Unifying Disparate Treatment (Really)

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MARTIN J. KATZ*

INTRODUCTION

Disparate treatment law is fragmented. There are three distinct frameworks for proving disparate treatment employment discrimination: one prescribed by the Civil Rights Act of 1991 ("1991 Act"), one prescribed by Price Waterhouse v. Hopkins, and one prescribed by McDonnell Douglas Corp. v. Green. The applicable framework determines both the substantive standard that will apply to the case and the party that will bear the burden of proving that substantive standard.

There are two problems with this fragmentation. First, there is doctrinal confusion and its attendant costs. The courts have been anything but clear in telling parties which framework will apply to particular cases. For example, the Supreme Court has said that plaintiffs can use the more favorable Price Waterhouse framework instead of the less favorable McDonnell Douglas framework only if they can produce "direct evidence." But the courts of appeals have split four ways over the meaning of "direct evidence." And when the Court had a chance to clarify things in Desert Palace v. Costa, the Court made things worse, not better.

Doctrinal confusion is expensive and inefficient. Parties often engage in gamesmanship and protracted litigation merely to determine

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1. There are two theories of employment discrimination law: disparate treatment (which tends to be described as intentional discrimination) and disparate impact (which deals with the use of sorting mechanisms that disproportionately sort out minorities). See BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 4 (ABA 3d ed. 1996) (listing theories of causation, including disparate treatment and disparate impact). Disparate treatment, the topic of this Article, is by far the most commonly used theory.
2. See infra notes 10–17.
3. See infra note 19 and accompanying text.
4. See infra note 20 and accompanying text.
the applicable framework. The uncertainty over the applicable framework often prevents early settlement, further increasing the costs for litigants (as well as the courts). And such a state of affairs breeds cynicism about the law in this area, as it suggests that outcomes depend more on technicalities than on the merits of a particular case.

But there is a second, perhaps more serious, problem with the fragmentation of disparate treatment law. As a normative matter, some of these frameworks are unequivocally better than others. The best framework under current law is the 1991 Act framework. This framework uses the best causal standard available under current law and allocates the burden for proving that standard in a way that makes the most sense. The other two frameworks (Price Waterhouse and McDonnell Douglas) are normatively inferior. Thus, the fragmentation of disparate treatment law, which results in some litigants being forced to proceed under one of the inferior frameworks, is normatively problematic.

This Article proposes a way out of this mess. It proposes the use of a single framework: the 1991 Act framework, which is the best of the three from a normative point of view. Moreover, it will set out a roadmap for lower courts to implement this unified view, without waiting for (unlikely) intervention from Congress or the Supreme Court.

The Article will proceed in three parts. Part I will show the fragmented state of current disparate treatment law. Part II will demonstrate why this fragmentation is problematic as a normative matter, and why the 1991 Act framework is superior to the Price Waterhouse and McDonnell Douglas frameworks. Part III will point the way toward a unified disparate treatment doctrine, in which all litigants will use the 1991 Act framework. Really.

6. See infra note 38 and accompanying text.
7. I say “really,” because many authors have made claims about unifying disparate treatment law. Some authors have made normative arguments about why disparate treatment law should be unified—or at least why one particular framework should apply to all cases. See, e.g., Kenneth R. Davis, Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law, 31 FLA. ST. U. L. REV. 859, 863 (2004) (arguing that McDonnell Douglas framework is formalistic and weak, and multiple frameworks are complex, so McDonnell Douglas should be scrapped in favor of 1991 Act framework); Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161 (1995) (arguing that “pretext” (McDonnell Douglas) framework is incapable of addressing unconscious bias and should therefore be scrapped); Charles A. Sullivan, Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof, 46 WM. & MARY L. REV. 1031, 1118–20 (2004) (arguing that McDonnell Douglas framework presents potential constitutional problems in disparate treatment cases brought by white males, which would be alleviated if that framework were eliminated); Michael J. Zimmer, The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation, 30 GA. L. REV. 563, 564 (1996) (arguing that multiple frameworks are complex and difficult to apply, so 1991 Act framework should apply); see also Martin J. Katz, Reclaiming McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 114 & n.21 (2007) (summarizing
I. THE SWAMP

At one level, disparate treatment law seems simple. An adverse employment action (such as firing, or refusing to hire) is illegal where that action occurs “because of” a characteristic of the plaintiff that is statutorily protected (such as her race or sex). In other words, disparate

arguments of scholars who have claimed that McDonnell Douglas is now “dead”). Some of these authors have even proposed doctrinal paths toward such a unification. However, many rely on congressional or Supreme Court intervention, which have not been forthcoming. See, e.g., Davis, supra (arguing that Congress should scrap McDonnell Douglas). Some have suggested that such unification is already upon us as the result of the Supreme Court’s decision in Desert Palace v. Costa, 539 U.S. 90, 101 (2003), which they believe has effectively killed McDonnell Douglas. See, e.g., Michael J. Zimmer, The New Discrimination Law: Price Waterhouse Is Dead, Whither McDonnell Douglas?, 53 Emory L.J. 1887 (2004) [hereinafter Zimmer, The New Discrimination Law]. But, as I will discuss below, any “unification” wrought by Desert Palace has tended to be limited to 1991 Act cases. See Katz, supra, at 164-68 (describing flaws in the arguments that McDonnell Douglas is “dead”); infra note 28 and accompanying text (Desert Palace was a 1991 Act case). And while a few writers have suggested doctrinal paths by which the lower courts could implement a partial or total unification of disparate treatment, none has been particularly persuasive. See, e.g., Krieger, supra, at 1242-44 (suggesting that “[n]o amendment to Title VII would be required,” but failing to explain how lower courts could scrap McDonnell Douglas, much less implement her proposed amendment to the 1991 Act that would make certain damages dependent on the defendant’s consciousness, rather than the Act’s “same action” defense). More importantly, none has been successful. As will be discussed below, the law is still anything but unified.

My Article addresses unification of the three frameworks used in disparate treatment cases. It does not address other forms—or claims—of unification. See, e.g., Harry L. Chambers, A Unifying Theory of Sex Discrimination, 34 Ga. L. Rev. 1591 (2000) (arguing, as a descriptive matter, that Supreme Court’s focus on causation in sexual harassment cases has unified sexual harassment law with sex discrimination law); Michael Evan Gold, Towards a Unified Theory of the Law of Employment Discrimination, 22 Berkeley J. Emp. & Lab. L. 175 (2001) (exploring similarities between disparate treatment law and disparate impact law, and suggesting that the two are somehow unified); Judith J. Johnson, A Uniform Standard for Exemplary Damages in Employment Discrimination Cases, 33 Richmond L. Rev. 41 (1999) (arguing for adoption of uniform standard for punitive damages in four disparate treatment statutes: Title VII, 42 U.S.C. § 1981, the ADEA, and the ADA); John Valerie White, The Irrational Turn in Employment Discrimination Law: Slouching Toward a Unified Approach to Civil Rights Law, 53 Mercer L. Rev. 709 (2002) (arguing, as a descriptive matter, that the Supreme Court has moved toward unifying disparate treatment law with other civil rights doctrines that he believes are ultimately grounded in equity); Jason Powers, Note, Employment Discrimination Claims Under ADA Title II: The Case for Uniform Administrative Exhaustion Requirements, 76 Tex. L. Rev. 1457 (1998) (arguing for unification of exhaustion requirements for public and private employees under ADA); see also Margaret E. Johnson, Comment, A Unified Approach to Causation in Disparate Treatment Cases: Using Sexual Harassment by Supervisors as the Causal Nexus for the Discriminatory Motivating Factor in Mixed Motive Cases, 1993 Wis. L. Rev. 231 (arguing that evidence of sexual harassment should be treated as “direct evidence” of sex discrimination, thereby permitting application of 1991 Act framework in pre-Costa cases).


treatment law proscribes adverse actions that are caused by a protected characteristic.

Yet despite the apparent simplicity of this concept, there are currently three distinct frameworks for proving disparate treatment. The first framework was developed by the Supreme Court in 1974 in *McDonnell Douglas Corp. v. Green.* Under this three-step, burden-shifting framework: (1) the plaintiff must first prove a prima facie case; after which (2) the defendant must offer a non-discriminatory reason for its challenged employment action; after which (3) the plaintiff must prove that the defendant's proffered reason is pretextual. In this framework, the plaintiff bears the burden of proof at all times. (The only burden that shifts is the burden of producing evidence; not the burden of persuading the factfinder.)

In 1989, in *Price Waterhouse v. Hopkins,* the Supreme Court gave us a second framework. Under this two-step, burden-shifting framework: (1) the plaintiff must prove that a protected characteristic (such as race or sex) was a "substantial factor" in the challenged employment action, after which (2) the defendant must try to prove that it would have made the "same decision" even had it not considered the protected characteristic. The defendant bears the burden of proof on this "same decision" defense. And if the defendant prevails on the "same decision" defense, there is no liability.

Then, in 1991, Congress gave us yet a third framework. Under this two-step, burden-shifting framework: (1) the plaintiff must prove that a protected characteristic (such as race or sex) was a "motivating factor" in the challenged employment action; after which (2) the defendant must try to prove that it would have taken the "same action" even had it not considered the protected characteristic. The defendant bears the burden of proof on this "same action" defense. But even if the defendant prevails on the "same action" defense, there is nevertheless liability. The defense only reduces the damages that are available.

Given these three frameworks, the question naturally arises: which

11. See id. at 800.
14. See id. at 244-45, 258.
15. Id. at 250.
16. Id. at 244-45, 258.
framework applies in particular cases? Unfortunately, neither the Court nor Congress has explained clearly when each of these frameworks applies.

In *Price Waterhouse*, when there were only two frameworks, Justice O'Connor (whose concurring opinion is generally seen as controlling)\(^8\) attempted to provide an answer: Only plaintiffs with “direct evidence” could use the *Price Waterhouse* framework; other plaintiffs must use the McDonnell Douglas framework.\(^9\)

<table>
<thead>
<tr>
<th>Type of Evidence</th>
<th>Framework Used</th>
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<tbody>
<tr>
<td>“Direct Evidence”</td>
<td><em>Price Waterhouse</em></td>
</tr>
<tr>
<td>No “Direct Evidence”</td>
<td><em>McDonnell Douglas</em></td>
</tr>
</tbody>
</table>

At this point, things were relatively simple, at least at the broad conceptual level. Once we knew whether a plaintiff had “direct evidence,” we knew what framework to apply. The problem was that Justice O'Connor did not tell us what she meant by “direct evidence.” The courts of appeals split four ways on this issue.\(^20\) And there have even been intra-circuit conflicts over the meaning of “direct evidence.”\(^21\) Not so simple.

Things got even more complicated after the passage of the 1991 Act: there were now three frameworks.

Initially, the courts developed a two-by-two grid to tell us which framework to apply. First, courts divided the world of disparate treatment into two types of cases:\(^22\) (1) those brought under Section


\(^9\) See *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring).


