burden-shifting instruction as opposed to a burden-retaining instruction. Judging from the oral argument in *Gross*, concern over this type of confusion did trouble some justices, which is unsurprising, given that the petition in *Gross* sought guidance on precisely this question.<sup>108</sup> In fact, the boundaries of *Price Waterhouse* burden-shifting

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<sup>107</sup> Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004).

<sup>108</sup> See Transcript of Oral Argument at \*7, *Gross*, 129 S. Ct. 2343 (No. 08-441), 2009 WL 832958 (Justice Alito: “[I]f there is a direct evidence requirement, it may arguably cause a great deal of problem [*sic*] when the trial judge has to give an instruction to the jury, because then the—the jury will first have to decide whether a particular type of evidence is present in the case before it can tell what—who has the burden of proof and what the standard is . . . .”); *id.* at \*16 (Justice Kennedy: “[A]re there any tactical difficulties or

have always been contested. It was clear from the start that difficult questions would arise concerning the applicability of the *Price Waterhouse* burden-shifting scheme. During the drafting of the *Price Waterhouse* opinions, the reach of the burden-shifting mechanism was a central focus of negotiations among the justices.<sup>109</sup> After the release of those opinions, the controversy continued, with courts developing divergent views concerning the range of cases to which the burden-shifting scheme could apply.<sup>110</sup> Neither the 1991 Act nor the Court's 2003 decision in *Desert Palace* has settled the question.

The Court's 1977 decision in *Mt. Healthy* anchored much of the Court's later discussion of burden-shifting in *Price Waterhouse*.<sup>111</sup> In *Mt. Healthy*, which involved a First Amendment retaliation claim, the Court held that if the plaintiff proved that the impermissible motive was "a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor'" in the challenged decision, the burden shifted to the defendant to prove that it would have made the same decision anyway.<sup>112</sup> As noted below, it appears that the second of these two alternatives—motivating factor—was added after Justice Marshall expressed concern about a prior draft's use of the terms "substantial factor" and "significant role."<sup>113</sup> Less than six years later, in *NLRB v. Transportation Management Corp.*, a unanimous Court approved a test employed by the National Labor Relations Board ("NLRB") for adjudicating claims that a worker was discharged based on mixed motives, one of which was the worker's union activity.<sup>114</sup> The Court used a number of different formulations when describing the NLRB's test: "contributed to," "in any way motivated by," "based in whole or in part on," and (twice) "a substantial or motivating factor."<sup>115</sup> And the Court characterized the *Mt. Healthy* standard as directing a court to ask whether "protected expression played a role in the employer's decision."<sup>116</sup>

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strategic difficulties that counsel face if they don't quite know which way the burden is going to shift before trial . . .").

<sup>109</sup> See *infra* notes 121–140.

<sup>110</sup> See *infra* notes 155–164 and accompanying text.

<sup>111</sup> See generally *Mt. Healthy*, 429 U.S. 274.

<sup>112</sup> *Id.* at 287 (citation omitted).

<sup>113</sup> See *infra* notes 323–330 and accompanying text.

<sup>114</sup> 462 U.S. 393, 394–95 (1983). For an account by "one of the NLRB attorneys who developed the agency's strategy in the *Wright Line/Transportation Management* litigation[.]" see Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 190 (2007) (describing "the active role that lawyers played in arguing across . . . doctrinal borders").

<sup>115</sup> *Transp. Mgmt.*, 462 U.S. at 395, 399, 400–01.

<sup>116</sup> *Id.* at 403.

During oral argument in *Price Waterhouse*, both the advocates and some of the justices discussed the applicability of *Mt. Healthy*.<sup>117</sup> Pressing *Price Waterhouse*'s lawyer, for instance, Justice O'Connor asked, "you argue for some 'but for' standard of causation? Or are you willing to settle for a substantial factor?"<sup>118</sup> The lawyer responded that she would choose the "but for" standard; but a few minutes later, Justice O'Connor once again alluded to the *Mt. Healthy* test.<sup>119</sup> In turn, Hopkins's lawyer relied on the *Mt. Healthy* test, but (with a nod to *Transportation Management*) added the alternative formulation "played a role."<sup>120</sup>

In early December 1988 Justice Brennan circulated the first draft of an opinion in *Price Waterhouse*.<sup>121</sup> Justices Marshall and Stevens promptly agreed to join the opinion, while Justice Kennedy accepted Chief Justice Rehnquist's invitation to write a dissent.<sup>122</sup> Justice O'Connor, however, wrote to express three concerns with the draft opinion.<sup>123</sup> Among other things, Justice O'Connor worried that the draft's use of the phrase "played a part" would give plaintiffs recourse to the burden-shifting framework too often.<sup>124</sup> Noting that *Mt. Healthy* used the terms "'substantial' or 'motivating factor'" and that this language was repeated in *Transportation Management*, Justice O'Connor argued that the draft opinion should always use these formulations rather than what she viewed as the looser term "played a part":

I much prefer to retain the "substantial or motivating" factor language . . . as I think it more clearly suggests that stray re-

<sup>117</sup> Audio Tape: The Oyez Project, *Price Waterhouse v. Hopkins—Oral Argument* (Oct. 31, 1988), available at [http://www.oyez.org/cases/1980-1989/1988/1988\\_87\\_1167/argument](http://www.oyez.org/cases/1980-1989/1988/1988_87_1167/argument).

<sup>118</sup> *Id.* at 4:20.

<sup>119</sup> *See id.* at 9:32 ("Well, there's language in a number of cases out there that it's enough to show that the discriminatory reason was a substantial factor.").

<sup>120</sup> *See id.* at 32:17 (James H. Heller argued for the respondent: "What we believe the Plaintiff must show is clearly marked by this Court's decisions. A motivating factor, a substantial factor. And *Transportation Management*, I believe, characterized *Mt. Healthy* as saying, played a role.").

<sup>121</sup> *See* First Draft, *Price Waterhouse*, 490 U.S. 228 (No. 87-1167) (circulated by Justice William J. Brennan, Jr. on Dec. 8, 1988). Citations to internal memoranda and other internal Court documents concerning *Price Waterhouse* are to items in Box 519 of the Papers of Justice Harry A. Blackmun at the Library of Congress.

<sup>122</sup> *See generally* Memorandum from Justice Marshall to Justice Brennan (Dec. 9, 1988) (on file with author); Memorandum from Justice Stevens to Justice Brennan (Dec. 9, 1988) (on file with author); Memorandum from Chief Justice Rehnquist to Justice Kennedy (Dec. 9, 1988) (on file with author); Memorandum from Justice Kennedy to Chief Justice Rehnquist (Dec. 9, 1988) (on file with author).

<sup>123</sup> *See generally* Memorandum from Justice O'Connor to Justice Brennan (Dec. 13, 1988) (on file with author).

<sup>124</sup> *Id.* at 1-2.

marks at the workplace, even by those responsible for management decisions, do not in and of themselves require a burden shift to the employer. The illegitimate criterion must actually have been relied upon by the decisionmaker in the case at hand.<sup>125</sup>

Justice Brennan responded by thanking Justice O'Connor for her "extensive and helpful memo;" he expressed a willingness to make changes in response to some of her suggestions, but he took issue with others.<sup>126</sup> Focusing on Justice O'Connor's concern about "stray remarks," Justice Brennan proposed to add language stating as follows:

Remarks at work that are based on sex stereotypes do not, in and of themselves, indicate that gender played a part in a particular employment decision. Rather, the plaintiff must show that the employer actually relied on her gender in making its decision. This is not to say, however, that such remarks cannot be *evidence* that gender played such a part.<sup>127</sup>

As one can see from the preceding quotation, Justice Brennan was unwilling to give up reliance on the term "played a part." As he explained:

I prefer to allay your concern in this fashion rather than by adding the "substantial factor" language throughout the opinion. Such language, I think, deflects attention from the important question in a case of this kind, which is whether gender was a consideration in an employment decision . . . . [T]he language and legislative history of Title VII demonstrate that gender is irrelevant to such decisions. To add the wording that you suggest might be taken to mean that some discrimination in employment decisions is acceptable, as long as it is not "substantial."<sup>128</sup>

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<sup>125</sup> *Id.* Justice O'Connor also expressed concern about the draft's characterization of the *McDonnell Douglas* test and about the draft's explanation of the nature of the employer's burden on the same-decision defense. *See id.* at 2-5. Justice White followed Justice O'Connor's memorandum with one of his own urging Justice Brennan to "give favorable consideration to Sandra's suggestions, particularly her third one" (i.e., the point concerning the employer's burden). *See* Memorandum from Justice White to Justice Brennan (Dec. 13, 1988.)

<sup>126</sup> Memorandum from Justice Brennan to Justice O'Connor I (Dec. 14, 1988) (on file with author).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* In the margin next to this paragraph, Justice Blackmun wrote "good" and "correct." *Id.*

Justice O'Connor's response indicates that Justice Brennan had narrowed the scope of her concerns, which now focused largely on her preference for the term "substantial factor":

[M]y main concern remaining is the threshold proof necessary to allow a plaintiff to take advantage of the favorable evidentiary framework of *Price Waterhouse*. . . . Unless it is made clear that this evidentiary framework is not to be invoked unless a forbidden criterion was a "substantial factor" in the employment decision, I may be forced to limit my concurrence to the judgment.<sup>129</sup>

Although Justice O'Connor cited a number of arguments in favor of her preferred language—for example, that the language appeared in *Mt. Healthy* and *Transportation Management* and in lower court employment-discrimination case law—her underlying concern appears to have been that shifting the burden to the defendant would be "strong medicine" that should be carefully controlled:

I view the evidentiary rule of *Price Waterhouse* as a supplement to the *McDonnell Douglas* framework for use in cases, like this one, where the employer has created uncertainty as to causation by knowingly giving substantial weight to an irrelevant characteristic. In such a situation, I agree that a strong deterrent message is needed. I think the "substantial factor" test gives trial judges the discretion to determine when this tool is necessary and when it is not.<sup>130</sup>

A few days later, Justice Blackmun agreed to join Justice Brennan's opinion.<sup>131</sup> Justice Blackmun's law clerk had expressed the hope that if Justice Blackmun joined the opinion, "perhaps Justice White would provide the necessary fifth [vote]."<sup>132</sup> No such vote was forthcoming, however, and there the matter sat until after the New Year.

In early January 1989, Justice Brennan wrote to Justice O'Connor that he remained "strongly inclined against adding the 'substantial fac-

<sup>129</sup> Memorandum from Justice O'Connor to Justice Brennan 3 (Dec. 16, 1988) (on file with author).

<sup>130</sup> *Id.* at 1, 2.

<sup>131</sup> Memorandum from Justice Blackmun to Justice Brennan 1 (Dec. 19, 1988) (on file with author).

<sup>132</sup> Memorandum from "Eddie" to Justice Blackmun 1 (Dec. 17, 1988) (on file with author). The law clerk reported that Justice Brennan's clerk was "fuming" in reaction to Justice O'Connor's memo. *Id.*

tor' language to this opinion."<sup>133</sup> Justice Brennan argued that the term "substantial factor" was used in *Mt. Healthy and Transportation Management* "not in order to suggest that the discrimination must be of a certain magnitude before the burden must shift, but in order to drive home the point that an impermissible motive must actually play a part in an employment decision in order to justify such a shift."<sup>134</sup> He acknowledged, however, that this was not the only possible reading of the term, and he asserted that he wished to avoid the ambiguity that would result from perpetuating the "substantial factor" language as the test in *Price Waterhouse*.<sup>135</sup> These arguments failed to sway Justice O'Connor; she promptly responded that she planned to write separately.<sup>136</sup> This response elicited a concession from Justice Brennan, who stated that in order to win Justice O'Connor's support for the draft he would agree to insert "motivating" before "part" in various places where the draft currently used the term "play a part."<sup>137</sup>

Perhaps such a concession, if it had come earlier, would have persuaded Justice O'Connor to join Justice Brennan's opinion. But her response to Justice Brennan indicates that before she received his offer, she "had concluded that our differences in this case went beyond mere linguistics, and had begun work on a concurring opinion."<sup>138</sup> She agreed that the changes Justice Brennan proposed "would be helpful" and "certainly could change the bottom line" on any opinion she wrote, but she stated that she would need to write her thoughts down in order to assess the question.<sup>139</sup>

It was still unclear at this point whether Justice Brennan would gain a fifth vote in support of his opinion; Justice White had indicated that he would wait to see Justice O'Connor's draft.<sup>140</sup> Accordingly, when Justice Kennedy circulated the first draft of his dissent, he warned that Justice Brennan's approach "will mean that almost every Title VII

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<sup>133</sup> Memorandum from Justice Brennan to Justice O'Connor 3 (Jan. 5, 1989) (on file with author).

<sup>134</sup> *Id.* at 1.

<sup>135</sup> *See id.*

<sup>136</sup> *See* Memorandum from Justice O'Connor to Justice Brennan 1 (Jan. 5, 1989) (on file with author).

<sup>137</sup> *See* Memorandum from Justice Brennan to Justice O'Connor 1 (Jan. 6, 1989) (on file with author).

<sup>138</sup> Memorandum from Justice O'Connor to Justice Brennan 1 (Jan. 10, 1989) (on file with author).

<sup>139</sup> *Id.*

<sup>140</sup> *See* Memorandum from Justice White to Justice Brennan 1 (Feb. 13, 1989) (on file with author).

plaintiff will be able to claim that her case is one of ‘mixed motives.’”<sup>141</sup> He reasoned that plaintiffs ordinarily do not sue unless they have more than a mere prima facie case: “Almost all plaintiffs will bring at least some additional evidence suggesting discrimination. When they do, the ‘motivating factor’ standard will be met, and the ultimate burden of persuasion shifted to the defendant.”<sup>142</sup>

Ultimately, Justice O’Connor and Justice White each wrote separately, with the well-known result that Justice Brennan wrote only for a plurality.<sup>143</sup> The plurality opinion used the “played a motivating part” standard at key points (such as when the plurality summed up its holding), but retained the “played a part” language in other places.<sup>144</sup> Justice White relied on *Mt. Healthy* and concluded that “as Justice O’Connor states, [plaintiff’s] burden was to show that the unlawful motive was a *substantial* factor in the adverse employment action.”<sup>145</sup> Justice O’Connor, for her part, indicated that she would require the plaintiff to produce “direct” evidence that the invidious motive was a “substantial factor” in the decision in order to qualify for *Price Waterhouse* burden-shifting.<sup>146</sup> She reasoned that such burden-shifting diverged from the Court’s existing *McDonnell Douglas* proof structure and that, as such, the burden-shifting mechanism “requires justification, and its outlines should be carefully drawn.”<sup>147</sup> She enumerated types of evidence that would not suffice:

[S]tray remarks in the workplace, while perhaps probative of sexual harassment . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself. . . .<sup>148</sup>

In Justice O’Connor’s view, to qualify for burden-shifting the plaintiff must present “direct evidence that decisionmakers placed substantial

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<sup>141</sup> First draft at 13, *Price Waterhouse*, 490 U.S. 228 (No. 87-1167) (circulated by Justice Kennedy, dissenting, on Feb. 14, 1989).

<sup>142</sup> *Id.* at 14.

<sup>143</sup> See *Price Waterhouse*, 490 U.S. at 231 (plurality opinion); *id.* at 258 (White, concurring in the judgment); *id.* at 261 (O’Connor, concurring in the judgment).

<sup>144</sup> See, e.g., *id.* at 244–45, 246, 247 n.12, 258 (plurality opinion).

<sup>145</sup> *Id.* at 259 (White, J., concurring in the judgment).

<sup>146</sup> *Id.* at 271, 276 (O’Connor, J., concurring in the judgment).

<sup>147</sup> *Id.* at 270.

<sup>148</sup> *Id.* at 277.

negative reliance on an illegitimate criterion in reaching their decision.”<sup>149</sup>

Justice Kennedy, meanwhile, had revised his dissent to reflect the narrowness of Justice O’Connor’s concurrence in the judgment.<sup>150</sup> Citing her opinion and Justice White’s opinion, the dissenters argued that the result—under the *Price Waterhouse* opinions—would be that “[t]he shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision.”<sup>151</sup> Rather than decrying the breadth of the burden-shifting mechanism (as the first draft did), the published dissent stressed the “limited” and “closely defined” scope of the mechanism.<sup>152</sup> But the dissenters also pointed out that these limitations would cause their own problems by requiring the lower courts to parse the meaning of “substantial” and to apply “the often subtle and difficult distinction between ‘direct’ and ‘indirect’ or ‘circumstantial’ evidence.”<sup>153</sup> The dissenters further asserted that “[c]onfusion in the application of dual burden-shifting mechanisms will be most acute in cases brought under 42 U.S.C. § 1981 or the Age Discrimination in Employment Act (ADEA), where courts borrow the Title VII order of proof for the conduct of jury trials.”<sup>154</sup>

In the years following *Price Waterhouse*, a number of courts concluded that the direct/circumstantial distinction provided the dividing line between cases that warranted burden-shifting and those that did not. To justify *Price Waterhouse* burden-shifting, those courts required “direct evidence” that an invidious motive as well as a legitimate motive drove the relevant decision.<sup>155</sup> As the *Gross* dissenters would later point

<sup>149</sup> *Price Waterhouse*, 490 U.S. at 277.

<sup>150</sup> *See id.* at 280 (Kennedy, J., dissenting).

<sup>151</sup> *Id.*

<sup>152</sup> *See id.*; First draft at 13, *Price Waterhouse*, 490 U.S. 228 (No. 87-1167) (circulated by Justice Kennedy, dissenting, on Feb. 14, 1989).

<sup>153</sup> *Price Waterhouse*, 490 U.S. at 291 (Kennedy, J., dissenting).

<sup>154</sup> *Id.* at 292.

<sup>155</sup> Relevant cases include those applying the non-statutory (*Price Waterhouse*) burden-shifting mechanism to types of claims that they did not regard as encompassed within the statutory burden-shifting scheme. *See, e.g.*, *Fabela v. Socorro Indep. Sch. Dist.*, 329 F.3d 409, 414–15 (5th Cir. 2003) (“A plaintiff alleging Title VII retaliation may establish her case for causation in one of two ways: she may either present direct evidence of retaliation, which is also known as the ‘mixed-motive’ method of proving retaliatory motivation; or she may provide circumstantial evidence creating a rebuttable presumption of retaliation.”); *Wexler v. White’s Fine Furniture, Inc.*, 317 F.3d 564, 571 (6th Cir. 2003) (en banc) (ADEA claim); *Vesprini v. Shaw Contract Flooring Servs., Inc.*, 315 F.3d 37, 41 (1st Cir. 2002) (observing that the “contours” of the direct-evidence requirement were “murky” but nonetheless applying it in an ADEA case); *E.E.O.C. v. Liberal R-II Sch. Dist.*, 314 F.3d 920, 922 (8th

out, this conclusion was dubious given that neither the *Price Waterhouse* plurality nor Justice White mentioned any requirement of “direct evidence.”<sup>156</sup> But Justice O’Connor’s approach nonetheless gained currency. The analysis was further complicated by the fact that the 1991 Act replaced *Price Waterhouse* for Title VII discrimination claims with the statutory burden-shifting mechanism found in §§ 2000e-2(m) and 2000e-5(g) (2) (B).<sup>157</sup> A number of courts applied the direct-evidence requirement when administering the statutory mechanism as well.<sup>158</sup>

As Justice Kennedy predicted, the line between direct and circumstantial evidence proved difficult to draw, and courts took varying positions.<sup>159</sup> The First Circuit’s widely-cited decision in *Fernandes v. Costa Bros. Masonry* classified the circuits’ approaches into “three schools of thought.”<sup>160</sup> First, it noted the “Classic” position, under which courts hold “that the term [direct evidence] signifies evidence which, if believed, suffices to prove the fact of discriminatory animus without inference, presumption, or resort to other evidence.”<sup>161</sup> A second approach is the “Animus Plus” position, which defines direct evidence “as evidence, both direct and circumstantial, of conduct or statements that (1) reflect directly the alleged discriminatory animus and (2) bear squarely on the contested employment decision.”<sup>162</sup> The *Fernandes* court noted that “[c]ourts endorsing the animus plus position do not distinguish between direct and circumstantial evidence in the classic sense but, rather, emphasize that the mixed-motive trigger depends on

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Cir. 2002) (ADEA claim); *Fakete v. Aetna, Inc.*, 308 F.3d 335, 338 (3d Cir. 2002) (ADEA claim).

