The Meaning of "Because" in Employment Discrimination Law: Causation in Title VII Retaliation Cases after *Gross*

Andrew Kenny†

INTRODUCTION

There are several employment discrimination statutes that together seek to safeguard equality in the workplace. Title VII of the Civil Rights Act of 1964[1] addresses discrimination based on race, color, religion, sex, or national origin. The Age Discrimination in Employment Act of 1967[2] (ADEA) addresses age discrimination. Both statutes make it unlawful for an employer to discriminate against an employee "because of" a protected characteristic.[3] They also prohibit retaliation against an employee "because" the employee opposed a discriminatory practice.[4] In *Price Waterhouse v Hopkins*,[5] the Supreme Court first interpreted the words "because of" in the discrimination provision of Title VII as establishing a burden-shifting framework.[6] This framework allows the employee to shift the burden of proof to her employer by showing that a protected characteristic played some part in the employer's decision to take an adverse action

† BA 2009, University of Notre Dame; JD Candidate 2012, The University of Chicago Law School.

1 Pub L No 88-352, 78 Stat 253, codified as amended at 42 USC § 2000e et seq.

2 Pub L No 90-202, 81 Stat 602, codified as amended at 29 USC §§ 621–34.

3 See 42 USC § 2000e-2(a); 29 USC § 623(a).

4 See 42 USC § 2000e-3(a); 29 USC § 623(d).

5 490 US 228 (1989).

6 There are two separate types of burden shifting available in employment discrimination cases. This Comment uses the term "burden shifting" only in the mixed-motive sense—meaning when the plaintiff shifts the burden of proof to the employer by showing that a protected characteristic played a part in the employer's decision to take adverse action against the employee. The other approach involves so-called "pretext" claims. See *McDonnell Douglas Corp v Green*, 411 US 792, 802–03 (1973). A pretext claim involves the plaintiff making out a prima facie case of discrimination, which then requires the employer to articulate a legitimate, nondiscriminatory reason for its action. If the employer does so, then the burden of proof returns to the plaintiff, who must prove that the employer's proffered reason is pretextual. Although the Supreme Court did not address the continuing viability of the *McDonnell Douglas* pretext framework in *Gross v FBL Financial Services, Inc*, 129 S Ct 2343 (2009), lower courts that have faced the issue continue to apply the pretext analysis. See, for example, *Gorzynski v Jetblue Airways Corp*, 596 F3d 93, 106 (2d Cir 2010); *Geiger v Tower Automotive*, 579 F3d 614, 622 (6th Cir 2009); *Smith v City of Allentown*, 589 F3d 684, 691 (3d Cir 2009).

against her, such as discharge or demotion.[7] Yet in the ADEA context, "because of" was later interpreted by the Court in *Gross v FBL Financial Services, Inc*[8] as requiring that the employee prove that age was a but-for cause of the employer's decision, without the aid of burden shifting.[9] In *Gross*, the Supreme Court reasoned that, because Congress codified the burden-shifting framework for Title VII discrimination claims in response to *Price Waterhouse*,[10] but did not similarly amend the ADEA, the burden-shifting framework is unavailable in the age discrimination context.[11]

Whether the pro-employee burden shifting of *Price Waterhouse* or the pro-employer standard of *Gross* should govern Title VII *retaliation* claims has currently split the lower courts. Three district courts hold that, because Congress codified burden shifting only for Title VII discrimination claims, the plaintiff cannot utilize burden shifting in the retaliation context.[12] Similarly, the Seventh Circuit asserts that, unless Congress has explicitly provided otherwise, the plaintiff-employee must prove but-for causation, without any burden shifting, "in all suits under federal law."[13] By contrast, the Fifth Circuit and a fourth district court follow the earlier precedent of *Price Waterhouse*—which *Gross* did not explicitly overturn—by applying burden shifting in the Title VII retaliation context.[14] What remains of *Price Waterhouse* and its burden-shifting framework, and whether and to what extent the logic of *Gross* applies to Title VII, is the subject of this Comment.

The allocation of the burden of proof has important consequences for employees' ultimate success at trial.[15] In recent years, plaintiffs in employment discrimination cases have fared increasingly poorly in federal court.[16] In 2010, Senators Tom Harkin, Patrick Leahy,

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7 *Price Waterhouse*, 490 US at 244–45 (plurality).

8 129 S Ct 2343 (2009).

9 Id at 2350–51.

10 See Civil Rights Act of 1991 § 107(a), Pub L No 102-166, 105 Stat 1071, 1075, codified at 42 USC § 2000e-2(m).

11 See *Gross*, 129 S Ct at 2349.

12 See *Zhang v Children's Hospital of Philadelphia*, 2011 WL 940237, *2 (ED Pa); *Hayes v Sebelius*, 762 F Supp 2d 90, 111–13 (DDC 2011); *Beckford v Giethner*, 661 F Supp 2d 17, 25 n 3 (DDC 2009).

13 *Fairley v Andrews*, 578 F3d 518, 525–26 (7th Cir 2009). See also *Serwatka v Rockwell Automation, Inc*, 591 F3d 957, 961–62 (7th Cir 2010).

14 See *Smith v Xerox Corp*, 602 F3d 320, 325–30 (5th Cir 2010); *Nuskey v Hochberg*, 730 F Supp 2d 1, 5 (DDC 2010).

15 See David Sherwyn and Michael Heise, *The* Gross *Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 Ariz St L J 901, 933–37 (2010).

16 See Kevin M. Clermont and Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv J L & Pub Pol 103, 104–05 (2009).

and George Miller proposed an amendment to the ADEA that would overturn *Gross*,[17] but the bill died in committee.[18] Moreover, even if it is enacted in the future, the proposed bill says nothing about the retaliation provision of Title VII. Lower courts, then, are tasked with deciding whether the burden-shifting framework of *Price Waterhouse* still protects employees who are subject to retaliation.

Part I places *Gross* in context by reviewing the statutory framework of Title VII and the ADEA and the interaction between the Supreme Court and Congress that led to the current split. Part II traces the development of the current split in the lower courts. Part III shows that, despite its complicated history, the recent split boils down to a single issue: the original scope of *Price Waterhouse*, the Supreme Court's first take on the meaning of "because" in Title VII. Part III also shows that, rather than grappling with this underlying question, lower courts favoring the broad application of *Gross* and its requirement of but-for causation proved solely by the plaintiff have either explicitly or implicitly assumed that *Price Waterhouse* originally applied only to discrimination—and not retaliation—claims. Similarly, courts applying *Price Waterhouse* and its burden-shifting framework to retaliation claims have necessarily assumed—so far, without analysis—that *Price Waterhouse* originally applied to *all* of Title VII. Part IV then explores the scope of *Price Waterhouse* to determine whether, at the time it was decided, it applied to all of Title VII or just to the discrimination section. Ultimately, Part IV argues that *Price Waterhouse* originally applied throughout Title VII and that, because neither Congress nor the Supreme Court has touched the retaliation provision since *Price Waterhouse* was decided, its burden-shifting framework necessarily continues to govern Title VII retaliation claims.

I. BACKGROUND: PUTTING *GROSS* IN CONTEXT

A. The Statutory Framework of Title VII and the ADEA

In different sections, Title VII prohibits both discrimination and retaliation by employers. Under Title VII's discrimination provision, it

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[17] See Protecting Older Workers against Discrimination Act, HR 3721, 111th Cong, 1st Sess, in 155 Cong Rec H 10518 (daily ed Oct 6, 2009) (introducing a bill "[t]o amend the Age Discrimination in Employment Act of 1967 to clarify the appropriate [mixed-motive] standard of proof"). Some commentators have argued that *Gross* was simply wrongly decided and have urged congressional intervention. See, for example, Michael C. Harper, *The Causation Standard in Federal Employment Law:* Gross v. FBL Financial Services, Inc., *and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 Buff L Rev 69, 70 (2010).

[18] See *H.R. 3721: Protecting Older Workers against Discrimination Act* (GovTrack 2011), online at http://www.govtrack.us/congress/bill.xpd?bill=h111-3721 (visited Apr 18, 2011).

is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[19] Under Title VII's retaliation provision, it is unlawful "for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing."[20]

Other federal statutes establish similar prohibitions against discrimination.[21] In particular, the ADEA makes it unlawful "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . *because of* such individual's age."[22] This language is identical to that in Title VII.[23] The question, then, is to what extent these identical terms should be interpreted identically.

B. *Price Waterhouse*: The Origin of Title VII Burden Shifting

The puzzle begins—and, as Part III shows, ultimately ends—with *Price Waterhouse*, a case involving the discrimination provision of Title VII. A female plaintiff was refused entry into the partnership at Ernst & Young at least in part because she was deemed insufficiently ladylike. Among other things, one of her evaluators said that to improve her chances, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[24] A plurality of the Supreme Court led by Justice William Brennan began by considering the language of Title VII and what Congress meant when it said that an employer could not discriminate against an employee "because of" a protected characteristic. The Court said that "[w]e take these words to mean that gender must be irrelevant to employment decisions" and thereafter explicitly dismissed an interpretation of "because" that required "but-for" causation.[25]

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19 42 USC § 2000e-2(a)(1).

20 42 USC § 2000e-3(a).

21 While several statutes are potentially affected by the Supreme Court's decision in *Gross*, this Comment focuses on Title VII, because Title VII and the ADEA are the cornerstones of employment discrimination law, generating the most lawsuits by far. See William R. Corbett, *Babbling about Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U Pa J Bus L 683, 692–93 n 39 (2010).

22 29 USC § 623(a)(1) (emphasis added).

23 See 42 USC § 2000e-2(a)(1) (discrimination); 42 USC § 2000e-3(a) (retaliation).

24 *Price Waterhouse*, 490 US at 235 (plurality).