\(^22\) This distinction between section 703(a) cases and other disparate treatment cases has been endorsed by many courts. The following courts have refused to apply the 1991 Act framework to statutes other than section 703(a) (non-1991 Act claims). Courts have refused to apply the 1991 Act to ADA claims. See, e.g., Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d 98, 112 (2d Cir. 2001); McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1076 (11th Cir. 1996), cert. denied, 520 U.S. 1228 (1997) (dicta); see also John L. Flynn, Note, *Mixed-Motive Causation Under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements*, 83 Geo. L.J. 2009 (1995) (arguing against application of 1991 Act in ADA cases). They have also refused to apply the 1991 Act to ADEA claims. See, e.g., Baqir v. Principi, 434 F.3d 733, 745 n.13 (4th Cir. 2006); Glanzman v. Metro. Mgmt. Corp., 391 F.3d...
703(a) of Title VII ("1991 Act cases"), and (2) those brought under other disparate treatment statutes, such as the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), and portions of Title VII that did not appear to have been amended by the 1991 Act. Then, within each of those types of cases, the


23. The portion of the 1991 Act that is relevant to the issues discussed in this Article amended section 703(a) of Title VII (as well as section 703(g) of Title VII, which deals with remedies for violations of section 703(a)). See Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075. Accordingly, for purposes of this Article (and in disparate treatment law generally), we can refer to cases brought under section 703(a) as "1991 Act cases," and cases brought under any other disparate treatment statute as "non-1991 Act cases."


26. The primary part of Title VII that was arguably not amended by the 1991 Act is Title VII's antiretaliation provision. See Henry H. Perritt, Jr., Civil Rights Act of 1991: Special Report 186 (1992) (explaining that amendments relate only to section 703, and thus do not affect retaliation provisions of Title VII); supra note 22 (listing courts refusing to apply 1991 Act standard to Title VII retaliation cases). But see infra note 31 (listing courts that do apply 1991 Act standard to Title VII retaliation cases). One commentator has suggested that the 1991 Act did not amend the Pregnancy Discrimination Act ("PDA"), which is found in Title VII. See R. Joseph Barton, Determining the Meaning of "Direct Evidence" in Discrimination Cases Within the 11th Circuit, 77 Fla. B.J. 42, 43 (Oct. 2003). However, most courts seem to assume that the 1991 Act applies in PDA cases. See, e.g., Wagner v. Dillard Dep't Stores, Inc., 17 F. App'x 141, 152 (4th Cir. 2001) (applying 1991 Act, rather than Price Waterhouse, to PDA case because Congress amended Title VII in 1991 Act); Maldonado v. U.S. Bank, 186 F.3d 759, 762-63 (7th Cir. 1999) (applying 1991 Act, rather than Price Waterhouse, to PDA case); Gudenko v. Stauffer Commodities, Inc., 5 F.3d 1074, 1079 (10th Cir. 1993) (applying 1991 Act overturned Price Waterhouse in PDA claims); Deneen v. Nw. Airlines, Inc., 132 F.3d 431, 435-36 (8th Cir. 1998) (same); Turic v. Holland Hospitality, Inc., 85 F.3d 1211, 1214-16 (6th Cir. 1998) (applying 1991 Act's "motivating factor" standard and damages provisions to PDA claim). The only case to expressly address the issue held that the 1991 Act applies to the PDA. See Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1351 (7th Cir. 1995). And the only case cited by Mr. Barton for this proposition (1) did not discuss the applicable standard; and (2) was later vacated. See Venturelli v. ARC Cnty. Servs., Inc., 336 F.3d 606 (7th Cir. 2003), vacated, 530 F.3d 592 (7th Cir. 2003).
courts distinguished between cases where plaintiffs could produce "direct evidence" and those where the plaintiff could not. In cases with "direct evidence," the plaintiff could use the 1991 Act framework (if the case was brought under the 1991 Act) or *Price Waterhouse* (if the case was brought under another statute). In cases without "direct evidence," the plaintiff would be forced to use the *McDonnell Douglas* framework.27

**Table II: Pre-Desert Palace Allocation of Frameworks**

<table>
<thead>
<tr>
<th>Type of Evidence</th>
<th>Cases Brought Under 1991 Act</th>
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<td>&quot;Direct Evidence&quot;</td>
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In *Desert Palace v. Costa*, the Court eliminated the "direct evidence" distinction in 1991 Act cases.28 Thus, a plaintiff under the 1991 Act could use the 1991 Act framework irrespective of whether she had "direct evidence." So here is where things stand—more or less.29


28. See Desert Palace v. Costa, 539 U.S. 90, 101 (2003). This may be a slight oversimplification. In a footnote, the Court stated that it was only addressing "mixed motive" cases. Id. at 101 n.1. This reservation might be read to suggest that the "direct evidence" test may continue to apply in 1991 Act cases that are not "mixed motive" cases—that in "single motive" cases without "direct evidence," plaintiffs must use the *McDonnell Douglas* framework. However, this more complicated approach would make no sense. See Katz, supra note 7, at 35 n.115.

29. I say "more or less" because, as discussed in the text immediately below, there remains some uncertainty regarding the boundaries I have suggested. Some courts follow these boundaries; others do not. See infra notes 30-31.
TABLE III: POST-DEsert PAlACE ALOcATION OF FRAMEWORKS

<table>
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<tr>
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However, even after Desert Palace, there remains significant uncertainty as to which framework to apply. There are (at least) three sources of this uncertainty. First, while most courts currently follow the boundaries discussed above, not all courts do. For example, some courts have applied Desert Palace’s reasoning to non-1991 Act cases, eradicating the “direct evidence” distinction in those cases. And there seems to be considerable confusion over the 1991 Act/non-1991 Act boundary; or, more precisely, over which statutes other than section 703(a) incorporate 1991 Act standards. So in any given non-1991 Act case, it is not clear which framework will apply.


Second, even in 1991 Act cases after Desert Palace, there remains some debate over the proper role of McDonnell Douglas. Some courts have found ingenious ways (a euphemism) to require certain 1991 Act plaintiffs to use McDonnell Douglas. So even after the demise of the "direct evidence" distinction in 1991 Act cases, there remains some uncertainty over which framework might apply in those cases.

And finally, we are still no closer to knowing the definition of "direct evidence." Desert Palace was kind enough to point out that there is currently a four-way circuit split over this definition. But the Court did not take a single step toward resolving this definition.

In summary, even after Desert Palace's "clarification," disparate treatment law remains a mess. In any given case, it is far from clear which of the three frameworks will apply.

II. THE NORMATIVE STAKES


32. See Katz, supra note 7. I have argued elsewhere that these attempts to impose McDonnell Douglas upon certain 1991 Act plaintiffs are (1) not required; and (2) misguided. See id. My point here is that these misguided attempts to impose McDonnell Douglas in 1991 Act cases adds to the existing uncertainty over which framework to apply.

33. See supra note 20 and accompanying text.

34. See id. The optimist in me would like to believe that the Court's refusal to define "direct evidence" stems from the fact that the Court believes, as I do, that the distinction is inapplicable in non-1991 Act cases, as well as 1991 Act cases. See infra Part III. But even if this were the case, it does not solve the current confusion in courts that continue to apply the "direct evidence" distinction in non-1991 Act cases.
routinely fight over the meaning of "direct evidence" (and whether the plaintiff in a particular case has any of it), whether to apply that test, and the possibility of a substitute for that test in 1991 Act cases. Nor should it be surprising that there has been a plethora of litigation over which of the three frameworks to apply to cases under a given statute. Nor should it be surprising that litigants try to game the system in order to influence which framework will be applied. The amount spent in litigation over these issues—with no clear resolution of them—has been staggering. Moreover, the uncertainty that results from these open issues can only serve to increase the cost and decrease the efficiency of employment discrimination cases.

But the fragmentation of disparate treatment law poses problems even more serious than cost and inefficiency. The fragmentation results in some litigants being forced to use frameworks that are normatively problematic.

We can understand this problem by looking at the three frameworks in the context of causation—disparate treatment's core requirement that a challenged action must have occurred "because of" a protected characteristic, such as race or sex. I will first show how each of the three frameworks can be understood as denoting a specific causal standard and a specific allocation of the burden of proof. Then, I will show that for two of the three frameworks, these standards and burdens are problematic.

A. UNDERSTANDING THE THREE FRAMEWORKS AS CAUSATION REQUIREMENTS AND ALLOCATIONS OF THE BURDEN OF PROOF

There are two different causal standards available under current disparate treatment law: necessity (often called "but for" causation) and minimal causation (often called "motivating factor" causation). A factor

35. See supra note 20 and accompanying text (discussing various definitions of "direct evidence"); see also supra notes 27, 30 (outlining controversy over when to apply "direct evidence" in non-1991 Act cases), 31 (discussing attempts by some courts to find substitute for "direct evidence" distinction).

36. See supra notes 26, 31.

37. For example, a female plaintiff over forty years old might try to bring a sex claim as well as an age claim, as the former would be covered by the 1991 Act. The defendant in such a case might try to get the sex claim dismissed for the same reason.

38. See George Loewenstein & Don A. Moore, When Ignorance Is Bliss: Information Exchange and Inefficiency in Bargaining, 33 J. LEGAL STUD. 37, 43 (2004) ("In the presence of uncertainty, the expectations of the two parties are likely to diverge, and negotiators can easily fail to agree despite the potential for profitable settlement." (citing Kalyan Chatterjee & Larry Samuelson, Bargaining with Two-Sided Incomplete Information: An Infinite Horizon Model with Alternating Offers, 54 REV. ECON. STUD. 175 (1987))); cf. Charles Silver, Does Civil Justice Cost Too Much?, 80 TEX. L. REV. 2073, 2107 (2002) ("When parties agree on expected trial results (as fully informed, rational parties always should), they should settle to minimize transaction costs.").

39. See supra note 9 and accompanying text.

is necessary to (a "but for" cause of) an event where, absent that factor, the event would not have occurred when it did.41 A factor is minimally causal (a "motivating factor") where it has a tendency to bring about the event, but does not rise to the level of being necessary.42 By definition, necessity ("but for" causation) is more restrictive than minimal causation ("motivating factor"): a factor is minimally causal (a "motivating factor") if and only if it does not rise to the level of being necessary (a "but for" cause).

The 1991 Act framework uses both causal standards, each for a different purpose. The plaintiff has the burden of proving "motivating factor" causation. At the "motivating factor" level, two things happen: liability attaches and the burden of proof shifts to the defendant on the issue of "but for" causation (to prove a lack of "but for" causation). If the defendant prevails on this issue, proving that there is only "motivating factor" causation, then there is liability but only minimal damages. If, on the other hand, the defendant does not prevail on this issue—that is, if there is "but for" causation—then the plaintiff becomes entitled to full damages.43 In other words, the 1991 Act uses a two-tier causation requirement: "motivating factor" causation is required for liability, while "but for" causation is required for full damages.

