



2022

Bostock: A Clean Cut into the Gordian Knot of Causation

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Recommended Citation

Melissa Essary, *Bostock: A Clean Cut into the Gordian Knot of Causation*, 75 SMU L. REV. 769 (2022)
<https://scholar.smu.edu/smulr/vol75/iss4/3>

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BOSTOCK: A CLEAN CUT INTO THE GORDIAN KNOT OF CAUSATION

Melissa Essary*

ABSTRACT

Regardless of merit, most individual employment discrimination claims die a fast death at summary judgment. Judges apply the fine mesh net created by McDonnell Douglas v. Green, and most cases are caught in its trap. This dated, obfuscatory Supreme Court case creates a complex and flawed binary approach to causation: either discrimination or an innocent reason caused an adverse employment action. For decades, all three levels of the federal judiciary have wrestled with McDonnell Douglas, creating snarls and knots in construing causation. Because of this causal confusion, the ideal of equal opportunity in employment is on life-support.

Judges and practitioners must take note of Bostock v. Clayton County, a stunning Supreme Court case that lays a new foundation to clear this causal confusion. In this Article, I argue that Bostock creates a new mixed-motive paradigm that, if correctly applied, should transform individual discrimination law in this country by allowing juries to hear more cases. Bostock explicitly recognizes what the social sciences have long known: decision-making in the workplace is often complex, and both discriminatory and innocent reasons may be “but-for” causes of an employer’s adverse action against an employee. Tort law labels these “multiple sufficient cause” cases. In the first work of its kind, I apply the causation standards in Bostock to create a taxonomy of causation scenarios that should guide lower courts in their analysis of individual discrimination cases at pre-trial stages.

As Bostock borrows its causation standards from tort law, this Article examines the nuances of that discipline to determine the legitimacy of Bostock’s causation discussion. I conclude that while Bostock conforms to tort law, the riddle of causation persists in that and almost every discipline. Still, Bostock’s causation logic is sufficient to guide courts into the future on firm ground. In the first comprehensive work

<https://doi.org/10.25172/smulr.75.4.3>.

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of its kind, this Article assists courts by applying *Bostock* at each stage of litigation through jury trials. *Bostock* can help revive the ideal of equal opportunity in employment.

I conclude the paper with tandem principled suggestions. First, I posit that the Court or Congress could create a burden-shifting scheme in multiple sufficient cause cases. Second, such a burden shifting of proof would pave the way for an allocation of fault scheme, similar to that found in tort law, whereby the plaintiff would recover those damages that correlate to the employer's percentage of discriminatory causation.

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I. INTRODUCTION

CIRCA 29 B.C.E, the philosopher Virgil proclaimed, “Happy he who hath availed to know the causes of things.”¹ Causation has bedeviled philosophers, scientists, sociologists, and psychologists throughout history.² Scholars of tort law fare no better: causation has perplexed the discipline for more than a century.³ Particularly baffling has been the notion of “but-for” causation in tort law.⁴ Determining whether the defendant’s conduct was a but-for cause of a plaintiff’s injury requires the factfinder to imagine facts contrary to those which occurred.⁵ The factfinder must mentally remove the defendant’s conduct and ask whether the plaintiff’s injury would have occurred regardless.⁶ If not, the

1. VIRGIL, *GEORGICS* 53 (J.W. Mackail trans., Riverside Press 1904) (c. 29 B.C.E.).

2. See generally JUDEA PEARL & DANA MACKENZIE, *THE BOOK OF WHY: THE NEW SCIENCE OF CAUSE AND EFFECT* 43–45 (2018) (previewing the authors’ extensive discussion of causal reasoning as represented in human understanding of counterfactuals).

3. See, e.g., Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 104 (1911) (“The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause.”) (internal quotation omitted); H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 65 (2d ed. 1985) (introducing the existence of an “apparent paradox” between “the relationship between cause and responsibility”); W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 41, at 263 (5th ed. 1984) (“There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion.”); JOSEPH W. GLANNON, *THE LAW OF TORTS* 189 (5th ed. 2015) (“Causation is a profound problem. We could think about it for years and perhaps at the end be little closer to understanding it. Yet . . . the law . . . must answer the unanswerable: it must decide, *today*, between plaintiff and defendant, and lacks the luxury of infinite speculation.”).

4. One eminent scholar’s instruction for identifying whether conduct of the defendant is a but-for cause of the plaintiff’s injury is “if the [injury] would not have occurred but for that conduct; conversely, defendant’s conduct is not a cause of the [injury], if the [injury] would have occurred without it.” KEETON ET AL., *supra* note 3, § 41, at 266. The seeming simplicity of this definition is belied by the necessity of imagining “hypothetical, contrary-to-fact conditions” and the further trouble that the definition draws an almost unlimited array of events into its maw. *Id.* § 41, at 265. In addition, in tort law, but-for causation is endless and can lead the factfinder back to the beginning of time. Proximate cause is a limiting principle on but-for causation, usually defined by foreseeability. See *id.* § 43, at 280–96. No such counterpart to proximate cause exists in discrimination cases; the knotty question is simply whether discrimination was a but-for cause of the adverse action. See Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 17, 26 (2013). But-for causation in discrimination cases is not endless and hence needs no limiting principle such as proximate cause.

5. KEETON ET AL., *supra* note 3, § 41, at 265.

6. See *id.*

conduct was a but-for cause, and the defendant is liable.⁷

Despite the causation conundrum in tort law, beginning in 2009, the United States Supreme Court borrowed but-for causation as the standard of causation in most individual employment discrimination cases.⁸ In cases involving discrimination on the basis of “race, color, religion, sex, or national origin,”⁹ or age,¹⁰ and in retaliation cases,¹¹ plaintiffs must prove that, but for the employer’s discrimination, the employer would not have taken the adverse action against the employee.¹² The seemingly simple statutory words “because of” in most discrimination statutes have morphed into a requirement that plaintiffs prove discrimination was a but-for cause of the adverse action.¹³

Recently, in *Bostock v. Clayton County*, the Supreme Court elaborated on but-for causation,¹⁴ providing a solid basis upon which to rethink causation and the messy landscape of employment discrimination litigation that currently favors employers.¹⁵ The Court’s elegant, simple discussion of causation should inspire future courts to rid themselves of the myriad of complex and unnecessary hurdles that impede individual employees

7. *See id.* If one strips the negatives from the traditional but-for question, a simpler question emerges: But for the defendant’s action, would the harm have occurred? If the answer is “no,” then the action caused the harm.