25 Id at 240. But see id at 281 (Kennedy dissenting) (observing that the plurality's test, in operation if not in name, does in fact require but-for causation, because the employer who can

Instead, the Court created a burden-shifting framework: to establish liability, a Title VII plaintiff need only show that a protected characteristic was a substantial factor—not necessarily the decisive one—in the employer's decision.[26] But the Court also held that it is a complete defense if the employer can then show by a preponderance of the evidence that it would have made the same decision regardless of its consideration of the protected characteristic.[27] The plurality reasoned that this result best reflected "Title VII's balance between employee rights and employer prerogatives."[28] Thus, *Price Waterhouse* makes the employee's initial burden of proof easier to meet, while allowing employers—who have greater access to the necessary proof[29]—to absolve themselves by showing that the employee was actually fired, demoted, or otherwise acted against for legitimate reasons, despite the illicit consideration of a protected characteristic. Ultimately, six justices agreed that the burden-shifting framework with a complete defense for the employer who could disprove but-for causation was the proper interpretation of the word "because."[30]

Although *Price Waterhouse* arose in the context of a Title VII discrimination claim, the Supreme Court relied on the legislative history of all of Title VII and used broad language potentially indicative of an intention to make burden shifting applicable throughout Title VII, including the retaliation provision. As Part II will show, this uncertainty over the original scope of *Price Waterhouse* is at the heart of the current split in the lower courts.

C. The Civil Rights Act of 1991: Congress Amends Title VII to Codify Burden Shifting

Congress responded in 1991 by amending the discrimination provision of Title VII to create a burden-shifting framework even

disprove causation has a complete defense); id at 262–63 (O'Connor concurring) (arguing that the words "because of" require but-for causation given the legislative history of Title VII, which "makes it clear that Congress was attempting to eradicate discriminatory actions in the employment setting, not mere discriminatory thoughts").

26 See id at 241 (plurality).

27 See id at 258.

28 *Price Waterhouse*, 490 US at 242–43 (plurality).

29 See, for example, *United States Postal Service Board of Governors v Aikens*, 460 US 711, 716 (1983) ("[T]he question facing triers of fact in discrimination cases is both sensitive and difficult. . . . There will seldom be 'eyewitness' testimony as to the employer's mental processes.").

30 *Price Waterhouse*, 490 US at 241–42 (plurality); id at 259–60 (White concurring); id at 276 (O'Connor concurring) (agreeing with Justice Byron White and the plurality and adding that the plaintiff must prove by "direct evidence," rather than mere inferences, "that an illegitimate criterion was a substantial factor in the decision"). For a summary of the "splintered" *Price Waterhouse* decision, see *Gross*, 129 S Ct at 2347.

more friendly to employees than the *Price Waterhouse* scheme.[31] The Civil Rights Act of 1991[32] ("1991 Act") codified the *Price Waterhouse* burden-shifting approach[33] by adding a new provision allowing the plaintiff to shift the burden of proof to the defendant by "demonstrat[ing] that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[34] And even where the employer is then able to carry its burden of proof by disproving but-for causation, the 1991 Act added a second provision[35] providing for limited remedies—declaratory relief, limited injunctive relief, and fees and costs—in contrast to the complete defense awarded to the employer under *Price Waterhouse*.[36] Yet while Congress explicitly rejected the but-for interpretation of the words "because of" for Title VII discrimination claims,[37] the newly added provisions failed to address the Title VII retaliation section,[38] the ADEA,[39] and every other employment discrimination statute.[40]

As a result of this selective amendment process, it is unclear whether and how the 1991 Act affects the interpretation of "because" in other contexts.[41] There are three possibilities. The first is that the

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31 See Civil Rights Act of 1991, HR Rep No 102-40, 102d Cong, 1st Sess 47–48 (1991), reprinted in 1991 USCCAN 549, 583–87 (emphasizing that *Price Waterhouse* implicitly condones racism and sexism so long as it is not the causal factor and finding that "[l]egislation is needed to restore Title VII's comprehensive ban on all impermissible consideration of race, color, religion, sex or national origin in employment"). See also *Beckham v National Railroad Passenger Corp*, 736 F Supp 2d 130, 142 (DDC 2010) (noting that "Congress [in 1991] approved the first of these points [burden shifting], but not the second [the employer's complete defense]").

32 Pub L No 102-166, 105 Stat 1071, codified as amended at 42 USC § 2000e et seq.

33 Civil Rights Act of 1991 § 107(a)–(b), 105 Stat at 1075–76, codified as amended at 42 USC §§ 2000e-2, 2000e-5(g). See *Gross*, 129 S Ct at 2356 (Stevens dissenting) (referring to "Congress' partial ratification of *Price Waterhouse*" in the 1991 Act).

34 42 USC § 2000e-2(m).

35 See 42 USC § 2000e-5(g)(2)(B).

36 See HR Rep No 102-40 at 44 (cited in note 31) (noting the need to overturn the but-for aspect of *Price Waterhouse* and replace it with a more lenient standard that awards at least some relief where consideration of a protected characteristic "actually contributed or was otherwise a factor in an employment decision or action").

37 See *Price Waterhouse*, 490 US at 281 (Kennedy dissenting) ("By any normal understanding, the phrase 'because of' conveys the idea that the motive in question made a difference to the outcome.").

38 42 USC § 2000e-3(a).

39 29 USC § 623(a).

40 See, for example, Americans with Disabilities Act of 1990 § 103(a), Pub L No 101-336, 104 Stat 327, 331–32 (prohibiting employment discrimination "against a qualified individual with a disability because of the disability"); Equal Pay Act of 1963 § 2, Pub L No 88-38, 77 Stat 56, 56–57, codified in relevant part at 29 USC § 206(d). See also Genetic Information Nondiscrimination Act of 2008 §§ 202–03, Pub L No 110-233, 122 Stat 881, 907–09, codified in relevant part at 42 USC § 2000ff-4.

41 It appears that this circumstance is not unique. Professor Deborah Widiss has explored the difficulty Congress experiences in attempting to override judicial decisions. She points out

failure to amend the other statutes was simply a mistake, and the "motivating factor" standard should apply universally.[42] The second possibility is that, by not amending the other employment statutes, Congress acquiesced to the application of *Price Waterhouse*'s burden-shifting framework as the proper interpretation of "because" in all unamended contexts. The third possibility is that the 1991 Act rejected both *Price Waterhouse* and the amended framework in contexts untouched by Congress, thus giving the courts license to create a new, third interpretation of "because." In sum, Congress's selective amendment of Title VII has given rise to substantial confusion concerning the continued viability of *Price Waterhouse*.[43]

D. In the Interim: Lower Courts Apply *Price Waterhouse* Everywhere

After the 1991 Act, several district courts embraced the first possibility. They held that the amended burden-shifting framework of the 1991 Act—including its partial remedies where the employer disproves but-for causation—applied not just to Title VII discrimination claims, but also to Title VII *retaliation* claims.[44] Every court of appeals to address the issue, however, adopted the second possibility: that the 1991 Act does *not* apply to retaliation claims, for the simple reason that the newly added provisions explicitly apply only to discrimination claims.[45]

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that Congress often amends one statute to purportedly overrule a Supreme Court decision, which then leaves the lower courts unsure of how to apply the overruled precedent in related (and unamended) contexts. See Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 Notre Dame L Rev 511, 523 (2009) (observing that lower courts often interpret congressional overrides as narrow exceptions to general precedents and continue to apply the "overruled" precedent in other contexts even when it is doubtful that this is what Congress intended).

42 It is entirely possible, as some commentators have suggested, that Congress's failure to codify the new burden-shifting framework in other contexts was just "a glaring oversight." See Thomas H. Barnard and George S. Crisci, *"Mixed-Motive" Discrimination under the Civil Rights Act of 1991: Still a "Pyrrhic Victory" for Plaintiffs?*, 51 Mercer L Rev 673, 687–90 (2000).

43 See Widiss, 84 Notre Dame L Rev at 514 (cited in note 41) ("[B]ecause Congress technically cannot overrule judicial decisions, the interpretation of overrides poses a particular challenge within a judicial system that is built on adherence to precedent.").

44 See *De Llano v North Dakota State University*, 951 F Supp 168, 170–71 (D ND 1997) (asserting that it would be "illogical and contrary to congressional intent to apply different standards of proof and accompanying relief provisions to retaliation claims as opposed to discrimination claims"); *Heywood v Samaritan Health System*, 902 F Supp 1076, 1080–81 (D Ariz 1995) (quoting the legislative history of the 1991 Act for the proposition that Congress intended to overrule *Price Waterhouse*, which makes it "reasonable to assume" that the amended framework is also meant to apply to retaliation claims).

45 See *Tanca v Nordberg*, 98 F3d 680, 682–84 (1st Cir 1996); *Matima v Celli*, 228 F3d 68, 81 (2d Cir 2000); *Woodson v Scott Paper Co*, 109 F3d 913, 931–35 (3d Cir 1997); *Kubicko v Ogden Logistics Services*, 181 F3d 544, 552 n 7 (4th Cir 1999); *Speedy v Rexnord Corp*, 243 F3d 397, 401–02 (7th Cir 2001); *Norbeck v Basin Electric Power Cooperative*, 215 F3d 848, 852 (8th Cir 2000); *Pennington v City of Huntsville*, 261 F3d 1262, 1269 (11th Cir 2001).

Instead, every court of appeals (with the exception of the DC Circuit, where the issue remained open) continued to apply the *Price Waterhouse* burden-shifting framework (and its complete defense for employers) to Title VII retaliation claims after 1991.[46] In the ADEA context, the courts of appeals similarly applied *Price Waterhouse* and its burden-shifting framework to age discrimination claims.[47] In effect, the lower courts decided that Congress's selective amendment of Title VII implicitly affirmed the application of *Price Waterhouse* as the proper interpretation of "because" in all unamended contexts.