Like the 1991 Act framework, the Price Waterhouse framework refers to both causal standards. However, Price Waterhouse uses only one of those standards as a substantive causation requirement: "But for" causation is required for liability, as well as damages. The burden of proof shifts at the "motivating factor" level. By proving "motivating factor" causation, the plaintiff can shift the burden to the defendant on the issue of "but for" causation (to prove a lack of "but for" causation). But if the defendant prevails on this issue—that is, if there is only "motivating factor" causation—then there is no liability.44 Put simply, Price Waterhouse requires "but for" causation for liability, as well as damages.

Courts that require litigants to use the McDonnell Douglas framework probably intend to require "but for" causation for all purposes (liability, as well as damages), and to place the full burden of proving "but for" causation on the plaintiff. I say "probably" because, in

41. See id. at 496–97.
42. See id. at 498–99.
43. See 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2000); see also Katz, supra note 40, at 502 (discussing "same action" test, which requires lack of "but for").
44. See Price Waterhouse v. Hopkins, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring); see also Katz, supra note 40, at 502 (discussing "same decision" defense, which is the test for lack of "but for" causation). At some points, Justice O'Connor uses the term "substantial factor," rather than "motivating factor." See id. at 503–07. However, there is no logical distinction between these two formulations. See id.
a recent article, I demonstrated that, contrary to popular belief, *McDonnell Douglas* proves—and thus, requires—only "motivating factor" causation. However, while it is logically true that *McDonnell Douglas* proves only "motivating factor" causation, the courts that have required litigants to use *McDonnell Douglas* almost certainly did not intend to require only "motivating factor" causation for liability and damages. They almost certainly intended to require "but for" causation for liability and damages. And they clearly intended plaintiffs to bear the full burden of proof. Thus, for purposes of this Article, I will assume that when courts say that a plaintiff must use *McDonnell Douglas*, those courts intend to require "but for" causation for all purposes and to place the full burden of proving "but for" causation on the plaintiff.

Thus, we can understand the three frameworks in terms of causal standards and burdens of proof, as follows:

**Table IV: The Three Frameworks' Causation Requirements**

<table>
<thead>
<tr>
<th>Type of Evidence</th>
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</tr>
<tr>
<td></td>
<td>1. &quot;Motivating Factor&quot; for Liability</td>
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<tr>
<td></td>
<td>2. &quot;But For&quot; for Full Damages</td>
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<td>3. Burden Shifting on &quot;But For&quot;</td>
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<tr>
<td></td>
<td></td>
<td>1. &quot;But For&quot; for all Purposes</td>
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<td>2. No Burden Shifting on &quot;But For&quot;</td>
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</tbody>
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45. See Katz, supra note 7, at 136-38.
46. See id. and discussion infra Part II.B.
47. See Katz, supra note 7, at 157-58.
48. I will argue in Part II.B below that "but for" causation should never be required for liability and that no plaintiff should be required to prove "but for" causation for any reason, and in Part III below that courts cannot impose such requirements consistently with congressional intent. But it is pretty clear that this is what courts currently intend to require when they say that non-1991 Act plaintiffs without "direct evidence" must use *McDonnell Douglas*. 
B. THE NORMATIVE PROBLEMS WITH *PRICE WATERHOUSE* AND *MCDONNELL DOUGLAS*

There are two normative problems with the standards and burdens set forth in *Price Waterhouse* and *McDonnell Douglas*. First, it is problematic to make plaintiffs prove "but for" causation (as *McDonnell Douglas* does) rather than shifting the burden on this issue to defendants. Second, it is problematic to require "but for" causation for liability as well as damages (as *McDonnell Douglas* and *Price Waterhouse* both do).

1. The Problem with Making Plaintiffs Prove "But For" (*McDonnell Douglas*)

Requiring plaintiffs, as opposed to defendants, to prove "but for" causation is normatively problematic for two reasons. First, the virtually 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.49 In the law of evidence, it is common to place the burden of proving a particular fact on a party who controls the means for proving that fact.50 A potential weakness in this control-of-evidence argument is that there are many situations in which defendants control evidence about a particular fact where the law nevertheless leaves the burden of proof on the plaintiff, assuming that the plaintiff can get access to this evidence through discovery. Shifting the burden of proof to defendants, it is often believed, can make it too easy to for plaintiffs to sue.51 However, in the context of disparate treatment law, the two frameworks that would transfer the burden of proof on the issue of "but for" causation (the 1991 Act and *Price Waterhouse* frameworks) do so only after the plaintiff has proven wrongdoing by the defendant: "motivating factor" causation—i.e., the fact that the defendant considered a protected characteristic (such as race or sex) in making the challenged decision. The access-to-proof argument, combined with defendant's wrongdoing, provide a strong case for making the defendant bear the burden of proof on the issue of "but for" causation once a plaintiff has proven "motivating factor" causation.52

But a second, and perhaps stronger, argument for forcing defendants to bear the burden of proof on the issue of "but for" causation is the near impossibility of a plaintiff proving this type of causation. Several commentators have complained that the concept of "but for" causation is hypothetical, and thus difficult to prove.53 But the problem is not the

52. See MUELLER & KIRKPATRICK, *supra* note 50, at 105.
53. See, e.g., *Price Waterhouse*, 490 U.S. at 240 (plurality opinion); see also id. at 264 (O'Connor,
hypothetical nature of the concept. It is the negative nature of the concept. That is, for a plaintiff to prove "but for" causation, she must prove a negative.

This is because the thing that allows a factor to be causal (a "motivating factor"), yet not be a "but for" cause, is the existence of a second factor that is itself sufficient to bring about the challenged event. Suppose, for example, that an employer considered the plaintiff's race in a firing decision. That is, suppose that race was a "motivating factor." In such a case, race would also be a "but for" cause unless (1) the employer considered at least one factor other than race in its decision (for example, excessive tardiness); and (2) that second factor, itself, would have triggered the same decision even if the employer had not considered the plaintiff's race. The second, independently sufficient factor (tardiness) is what precludes the first factor (race) from being a "but for" cause. Thus, to prove "but for" causation, a plaintiff needs to prove a negative: the absence of any additional, independently sufficient reasons for the challenged action.

Proving a negative is always difficult. But the difficulty of proving this particular negative is significantly compounded by the fact that there are only a limited number of ways to prove discrimination; and most of them are logically incapable of disproving the existence of a second, independently sufficient factor. That is, most of them are incapable of proving "but for" causation.

The ways that a plaintiff can prove discrimination include (1) admissions by the defendant (e.g., "I fired her because she is a woman"); (2) statements other than admissions that show bias (e.g., "women do not belong at work"); (3) statistical proof; (4) non-statistical comparative proof (e.g., evidence showing that the non-minorities were not treated as harshly as the plaintiff for the same conduct, where the numbers are too small to make the comparison statistically significant); and (5) proof of pretext (e.g., evidence that the reason given by the employer for the challenged action was incorrect, which permits an inference of discrimination). 54

Most of these methods are logically incapable of proving "but for" causation. The second (statements other than admissions), third (statistics), and fourth (comparative) methods cannot eliminate the possibility of a second, independently sufficient reason for the challenged action. And while it is logically possible that the first method (admission)

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1. See Katz, supra note 7, at 124-42.

54. See Katz, supra note 7, at 124-42.
might permit a plaintiff to prove "but for" causation, such proof is incredibly unlikely—so unlikely that it can be virtually completely discounted. To prove "but for" discrimination using an admission, the defendant would have to admit not only that it used a protected characteristic (such as race) in its decision-making—itself unlikely; the defendant would also have to admit that it had no other, independently sufficient motive—ridiculously unlikely.

The only method that would permit a plaintiff to prove "but for" causation is a special variation of the fifth method (pretext). The basic version of the pretext method works when the plaintiff disproves a single reason offered by the defendant for the challenged action. However, under a variation of this method, which can be called the "strong version" of the pretext method, the plaintiff (1) gets the defendant to provide an exhaustive list of the reasons it relied upon in taking the challenged action; (2) disproves all of those reasons; and (3) proves that at least one of those incorrect reasons was given by the defendant as a pretext to cover up illegal discrimination. By disproving all of the reasons in the record for the challenged decision, and at the same time proving discrimination, this leaves discrimination as the only factor in the record for the defendant's challenged decision. Such proof excludes the possibility of a second, independently sufficient reason, and thus the possibility that discrimination could be anything less than a "but for" cause.\(^5\)

The problem is that the strong version of the pretext method proves too much. It actually requires proof of a type of causation even more restrictive than "but for" causation; a type of causation called "sole causation."\(^5\) Notably, Congress unequivocally rejected the idea that a plaintiff must prove "sole causation" in order to prevail in a disparate treatment case.\(^6\) But because the only method for proving "but for" causation is to prove "sole causation," requiring plaintiffs to prove "but for" causation is tantamount to a "sole causation" requirement.

For all of these reasons, plaintiffs should never be required to prove "but for" causation. That burden should always rest on the defendant once the plaintiff proves "motivating factor" causation (as it does under

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55. See id. at 139-42.
56. See id.
57. See 110 Cong. Rec. 13, 837-38 (1964); see also Price Waterhouse, 490 U.S. at 241 n.7 (observing that "Congress specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of'" (citing 110 Cong. Rec. 13, 837 (1964))); Griffith v. City of Des Moines, 387 F.3d 733, 740 n.4 (8th Cir. 2004) (Magnuson, J., concurring specially) (same); see also Pinkerton v. U.S. Dep't of Educ., No. 06-10657, 2007 WL 3349092, at *3 (5th Cir. Nov. 13, 2007) (holding that ADA does not require "sole cause" and citing decisions in accord by seven other circuits); Cheryl L. Anderson, What Is "Because of Disability" Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine, 27 Berkeley J. Emp. & Lab. L. 323, 340 (2006) (noting that Congress also rejected a "sole cause" requirement in the ADA).
the 1991 Act and Price Waterhouse frameworks). The McDonnell Douglas framework, which requires plaintiffs to prove "but for" causation, is normatively problematic.

2. The Problem with Requiring "But For" for Liability (Price Waterhouse and McDonnell Douglas)

As discussed above, both Price Waterhouse and McDonnell Douglas require "but for" causation for liability. This is normatively problematic.

It makes some sense to require "but for" causation for compensatory damages. This is because, absent "but for" causation, requiring the defendant to compensate the plaintiff for her injuries may provide a windfall to the plaintiff. That is, the plaintiff might be compensated for injuries she would have suffered as a result of another factor—that is, irrespective of the defendant's act.

But it makes no sense to require "but for" causation for liability—that is, in order to impose sanctions upon the defendant. A defendant who engages in "motivating factor" discrimination has engaged in wrongdoing. The point of disparate treatment law is to prevent employers from considering protected factors (such as race or sex) in their decisions; that is, from engaging in "motivating factor" discrimination. Such discriminatory decision-making harms both the plaintiff and society. A defendant who engages in such discriminatory decision-making should not be relieved from all penalties merely because he also considered a non-protected factor. Society, as well as the individual plaintiff, has a strong interest in deterring "motivating factor," as well as "but for" discrimination.

The 1991 Act framework imposes liability at the "motivating factor" level, requiring "but for" causation only for damages. The other two frameworks, in contrast, impose liability only at the "but for" level. Thus, from a normative standpoint, the 1991 Act framework is the best of these frameworks.