<sup>156</sup> See *Gross*, 129 S. Ct. at 2357 (Stevens, J., dissenting) (“Because Justice White provided a fifth vote for the rationale explaining the result of the *Price Waterhouse* decision, his concurrence is properly understood as controlling, and he, like the plurality, did not require the introduction of direct evidence.”) (internal quotation marks and citation omitted).

<sup>157</sup> See 42 U.S.C. §§ 2000e-2(m), 2000e-5(g) (2) (B) (2006).

<sup>158</sup> See, e.g., *Mohr v. Dustrol, Inc.*, 306 F.3d 636, 640 (8th Cir. 2002), *abrogated by Desert Palace*, 539 U.S. 90 (2003).

<sup>159</sup> See, e.g., *Fakete*, 308 F.3d at 338 n.2 (“[W]hile courts agree on what is not direct evidence—e.g., statements by non-decisionmakers, statements by decisionmakers unrelated to the contested employment decision, and other ‘stray remarks’—there is no consensus on what is.”); Zimmer, *supra* note 106, at 1912 (“Creating two separate methods of analysis and drawing the boundary between them based on the characterization of ‘direct’ evidence set up a structure for individual disparate treatment law that proved impossible to implement coherently.”).

<sup>160</sup> 199 F.3d 572, 582 (1st Cir. 1999), *abrogated on other grounds by Desert Palace*, 539 U.S. 90 (2003).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

the strength of the plaintiff's case."<sup>163</sup> Third, the court described the "Animus" position, under which "as long as the evidence (whether direct or circumstantial) is tied to the alleged discriminatory animus, it need not bear squarely on the challenged employment decision."<sup>164</sup>

In *Desert Palace*, the Court granted certiorari on two questions: whether the direct-evidence requirement applied to Title VII's statutory burden-shifting mechanism and, if so, what the contours of that direct-evidence requirement should be.<sup>165</sup> The Court, however, avoided the second question by answering the first question in the negative.<sup>166</sup> The Court focused on statutory text: § 2000e-2(m) establishes a violation "when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor."<sup>167</sup> Section 2000e(m) defines "demonstrates" to mean meets "the burdens of production and persuasion."<sup>168</sup> Other parts of Title VII—including § 2000e-5(g)(2)(B), which defines the same-decision defense—use the term "demonstrates," and there is no indication that the term should include a direct-evidence requirement when used in one provision but not in another.<sup>169</sup> Absent a contrary indication in the statute, the Court declined to depart from the general practice of permitting proof by both direct and circumstantial evidence.<sup>170</sup> As the Court explained, "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'"<sup>171</sup>

As a result, the *Desert Palace* Court explained, "[i]n order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"<sup>172</sup> But what does this requirement actually mean? The description "sufficient evidence to find that discrimination was a motivating factor" seems to describe *all* discrimination cases that reach a jury. After all, if there is insufficient evidence to justify a jury finding that discrimination was even a motivat-

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> See 539 U.S. at 92, 101 n.3.

<sup>166</sup> *Id.* at 101 n.3.

<sup>167</sup> See *id.* at 94.

<sup>168</sup> See *id.* at 98–99.

<sup>169</sup> See *id.* at 100–01.

<sup>170</sup> See *id.* at 101.

<sup>171</sup> *Desert Palace*, 539 U.S. at 100.

<sup>172</sup> *Id.* at 101.

ing factor, then the defendant is entitled to judgment as a matter of law.<sup>173</sup>

Concededly, the *Desert Palace* Court appears to have viewed the description “mixed-motive” as providing a possible boundary for its ruling; it stated in a footnote that “[t]his case does not require us to decide when, if ever, § 107 [the portion of the 1991 Act that enacted §§ 2000e-2(m) and 2000e-5(g)(2)(B)] applies outside of the mixed-motive context.”<sup>174</sup> *Desert Palace*, therefore, eliminated one sort of line-drawing (direct versus circumstantial evidence) but left another: mixed-motive versus single-motive.<sup>175</sup> As commentators have noted, nearly all discrimination cases could be characterized as mixed-motive cases.<sup>176</sup> Thus, for example, Michael Zimmer predicted soon after *Desert Palace* “that a new, uniform proof structure will evolve from *Desert Palace* and that the approach established in [§ 2000e-2(m)] will apply to almost all individual discrimination cases.”<sup>177</sup> Henry Chambers has suggested that

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<sup>173</sup> See Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 100 (2004) (“Because allowing a motivating factor showing to be made purely through circumstantial evidence makes the showing easier to make than (or identical to) a pretext showing, a motivating factor instruction would appear to be appropriate in every pretext case that survives summary judgment.”).

<sup>174</sup> *Desert Palace*, 539 U.S. at 94 n.1.

<sup>175</sup> See *id.* Although both direct and circumstantial evidence can be used under *Desert Palace*, courts continue to maintain other boundaries, ruling that some evidence is not closely enough linked to the challenged action to show a discriminatory motivation. See, e.g., *Richardson v. Sugg*, 448 F.3d 1046, 1058 (8th Cir. 2006) (“The required causal link renders stray remarks, statements by nondecisionmakers, or statements by decisionmakers that are unrelated to the decisional process insufficient to require a mixed-motive analysis.”).

<sup>176</sup> See, e.g., Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 764 (2005) (“There is no logical way to separate cases involving mixed motives from cases in which a plaintiff claims that only a single, illegitimate factor motivated the decision without imposing obligations not contemplated by the statute or basic rules of civil procedure.”); Zimmer, *supra* note 106, at 1928 (“Even if courts try to maintain a distinction between ‘single-motive’ cases where § 703(m) does not apply and ‘mixed-motive’ cases where it does, every *McDonnell Douglas* case turns, at least potentially, into a ‘mixed-motive’ case once the defendant asserts a nondiscriminatory reason.”).

<sup>177</sup> Zimmer, *supra* note 106, at 1891; see also *Griffith v. City of Des Moines*, 387 F.3d 733, 747 (8th Cir. 2004) (Magnuson, D.J., concurring specially) (“There is simply no need to retain the *McDonnell Douglas* paradigm when the Civil Rights Act of 1991 effectively allows a court to analyze the evidence to determine if discrimination was a motivating factor in the employment decision.”); William R. Corbett, *An Allegory of the Cave and Desert Palace*, 41 HOUS. L. REV. 1549, 1568–69 (2005) (“*McDonnell Douglas*’s standard of causation . . . is higher or more rigorous (harder for a plaintiff to satisfy) than section 703(m)’s motivating factor standard. After *Desert Palace*, a plaintiff cannot be required to satisfy the higher standard of the pretext analysis.”).

*Desert Palace* increases trial judges' discretion concerning when to give a motivating-factor instruction.<sup>178</sup>

Courts have not been eager to conclude that *Desert Palace* assimilated all Title VII discrimination claims to the § 2000e-2(m) structure.<sup>179</sup> A number of courts have noted the questions *Desert Palace* raised but have avoided the need to discern the reach of the motivating-factor framework by concluding that the choice between a burden-shifting and a burden-retaining proof structure did not affect the case before them.<sup>180</sup> In the wake of *Desert Palace*, courts have also confronted the question of whether a mixed-motive plaintiff who proffers no direct

<sup>178</sup> See Chambers, *supra* note 173, at 102 (“[T]he Court is unlikely to develop a specific test to tell trial judges when sufficient evidence has been presented to trigger a motivating factor instruction. Rather, it will likely leave the evidentiary analysis (and the discretion that accompanies it) to trial judges.”).

<sup>179</sup> See, e.g., *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 319 n.5 (4th Cir. 2005) (agreeing with courts that “rejected the view that *Desert Palace* nullified the *McDonnell Douglas* framework”); *Cooper v. S. Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004) (“[A]fter *Desert Palace* was decided, this Court has continued to apply the *McDonnell Douglas* analysis in non-mixed-motive cases.”), *overruled on other grounds by* *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006). The Fifth Circuit “has adopted . . . a ‘modified *McDonnell Douglas* approach’” that offers mixed-motive analysis as an alternative to pretext analysis. *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 341 (5th Cir. 2005). Under this modified approach:

After the plaintiff has met his four-element *prima facie* case and the defendant has responded with a legitimate nondiscriminatory reason for the adverse employment action[,] the plaintiff must offer evidence “either (1) that the defendant’s reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant’s reason, while true, is only one of the reasons for its conduct, and another motivating factor is the plaintiff’s protected characteristic. (mixed-motive[s] alternative).”

*Id.* (quoting *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)).

Some courts have asserted that the U.S. Supreme Court’s post-*Desert Palace* decision in *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), demonstrates that the Court contemplates the continued use of the *McDonnell Douglas* framework even after *Desert Palace*. See, e.g., *White v. Baxter Healthcare Corp.* 533 F.3d 381, 400 n.10 (6th Cir. 2008) (“[P]ost-*Desert Palace*, the Supreme Court has continued to apply the *McDonnell Douglas/Burdine* analysis to summary judgment challenges in single-motive Title VII cases.”), *cert. denied*, 129 S. Ct. 2380 (2009). *Raytheon*, however, concerned an ADA claim and did not discuss § 2000e-2(m). See 540 U.S. at 46.

<sup>180</sup> So, for example, the First Circuit recently noted that *Desert Palace* and *McDonnell Douglas* “have not been definitively disentangled or reconciled.” *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 45 n.8 (1st Cir. 2009). The *Chadwick* court, however, declined to attempt such a reconciliation because it concluded that the plaintiff had in any event presented evidence that would justify a jury in finding “that the promotion denial was more probably than not caused by discrimination.” *Id.* at 48; see also *Semsroth v. City of Wichita*, 304 F. App’x 707, 718 n.11, 2008 WL 5328466 (10th Cir. 2008) (unpublished opinion) (“We doubt that the *Costa* Court modified [the *McDonnell Douglas*] framework because the Court did not address or cite *McDonnell Douglas* in that opinion; however, we need not resolve that issue here.”).

evidence of discriminatory motive is subject to the *McDonnell Douglas* framework at the summary judgment stage.<sup>181</sup> That question, however, lies beyond the scope of this Article.<sup>182</sup>

In any event, *Desert Palace* failed to resolve the question of how to delineate the application of *Price Waterhouse* burden-shifting in cases not covered by the statutory burden-shifting framework.<sup>183</sup> That, of course, was the question on which certiorari was granted in *Gross*—and which the *Gross* Court avoided by holding *Price Waterhouse* burden-shifting categorically inapplicable in ADEA cases.<sup>184</sup>

It seems possible that the decision in *Gross* was driven by the view that *Desert Palace* lacks any limiting principle. In this regard, it is suggestive that both Justice Alito and Justice Ginsburg questioned the mixed-motive/non-mixed motive dichotomy during the oral argument in

<sup>181</sup> See, e.g., *White*, 533 F.3d at 400 (reviewing cases and holding that “the *McDonnell Douglas/Burdine* burden-shifting framework does *not* apply to the summary judgment analysis of Title VII mixed-motive claims”); see also *Griffith*, 387 F.3d at 735 (“*Desert Palace*, a decision in which the Supreme Court decided only a mixed motive jury instruction issue, is an inherently unreliable basis for district courts to begin ignoring this Circuit’s controlling summary judgment precedents.”).

<sup>182</sup> Although this question lies beyond the scope of the Article, it seems clear that a mixed-motive plaintiff should not be required to demonstrate that the defendant’s stated reason for the challenged employment action was pretextual. See, e.g., *Holcomb v. Iona Coll.*, 521 F.3d 130, 138, 141–42 (2d Cir. 2008) (applying the *McDonnell Douglas* framework to commence its analysis of a mixed-motive claim, but emphasizing that mixed-motive plaintiffs are not required to show pretext in order to avoid summary judgment). Moreover, Judge Karen Nelson Moore has argued persuasively that “the purpose of the *prima facie* case” under the *McDonnell Douglas/Burdine* framework

is to rule out the most likely legitimate reasons for an adverse employment decision. An employee can succeed on a mixed-motive claim, however, even if such legitimate reasons played a role in the decision, so long as an illegitimate reason was a motivating factor. Therefore, a different approach is necessary for analyzing mixed-motive claims at the summary judgment stage.

*Wright v. Murray Guard, Inc.*, 455 F.3d 702, 720 (6th Cir. 2006) (Moore, J., concurring) (citation omitted).

<sup>183</sup> See, e.g., *Fye v. Okla. Corp. Comm’n*, 516 F.3d 1217, 1225 n.5, 1226 (10th Cir. 2008) (declining to decide whether § 2000e-2(m) applies to Title VII retaliation claims, but nonetheless holding that the plaintiff could “use circumstantial evidence to establish directly that retaliatory animus played a motivating part in the [Oklahoma Corporation Commission’s] decision to terminate her”); see also B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 464 (2008) (“For retaliation claims arising under section 704[,] . . . the 1991 amendments are inapplicable and the distinction between direct evidence and circumstantial evidence cases apparently remains an open question.”).

<sup>184</sup> The dissenters, by contrast, would have held *Price Waterhouse* burden-shifting applicable and would have held that no direct evidence requirement circumscribes the availability of such burden-shifting. See *Gross*, 129 S. Ct. at 2357 (Stevens, J., dissenting).

*Gross*.<sup>185</sup> And they were right to question that dichotomy. As a number of commentators have suggested, the concept of mixed motives provides an apt description of many instances of discrimination.<sup>186</sup> In any case in which the evidence would entitle the jury to find both that the employer was motivated by a legitimate reason and that the employer was also motivated by bias, it seems fair to argue that the term “mixed motive” is apt.<sup>187</sup> The “direct evidence,” “animus,” and “animus plus” tests all restrained the use of burden-shifting to a subset of these cases; but no such limitation seems justified under *Desert Palace*.

The lack of a limiting principle does not in itself counsel against adopting the *Desert Palace* approach. Indeed, one might argue that *Desert Palace* parallels the course taken by five justices in *Price Waterhouse*, given that neither the *Price Waterhouse* plurality nor Justice White imposed any “direct evidence” requirement for the application of the burden-shifting framework. But neither those five justices in *Price Waterhouse*, nor the Court in *Desert Palace*, nor the dissenters in *Gross* explained how a district court should proceed to choose between the burden-retaining (“determinative factor”) instruction and the burden-shifting (“motivating factor”) instruction in a given case.

William Corbett has argued that under *Desert Palace* the burden-retaining instruction should no longer be available; in his view, the court should always give a mixed-motive burden-shifting instruction.<sup>188</sup> A number of courts, however, have rejected this view, reasoning that the plaintiff should have the option of proceeding under a burden-

<sup>185</sup> Transcript of Oral Argument, *supra* note 107, at \*19 (Justice Alito: “Do you think that there is a tenable distinction between a mixed motives case and a non-mixed motives case? In every employment discrimination case that gets beyond summary judgment, aren’t there mixed motives at play?”); *id.* at \*20 (Justice Ginsburg: “Couldn’t—couldn’t any Title VII case be presented in either framework?”).

<sup>186</sup> See, e.g., Hart, *supra* note 176, at 764; Zimmer, *supra* note 106, at 1928.

<sup>187</sup> The Ninth Circuit, in *Desert Palace* itself, concluded that “the choice of jury instructions depends simply on a determination of whether the evidence supports a finding that just one—or more than one—factor actually motivated the challenged decision.” *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 856 (9th Cir. 2002) (en banc), *aff’d*, 539 U.S. 90 (2003); see also *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1072 (9th Cir. 2004) (“Since it is uncontroverted that Marathon has offered two reasons for firing Stegall, yet we hold that the record in this case would support a finding that Marathon had illegitimate motives, it is logical to examine the case as one involving ‘mixed motives.’”).

<sup>188</sup> Corbett, *supra* note 177, at 1572–73. (“If one accepts my argument . . . that after *Desert Palace* the standard of causation for all intentional discrimination cases is the motivating factor standard, then the idea that a plaintiff could request a jury instruction on a higher standard should not even be entertained.”).

retaining framework.<sup>189</sup> But when might the plaintiff wish to do so? If the burden-retaining and burden-shifting instructions are compared strictly as a matter of logic, plaintiffs ought to always prefer the mixed-motive burden-shifting instruction and defendants ought to always prefer the burden-retaining instruction.<sup>190</sup>

It seems fair to assume that defendants will ordinarily follow this logic.<sup>191</sup> There is evidence to suggest, however, that plaintiffs may not always do so.<sup>192</sup> Zimmer asserts that “historically *Price Waterhouse* ‘mixed-motive’ cases have been treated as somewhat of a ‘third rail’ issue by defendants as well as plaintiffs.”<sup>193</sup> Assessing the extent to which litigants are likely to try to use Title VII’s statutory burden-shifting framework, Zimmer suggests that lawyers who lack experience with the use of a burden-shifting framework may prefer a burden-retaining instruction

<sup>189</sup> See, e.g., *Sosa v. Napolitano*, 318 F. App’x. 68, 72 (3d Cir. 2009) (unpublished opinion) (stating in dicta that “a plaintiff who has circumstantial evidence of discrimination may choose to proceed under either the mixed-motive theory or the burden shifting framework of *McDonnell Douglas*,” but holding that the plaintiff’s proof failed under either theory); *White*, 533 F.3d at 390 n.4 (“White has presented his failure to promote claim as a single-motive discrimination claim brought pursuant only to 42 U.S.C. § 2000e-2(a)(1). Thus, we do not analyze his claim under the unique mixed-motive summary judgment analysis that is appropriate for claims brought pursuant to 42 U.S.C. § 2000e-2(m).”); *Fogg v. Gonzales*, 492 F.3d 447, 453 (D.C. Cir. 2007) (rejecting contention that § 2000e-2(m) provides the sole route for establishing liability because, if so, “an option previously open to plaintiffs would be foreclosed without the Congress having spoken to the issue”); *Dominguez-Curry v. Nev. Transp. Dep’t*, 424 F.3d 1027, 1037 (9th Cir. 2005) (“In responding to a summary judgment motion in a Title VII disparate treatment case, a plaintiff may produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated the defendant’s decision, or alternatively may establish a prima facie case under the burden-shifting framework set forth in *McDonnell Douglas*.”).

<sup>190</sup> Cf. Timothy M. Tymkovich, *The Problem with Pretext*, 85 DENV. U. L. REV. 503, 524 (2008) (“If both options are available to plaintiffs, most—if not all—plaintiffs would likely choose the mixed motive theory.”).

<sup>191</sup> Defendants—who already should logically prefer a burden-retaining instruction—may additionally fear that articulating any burden-shifting scheme might confuse the jury into thinking that the defendant bears the burden of proof on other issues as well. See Brill, *supra* note 80, at 22 (“Often, neither party will request the ‘same decision’ instruction. The defendant may not want it because it shifts the burden of proof to the defendant and it may be confusing.”); Zimmer, *supra* note 106, at 1942 (“[D]efendants do not relish the prospect of ever carrying the burden of persuasion on any issue in a discrimination case.”). Judge Brill (a federal magistrate judge) also suggests that if the jury believes that the plaintiff has proven that discrimination was a motivating factor in the employment decision, it is unlikely that the defendant will be able to convince the jury that it would have made the same decision anyway. See Brill, *supra* note 80, at 18–19; see also George Rutherglen, *Reconsidering Burdens of Proof: Ideology, Evidence, and Intent in Individual Claims of Employment Discrimination*, 1 VA. J. SOC. POL’Y & L. 43, 68 (1993).

<sup>192</sup> See Zimmer, *supra* note 106, 1935–48.