E. *Gross*: Providing Clarity or Creating Confusion?

In *Gross*, the Supreme Court decided otherwise, holding that "because" in the ADEA means that the plaintiff must prove but-for causation without the aid of burden shifting. The plaintiff in *Gross* had been reassigned from director to coordinator and some of his previous responsibilities were transferred to a fellow employee in a newly created position.[48] Although both the plaintiff and the other employee received the same salary, he considered the change a demotion, because he had lost some of his responsibilities. The plaintiff was fifty-four years old, while his coworker was in her early forties. The plaintiff alleged that he had been demoted at least in part because of his age in violation of the ADEA.[49]

The Court held in a 5–4 opinion by Justice Clarence Thomas that a mixed-motive jury instruction was never proper in a suit brought under the ADEA.[50] The Court, relying on the dictionary definition "by

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46 In addition to the cases cited in note 45, see *Fabela v Socorro Independent School District*, 329 F3d 409, 414–15 (5th Cir 2003); *Smith v City of Salem*, 378 F3d 566, 574–76 (6th Cir 2004); *Stegall v Citadel Broadcasting Co*, 350 F3d 1061, 1071–72 (9th Cir 2003); *Fye v Oklahoma Corporation Commission*, 516 F3d 1217, 1224–25 (10th Cir 2008). For a review of these interim decisions, see Barnard and Crisci, 51 Mercer L Rev at 687–90 (cited in note 42).

47 See *Febres v Challenger Caribbean Corp*, 214 F3d 57, 60 (1st Cir 2000); *Ostrowski v Atlantic Mutual Insurance Co*, 968 F2d 171, 180–81 (2d Cir 1992); *Starceski v Westinghouse Electric Corp*, 54 F3d 1089, 1095–98 (3d Cir 1995); *EEOC v Warfield-Rohr Casket Co*, 364 F3d 160, 164 n 2 (4th Cir 2004); *Rachid v Jack in the Box, Inc*, 376 F3d 305, 309 (5th Cir 2004); *Wexler v White's Fine Furniture, Inc*, 317 F3d 564, 571–72 (6th Cir 2003); *Visser v Packer Engineering Associates, Inc*, 924 F2d 655, 658 (7th Cir 1991) (en banc); *Hutson v McDonnell Douglas Corp*, 63 F3d 771, 780 (8th Cir 1995); *Lewis v YMCA*, 208 F3d 1303, 1305–06 (11th Cir 2000) (per curiam). See also *Gross*, 129 S Ct at 2354–55 (Stevens dissenting) ("[T]he Courts of Appeals to have considered the issue [of whether to apply burden shifting in the age discrimination context] unanimously have applied Price Waterhouse to ADEA claims."). *Gross* overruled these previous cases.

48 See *Gross*, 129 S Ct at 2346.

49 See id at 2346–47.

50 See id at 2350–51.

reason of: on account of,"[51] interpreted the word "because" in the ADEA according to its "ordinary meaning" of outcome determinative. Using that interpretation, the Court held that ADEA plaintiffs must prove that an unlawful motive was a "but-for" cause of the employer's decision.[52] Thus the Court declined to apply the more plaintiff-friendly burden-shifting framework of either *Price Waterhouse* or the 1991 Act to age discrimination claims.[53]

In doing so, the Court distinguished between the ADEA and Title VII.[54] The Court observed that Congress amended Title VII in 1991 to codify burden shifting where discrimination was a "motivating factor" in an employment decision.[55] However, the Court emphasized that Congress did not similarly amend the ADEA, even though Congress amended the ADEA contemporaneously for other reasons, creating a strong inference that Congress did not simply forget to codify burden shifting in the age discrimination context.[56] Based on this textual discrepancy, the Court held that "[the] interpretation of the ADEA is not governed by Title VII decisions such as . . . *Price Waterhouse*."[57]

The Court went on to criticize the practical value of *Price Waterhouse* and its burden-shifting framework, observing that "it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply."[58] The Court noted that judges have often struggled to formulate jury instructions that adequately explain burden shifting. "Thus," the Court concluded, "the problems associated with [*Price Waterhouse*'s] application have eliminated any perceivable benefit to *extending* its framework to ADEA claims."[59] Significantly, however, at no point did the Court explicitly overrule *Price Waterhouse*. By contrast, the Court was careful to note that it had not previously applied the burden-shifting framework of *Price Waterhouse* to the ADEA and "declined to do so now."[60]

In dissent, Justice John Paul Stevens criticized the majority's decision to interpret "because" as requiring but-for causation when *Price Waterhouse* interpreted identical language as prohibiting

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51 Id at 2350, citing *Webster's Third New International Dictionary* 194 (Merriam-Webster 3d ed 1966).

52 *Gross*, 129 S Ct at 2350.

53 See id at 2352.

54 See id at 2349.

55 See 42 USC § 2000e-2(m).

56 See *Gross*, 129 S Ct at 2349.

57 Id.

58 Id at 2352.

59 Id (emphasis added).

60 *Gross*, 129 S Ct at 2349.

"adverse employment actions motivated in whole *or in part* by the age of the employee."[61] Justice Stephen Breyer, joining Justice Stevens but also writing separately, noted the difficulty of attributing but-for causation to any one particular factor when mental motivations for employment decisions are at issue.[62] In contrast to torts or other instances of physical causation, where "reasonably objective and commonsense theories" provide judges with tools of analysis, it is difficult for the plaintiff to know, and much less to prove, precisely which factor led his employer to fire him.[63]

II. APPLYING *GROSS*: UNCERTAINTY IN THE LOWER COURTS

This new interpretation of "because" has led to conflict in the lower courts. The confusion concerns whether *Gross* or *Price Waterhouse* applies in the Title VII retaliation context. Three district courts have held that *Gross* dictates the death of *Price Waterhouse* and its burden-shifting framework for Title VII retaliation claims.[64] The Fifth Circuit, by contrast, reasoned that because *Gross* distinguished between the ADEA and Title VII, the *Price Waterhouse* burden-shifting framework continues to govern retaliation claims.[65] This Part shows that in both cases, lurking beneath the surface is an unrecognized—yet fundamental—disagreement about the scope of *Price Waterhouse* and whether its burden-shifting framework originally applied to all of Title VII or only the discrimination provision. Part III then shows why, although it is often assumed or even left unstated in the opinions, the crucial question in the Title VII retaliation context is the original scope of *Price Waterhouse*.

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61 Id at 2353–54 (Stevens dissenting) (emphasis added) (lamenting that "the majority's inattention to prudential Court practices is matched by its utter disregard of our precedent and Congress' intent").

62 See id at 2358–59 (Breyer dissenting). See also Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 Stan L Rev 60, 67 (1956) (arguing that forcing the plaintiff to pry into the thoughts of the defendant sets up the "impossible" task of "prob[ing] into a purely fanciful and unknowable state of affairs").

63 See *Gross*, 129 S Ct at 2358–59 (Breyer dissenting) ("Sometimes we speak of determining or discovering motives, but more often we ascribe motives, after an event, to an individual in light of the individual's thoughts and other circumstances present at the time of decision.").

64 See *Zhang v Children's Hospital of Philadelphia*, 2011 WL 940237, *2 (ED Pa); *Hayes v Sebelius*, 272 F Supp 2d 90, 111–13 (DDC 2011); *Beckford v Giethner*, 661 F Supp 2d, 25 n 3 (DDC 2009).

65 See *Smith v Xerox Corp*, 602 F3d 320, 329–30 (5th Cir 2010).

A. Retaliation Plaintiffs Must Prove But-for Causation without Burden Shifting

Representative of the cases applying *Gross* and its requirement of but-for causation proved solely by the plaintiff to Title VII retaliation claims is *Hayes v Sebelius*,[66] a recent district court decision in the District of Columbia.[67] In *Hayes*, the plaintiff alleged both discrimination and retaliation in violation of Title VII when his employer failed to promote him and gave him low performance ratings.[68] Although there was little argument that the employee who was promoted instead of Hayes was more qualified,[69] there was evidence in the record that Hayes's boss was biased against him because Hayes had previously brought a successful discrimination complaint against him. Hayes's boss admitted that he did not bother "look[ing] into Mr. Hayes' background," because Hayes "didn't get put [in his current position] because of any merit. It was because of an EEO settlement."[70] Moreover, fellow employees testified that Hayes's boss was "very upset" by the earlier verdict and that the boss considered Hayes's action in bringing the original case "morally repugnant."[71] One question the court faced was whether Hayes could shift the burden of proof to his employer by showing that retaliation played a part in the employer's decision.

The court ruled that, after the 1991 Act and *Gross*, *Price Waterhouse* and its burden-shifting framework are no longer applicable to Title VII retaliation claims.[72] The court began by observing that "*Price Waterhouse* arose in the context of a discrimination claim, but the DC Circuit subsequently extended its burden-shifting framework to retaliation cases [in the context of a pre-1991 retaliation claim] as well."[73] In doing so, the court unceremoniously assumed that *Price Waterhouse*, at the time it was decided, was limited by its terms to only the discrimination provision

66 272 F Supp 2d 90 (DDC 2011).

67 For another recent decision applying *Gross* and its requirement of but-for causation proved solely by the plaintiff to a Title VII retaliation claim (albeit one with a very sparse analysis of the issue), see *Beckford*, 661 F Supp 2d at 25 n 3.

68 *Hayes*, 272 F Supp 2d at 93 (involving a claim against the Secretary of Health and Human Services).

69 Id at 95.

70 Id at 105.

71 Id.

72 *Hayes*, 272 F Supp 2d at 111–13.