58. See supra note 48 (noting that courts applying McDonnell Douglas clearly intend to require "but for" causation).

59. See Katz, supra note 40, at 512-14. Note that, in such a scenario, requiring "but for" causation—and thus allowing the defendant not to compensate the plaintiff—may result in a windfall to the defendant. See id. at 520-27. The way to avoid this problem is to (1) use a necessity-or-sufficiency test, and (2) damages apportionment. That is, instead of limiting compensatory damages to cases where the defendant's wrongdoing was necessary to (a "but for" cause of) the harm, such damages should also be permitted anytime that the defendant's wrongdoing would have been independently sufficient to bring about the harm. See id. at 541-44. In such cases, where the plaintiff was also at fault, damages should be apportioned according to relative fault. See id. at 544-49. However, this change in the law could not likely be accomplished without congressional intervention. Accordingly, I do not argue for this change in this Article, where my point is to argue for changes that could be accomplished by the courts alone.

60. See id. at 517-20.

61. The 1991 Act is not perfect in this regard. Requiring "but for" causation for compensatory

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60. See id. at 517-20.

61. The 1991 Act is not perfect in this regard. Requiring "but for" causation for compensatory
III. THE WAY OUT

So here is where things stand: We have seen that three different frameworks apply, depending on the statute under which a case is brought and whether the plaintiff can produce “direct evidence.” And we have seen that two of the three frameworks (McDonnell Douglas and Price Waterhouse) are normatively flawed. One (McDonnell Douglas) requires plaintiffs to bear the full burden of proving “but for” causation, and both require “but for” causation for liability. Of the three frameworks, only the 1991 Act framework is free from these flaws. The question is: what can be done about this?

The simplest solution would be for Congress to legislate. Congress could pass a statute stating that the 1991 Act framework (“motivating factor” for liability and burden shifting, and “but for” for full damages) applies in all disparate treatment cases—irrespective of which disparate treatment statute is invoked and irrespective whether the plaintiff has “direct evidence.” Such a statute would effectively amend all disparate treatment statutes other than the 1991 Act to match the 1991 Act. Alternatively, the Supreme Court could implement the changes I have proposed. However, this Part will argue that the lower courts can implement the changes I have proposed even without congressional or Supreme Court intervention.

This argument will proceed in two steps. First, it will seek to eradicate the “direct evidence” distinction that is currently applied in non-1991 Act cases. This would permit plaintiffs in non-1991 Act cases to use the burden-shifting mechanism of Price Waterhouse. This would solve the problem of requiring plaintiffs to bear the full burden of proving “but for” causation. Second, I will argue that courts in non-1991 Act cases should stop applying the Price Waterhouse definition of damages, as the 1991 Act does, may provide a windfall to undeserving defendants. See id. Also, while the 1991 Act imposes some costs upon (and thus some deterrence against) defendants who engage in only “motivating factor” discrimination, the level of those costs (and thus the level of deterrence) is likely too low. See id. at 534-36. Similarly, while plaintiffs in cases where there is only “motivating factor” discrimination get the moral satisfaction of being vindicated, and may be able to recover some of their legal fees, the 1991 Act provides insufficient incentives for plaintiffs and their attorneys to pursue defendants who have engaged in only “motivating factor” discrimination. See id. at 534-36. However, my point here is that the 1991 Act is the best of the three available frameworks. Most of the changes that would be necessary to correct these problems with the 1991 Act would have to be done by Congress. The one thing that courts can—and should—do in this regard is to consider a plaintiff who has proven “motivating factor” causation to be a substantially prevailing party, thus permitting such plaintiffs to recover their attorneys fees. See id. at 539-40.

62. Such a legislative solution would also permit Congress to address the weaknesses of the 1991 Act. See supra notes 59 and 61 (discussing flaws in 1991 Act).

63. But 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, 1215 (1993) (arguing that the only way to apply a 1991 Act standard to the ADEA would be through an act of Congress or the Supreme Court). In this Part, I will address the flaws in this position.
“because of” ("but for" for liability, as well as damages), and should instead apply the 1991 Act definition ("motivating factor" for liability and "but for" for full damages). This would solve the problem of requiring "but for" causation for liability.64

A. ERADICATING PLAINTIFFS’ BURDEN OF PROVING "BUT FOR" (THE DEATH OF THE "DIRECT EVIDENCE" REQUIREMENT)

The source of plaintiffs' burden to prove "but for" causation is the "direct evidence" requirement in Justice O'Connor's concurrence in Price Waterhouse.65 That case recognized a burden-shifting mechanism by which plaintiffs can prove "motivating factor" causation and thereby shift the burden to defendants to prove a lack of "but for" causation.66 But Justice O'Connor's concurrence in that case limited the availability of this burden-shifting mechanism to plaintiffs who could produce "direct evidence."67

Thus, to eradicate plaintiffs' burden for proving "but for" causation, we must eradicate the "direct evidence" requirement.68 There are four doctrinal arguments for eradicating such a requirement; for permitting non-1991 Act plaintiffs to use Price Waterhouse's burden-shifting framework irrespective of whether they have "direct evidence."

The first argument is based on a literal reading of Justice O'Connor's concurrence. Justice O'Connor did not actually say that plaintiffs without "direct evidence" must bear the full burden of proving "but for" causation. What she said was that plaintiffs without "direct evidence" must use McDonnell Douglas.69 She apparently believed that

64. It may be noted that my focus in this Part is on non-1991 Act cases. This is because the optimal framework—the 1991 Act framework—applies in most, if not all, 1991 Act cases. See supra note 32. While a few courts have tried to limit the application of the 1991 Act framework in 1991 Act cases, those courts are not obligated to do so and should stop. It is only in non-1991 Act cases that the courts routinely impose the two normatively flawed frameworks, Price Waterhouse and McDonnell Douglas. Hence, my focus is on cases outside of the 1991 Act.

65. See Price Waterhouse v. Hopkins, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring) ("[I]n order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision.").

66. See id. at 258 (plurality opinion).

67. See Price Waterhouse, 490 U.S. at 276 (O'Connor, J., concurring). In the 1991 Act context, where the "direct evidence" requirement has been eradicated, we have seen new and creative attempts to force plaintiffs to use McDonnell Douglas—presumably as a way of forcing them to bear the full burden of proving "but for" causation. See Katz, supra note 7, at 120 & n.47. However, those attempts make no sense. See id. at 165-66. They should certainly not be imported into the non-1991 Act context.

68. Eradicating the "direct evidence" requirement would have an additional salutary effect: The concept of "direct evidence" has proven virtually impossible to define, with the federal appeals courts split four ways on the issue. See Costa v. Desert Palace, Inc., 299 F.3d 838, 852–53 (9th Cir. 2002), aff'd, 539 U.S. 90 (2003) (describing circuit split).

this was tantamount to making those plaintiffs prove "but for" causation. But it turns out that she was wrong. In a recent article on *McDonnell Douglas*, I demonstrated that, contrary to popular belief, *McDonnell Douglas* proves only "motivating factor" causation—not "but for" causation. So, read literally, Justice O'Connor's concurrence requires plaintiffs without "direct evidence" to bear the burden of proving only "motivating factor" causation—not "but for" causation (though they must apparently prove "motivating factor" causation using *McDonnell Douglas*, as opposed to some other method of proof). A second, and related, argument is that Justice O'Connor's concurrence should not be seen as controlling in *Price Waterhouse*. By requiring plaintiffs without "direct evidence" to use *McDonnell Douglas*, it turns out that Justice O'Connor's concurrence permits these plaintiffs to establish liability by proving only "motivating factor" causation. All of the other opinions in *Price Waterhouse* would require all plaintiffs to establish the more stringent "but for" standard to establish liability. Thus, Justice O'Connor's opinion should not be seen as the narrowest opinion; it should not be seen as controlling. Either the plurality opinion or Justice White's concurrence (both of which ultimately require "but for" causation for liability by permitting a complete "same decision" defense, and are thus more restrictive) should be seen as controlling. And both of those opinions permit plaintiffs to use *Price Waterhouse*'s burden-shifting mechanism, irrespective of whether they can produce "direct evidence."

A potential problem with these first two arguments is that they may be just a little too cute. They rely on what was likely a mistake made by Justice O'Connor (her use of *McDonnell Douglas* as a shorthand way of describing a requirement that plaintiffs bear the full burden of proving "but for" causation). These arguments ask courts to focus on what Justice O'Connor said, rather than what she meant. If courts focus on her intent, rather than the literal language of her concurrence, these first two arguments are not likely to be persuasive.

A third, and more persuasive, argument is based on congressional intent. The argument is that Congress did not intend to limit burden shifting to plaintiffs who could produce "direct evidence." Congress has

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70. See Katz, *supra* note 7, at 124-42

71. Note that this first argument would not result in the eradication of the "direct evidence" requirement. Plaintiffs without "direct evidence" would still be treated differently than those with "direct evidence": The former would be required to use *McDonnell Douglas* to prove "motivating factor" causation, while the latter would be allowed to use the *Price Waterhouse* framework to shift the burden to defendants to prove "but for" causation upon a showing of "motivating factor" causation. What this argument would do is to make it so that no plaintiff needed to prove "but for" causation.

72. See *Price Waterhouse*, 490 U.S. at 244 (plurality opinion); id. at 258-59 (White, J., concurring); id. at 281 (Kennedy, J., dissenting).
never used the words “direct evidence” in any disparate treatment statute. Nor is the concept suggested anywhere in the legislative history of those statutes as a means of limiting burden shifting. Therefore, it seems reasonable to conclude that Congress did not seek to limit burden shifting in this way. 73

Notably, this was the Court’s rationale for precluding the use of a “direct evidence” requirement in 1991 Act cases. A unanimous Court in Desert Palace looked at the text and legislative history of the 1991 Act and held that there was simply no evidence that Congress intended to distinguish between types of evidence, or to limit the use of the 1991 Act framework (with its burden-shifting mechanism) in this way. 74

And at least one circuit has now applied this rationale to disparate treatment statutes other than the 1991 Act. Since neither those statutes nor their legislative history suggest a “direct evidence” limit on the use of the Price Waterhouse framework (with its burden-shifting mechanism), the Fifth Circuit has refused to impose such a limit in ADEA and FMLA cases. 75 In that circuit, all plaintiffs are permitted to use Price Waterhouse’s burden-shifting mechanism irrespective of whether they can produce “direct evidence.”

The potential problem with this third argument (and with the Fifth Circuit’s position) is, once again, Justice O’Connor’s concurrence in Price Waterhouse: Even if Congress said nothing about “direct evidence,” the Supreme Court arguably did. Assuming that Price Waterhouse is still good law outside of the 1991 Act, and that Justice O’Connor’s concurrence in that opinion is the controlling one, that opinion expressly requires “direct evidence” in order to shift the burden. Aren’t courts that are looking at congressional intent wrongfully ignoring the Supreme Court’s direct pronouncement on this issue?