<sup>193</sup> *Id.* at 1942.

because the latter is familiar to them.<sup>194</sup> Moreover, plaintiffs litigating a Title VII case may “fear the same-decision defense will tempt the jury to ‘split the baby,’ finding liability under § [2000e-2(m)]’s ‘a motivating factor’ standard, but then finding that the defendant proved its same-decision defense—thereby depriving plaintiff of the most important remedies.”<sup>195</sup>

It is possible, then, to conclude that under *Desert Palace* many (or most) Title VII discrimination claims could logically be tried under either a “determinative factor” instruction or a “motivating factor” instruction. When and how should the district court make the choice? At a minimum, the choice should be made before closing arguments and the final jury instructions. It is interesting to note that the confusion over the applicability of *Price Waterhouse* burden-shifting has been so severe in some instances that the trial court was unable to make the choice even at that point. Accordingly, the committee that drafted model instructions for use in civil cases in the Eighth Circuit has suggested that if a district judge is uncertain whether a case warrants a burden-shifting or a burden-retaining instruction, the judge should direct the jury to fill out a special verdict form that combines the two frameworks.<sup>196</sup> The form first asks whether the plaintiff has proven but-for causation.<sup>197</sup> If the answer is yes, then the jury proceeds to assess damages; if the answer is no, then the form inquires whether the plaintiff has proven that the plaintiff’s protected status was a motivating factor.<sup>198</sup> If the answer is no, then the jury is done; if the answer is yes, then the form asks whether the defendant has proven that it would have made the same decision anyway.<sup>199</sup> If the answer is yes, then the jury is done; if the answer is no, then the jury proceeds to assess damages.<sup>200</sup>

The Eighth Circuit suggests this approach only when the trial court is uncertain of the appropriate instruction to give.<sup>201</sup> These writ-

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<sup>194</sup> *Id.* (“Given that the vast majority of individual discrimination cases have been treated as *McDonnell Douglas* cases, both defendants and plaintiffs may be reluctant to use the mixed-motive analysis because they share the feeling that the known devil of *McDonnell Douglas* is better than the unknown devil of § 703(m).”).

<sup>195</sup> *Id.*

<sup>196</sup> See 8TH CIR. CIVIL JURY INSTR. § 5.92 (2008).

<sup>197</sup> See *id.*

<sup>198</sup> See *id.*

<sup>199</sup> See *id.*

<sup>200</sup> See *id.*

<sup>201</sup> See *id.*; see also *Hartley v. Dillard’s, Inc.*, 310 F.3d 1054, 1059 (8th Cir. 2002) (rejecting a challenge to a district court’s use of the special verdict form and noting that “[t]his

ten questions can help to avoid the risk that a new trial will be required if an appellate court disagrees with the trial court's judgment over which instruction to give. They constitute an ingenious solution to the problem of doctrinal uncertainty. But they are not an optimal solution, because it is difficult to see how one should explain to the jury the purpose of these alternative questions. Ideally, the trial court should be put in a position to choose between the burden-retaining and the burden-shifting instruction so as to give only one of those instructions to the jury.

Moreover, that choice should ideally be made before the start of the trial (rather than after the close of the evidence). The parties should be permitted to tailor their opening statements and their presentation of evidence to the burden framework on which the jury will be instructed. Additionally, it is generally useful for the court to give the jury some simple preliminary instructions concerning the law that governs the claims—a task that will be more straightforward if the burden framework has been determined in advance.

This does not mean that either party should be obliged to adduce their views of the applicable burden framework at the outset of the litigation.<sup>202</sup> For one thing, if there do exist some cases in which the evidence could *only* support a choice between two competing visions of the motive for the challenged action—and the evidence would not permit a jury to conclude that both motives coexisted—it will ordinarily be impossible to discern the applicability of a mixed-motives instruction until after discovery.<sup>203</sup> Thus, it should be open to the plaintiff to see how the evidence evolves through discovery before taking a position on whether to request a burden-shifting rather than a burden-retaining instruction. Likewise, although various justices and commentators have referred to the same-decision defense as an “affirmative defense,” this categorization should not be taken to indicate that the de-

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jury instruction was designed for use when a case cannot easily be classified as either a mixed motive case or a pretext case”).

<sup>202</sup> See, e.g., *Dominguez-Curry*, 424 F.3d at 1041 n.7 (“A plaintiff need not decide at the outset of the case whether she wishes to pursue a single motive or a mixed-motives theory of discrimination.”); *Diamond*, 416 F.3d at 317 n.3 (“Whether Diamond pled a mixed-motive claim is irrelevant, however, because ‘a case need not be characterized or labeled at the outset. Rather, the shape will often emerge after discovery or even at trial. Similarly, the complaint itself need not contain more than the allegation that the adverse employment action was taken because of a protected characteristic.’”) (quoting *Costa*, 299 F.3d at 856 n.7).

<sup>203</sup> See *Stegall*, 350 F.3d at 1071 (“[I]t is common to have an employer’s reasons for terminating an employee fleshed out during the course of litigation.”).

fendant risks waiver of the defense by failing to raise it in its answer.<sup>204</sup> The term “affirmative defense,” here, is best read as shorthand for the view that the burden of proof should rest on the defendant because the defendant is best equipped to marshal the relevant evidence.<sup>205</sup> Accordingly, the best approach would seem to be that the parties should brief the question of burdens in their pretrial submissions and the trial court should designate the applicable burden framework in the final pretrial order. If the plaintiff requests, and the court agrees to give, a “motivating factor” instruction under *Price Waterhouse*, then the defendant should be allowed to choose whether or not to request a “same decision” instruction.<sup>206</sup>

The approach outlined above is far from the only possible way to settle the question of when and how the burden choice should be made. But it is consistent with the logic of *Desert Palace*, and it provides a structured and predictable framework for the application of that case’s guidance.<sup>207</sup> Objections might be leveled at this approach; for example,

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<sup>204</sup> It is, however, advisable to require the defendant to request a same-decision instruction in its pretrial submissions, so that the plaintiff is alerted to the defendant’s intention to frame its defense in this way. *But see Fogg*, 492 F.3d at 459 (Henderson, J., concurring) (arguing that the § 2000e-5(g)(2)(B) same-decision defense goes only to remedies and thus “need not be raised until the remedy stage of the proceedings”).

<sup>205</sup> See Brill, *supra* note 80, at 24 (discussing possible views concerning when defendant should raise the same-decision defense).

<sup>206</sup> For a case in which the defendant’s choice not to request a same-decision instruction resulted in a defense verdict, see *Galdamez v. Potter*, 415 F.3d 1015, 1020, 1021 (9th Cir. 2005). In *Galdamez*, the U.S. Court of Appeals for the Ninth Circuit rejected plaintiff’s contention that “the district court failed to give a mixed motive instruction” where the court in fact *did* give a motivating-factor instruction but did not instruct the jury on the same-decision defense because the defendant did not request such an instruction. *Id.* If there is no evidence from which a jury could conclude that the defendant would have made the same decision absent the discriminatory motive, then the court should not instruct on the same-decision defense. See Brill, *supra* note 80, at 25. As to complexities that may arise in cases that involve statutory burden-shifting, see *infra* note 207.

<sup>207</sup> For claims, such as Title VII claims, to which the statutory same-decision defense applies, the question of jury instructions on the same-decision defense is somewhat more complicated than it is for cases in which the *Price Waterhouse* same-decision defense applies. In *Price Waterhouse* cases, the defendant’s decision not to request a same-decision instruction should clearly be dispositive: if the defendant does not wish the jury to receive that instruction, the defendant will have no further opportunity to raise the same-decision defense after a jury verdict for the plaintiff. But what if, in a case covered by § 2000e-5(g)(2)(B), the defendant fails to request a same-decision instruction, the jury finds for the plaintiff under the motivating-factor instruction, and the defendant later argues to the court that reinstatement is inappropriate under § 2000e-5(g)(2)(B) because the defendant can “demonstrate” that it would have fired the plaintiff anyway for a nondiscriminatory reason? For a case holding that the district court was free to find facts concerning the same-decision argument where the defendant had requested, and the plaintiff had successfully opposed, a same-decision jury instruction, see *Porter v. Natsios*, 414 F.3d 13, 21

one might question whether plaintiffs should have the option of choosing between the two frameworks. As noted above, Professor Corbett argues that all Title VII discrimination claims should now be litigated as mixed motive cases.<sup>208</sup> The salient point for current purposes, however, is that either the approach this Article suggests or Professor Corbett's approach could be readily administered. Thus, although *Gross* did remove any confusion over when to give a burden-shifting instruction in ADEA cases, outlawing the use of burden-shifting in such cases was not the only option for addressing confusion over the applicability of burden-shifting. Moreover, a decision to hold burden-shifting categorically inapplicable to ADEA (or other) claims has the potential to increase a different sort of confusion—that which arises when a jury confronts multiple claims that carry varying burdens of proof.

### 3. The Possible Impact of *Gross* on Other Types of Employment Claims

The holding in *Gross* covers only ADEA discrimination claims.<sup>209</sup> But how does the *Gross* majority's reasoning affect the availability of burden-shifting instructions as to other causes of action? The *Gross* majority did not say.<sup>210</sup> A preliminary cut at the question might ask to what extent the rationales discussed in Part I.A. apply to each type of claim. Such an analysis is only a rough cut, of course, because in each instance there may be other factors that might make the parallel with the ADEA claims addressed in *Gross* either stronger or weaker. But at least the factors discussed in *Gross* provide a starting point. One might chart the potential application of the *Gross* rationales to other claims as shown in the following table.<sup>211</sup> The rationales discussed in Parts I.A.1 through

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(D.C. Cir. 2005) (“Even if the court were to assume that the 1991 Act reserves the ‘same action’ defense under § 2000e-5(g)(2)(B) for the jury, Porter waived any right to a jury instruction on that defense when he objected to USAID’s request for that instruction and agreed instead to an instruction that asked the jury only to determine liability based on a finding of discrimination or retaliation as ‘a motivating factor.’”). In any event, though this issue may be challenging, it arises only under the statutory burden-shifting framework. Therefore, it is not directly germane to my argument here, because my focus is on the administrability of the *Price-Waterhouse* burden-shifting framework, where this particular challenge does not arise.

<sup>208</sup> See Corbett, *supra* note 177, at 1572–73.

<sup>209</sup> See *Gross*, 129 S. Ct. at 2346.

<sup>210</sup> See *id.*

<sup>211</sup> The table shows selected claims rather than attempting to list all the possible claims that might be affected by *Gross*. For a sense of the relative frequency of some of the listed types of claims, see Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 117 display 6 (2009). Clermont and Schwab list the frequency of selected types of cases in federal court

I.A.4. are listed in the top row, but they are re-ordered to reflect the potential breadth of their applicability to other types of claims.

	The '91 Act burden-shifting framework does not apply	Rejection of <i>Price Waterhouse</i> removes Supreme Court authority for burden-shifting	Statutory language particular to the claim forecloses burden-shifting	The '91 Act framework forecloses burden-shifting
Title VII retaliation claims	✓	✓	✓	✓
ADEA retaliation claims	✓	✓	✓	✓
Equal Pay Act retaliation claims	✓	✓	✓	?
FLSA retaliation claims	✓	✓	✓	?
FMLA retaliation claims	✓	✓	✓	?
FMLA claims	✓	✓	(✓)	?
ADA retaliation claims	(✓)	✓	✓	?
ADA claims	(✓)	✓	(✓)	?
§ 1981 claims	✓	✓	✗	?
§ 1981 retaliation claims	✓	✓	✗	?
§ 1983 discrimination claims	✓	✗	✗	✗
§ 1983 1st Am. retaliation claims	✓	✗	✗	✗

a. *Inapplicability of Statutory Burden-Shifting*

One can see that for almost all of the claims listed in the above chart the Court would likely conclude (as it did in *Gross*) that Title VII's statutory burden-shifting scheme is inapplicable, because neither text nor legislative history provides stronger support than it did in *Gross* for the application of §§ 2000e-2(m) and 2000e-5(g)(2)(B). For example, Title VII's statutory burden-shifting scheme does not refer explicitly to Title VII retaliation claims: section 2000e-5(g)(2)(B) refers to "a claim in which an individual proves a violation under section 2000e-2(m)," and § 2000e-2(m) refers to a showing "that race, color, religion, sex, or

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from 1998–2006 as 64,122 Title VII cases, 8240 ADA cases, 8342 § 1983 cases, 7105 ADEA cases, 4457 § 1981 cases, and 1503 FMLA cases. *Id.*

national origin was a motivating factor” in an employment practice.<sup>212</sup> Because § 2000e-2(m)’s list of invidious motives does not include retaliation, a number of courts have concluded that the statutory burden-shifting scheme is inapplicable to Title VII retaliation claims.<sup>213</sup> ADEA retaliation claims, like ADEA discrimination claims, invoke a remedial scheme that is distinct from Title VII’s; thus, §§ 2000e-2(m) and 2000e-5(g) (2) (B) are inapplicable to ADEA retaliation claims.<sup>214</sup>

The only claims in this chart for which a contrary view might be taken are claims under the Americans with Disabilities Act (“ADA”)—but even there, such a view would not be likely to persuade the Supreme Court. To understand the effect of the 1991 Act on the ADA, a brief outline of the connections between the ADA and Title VII is helpful. Congress enacted the ADA in July 1990—after the Court’s 1989 decision in *Price Waterhouse* but before the passage of the 1991 Act.<sup>215</sup> Then as now, the ADA included the following enforcement provision:

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.<sup>216</sup>

At the time, § 2000e-5 said nothing about motivating-factor analysis; § 2000e-5(g) (2) (B) would not be added until 1991.<sup>217</sup> Thus, to the ex-

<sup>212</sup> 42 U.S.C. § 2000e-2(m), e-5(g) (2) (B) (2006).

<sup>213</sup> See, e.g., *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 552 n.7 (4th Cir. 1999) (“[Section] 107(a) of Civil Rights Act of 1991 does not expressly roll back *Price Waterhouse’s* application to retaliation claims.”); *McNutt v. Bd. of Trs. of Univ. of Ill.*, 141 F.3d 706, 709 (7th Cir. 1998) (“Congress clearly stated its decision to overrule *Price Waterhouse* only with respect to claims under § 2000e-2(m) and did not make a similar provision for retaliation claims under § 2000e-3(a).”); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 935 (3d Cir. 1997) (“[Section] 107 does not apply to retaliation cases.”); *Tanca v. Nordberg*, 98 F.3d 680, 684 (1st Cir. 1996) (“[T]he mixed motive provisions of section 107 of the 1991 Act do not apply to Title VII retaliation claims brought under section 2000e-3.”). *But see Fye*, 516 F.3d at 1225 n.5 (“[W]e have yet to decide whether [§ 2000e-2(m)] actually appl[ies] to retaliation cases, and we decline to do so today because we conclude that Ms. Fye has not presented evidence sufficient to survive summary judgment.”).

<sup>214</sup> See 29 U.S.C. § 626(b), (c) (West 2008 & Supp. 2009).

<sup>215</sup> See Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (1990).

<sup>216</sup> 42 U.S.C. § 12117(a) (2006).

<sup>217</sup> See Civil Rights Act of 1991, Pub. L. 102-166, sec. 107, § 706(g) (2) (B), 105 Stat. 1071 (1991).

tent that the 1990 Congress intended the ADA's enforcement scheme to mirror that in Title VII, one might argue that the relevant framework for mixed-motive cases would have been that set by *Price Waterhouse*, under which the same-decision affirmative defense, if established, would preclude liability altogether.<sup>218</sup>

As noted above, the 1991 Act addressed *Price Waterhouse* by amending § 2000e-2 to add, inter alia, subsection 2000e-2(m), which provides: "Except as otherwise provided in this subchapter, an unlawful employment practice is established 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."<sup>219</sup> Did this amendment directly affect the ADA? No statutory provision explicitly incorporates Section 2000e-2's standards into the ADA. The 1991 Act, however, also altered § 2000e-5 to add § 2000e-5(g)(2)(B):

On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).<sup>220</sup>

It is unclear how § 2000e-5(g)(2)(B) affects ADA claims.<sup>221</sup> Because an ADA violation would not constitute "a violation under section 2000e-2(m) of this title," one could argue that § 2000e-5(g)(2)(B)

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<sup>218</sup> See Flynn, *supra* note 50, at 2035–36 ("The 100th Congress introduced the first ADA bill, Senate Bill 2345, on April 28, 1988—six months before *Price Waterhouse* was argued . . . . The 101st Congress, which would eventually enact the ADA, forged the ADA in a legislative crucible in which *Price Waterhouse* was explicitly an element. Consideration of the ADA began on May 9, 1989—eight days after the Supreme Court handed down *Price Waterhouse* . . . .").

<sup>219</sup> 42 U.S.C. § 2000e-2(m).

<sup>220</sup> *Id.* § 2000e-5(g)(2)(B).

<sup>221</sup> See Flynn, *supra* note 50, at 2044 (arguing that "[i]t would be odd . . . to impute to a provision designed to limit remedies the power to create new substantive liability under the ADA"). *But see* *Belk v. Sw. Bell Tel. Co.*, 194 F.3d 946, 950 (8th Cir. 1999) (indicating that § 2000e-5(g)(2)(B) applies to ADA claims); *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 470 (4th Cir. 1999) (indicating that § 2000e-5(g)(2)(B) applies to ADA claims).

simply does not apply to ADA claims. That argument gains some force from the fact that the 1991 Act made a number of changes to the ADA without explicitly inserting into the ADA a provision similar to § 2000e-2(m) and without including ADA claims on the list of claims in § 2000e-2(m) itself.<sup>222</sup> On the other hand, a strong argument can be made that legislators would have understood the new § 2000e-5(g)(2)(B) to be among the “powers, remedies and procedures” available under the ADA. Consider the following passage from a 1991 House Report on a prior version of the legislation:

RELATIONSHIP TO OTHER LAWS MODELED  
AFTER TITLE VII

A number of other laws banning discrimination, including the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. S 12101 et seq. and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. S 621, et seq., are modeled after, and have been interpreted in a manner consistent with, Title VII.

The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act. For example, disparate impact claims under the ADA should be treated in the same manner as under Title VII. Thus, under the ADA, once a plaintiff makes a prima facie case of disparate impact, the burden then shifts to the defendant to demonstrate business necessity, using the same standards as under Title VII. This was the clear intent of the Committee during its consideration of the ADA.

*Similarly, mixed motive cases involving disability under the ADA should be interpreted consistent with the prohibition against all intentional discrimination in Section 5 of this Act.*

Certain sections of Title VII are explicitly cross-referenced in Subsection 107(a) of the ADA, to ensure that persons with disabilities have the same powers, remedies and procedures as under Title VII. This would include having the same remedies and statute of limitations as Title VII, as amended by this Act, and by any future amendment. This issue was specifically addressed by the Committee during its consideration of the ADA.<sup>223</sup>

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<sup>222</sup> See Civil Rights Act of 1991, Pub. L. 102-166, § 107.

<sup>223</sup> H.R. REP. NO. 102-40 (II), at 4 (1991) (footnotes omitted) (emphasis added).

In the version of the legislation this House Report describes, it was Section 5 of the Act that addressed *Price Waterhouse*.<sup>224</sup> Thus, the House Report's discussion of ADA mixed-motive claims indicates an expectation that a new statutory burden-shifting scheme would displace *Price Waterhouse* for ADA claims as well as Title VII claims.<sup>225</sup>

The *Gross* court, however, was aware of this passage in the House Report—which specifically mentions ADEA claims—and yet did not find it persuasive in determining whether to assimilate ADEA claims to Title VII's statutory mixed-motive framework. Justice Stevens' dissent specifically discusses this passage of the House Report and notes that it provides “some evidence that Congress intended the 1991 mixed-motives amendments to apply to the ADEA as well.”<sup>226</sup> Nonetheless, Justice Stevens concludes that it is “reasonabl[e]” to hold that the statutory burden-shifting structure does not apply to ADEA claims.<sup>227</sup>

One might attempt to distinguish ADA claims from ADEA claims in two ways. First, one might note that the House Report specifically mentions ADA mixed-motive claims.<sup>228</sup> Second, the ADA incorporates the provisions of § 2000e-5 whereas the ADEA does not.<sup>229</sup> It is unclear, however, that these arguments would suffice to establish (after *Gross*) that the statutory burden-shifting mechanism applies to ADA claims.

### b. *Rejecting Price Waterhouse Removes Authority for Burden-Shifting*

With respect to many of the claims listed in the chart, it will be possible to argue that the Court's rejection of *Price Waterhouse* removes any decisional support for burden-shifting. Section 1983 claims for First Amendment retaliation or for employment discrimination, however, will be unaffected by this rationale. Section 1983 provides a cause of action to persons claiming that one acting under color of state law vio-

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<sup>224</sup> As the House Report explained:

Section 5 of the Act responds to *Price Waterhouse* by reaffirming that any reliance on prejudice in making employment decisions is illegal. At the same time, the Act makes clear that, in considering the appropriate relief for such discrimination, a court shall not order the hiring, retention or promoting of a person not qualified for the position.