73 Id at 109–10. The word "extended" here is critical: if *Price Waterhouse* originally applied only to discrimination claims, and it was only the subsequent *extension* of the logic of *Price Waterhouse* to retaliation claims that made *Price Waterhouse* relevant in the retaliation context, then the reasoning of *Gross* now dictates that lower courts reverse those prior "extension" decisions. See Part III.B.

of Title VII, asserting that "[b]oth *Price Waterhouse* and the 1991 Amendments [ ] dealt only with Title VII discrimination claims."[74]

The court then considered the continued viability of the DC Circuit's extension of *Price Waterhouse* and its burden-shifting framework to retaliation claims in light of the 1991 Act and *Gross*. The court observed that the "language [of the ADEA] is indistinguishable from Title VII's discrimination and retaliation provisions, both of which contain the same 'because of' formulation."[75] More importantly, the Supreme Court in *Gross* was critical of its earlier decision in *Price Waterhouse*, declaring that its burden-shifting framework was difficult to apply and that "the problems associated with *Price Waterhouse* have eliminated any perceivable benefit to extending its framework to ADEA claims."[76] As a result, the court reasoned, "*Gross* [ ] makes clear that *Price Waterhouse*'s interpretation of 'because of' is flatly incorrect."[77]

The court went on to reject the argument that the 1991 Act (and its limited remedies even where the employer disproves but-for causation) apply to retaliation claims. Quoting *Gross*, it reasoned that "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally."[78] By its terms, the 1991 Act applies only to discrimination claims.[79] Moreover, the Court in *Gross* stressed the fact that Title VII and the ADEA were amended simultaneously in 1991, prompting the *Hayes* court to point out that "[t]his argument applies with even greater force to [Title VII's retaliation provision]."[80] Furthermore, if burden shifting already applied to all of Title VII in 1991, then Congress would not have needed to add a provision specifying that burden shifting is available for discrimination claims; Congress could have simply added the limited remedies provision alone.[81] Finally, the court observed that "if Congress had wanted to mention motivating-factor claims in Title VII's retaliation provision, it knew how to do so."[82] Because Congress left out retaliation, the amended burden-shifting framework does not apply.

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74 *Hayes*, 272 F Supp 2d at 110.

75 Id at 111.

76 Id, citing *Gross*, 129 S Ct at 2351–52 ("[I]t is far from clear that the Court would have the same approach were it to consider the question [of *Price Waterhouse*'s burden-shifting framework] today in the first instance.").

77 *Hayes*, 272 F Supp 2d at 111.

78 Id at 112, quoting *Gross*, 129 S Ct at 2349.

79 See 42 USC § 2000e-2(m).

80 *Hayes*, 272 F Supp 2d at 113.

81 See id.

82 Id.

In another recent case, the district court for the Eastern District of Pennsylvania similarly ruled that *Gross* dictates that but-for causation proved solely by the plaintiff governs Title VII retaliation claims.[83] In *Zhang v Children's Hospital of Philadelphia*,[84] the plaintiff argued that he was entitled to a mixed-motive (burden-shifting) jury instruction on his retaliation claim because the Third Circuit's Model Civil Jury Instructions provide that "a mixed-motive standard could be appropriate in Title VII retaliation cases 'if warranted by the evidence.'"[85] The court pointed out that the Third Circuit's Committee on Model Civil Jury Instructions has not yet decided whether *Gross* affects the availability of burden shifting under Title VII; moreover, "the comments conclude with the suggestion that the 'users of these instructions should consider that question.'"[86] Thus, the court felt compelled to answer the question itself.

Mirroring *Hayes*, the court in *Zhang* repeated the Supreme Court's interpretation of the "ordinary meaning" of "because" as requiring but-for causation.[87] The court then reviewed another recent case in its district, *Warshaw v Concentra Health Services*,[88] in which the court applied *Gross* to a claim under the Americans with Disabilities Act of 1990[89] (ADA). The *Warshaw* court emphasized that the ADA, like the ADEA, was not amended along with Title VII's discrimination provision in 1991. Moreover, both the ADA and the ADEA "use[] the term 'because' to describe the causal connection required between an employee's protected activity and an employer's adverse action."[90] The court held that *Gross* and its requirement of but-for causation proved solely by the plaintiff governs ADA claims.[91] Convinced by this reasoning, the *Zhang* court found "no compelling reason to define 'because,' as used in Title VII's anti-retaliation provision, any differently than the Supreme Court defined the phrase 'because of' in *Gross*."[92]

Outside the Title VII retaliation context, the Seventh Circuit has interpreted *Gross* in a similarly expansive fashion, holding that "unless a statute (such as the Civil Rights Act of 1991) provides

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83 See *Zhang*, 2011 WL 940237 at *2.

84 2011 WL 940237 (ED Pa).

85 Id at *1, quoting Third Circuit Model Civil Jury Instructions § 5.1.7 (2010).

86 *Zhang*, 2011 WL 940237 at *1, quoting Third Circuit Model Civil Jury Instructions § 5.1.7 (2010).

87 *Zhang*, 2011 WL 940237 at *1, quoting *Gross*, 129 S Ct at 2350–51.

88 719 F Supp 2d 484 (ED Pa 2010).

89 Pub L No 101-336, 104 Stat 327, codified as amended at 42 USC § 12101 et seq.

90 *Zhang*, 2011 WL 940237 at *2, citing *Warshaw*, 719 F Supp 2d at 503.

91 *Warshaw*, 719 F Supp 2d at 503.

92 *Zhang*, 2011 WL 940237 at *2.

otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law."[93] In *Fairley v Andrews*,[94] two Chicago prison guards quit their jobs and sued after their peers allegedly taunted and threatened to kill them for reporting prisoner abuse by fellow guards.[95] They alleged a violation of their right to free speech under 42 USC § 1983. In the past, courts have applied the same burden-shifting framework from employment discrimination cases (like *Price Waterhouse*) to First Amendment retaliation claims.[96] But Judge Frank Easterbrook held that "[t]hese decisions do not survive *Gross*," and remanded the case in part so that the jury could be instructed that the plaintiff must prove but-for causation alone.[97]

A few months later, the Seventh Circuit affirmed *Fairley* and its broad application of the but-for causation requirement in the context of the ADA. In *Serwatka v Rockwell Automation, Inc*,[98] the jury returned a special verdict finding that the plaintiff had been fired in part because of her disability, but also that her former employer would have fired her anyway.[99] The Seventh Circuit held that, because the ADA prohibited discrimination against an employee "because of" her disability,[100] but-for causation was required.[101] The *Serwatka* court reasoned that "[a]lthough the *Gross* decision construed the ADEA, the importance that the court attached to the express incorporation of the mixed-motive framework into Title VII suggests that when another anti-discrimination statute lacks comparable language, a mixed-motive claim will not be viable under that statute."[102] Because the ADA did not also incorporate something akin to the "motivating factor" provision of Title VII, the court refused to allow burden shifting.[103] Although the Seventh Circuit has yet to consider a Title VII

93 *Fairley v Andrews*, 578 F3d 518, 525–26 (7th Cir 2009).

94 578 F3d 518 (7th Cir 2009).

95 See id at 520.

96 See id at 525–26.

97 Id.

98 591 F3d 957 (7th Cir 2010).

99 See id at 958.

100 ADA § 102(a), 104 Stat at 331–32. Note, however, that the ADA was amended after *Serwatka* was decided. See ADA Amendments Act of 2008 § 5(a)(1), Pub L No 110-325, 122 Stat 3553, 3557, codified in relevant part at 42 USC § 12112(a).

101 See *Serwatka*, 591 F3d at 962.

102 Id at 961.

103 Interestingly, in applying *Gross* to the ADA, the Seventh Circuit cited its earlier holding in *McNutt v Board of Trustees of the University of Illinois*, 141 F3d 706, 709 (7th Cir 1998), a decision that held that *Price Waterhouse* continues to govern Title VII retaliation claims after the 1991 Act. The *Serwatka* court cited *McNutt* for the proposition that where Congress changes one statute but not another (such as amending the discrimination section—but not the retaliation section—of Title VII), the amended standard should not apply to claims under the unamended section. See *Serwatka*, 591 F3d at 962–63 (summarizing *McNutt* and noting that "*McNutt* is consistent with the

retaliation case after *Gross*, extending the logic of its recent decisions would appear to lead inexorably to the death of burden shifting. As the *Hayes* and *Zhang* courts have already reasoned, the lack of express incorporation of burden shifting by Congress would seem to end burden shifting for Title VII retaliation claims.

B. Burden Shifting Applies to Title VII Retaliation Claims

The Fifth Circuit in *Smith v Xerox Corp*[104] was similarly confronted with the question of how broadly to apply *Gross*. The issue was the same as in *Hayes* and *Zhang*: how to interpret "because" in the retaliation section of Title VII. The court began by acknowledging the Seventh Circuit's decisions in *Fairley* and *Serwatka* and that similar reasoning could lead to the exclusion of burden shifting in the Title VII retaliation context. Nevertheless, the court gave great weight to the distinction in *Gross* between the ADEA and Title VII and ultimately held that *Price Waterhouse* and its burden-shifting framework still govern Title VII retaliation claims.[105]

In *Smith*, the plaintiff had worked for Xerox as a sales representative for twenty-two years. Although Kim Smith had received positive evaluations and even a prestigious award for her work, she was fired after she clashed with a new manager. The new manager reduced Smith's sales area without reducing her sales goals. He then gave Smith poor performance evaluations when she fell short of her expected sales, which Smith characterized as "unreasonable" compared to those of her peers.[106] She was placed on probation and threatened with termination. After complaining within the company to no avail, Smith filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that her new boss was discriminating against her because of her age, race, and gender. Shortly thereafter, she was fired. She then filed a second complaint alleging retaliation. The jury was instructed on the mixed-motive theory despite Xerox's objections. The jury denied the discrimination claim, but also found that the fact that Smith had filed the first EEOC charge was a motivating factor in her boss's decision to fire her and that Xerox had failed to demonstrate that it would have taken the same action even had Smith's boss not harbored any retaliatory

Supreme Court's subsequent decision in *Gross*"). Yet the *Serwatka* court seemed to overlook the fact that the ultimate result of *McNutt* is the application of *Price Waterhouse*'s burden-shifting framework to a Title VII retaliation claim, even though Congress never added a "motivating factor" provision to the retaliation section. See *McNutt*, 141 F3d at 709.

104 602 F3d 320 (5th Cir 2010).