The answer is, no. As will be discussed more fully in the next section, Price Waterhouse interpreted only section 703(a) of Title VII. And its interpretation of that statute was expressly overruled by the 1991 Act, which permits burden shifting in section 703(a) cases irrespective of whether the plaintiff can produce “direct evidence.” 76 So the only question that remains is what to do in cases under statutes other than section 703(a)—that is, in non-1991 Act cases. Price Waterhouse, a

73. Of course, Congress did not mention burden shifting either, at least not prior to 1991. But six Justices in Price Waterhouse believed that Congress would want to shift the burden of proving “but for” causation. And Congress vindicated those Justices in the 1991 Act. In doing so, Congress omitted any reference to limiting such burden shifting to plaintiffs with “direct evidence.” See Desert Palace, 539 U.S. at 100-02.
74. See 539 U.S. at 100-02.
76. See Desert Palace, 539 U.S. at 100-02.
section 703(a) case, says nothing about this question. Although several courts have assumed that *Price Waterhouse* (and Justice O'Connor's "direct evidence" distinction) applies to statutes other than section 703(a), the Supreme Court has never held this. Lower courts remain free to interpret those statutes for themselves.

Finally, a fourth argument for the eradication of the "direct evidence" requirement would apply irrespective of the applicability of *Price Waterhouse* to non-1991 Act cases: Requiring plaintiffs without "direct evidence" to prove "but for" causation directly contradicts Congress's intent on the issue of "sole cause." As discussed above, Congress made clear that plaintiffs could not be required to prove "sole cause." And as also discussed above, we now know that requiring plaintiffs to bear the burden of proving "but for" causation is tantamount to requiring them to prove "sole cause." This might not have been understood at the time *Price Waterhouse* was decided. But it should be clear now. And once we understand that *Price Waterhouse*’s "direct evidence" requirement contradicts the unambiguous will of Congress, that requirement should no longer be seen as valid.

Thus, lower courts can examine congressional intent regarding "direct evidence" in non-1991 Act statutes. And based on Congress's lack of intent to impose a "direct evidence" requirement, as well as its intent to avoid a "sole cause" requirement, those courts should conclude, as the Fifth Circuit did, that there is no requirement to produce "direct evidence" in order to use the *Price Waterhouse* burden-shifting mechanism. Any plaintiff who can prove "motivating factor" causation, with any type of evidence, should be entitled to avail herself of that burden-shifting mechanism. No plaintiff should be forced to bear the full

77. See supra note 27. In the following section, I will address arguments that *Price Waterhouse* might retain precedential force in non-1991 Act cases.

78. There are two Supreme Court cases that mention "direct evidence" in ADEA cases. See Hazen Paper Co. v. Biggins, 507 U.S. 604, 613 (1993); Trans World Airlines v. Thurston, 469 U.S. 111 (1985) (discussing "direct evidence" in the context of an ADEA claim). However, neither case can be read for the proposition that ADEA plaintiffs without "direct evidence" cannot avail themselves of burden shifting. Both of these cases used the phrase as a way to describe evidence, not as a way to limit burden shifting. In fact, burden shifting was not an issue in either case. Notably, Hazen Paper—a post-*Price Waterhouse* case—did not even cite *Price Waterhouse*. And Thurston was decided four years before *Price Waterhouse*, before the Court had articulated the availability of a burden-shifting mechanism. Thus, neither of these cases can be seen as limiting the availability of a burden-shifting mechanism to ADEA plaintiffs who could produce "direct evidence."

79. See supra note 57.

80. See supra Part II.B.1.

81. This final argument would require bold assertiveness by lower courts. They would need to anticipate that, confronted with this new information about its error, the Supreme Court would reverse course. Whether lower courts should ever engage in this type of assertiveness is beyond the scope of this Article. But it is worth mentioning here that, without such assertiveness by lower courts, it is difficult to see how the Supreme Court would ever have the opportunity to evaluate an error it may well have overlooked in an earlier case.
burden of proving "but for" causation.82

If the "direct evidence" requirement were eradicated, disparate treatment law would look like this:

**TABLE V: AFTER THE DEATH OF THE "DIRECT EVIDENCE" DISTINCTION**

<table>
<thead>
<tr>
<th>Type of Evidence</th>
<th>Cases Brought Under 1991 Act</th>
<th>Cases Brought Under Other Statutes</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Direct Evidence&quot;</td>
<td>1991 Act</td>
<td>Price Waterhouse</td>
</tr>
<tr>
<td></td>
<td>1. &quot;Motivating Factor&quot; for Liability</td>
<td>1. &quot;But For&quot; for all Purposes</td>
</tr>
<tr>
<td></td>
<td>2. &quot;But For&quot; for Full Damages</td>
<td>2. Burden Shifting on &quot;But For&quot;</td>
</tr>
<tr>
<td>No &quot;Direct Evidence&quot;</td>
<td>3. Burden Shifting on &quot;But For&quot;</td>
<td></td>
</tr>
</tbody>
</table>

B. ERADICATING THE "BUT FOR" REQUIREMENT FOR LIABILITY (THE DEATH OF PRICE WATERHOUSE)

The above analysis solves one normative problem with current law (the requirement that some plaintiffs bear the full burden of proving "but for" causation), but would leave in place the other normative problem with current law (the requirement of "but for" causation for liability in some cases). This section will suggest a solution for this problem: Eradicate Price Waterhouse. Really.

The source of the simple "but for"-for-liability rule is Price Waterhouse.83 Prior to Price Waterhouse, the Court had never been called

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82. Note that I assume here that the burden-shifting mechanism in Price Waterhouse is still good law, even though the "direct evidence" limit on the use of that mechanism is not. That is because it is only the "direct evidence" limit that finds no support in the text or legislative history of Congress's enactments. Congress expressly endorsed burden shifting in the 1991 Act. Of course, it could be argued that Congress's failure to do so in other disparate treatment statutes suggests an intent not to permit burden shifting under those statutes. I will argue below that this limited amendment argument is not persuasive. See infra Part II.B.2.a. However, if one accepted this argument, then the only way to accomplish what I suggest (universal burden shifting) would be for Congress to amend these statutes.

83. It is often thought that the simple "but for" standard originated with McDonnell Douglas. See Katz, supra note 7, at 123–24 & n.58. If this were true, then attacking Price Waterhouse, as I do in this section, would be ineffective at eradicating this requirement. However, McDonnell Douglas cannot be the source of the simple "but for" requirement. As noted in the text below, the issue could not have been raised in that case, which did not involve the possibility of multiple factors in the employer's decision (and thus, the possibility of "motivating factor" causation without "but for" causation). See id. Moreover, the McDonnell Douglas framework does not always prove "but for" causation. See id. So McDonnell Douglas cannot be the source of a "but for" causation requirement.
upon to determine what type of causation was required in disparate treatment cases. This is because all of the Court's earlier cases were what might be termed single-factor cases. In these cases, the factfinder could conclude either that a protected factor (such as race) caused the challenged decision or that a non-protected factor (such as tardiness) caused the challenged decision; the factfinder in these cases could not conclude that both protected and non-protected factors caused the decision. In such single-factor cases, if the protected factor (race) caused the decision, that factor would be the sole factor in the decision. That factor would therefore satisfy any causation requirement. It would always be a "but for" cause. So there would be no reason to decide whether "but for" causation was required, or if some lesser level of causation (such as "motivating factor" causation) would suffice.

The question of what level of causation is required is raised only in multiple-factor cases; cases in which the factfinder might conclude that more than one factor (for example, race and tardiness) contributed to the challenged decision. In a multiple-factor case, there is the possibility that a protected factor (such as race) might have been a "motivating factor," but not a "but for" cause of the challenged decision.

The first time that the Supreme Court addressed a multiple-factor case—and thus, the level-of-causation issue—in a disparate treatment claim was in Price Waterhouse. And in that case, the Court held that "but for" causation was required for liability. Specifically, the Court held that, if the defendant shows that it would have reached the same decision irrespective of its use of the protected factor—that is, a lack of "but for" causation—then there is no liability. Thus, Price Waterhouse is the source of the simple "but for" causation requirement.

This section will argue that this aspect of Price Waterhouse, which was expressly overruled in 1991 Act cases, should not apply to non-1991 Act cases. It is an uphill battle, in the sense that a large number of courts and commentators assume that Price Waterhouse applies in non-1991 Act cases. But they need not do so. There is no Supreme Court precedent...
applying Price Waterhouse’s causal standard to non-1991 Act cases. And there is no good argument for doing so. Rather, the 1991 Act’s two-tier causal standard—“motivating factor” for liability and “but for” for full damages—should apply in non-1991 Act cases, as well as 1991 Act cases.

I. The Basic Argument: Price Waterhouse Is Dead

To understand this argument, it is helpful to keep it in perspective. Specifically, it is helpful to keep in mind that the question here is the meaning of a particular statutory phrase: “because of.” That phrase clearly denotes a causation requirement. But the phrase is not specific about the particular form of causation it requires. It is not clear whether the phrase requires “motivating factor” causation, “but for” causation, or a two-tier combination of the two (such as “motivating factor” causation for liability and “but for” causation for full damages).

As noted above, in Price Waterhouse the Court defined the phrase as requiring simple “but for” causation; that is, requiring “but for” causation for liability, as well as damages. But two years later, in 1991, Congress provided a different definition—a two-tier definition: “but for” causation is required for full damages, but only “motivating factor” causation is required for liability.

90. There is no doubt that Price Waterhouse is no longer good law in 1991 Act cases. That Act expressly overruled Price Waterhouse, imposing liability for “motivating factor” causation.

One might think that this clarification by Congress would end the matter. After all, the whole question revolves around the meaning of a statutory phrase ("because of"). So once Congress defined that phrase, one might think that this would be all there would be to say: Congress’s definition—here, the two-tier definition ("motivating factor" for liability and "but for" for full damages)—would control.

But things are a little more complicated. This is because Congress has used the phrase "because of" in many different disparate treatment statutes. In fact, the phrase appears in virtually every disparate treatment statute.

Thus, it might be possible that Congress intended to apply different definitions of the phrase in different statutes. That is, while it is clear that the 1991 Act definition of "because of" applies in cases brought under section 703(a) of Title VII (the statute amended by the 1991 Act), Congress might have sought to apply a different definition, such as the Price Waterhouse’s definition, in cases brought under other disparate treatment statutes (non-1991 Act cases). This possibility is what fuels the courts’ current application of Price Waterhouse’s “but for”-for-liability definition in non-1991 Act cases.

There are three strong arguments against the proposition that Congress intended to apply different definitions of "because of" in different statutes. First, there is what might be termed the assumption of uniformity. Congress has banned several types of disparate treatment discrimination in several different statutes. Unless Congress says otherwise, it makes sense to assume that Congress intended to apply the same causal standard to all forms of discrimination. Moreover,
Congress used the same phrase in all of these statutes: "because of." It is a well established canon of statutory construction that, where a legislature uses the same phrase in related statutes, that phrase should be given a uniform meaning in those statutes.