8. *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 177–78 (2009) (holding that the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, requires but-for causation); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346–47 (2013) (holding that Title VII’s retaliation provision requires but-for causation); *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020) (holding that 42 U.S.C. § 1981 requires but-for causation); *Babb v. Wilkie*, 140 S. Ct. 1168, 1173–74 (2020) (holding that federal sector provisions of the ADEA, which require personnel decisions be made “free from” any consideration of age, require plaintiffs to prove that age was a but-for cause in order to recover full remedies). The Court has not addressed the causation standard in the Americans with Disabilities Act of 1990. 42 U.S.C. §§ 12111–17. The statutory causation language in that Act is “on the basis of” as opposed to “because of.” *Id.* § 12112(a). Even so, circuit courts interpret that language as requiring but-for causation. *See Natofsky v. City of New York*, 921 F.3d 337, 349 (2d Cir. 2019) (“We conclude that ‘on the basis of’ in the ADA requires a but-for causation standard.”). *Accord Murray v. Mayo Clinic*, 934 F.3d 1101, 1105 (9th Cir. 2019); *Hooper v. Proctor Health Care Inc.*, 804 F.3d 846, 853 (7th Cir. 2015).

9. *See* 42 U.S.C. § 2000e-2(a)(1) (2018); *see also* 42 U.S.C. § 1981 (2018).

10. 29 U.S.C. § 623 (2018).

11. 42 U.S.C. § 2000e-3(a) (2018); 29 U.S.C. § 623(d) (2018).

12. *See, e.g., Gross*, 557 U.S. at 177–78; *Nassar*, 570 U.S. at 346–47; *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020). The Court has yet to decide whether disability, genetic information, and military service require a plaintiff to prove but-for causation. *See* 42 U.S.C. § 12113 (2018) (disability); 42 U.S.C. § 2000ff-1 (2018) (genetic information); 38 U.S.C. § 4311 (2018) (military service).

13. 42 U.S.C. § 2000e-2(a)(1) (2018); 29 U.S.C. § 623 (2018); *see infra* Part III.

14. *Bostock*, 140 S. Ct. at 1739–43. *Bostock* is best known for holding that Title VII forbids employers from discriminating against employees because of their sexual orientation or for being transgender. *See id.* at 1737.

15. *See* Ellen Berrey, Steve G. Hoffman & Laura Beth Nielsen, *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 LAW & SOC’Y REV. 1, 5 (2012) (contrasting the “significantly different burdens” in employment discrimination litigation between defendants who are able to “managerialize[]” and bear expenses as “routine operating costs” and plaintiffs for whom “these burdens often are personally and professionally crushing”).

from getting to trial.¹⁶

This Article will argue that *Bostock* should have positive ripple effects for plaintiffs across the thousands of individual disparate treatment cases filed under various employment discrimination statutes in federal courts.¹⁷ In *Bostock*, Justice Neil Gorsuch wrote for the majority that causation in employment discrimination requires the plaintiff to prove that but-for the discrimination, the adverse action would not have occurred.¹⁸ This portion of the opinion broke no new ground. But Justice Gorsuch did not stop there; he further wrote that discrimination need only be “a” but-for cause of the adverse action, not “the” but-for cause.¹⁹ Further, he opined, more than one but-for cause may exist, including an innocent one.²⁰ Perhaps, he said, this innocent but-for cause may be the “main” or “primary” cause.²¹ Such language recognizes that two or more causes analyzed separately may have been but-for causes of the adverse action.²² This language breaks new ground and opens the door for deeper analysis and, ultimately, more opportunities for plaintiffs to survive employer motions for summary judgment, where discrimination cases often go to die.²³

Take a simple example. Assume that employer Jones Manufacturing fires employee James Smith, a lower-level manager, ostensibly for excessive absences during the course of his employment. Assume further that Smith is Black and after his termination, Smith files a lawsuit against employer Jones alleging that his race was the true reason for his termination. Smith asserts that the manager who fired him remarked shortly before his firing that “Blacks make lousy managers.” Assume that Smith’s race was indeed a but-for cause of his termination but that his excessive absences were also a but-for cause of his termination. The latter cause, of course, is

16. See discussion *infra* Section III.A for an extended discussion of *McDonnell Douglas v. Green*.

17. This Article focuses only on individual disparate *treatment* cases, which occur when the employer intentionally discriminates against an employee based on a protected class. See, e.g., *Bostock*, 140 S. Ct. at 1734–35 (enumerating disparate treatment based on sex under 42 U.S.C. § 2000e-2(a)(1)). This Article does not focus on other types of discrimination cases, such as disparate impact cases under 42 U.S.C. § 2000e-2(k)(1)(A), systemic disparate treatment cases, or harassment cases. Disparate impact, systemic disparate treatment, and harassment cases have their own unique models of proof, either statutorily or judicially created.

18. *Bostock*, 140 S. Ct. at 1738–39 (referencing that but-for analysis applies to all causes of action under Title VII including failure to hire, failure to promote, wrongful termination, etc.).

19. See *id.* at 1744, 1748.

20. *Id.* at 1739.