105 See id at 328–29.

106 Id at 323.

motive. As such, the jury awarded Smith $67,500 in compensatory damages and $250,000 in punitive damages.[107]

As in *Hayes*, the Fifth Circuit considered the significance of the 1991 Act. Notably absent from the Act's list of protected characteristics susceptible to "motivating factor" liability is retaliation—discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.[108] The Fifth Circuit acknowledged the Seventh Circuit's broad holding that *Gross* bars burden shifting "in all suits under federal law."[109] But the Fifth Circuit also pointed out that *Price Waterhouse* is the Supreme Court's most recent interpretation of "because" in Title VII itself, and that *Gross* did not explicitly overrule *Price Waterhouse*.[110] Moreover, the court held that Congress's selective amendment of Title VII did not dislodge *Price Waterhouse* in the retaliation context.[111] Because the Seventh Circuit's broad interpretation of *Gross* would effectively overrule *Price Waterhouse*—something the Supreme Court did not do—the Fifth Circuit held that the Seventh Circuit's "simplified application of *Gross* is incorrect."[112]

In doing so, the Fifth Circuit emphasized the distinction in *Gross* between Title VII and the ADEA. Because the distinction between Title VII and the ADEA was crucial to the Supreme Court's avoidance of its *Price Waterhouse* mixed-motive burden-shifting precedent,[113] the Fifth Circuit reasoned that Title VII was not affected by *Gross*, and thus that *Price Waterhouse* still applied to Title VII retaliation claims.[114] Moreover, the court felt bound by its own post-1991 circuit precedent applying *Price Waterhouse* to Title VII retaliation claims.[115] As a result, the court held that Smith could shift the burden of proof to her employer by showing that a retaliatory motive played a part in her employer's decision.

Dissenting in *Smith*, Judge Grady Jolly argued that the majority drew a "meaningless distinction" and created "an unnecessary split in the circuits" by ruling in conflict with the Seventh Circuit's decisions

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107 Id at 323–25.

108 *Smith*, 602 F3d at 328.

109 Id at 328 n 25, quoting *Fairley*, 578 F3d at 525–26.

110 See *Smith*, 602 F3d at 328–29 ("It is not our place, as an inferior court, to renounce *Price Waterhouse* as no longer relevant to mixed-motive retaliation cases, as that prerogative remains always with the Supreme Court.").

111 See id at 329.

112 Id at 328.

113 See id at 329 n 28 ("If *Gross* teaches anything, however, it is that Title VII and the ADEA are distinct statutory schemes.").

114 *Smith*, 602 F3d at 330.

115 See id.

in *Fairley* and *Serwatka*.[116] He argued that "Title VII's retaliation section . . . lacks the provision of Title VII's discrimination section that allows mixed-motive cases"—a distinction that was "determinative" in *Gross*.[117] Judge Jolly would have followed the Seventh Circuit's broad reading of *Gross* and invalidated the burden-shifting framework everywhere unless Congress explicitly provides otherwise.[118]

Judge Paul Friedman of the DC District Court has since sided with the Fifth Circuit. Relying on pre-*Gross* DC Circuit precedent that applied burden shifting throughout Title VII, Judge Friedman ruled that *Price Waterhouse* still governs Title VII retaliation claims.[119]

C. The 1991 Act and Its Limited Remedies Provision Applies to Retaliation Claims

A final district court case is particularly suggestive of the confusion that has followed in the wake of *Gross*. Judge Rosemary Collyer was faced with the difficult task of deciding how to proceed when confronted by allegations of both retaliation and discrimination under Title VII in the same case.[120] Because the "motivating factor" provision added to Title VII by the 1991 Act creates liability where "an impermissible motive animates '*any*' employment practice," Judge Collyer ruled that "[t]here can, therefore, be mixed-motive retaliation cases despite the 'because' language in the statute."[121] However, this was an apparent misreading of the statute; the "motivating factor" provision added in 1991 said that "an unlawful employment practice is established when the complaining party demonstrates that *race, color, religion, sex, or national origin* was a motivating factor for any employment practice."[122] Conspicuously absent from this list is anything involving retaliation, a fact not lost on the Seventh and Fifth Circuits.[123] Still, this misreading of the statute is a striking example of the difficulty lower courts experience in trying to sort out what the law is in this confusing and indeterminate area.[124] Because other courts

116 Id at 336 (Jolly dissenting).

117 Id at 338.

118 *Smith*, 602 F3d at 336 (Jolly dissenting).

119 *Nuskey v Hochberg*, 70 F Supp 2d 1, 5 (DDC 2010).

120 See *Beckham v National Railroad Passenger Corp*, 736 F Supp 2d 130, 140–46 (DDC 2010) (analyzing each type of claim separately).

121 Id at 145 (citation omitted).

122 42 USC § 2000e-2(m) (emphasis added).

123 See *Smith*, 602 F3d at 328; *McNutt*, 141 F3d at 707–08.

124 For earlier examples of similar confusion following the passage of the 1991 Act, see *Hall v City of Brawley*, 887 F Supp 1333, 1345 (SD Cal 1995) (applying the amended partial remedies framework to a retaliation claim while apparently overlooking the absence of any explicit amendment of the retaliation section of Title VII); *Doe v Kohn Nast & Graf, PC*, 862 F

have uniformly rejected this third approach,[125] the remainder of this Comment focuses on the underlying assumptions of the first two positions: whether *Gross* (as in *Hayes* and *Zhang*) or *Price Waterhouse* (as in *Smith*) governs Title VII retaliation claims.

III. THE ORIGINAL SCOPE OF *PRICE WATERHOUSE* DETERMINES WHETHER BURDEN SHIFTING APPLIES TO TITLE VII RETALIATION CLAIMS

This Part shows that the uncertainty surrounding the applicability of burden shifting in the Title VII retaliation context boils down to a single question: whether *Price Waterhouse*, at the time it was decided, applied to all of Title VII or only the discrimination provision.[126] If *Price Waterhouse* originally applied to all of Title VII, then it still does today; if not, then it does not. Lower courts have so far overlooked this critical question, beginning their analyses instead by summarily stating (or even implicitly assuming) that *Price Waterhouse* did or did not apply. Part III.A shows that if *Price Waterhouse* is assumed to have originally applied throughout Title VII, then its burden-shifting framework still applies today, because *Gross* did nothing to overrule it. In contrast, Part III.B shows that if *Price Waterhouse* originally applied only to the discrimination provision of Title VII, then but-for causation proved solely by the plaintiff applies to retaliation claims, as the ADEA and the retaliation provision of Title VII would then be indistinguishable from the standpoint of *Gross*. This Part is agnostic on the question of whether *Price Waterhouse actually* applies to retaliation claims—the point is only to show that, regardless of the answer, the initial determination about the scope of *Price Waterhouse* drives the result.

Supp 1310, 1316 n 2 (ED Pa 1994) (same). On the subject of confusion in the employment law context more generally, see Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 Mercer L Rev 651, 670 (2000) (postulating that such confusion is "symptomatic of a larger problem: either the inability, or the refusal, of a significant number of federal judges, including Supreme Court Justices, to recognize the continuing significance that consideration of race and sex, for example, plays in the decisionmaking process of our society").

125 See notes 45–46 and accompanying text.

126 Since *Price Waterhouse* arose in the context of a Title VII discrimination claim, courts could easily assume that the decision applies only to the discrimination section. On the other hand, *Price Waterhouse* arguably construed all of Title VII, considering its reliance on the shared legislative history of Title VII, as well as the conceptual similarity of the discrimination and retaliation provisions. Part IV explores which of these two interpretations is correct.

A. If *Price Waterhouse* Originally Applied to All of Title VII

If *Price Waterhouse* originally applied throughout Title VII, then burden shifting still applies to the retaliation provision.[127] *Gross* interpreted the words "because of" in the ADEA, which the Supreme Court had never interpreted before.[128] There was no ADEA precedent on point. If *Price Waterhouse* and its burden-shifting framework originally applied to *all* of Title VII, however, then the retaliation provision is not a similarly blank slate.[129] If *Price Waterhouse* applied to retaliation claims when it was decided in 1989, then burden shifting governs at that point. When Congress revisited Title VII in 1991, it did not change the retaliation provision in any way. The only way that Congress can change the causation requirement for retaliation, as created by the Supreme Court, is by changing the text itself.[130] The key question—and the one that has not received sufficient attention from the courts—is whether Congress in 1991 was working with a retaliation provision *already* governed by burden shifting, or rather with a blank slate, like the ADEA.

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127 Other arguments in favor of burden shifting for retaliation claims are extraneous or irrelevant. For example, the Fifth Circuit insisted that the ADEA is somehow different from Title VII, without explaining why. See *Smith*, 602 F3d at 329. The court even quoted *Gross* for the idea that "we must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." Id, quoting *Gross*, 129 S Ct at 2349. Yet, without any analysis, the Fifth Circuit simply stated that, because the claim in *Smith* was brought under Title VII, *Price Waterhouse* (and circuit cases applying it) was the only precedent that mattered. See *Smith*, 602 F3d at 329–30. What the Fifth Circuit overlooked was that the precise reason the Supreme Court distinguished between Title VII and the ADEA was that the discrimination provision of Title VII had been amended to codify burden shifting, whereas the ADEA had not. See *Gross*, 129 S Ct at 2349. This same state of affairs applies in the Title VII retaliation context. See Part III.B.

128 See *Gross*, 129 S Ct at 2349 ("This Court has never held that this burden-shifting framework applies to ADEA claims.").

129 For example, the Seventh Circuit's broad admonition that, "unless a *statute* . . . provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law" falls flat if a prior *Supreme Court* decision established an alternative framework prior to the 1991 Act. *Fairley*, 578 F3d at 525–26 (emphasis added). If extended to the Title VII context, the validity of the Seventh Circuit's assertion depends on *Price Waterhouse* originally applying only to discrimination claims—which might be true, but which must be demonstrated rather than assumed. It is the necessary precursor to showing why *Gross* applies. By contrast, the original scope of *Price Waterhouse* was properly irrelevant to the outcome of *Serwatka* because *Serwatka* involved the ADA, which was not enacted until after *Price Waterhouse*, in 1990.