While assumptions of congressional intent and canons of statutory construction are usually not the strongest arguments for a particular position, the assumption of uniformity and related uniform-meaning canon have special significance here. This is because it was this exact assumption of uniformity that provided the basis—the sole basis—for applying the Price Waterhouse definition of "because of" to cases outside of section 703(a) in the first place. Price Waterhouse was a section 703(a) case. So it could have been read narrowly; as holding that "because of" means "but for"-for-liability only in section 703(a). Courts could have entertained the possibility that "because of" meant something else in other statutes. But few, if any, did. Most courts that addressed the matter made either an explicit or implicit assumption of uniformity. That is, they assumed that Congress would have wanted the same definition of "because of" to apply in all of its disparate treatment statutes. Based on this assumption, these courts applied Price Waterhouse to disparate treatment cases other than those brought pursuant to section 703(a)—to what are now non-1991 Act cases.

to the different forms of discrimination.

94. See supra note 92. Professor Eglit argues that the assumption of uniformity that once justified common interpretation of Title VII and similar statutes no longer applies because they no longer have common language. See Eglit, supra note 63, at 1104. However, to the extent he is referring to the "motivating factor" and "same action" language that is now in Title VII but not the ADEA, this is not a difference in language. As noted above, the "motivating factor" and "same action" provisions of post-1991 Title VII merely provide a definition for the phrase "because of," which is common to these statutes. See supra note 91.

95. See William N. Eskridge et al., Legislation and Statutory Interpretation (2d ed. 2006); William N. Eskridge, Jr. & Philip P. Frickey, Foreword: Law as Equilibrium, 108 HARV. L. REV. 26, 97–100, 105 (1994) (and cases cited therein). See also Northcross, 412 U.S. at 428 (stating that similarity in language in two statutes "is, of course, a strong indication that the two statutes should be interpreted pari passu"); Pinkerton v. U.S. Dep't of Educ., No. 06-10657, 2007 WL 3349092, at *4 (5th Cir. Nov. 13, 2007) (noting similarity in causal language of ADA and Title VII); Parker, 204 F.3d at 337 ("[T]he 'substantially identical . . . causal language' used in Title VII and the ADA . . . indicates that the expansion of Title VII to cover mixed-motive cases should apply to the ADA as well.") (citation omitted); Jamie Darin Prenkert, Bizarro Statutory Stare Decisis, 28 BERKELEY J. EMP. & LAB. L. 217, 234–35 (2007) ("When the legislature borrows language from one statute to draft a subsequent statute, courts generally agree that the statutes should be construed consistently. . . . Courts have applied the consistency presumption when interpreting language of the ADEA that was lifted directly from Title VII.").

96. See, e.g., Beshears v. Asbll, 930 F.2d 1348, 1353 n.6 (8th Cir. 1991) (applying Price Waterhouse to ADEA case); Visser v. Packer Eng'g Assess., Inc., 924 F.2d 655, 662 (7th Cir. 1991) (same); Kelly v. Drexel Univ., 907 F. Supp. 864, 870–71 (E.D. Pa. 1995) (applying Price Waterhouse to ADA case); Hutchinson v. United Parcel Serv., Inc., 883 F. Supp. 379, 399 (N.D. Iowa 1995) (same); see also Wilson v. Firestone Tire & Rubber Co., 932 F.2d 510, 514 (6th Cir. 1991) (declining to apply Price Waterhouse's burden-shifting mechanism in ADEA case where there was no "direct evidence"); in other words, applying Price Waterhouse's "direct evidence" distinction in ADEA case); Reiff v.
This made perfect sense. The courts have long noted the similarities between section 703(a) and other disparate treatment statutes. For example, the Supreme Court stated that Title VII precedent applies with equal force in an ADEA case because “the substantive provisions of the ADEA ‘were derived in haec verba from Title VII.” And the Supreme Court has never hesitated to apply Title VII precedent to other statutes. Similarly, lower courts have routinely applied section 703(a) precedent to other parts of Title VII (such as its antiretaliation provision) and other disparate treatment statutes (such as the ADEA). So when Price Waterhouse provided the reigning definition of “because of” in section 703(a), it made perfect sense to apply that definition to other disparate treatment statutes too.

But now, this same argument—the same assumption of uniformity—that supported the expansion of Price Waterhouse beyond section 703(a) undercuts the original expansion. Now, this assumption of uniformity suggests that the 1991 Act definition of “because of” controls in all disparate treatment statutes. Before Congress spoke, the only authoritative definition of “because of” came from Price Waterhouse. At

that time, it made sense to apply this definition uniformly. But now Congress has authoritatively defined "because of": in section 703(a), Congress has said that "because of" means "motivating factor" causation for liability and "but for" causation for full damages. Now, the assumption of uniformity and the related uniform-meaning canon—the same principles that initially supported the expansion of Price Waterhouse beyond section 703(a)—suggest that the definition which now appears in section 703(a) should apply to those other disparate treatment statutes. 101

A second argument for the application of the 1991 Act definition beyond section 703(a) is based upon express congressional intent. While assumptions of uniformity or uniform-meaning canons may be helpful in guessing Congress's intent regarding uniformity, such guessing is not necessary where Congress has expressed its intent. In passing the 1991 Act, Congress—or, at least the House committee that evaluated and recommended the 1991 Act—expressly stated that it intended uniformity. 102 The House Committee on the Judiciary stated:

A number of other laws banning discrimination, including the [ADA] and the [ADEA] 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,... mixed motive cases involving disability under the ADA

101. Some scholars of statutory interpretation have suggested that it is generally inappropriate to use later legislative pronouncements (such as the 1991 Act) as a guide to interpreting prior legislative pronouncements (such as the ADEA or the ADA). See Prenkert, supra note 95, at 252 (describing general rule against reliance on post-enactment legislative pronouncements). However, a case such as this, where the later pronouncement is an unequivocal response to a court's interpretation of the earlier pronouncement, is an exception to this general rule. See id.

102. See H.R. REP. No. 102-40, pt. 2, at 47 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 710. I recognize that there is currently a debate over the value of committee reports in statutory interpretation. The Supreme Court has recognized such reports as an "authoritative source for legislative intent." See Thornburg v. Gingles, 478 U.S. 30, 43-44 nn.7-8 (1986); see also Jorge L. Carro & Andrew R. Braunn, The U.S. Supreme Court & the Use of Legislative Histories: A Statistical Analysis, 22 JURIMETRICS 294, 304 (60% of Supreme Court legislative history citations refer to committee reports). However, certain textualists have expressed concern over using committee reports to interpret statutes as a result of the possibility that lobbyists might insert self-serving material into those reports. See Flynn, supra note 22, at 2025-26, 2032. This debate is beyond the scope of this Article. In any event, this particular report seems reliable in that it is consistent with both the general assumption of uniformity and the less manipulable legislative history of the Act: the context of the Act, in which Congress was expressing profound disapproval of Price Waterhouse's definition of "because of" (discussed in the text immediately below).

Professor Eglit challenges the reliability of this particular report on the ground that it was drafted early in the process of passing the 1991 Act. See Eglit, supra note 63, at 1168-69. This timing might be important with respect to the report's conclusions on disparate impact, the subject of most of the subsequent debate over the statute. See Jacobs, supra note 91, at 1-2 (noting that controversy over the 1991 Act was over disparate impact). The provisions of the Act regarding the standard of causation for liability did not undergo any significant changes between the time the report was written and the passage of the final bill.
should be interpreted consistent with the prohibition against all intentional discrimination in Section 5 of this Act [which, in that version of the bill, contained the two-tier "motivating factor"/"but for" standard].

Thus, the application of the 1991 Act definition to other statutes is supported not just by assumptions or canons of construction; it is supported by Congress's express statements.

Finally, the legislative history of the 1991 Act—specifically, the context in which that Act was passed—supports the application of that Act's definition to other disparate treatment statutes. Congress expressly overruled the Price Waterhouse definition of "because of" based on the exact same normative problem discussed above in Part II.B: requiring "but for" causation for liability lets defendants who engaged in "motivating factor" discrimination off the hook. As explained by an outraged House Committee on the Judiciary, Price Waterhouse's definition "undercut [the prohibition against invidious discrimination], threatening to undermine Title VII's twin objectives of deterring employers from discriminatory conduct and redressing the injuries suffered by victims of discrimination." And the House Education and Labor Committee explained: "If Title VII's ban on discrimination in employment is to be meaningful, victims of proven discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions. Price Waterhouse jeopardizes that fundamental principle." That Committee criticized Price Waterhouse for "send[ing] a message that a little overt sexism or racism is okay, as long as it was not

103. H.R. Rep. No. 102-40. Arguably, this language might suggest that Congress intended its 1991 Act two-tier formulation to apply only in "mixed motive" cases under other statutes. However, as I suggested in an earlier article, the only viable definition of "mixed motive" is a case in which a factfinder could reasonably conclude that a decision was based on multiple factors. See Katz, supra note 7. In a "single motive" case, a defendant who was found to discriminate would satisfy any possible definition of causation; the plaintiff could not help but prove "but for" causation. Thus, the question of whether to adopt the 1991 Act standard or the Price Waterhouse would be irrelevant.

104. This argument is even stronger in the context of the ADA, in which Congress expressly incorporated the remedies provisions of Title VII, including 42 U.S.C. § 2000e-5, which contains the "same action" defense. See 42 U.S.C. § 12117(a); see also Perrett, supra note 26, at 6 (noting that Congress rejected an amendment to the ADA that would have limited its incorporation of Title VII law to Title VII law at the time, i.e., post-Price Waterhouse, but pre-1991 Act); Flynn, supra note 22, at 2038 n.147 (discussing why it is clear that, in passing the ADA, Congress intended to incorporate future changes to Title VII into its linked provisions). The "same action" defense, of course, makes no sense without the "motivating factor" test. "Same action" is a defense that permits defendants to prove a lack of "but for" causation. This burden arises only after the plaintiff has proven the lower "motivating factor" standard. Similarly, in the context of Title VII retaliation claims, there is an additional textual argument for uniformity. As explained by Lex Larson, "the mixed motive clause defines the conditions under which an 'unlawful employment practice' is established. The antiretaliation provision of Title VII appears under the specific heading of '[o]ther unlawful employment practices.'" 2 Larson, Employment Discrimination, supra note 31, § 35.04[1].


the only basis for the employer's action.'" In other words, Congress thought that *Price Waterhouse* got the definition of “because of” wrong—very wrong.\(^{108}\)

There is no reason to believe that Congress’s concern over *Price Waterhouse*’s definition was limited to Title VII. Virtually all disparate treatment statutes share the same two goals articulated by the House Committee on the Judiciary: deterrence and compensation. And a simple “but for” requirement undermines these goals, particularly the goal of deterrence. Such a requirement exonerates defendants who have used protected characteristics (such as race or sex—or age, disability, or family leave status) in their decision-making. Given Congress’s outrage when *Price Waterhouse* tried to impose such a problematic requirement in Title VII, it seems inconceivable that Congress intended to permit the same flawed definition—cribbed from the case Congress had just overruled—to apply in its other disparate treatment statutes.\(^{109}\) As Professor Schnapper put it so pithily: “No one but an incorrigible judicial recidivist would consider... applying to [non-1991 Act] statutes the very defective interpretive methodology that the Congress condemned in enacting those corrective laws.”\(^{110}\)

In summary, the application of the 1991 Act definition of “because of” to other statutes is supported by an express statement of congressional intent and the historical context of the Act. And the only bases that ever existed for applying the *Price Waterhouse* definition to statutes other than section 703(a)—an assumption of uniformity and the related uniform-meaning canon—no longer support that result. To the contrary, the assumption of uniformity and the uniform-meaning canon support the application of the 1991 Act definition to those other statutes. The 1991 Act definition (“motivating factor” for liability and “but for” for full damages) should apply in all disparate treatment cases. *Price Waterhouse*’s definition (“but for” causation for liability, as well as damages) should be declared dead.