*Id.* at 2–3.

<sup>225</sup> *See id.* at 4.

<sup>226</sup> *Gross*, 129 S. Ct. at 2356 n.6 (Stevens, J., dissenting).

<sup>227</sup> *Id.*

<sup>228</sup> *See* H.R. REP. NO. 102-40 (II), at 4 (1991).

<sup>229</sup> *See* 42 U.S.C. § 12117(a) (2006).

lated their constitutional rights.<sup>230</sup> This Article focuses on equal protection discrimination claims and First Amendment retaliation claims, because those two types of claims are of central relevance in employment discrimination litigation under § 1983.

In contrast to all other claims discussed in this Part, the § 1983 claims discussed here in fact implicate U.S. Supreme Court holdings that direct burden-shifting in mixed-motive cases. Indeed, *Price Waterhouse* itself was modeled largely on the burden-shifting scheme set forth by the Supreme Court for First Amendment retaliation cases in *Mt. Healthy*.<sup>231</sup> Doyle, a teacher, claimed that the school board's failure to renew his contract constituted retaliation for his exercise of First Amendment rights.<sup>232</sup> Specifically, Doyle had called a local radio station to criticize a memorandum from the principal setting a dress code for teachers, and the radio station then discussed this dress code on the air.<sup>233</sup> When the school board subsequently decided not to rehire Doyle, he asked for a statement of reasons.<sup>234</sup> The ensuing response stated that Doyle displayed "a notable lack of tact in handling professional matters" and cited two examples: the call to the radio station and an incident in which Doyle "used obscene gestures to correct students in a situation in the cafeteria."<sup>235</sup>

The Supreme Court vacated the judgment below (which had ordered Doyle's reinstatement with back pay). As the unanimous Court explained:

Initially, in this case, the 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" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.<sup>236</sup>

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<sup>230</sup> See 42 U.S.C. § 1983 (West 2008 & Supp. 2009).

<sup>231</sup> See 429 U.S. at 287.

<sup>232</sup> *Id.* at 276.

<sup>233</sup> *Id.* at 282.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 282–83 & n.1.

<sup>236</sup> *Id.* at 287 (citation omitted).

The Court reasoned that this same-decision affirmative defense was necessary in order to avoid granting a windfall to the plaintiff:

A rule of causation which focuses solely on whether protected conduct played a part . . . in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.<sup>237</sup>

The Court further suggested that the defense was necessary in order to prevent an employee who merited dismissal from manufacturing a reason to challenge such dismissal:

A borderline or marginal candidate . . . ought not to be able, by engaging in [protected First Amendment] conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.<sup>238</sup>

Some two decades later, the Court applied the *Mt. Healthy* burden-shifting scheme to a race discrimination challenge to a school's admission practices.<sup>239</sup> The plaintiff in *Texas v. Lesage* challenged a university's use of race during the admissions process for a Ph.D. program.<sup>240</sup> The court of appeals rejected (as irrelevant to liability) the university's contention that it would have denied Lesage admission even under a colorblind admissions process.<sup>241</sup> The Supreme Court—in a unanimous per curiam opinion—reversed, holding that the court of appeals' view was “inconsistent with this Court's well-established framework”:

Under *Mt. Healthy* . . . even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration . . . . Our previous decisions on this point have typically involved alleged retaliation for protected First Amendment activity rather than racial discrimination, but that distinction is immaterial. The underlying principle is the

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<sup>237</sup> 429 U.S. at 285.

<sup>238</sup> *Id.* at 286.

<sup>239</sup> *Texas v. Lesage*, 528 U.S. 18, 19, 20–21 (1999) (per curiam).

<sup>240</sup> *Id.* at 19.

<sup>241</sup> *See id.* at 20.

same: The government can avoid liability by proving that it would have made the same decision without the impermissible motive.<sup>242</sup>

Given *Lesage's* sweeping language, it seems likely that its holding applies to race discrimination claims concerning employment as well as those concerning school admissions. The *Lesage* Court did limit its holding by specifying that forward-looking claims for injunctive relief are not subject to the same-decision defense.<sup>243</sup> But this limitation is not of concern here because claims for injunctive relief would not ordinarily be tried to the jury, and because this Article focuses on whether burden-shifting instructions should be given to juries.

### c. *Statutory Language Governing the Claim Forecloses Burden-Shifting*

As the chart indicates, a number of types of anti-retaliation claims are grounded in statutes containing causation language that uses the word “because.” Title VII’s anti-retaliation provision prohibits an employer from “discriminat[ing] against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”<sup>244</sup> The ADEA’s anti-retaliation provision contains similar language,<sup>245</sup> as does the ADA’s anti-retaliation provision.<sup>246</sup> 29 U.S.C. § 215(a)(3)—which protects those bringing complaints under the Equal Pay Act (“EPA”) as well as those bringing complaints under the Fair Labor Standards Act (“FLSA”)—makes it unlawful “to dis-

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<sup>242</sup> *Id.* at 20–21. “Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983.” *Id.* at 21.

<sup>243</sup> *See id.* at 21 (“Of course, a plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant injury in such cases is ‘the inability to compete on an equal footing.’”).

<sup>244</sup> 42 U.S.C. § 2000e-3(a) (2006).

<sup>245</sup> 29 U.S.C. § 623(d) (West 2008 & Supp. 2009) (prohibiting an employer from discriminating against an employee “because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter”).

<sup>246</sup> 42 U.S.C. § 12203(a) (2006) (“No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.”).

charge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding . . . .”<sup>247</sup> The Family and Medical Leave Act (“FMLA”) includes an anti-retaliation provision featuring language similar to that in the FLSA.<sup>248</sup> As to all of these claims, the *Gross* Court’s reasoning concerning the term “because of” in the ADEA would seem to apply with equal force.

Two types of claims—under the FMLA and the ADA—might not be as clearly subject to the same reasoning, but the distinction is not a strong one. 29 U.S.C. § 2615(a)(2) makes it “unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by” the FMLA’s leave provisions.<sup>249</sup> It might be possible to argue that “for opposing” could be read differently than “because.” It seems relatively unlikely, however, that much would turn on the distinction between “for opposing” and “because.”

The ADA forbids discrimination “on the basis of” disability, and it defines such discrimination to include, inter alia, “limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.”<sup>250</sup> Does the ADA’s use of the term “on the basis of” permit a broader reading than “because of”?

To interpret this provision, it is worth comparing its text to the text of the Rehabilitation Act. The Rehabilitation Act provides in part:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, *solely by reason of* her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Fed-

<sup>247</sup> 29 U.S.C. § 215(a) (2006).

<sup>248</sup> The FMLA “entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons, including the onset of a ‘serious health condition’ in an employee’s spouse, child, or parent.” *Nev. Dep’t. of Human Res. v. Hibbs*, 538 U.S. 721, 724 (2003). 29 U.S.C. § 2615(b) makes it “unlawful for any person to discharge or in any other manner discriminate against any individual because such individual” has, inter alia, filed a charge or instituted a proceeding under the FMLA’s leave provisions. 29 U.S.C. § 2615(b) (2006).

<sup>249</sup> 29 U.S.C. § 2615(a)(2); *see Richardson v. Monitronics Intern., Inc.*, 434 F.3d 327, 335 (5th Cir. 2005) (holding mixed motive analysis applicable to FMLA claim under § 2615(a)).

<sup>250</sup> 42 U.S.C. § 12112(a), (b)(1) (West 2008).

eral financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.<sup>251</sup>

The contrast between this language and that in the ADA suggests that the ADA bars discrimination even if the adverse act is not motivated solely by the disability. Thus, commentators have argued that the contrast in language between the ADA and the Rehabilitation Act counsels against applying the “solely by reason of” standard to the ADA.<sup>252</sup> A comparison between the ADA and the Rehabilitation Act indicates that an ADA plaintiff need not show that the disability was the sole cause of the employer’s action. That comparison, however, does not establish whether the plaintiff bears the burden of proving but-for causation. Here, as in the ADEA, the statutory language includes the term “because of.” In short, although one might attempt to distinguish the language that grounds these FMLA and ADA claims from that analyzed in *Gross*, it is not clear that the Court would find the distinction salient.

By contrast, the textual analysis differs dramatically with respect to discrimination claims or retaliation claims brought under 42 U.S.C. § 1981.<sup>253</sup> Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.<sup>254</sup>

Although § 1981 does not explicitly address retaliation for the assertion of these rights, the Supreme Court held in *CBOCS West, Inc. v. Humphries* that retaliation claims can be brought under § 1981.<sup>255</sup> The *CBOCS* Court reasoned as follows:

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<sup>251</sup> 29 U.S.C. § 794(a) (2006) (emphasis added).

<sup>252</sup> See, e.g., Seam Park, *Curing Causation: Justifying a “Motivating-Factor” Standard Under the ADA*, 32 FLA. ST. U. L. REV. 257, 267 (2004) (quoting 29 U.S.C § 794 (2000)).

<sup>253</sup> See 42 U.S.C. § 1981 (2006).

<sup>254</sup> 42 U.S.C. § 1981(a). For a suggested interpretation of this statutory language, see Judith Olans Brown et al., *Treating Blacks as if They Were White: Problems of Definition and Proof in Section 1982 Cases*, 124 U. PA. L. REV. 1, 28 (1975).

<sup>255</sup> See 128 S. Ct. 1951, 1961 (2008).

(1) in 1969, *Sullivan* [v. Little Hunting Park, Inc., 396 U.S. 229 (1969)] . . . recognized that [42 U.S.C.] § 1982 encompasses a retaliation action; (2) this Court has long interpreted §§ 1981 and 1982 alike; (3) in 1989, *Patterson* [v. McLean Credit Union, 491 U.S. 164 (1989)], without mention of retaliation, narrowed § 1981 by excluding from its scope conduct, namely post-contract-formation conduct, where retaliation would most likely be found; but in 1991, Congress enacted legislation [the 1991 Act] that superseded *Patterson* and explicitly defined the scope of § 1981 to include post-contract-formation conduct; and (4) since 1991, the lower courts have uniformly interpreted § 1981 as encompassing retaliation actions.<sup>256</sup>

Section 1981 contains no terms similar to the ADEA's "because of," and thus nothing in the text of § 1981 forecloses the application of a burden-shifting framework.<sup>257</sup> The same is true for § 1983 claims: As the *Gross* Court itself noted, such claims involve no statutory language that would foreclose a burden-shifting approach.<sup>258</sup>

#### d. *The Effect of the 1991 Civil Rights Act*

Finally, when one considers the *Gross* Court's suggestion that the 1991 Act forecloses the continued application of *Price Waterhouse* burden-shifting, one finds only two claims to which that assertion seems strongly applicable. (Of course, as noted above, this line of reasoning seems implausible as to *any* claims, even those under the ADEA; but, for the purpose of predicting *Gross*'s reach, it is necessary to take the contention at face value.)

For Title VII retaliation claims, as for the ADEA claims *Gross* addressed, it seems relatively uncontroversial to conclude that §§ 2000e-2(m) and 2000e-5(g)(2)(B) do not apply. But, as Part I.A.4. discussed, the *Gross* Court took that statutory argument a step further, maintain-

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<sup>256</sup> *Id.* at 1957–58.

<sup>257</sup> See Joanna L. Grossman, *Making a Federal Case Out of It: Section 1981 and At-Will Employment*, 67 BROOK. L. REV. 329, 371 (2001) ("Although it seems clear that § 1981 plaintiffs may rely on a mixed-motive theory to prove discrimination, it is not clear whether the pre- or post-1991 rules regarding liability and available remedies will be applied. The Civil Rights Act of 1991, which changed the mixed-motive proof structure, did not explicitly amend § 1981. Most circuits, therefore, continue to hold that a defendant who makes the appropriate showing will be excused from both liability and damages.") (citation omitted).

<sup>258</sup> See 129 S. Ct. at 2352 n.6 ("[T]he constitutional cases such as *Mt. Healthy* have no bearing on the correct interpretation of ADEA claims, which are governed by statutory text.").

ing that by failing to encompass ADEA claims within the statutory burden-shifting framework, Congress also foreclosed the application of the *Price Waterhouse* framework.<sup>259</sup> Interestingly, when courts have held the statutory burden-shifting framework inapplicable to Title VII retaliation claims they have tended to conclude from that fact that the *Price Waterhouse* framework applies instead—which demonstrates that the *Gross* Court’s contrary inference is hardly intuitive.<sup>260</sup> But, if the *Gross* majority found this argument persuasive in the context of ADEA discrimination claims, it seems likely that would also find it so in the context of Title VII retaliation claims. For similar reasons, the *Gross* Court’s contention that the 1991 Act’s statutory burden-shifting provision forecloses the application of *Price Waterhouse* burden-shifting to ADEA discrimination claims would seem to apply with equal force to ADEA retaliation claims.

For all the other claims the chart covers, however, the application of this rationale seems more or less questionable. As noted in Part I.A.4, the premise for the *Gross* Court’s contention that *Price Waterhouse* burden-shifting is foreclosed by the 1991 Act’s statutory burden-shifting scheme was that the 1991 Act amended the ADEA without adding to the ADEA a statutory burden-shifting framework similar to that in §§ 2000e-2(m) and 2000e-5(g)(2)(B).<sup>261</sup> That premise is inapplicable to FLSA and EPA retaliation claims, because the 1991 Act left the FLSA and the EPA untouched.<sup>262</sup> Likewise, the 1991 Act neither amended § 1983 nor purported to affect the standards of proof for constitutional claims.<sup>263</sup>

As to § 1981 claims, the absence of any language in the text of § 1981 that could be read to suggest but-for causation also rebuts the contention that the 1991 Act itself forecloses burden-shifting for such claims.<sup>264</sup> In *Gross*, the majority viewed the ADEA’s “because of” language as clear evidence of a but-for causation standard.<sup>265</sup> One can argue that the *Gross* majority’s interpretation of the 1991 Act’s effect on the ADEA depends in part on the parallel between the “because of”

<sup>259</sup> See *supra* notes 67–74 and accompanying text.

<sup>260</sup> See, e.g., *McNutt*, 141 F.3d at 709 (concluding that statutory burden-shifting does not apply to Title VII retaliation claims and noting that “[i]n order to prove a Title VII violation . . . based on retaliation, *Price Waterhouse* still requires plaintiffs to establish that the alleged discrimination was the ‘but for’ cause of a disputed employment action”).

<sup>261</sup> See *supra* notes 67–74 and accompanying text.

<sup>262</sup> See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

<sup>263</sup> See *id.*

<sup>264</sup> See 42 U.S.C. § 1981 (2006).

<sup>265</sup> See 129 S. Ct. at 2350–51.

language in the ADEA and the same “because of” language in Title VII.<sup>266</sup> That is to say, if the “because of” language so strongly denotes but-for causation, then *that* would constitute a significant part of the reason why—in the *Gross* Court’s view—it was necessary in amending Title VII not only to add § 2000e-5(g)(2)(B) but also to add § 2000e-2(m). Seen in that light, the failure to add similar provisions to § 1981 does not evince a congressional aversion to burden-shifting—it indicates, if anything, the lack of a parallel textual issue with respect to § 1981.

Part I.B.3.a. noted that the legislative history of the 1991 Act suggests a view on the part of some legislators that a statutory burden-shifting mechanism should apply to ADA claims.<sup>267</sup> That legislative history probably would not convince the Court to apply statutory burden-shifting to such claims. But the history does provide particular reason to doubt the applicability of the *Gross* Court’s further contention concerning the 1991 Act—namely, that the Act provides a reason to foreclose the application of *Price Waterhouse* burden-shifting as well. As discussed above, that argument seems weak even as to the ADEA. But as to the ADA, the argument seems particularly dubious. If anything, the House Report indicates that at least some legislators wanted to afford plaintiffs a more favorable burden-shifting mechanism than that delineated in *Price Waterhouse*.<sup>268</sup> Although those legislators may not have succeeded in effecting that change in the text of the statute, it would be odd to conclude that the statutory text in fact did the opposite—i.e., that it eliminated all burden-shifting for ADA claims (even the more limited burden-shifting framework delineated in *Price Waterhouse*).

The argument that the 1991 Act’s burden-shifting framework forecloses *Price Waterhouse* burden-shifting plays out somewhat differently for FMLA claims than it did in *Gross* with respect to ADEA claims. The FMLA was not enacted until 1993.<sup>269</sup> Prior versions, however, were introduced even before the Court’s decision in *Price Waterhouse*.<sup>270</sup> Indeed, precursors of the relevant language—“for opposing” in § 2615(a)(2) and “because” in § 2615(b)—can be found both in a bill that was under consideration prior to the Supreme Court’s *Price Waterhouse* decision, and in a bill that was under consideration between the time of that deci-

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<sup>266</sup> That language in Title VII is currently codified in 42 U.S.C. § 2000e-2(a)(1) (2006).

<sup>267</sup> See *supra* notes 212–229 and accompanying text.

<sup>268</sup> See H.R. REP. NO. 102-40 (II), at 4 (1991).

<sup>269</sup> Family and Medical Leave Act of 1993, Pub. L. 103-3 (1993).

<sup>270</sup> See H.R. REP. NO. 103-8(I), at 18–19 (1993), 1993 WL 30779 (giving history of prior versions).

sion and the enactment of the 1991 Civil Rights Act.<sup>271</sup> The relevant language, therefore, pre-dated the congressional debates (concerning *Price Waterhouse*) that led to the enactment of the 1991 Act.<sup>272</sup> What can be inferred from Congress's failure to include a statutory mixed-motive burden-shifting mechanism in the FMLA? On the one hand, it might still be argued that Congress knew how to do so and did not—suggesting an intent not to subject FMLA claims to the same sort of mechanism set by §§ 2000e-2(m) and 2000e-5(g) (2) (B). And, if the line of reasoning in *Gross* is applied (despite the weaknesses identified above in Part I.A.4), one might even argue that such a congressional choice indicates a desire not to apply *Price Waterhouse* burden-shifting. On the other hand, to the extent that the *Gross* majority's inferences depended on the fact that Congress amended the ADEA *in the 1991 Act* without inserting a statutory burden-shifting mechanism, the FMLA would be distinguishable because it was not at issue in the 1991 Act.

Something more can be gleaned from the FMLA's legislative history. A Senate report explains that § 2615(a)(2) is modeled on Title VII's anti-retaliation provision and that § 2615(b) is modeled on the FLSA's anti-retaliation provision.<sup>273</sup> It might, therefore, be reasonable to conclude that Congress intended to incorporate into those sections whatever proof framework existed for the claims on which each provision was modeled. As to § 2615(b), that might lead to the conclusion that the 1991 Act ought not to be taken to foreclose application of a *Price Waterhouse* burden-shifting mechanism. As to § 2615(a)(2), the opposite inference might be drawn from the analysis in Part I.A.1. above concerning Title VII retaliation claims.

Where does this analysis take us? One can conclude that some types of claims—most obviously, § 1983 claims—are unlikely to be affected by *Gross*. At the other extreme, certain claims—such as retaliation claims under the ADEA or Title VII—seem subject to the rationales applied by the *Gross* Court; as a result, courts may conclude that burden-shifting is no longer available for such claims. Such an outcome will be a significant change from prior law, given that at least five circuits previously viewed Title VII retaliation claims as eligible for bur-

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<sup>271</sup> See H.R. REP. NO. 100-511, pt. 2, § 107(a)(2), (b) (1988); S. REP. NO. 101-77, at § 107(a)(2), (b) (1989).

<sup>272</sup> See H.R. REP. NO. 100-511, pt. 2, § 107(a)(2), (b); S. REP. NO. 101-77, at § 107(a)(2), (b).

<sup>273</sup> See S. REP. NO. 103-3, at 34, 35 (1993).

den-shifting.<sup>274</sup> The applicability of *Gross* is less clear for other types of claims, with the result that courts may be uncertain as to the availability of burden-shifting.<sup>275</sup>

There is, of course, the problem that a mechanical application of the *Gross* rationales to other types of claims may be inappropriate, because in each instance there may be additional factors—not present in *Gross*—that could change the analysis. The *Gross* Court’s repudiation of *Price Waterhouse*, however, could affect almost all the claims discussed here (although, unless the Court were also inclined to overrule *Mt. Healthy* and *Lesage*, it would not affect § 1983 claims).