21. *Id.*

22. As Justice Gorsuch noted, a “but-for test directs [courts] to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.” *Id.*

23. This language is new because it applies to but-for causation. See *supra* note 8 and accompanying text. The Court previously recognized that “mixed-motives” existed in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 236–37 (1989) (plurality opinion), discussed at length in Section III.B of this Article. The Court utilized a lesser causation standard in that case, termed “motivating factor” causation, that created a two-part test later codified by Congress. *Id.* at 244–45, 247, 250, 258. Unfortunately, that test generally results in plaintiffs recovering very limited damages. As a result, plaintiffs’ attorneys seldom rely on this test and seek to prove but-for causation. See *infra* notes 95–109 and accompanying text.

innocent and does not invoke liability; the reverse is true of the former cause. Writing for the 6–3 majority in *Bostock*, Justice Gorsuch set the stage for a new approach to this common occurrence in decision-making. Prior to *Bostock*, lower courts would have shoved this individual discrimination case into a Court-created paradigm long out of date, likely resulting in a quick death.²⁴ If appropriately applied by lower courts, *Bostock* will infuse new legal life into this common scenario.

Justice Gorsuch firmly introduced the issue of multiple sufficient causes into employment discrimination law—a topic that has long bedeviled tort scholars.²⁵ Like the example above, these cases involve both illegitimate (discriminatory) and innocent (non-discriminatory) causes. In the very real world of decision-making in the workplace, these cases likely constitute a significant percentage of individual disparate treatment cases.²⁶ The complexity of human decision-making cannot be overstated.²⁷ A decision is seldom based on a single motive, and the binary inquiry inherent in *McDonnell Douglas v. Green*²⁸ is the wrong shoe in which to fit these common situations.

Justice Gorsuch’s analysis should clarify discrimination law’s often baffling causation requirement. It is an exclamation point at the end of almost fifty years of difficult (and sometimes contradictory) Supreme Court precedents.²⁹ Each decision has turned what should have been a simple matter of statutory construction into hurdles for plaintiffs.³⁰ Lower courts

24. See discussion *infra* Section III.A for an extended discussion of *McDonnell Douglas v. Green*.

25. See generally Robert J. Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127, 1129 (1934); Richard Fumerton & Ken Kress, *Causation and the Law: Preemption, Lawful Sufficiency, and Causal Sufficiency*, 64 LAW & CONTEMP. PROBS. 83, 99 (2001) (discussing difficulties in theories of normative judgments about lawful sufficiency for liability); Note, *Rethinking Actual Causation in Tort Law*, 130 HARV. L. REV. 2163, 2175–80 (2017) [hereinafter *Rethinking Actual Causation*] (discussing difficulties in contemporary approaches to multiple sufficient causation).

26. Employment discrimination claims comprise roughly 10% of federal district court dockets. Berrey, Hoffman & Nielson, *supra* note 15, at 9.

27. Decision-making is a complex and multifaceted process. Rarely does a single reason motivate a decisionmaker. See Cindy Dietrich, *Decision Making: Factors that Influence Decision Making, Heuristics Used, and Decision Outcomes*, 2 INQUIRIES J. 1, 1–3 (2010); see also Sam Stonefield, *Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law*, 35 BUFF. L. REV. 85, 113 (1986). In arguing for the passage of Title VII, Senator Case acknowledged the fundamental complexity of decision making: “If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of.” 110 CONG. REC. 13837 (1964).

28. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

29. Much of this precedent grapples with how to apply *McDonnell Douglas*. See, e.g., *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 503, 509–11, 514–15 (1981). See also *Reeves v. Sanderson Plumbing*, 520 U.S. 133, 142 (2000) (applying *McDonnell Douglas* to an age discrimination case but noted that it did so because the parties did not dispute the issue). As discussed *infra* Section IV.A, *Bostock* paves the way for the Court to rid itself of the *McDonnell Douglas* paradigm.

30. Plaintiffs initially approach discrimination law with the hope that it can vindicate their complaints about negative workplace experiences. See Berrey, Hoffman & Nielson, *supra* note 15, at 17. Their often high expectations are confronted with a litigation process that fails to serve them or is opaque and confusing. See *id.* at 16. Plaintiffs adjust their expectations to their experiences, and along the way, their sense of fairness changes—

have long struggled to apply evolving, ambiguous Supreme Court precedent, and the result is that individual discrimination cases have become tangled conflicts, unfolding on a lopsided playing field that favors defendants.³¹

This tangled conflict is wholly unnecessary given the simplicity of Title VII's causation language. The statute makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin."³² The Court's construction of the simple words "because of" has created decades of confusion.

This Article will deconstruct *Bostock's* causation analysis and contrast and compare it with tort law causation from which it borrows.³³ Ultimately, this Article offers a novel approach to rethink but-for causation and provides a path forward for attorneys, judges, and juries in interpreting and applying employment discrimination law.³⁴ This path forward should provide clarity for judges whose first instinct may be to grant an employer's motion for summary judgment. Ultimately, applying *Bostock* should result in more cases proceeding to trial. This Article argues for such an outcome.

Part II will introduce the major employment discrimination statutes

usually diminishing dramatically—as their understanding of what is possible settles in. *See id.* at 16–17; *see* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 456 (2004) ("Employment discrimination plaintiffs must swim against the tide—at pretrial, trial, and appeal."). Empirical research on information collected in "100 in-depth interviews with defendant's representatives, plaintiffs, and lawyers involved in employment discrimination lawsuits, selected as part of a multimethod study of 1,788 discrimination cases filed in U.S. district courts between 1988 and 2003" are instructive. Berrey, Hoffman & Nielson, *supra* note 15, at 1. The data suggest two key takeaways. First, the study indicates that "neither defendants' representatives nor plaintiffs believe discrimination law is fair . . . [H]owever, each side sees unfairness only in those aspects of the process that work to their disadvantage." *Id.* The second important finding was that "the very notion of fairness can belie structural asymmetries that, overall, *profoundly benefit employers in employment discrimination lawsuits.*" *Id.* (emphasis added).