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107. Id.

108. See Desert Palace v. Costa, 539 U.S. 90, 94 (2003) (noting that section 107 of the 1991 Act, which sets out the “motivating factor” for liability standard, was a direct response to *Price Waterhouse*).

109. See Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1235 n.23 (3d Cir. 1994) (“One overriding lesson the 1991 Act tutors... is that Congress was unhappy with increasingly parsimonious constructions of Title VII.”); EEOC Policy Guidance No. 915.002, § 2095 n.14 (July 14, 1992); 2 Larson, Employment Discrimination, supra note 31, § 35.04[1]. See also Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (codified as amendment at 42 U.S.C. § 1981) (stating that the purpose of the Act was “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”).

If *Price Waterhouse*’s “but for”-for-liability rule, as well as its “direct evidence” requirement, were eradicated, disparate treatment law would be completely unified. It would look like this:

**TABLE VI: AFTER THE DEATH OF PRICE WATERHOUSE**

<table>
<thead>
<tr>
<th>Type of Evidence</th>
<th>Cases Brought Under 1991 Act</th>
<th>Cases Brought Under Other Statutes</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Direct Evidence”</td>
<td>1991 Act</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1. “Motivating Factor” for Liability</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2. “But For” for Full Damages</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3. Burden Shifting on “But For”</td>
<td></td>
</tr>
<tr>
<td>No “Direct Evidence”</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

2. *Overcoming Denial: Price Waterhouse Really Is Dead*

While the above argument may seem straightforward, it has not been universally accepted. In fact, it has met staunch resistance among courts and commentators. As noted above, most courts and commentators seem to apply the *Price Waterhouse* definition of “because of” in non-1991 Act cases; that is, cases brought under statutes other than section 703(a) of Title VII. Those writers who have addressed the issue have tended to offer one of two arguments for the continued viability of *Price Waterhouse* in non-1991 Act cases. But both arguments are flawed.

a. *The Limited Amendment Argument (or “Bizarro Statutory Stare Decisis”)*

The primary argument for the continued viability of *Price Waterhouse* in non-1991 Act cases is what might be termed the limited amendment argument. The argument is that Congress could have amended all of its disparate treatment statutes, but did not. The idea is that Congress must have known that courts were applying the *Price Waterhouse* definition of “because of” not just to 703(a) cases, but to cases under all disparate treatment statutes. So, the argument goes, if Congress wanted to stop this expansion of *Price Waterhouse*, it could have amended all of those other statutes. It could have amended the ADEA, the ADA, and any other disparate treatment statute it thought appropriate. It could have added language to each of those statutes to say that “but for” means “motivating factor” causation for liability and

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111. See supra note 88 and accompanying text.
112. The more colorful label for this argument comes from Professor Prenkert. See Prenkert, supra note 95.
“but for” causation for full damages. But Congress did not amend those other statutes. The only statute it amended in this regard was section 703(a). Thus, the argument concludes, Congress must have sought to amend only section 703(a). And it must have intended to leave the Price Waterhouse definition in place for all other disparate treatment statutes.13

There are five problems with the limited amendment argument. First, the limited amendment argument is fundamentally an argument that attempts to ascertain Congress’s intent. It assumes, based on the fact that Congress amended only section 703(a), that Congress intended to permit the continued application of Price Waterhouse to other statutes. But, as noted above, we do not need to attempt to ascertain Congress’s intent by looking at what statutes it amended and what statutes it did not amend. Congress has told us its intent: It intended its definition of “because of” in section 703(a) to control the interpretation of that phrase in other disparate treatment statutes.14 Moreover, even had Congress not told us its intent in such express terms, we have another—better—indicia of its intent than the fact of limited amendment: Congress’s angry response to the Court’s definition in Price Waterhouse should tell us unequivocally that Congress intended to eradicate the Court’s erroneous definition.15 Thus, the limited amendment analysis, which purports to divine congressional intent and then suggests that Congress’s intent was to leave Price Waterhouse in place in all but one disparate treatment statute, is both unnecessary and wrong.

The second problem with the limited amendment argument is that it relies on an untenable assumption. It wrongly assumes that, at the time it crafted the 1991 Act, Congress was aware of the courts’ expansion of


114. See supra notes 103-04 and accompanying text.

115. See supra notes 105-08 and accompanying text.
Price Waterhouse to other disparate treatment statutes. This assumption is necessary to give significance to Congress's supposed decision not to amend those other statutes. But the assumption is simply incorrect. In 1990 and 1991, when Congress was at work on the 1991 Act, it had little or no reason to know of the expansion of Price Waterhouse beyond section 703(a). At that time, the Supreme Court had not applied Price Waterhouse to any case outside of section 703(a). And only two courts of appeals had done so—both quite late in the two-year process that led to the passage of the 1991 Act. Thus, to assume that Congress was aware of any Price Waterhouse “creep”—of any trend toward applying that case in statutes beyond section 703(a)—is, at best, a stretch.

A third, and related, problem with the limited amendment argument is that it tells an unconvincing story about why Congress amended only section 703(a). It suggests that this act of limited amendment surely reflected a conscious desire to leave Price Waterhouse in place for other statutes. But its act of limited amendment may have reflected any number of possible intents. It may simply have reflected Congress’s focus on a particular problem: Price Waterhouse, a section 703(a) case. It may have reflected an assumption by Congress that the Price Waterhouse problem was limited to section 703(a); that courts either had not or would not expand the Price Waterhouse definition of “because of” to

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116. See Eglit, supra note 63, at 1173 (noting that, to ascertain meaning from congressional silence, one must assume congressional awareness); see also Prenkert, supra note 95, at 237 (noting difficulty of determining the meaning of congressional inaction).

117. In fact, it is unclear that the Supreme Court has ever applied Price Waterhouse to a disparate treatment statute other than section 703(a). The closest the Court has come to doing so is citing Price Waterhouse in an ADEA case, Smith v. City of Jackson, 544 U.S. 228 (2005). But Smith was a disparate impact case. And Price Waterhouse’s relevance to that case is far from clear. Moreover, as will be discussed below, Smith should not be read as supporting the continued viability of Price Waterhouse. See infra Part B.2.b.

118. See, e.g., Beshears v. Asbill, 930 F.2d 1348, 1353 n.6 (8th Cir. 1991) (applying Price Waterhouse to ADEA case in May 1991); Visser v. Packer Eng’g Assocs., Inc., 922 F.2d 655, 662 (7th Cir. 1991) (same in February 1991); see also Wilson v. Firestone Tire & Rubber Co., 932 F.2d 510, 514 (6th Cir. 1991) (refusing to apply Price Waterhouse to ADEA case where there was no “direct evidence” in May 1991). Cf. Hicks v. Brown Group, Inc., 902 F.2d 650, 655–56 (8th Cir. 1990) (suggesting, without deciding, that it would not apply Price Waterhouse to a claim under 42 U.S.C. § 1981, because its purpose and legislative history differ from those of Title VII); Narang v. Chrysler Corp., Nos. 88-3918, 88-3954/896, 1990 WL 18057, at *4 n.2 (6th Cir. Mar. 1, 1990) (unpublished decision holding, as alternative ground, that Price Waterhouse does not apply to claim under 42 U.S.C. § 1981). Even those who argue for the application of Price Waterhouse to non-1991 Act cases acknowledge that there was little reason to assume that the 1991 Act Congress would have been aware of any trend toward applying Price Waterhouse in non-1991 Act cases. See Eglit, supra note 63, at 1192. Professor Eglit tries to argue that Congress should have anticipated this trend based on its knowledge of the trend toward uniformity. See id. at 1192–93. However, this knowledge could equally support the argument that Congress expected that its 1991 Act definition would be applied uniformly.

other statutes, particularly given the fact that Congress was providing a new definition. Or it may have reflected an assumption by Congress that amending other statutes was unnecessary, given its express statement in the legislative history that it intended the 1991 Act to apply to other disparate treatment statutes. Or it may simply reflect the "sloppy draftsmanship, inconsistent usages, and unnecessary ambiguities" that pervade the 1991 Act. Trying to deduce anything significant from the fact that Congress amended only section 703(a) is problematic.

A fourth problem with the limited amendment argument is that it rejects the assumption of uniformity—and adopts an assumption of non-uniformity—without good reason. The argument suggests that Congress intended to apply different causal standards to different types of discrimination. And it suggests, contrary to the uniform-meaning canon, that Congress used the same language ("because of") in different statutes to mean different things. The assumption of uniformity makes sense, as does the uniform-meaning canon. These principles should not be rejected based on weak inferences from ambiguous patterns of congressional action or inaction.

Moreover, the rejection of the assumption of uniformity is particularly troubling, given that it was this exact assumption that justified the expansion of Price Waterhouse beyond section 703(a) in the first place. This is, perhaps, the most "bizarre" aspect of the limited amendment argument. It adopts the assumption of uniformity to expand the reach or Price Waterhouse, but rejects the same assumption when it comes time to expand the reach of the 1991 Act and restrict the reach of Price Waterhouse.

This about-face on the assumption of uniformity highlights a fifth and final problem with the limited amendment argument: the argument is problematic because it sets different standards for the Court and Congress, and in a context that is unseemly. When the Court decided Price Waterhouse, it was a section 703(a) case. Yet other courts had no

120. See supra note 103 and accompanying text.
121. See Larson, Civil Rights Act, supra note 31, at 5 (noting that primary focus of Congress in 1991 Act was avoiding presidential veto of the bill as a "quota bill" based on its disparate impact provisions, and that the rest of the bill suffered as a result).
122. See Prenkert, supra note 95, at 238, 250-52 (listing and explaining numerous reasons why Congress might fail to amend a particular statute); see also Eglit, supra note 63, at 1174 ("Silence, in sum, can be read as meaning nothing"); id. at 1177 ("The argument also has been made, both by commentators and by the Court itself, that Congressional inaction cannot support any inferences because there are so many possible reasons for a legislature's failure to act.").
123. One might conceivably argue that Congress thought that forms of discrimination outside of section 703(a) (such as age discrimination) are less serious, and thus sought to impose a higher standard. See, e.g., Mereish v. Walker, 359 F.3d 330, 340 (4th Cir. 2004). This argument seems problematic in light of the fact that in the voluminous legislative history of statutes such as the ADA or the ADEA Congress never suggests any less concern regarding the types of discrimination contained in those statutes than the types of discrimination covered in Title VII.
problem assuming that the Supreme Court wanted its pronouncement to be applied to other disparate treatment statutes. The Supreme Court did not need to say, "We want this ruling to apply to all disparate treatment statutes." On the other hand, the limited amendment argument suggests that Congress must be far more explicit than the Court. If Congress wants its pronouncement to apply beyond section 703(a), the argument posits, it must affirmatively say so. This double standard—curmudgeonly readings of congressional pronouncements and broad readings of the Court's pronouncements—seems problematic.