In sum, although *Gross* simplified the analysis of ADEA discrimination claims (by holding burden-shifting categorically inapplicable) *Gross* cannot be said to have simplified the landscape of employment discrimination generally. *Gross* will cause a period of uncertainty concerning the availability of burden-shifting for other types of claims. What does seem clear is that, as the *Gross* dissenters noted, the decision will increase the likelihood that when multiple claims are tried together, two different burden frameworks will apply.<sup>276</sup>

#### 4. Confusion When Multiple Claims Are Subject to Different Frameworks

Many employment discrimination cases involve more than one type of claim.<sup>277</sup> A plaintiff might allege a Title VII retaliation claim in

<sup>274</sup> See, e.g., *Fye*, 516 F.3d at 1225 & n.5 (noting availability of mixed-motive framework for Title VII retaliation claims, but declining to decide whether § 2000e-2(m) applies to such claims); *Speedy v. Rexnord Corp.*, 243 F.3d 397, 402 (7th Cir. 2001) (applying *Price Waterhouse* framework to a Title VII retaliation claim); *Kubicko*, 181 F.3d at 546 (same); *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997) (“[W]e analyze ADA retaliation claims under the same framework we employ for retaliation claims arising under Title VII . . . . This framework will vary depending on whether the suit is characterized as a ‘pretext’ suit or a ‘mixed motives’ suit.”); *Tanca v. Nordberg*, 98 F.3d 680, 685 (1st Cir. 1996) (applying *Price Waterhouse* framework to a Title VII retaliation claim); see also *George*, *supra* note 183 at 462–63 (“[T]he *Price Waterhouse* approach presumably remains good law in considering retaliation cases . . . .”). But see *Van Horn v. Best Buy Stores, L.P.*, 526 F.3d 1144, 1148 (8th Cir. 2008) (“[T]he *Price Waterhouse* standard does not apply to retaliation claims.”).

<sup>275</sup> For some of the claims discussed here, burden-shifting may not have been a widespread practice even before *Gross*. In particular, it appears that no court of appeals has held *Price Waterhouse* burden-shifting applicable to EPA retaliation claims or FLSA retaliation claims.

<sup>276</sup> See *Katz*, *supra* note 16, at 868 (discussing the “practical benefits”—including for jury instructions—of an approach that treats claims under different statutes the same way).

<sup>277</sup> This fact is evident in sources that list the percentage of employment discrimination cases that include various types of claims: when one sums the percentages, they

addition to her Title VII discrimination claim. A race discrimination plaintiff might sue under both Title VII and § 1981.<sup>278</sup> A government employee might bring a § 1983 claim as well as a Title VII claim or § 1981 claim.<sup>279</sup> To the extent that different claims are subject to different burden-of-proof frameworks, a jury might be asked to decide one claim under a burden-retaining instruction and another under a burden-shifting instruction.

As an example, consider Title VII retaliation claims. Judging from filings with the Equal Employment Opportunity Commission (“EEOC”),<sup>280</sup> Title VII plaintiffs are bringing retaliation claims with increasing frequency: the percentage of EEOC filings that included Title VII retaliation claims rose from roughly 20% in fiscal year 1997 to roughly 30% in fiscal year 2008.<sup>281</sup> It seems fair to infer both that law-

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amount to well over 100%. See, e.g., John J. Donohue III & Peter Siegelman, *Law and Macroeconomics: Employment Discrimination Litigation over the Business Cycle*, 66 S. CAL. L. REV. 709, 715 tbl. 1 (1993) (reporting data from an American Bar Foundation survey of employment civil rights cases filed in seven federal district courts from 1972 to 1987 and listing percentage of cases featuring, *inter alia*, Title VII claims (75.5%); § 1981 claims (33.1%); § 1983 claims (13.6%); and ADEA claims (10.3%)).

<sup>278</sup> Theodore Eisenberg and Stewart Schwab “examined the courthouse record in every § 1981 case filed in fiscal 1980–81 in the Central District of California, the Eastern District of Pennsylvania, and the Northern District of Georgia.” Theodore Eisenberg & Stewart Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 598 (1988). They found

considerable but not complete overlap between title VII and section 1981. In 1980–81 in the three districts, plaintiffs filed 321 complaints of racial discrimination in employment. Two hundred seventy (84%) filed a title VII claim. Of the title VII claims, almost one-half (133) also had a section 1981 claim.

*Id.* at 602–03 (citation omitted).

<sup>279</sup> For example, in their study of § 1981 cases filed in fiscal 1980–81, Eisenberg and Schwab found that of forty-one cases that involved claims under § 1981 but not Title VII, “[e]ven of these cases were brought against government defendants and also relied on section 1983.” Eisenberg & Schwab, *supra* note 278, at 603.

<sup>280</sup> EEOC charge filings are of course an indirect measure of the relative frequency of various types of claims in *lawsuits*, because most charges filed with the EEOC do not result in lawsuits. As a rough point of comparison, in fiscal year 2007 the Administrative Office of the U.S. Courts reports that 13,375 “employment” civil rights suits were filed and 665 “accommodations” civil rights suits were filed. See 2007 Judicial Facts and Figures, at tbl. 4.4, <http://www.uscourts.gov/judicialfactsfigures/2007.html> (last visited Mar. 7, 2010). The EEOC reports that over 75,000 charges were filed with it in every fiscal year from 1997 through 2007. See U.S. Equal Employment Opportunity Comm’n, Charge Statistics FY 1997 Through FY 2008, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Dec. 15, 2009).

<sup>281</sup> See Charge Statistics FY 1997 Through FY 2008, *supra* note 280. The absolute number of Title VII retaliation charges also rose, from 16,394 in fiscal year 1997 to 28,698 in fiscal year 2008. *Id.*; see also George, *supra* note 183, at 441 (“Retaliation charges filed with

suits involving retaliation claims are rising in frequency and that plaintiffs are combining discrimination and retaliation claims relatively often.<sup>282</sup> For example, one study of reported opinions on racial harassment claims found that in almost half of the cases studied the plaintiff also asserted a retaliation claim.<sup>283</sup> In some subset of the cases that involve both discrimination and retaliation claims, both types of claims will survive motions for summary judgment and judgment as a matter of law and will be submitted to a jury.

How will the court instruct the jury in such cases? For the Title VII discrimination claim, the statutory burden-shifting mechanism will be potentially available. As noted in Part I.B.3.a., a number of courts will treat the Title VII retaliation claim differently, holding that the statutory burden-shifting mechanism is unavailable.<sup>284</sup> Nonetheless, prior to *Gross*, it seemed clear that in some cases the *Price Waterhouse* burden-shifting mechanism would be available for the retaliation claim—although the availability of such burden-shifting might depend on the uncertain doctrinal contours discussed above in Part I.B.2.<sup>285</sup> In some of these double-claim trials, the jury would receive relatively consistent causation instructions on the two claims, in the sense that a motivating-factor instruction would be provided on each claim. The nature of the same-decision defense would, of course, differ as between the Title VII discrimination claim, where the same-decision defense would go only to remedies under § 2000e-5(g)(2)(B), and the Title VII retaliation claim, where the same-decision defense would go to liability under *Price*

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the Equal Employment Opportunity Commission (EEOC), the enforcement agency for Title VII, have been steadily rising, doubling in the last fifteen years.”); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 690 & fig. 1 (reviewing EEOC charge filing data from 1992 to 2002 and observing that “[t]wo types of discrimination clearly rise in prominence over the period: retaliation, which grows from 15.3% of individual complaints to 27.5% of individual complaints, and disability”).

<sup>282</sup> Nielsen and Nelson, noting the rise in retaliation claims during the period from 1992 to 2002, posit “an increasing tendency for plaintiffs (and their lawyers) to add retaliation as a claim in discrimination disputes” as one possible reason for the rise, but also list other possible reasons and caution that they lack the data to draw a conclusion. Nielsen & Nelson, *supra* note 281, at 690.

<sup>283</sup> Pat Chew and Robert Kelley studied 260 opinions in racial-harassment cases from six circuits during the years up to and including 2002. Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 53–54 (2006). They found that the plaintiffs in nearly half (49.2%) of the cases also asserted retaliation claims. *Id.* at 80, tbl. 11. Although the study encompassed § 1981 claims and § 1983 claims as well as Title VII claims, 87.7% of the cases involved Title VII claims. *Id.*

<sup>284</sup> See *supra* note 213 and accompanying text.

<sup>285</sup> See *supra* notes 108–208 and accompanying text.

*Waterhouse*. But at least the starting point—the motivating-factor instruction—would be parallel.

The analysis in Part I.B.3. provides some reason to wonder whether courts will continue to apply *Price Waterhouse* burden-shifting to Title VII retaliation claims, because all the rationales relied upon by the *Gross* Court with respect to ADEA discrimination claims seem to apply with equal force to Title VII retaliation claims.<sup>286</sup> But before courts extend *Gross* to Title VII retaliation claims, it would make sense for them to consider whether such an extension truly serves the interests articulated by the Court in *Gross*.<sup>287</sup> Although the *Gross* Court’s concern that burden-shifting instructions are inherently confusing seems unsupported,<sup>288</sup> it is worthwhile to consider the costs of confusion that will arise from giving jurors a burden-shifting instruction on one claim while giving them a burden-retaining instruction on the other. Such contrasting instructions do seem potentially confusing, and it seems fair to predict that they will be given more often if *Gross* is extended to Title VII retaliation claims.<sup>289</sup>

Other permutations of the problem will arise. In some cases, a plaintiff may assert a Title VII discrimination claim and an ADEA discrimination claim.<sup>290</sup> After *Gross*, this pairing will predictably result in contrasting causation instructions whenever the Title VII discrimination claim qualifies for the statutory burden-shifting mechanism.<sup>291</sup> In other cases, § 1981 claims may be paired with Title VII discrimination claims or with § 1983 discrimination claims.<sup>292</sup> As was previously noted,

<sup>286</sup> See *supra* notes 209–275 and accompanying text.

<sup>287</sup> See *Gross*, 129 S. Ct. at 2352.

<sup>288</sup> See *supra* notes 79–107 and accompanying text.

<sup>289</sup> I say “more often” advisedly, because even if the same approach were to apply to both Title VII discrimination claims and Title VII retaliation claims, it would still be theoretically possible for a burden-shifting instruction to be given on one claim and a burden-retaining instruction to be given on the other. So long as the relevant scheme is one in which not all cases qualify for a burden-shifting instruction, there may exist fact patterns that justify a burden-shifting instruction for one claim but not for the other.

<sup>290</sup> For rough evidence that this pairing sometimes occurs in actual litigation, I ran the following search in the U.S. District Courts Cases (“DCT”) database on Westlaw: ASSERT! /S “TITLE VII” /S ADEA. As of August 3, 2009, the search retrieved 865 documents.

<sup>291</sup> See *Gross*, 129 S. Ct. at 2357 (Stevens, J., dissenting) (“Were the Court truly worried about difficulties faced by trial courts and juries, moreover, it would not reach today’s decision, which will further complicate every case in which a plaintiff raises both ADEA and Title VII claims.”).

<sup>292</sup> See Grossman, *supra* note 257, at 377–78 (describing her “review of all district court decisions within the Second Circuit in 1999 and 2000, in which a § 1981 claim is raised” and reporting that “[s]ixty-nine percent of the cases including a § 1981 claim also included a Title VII claim. Section 1981 claims were also coupled with § 1983 claims (31%),

Title VII discrimination claims are eligible for statutory burden-shifting.<sup>293</sup> Section 1983 discrimination claims are eligible for burden-shifting instructions under *Mt. Healthy*, and as Part I.B.3 discussed, there is no reason to think that *Gross* will change that.<sup>294</sup> As Part I.B.3 also notes, two of the key rationales relied upon in *Gross* do not apply to § 1981 claims, and thus there is reason to doubt that *Gross* will be extended to such claims.<sup>295</sup> From the perspective of jury comprehension, that seems like a good thing in light of the overlap in some cases between § 1981 claims and either Title VII or § 1983 claims.

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This Part noted that the *Gross* Court adduced four rationales in support of its conclusion that burden-shifting on causation is impermissible under the ADEA. By revisiting those rationales briefly, one can see that three of them support the result in *Gross* only if one accepts the view that the *Price Waterhouse* burden-shifting approach has been discredited. Take first the Court's argument that the ADEA's language forecloses burden-shifting; *Price Waterhouse* addressed materially similar language in Title VII and reached the opposite conclusion. Next, take the Court's conclusion that the statutory burden-shifting mechanism does not apply to ADEA cases; although reasonable, this argument does not in itself foreclose the application of the non-statutory *Price Waterhouse* burden-shifting. Admittedly, one rationale in *Gross* stands independent of the merits of *Price Waterhouse*. If the *Gross* Court were correct that the 1991 Act itself forecloses the continued application of *Price Waterhouse* burden-shifting for claims other than Title VII discrimination claims, that conclusion would support the result in *Gross* even if *Price Waterhouse* were not otherwise discredited. However, as discussed in Part I.A.4, it seems implausible that the 1991 Act was meant to foreclose *Price Waterhouse* burden-shifting for ADEA claims.<sup>296</sup> And, as noted in Part I.B.3, such an argument is even less plausible when applied to a number of other types of employment discrimination claims.<sup>297</sup>

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§ 1985 claims (18%), and related state law claims (29%)"). Professor Grossman points out that "[w]here plaintiffs are protected by both Title VII and § 1981, the latter may be used to hold the individual discriminator liable." *Id.* at 378.

<sup>293</sup> See *supra* notes 3–8 and accompanying text.

<sup>294</sup> See *Mt. Healthy*, 429 U.S. at 287; *supra* notes 209–275 and accompanying text.

<sup>295</sup> See *supra* notes 209–275 and accompanying text.

<sup>296</sup> See *supra* notes 67–74 and accompanying text.

<sup>297</sup> See *supra* notes 209–275 and accompanying text.

In sum, the majority in *Gross* adduced one implausible rationale and two other rationales that depend (for their force) on the view that *Price Waterhouse* has been discredited. And the *Gross* Court's central support for the proposition that the *Price Waterhouse* approach has been discredited was the assertion that *Price Waterhouse* burden-shifting causes confusion. Part I.B. examined this assertion in detail.<sup>298</sup> Part I.B.1 argued that the *Gross* Court failed to adduce persuasive support for the proposition that burden-shifting instructions are inherently confusing to juries.<sup>299</sup> To the extent that *Price Waterhouse* burden-shifting causes confusion, it suggested that the relevant confusion arises from two other sources. As Part I.B.2 noted, much of the confusion arises from the Court's failure to provide clear guidance to district courts concerning how to tell when to use a burden-shifting instruction (as opposed to a burden-retaining instruction).<sup>300</sup> Part I.B.3 observed that a different sort of confusion arises when more than one claim is sent to the jury and the causation instructions on one claim differ from those on the other.<sup>301</sup>

When considered as rationales for repudiating the twenty-year-old *Price Waterhouse* burden-shifting practice, these concerns over confusion are at best a wash. It is true that *Gross* removed confusion over burden-shifting in the ADEA context, but outlawing burden-shifting was not the only available option for addressing concerns over trial-court confusion. Meanwhile, the decision in *Gross* will increase uncertainty, at least in the short term, concerning the availability of burden-shifting for various other employment discrimination claims. But despite this uncertainty, it does seem clear that the holding in *Gross* will increase the likelihood that cases will be tried to juries on multiple claims that carry different burden frameworks. I therefore suggest that—at least when one takes the arguments offered on the face of the opinion—the *Gross* majority failed to carry its burden of showing that *Price Waterhouse* should be abandoned.

## II. GROSS AND POLICY CONSIDERATIONS

Part I asserted that the reasoning in *Gross v. FBL Financial Services, Inc.* fails to satisfy.<sup>302</sup> The Court's arguments based on statutory text and

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<sup>298</sup> See *supra* notes 75–301 and accompanying text.

<sup>299</sup> See *supra* notes 79–107 and accompanying text.

<sup>300</sup> See *supra* notes 108–208 and accompanying text.

<sup>301</sup> See *supra* notes 209–275 and accompanying text.

<sup>302</sup> See *supra* notes 23–301 and accompanying text.

concerns about judicial administration do not provide persuasive grounds for abandoning *Price Waterhouse* burden-shifting. Is it possible that members of the Court were motivated in part by unstated assumptions concerning the realities of employment discrimination litigation? Were they responding to concerns that discrimination claims generally are too easy to assert, or too readily won? Were they proceeding from a view that age discrimination claims, in particular, warrant more restrictive treatment? No suggestion of such reasoning appears on the face of the majority opinion (although a stray remark by Justice Alito at oral argument suggests that some of these considerations might have crossed the mind of at least one justice).<sup>303</sup> Nor, in fact, does Justice Stevens's dissent resort to any countervailing assertions concerning the challenges faced by discrimination plaintiffs.<sup>304</sup> Justice Breyer, writing for three justices, did argue that information asymmetries support the application of burden-shifting.<sup>305</sup> But apart from that suggestion, the opinions in *Gross* are strikingly devoid of references to the dynamics of employment discrimination litigation.

This Part briefly surveys the rich literature concerning those dynamics and their implications for the choice among burden frameworks. To illustrate the (perhaps obvious) point that such choices have been influenced by justices' views of the merit and dynamics of litigation concerning the relevant claim, Part II first recounts, in Part II.A., evidence from the files of Justice Blackmun concerning the development of the *Mt. Healthy* burden-shifting framework.<sup>306</sup> Part II.B. surveys data that might bear upon the calibration of employment discrimination litigation today.<sup>307</sup> If, as Justice O'Connor suggested during the deliberations on *Price Waterhouse*, the choice of a burden-shifting approach is "neither required by, nor prohibited by" the language of the relevant statutes, what considerations might one weigh in determining how best to further the goals of the statutory scheme?<sup>308</sup> In this regard,

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<sup>303</sup> See *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2346–52 (2009); Transcript of Oral Argument, *supra* note 108, at \*47 (Justice Alito: "[I]sn't age more closely correlated with legitimate reasons for employment discrimination than race and other factors that are proscribed by Title VII?").

<sup>304</sup> See *Gross*, 129 S. Ct. at 2352–58 (Stevens, J., dissenting).

<sup>305</sup> See *Gross*, 129 S. Ct. at 2359 (Breyer, J., dissenting).

<sup>306</sup> See *infra* notes 310–342 and accompanying text.

<sup>307</sup> See *infra* notes 343–399 and accompanying text.

<sup>308</sup> Memorandum from Justice O'Connor to Justice Brennan, *supra* note 138. For a question premised on a similar possibility, see Transcript of Oral Argument, *supra* note 108, at \*46 (Justice Kennedy: "Let's—let's assume we have authority to incorporate the Title VII jurisprudence into the ADEA area as a matter of choice. Are there reasons why

it is also worth noting the circumscribed nature of the question as framed by both the *Price Waterhouse* and the *Gross* Courts: in each instance, the choice is seen as whether or not to shift the burden on liability, and in both instances, the most plaintiff-friendly position is one that gives the defendant a complete defense to liability. Part II.C. broadens the focus to acknowledge proposals for a more extensive re-orientation of the burden framework.<sup>309</sup>

### A. *Mining* Mt. Healthy

An examination of mixed-motive burden-shifting in the late 1970s reveals that the test began its Supreme Court career as a test favored by justices seeking to curb constitutional claims.

As many commentators have observed, the *Price Waterhouse* Court drew the idea of burden-shifting from prior decisions in other contexts, most prominently from the Court's 1977 decision in *Mt. Healthy City School District Board of Education v. Doyle*.<sup>310</sup> As noted above, Doyle was a schoolteacher who brought a First Amendment retaliation claim after the school district failed to renew his teaching contract.<sup>311</sup> The first of the "questions presented" in *Mt. Healthy* shows why this case involved a question of mixed motives:

Whether a Board of Education can be forced to give a continuing contract to a non-tenured teacher it considers too immature for the position, if one of the many factors on which the Board's decision is based is a telephone call to a local radio station, such call allegedly being within the First Amendment rights of the teacher?<sup>312</sup>

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there should be distinctions between the two regimes? . . . Are there reasons of administration or fairness . . . [?]").

<sup>309</sup> See *infra* notes 400–427 and accompanying text.