31. *See* Berrey, Hoffman & Nielson, *supra* note 15, at 9 ("Employment discrimination lawsuits themselves embody inequality. They function as an individualized system of justice in which nearly all plaintiffs (93[%]) pursue individual rather than collective claims, which puts them at a tremendous disadvantage relative to employer-defendants. Unlike other kinds of cases in district courts, they show a consistent, exaggerated pattern of case resolution in which plaintiffs fare poorly in many ways. Most cases end not in a big plaintiff win, as media coverage suggests, but in a small settlement. These cases are more likely to be pursued pro se, to be dismissed or thrown out on summary judgment, to result in plaintiff losses at trial, to be appealed by defendant-employers, and to result in plaintiff loss on appeal." (citations omitted)); *see also* Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 201 (2010).

32. 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

33. *See, e.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013).

34. I hold out no hope that the Court will deviate from its statutory interpretation that discrimination statutes require but-for causation. This Article will thus deal with its reality and argue for a precise application of that standard at every stage of litigation.

and their specific language related to causation.³⁵ This overview will highlight where causation is located in each statute and lay the foundation for an examination of the Court's tortuous journey to interpret these causation requirements in Part III.

Part III will discuss the evolution of causation in Supreme Court cases construing Title VII, the Age Discrimination in Employment Act, and § 1981. This Part begins with the landmark case *McDonnell Douglas v. Green*,³⁶ then traces the evolution of Supreme Court precedent on causation through *Gross v. FBL Financial Services*,³⁷ *University of Texas Southwest Medical Center v. Nassar*,³⁸ and *Comcast Corporation v. National Association of African American Owned Media*.³⁹ In each of the latter group of cases, the Court required the plaintiff to prove but-for causation.⁴⁰

Part IV will then discuss *Bostock v. Clayton County* and Justice Gorsuch's decision. This Article argues that the hyper-technical, Court-created procedural construct that is *McDonnell Douglas* should be abandoned in light of *Bostock*. Additionally, this portion of the Article will introduce the multiple sufficient cause language used in *Bostock* that is now a very real part of the causation landscape in employment discrimination cases.⁴¹ The Court's language in *Bostock* cannot, and should not, be ignored by lower courts who may be tempted to rely on prior Court precedent.

Part V of this Article will probe deeply into but-for causation under tort law and how tort law deals with multiple sufficient causes. Additionally, it will examine provisions in the Third Restatement of Torts that provide needed context for tort law's historical approach to multiple sufficient causes. Finally, this Part will conclude by explaining what the model of proof under *Bostock* should look like.

Part VI of this Article will seek to apply *Bostock*'s causation framework at each stage of litigation. First, it will explain how to plead a plausible claim of causation using *Bostock* with *Ashcroft v. Iqbal*⁴² and *Bell*

35. This Article addresses only federal employment discrimination law, not state anti-discrimination statutes modeled on federal law, although many such state analogs exist. See, e.g., *Pippin v. State*, 854 N.W.2d 1, 27 (Iowa 2014) (interpreting IOWA CODE § 216); *Univ. of Tex. v. Poindexter*, 306 S.W.3d 798, 803 (Tex. App.—Austin 2009, no pet.) (interpreting TEX. LAB. CODE ANN. § 21.051); *W. Va. Univ./W. Va. Bd. of Regents v. Decker*, 447 S.E.2d 259, 261–63 (W. Va. 1994) (interpreting W.VA. CODE § 5-11-1). Many plaintiffs' attorneys prefer to litigate employment discrimination cases in state courts, where judges are less likely to dispose of cases at the pre-trial stage. Employers' attorneys, on the other hand, generally prefer to litigate these cases in federal court. They will typically seek to remove a case if a plaintiff's attorney breathes a word of federal law, such as Title VII, in the state court complaint. See Sarah B. Schlehr & Christa L. Riggins, *Why Employment Discrimination Cases Usually Belong in State Court*, ADVOC. MAG., June 2015, at 34, 38.

36. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

37. *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009).

38. *Nassar*, 570 U.S. at 338.

39. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020).

40. See *infra* Part III.

41. See *infra* notes 150–152 and accompanying text.

42. *Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2009).

Atlantic Corp. v. Twombly.⁴³ Then, this Part will dive deeply into the application of *Bostock*'s causation requirements at the summary judgment stage. Finally, the Part will analyze how jury instructions should be constructed to include *Bostock*'s causal framework.

Last, this Article will discuss two novel concepts: (1) the creation of a burden-shifting paradigm that should apply to multiple sufficient cause cases and (2) the creation of an allocation of damages in employment discrimination cases. These seemingly radical suggestions have a fair and legally sound basis. These suggestions allow an appropriate construction of *Bostock*, allocating damages based on one's percentage of causation, whether discriminatory or innocent. This portion of the Article is a novel and logical extension of multiple sufficient causation. This approach awards a plaintiff the percentage of damages that accords with the percentage of the employer's discriminatory fault. This is a fair apportionment of damages according to fault.

II. INTRODUCTION TO EMPLOYMENT DISCRIMINATION STATUTES

In 1964, Congress took a bold step in enacting Title VII of the Civil Rights Act, one of the twentieth century's towering legislative achievements.⁴⁴ The Act was progressive and enacted at a time when overt racism abounded; before 1964, employers could—and often did—lawfully discriminate based on an individual's status in a protected class.⁴⁵ The Act's ban on employment discrimination revolutionized the law by

43. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548–49, 553–54 (2007).

44. See GILLIAN THOMAS, *BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK* 1–6 (2016). The United States House of Representatives passed the bill on July 2, 1964, and after a sixty-day filibuster—orchestrated largely by Southern Democrats—it passed the United States Senate on June 19, 1964, with a final vote of 290–130 in the House of Representatives and 73–27 in the Senate. Gillian Brockell, *Note to Mitch McConnell: The Senate's Longest Filibuster Was Definitely Racist*, WASH. POST (Mar. 26, 2021 7:00 AM), <https://www.washingtonpost.com/history/2021/03/26/thurmond-filibuster-senate-mcconnell> [<https://perma.cc/8WU4-W562>]; see H.R. 7152, 88th Cong. (1964).