And this double standard seems particularly problematic in the context of *Price Waterhouse* and the 1991 Act. In this context, it is not a question of courts giving a curmudgeonly reading to just any congressional pronouncement. Here, the congressional pronouncement in question is a slap in the face to the courts—an overruling of a court's misinterpretation of a statute. Courts adopting the limited amendment argument in this context look like they are applying a double standard that favors an overruled Court opinion over Congress's overruling. This unseemliness is heightened by the fact that, prior to the 1991 Act, courts appeared to fall all over themselves to apply a uniform standard (the *Price Waterhouse* standard). But now that such a uniform standard would be based on a congressional correction to a Supreme Court misinterpretation—and a correction that would be more friendly to plaintiffs—the same courts suddenly seem unsure about whether Congress really wanted uniformity. This double standard is unseemly.

In summary, the limited amendment argument is seriously flawed. It can—and should—be rejected.

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124. As noted above, Congress did say so. See supra note 103 and accompanying text. But that is beside the point here. The point here is that the limited amendment argument applies a double standard.

125. This standard also sets an unrealistic and onerous standard for Congress and encourages otherwise unnecessary tinkering with statutes. See Prenkert, supra note 95, at 253.

126. See supra notes 97–100 and accompanying text.

127. In addition to the general limited amendment argument described in the text, there are two additional limited amendment arguments that may apply in the context of Title VII antiretaliation claims: First, some parts of the 1991 Act reference Title VII's antiretaliation provision and others do not. Thus, one might argue, where Congress did not reference Title VII's antiretaliation provision, Congress intended to exclude that provision. And in both its "motivating factor" provision and its "same action" provision, the 1991 Act does not refer to Title VII's retaliation provision. So, the argument goes, Congress must have meant to exclude Title VII's retaliation provision from the 1991 Act framework; that is, Congress must have meant to treat retaliation claims under Title VII differently from claims under section 703(a). See McNutt v. Bd. of Trs. of Univ. of Ill. 141 F.3d 706, 707–09 (7th Cir. 1998). Second, in the amended version of Title VII, the provision immediately preceding the one containing the "same action" defense refers to both discrimination and retaliation, while the "same action" section does not. Arguably, this gives the omission of retaliation in the "same action" section "special significance," i.e., it suggests that Congress intended to exclude retaliation claims from those in which limited damages would be available despite a successful "same action" defense. However, neither of these arguments is any more persuasive than the general limited
b. The Smith Card

The final attempt to spare Price Waterhouse relies on the Supreme Court's recent decision in Smith v. City of Jackson. That case was a disparate impact case. So it can hardly serve as a direct authority for applying Price Waterhouse to disparate treatment statutes other than section 703(a). And that does not appear to be the argument of Price Waterhouse supporters. Rather, the argument is that—irrespective of the merits of the limited amendment argument—Smith has espoused that argument.

The limited amendment argument came up in Smith because, in the field of disparate impact law, the 1991 Act overruled another Title VII case: Wards Cove Packing Co. v. Atonio. In dicta, Smith suggested that Wards Cove is still good law in cases outside of Title VII. The rationale for this point was a limited amendment argument: when Congress overruled Wards Cove, it did not mention the ADEA; so Wards Cove still applied in ADEA cases.

There are four problems with trying to use Smith to save Price Waterhouse. First, this portion of Smith was dicta. The issue was whether the plaintiffs had a viable disparate impact case. The holding was that the plaintiffs did not, since they could not overcome the defendant's "reasonable factor other than age" defense. Along the way, the Court

amendment argument. First, in the context of Title VII retaliation claims, there is a textual argument for the application of the 1991 Act standard. See 2 Larson, Employment Discrimination, supra note 31, § 35.04[1] (the 1991 Act provides a definition of "unlawful employment practice," and retaliation is included on statute's list of "other unlawful employment practices"). These textual arguments against the application of the 1991 Act to Title VII retaliation claims rely on slight drafting differences to find an inexplicable congressional intent to treat two types of discrimination differently. See McNutt, 141 F.3d. at 709 (lacking an explanation of why Congress would do this, and chalking it up to "seemingly inexplicable legislative choices"); see also Larson, Civil Rights Act, supra note 31, at 5 (noting that Congress's primary focus in 1991 Act was avoiding a presidential veto as a "quota bill" and that, as a result, the law is "riddled with sloppy craftsmanship, inconsistent usages, and unnecessary ambiguities"). Perhaps as a result of the weakness of this textual argument, the EEOC and several courts have rejected the argument that the 1991 Act does not apply in Title VII retaliation cases. See supra note 31.

128. Professor Prenkert proposes a compelling solution to the limited amendment argument as a general matter: a presumption that, when Congress rebukes a statutory interpretation by the Court, that interpretation should not be resurrected in other statutory contexts without a "particularly compelling indication that the interpretation is warranted under the related statute." See Prenkert, supra note 95, at 256. In the context of Price Waterhouse, there is no such indication. Although Professor Prenkert's project focuses on Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), and disparate impact law, he suggests that this would be the proper conclusion with respect to Price Waterhouse. See Prenkert, supra note 95, at 267.

129. 544 U.S. 228 (2005)


131. See 544 U.S. at 240.

132. See id.

133. See id. at 242 ("In sum, we hold that the City's decision... was a decision based on a
"initially note[d]" that the plaintiffs had failed to challenge a specific employment practice. Although the 1991 Act also contains a requirement that the plaintiff challenge a specific employment practice, the Court for some reason attributed this requirement to *Wards Cove.* It was in this context—an argument that *Wards Cove* required plaintiffs to identify a specific employment practice—that the Court seemed to adopt the limited amendment argument. Yet, the irrelevance of the specific employment practice requirement to the Court’s holding, as well as the irrelevance of *Wards Cove* to the specific employment practice requirement, make clear that there was no need whatsoever for the Court to opine on the continued validity of *Wards Cove.* This portion of *Smith* was clearly dicta.

Second, and relatedly, while the Court recited a limited amendment argument, it did not discuss that argument. The opinion contains no consideration of the strengths or (considerable) weaknesses of the limited amendment argument. The fact that the limited amendment argument was recited in dicta without discussion undercuts most, if not all, precedential force the argument might have.

These first two problems are, of course, somewhat weak. The fact that the Court seemed to buy into the limited amendment argument, even in unconsidered dicta, is important. It might certainly suggest an inclination to accept the argument when properly brought before it.

But there are two more serious problems with trying to use *Smith* and *Wards Cove* to save *Price Waterhouse:* there are two critical differences between disparate treatment cases and disparate impact cases under the 1991 Act. These two differences, respectively, underlie the third and fourth arguments against attempting to rely on *Smith* to preserve *Price Waterhouse.*

The third problem with trying to use *Smith* to save *Price Waterhouse* is a difference in the assumption of uniformity between disparate impact cases and disparate treatment cases. In disparate impact cases, such as *Smith,* the text of the ADEA differs significantly from the text of Title VII. *Smith,* in fact, noted that the ADEA provided a "reasonable factor other than age" (RFOA) defense, which it saw as more defendant-friendly than Title VII’s "business necessity" defense. Such a textual difference might arguably support the idea that Congress intended the standard for liability under the ADEA to differ from the standard for liability under Title VII. In contrast, in their disparate treatment

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134. See id. at 241.
135. See 544 U.S. at 240 (stating that the RFOA provision in the ADEA suggests that "the scope of disparate-impact liability under ADEA is narrower than under Title VII").
language, the language of the two statutes is virtually identical.\textsuperscript{36} Hence, in disparate treatment cases, such as \textit{Price Waterhouse}, the presumption of uniformity should apply. Disparate impact cases, such as \textit{Smith}, have no bearing on this presumption.

A final problem with trying to use \textit{Smith} to save \textit{Price Waterhouse} is that there is a critical difference in the legislative history available in disparate impact cases and disparate treatment cases. Perhaps as a result of extensive political wrangling over the disparate impact portion of the 1991 Act, the Act limited the legislative history that courts could use to interpret that portion of the Act: in interpreting its disparate impact provisions, the only legislative history that can be considered is a particular interpretive memorandum that was read into the Senate record.\textsuperscript{137} Because that interpretive memorandum says nothing about other statutes or Congress's intent regarding uniformity between statutes, the Court in a disparate impact case such as \textit{Smith} might arguably be in the position of needing to discern intent using arguments like the limited amendment argument. However, in disparate treatment cases, there is no limit on the legislative history a court can consider. Thus, in disparate treatment cases, courts may and should consider the House report discussed above—in which Congress made clear that its new definition of "because of" should apply in all disparate treatment statutes "modeled after" Title VII.\textsuperscript{38} This statement of legislative intent, which was not available in \textit{Smith}, strongly suggests that \textit{Price Waterhouse} should be declared dead.

In summary, \textit{Price Waterhouse} was overruled in section 703(a) cases, and it should not be applied in non-703(a) cases. Rather, the definition of "because of" provided by Congress in the 1991 Act should guide courts' interpretation of that phrase in all disparate treatment cases. Doing so

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\textsuperscript{136}. Arguably, the RFOA provision of the ADEA applies to disparate treatment cases as well, suggesting textual differences in the disparate treatment, as well as the disparate impact, portions of those statutes. However, as explained by \textit{Smith}, the RFOA language of the ADEA is irrelevant in disparate treatment cases: "In most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under [the ADEA's disparate treatment provision] in the first place. . . . In those disparate-treatment cases, such as in \textit{Hazen Paper} itself, the RFOA provision is simply unnecessary to avoid liability under the ADEA, since there was no prohibited action in the first place." See 544 U.S. at 238.

\textsuperscript{137}. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1075 ("No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to \textit{Wards Cove}—Business necessity/cumulation/alternative business practice.").

\textsuperscript{138}. See supra note 103 and accompanying text. Interestingly, the same legislative history expresses an intent to apply the Act's new disparate impact standards to other statutes beyond Title VII, using the ADA as an example. However, as discussed in the text, because of the Act's limit on legislative history in disparate impact cases, the Court could not have considered this piece of legislative history, even had it seriously discussed the issue.
would end the use of the normatively problematic "but for" standard. It would also permit a true unification of disparate treatment law. All disparate treatment cases would be litigated under the 1991 Act's two-tier standard: "motivating factor" causation would be required for liability (and to shift the burden of proof), and "but for" causation would be required for damages.

CONCLUSION

The current fragmentation in disparate treatment law is costly and problematic. Two of the three existing frameworks are normatively flawed. Disparate treatment doctrine should be unified under the standards and allocations of burden set forth in the 1991 Act. This Article has pointed the way toward such a unification.