<sup>310</sup> See, e.g., Alfred W. Blumrosen, *Society in Transition II: Price Waterhouse and the Individual Employment Discrimination Case*, 42 RUTGERS L. REV. 1023, 1035 (1990) ("The *Mt. Healthy* precedent influenced the *Price Waterhouse* opinions in the Supreme Court and in the courts below, and the arguments of the parties. Despite all this attention, none of the Justices examined whether it was appropriate to apply *Mt. Healthy* at all as a precedent under Title VII."). For a discussion of the Supreme Court's treatment of causation issues in Title VII class actions, see Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 302–04 (1982).

<sup>311</sup> *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 276 (1977).

<sup>312</sup> Brief for the Petitioner at \*4, *Mt. Healthy*, 429 U.S. 274 (No. 75-1278), 1976 WL 194371.

*Mt. Healthy* was a complex case that presented a range of unsettled issues for the Court's decision. Before even reaching the merits of the case, the Court had to resolve a question concerning the amount-in-controversy requirement,<sup>313</sup> a claim that the school board was not a "person" for purposes of § 1983,<sup>314</sup> and an assertion of sovereign immunity.<sup>315</sup> Thus, the question of burden-shifting was not the only focus of debate among the justices.<sup>316</sup> Nonetheless, the evidence in Justice Blackmun's case file is informative; it suggests that some justices' views of the burden-shifting question were informed by their assumptions about Doyle's claim in particular and the merits of such claims more generally.

Notes by Justice Blackmun dated prior to the argument in *Mt. Healthy* suggest that he sympathized with Doyle's employer:

It seems to me that Doyle's general behavior, wholly apart from the incidental radio station factor, hardly merited renewal of his contract. Seemingly, he could get along with neither the authorities, the help, nor the students, and was frequently driven to apologies for his actions. Giving such emphasis to the one radio station incident . . . almost manufactures a property interest in his job.<sup>317</sup>

The evidence in the case included a statement explaining the school board's decision not to renew the contract; the statement not only cited Doyle's "lack of tact" but also complained about Doyle's call to a local radio station: "You assumed the responsibility to notify W.S.A.I. Radio

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<sup>313</sup> See *Mt. Healthy*, 429 U.S. at 277 (holding that "it was far from a 'legal certainty' at the time of suit that Doyle would not have been entitled to more than \$10,000").

<sup>314</sup> See *id.* at 278–79 (avoiding this contention on the grounds that it was belatedly raised and non-jurisdictional). As it turned out, the Court would revisit the question of municipal liability under § 1983 relatively soon. See generally *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

<sup>315</sup> See *Mt. Healthy*, 429 U.S. at 280–81 ("[A] local school board such as petitioner is more like a county or city than it is like an arm of the State. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts.").

<sup>316</sup> Justice Blackmun's notes indicate that much of the discussion in conference focused on the question of whether the school board counted as a "person" under § 1983, with some justices suggesting that the Court dismiss certiorari as improvidently granted and others objecting, and with some discussion of whether the case should be re-listed for argument along with *Monell v. Department of Social Services*. See Conference notes of Justice Blackmun (Nov. 5, 1976) (on file with author). Citations to internal memoranda and other internal Court documents concerning *Mount Healthy* are to items in Box 245 of the Papers of Justice Harry A. Blackmun.

<sup>317</sup> Memorandum signed "H.A.B" at 4 (Sept. 1, 1976) (on file with author).

Station in regards to the suggestion of the Board of Education that teachers establish an appropriate dress code for professional people. This raised much concern not only within this community, but also in neighboring communities.”<sup>318</sup> Justice Blackmun’s notes might be read to suggest an impulse to commiserate with the defendant over the existence of this evidence: “Of course, had the principal received adequate legal advice before he responded to the request for reasons, his response would have been very different.”<sup>319</sup>

Justice Blackmun’s conference notes suggest that the justices crafted the *Mt. Healthy* burden-shifting standard with instrumental goals in mind. For instance, Justice Blackmun’s handwritten notes concerning Chief Justice Burger’s remarks include a notation that could fairly be interpreted as reading “harmless error approach to avoid endless litigation.”<sup>320</sup> In a memo dated a few days after the conference, Justice Rehnquist presumably referred to that discussion when he stated: “[I]f there were a majority to follow the views advanced by the Chief, calling it ‘harmless error,’ or by Potter and me, saying that we would require a ‘but for’ causation in order to sustain a First Amendment claim, I would vacate and remand on the merits.”<sup>321</sup> Justice Blackmun responded with a memo stating in part: “I could participate in an approach on ‘but for’ causation. This, in fact, might clear the atmosphere for situations that are cluttered by a secondary First Amendment claim.”<sup>322</sup>

The justices also engaged in negotiations concerning the wording of the causal test in *Mt. Healthy*. Writing in response to a draft circulated by Justice Rehnquist, Justice Marshall stated that he was “somewhat troubled by aspects of the penultimate paragraph.”<sup>323</sup> Justice Marshall agreed that Doyle “must prove more than that the school board was aware of [the call to the radio station], or that they discussed it in making the decision not to renew the contract.”<sup>324</sup> He continued, “[I]n my view, plaintiff must prove that his constitutionally protected activity ac-

<sup>318</sup> *Mt. Healthy*, 429 U.S. at 283 n.1.

<sup>319</sup> Memorandum signed “H.A.B.,” *supra* note 317, at 4.

<sup>320</sup> See Conference notes of Justice Blackmun, *supra* note 316. A literal transcription of the handwritten notes would read: “H E approach t avoid endless liti.” *Id.*

<sup>321</sup> Memorandum from Justice Rehnquist to the Conference 4 (Nov. 9, 1976) (on file with author).

<sup>322</sup> Memorandum from Justice Blackmun to the Conference (Nov. 10, 1976) (on file with author).

<sup>323</sup> Memorandum from Justice Marshall to Justice Rehnquist (Dec. 13, 1976) (on file with author).

<sup>324</sup> *Id.*

tually played a role in (i.e., was one of the reasons for) the decision not to renew his contract.”<sup>325</sup> If Doyle met this burden, Justice Marshall asserted, the school board should then be required to prove that it would have made the same decision “in any event.”<sup>326</sup> Justice Marshall’s concern stemmed from the draft’s wording, which he appeared to view as placing a greater burden on the plaintiff. As Justice Marshall wrote, “the terms ‘substantial factor’ and ‘significant role’ are at least ambiguous, and it would be much easier for me to join if you were able to clarify the relevant paragraph along the lines I’ve suggested.”<sup>327</sup>

Justice Marshall evidently succeeded in convincing Justice Rehnquist to soften the relevant language by adding the phrase “motivating factor.”<sup>328</sup> The next day Justice Rehnquist circulated a second draft, which stated in relevant part that “the 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’ in the Board’s decision not to rehire him.”<sup>329</sup> One finds this formulation, in substantially similar form, in the published opinion.<sup>330</sup>

Justice Rehnquist also took the opportunity to link the *Mt. Healthy* burden-shifting standard to the standard enunciated, in passing, by the Court in 1977 in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>331</sup> Justice Rehnquist’s memorandum responding to Justice Marshall recognized that “the draft opinion may not be a model of clarity” concerning the plaintiff’s burden.<sup>332</sup> Justice Rehnquist continued:

Lewis’ *Arlington Heights* opinion has something of the same problem in it, and I understand he is making some revisions in its language. When I see what he recirculates, I will try to sharpen up the paragraph to which you refer in order to accommodate your view and make it consistent with the corresponding part of his draft.<sup>333</sup>

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> Second draft at 12, *Mt. Healthy*, 429 U.S. 274 (No. 75-1278), circulated Dec. 14, 1976.

<sup>329</sup> *Id.* (citation omitted).

<sup>330</sup> See *Mt. Healthy*, 429 U.S. at 287.

<sup>331</sup> See 429 U.S. 252 (1977); Memorandum from Justice Rehnquist to Justice Marshall (Dec. 13, 1976) (on file with author).

<sup>332</sup> Memorandum from Justice Rehnquist to Justice Marshall, *supra* note 331.

<sup>333</sup> *Id.*

In *Arlington Heights*, the Court rejected the plaintiffs' Fourteenth Amendment challenge to the village's denial of rezoning, reasoning that the plaintiffs "failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision."<sup>334</sup> At this point, the *Arlington Heights* opinion has a footnote that cites *Mt. Healthy* and states:

Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.<sup>335</sup>

The footnote was, of course, dictum, because the Court held that the plaintiffs had failed to carry their burden in this case.<sup>336</sup>

Why was this dictum included? The footnote did not appear in Justice Powell's first draft of the *Arlington Heights* opinion.<sup>337</sup> But by the time Justice Powell circulated a revised first draft, a new "note 21" had been added.<sup>338</sup> Justice Blackmun's files contain a memorandum (presumably from one of Justice Blackmun's clerks) expressing doubt about the change:

I do not think the dictum in note 21, added following page 17, is advisable. Perhaps Justice Powell would be willing to reword the footnote to reserve the question as not presented for decision in this case. If *Mt. Healthy* is correct (which I think it is), its test of causation could well be different because the first amendment is concerned with effect more than motivation. The distinction is not perfect, but there is enough of a difference that I would wait for a case in which the issue is

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<sup>334</sup> 429 U.S. at 270.

<sup>335</sup> *Id.* at 270–71, 271 n.21.

<sup>336</sup> *See id.* at 270.

<sup>337</sup> *See generally* First Draft Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (No. 75-616), circulated Dec. 2, 1976. Citations to internal memoranda and other internal Court documents concerning *Arlington Heights* are to items in Box 240 of the Papers of Justice Harry A. Blackmun. In that first draft, there is a text sentence that is similar (but not identical) to the relevant text sentence in the opinion as published. The first draft states: "Respondents simply failed to carry their burden of proving that discriminatory purpose was a substantial factor in the Village's decision." *Id.* at 17. No footnote is appended to this sentence. *Id.*

<sup>338</sup> *See* Memorandum signed RKW (Dec. 13, 1976) (on file with author).

presented before applying the Mt. Healthy test to racial discrimination under the 14th amendment.<sup>339</sup>

Notes on this memorandum, in what appears to be Justice Blackmun's handwriting, indicate that Justice Blackmun took the matter up with Justice Powell: "LP says PS - WHR insist—12-13-76 I told him I would prefer to omit, but would not depart if included I suggested a See cite to Mt. Healthy & that both cases come down the same day."<sup>340</sup>

From this evidence, it seems fair to infer that the reference to the same-decision defense in footnote 21 of the *Arlington Heights* opinion was urged upon Justice Powell by Justices Stewart ("PS") and Rehnquist ("WHR"). Despite Justice Blackmun's request that the footnote be omitted, it remained in the opinion; but his suggestion that the two opinions be released on the same day was implemented.

In *Mt. Healthy*, then, some justices favored the same-decision defense as a way to "avoid endless litigation" or to clear away "secondary" retaliation claims that were viewed as "clutter."<sup>341</sup> At least some commentators viewed the Court's endorsement of that defense as a pro-employer move.<sup>342</sup> In *Arlington Heights*, Justices Stewart and Rehnquist evidently sought the inclusion of a same-decision defense in footnote 21—perhaps because they saw such a defense as a desirable backstop against race-discrimination equal protection claims.

### B. *Calibrating Employment Litigation*

The *Gross* Court's opinion was remarkable for its failure to discuss the body of work debating the merits of burden-shifting in employment discrimination cases. Even an abbreviated review of that literature

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> Memorandum from Justice Blackmun to the Conference, *supra* note 322; Conference notes of Justice Blackmun, *supra* note 316.

<sup>342</sup> Thus, for instance, Justice Blackmun's file on *Mt. Healthy* includes a law professor's letter warning that "the holding in Mt. Healthy . . . and note 21 in the Village of Arlington Heights case . . . contain enormous potential for damaging the cause of protecting Constitutional rights." Letter from Professor Benjamin M. Schieber to Justice Blackmun (Mar. 8, 1977) (on file with author). For a more recent assessment of *Mt. Healthy*, see, e.g., Joseph O. Oluwole, *On the Road to Garcetti: 'Unpick' Erring Pickering and Its Progeny*, 36 CAP. U. L. REV. 967, 990 (2008) ("The problem with sanctioning 'mixed motives' and the 'same decision anyway' affirmative defense is that it empowers employers to concoct *post-hoc*, multiple motives other than the employee's free speech as justification for a termination, recasting what is actually a 'single motive' case as a pretextual 'mixed motives' case. Thus, *Mount Healthy* effectively strengthened the interests of public employers, relative to that of employees, in the *Pickering v. Board of Education* calculus.").

(which is all that space permits here) reveals the range of policy considerations that might have been—but were not—addressed in the *Gross* Court’s opinion. Justice Stevens’s dissent in *Gross* resembles the majority’s opinion in one respect: he eschewed any reliance on policy arguments concerning burden-shifting.<sup>343</sup> Instead, he rebutted the majority’s statutory and doctrinal arguments and decried what he termed the majority’s “unabashed display of judicial lawmaking.”<sup>344</sup> Justices Breyer, Souter, and Ginsburg joined Justice Stevens’s dissent, but they also wrote separately to adduce policy rationales for retaining *Price Waterhouse* burden-shifting in areas not covered by Title VII’s statutory burden-shifting mechanism.<sup>345</sup> Their rationales can provide a starting point for our discussion.

Justice Breyer pointed out that determining motivation in an employment discrimination case differs from determining causation in a tort case involving purely physical events:

It is one thing to require a typical tort plaintiff to show “but-for” causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of “but-for” causation comparatively easy to understand and relatively easy to apply. But it is an entirely different matter to determine a “but-for” relation when we consider, not physical forces, but the mind-related characterizations that constitute motive. Sometimes we speak of *determining* or *discovering* motives, but more often we *ascribe* motives, after an event, to an individual in light of the individual’s thoughts and other circumstances present at the time of decision.<sup>346</sup>

Justice Breyer’s reference to “ascribing” motives calls to mind Professor Mark Brodin’s observation that “issues of causation frequently involve and indeed mask considerations of policy.”<sup>347</sup> Indeed, Justice Breyer

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<sup>343</sup> See *Gross*, 129 S. Ct. at 2352–58 (Stevens, J., dissenting).

<sup>344</sup> *Id.* at 2358.

<sup>345</sup> See *id.* at 2358–59.

<sup>346</sup> *Id.* (Breyer, J., dissenting); see also Blumrosen, *supra* note 310, at 1042 (“Psychological forces cannot be measured by the same calculus used for physical mechanical forces.”); Rutherglen, *supra* note 191, at 61 (“Mixed motive cases concern reasons for action, which, if they are causes at all, are very special causes. They do not resemble the physical causes that are familiar from tort law; they are not concerned with physiological mechanisms, but with mental processes.”).

<sup>347</sup> Brodin, *supra* note 310, at 312.

went on to suggest two policy considerations in favor of burden-shifting on a same-decision defense.<sup>348</sup>

First, Justice Breyer observed that when the issue is whether the employer would have made the same decision absent the invidious motive, information asymmetry justifies placing the burden of proof on the employer:

[T]o apply “but-for” causation is to engage in a hypothetical inquiry about what would have happened if the employer’s thoughts and other circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.<sup>349</sup>

Here, Justice Breyer’s *Gross* dissent mirrors Justice O’Connor’s reasoning in *Price Waterhouse*, where she too relied on the notion of asymmetric information to support burden-shifting.<sup>350</sup> Interestingly, Justice O’Connor, like the majority in *Gross*, relied on her perception of the challenges of adjudicating employment discrimination claims; but, where the *Gross* Court perceived the challenge as arising from difficulties in giving a burden-shifting instruction, Justice O’Connor identified the challenge as one discrimination plaintiffs face:

[T]here is mounting evidence in the decisions of the lower courts that [Hopkins] is not alone in her inability to pinpoint discrimination as the precise cause of her injury, despite having shown that it played a significant role in the decisional process. Many of these courts, which deal with the evidentiary issues in Title VII cases on a regular basis, have concluded that placing the risk of nonpersuasion on the defendant in a situation where uncertainty as to causation has been created by its consideration of an illegitimate criterion makes sense as a rule of evidence and furthers the substantive command of Title VII. Particularly in the context of the professional world, where decisions are often made by collegial bodies on the ba-

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<sup>348</sup> See *Gross*, 129 S. Ct. at 2359 (Breyer, J., dissenting).

<sup>349</sup> *Id.*; see also Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 655 (2008) (“[V]irtually all of the evidence required to prove ‘but for’ causation is under the control of the defendant—often in the head of the decision-maker.”).

<sup>350</sup> See *Price Waterhouse*, 490 U.S. at 273 (O’Connor, J., concurring in the judgment).

sis of largely subjective criteria, requiring the plaintiff to prove that *any* one factor was the definitive cause of the decision-makers' action may be tantamount to declaring Title VII inapplicable to such decisions.<sup>351</sup>

Second, Justice Breyer suggests (although less explicitly) that it is fair to give the employer a same-decision defense so as not to give a windfall to the plaintiff.<sup>352</sup> Once the plaintiff has shown that discrimination was a motivating factor,

the law need not automatically assess liability in these circumstances. In *Price Waterhouse*, the plurality recognized an affirmative defense where the defendant could show that the employee would have been dismissed regardless. The law permits the employer this defense, not because the forbidden motive, age, had no role in the *actual* decision, but because the employer can show that he would have dismissed the employee anyway in the *hypothetical* circumstance in which his age-related motive was absent.<sup>353</sup>

Although Justice Breyer did not spell it out, this passage suggests a reference to the reasoning laid out in *Mt. Healthy*:

A rule of causation which focuses solely on whether protected conduct played a part, “substantial” or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. . . . The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.<sup>354</sup>

Thus, in his dissent, Justice Breyer touched on one of the key rationales for adopting burden-shifting—information asymmetry—and also adverted to one of the Court’s stated reasons for allowing a same-decision defense—avoiding windfalls to the plaintiff. On the latter point, a number of commentators have argued that the *Price Waterhouse* Court should have distinguished *Mt. Healthy* rather than importing its

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<sup>351</sup> *Id.* (citation omitted).

<sup>352</sup> See *Gross*, 129 S. Ct. at 2359 (Breyer, J., dissenting).

<sup>353</sup> *Id.*

<sup>354</sup> *Mt. Healthy*, 429 U.S. at 285–86.

same-decision defense into *Price Waterhouse* as a defense to liability.<sup>355</sup> To the extent that *Mt. Healthy* crafted the same-decision defense as a defense to liability (rather than merely a limit on damages),<sup>356</sup> the Court based its holding in part on the concern that marginal employees might decide to engage in protected speech strategically, in order to manufacture potential retaliation claims in case they are fired. But a discrimination plaintiff cannot be suspected of gaming the system in the same way, because being a member of a protected class is not a matter of choice.<sup>357</sup> That critique, however, is better left for discussion in Part II.C., which considers alternatives to the binary choice between the position the Court took in *Gross* and that taken in *Price Waterhouse*.

As the majority and dissenting opinions in *Gross* indicate, the question was not whether burden-shifting should occur at the remedy stage or the liability stage, but instead whether it should occur at all.<sup>358</sup> If the choice is simply between a burden-shifting and a burden-retaining instruction, one might wonder how much is at stake: after all, both approaches ultimately concern but-for causation. And as some justices suggested during the oral argument in *Gross*, it is unclear what difference, if any, the choice of a burden-retaining versus a burden-shifting

<sup>355</sup> See, e.g., Robert Brookins, *Mixed-Motives, Title VII, and Removing Sexism from Employment: The Reality and the Rhetoric*, 59 ALB. L. REV. 1, 73 (1995) (arguing that “[t]he enactment of Title VII strongly suggests Congressional dissatisfaction with the Court’s treatment of race and sex discrimination, at least in the employment context[.]” and suggesting that “Congress must have enacted Title VII to accomplish something more than the Court had accomplished through traditional equal protection analysis”).

<sup>356</sup> This clearly seems to be the case under the Court’s decision in *Texas v. Lesage*, which cited *Mt. Healthy* for the proposition that “where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting [retrospective damages] relief under § 1983.” 528 U.S. 18, 21 (1999). Some commentators, however, have criticized this conclusion. See generally Sheldon Nahmod, *Mt. Healthy and Causation-In-Fact: The Court Still Doesn’t Get It!*, 51 MERCER L. REV. 603 (2000) (arguing that *Lesage* is in tension with *Carey v. Phipps*, 435 U.S. 247 (1978)).