45. Before the Act, classified ads spelled out as a matter of course which genders and races could apply for particular jobs. See Tamara Lytle, *Title VII Changed the Face of the American Workplace*, SOC'Y OF HUM. RES. MGMT. (May 21, 2014), <https://www.shrm.org/hr-today/news/hr-magazine/pages/title-vii-changed-the-face-of-the-american-workplace.aspx> [<https://perma.cc/4RV4-WD2X>]. But these misguided attitudes were not limited to mere classified advertisements or even employment. See, e.g., *Shelby Cnty. v. Holder*, 570 U.S. 529, 535 (2013) (In 1965, the nation harbored “entrenched racial discrimination in voting, ‘an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.’” (quoting *S.C. v. Katzenbach*, 383 U.S. 301, 309 (1966))). Nor were they limited to race; the restraints on women's rights prior to the Civil Rights era were considerable. See Lytle, *supra*. Lytle shows that in 1967, when Title VII was still new legislation, society's attitudes were such that women composed only 29% of the U.S. workforce, whereas today, women comprise nearly half at 46.8%. Lytle, *supra*; see MITRA TOOSI & TERESA L. MORISI, U.S. BUREAU OF LAB. STATS., *WOMEN IN THE WORKFORCE BEFORE, DURING, AND AFTER THE GREAT RECESSION* 3 (2017), <https://www.bls.gov/spotlight/2017/women-in-the-workforce-before-during-and-after-the-great-recession/home.htm> [<https://perma.cc/B2CD-367F>].

prohibiting employers from discriminating in the workplace.⁴⁶

In pertinent part, the Act makes it unlawful for employers with fifteen or more employees to discriminate against employees “because of” their “race, color, religion, sex, or national origin.”⁴⁷ The Act is driven by the idea that all people are created equal.⁴⁸ As such, Title VII demands employers provide equal opportunity to those in protected classes.⁴⁹ The Act provided a vision of what America should be, not what it was at that time, nor, importantly, what we are today.

Over the years, the Act has deterred and sometimes eliminated employment discrimination.⁵⁰ Unfortunately, it is fair to say that, in its current form and as applied by lower courts over the decades, the law is a doctrinal mess. Our courts do not adequately police discrimination. Lower courts seeking clarity from Supreme Court precedent instead find muddy waters, particularly in the area of causation.⁵¹ Such obfuscation has benefitted employers, not employees,⁵² and has frustrated the core purpose of the Act by allowing all but the most egregious forms of employer discrimination to go undetected, unchecked, and unpunished.

While most overt discrimination has been driven underground, discrimination persists in our country.⁵³ Despite this fact, employees lose their

46. 42 U.S.C. § 2000e-2 (2018).

47. *Id.* (listing prohibited bases for employers to discriminate); *id.* § 2000e(b) (defining “employers” subject to the statute).

48. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”). Of course, the addition of the word “sex” in Title VII almost did not occur. Representative Howard W. Smith, a Virginia Democrat, added sex to the list of protected classes. *See* THOMAS, *supra* note 44, at 1–4. Historical debate continues as to whether Smith wanted to protect women or wanted to kill the bill by including “sex” in the list of protected classes. *See generally id.*

49. *See* 42 U.S.C. § 2000e-2(a) (2018).

50. *See* Lytle, *supra* note 45 and accompanying text.

51. *See* discussion *infra* Part IV.

52. *See infra* notes 54–56 and accompanying text.

53. This unfortunate truth has been demonstrated empirically in a number of studies. *See, e.g.,* Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOCIO. 181, 187–90 (2008) (“Although there have been some remarkable gains in the labor force status of racial minorities, significant disparities remain. African Americans are twice as likely to be unemployed as [W]hites (Hispanics are only marginally so), and the wages of both [B]lacks and Hispanics continue to lag well behind those of [W]hites.”). Pager and Shepherd point to a significant survey where researchers sent identical resumes to employers in Boston and Chicago using names generally associated with certain races (such as “Jamal” and “Lakisha” as compared with “Brad” and “Emily”) and found that, *inter alia*, employers use names as a proxy for race and call back rates are substantially affected thereby. *Id.* at 187 (citing Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004)). The authors also note that the “study indicated that improving the qualifications of applicants benefited [W]hite applicants but not [B]lacks, thus leading to a wider racial gap in response rates for those with higher skill.” *Id.* Employers’ views on anti-discrimination laws are generally more conservative, and this is informed by a general concern about weaponization by employees in litigation under broadly drafted statutes. *See* Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996*, 41 AM. BEHAV. SCI.

discrimination cases in pre-trial motions at an alarming rate.⁵⁴ Sometimes this occurs on a motion to dismiss, but more commonly, it happens at the summary judgment stage.⁵⁵ For example, in 2017, North Carolina federal courts disposed of 75% of cases (excluding those with pro se plaintiffs) during the pre-trial stages.⁵⁶ Pre-trial motion outcomes depend largely on the pleadings at the motion to dismiss stage and discovery at the motion for summary judgment stage under Federal Rule of Civil Procedure 56.⁵⁷ Pre-trial resolution of these cases prevents juries from fulfilling their ultimate fact-finding role, a role particularly suited for the fact-intensive nature of employment discrimination claims. Jurors can see and hear witnesses and assess the witnesses' demeanor and credibility, an important element in hidden discrimination cases.⁵⁸ Yet, nationwide, employ-

ENTIST 960, 965 (1998) (noting that in the context of equal employment opportunity, "enforcement . . . caused anxiety among employers, for compliance criteria remained ambiguous").