130 Moreover, even if we were attempting to infer intent from Congress's failure to amend the Title VII retaliation provision in 1991, it is hard to believe that Congress would have intended the death of burden shifting. It would be strange to infer that, by amending the discrimination section to create a framework even *more* favorable to employees than the *Price Waterhouse* framework, Congress somehow intended to overrule the moderately pro-employee burden-shifting framework of *Price Waterhouse* for retaliation claims and replace it with the employer-friendly approach of *Gross*.

1. Congress's selective amendment of Title VII could not dislodge existing retaliation precedent without changing the text of the retaliation provision itself.

While a court may allow itself to be influenced by congressional silence when interpreting a statute as a matter of first impression (as the Supreme Court was in *Gross*), it is quite different—and problematic—for a court to use congressional silence as a rationale for overturning *existing law*.[131] As Earl Maltz points out, the intent of Congress applies only insofar as it is embodied in the law itself: "in the absence of majority concurrence, no change in the common law can be adopted."[132] Justice Wiley Rutledge expressed a similar sentiment when he wrote that "in view of the specific and constitutional procedures required for the enactment of legislation, it would seem hardly justifiable to treat as having legislative effect" mere legislative inaction.[133] In *Gross*, the Court did not treat Congress's selective amendment as having legislative effect—it just took it into consideration. However, if *Price Waterhouse* originally applied to Title VII retaliation claims, then lower courts who decide burden shifting no longer applies based on *Gross* are implicitly treating legislative inaction as overruling existing law.

The point, then, is that Congress speaks only when acting according to the procedures for passing laws spelled out in the Constitution.[134] If *Price Waterhouse* originally applied to *all* of Title

131 See *Midlantic National Bank v New Jersey Department of Environmental Protection*, 474 US 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."), citing *Edmonds v Compagnie Generale Transatlantique*, 443 US 256, 266–67 (1979); William N. Eskridge Jr, *Interpreting Legislative Inaction*, 87 Mich L Rev 67, 94–95 (1988).

132 Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation*, 71 BU L Rev 767, 777 (1991). See also John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities,"* 64 BU L Rev 737, 741 (1984) ("[T]here exists no legal or functional justification for the imputation of any meaning to the necessarily frequent and prolonged silences of Congress.").

133 *Cleveland v United States*, 329 US 14, 22 n 4 (1946) (Rutledge concurring). As Justice Felix Frankfurter once observed, "[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering v Hallock*, 309 US 106, 121 (1940). Similarly, Justice Thurgood Marshall drew attention to "the realities of the legislative process" when he observed that "it is generally difficult to infer from a failure to act any affirmative conclusions." *Goldstein v California*, 412 US 546, 577 (1973) (Marshall dissenting).

134 See *INS v Chadha*, 462 US 919, 951 (1983) ("[T]he prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."). See also John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum L Rev 673, 707–10 (1997) (emphasizing the importance of the bicameralism and presentment requirements); Daniel L. Rotenberg, *Congressional Silence in the Supreme Court*, 47 U Miami L Rev 375, 376 (1992) ("A failure to follow the method results in no law.").

VII, and yet lower courts follow *Gross* by refusing to allow burden shifting, then they are overruling a prior Supreme Court decision *without Congress having done anything*.[135]

2. *Gross* did not overrule *Price Waterhouse*.

Furthermore, if *Price Waterhouse* originally applied to retaliation claims, then no change in that precedent can be drawn from *Gross*.[136] The Supreme Court in *Gross* tailored its opinion to limit its scope—the Court was careful not to overrule prior precedents, most particularly *Price Waterhouse*.[137] *Gross* required ADEA plaintiffs to prove but-for causation without the aid of burden shifting,[138] but it stopped short of saying that but-for causation proved solely by the plaintiff applied elsewhere. Instead, the Court merely declined to "extend[]" *Price Waterhouse* to the ADEA.[139]

As the Supreme Court itself has explained, "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[140] The Supreme Court does not overrule its own decisions by implication, so the carefully crafted language of *Gross* should be taken seriously. Just as Congress's selective amendment of Title VII should be treated as intentional (as *Gross* tells us),[141] the Supreme Court's selective change to the meaning of "because" in the ADEA should be treated as intentional—and

135 Justice Antonin Scalia—himself in the majority in *Gross*—has argued forcefully against drawing meaning from legislative inaction, explaining that "[i]t is based, to begin with, on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant." *Johnson v Transportation Agency, Santa Clara County, California*, 480 US 616, 671 (1987) (Scalia dissenting). Moreover, "even accepting the flawed premise that the intent of the current Congress . . . is determinative, one must ignore rudimentary principles of political science to draw any conclusions regarding that intent from the *failure* to enact legislation." Id at 671–72.

136 The court in *Zhang* appeared to assume that *Gross* overruled *Price Waterhouse* even though the Supreme Court in *Gross* never explicitly did so, and even though *Gross* did not involve Title VII. See *Zhang*, 2011 WL 940237 at *2.

137 The *Hayes* court, like others to have interpreted *Gross* broadly, evidently ignored the self-limiting language of *Gross* when it said that *Gross* "makes clear that *Price Waterhouse*'s interpretation of 'because of' is flatly incorrect" without first showing why the retaliation provision and the ADEA are indistinguishable. *Hayes*, 762 F Supp 2d at 112.

138 See *Gross*, 129 S Ct at 2352.

139 Id. See also id at 2349 ("This Court has never held that [the Title VII] burden-shifting framework applies to ADEA claims. And we decline to do so now.").

140 *Agostini v Felton*, 521 US 203, 237 (1997), quoting *Rodriguez de Quijas v Shearson/American Express, Inc*, 490 US 477, 484 (1989). See also *Illinois Tool Works, Inc v Independent Ink, Inc*, 547 US 28, 33 (2006) ("[T]he duty of a court of appeals [is] to follow the precedents of the Supreme Court until the Court itself chooses to expressly overrule them.").

141 See *Gross*, 129 S Ct at 2349.

should not be extended to Title VII retaliation claims.[142] In the same way that Congress speaks only by passing laws, the Supreme Court speaks only by issuing opinions.[143] As the Fifth Circuit has explained, the prerogative of overruling *Price Waterhouse* "remains always with the Supreme Court."[144] If the Court wanted to completely overrule *Price Waterhouse*, it could have done so. It did not.

Some courts have so far resisted this argument, concluding instead that *Gross* overruled *Price Waterhouse*.[145] This has allowed them to avoid deciding whether *Price Waterhouse* originally applied to Title VII's retaliation provision in the first place, which is the crucial question. For example, the *Hayes* court concluded that *Price Waterhouse* did not matter because the Supreme Court criticized it in *Gross*.[146] The *Gross* Court said, as the *Hayes* court stressed, that "it has become evident in the years since [*Price Waterhouse*] was decided that its burden-shifting framework is difficult to apply."[147] Yet the carefully chosen language of *Gross* shows that *Gross* did nothing to alter the applicability of *Price Waterhouse*.[148] *Hayes* also quoted *Gross* as saying that "it is far from clear that the Court would have the same approach were it to consider the question [of *Price Waterhouse*'s mixed-motive burden-shifting framework] today in the first instance."[149] But if the Supreme Court in *Gross* meant to overrule *Price Waterhouse* completely, then it would not be "far from clear" that *Price Waterhouse* was the right standard. Rather, it would be absolutely certain that *Price Waterhouse* was not the right standard, because the Court would have just said that *Price Waterhouse* is no longer applicable in any context. Since the Court did not do so, we must once again return to the initial question of the original scope of *Price Waterhouse*.

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142 See Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 L & Soc Inquiry 89, 107 (2005) ("The justices [ ] demonstrate their genuine concern for doctrine not only by issuing opinions, but by frequently bargaining and negotiating among themselves over the specific contents of their majority opinions, as if the precise wording of paragraphs and even single sentences made a difference.").

143 See Paul J. Wahlbeck, James F. Spriggs II, and Forrest Maltzman, *Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court*, 42 Am J Polit Sci 294, 297 (1998) (discussing how justices circulate draft opinions and bargain over language, because the final opinions are what "contain legal rules that establish referents for future behavior and thus have an impact beyond the parties in the litigation").

144 *Smith*, 602 F3d at 329.

145 See *Zhang*, 2011 WL 940237 at *2.

146 *Hayes*, 762 F Supp 2d at 111–12.

147 Id at 112, quoting *Gross*, 129 S Ct at 2352.

148 See notes 143–44.

149 *Hayes*, 762 F Supp 2d at 112, quoting *Gross*, 129 S Ct at 2351–52.

This reasoning is critical to the application of *Price Waterhouse* to Title VII retaliation claims, but has so far gone unstated in the lower courts.[150] *Gross* did not overrule *Price Waterhouse*, and Congress did not touch the retaliation provision in 1991 or thereafter. If burden shifting applied to retaliation claims in 1989, then it still does today.

B. If *Price Waterhouse* Originally Applied Only to the Discrimination Provision of Title VII

If instead *Price Waterhouse* is assumed to have originally applied only to Title VII discrimination claims, then *Gross* dictates that burden shifting is no longer available for retaliation claims. The crucial question is whether the ADEA and Title VII were similarly unburdened by Supreme Court precedent in 1991. If so, the negative implication drawn from the selective amendment of Title VII in 1991—which was determinative in *Gross*—would apply with equal force to the retaliation provision of Title VII. In *Gross*, the Supreme Court was addressing the burden of proof in the ADEA context for the first time.[151] If Title VII's retaliation provision is a similarly blank slate today, then it is indistinguishable from the ADEA in *Gross*. Indeed, if *Price Waterhouse* originally applied only to the Title VII discrimination provision, the selective amendment rationale of *Gross* arguably applies even *more* strongly to Title VII's retaliation provision than it did to the ADEA in *Gross* because the retaliation provision is in the same subchapter that Congress revisited in 1991.[152] The only way the retaliation provision would be different is if *Price Waterhouse*'s burden-shifting framework originally applied throughout Title VII. If not, but-for causation proved solely by the plaintiff is the correct result.