<sup>357</sup> Admittedly, the gaming-the-system rationale might be argued to apply to one particular subset of employment discrimination claims: A dishonest employee, realizing that he or she might be fired, might make a discrimination complaint as a way to lay the groundwork for a retaliation claim. But such a concern seems much less plausible than the concern about government employees strategically engaging in protected speech, because in order to have a viable retaliation claim under Title VII based on retaliation for informal complaints, the complaints “must be based on a ‘reasonable’ and good faith belief that the practice identified is a violation of Title VII.” George, *supra* note 183, at 449. (Protection against retaliation for participating in a formal EEOC charge or ensuing formal processes is broader.) See *id.* at 446–48. Moreover, against the possible concern over strategic behavior one should weigh the important systemic goals served by permitting (and facilitating) retaliation claims. See Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 59–60 (2005).

<sup>358</sup> See *Gross*, 129 S. Ct. at 2348, 2357, 2359.

instruction makes to the jury.<sup>359</sup> Perhaps jurors are relatively impervious to the choice of instruction: the “story model” of juror decision making suggests that the jurors will decide the case by constructing narratives that may have little to do with the specifics of the instructions in the case.<sup>360</sup> Moreover, even if jurors are careful to follow instructions concerning the burden of proof, logic would indicate that the choice between a burden-shifting and a burden-retaining instruction would make a difference only when the evidence on but-for causation is in equipoise. It is, however, also possible that the choice between the two burden frameworks is more significant than such an analysis would suggest. For example, the instructions may affect the decision-making process by framing the jurors’ analysis of the relevant events.<sup>361</sup> Moreover, the range of cases affected by burden-shifting would be greater to the extent that either “the zone of evidential ties is broader and fuzzier than point probabilities would suggest”<sup>362</sup> or jurors perceive the preponderance-of-the-evidence standard to require a probability of significantly more than fifty-one percent.<sup>363</sup>

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<sup>359</sup> As Justice Souter put it:

[I]sn’t it likely that the jury, regardless of instruction, is going to say something like this: If we find that—that age really was in the boss’s mind when he fired the person, and the boss comes in, regardless of the instructions, and says the guy’s work was no good, he got late—he arrived late and so on, the jury is going to say: Did they really fire him because he was old or because he didn’t come to work on time? They are going to do the same thing that they are going to do on the burden-shifting instruction, probably, aren’t they?

Transcript of Oral Argument, *supra* note 108, at \*25–26; *see also id.* at \*27 (Justice Souter: “[I]f you said to the jury, do the right thing, they’d probably come out the same way it would come out if you gave the burden shifting instruction, I think.”).

<sup>360</sup> *See, e.g.,* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 *CARDOZO L. REV.* 519, 521 (1991) (“The Story Model is based on the hypothesis that jurors impose a narrative story organization on trial information.”); *id.* at 530 (suggesting that jurors will reach a decision by “matching the accepted story with each of the verdict definitions” provided in jury instructions).

<sup>361</sup> *See* RICHARD H. FIELD ET AL., *CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE* 1311 (9th ed. 2007) (“[H]ow the law frames a question—whether the plaintiff or the defendant bears the risk of nonpersuasion of a fact—matters. The plaintiff may start from ‘zero,’ or the defendant may. An anchoring heuristic lowers the likelihood of the fact-finders determining that the burdened party has prevailed, because people fail to adjust fully from even an arbitrarily set starting point.”).

<sup>362</sup> *Id.* at 1311–12 (“The factfinder will consider a range of showings indeterminate, not just perfect ties. Thus, the fact-finder will have to rely on the burden of persuasion more often than you would imagine.”).

<sup>363</sup> *See* George Rutherglen, *supra* note 191, at 68 (“Empirical studies have found that juries interpret proof by a preponderance of the evidence to require more than simply a bare preponderance of mathematical probabilities.”).

It would, of course, be helpful to have empirical data on these questions, but they are difficult to come by. A natural experiment of sorts may have been provided by the measure adopted in the U.S. Court of Appeals for the Eighth Circuit's model jury instructions, which advise a judge who cannot decide whether to give a determinative-factor or motivating-factor instruction to send both questions to the jury in the form of written questions.<sup>364</sup> We might attempt to measure the difference made by burden-shifting instructions by examining the frequency with which juries respond to this form by finding that: (1) the plaintiff has not proven that bias was the determinative factor, but (2) the plaintiff has proven that bias was a motivating factor, and (3) the defendant has not proven that it would have made the same decision anyway. Such information would add to the meager store of knowledge on the question, but it would not come close to settling the issue: even if this form is used frequently enough to yield a large sample of cases,<sup>365</sup> it is questionable whether studying those results would tell us much about the effects of using *either* a burden-shifting *or* a burden-retaining instruction, but not both at once. The use of a special verdict form, in itself, might alter the dynamics of jury decision making, and so might the specification of two different proof standards in the same set of questions.

Another approach might be to compare outcomes in cases where a burden-shifting instruction is given with cases where a burden-retaining instruction is given; but there would be obvious difficulties in trying to ensure that such an approach compared like cases. Still another approach might be to vary the burden instructions given to mock juries, but no one has yet undertaken such studies with respect to burden-shifting and burden-retaining instructions in discrimination litigation.

Even absent such data, it seems fair to assume that when the choice between a burden-shifting and a burden-retaining instruction makes a difference, most of the time that difference works in the plaintiff's favor. On that assumption, when assessing the two approaches, one might regard the choice between them as a means of calibrating the outcomes of discrimination litigation. Admittedly, if one wishes to calibrate outcomes, the choice of burden-retaining or burden-shifting jury instructions might seem like a rather weak tool. In discrimination litigation, as in all litigation, only a tiny fraction of cases actually reach

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<sup>364</sup> See 8TH CIR. CIVIL JURY INSTR. § 5.92 (2008). For a discussion of these instructions, see *supra* notes 196–201 and accompanying text.

<sup>365</sup> Although the Eighth Circuit has approved the use of this form, it is unclear how often it has been employed.

trial. Other measures—affecting gatekeeping by district judges earlier in the process—may be considerably more powerful.<sup>366</sup> On the other hand, trials, although rare, are more frequent—and jury trials in particular are more common—in employment discrimination litigation than in most other types of litigation.<sup>367</sup> Moreover, settlement outcomes are likely to reflect expectations concerning trial outcomes. It is also possible that the choice of burden framework would have effects at the summary judgment stage. Thus, it would be plausible to regard a choice between burden frameworks as a means for calibrating the level and success of discrimination litigation.

If that is the case, then one might wish to know something about how employment discrimination litigation currently plays out in federal court. Is there a problem of overclaiming or underclaiming?<sup>368</sup> Are discrimination trials too easy (or too hard) to win? On these broader questions, we do possess some relevant data.<sup>369</sup> It is certainly the case that the number of employment discrimination cases in federal court rose dramatically during the 1990s, and although the numbers of such cases in federal court have fallen since 1998 they still constitute a significant portion of the federal civil docket.<sup>370</sup> But do these numbers indicate an

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<sup>366</sup> See Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 522 (2010).

<sup>367</sup> See Clermont & Schwab, *supra* note 211, at 123 display 9 (“[T]he fraction of cases resolved by trial is comparatively higher for employment discrimination cases, as the fraction of cases resolved by trial has fallen from 18.2% in 1979 to 2.8% in 2006 for employment discrimination cases, but from 6.2% in 1979 to the even lower level of 1.0% in 2006 for other cases.”); *id.* at 126 (“[I]n 1979, only about one in ten trials was a jury trial; by 2006, jury trials were about nine in ten. Compared to other plaintiffs, jobs plaintiffs prefer jury trial to judge trial.”).

<sup>368</sup> In a well-known 1991 article, John Donohue and Peter Siegelman argued that the vast preponderance of the rise in litigation [from 1970 to 1989] has come from allegations of discriminatory firing. Such suits actually provide employers with a disincentive—perhaps even a net disincentive—to hire minorities and women. Thus, we would expect less of an improvement per suit now than in the earlier phase.

John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1032–33 (1991). To the extent that such an argument could ground a proposal for retrenchment in discrimination law, Congress appears to have taken a different view when, that same year, it codified the statutory burden-shifting framework for Title VII discrimination claims. See generally Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

<sup>369</sup> See, e.g., Clermont & Schwab, *supra* note 211, at 116, 117, 127.

<sup>370</sup> See *id.* at 116 (reporting that during the 1990s “employment discrimination cases exploded from 8,303 cases terminated in 1991 to 23,722 cases terminated in 1998”); *id.* at 117 (noting that “the employment discrimination category has dropped in absolute num-

onslaught of claims that require deterrence through a more demanding burden of proof? The low overall win rates in employment discrimination litigation suggest not.<sup>371</sup> Moreover, developments in pleading requirements, summary judgment standards, and expert testimony doctrine over the past thirty years have augmented the district judge's authority to reject claims of civil rights violations and employment discrimination.<sup>372</sup>

Because most cases settle, it is important to take account of settlement outcomes. Analyzing "an anonymously coded dataset of 1,170 cases settled by federal magistrate judges in Chicago over a six-year period ending in 2005," Minna Kotkin has concluded that "there are very few settlements which are so low that it could be presumed that the case is frivolous," and that "most settlements show a reasonable degree of plaintiff success."<sup>373</sup> Specifically, leaving aside class actions and cases

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ber of terminations every year after 1998," that in 2001 "employment discrimination cases constituted nearly ten percent of federal civil terminations" and that in 2006 such cases "accounted for fewer than six percent of federal civil terminations").

<sup>371</sup> Kevin Clermont and Stewart Schwab report that "[t]he most significant observation about the district courts' adjudication of employment discrimination cases is the long-run lack of success for these plaintiffs relative to other plaintiffs. Over the period of 1979–2006 in federal court, the plaintiff win rate for jobs cases (15%) was much lower than that for non-jobs cases (51%)." *Id.* at 127.

<sup>372</sup> See Schneider, *supra* note 366, at 527–55 (documenting these developments); see also Clermont & Schwab, *supra* note 211, at 128 (arguing that "the difference in win rates between jobs cases and non-jobs cases shows that pretrial adjudication particularly disfavors employment discrimination plaintiffs"); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101, 102 (1999) (arguing, based on a "review of every appellate decision and many of the district court cases decided since the ADA became effective in 1992," that summary judgment is granted with undue frequency in ADA cases because "district courts are refusing to send 'normative' factual questions to the jury, such as issues of whether an individual has a 'disability'" and because courts are "creating an impossibly high threshold of proof for defeating a summary judgment motion").

Deborah Brake and Joanna Grossman have reviewed "the various doctrines that obligate employees to promptly challenge and report violations of Title VII rights." Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII As a Rights-Claiming System*, 86 N.C. L. REV. 859, 864 (2008). They argue that doctrines such as "the statute of limitations, the definition of the acts that trigger the limitations period, equitable tolling and discovery rules, the special rules for reporting and challenging sexual harassment, and the role of internal employer procedures in the timing requirements for formally asserting Title VII rights" tend to "close off substantive protections from employees who do not match the law's ideal." *Id.* at 864–65.

<sup>373</sup> Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 111, 117 (2007).

involving multiple plaintiffs, Kotkin found that the mean settlement was approximately \$54,000 and the median settlement was \$30,000.<sup>374</sup>

Interestingly, win rates at trial show less of an overall difference between employment discrimination cases and other types of cases in recent years than in the 1980s.<sup>375</sup> The reason for the convergence appears to be that in recent years more employment discrimination cases are tried to juries than to judges and that the set of such cases tried to juries has a higher plaintiff win rate than the set of such cases tried to judges.<sup>376</sup> Even so, the plaintiff win rate in employment discrimination jury trials has remained generally below the plaintiff win rate in other types of jury trials and has almost always remained below fifty percent.<sup>377</sup> Although the win rate at trial is obviously affected by the mix of cases that reach trial, it seems fair to say that neither judges nor juries appear to be reflexively ruling in favor of plaintiffs in employment discrimination cases.

At a more fine-grained level, one might consider the challenges those seeking to prove employment discrimination face. A number of commentators have observed that as discrimination becomes less and less overt, the difficulty of proving a discrimination claim increases.<sup>378</sup> As Linda Krieger has argued, “[t]he conscious, deliberate desire to exclude women and minorities from the workforce has largely disappeared, but forms of intergroup bias stemming from social categorization and the cognitive distortions which inexorably flow from it re-

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<sup>374</sup> See *id.* at 139, 144. Noting the low plaintiff win rates at trial in discrimination cases, Kotkin posits “that the departure from the expected 50% trial success rate is explained by employers’ interest in not being labeled a discriminator, not by weak plaintiff claims.” *Id.* at 117.

<sup>375</sup> See Clermont & Schwab, *supra* note 211, at 129 display 15.

<sup>376</sup> See *id.* at 129–30.

<sup>377</sup> See *id.* at 130 display 16. Michael Delikat and Morris Kleiner studied employment discrimination cases that were decided in the U.S. District Court for the Southern District of New York from April 1, 1997 to July 31, 2001. They report that “of the 3,000 discrimination cases filed during a four-and-one-quarter-year period, only 125 cases (3.8% of the total) were tried to conclusion, 115 by juries, 10 by judges.” Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 DISP. RESOL. J. 56, 56 (2003). They state that “employment discrimination plaintiffs prevailed in about one-third of the trials (33.6%) while the employers prevailed in the rest.” *Id.* at 57.

<sup>378</sup> See, e.g., Donohue & Siegelman, *supra* note 368, at 1032 (“[T]he flagrant and obvious violations of the pre-Title VII era—systematic refusal to hire women or minorities for certain jobs, gross disparities in pay for identical jobs, segregated work place facilities—were much more likely to produce plaintiff victories than the subtler and less-frequent forms of discrimination practiced today.”).

main.”<sup>379</sup> Krieger points out that when these cognitive forms of intergroup bias contribute to an employment decision, there may well be evidence of another, seemingly legitimate, reason for the decision, and there may not be direct evidence of the invidious reason.<sup>380</sup> Others have pointed out that even the seemingly neutral reason for the employment action might, upon closer examination, turn out to be the product of perceptions, recollections, and assessments that themselves are affected by bias.<sup>381</sup> Marshalling proof of these subtler forms of bias is challenging.

More broadly, one can see that victims of discrimination face disincentives to bring a claim and that those who do bring claims must surmount significant structural obstacles.<sup>382</sup> Deborah Brake reports studies showing “general reluctance on the part of women and persons of color to perceive themselves as targets of discrimination, notwithstanding evidence that discrimination has occurred.”<sup>383</sup> Brake also reports studies suggesting that women or people of color who challenge discrimination may face social stigma for doing so.<sup>384</sup> Retaliation for discrimination claims appears to be common.<sup>385</sup> Although Title VII and other statutes prohibit retaliation against those who bring forward discrimination claims, doctrinal limits circumscribe the availability of such retaliation claims.<sup>386</sup>

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<sup>379</sup> Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1241 (1995). Judith Olans Brown, Stephen Subrin, and Phyllis Tropper Baumann have argued that the same sorts of biases can affect jury decision making. See Judith Olans Brown et al., *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1508 (1997) (proposing that “the trial judge caution jurors about unconscious cognitive stereotyping by pointing out the human tendency to see life and evaluate evidence through a clouded filter that favors those like themselves”).

<sup>380</sup> Krieger, *supra* note 379, at 1223–24.

<sup>381</sup> See, e.g., Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 527 (1990) (arguing that when the assertedly legitimate reason for the action is based on a subjective judgment, that reason may itself be the product of stereotypes). But see Susan Bisom-Rapp, *Of Motives and Maleness: A Critical View of Mixed Motive Doctrine in Title VII Sex Discrimination Cases*, 1995 UTAH L. REV. 1029, 1063 (criticizing Radford for “carv[ing] out for protection so-called objective standards that were designed with working men, not women, in mind”).

<sup>382</sup> See Brake, *supra* note 357.

<sup>383</sup> *Id.* at 26.

<sup>384</sup> See *id.* at 32–36.

<sup>385</sup> See *id.* at 38 n.59.

<sup>386</sup> On the other hand, Glenn George posits that plaintiffs may have better chances of winning on a retaliation claim than on the underlying discrimination claim:

[I]n a typical discrimination trial, where the jury is often presented with evidence of both discrimination and employee performance problems allegedly

In short, the data on employment discrimination litigation generally do not appear to demonstrate that *Price Waterhouse* should be rejected in order to deter claims or to make it more difficult for plaintiffs to prevail. What of ADEA claims in particular? George Rutherglen, analyzing data from an American Bar Foundation survey of some 1250 employment discrimination cases in seven cities from 1972 to 1987, found that ADEA cases were settled at a higher rate (57.9%) than non-ADEA cases (46.5%), that the defendant won at various stages in 26.3% of ADEA cases compared with 47% of non-ADEA cases, and that plaintiffs won at trial in 6.3% of ADEA cases compared with 2.2% of non-ADEA cases.<sup>387</sup> Rutherglen concluded that “claims under the ADEA are brought predominantly by white males who hold relatively high-status and high-paying jobs” and that such claims “mainly allege discriminatory discharge and result in recovery of money judgments several times higher than other claims of employment discrimination.”<sup>388</sup> Arguing that “claims under the ADEA more closely resemble claims for wrongful discharge than other claims of employment discrimination,” Rutherglen asserted that “the ADEA cannot be justified, either doctrinally or empirically, because it protects a disfavored and relatively powerless minority group from discrimination.”<sup>389</sup> Michael Selmi has suggested that

treating all discrimination cases equally can lead to a doctrinal mismatch; age cases have largely borrowed the proof structure from Title VII, even though the prima facie case in an age discrimination case is likely to offer less probative value than is

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justifying the employer’s adverse action, a juror may be slower to find a discriminatory motive because he or she would be reluctant to evaluate their own actions through that lens. When presented with evidence of a retaliatory motive, however, a juror may more readily identify with the employer’s alleged resentment if the employer feels he was wrongly accused of discriminating against the plaintiff. Because the juror can more easily project his or her own revenge or retaliation instinct in a similar situation, he or she may more easily conclude that retaliation played a role in the adverse decision made.

George, *supra* note 183, at 469.

However, Wendy Parker’s analysis of 467 opinions in employment discrimination cases did not find that plaintiffs claiming retaliation had higher success rates. See Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 918 (2006). Though this study was limited to opinions available on Westlaw, and thus may not reflect the mix of results in all cases, the finding is nonetheless suggestive.

<sup>387</sup> See George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 504–05, 504 n.67, 512 tbl. 6 (1995).

<sup>388</sup> *Id.* at 491.

<sup>389</sup> *Id.*

true in a race discrimination case because of the different histories our country has experienced with respect to race and age discrimination.<sup>390</sup>

It is possible that some such concern factored into the justices' deliberations. At oral argument, for example, Justice Alito asked: "[I]sn't age more closely correlated with legitimate reasons for employment discrimination than race and other factors that are proscribed by Title VII?"<sup>391</sup>

Perhaps, then, intuitions that ADEA cases are distinctive animated some justices' views of the issue in *Gross*. That possibility might support an argument that *Gross* should not apply to other types of discrimination claims. It is worth noting, however, that other studies suggest a different view of age claims. David Oppenheimer, reporting on a study that "examined every California employment law jury verdict reported in one or more of the state's three major jury verdict reporters for the years 1998 and 1999," found that "women alleging age discrimination lost every case they tried, while men alleging age discrimination won 36% of the time."<sup>392</sup> Oppenheimer's study may have included age discrimination claims under California state law as well as under the ADEA, and the jury verdict reporter data are not comprehensive.<sup>393</sup> Nonetheless, these figures suggest that in age discrimination cases, as in employment discrimination claims more generally, juries are not reflexively finding in favor of plaintiffs. Wendy Parker examined cases filed in 2002 in the U.S. District Courts for the Eastern District of Pennsylvania and the Northern District of Texas, including 192 cases involving race or national origin discrimination claims, 172 cases involving gender discrimination claims, and 109 cases involving age discrimination claims.<sup>394</sup> Defendants won pretrial judgments in 17% of the Eastern District of Pennsylvania age discrimination cases and 22% of the Northern District of Texas age discrimination cases.<sup>395</sup> By comparison,

<sup>390</sup> Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 *L. L. Rev.* 555, 565 (2001).