54. For instance, from the period June 30, 2020, to June 30, 2021, only 0.6% of all employment law cases reached the trial stages. See *Table C-4: U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending June 30, 2021*, STAT. TABLES FOR THE FED. JUDICIARY (2021) [hereinafter *Civil Cases Terminated*], <https://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2021/06/30> [<https://perma.cc/8CCG-8XYC>]. Specifically, of the 8,699 cases that were filed, only fifty-five reached a trial: forty-five jury trials and ten bench trials. *Id.* And jaundiced judicial eyes exist even on our circuit courts of appeals. Even if an employee manages to survive pretrial motions and prevail at the trial level, the employee still faces an uphill battle to hold onto that win. Professors Kevin M. Clermont and Stewart J. Schwab have studied how successful employees in employment claims are at maintaining favorable jury verdicts. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 103–04, 113 (2009). The results of this study indicate that even when an employee wins at trial, the appellate court will reverse the jury verdict in about 41% of those cases. *Id.* at 110. In contrast, when the employer wins before the district court, it will face a reversal rate of only 8.72%. *Id.* The authors of the study have concluded that this discrepancy "raises the specter that federal appellate courts have a double standard for employment discrimination cases, harshly scrutinizing employees' victories below while gazing benignly at employer victories." *Id.* at 115; see Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 949 (2002). Circuit judges faced with cases like these must understand *Bostock's* explicit adoption of multiple sufficient causes. Further, they should shed themselves of what Professor Sandra Sperino refers to as "disbelief doctrines" when reviewing evidence. See Sandra F. Sperino, *Disbelief Doctrines*, 39 BERKELEY J. EMP. & LAB. L. 231, 231–34 (2018).

55. Cf. Sperino, *supra* note 54, at 233–42; *Civil Cases Terminated*, *supra* note 54.

56. Melissa A Essary, *North Carolina Federal District Court Update: A Year in Review Labor and Employment Law Cases*, 34 ANN. N.C./S.C. LAB. & EMP. L. CONF. ch. IX-A, pt. I, at 3 (2018). Research on file with the author. From 2017, 2018, and 2019, I read every employment discrimination case decided by the federal district courts in North Carolina. I presented these papers at the joint North Carolina and South Carolina Labor and Employment Law Annual Meeting sponsored by both states' respective state bar organizations. I summarized all but the pro se cases, which plaintiffs invariably lost at the pre-trial stage. Had I included pro se cases, the percentage of cases disposed of by pre-trial motions would increase by double digits. I created pie charts to keep track of how judges handled the non-pro se cases. While my research is anecdotal and not perfectly empirical, it showed how few plaintiffs prevail at the pre-trial stages, even with representation.

57. See *supra* notes 44–45 and accompanying text.

58. It is as though judges do not trust juries anymore, which of course raises significant issues in all civil litigation. But in cases involving civil rights, the near total lack of civic engagement through trials by juries should alarm us all. Our peers—not judges—should

ment discrimination cases rarely reach juries.⁵⁹

At the summary judgment stage, judges lean heavily on the procedural hurdles established in *McDonnell Douglas*,⁶⁰ discussed in depth below.⁶¹ The Court's *Bostock* decision provides a path to rethink the very existence of this impediment for plaintiffs in Title VII cases.⁶² Understanding why an adverse action occurred is the riddle of discrimination cases. The Court could and should make this factual inquiry easier by overturning *McDonnell Douglas*.

The statutes themselves suggest no procedural complexity. Congress forbade employers from taking employees' protected classifications, such as race, into account when making employment decisions.⁶³ These important civil rights statutes speak in simple language. Congress's intent appears on the face of Title VII in no uncertain terms; in the language quoted above, the statute makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin."⁶⁴ Similarly, the Age Discrimination in Employment Act (ADEA) also utilizes "because of" causation language.⁶⁵ The ADEA makes it unlawful for an employer "to fail or

decide whether an employer discriminated in any case in which a genuine issue of material fact exists. Another significant reason for the lack of federal jury trials is that many employees are bound by arbitration agreements and cannot file their cases in federal court. KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL'Y INST., *THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS* 3-4 (2015). The United States Supreme Court explicitly interpreted the Federal Arbitration Act (FAA) to allow employers to mandate an employee's signing of an arbitration clause as a condition of employment. *See id.* at 10, 23-24, 26. Congress enacted the Statute to promote business arbitration, but in recent years, the Supreme Court's interpretation of the FAA's reach decimates the right to trial by jury when an employer utilizes an arbitration agreement as a condition of employment. *Id.* at 7, 10, 23-24, 26; *see also* Jerett Yan, *A Lunatic's Guide to Suing for \$30: Class Action Arbitration, the Federal Arbitration Act and Unconscionability After AT&T v. Concepcion*, 32 BERKELEY J. EMP. & LAB. L. 551, 559 n.43 (2011) (citing cases interpreting the FAA and finding it applicable). In 1964, Congress intended litigation to be the primary mechanism for attempting to enforce civil rights law in the contemporary United States. *See* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (2003). Doubtless, it never foresaw the "new" interpretation of the FAA by the United States Supreme Court. *See* Jean R. Sternlight, *Compelling Arbitration of Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 U. KAN. L. REV. 273, 281 (1999). As a result, a significant percentage of employees are bound by arbitration agreements. The statistics do not track settlements, which can occur at any point during an employment dispute, pre-EEOC complaint filing, during the EEOC's mediation process, or any time after a discrimination lawsuit has been filed. If the plaintiff survives the employer's motion for summary judgment, a case likely gains more settlement value at that time.

59. *See Civil Cases Terminated*, *supra* note 54.

60. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

61. *See* discussion *infra* Section III.A.

62. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1734 (2020).

63. 42 U.S.C. § 2000e-2(a)(1) (2018).

64. *Id.* (emphasis added).

65. 29 U.S.C. § 623(a)(1) (2018). The Supreme Court has not yet addressed the causation standard to be used in individual disparate treatment claims under the Americans with Disabilities Act. The heart of the Act states the following: "No covered entity shall discrim-

refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age."⁶⁶

The Retaliation Clause of Title VII also uses “because” language.⁶⁷ Title VII’s retaliation provision provides,

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . *because* [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or *because* he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.⁶⁸

Clearly, Congress intentionally chose “because of” language when crafting each statute’s causal framework. It is critical to trace how the causal phrase has been interpreted in Title VII cases.