Lower courts have failed to grapple with this underlying question, instead relying on various alternative (and inadequate) arguments to reach an anti-burden-shifting result. First, courts applying *Gross* have readily relied on Congress's selective amendment of Title VII as proof that a different standard, namely but-for causation proved solely by

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150 The Fifth Circuit merely said that *Price Waterhouse* remains "our guiding light" since it interpreted "because" in Title VII, whereas *Gross* involved only the ADEA. *Smith*, 602 F3d at 329. The Fifth Circuit made no actual argument regarding why *Price Waterhouse* applies to retaliation claims in the first place; rather, it implicitly assumed that a decision about one part of Title VII would naturally apply to the entire statute. In dissent, Judge Jolly made the opposite assumption—evidenced by his suggestion that burden shifting applied only to retaliation claims because the Fifth Circuit had *extended Price Waterhouse* to the retaliation context—and reached the opposite result. See id at 336–38 (Jolly dissenting).

151 See *Gross*, 129 S Ct at 2349.

152 See *Hayes*, 762 F Supp 2d at 112.

the plaintiff, should apply in all unamended contexts.[153] It is true that Congress in 1991 altered the burden of proof for Title VII discrimination claims without making similar changes elsewhere in the statute—and that, given this new discrepancy, differences in language should be treated as intentional.[154] But this suggests only that Title VII retaliation claims must be governed by a different standard than Title VII discrimination claims, not that the *Gross* standard of but-for causation proved solely by the plaintiff should necessarily apply. The *Price Waterhouse* burden-shifting framework is, of course, different from the framework created by Congress in 1991.[155] Lower courts can still give full effect to the discontinuity created in the law by Congress by continuing to apply *Price Waterhouse* to retaliation claims.

Second, courts have mistakenly reasoned that but-for causation must apply to Title VII's retaliation provision because to do otherwise would render the "motivating factor" provision added by Congress in 1991 mere surplusage. This argument was made forcefully by the *Hayes* court, which pointed out that Congress felt compelled to amend Title VII to include both a "motivating factor" provision (which codified burden shifting for discrimination claims only) *and* a revised remedies provision (which entitles discrimination plaintiffs to limited recovery even where the employer disproves but-for causation).[156] As such, the *Hayes* court argued that "the only construction that gives meaning both to [the limited remedies provision] as well as the motivating-factor provision without reading either as surplusage is one that restricts the motivating-factor provision's application to Title VII discrimination claims only."[157]

If Title VII is viewed statically as it existed in 1991, then the surplusage argument makes a certain amount of sense. But the static

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153 See, for example, id at 111–12 (dismissing at the outset the possibility that *Price Waterhouse* originally applied to retaliation claims); *Zhang*, 2011 WL 940237 at *2. See also *Beckford v Giethner*, 661 F Supp 2d 17, 25 n 3 (DDC 2009) (noting, in a cursory fashion, that the reasoning of *Gross* "appears applicable to the anti-retaliation provision of Title VII" because the ADEA and the retaliation section both use the word "because").

154 See, for example, *Serwatka*, 591 F3d at 961.

155 The 1991 Act allows the plaintiff to shift the burden of proof to the defendant by showing that a protected characteristic was a "motivating factor" in the employer's decision. See 42 USC § 2000e-2(m). Similarly, *Price Waterhouse* allows the plaintiff to shift the burden of proof by showing that a protected characteristic was a "substantial factor" in the employer's decision. See *Price Waterhouse*, 490 US at 241 (plurality); id at 259–60 (White concurring); id at 276 (O'Connor concurring). The major difference is that *Price Waterhouse* gives the employer a complete defense if it can disprove that consideration of a protected characteristic was a but-for cause of its decision, while the 1991 Act still provides the employee with limited remedies (most importantly, fees and costs) even where but-for causation is disproved. See *Price Waterhouse*, 490 US at 241 (plurality). See also 42 USC § 2000e-5(g)(2)(B).

156 See *Hayes*, 762 F Supp 2d at 112–13.

157 Id at 113.

perspective ignores the possibility that the Title VII retaliation provision was already governed by *Price Waterhouse*'s burden-shifting framework before 1991. The only way that Congress in 1991 could have changed the then-current law of causation for Title VII is by directly amending the statute. Congress in 1991 amended the discrimination provision but not the retaliation provision. If courts interpret the 1991 Act as affecting the relevant standard of causation under the retaliation provision (and if *Price Waterhouse* applied to the retaliation provision prior to 1991), then they are holding that Congress can overrule judicial interpretations of statutes without changing the text of the specific provision at issue. Presumptions and canons of construction are useful only where the proper interpretation is not clear; they cannot overrule existing Supreme Court precedent that interprets particular words as creating a particular standard of causation.[158]

IV. *PRICE WATERHOUSE* ORIGINALLY APPLIED TO ALL OF TITLE VII, AND BURDEN SHIFTING CONTINUES TO GOVERN TITLE VII RETALIATION CLAIMS

Part III showed that, for burden shifting in Title VII retaliation claims, whether *Price Waterhouse* originally applied to all of Title VII or just to the discrimination provision is the crucial question. This Part answers that question. The lower courts applying *Gross* have assumed that because the plaintiff in *Price Waterhouse* brought only a discrimination claim, burden shifting applied only to the discrimination provision of Title VII. But this Part shows that the more compelling argument is that *Price Waterhouse* was a decision about all of Title VII for three reasons: (1) *Price Waterhouse* was phrased broadly to apply throughout Title VII, and its reasoning relied on the legislative history of all of Title VII; (2) the discrimination and retaliation provisions are a conceptually linked package; and (3) *Gross* and other lower courts have implicitly interpreted *Price Waterhouse* as a decision applying to all of Title VII. If this analysis is sound, then *Price Waterhouse* and its burden-shifting framework necessarily still apply to Title VII retaliation claims today.

A. *Price Waterhouse* Construed All of Title VII, and Its Reasoning Was Based on the Shared Legislative History of Title VII

The Supreme Court in *Price Waterhouse* did not distinguish between the various provisions of Title VII. The Court framed its

158 See note 140 and accompanying text.

inquiry as relevant throughout the statute, explaining that "[w]e granted certiorari to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit *under Title VII* when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives."[159] Conceptually, retaliation and discrimination are equally illegitimate motives, so it stands to reason that the Court was laying down a standard for all of Title VII's prohibitions.[160] Likewise, the Court said that "[t]he specification of the standard of causation *under Title VII* is a decision about the kind of conduct that violates *that statute*."[161] When announcing the purpose of the law it was construing, the Court used similarly expansive language: "*Title VII* meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."[162] In deciding the case, the Court said that the burden-shifting framework it was creating was based on "*Title VII*'s balance between employee rights and employer prerogatives."[163] In sum, the Court's inquiry was phrased broadly as relevant to all of Title VII, and its reasoning did not distinguish between separate provisions.

Moreover, and regardless of the merits of using legislative history as a guide to congressional intent,[164] the Supreme Court in *Price Waterhouse* relied extensively on the legislative history of Title VII in determining that "because" meant the plaintiff could shift the burden of proof to her employer.[165] *Price Waterhouse* relied on the legislative history of Title VII to strike a proper "balance of burdens" in accord

159 *Price Waterhouse*, 490 US at 232 (plurality) (emphasis added). See also id at 263 (O'Connor concurring) ("The question for decision in this case is what allocation of the burden of persuasion on the issue of causation best conforms with the intent of Congress and the purposes behind Title VII.").

160 See Part IV.B.

161 *Price Waterhouse*, 490 US at 237 (plurality) (emphasis added).

162 Id at 241 (emphasis added).

163 Id at 243 (emphasis added). See also id at 260 (White concurring) ("I agree with Justice Brennan that applying th[e burden-shifting] approach to causation in Title VII cases is not a departure from, and does not require modification of, the Court's [prior] holdings.").

164 Whether and when legislative history is a useful guide to statutory interpretation has been hotly debated. See, for example, Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S Cal L Rev 845, 848–61 (1992) (listing examples of the beneficial uses of legislative history, which include avoiding absurd results, correcting drafting errors, determining specialized meanings, and identifying the "reasonable purpose" of a statute); Frank H. Easterbrook, *Statutes' Domains*, 50 U Chi L Rev 533, 539 (1983) (arguing that turning to legislative history to "fill in blanks" is "a sort of creation," which is illegitimate "without some warrant—other than the existence of the blank").

165 See *Price Waterhouse*, 490 US at 239 n 4, 243–44 (plurality); id at 262–63 (O'Connor concurring).

with "Title VII's balance of rights."[166] Significantly, the debates of the enacting Congress never hinted at a difference in standards for retaliation and discrimination claims.[167] Thus, neither the Court itself nor the primary source on which it relied distinguished between the two provisions.

Burden shifting also effectuates the intent of the enacting Congress. In her *Price Waterhouse* concurrence, Justice Sandra Day O'Connor quoted Senator Joseph Clark for the proposition that Title VII "simply eliminates consideration of color [and other protected characteristics] from the decision to hire or promote."[168] But the most relevant statement regarding Title VII comes from Senator Hubert Humphrey: "What the bill does . . . is simply to make it an illegal practice to use race as a *factor* in denying employment."[169] Furthermore, the legislative history indicates that the Eighty-Eighth Congress—which enacted Title VII—did *not* intend the word "because" to require but-for causation.[170] In particular, a proposed amendment to Title VII would have made liability contingent on a protected characteristic being the *sole* basis for the employer's decision. But this amendment was rejected, because it would render the statute, in the words of Senator Clifford Case, "totally nugatory."[171] In sum, the *Price Waterhouse* framework best captures the intent of the enacting Congress for all of Title VII.