<sup>391</sup> Transcript of Oral Argument, *supra* note 108, at \*47.

<sup>392</sup> David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 *U.C. DAVIS L. REV.* 511, 515–16, 549 (2003).

<sup>393</sup> *See id.* at 550–51 (arguing that reporting bias may skew jury verdict reporter data because plaintiff wins may be more likely to be reported than defendant wins).

<sup>394</sup> Parker, *supra* note 386, at 904–05, 949 tbl. A3, 951 tbl. A4. It appears that national origin claims were coded as race claims, so Professor Parker treats the two together as "race discrimination" claims. *See id.* at 904 & n.70.

<sup>395</sup> *Id.* at 954 tbl. A6.

defendants won pretrial judgments in 6% of the Eastern District of Pennsylvania gender discrimination cases, 14% of the Northern District of Texas gender discrimination cases, 7% of the Eastern District of Pennsylvania race discrimination cases, and 26% of the Northern District of Texas race discrimination cases.<sup>396</sup> Age discrimination cases settled at a rate of 78% in the Eastern District of Pennsylvania and 53% in the Northern District of Texas.<sup>397</sup> Settlement rates were 78% for Eastern District of Pennsylvania race claims, 58% for Northern District of Texas race claims, 87% for Eastern District of Pennsylvania gender claims, and 72% for Northern District of Texas gender claims.<sup>398</sup> From these data, Parker concludes that “[a]ge discrimination cases appear to be much harder to win (and settle) than previously proposed.”<sup>399</sup>

### C. *Reorienting Employment Litigation*

Part II.B. argued that the data on discrimination litigation do not appear to justify the ruling in *Gross* as a means of recalibrating levels of claiming or litigation outcomes.<sup>400</sup> In making that argument, Part II.B. focused on the choice discussed by the majority and the dissents in *Gross*—namely, the choice between a burden-retaining and a burden-shifting approach to liability. It is important to note the constrained nature of that analysis. This Part steps further back to note the possibility of a more significant overhaul of the current system.<sup>401</sup> Part II.B. was essentially conservative in its focus; it argued that the data on employment discrimination litigation do not appear to indicate a reason to switch from the *Price Waterhouse* framework to a unitary burden-retaining framework. This Part notes that arguments could, instead, be made for

<sup>396</sup> *Id.* at 949 tbl. A3, 951 tbl. A4, 953 tbl. A5.

<sup>397</sup> *Id.* at 954 tbl. A6.

<sup>398</sup> *Id.* at 949 tbl. A3, 951 tbl. A4, 953 tbl. A5.

<sup>399</sup> *Id.* at 930. Parker indicates that two Eastern District of Pennsylvania age cases were disposed of by jury verdicts for plaintiffs; she does not list any Eastern District of Pennsylvania age discrimination jury verdicts for defendants, and apparently the sample included no Eastern District of Pennsylvania bench trials on age discrimination claims. *See id.* at 954 tbl. A6. Parker indicates that one Northern District of Texas age case was disposed of by a ruling for the defendant after a bench trial; she does not list any Northern District of Texas age discrimination rulings for the plaintiff after a bench trial, and apparently the sample included no Northern District of Texas jury trials on age discrimination claims. *See id.*

<sup>400</sup> *See supra* notes 343–399 and accompanying text; *see also* Katz, *supra* note 16, at 890 (arguing that *Gross* “provides a windfall to defendants, fails to punish discriminators, under-deters discrimination, and places an undue burden of proof on plaintiffs”).

<sup>401</sup> *See infra* notes 400–427 and accompanying text.

moving in the opposite direction—in other words, for extending the statutory burden-shifting mechanism to claims beyond Title VII.<sup>402</sup>

*Price Waterhouse*, after all, has long been criticized by some as too favorable to defendants.<sup>403</sup> As Reginald Govan recalls, “[c]ivil rights advocates initially hailed [*Price Waterhouse*] . . . as a great victory,” but opinion later shifted:

Civil rights advocates immediately embraced these new burden-shifting rules. Only later did they focus on that part of the Court’s holding that completely absolved employers of liability upon proof that their decision was predicated on permissible as well as impermissible factors. Thereafter, civil rights advocates contended that *Price Waterhouse* let employers escape

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<sup>402</sup> When considering legislation to make burden frameworks consistent, Congress might also study possibilities for adjusting the choices made in Title VII’s statutory burden-shifting framework. William Corbett has observed that the statutory framework’s “limitation on remedies is substantial, leaving the plaintiff without any money (except possibly attorneys’ fees) if the defendant prevails on same decision.” William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. REV. 81, 107 (2009). And as others have observed, “courts usually have refused to award attorney fees to the employee when the employer proves that it would have made the same employment decision absent the discriminatory motive and when injunctive relief is not necessary.” Thomas H. Barnard & George S. Crisci, “Mixed-Motive” Discrimination Under the Civil Rights Act of 1991: Still a “Pyrrhic Victory” for Plaintiffs?, 51 MERCER L. REV. 673, 674 (2000). Corbett suggests that “Congress could reduce the remedy limitation, making it possible for a plaintiff to recover a monetary remedy,” through either of two possible means: “1) the same-decision defense cuts off compensatory and punitive damages and injunctive relief of reinstatement (instatement, promotion, etc.) and front pay, but not backpay; or 2) the same-decision defense cuts off punitive damages and injunctive relief such as reinstatement, but not backpay and compensatory damages.” Corbett, *supra*, at 108. Corbett advocates the second option “because the remedy for disparate treatment should provide relief for lost wages and compensation for emotional distress injuries that makes the plaintiff whole.” *Id.* Martin Katz has also proposed adjustments in the statutory remedial framework. He argues that “the procedural-and-substantive two-tier approach used in current doctrine should be modified to include meaningful punitive and deterrent sanctions at the ‘motivating factor’ level of causation[,]” and that “the two-tier approach used in current doctrine should be modified to include meaningful incentives for plaintiffs and their attorneys to act as private attorneys general in over-determined/‘same action’ cases.” Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 539–40 (2006). Linda Krieger has suggested that “cognitive bias-based disparate treatment” should be explicitly recognized as actionable, but should not result in compensatory or punitive damages. Krieger, *supra* note 379, at 1243–44. An assessment of the merits of these proposals lies beyond the scope of this Article.

<sup>403</sup> See, e.g., Govan, *supra* note 44, at 17–18; Hart, *supra* note 176, at 759.

liability for “overt sexism or racism . . . as long as it was not the only thing on the employer’s mind.”<sup>404</sup>

The notion of “mixed motives” is useful because it evokes a more realistic understanding of how discrimination occurs.<sup>405</sup> But critics of *Price Waterhouse* burden-shifting take issue with the notion that the mixed-motive framework should include the same-decision defense as a defense to liability.<sup>406</sup> Many such commentators argue that once a discrimination plaintiff shows that the invidious motive was a motivating factor in the challenged decision, liability should be taken as established and the same-decision defense should only affect the question of remedies.<sup>407</sup> In this view, the presence of a discriminatory motive triggers the deterrent function of employment discrimination law.<sup>408</sup> The wish to avoid a windfall to the plaintiff is relevant only to the law’s compensatory goal and not the public interest in deterring discrimination.<sup>409</sup> Even if the employer’s discriminatory motivation did not make a difference to the outcome in that particular instance, it affects the workplace in ways that may increase the likelihood of future discriminatory acts. Furthermore, an employee subjected to an employment decision in part based upon discriminatory reasons suffers a dignitary harm even if the employment action would have been taken anyway.<sup>410</sup>

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<sup>404</sup> Govan, *supra* note 44, at 17–18 (citation omitted); *see also* Hart, *supra* note 176, at 759 (“The mixed motive claim [as defined in *Price Waterhouse*] was, at best, a mixed blessing for plaintiffs. On the one hand, it went a step toward eliminating the notion that an employee has been discriminated against only if race or gender was the exclusive motivator for the decision. On the other hand, an employer could use discriminatory factors in the decision-making process but still avoid any liability if it could show that it would have made the same decision anyway.”).

<sup>405</sup> *See* Hart, *supra* note 176, at 760 (“[M]ost of the significant psychological models for racism today suggest that discrimination most often occurs when the decisionmaker can justify the decision in some other way.”); Krieger, *supra* note 379, at 1223 (“Mixed-motives theory reflects much more accurately than pretext theory the processes by which cognitive sources of bias result in intergroup discrimination.”).

<sup>406</sup> *See* Brodin, *supra* note 310, at 317; Katz, *supra* note 349, at 658.

<sup>407</sup> *See* Brodin, *supra* note 310, at 317; Katz, *supra* note 349, at 658.

<sup>408</sup> *See* Brodin, *supra* note 310, at 317; Katz, *supra* note 349, at 658.

<sup>409</sup> *See* Brodin, *supra* note 310, at 319–20 (arguing that “Congress has relied primarily on private litigants for the judicial enforcement of title VII, thus imbuing these private actions with a social function unaddressed by the *Mt. Healthy* theory of causality”) (citation omitted). Martin Katz has argued that when a defendant was motivated by bias but there was also a non-discriminatory and sufficient reason for the employment action, the problem of windfalls can best be dealt with “by splitting this windfall between the two parties” according to a sort of “comparative fault rule.” Katz, *supra* note 402, at 545.

<sup>410</sup> *See* Blumrosen, *supra* note 310, at 1040 (“Discrimination has both economic and dignitary aspects. The ‘same decision’ rule confines title VII to protection of economic interests and in effect casts out many employees from its protection.”); Brodin, *supra* note

The 1991 Act responded to such concerns, in the field of Title VII claims, by crafting the statutory burden-shifting mechanism so that the same-decision defense goes only to remedies and not to liability.<sup>411</sup> A number of commentators argue that the statutory burden-shifting mechanism, for this reason, better implements anti-discrimination principles.<sup>412</sup> Such commentators advocate the extension of that approach to other employment discrimination claims.<sup>413</sup> Such an extension would carry the significant advantage of rendering the approach to burden frameworks consistent across different types of claims. Consistency would be particularly valuable because, as Part I.B.4 illustrated, a significant number of trials involve more than one type of claim.<sup>414</sup>

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310, at 318–19 (“Since the stigmatization that discrimination based on an immutable characteristic inflicts on a person occurs when that characteristic operates as a motivating factor, should not title VII provide the victim with some relief at that point?”) (citation omitted).

<sup>411</sup> See Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 107(a), (b), §§ 703(m), 706(g).

<sup>412</sup> Mark Brodin, writing almost a decade before the enactment of the 1991 Civil Rights Act, suggested a somewhat similar mechanism. See Brodin, *supra* note 310, at 323 (proposing a system under which “[a] plaintiff who establishes that a prohibited criterion was a motivating factor in the challenged decision thereby establishes a violation of the Act and thus the defendant’s liability. The same-decision test would then be applied only to determine the appropriate remedy.”) (citation omitted). Melissa Hart has argued that Title VII’s two-tiered remedial structure “may further aid efforts to challenge unconscious discrimination by creating a middle ground that will make courts comfortable with acknowledging the role that discrimination can play even in cases where employers can otherwise justify their decisions.” Hart, *supra* note 176, at 762.

<sup>413</sup> See, e.g., Corbett, *supra* note 402, at 109 (suggesting modifications to the statutory burden-shifting framework and arguing that “Congress should . . . expressly provid[e] that the one new proof structure applies to disparate treatment claims under Title VII, Section 1981, the ADEA, and the ADA”); Katz, *supra* note 349, at 659; Jamie Darin Prekert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas’s Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511, 560–62 (2008) (arguing that Congress should “add the 703(m) language to the other statutes and the corresponding anti-retaliation provisions,” “clarify[] the availability and character of the same-decision defense,” and “incorporate the *Desert Palace* ruling into the other statutes”); Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 625–26 & n.202 (1996).

Even absent legislation explicitly extending the statutory burden-shifting framework to § 1981, the Ninth Circuit has concluded that the same-decision defense goes only to remedies, not to liability, on § 1981 discrimination claims (though it also concluded that the same-decision defense goes to liability on § 1981 retaliation claims). See *Metoyer v. Chassman*, 504 F.3d 919, 934 (9th Cir. 2007). By contrast, in an unpublished decision a Sixth Circuit panel—without citing *Price Waterhouse*—held a mixed-motive framework inapplicable to a § 1981 case on the ground that § 2000e-2(m) does not apply to such claims. See *Aquino v. Honda of Am., Inc.*, 158 F. App’x 667, 676, 2005 WL 3078627, \*7 (6th Cir. 2005).

<sup>414</sup> See *supra* notes 277–301 and accompanying text.

Since the time this Article was first drafted, bills that would extend the statutory burden-shifting mechanism well beyond Title VII have been introduced in both houses of Congress. I will summarize here the current version of the Senate Bill; the House Bill is substantially similar.<sup>415</sup> The bill’s findings state that “unlawful discrimination is often difficult to detect and prove because discriminators do not usually admit their discrimination and often try to conceal their true motives.”<sup>416</sup> Rejecting the reasoning of *Gross*—which, as we have seen, asserted that the 1991 amendments foreclosed burden-shifting in ADEA cases—the bill states that “Congress has relied on” the premise that the ADEA “and similar antidiscrimination and anti-retaliation laws . . . would be interpreted consistently with judicial interpretations of title VII . . . including amendments made by the Civil Rights Act of 1991.”<sup>417</sup> Absent legislation, the findings conclude, “victims of age discrimination will find it unduly difficult to prove their claims and victims of other types of discrimination may find their rights and remedies uncertain and unpredictable.”<sup>418</sup>

The bill is designed

to ensure that the standard for proving unlawful disparate treatment under the Age Discrimination in Employment Act of 1967 and other anti-discrimination and anti-retaliation laws is no different than the standard for making such a proof under title VII . . . including amendments made by the Civil Rights Act of 1991.<sup>419</sup>

To accomplish this goal of uniform treatment, the bill creates a proof framework modeled on the existing statutory framework for Title VII discrimination claims.<sup>420</sup> The proof framework will apply not just to all ADEA claims but also to claims under any other federal law forbidding employment discrimination, to claims under “any provision of the Constitution that protects against discrimination or retaliation,” and—with certain exceptions—to claims under any law “forbidding . . . retaliation against an individual for engaging in, or interference with, any federally protected activity including the exercise of any right estab-

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<sup>415</sup> See generally S. 1756, 111th Cong., 1st. Sess. (2009); H.R. 3721, 111th Cong., 1st. Sess. (2009).

<sup>416</sup> S. 1756, § 2(a)(2).

<sup>417</sup> *Id.* § 2(a)(3).

<sup>418</sup> *Id.* § 2(a)(6).

<sup>419</sup> *Id.* § 2(b).

<sup>420</sup> *Id.* § 3.

lished by Federal law (including a whistleblower law).<sup>421</sup> The bill excludes from the new framework anti-retaliation claims under laws that have “an express provision regarding a legal burden of proof.”<sup>422</sup>

From this summary, one can see that the bill would do more than merely erase the effects of *Gross* itself. It would extend the statutory burden-shifting mechanism to claims—such as ADEA claims—that prior to *Gross* would likely have been governed instead by the *Price Waterhouse* (or *Mount Healthy*) burden-shifting mechanism.<sup>423</sup> The bill’s statutory burden-shifting mechanism would also extend to some types of claims that might not have previously been subject to either *Price Waterhouse* or statutory burden-shifting.<sup>424</sup> The proposed statutory mechanism would enable a plaintiff to establish liability by proving that discrimination (or retaliation) was a motivating factor in the challenged action, although the defendant could limit remedies by proving that it would have made the same decision anyway.<sup>425</sup> The bill would also clear up certain questions that have plagued burden-shifting doctrine. For one thing, the bill would indicate that the plaintiff can choose whether to proceed under a motivating-factor or determinative-factor burden framework.<sup>426</sup> For another, the bill would also provide—as *Desert Palace v. Costa* did for Title VII discrimination claims—that the plaintiff can use either circumstantial or direct evidence to establish a claim under either the motivating-factor or determinative-factor framework.<sup>427</sup>

## CONCLUSION

Although the scholarly literature abounds with criticisms of *Price Waterhouse* burden-shifting, the most common complaints have been that the decision did not go far enough (and should have provided for liability upon a finding of illicit motivation) and that the decision failed to provide guidance on when a burden-shifting (as opposed to a burden-retaining) instruction should be used. In *Gross v. FBL Financial Ser-*

<sup>421</sup> *Id.* § 3 (adding new subsection (g)(5) to 29 U.S.C. § 623).

<sup>422</sup> S. 1756 § 3, 111th Cong., 1st Sess. (2009) (adding new subsection (g)(6) to 29 U.S.C. § 623). This carve-out would exclude, for example, 5 U.S.C. § 1221’s whistleblower provision, which sets a clear-and-convincing burden for the employer proving a same-decision defense. *See* 5 U.S.C. § 1221(e)(2) (2006).

<sup>423</sup> *See* S. 1756 § 3.

<sup>424</sup> Examples would be EPA retaliation claims and FLSA retaliation claims.

<sup>425</sup> *See* S. 1756, § 3 (adding new subsection (g) to 29 U.S.C. § 623).

<sup>426</sup> *See id.*

<sup>427</sup> *See id.*

*vices, Inc.*, the majority chose instead to move the law in the other direction and prohibit the use of burden-shifting for all ADEA discrimination claims.

Because lower courts had long been applying *Price Waterhouse* burden-shifting to such claims, the holding in *Gross* constituted a departure from well-established law. The *Gross* majority chose to reject *Price Waterhouse* on the basis that sound judicial administration required it to do so—because, the Court said, *Price Waterhouse* burden-shifting causes too much confusion. But, as Part I.B.2 argued, the strongest argument concerning confusion is simply that lower courts lack guidance as to when a burden-shifting instruction is appropriate and when it is not. *Gross* has, admittedly, eliminated that confusion for purposes of ADEA discrimination claims. But holding burden-shifting categorically inapplicable to such claims was not the only possible option for addressing such confusion. The Court could instead have extended *Desert Palace v. Costa* to non-statutory burden-shifting, holding that such burden-shifting is available (under *Price Waterhouse*) whenever either direct or circumstantial evidence exists that discrimination was a motivating factor. The purely technical goal of eliminating doctrinal confusion does not suffice to determine the choice between these two options, since either option would accomplish that goal. If the majority's choice between the options flowed instead from underlying views about the goals of the ADEA or the realities of age discrimination litigation, the majority opinion might have been more persuasive—or, at the least, less puzzling—if it had said so.<sup>428</sup>

While the *Gross* Court put an end to debates over burden-shifting in the ADEA context, the decision will spark litigation over the viability of burden-shifting for a range of other types of claims. As Part I.B.3 notes, the availability of burden-shifting under *Gross* may vary from claim to claim because not all the rationales adduced by the *Gross* Court apply to each type of claim. In addition to those rationales, other policy concerns might legitimately be considered. For example, the fact that all of the *Gross* Court's rationales apply to Title VII retaliation claims need not compel the conclusion that burden-shifting is unavailable for all such claims. A court faced with this question might consider, for example, the vital role played by anti-retaliation provisions in ensuring the effective enforcement of the law. The court might also consider the

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<sup>428</sup> See Brodin, *supra* note 310, at 312–13 (“[F]ew of the published opinions dealing with the causation question in title VII litigation make an explicit reference to policy concerns or address the fundamental question, ‘How can the policies of [this] public law best be served in a concrete case?’”).

fact that Title VII retaliation claims will often go to the jury accompanied by a Title VII discrimination claim that entails a statutory burden-shifting instruction. In short, this Article argued that—even as to claims to which all of the *Gross* rationales appear to pertain—the applicability of *Gross* should not be viewed as clear-cut.

Ultimately, however, it appears likely that the Court will extend *Gross* to some or all of the claims discussed in Part I.B.3. And, if it takes an approach similar to *Gross*, the Court will do so without an assessment of the data discussed in Part II.B. Explicit discussions of those considerations are more likely to occur in legislative deliberations than in Supreme Court caselaw. As Part II.C notes, bills have been introduced in both houses of Congress that would extend statutory burden-shifting to all federal employment discrimination claims, to many federal anti-retaliation claims, and to all federal constitutional discrimination or retaliation claims. If such legislation comes to pass, then the Supreme Court in *Gross* might ultimately achieve what commentators have not—namely, spurring the adoption of legislation that codifies burden-shifting across a range of different types of claims.