III. HISTORY OF CAUSATION UNDER TITLE VII

A. *McDONNELL DOUGLAS v. GREEN*

In 1973, the Supreme Court kicked off fifty years of causation confusion when it created a three-part minuet in *McDonnell Douglas v. Green*.⁶⁹ The model established by *McDonnell Douglas* is now utilized by lower courts at the summary judgment stage.⁷⁰ The paradigm, nonsensical at best, is outdated and creates a “deeply flawed” and “hyper-technical”

inate against a qualified individual *on the basis of* disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a) (emphasis added). The Supreme Court has not yet opined as to whether “on the basis of” requires a plaintiff to show but-for causation. *See Murray v. Mayo Clinic*, 934 F.3d 1101, 1106–07 (9th Cir. 2019) (demonstrating that some lower courts have followed *Gross* and *Nassar* in interpreting on the basis of to require but-for causation, not permitting motivating factors); *see also Gentry v. E.W. Partners Club Mgmt. Co.*, 816 F.3d 228, 235 (4th Cir. 2016).

66. 29 U.S.C. § 623(a)(1) (2018) (emphasis added).

67. *See* 42 U.S.C. § 2000e-3(a) (2018) (emphasis added).

68. *Id.*

69. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Court remanded the case, in which a Black employee sued on grounds that his employer’s failure to rehire him after firing him was racially motivated. *Id.* at 794–96.

70. *Id.* *McDonnell Douglas* is one of the most-cited cases in American jurisprudence, having been cited almost 60,000 times by federal courts, according to LexisNexis. *Shepard’s Report for McDonnell Douglas v. Green*, LEXISNEXIS (Sep. 21, 2022) (on file with author). However, the better logic is that *McDonnell Douglas* applies only at the summary judgment stage. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510–11 (2002) (holding that a plaintiff can survive a motion to dismiss even if the plaintiff does not provide facts to support each of the factors within the *McDonnell Douglas* paradigm). The Supreme Court later decided cases that made it more difficult to survive a 12(b)(6) motion but specifically held that its holding in *Swierkiewicz* remained untouched. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). I do not attempt to discuss the nuances of *McDonnell Douglas* in this Article; indeed, Professor Sandra Sperino wrote an entire book on the subject. *See SANDRA F. SPERINO, MCDONNELL DOUGLAS: THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW* (2022). Lower courts ubiquitously apply *McDonnell Douglas* not only to Title VII claims but to age discrimination and American with Disabilities Act cases. *Id.* ch. IX.

procedural hurdle for plaintiffs.⁷¹ One scholar calls it “one of the most significant and pervasive obstacles to contemporary anti-discrimination enforcement.”⁷² Trial judges dismiss thousands of discrimination cases every year by applying *McDonnell Douglas*.⁷³ Yet the case clearly conflicts with the plain but-for causation standard the Court has embraced in a litany of cases since 2009.⁷⁴

It is necessary to understand *McDonnell Douglas* to unravel the causation conundrum. At the first step of the case’s framework, a plaintiff must prove a prima facie case of discrimination tailored to the adverse action at issue, proving that he or she: “(1) belongs to a protected class; (2) was qualified for the job; and (3) was subjected to an adverse employment action; and (4) that the employer gave better treatment to a similarly-situated person outside the plaintiff’s protected class.”⁷⁵

At step two, the employer must articulate a legitimate, nondiscriminatory reason for the adverse action.⁷⁶ Doing so rebuts the presumption created by the prima facie case.⁷⁷ Illogically, at step three, the plaintiff must prove the employer’s articulated reason is “pretextual” and that discrimination was the real reason for the adverse action.⁷⁸

This procedural mechanism appears to create a binary choice as to why the adverse action occurred: either the employer’s discrimination or the employer’s lawful reason.⁷⁹ It does not say anything about but-for causa-

71. Katie Eyer, *The Return of the Technical McDonnell Douglas Paradigm*, 94 WASH. L. REV. 967, 969 (2019).

72. *Id.* at 967.

73. *Id.* at 1015.

74. See discussion *infra* Sections III.A–C.

75. Yina Cabrera, *The “Ultimate” Question: Are Ultimate Employment Decisions Required to Succeed on a Discrimination Claim Under Section 703(A) of Title VII?*, 15 FIU L. REV. 97, 103 (2021) (“[C]ourts remain split on their interpretations of the ‘adverse employment action’ requirement to establish a prima facie case of disparate treatment. While several courts follow the premise that a wide array of disadvantageous changes in the workplace can constitute adverse employment actions, other courts, like the Fifth and Third Circuits, strongly disagree, interpreting Title VII’s substantive prohibition on discrimination to reach only ‘ultimate employment decisions.’” (citations omitted)); *McDonnell Douglas*, 411 U.S. at 802. Adverse actions certainly include “ultimate employment actions,” such as failure to hire, failure to promote, and termination. See *Ray v. Henderson*, 217 F.3d 1234, 1240–41 (9th Cir. 2000).

76. *McDonnell Douglas*, 411 U.S. at 802.

77. *Id.*

78. See SPERINO, *supra* note 70, at 88 (“The central focus of the *McDonnell Douglas* framework is the pretext inquiry. This inquiry asks the plaintiff to show that the employer’s proffered reason for its action is not credible. Implicitly, *McDonnell Douglas* sets up a framework of competing narratives, where the judge at summary judgment is asked to determine whether there is sufficient evidence to challenge the reason given by the employer.”).

79. Circuit courts of appeals disagree as to whether a plaintiff employee must prove pretext. See, e.g., *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 508–09 (1993) (stating that the court of appeals’ judgment that plaintiff’s proof of pretext alone was sufficient for a judgment in plaintiff’s favor is incorrect). The Court has spent much time and much ink trying to interpret the “pretext” stage of *McDonnell Douglas*, and lower courts are still confused. *Id.* at 512–13 (listing cases).

tion.⁸⁰ Subsequent cases have affirmed that judges are to use this procedural device when employers move for summary judgment but not at trial.⁸¹ Some cases erroneously say it is to be used when employees have only “circumstantial” evidence.⁸² As any evidence professor will tell you, circumstantial and direct evidence do not differ in their potential probative value.⁸³

More importantly, instead of being an aid to plaintiffs, lower courts have utilized *McDonnell Douglas* in a hyper-technical manner to screen out meritorious cases, a result the Court did not intend.⁸⁴ The factual inquiry of causation—whether the employer in fact discriminated because of the plaintiff’s protected class—should predominate, not an outdated device utilized by lower courts to toss cases from the justice system.