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166 Id at 245 (plurality).

167 See Sandra Tafuri, *Title VII's Antiretaliation Provision: Are Employers Protected after the Employment Relationship Has Ended?*, 71 NYU L Rev 797, 808 (1996) ("Only scant legislative history exists on section 704(a) [the retaliation provision]."); Edward C. Walterscheid, *A Question of Retaliation: Opposition Conduct as Protected Expression under Title VII of the Civil Rights Act of 1964*, 29 BC L Rev 391, 393 (1988) (observing the "almost total absence of any legislative history" for Title VII's retaliation provision, and noting that the committee reports that exist "simply repeat certain language of Section 704(a) without any explanation of its meaning"). See also *Green v McDonnell Douglas Corp*, 463 F2d 337, 341 (8th Cir 1972) (noting that the legislative history of Title VII provides "no guidance as to the scope of protection afforded by [the retaliation provision]").

168 See *Price Waterhouse*, 490 US at 265 (O'Connor concurring), quoting 110 Cong Rec S 7218 (Apr 8, 1964) (Sen Clark).

169 See *Price Waterhouse*, 490 US at 265 (O'Connor concurring), quoting 110 Cong Rec S 13088 (June 9, 1964) (Sen Humphrey) (emphasis added). There are—as is usually the case among the volumes of legislative history—some statements that arguably contradict these sentiments. See *Price Waterhouse*, 490 US at 281 (Kennedy dissenting) ("To discriminate is to make a distinction, to make a difference in treatment or favor."), quoting 110 Cong Rec at S 7213 (cited in note 168) (Joint Memorandum by Sen Clark and Sen Case). But, importantly, there are no inklings in the legislative history that the discrimination and retaliation provisions should be treated differently. See note 167.

170 See *Price Waterhouse*, 490 US at 241 n 7, citing 110 Cong Rec S 2728 (Feb 10, 1964) (Sen Dowdy); 110 Cong Rec S 13837 (June 15, 1964) (Sen Case).

171 See Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 Colum L Rev 292, 297 (1982), quoting 110 Cong Rec at S 13837 (cited in note 170) (Sen Case).

B. The Discrimination and Retaliation Provisions Are Conceptually Linked and *Price Waterhouse* Applies to Both

Several federal statutes—including Title VII and the ADEA—prohibit both discrimination itself and retaliation for having opposed such prohibited discrimination. The provisions are part and parcel of each other, and when they are (1) enacted together by the same Congress and (2) use identical language—like the discrimination and retaliation provisions of Title VII—it makes it more likely that they are intended to be interpreted identically. Recently, the Supreme Court had occasion to consider the conceptual relationship between discrimination and retaliation provisions in the ADEA. As Justice O'Connor explained, "Retaliation against a person because that person has complained of [ ] discrimination is another form of intentional [ ] discrimination.... Retaliation is, by definition, an intentional act. It is a form of 'discrimination' because the complainant is being subjected to differential treatment."[172]

The Supreme Court later cited this analysis approvingly, affirming that it roundly rejected the argument "that a claim of retaliation is conceptually different from a claim of discrimination."[173] At other times, however, the Court has suggested that discrimination and retaliation are somewhat distinct. As Justice Breyer explained in a Title VII case:

> The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.[174]

Whatever the theoretical intricacies, the discrimination and retaliation provisions are part of a conceptually linked package. This bolsters the application of a uniform standard of proof.

Both provisions also present similar problems of proof for plaintiffs, because liability under either depends on the plaintiff being

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172 *Jackson v Birmingham Board of Education*, 544 US 167, 173–74 (2005).

173 *Gomez-Perez v Potter*, 553 US 474, 481 (2008).

174 *Burlington Northern & Santa Fe Railroad Co v White*, 548 US 53, 63 (2006) (citation omitted).

able to prove what her employer was thinking.[175] The Court in *Price Waterhouse* understood that it is difficult for a plaintiff to parse the precise weighting of different motivations in her boss's mind concerning an adverse employment decision. Thus, the employee can shift the burden of proof to make the employer provide the necessary explanation for various mental motivations, some of which might have been legitimate while others were not.[176] Since the retaliation provision is an enforcement mechanism for the discrimination provision and is characterized by a similar proof problem, burden shifting under both makes the Title VII scheme as a whole conceptually consistent. Given the interrelatedness of the dual prohibitions on discrimination and retaliation, a burden-shifting framework spanning the whole of Title VII is the most persuasive reading of *Price Waterhouse*.

The context in which *Price Waterhouse* was decided similarly sheds light on its broad scope. At the time, the provisions of Title VII used the same "because" formulation, and courts generally seek to interpret the words within a statute in an internally consistent manner.[177] While the 1991 Act altered only the discrimination provision of Title VII, this change was still a few years away when *Price Waterhouse* was decided; in 1989, the two provisions were still part of the same linked package, unchanged since 1964. Unsurprisingly, Title VII cases were generally thought to apply throughout the entire statute.[178] Since both provisions used the same words at the time *Price Waterhouse* was decided, burden shifting naturally applied to both Title VII retaliation and discrimination claims.

C. *Gross* Implicitly Acknowledged the Statute-Wide Scope of *Price Waterhouse*

Even the Supreme Court in *Gross* arguably acknowledged implicitly the statute-wide scope of *Price Waterhouse*. As Justice Thomas observed, "[T]he ADEA is [not] controlled by *Price Waterhouse*, which initially established that the burden of persuasion

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175 See *Gross*, 129 S Ct at 2358–59 (Breyer dissenting) ("All that a plaintiff can know for certain in such a context is that the forbidden motive did play a role in the employer's decision."); Malone, 9 Stan L Rev at 67 (cited in note 62).

176 See *Price Waterhouse*, 490 US at 250 (plurality) ("It is fair that [the employer] bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.").

177 See, for example, *Commissioner of Internal Revenue v Keystone Consolidated Industries, Inc*, 508 US 152, 159 (1993) ("[I]dentical words used in different parts of the same act are intended to have the same meaning."), quoting *Atlantic Cleaners & Dyers, Inc v United States*, 286 US 427, 433 (1932).

178 See *Womack v Munson*, 619 F2d 1292, 1296 (8th Cir 1980).

shifted in alleged mixed-motives *Title VII* claims."[179] The Court even contextualized its earlier decision within the case law by saying that "[i]n *Price Waterhouse*, this Court addressed the proper allocation of the burden of persuasion in cases brought under Title VII . . . when an employee alleges that he suffered an adverse employment action because of both permissible and impermissible considerations."[180] Most revealingly, the Court in *Gross* was particularly careful not to overrule *Price Waterhouse* and instead merely declined to "extend[]" burden shifting to the ADEA.[181] Taken together, this language not only demonstrates the basis for the recent confusion, but also suggests that burden shifting should continue to apply to Title VII retaliation claims.

Lower court decisions both before and after *Price Waterhouse* contain similar confirmations of the broad original scope of *Price Waterhouse*. For example, in discussing the scope of *Price Waterhouse* with respect to the ADA, the Seventh Circuit in *Sewatka* said, "*Price Waterhouse* dealt solely with *Title VII*."[182] As the Eleventh Circuit has explained, "[T]he 1991 Act overruled and limited the mixed-motive defense only in discrimination cases based on race, color, religion, sex and national origin, but left the defense intact for retaliation cases."[183] In an earlier case, the Seventh Circuit summed up best the state of Title VII retaliation claims pre-*Gross*: "The continued viability of the mixed-motive affirmative defense in the arena of retaliation cases [is] uncontested."[184] If lower courts ignore this evidence and instead apply *Gross* to Title VII retaliation claims, they will overrule *Price Waterhouse* completely, something the Supreme Court was careful not to do.[185]

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This analysis has several implications. *Hayes* and the other courts holding that burden shifting is unavailable for Title VII retaliation claims are incorrect, because they mistakenly assume that *Price Waterhouse* was a decision only about the discrimination section of Title VII and so does not bind them. On the other side, *Smith* and the other courts holding that burden shifting is available in the retaliation context are correct, although they too gave insufficient consideration

179 *Gross*, 129 S Ct at 2351 (emphasis added).
180 Id at 2347.
181 Id at 2352.
182 See *Serwatka*, 591 F3d at 959 (emphasis added).
183 *Pennington v City of Huntsville*, 261 F3d 1262, 1269 (11th Cir 2001).
184 *Speedy v Rexnord Corp*, 243 F3d 397, 402 (7th Cir 2001).
185 See *Gross*, 129 S Ct at 2352 (declining to "extend[]" *Price Waterhouse* to the ADEA).

to the key question of whether *Price Waterhouse*, when originally decided, applied to all of Title VII. Outside of Title VII, this conclusion shows that the admonition of the Seventh Circuit—that but-for causation proved solely by the plaintiff applies under every federal statute unless *Congress* says otherwise—is overly broad, because it fails to recognize the continued vitality of *Price Waterhouse*, a Supreme Court decision, in creating a burden-shifting framework for the Title VII retaliation context.

CONCLUSION

If *Price Waterhouse* originally applied to all of Title VII, it still does today. Congress has not amended the retaliation section, and since *Gross* did not overrule *Price Waterhouse*, its burden-shifting framework remains the governing precedent. *Price Waterhouse* originally applied to all of Title VII based on (1) its broadly framed inquiry and its reliance on the shared legislative history of Title VII, (2) the conceptual equivalence of the discrimination and retaliation provisions, and (3) *Gross*'s implicit acknowledgement of *Price Waterhouse*'s statute-wide scope. The point is not to unduly limit the application of *Gross* but rather to put *Gross* in context—as a decision whose reasoning was tailored specifically to the ADEA, and one issued against a complex backdrop of statutory and judicial history. In context, *Gross* does not reach the retaliation provision of Title VII, and *Price Waterhouse* and its more employee-friendly burden-shifting framework continue to apply.