Lower court judges of various perspectives appropriately critique not only the hyper-technical application of *McDonnell Douglas* but the paradigm itself.⁸⁵ Judge Diane Wood of the Seventh Circuit noted, “The origi-

80. See Deborah A. Widiss, *Proving Discrimination by the Text*, 106 MINN. L. REV. 353, 401 (2021) (“[D]ecades of decisions characterizing the ‘pretext’ stage as requiring a plaintiff to disprove the employer’s claimed rationale make clear that, *as applied*, the test does require narrowing actions down to a single motive.”). Such “judge-made doctrine functionally requires a plaintiff to prove sole-causation,” something that *Bostock* makes eminently clear is erroneous. *Id.*; see *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1744 (2020) (“[T]he plaintiff’s sex need not be the sole or primary cause of the employer’s adverse action.”) The statute requires plaintiffs prove discrimination was a but-for cause. 42 U.S.C. 2000e-2 (2018). And again, other innocent but-for causes may exist. *Bostock*, 140 S. Ct. at 1744. While I recognize the error of these decades of law post-*Bostock*, many federal district court judges approach discrimination cases with skepticism and appear to begin with the presumption that discrimination cases lack merit. See Widiss, *supra*, at 408. It will be no easy task to divorce them from their usual—and as I argue, erroneous—construction vis-à-vis *McDonnell Douglas*’s implicit command that a sole causal factor be identified.

81. See Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. C.R. & C.L. 1, 12, 14–15 (2005); Lee A. Kraftchick, *It’s Not Your Father’s Summary Judgment: Recent Developments in the Use of Summary Judgment to Resolve Employment Discrimination Cases*, 78 FLA. B.J. 63, 73 (2004) (“Employment discrimination cases today are resolved more often on summary judgment than they are at any other stage of litigation.”); see also *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020).

82. See, e.g., *Walton v. Powell*, 821 F.3d 1204, 1211 (10th Cir. 2016) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 246–47 (1989) (plurality opinion); *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 998–99 (10th Cir. 2011); *Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1237–39 (11th Cir. 2016)).

83. DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* 17–18 (2d ed. 2012) (noting that “no legal effect” follows from the distinction between circumstantial and direct evidence and that the “[Federal] Rules of Evidence draw no distinction Circumstantial evidence can support a verdict as effectively as direct evidence”).

84. Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 752–53, 761 (1995); see generally SPERINO, *supra* note 70, at 321–22 (collecting critiques).

85. Eyer, *supra* note 71, at 1017, n.5. See, e.g., *Walton*, 821 F.3d at 1210–12 (10th Cir. 2016); *Wells v. Colo. Dep’t of Transp.*, 325 F.3d 1205, 1221 (10th Cir. 2008). In *Wells*, Judge Hartz authored the majority opinion, dutifully applying *McDonnell Douglas*. *Wells*, 325 F.3d at 1209, 1212–20. But he could not hold back his hostility to the case, authoring a separate opinion which argues that *McDonnell Douglas* had outlived its usefulness:

I write separately to express my displeasure with the mode of analysis employed in the panel opinion (which I authored). The *McDonnell Douglas* framework only creates confusion and distracts courts from “the ultimate

nal *McDonnell Douglas* decision was designed to clarify and to simplify the plaintiff's task in presenting such a case. Over the years, unfortunately, both of those goals have gone by the wayside."⁸⁶ Importantly, then-Judge Gorsuch, while on the Tenth Circuit Court of Appeals, wrote,

McDonnell Douglas today serves only a narrow function. It does not create a pleading requirement or apply in post-trial JMOL motions practice. At trial the jury need not be instructed under its terms. Even at summary judgment we won't use it for cases presenting direct evidence of discrimination. Instead as things have evolved *McDonnell Douglas* has come to apply predominately at summary judgment and there only to cases relying on indirect proof of discrimination.⁸⁷

Judge Gorsuch further wrote that the use of *McDonnell Douglas* "'play[s] no role in assessing post-trial' motions and 'questioned whether *McDonnell Douglas* . . . continues to be helpful enough to justify the costs and burdens associated with its administration.'"⁸⁸ Judge Gorsuch reiterated his disdain for the *McDonnell Douglas* test two years later, criticizing it for possessing "limited value even in its native waters . . . because of the confusion and complexities its application can invite."⁸⁹ Judge Gorsuch also opined that, even if *McDonnell Douglas* had any relevance at all, it was only in cases where the plaintiff "alleges a 'single' unlawful

question of discrimination *vel non*." *McDonnell Douglas* has served its purpose and should be abandoned.

So how did the Supreme Court come to adopt the artificial formalism of the *McDonnell Douglas* framework? I am sure it was for the best of motives, and the framework likely conveyed some important points that educated the nation's courts. Now, however, these lessons are deeply ingrained in the judiciary, and the artificiality of the framework exacts a significant, unnecessary expense—in terms of both wasted judicial effort and greater opportunity for judicial error.

Id. at 1221 (Hartz, Circuit J., concurring) (citations omitted).

86. *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, Circuit J., concurring). Judge Wood's entire concurrence criticized the continued use of *McDonnell Douglas*. *See id.* ("I write separately to call attention to the snarls and knots that the current methodologies used in discrimination cases of all kinds have inflicted on courts and litigants alike Perhaps *McDonnell Douglas* was necessary nearly 40 years ago, when Title VII litigation was still relatively new in the federal courts. By now, however, as this case well illustrates, the various tests that we insist lawyers use have lost their utility. Courts manage tort litigation every day without the ins and outs of these methods of proof, and I see no reason why employment discrimination litigation (including cases alleging retaliation) could not be handled in the same straightforward way. In order to defeat summary judgment, the plaintiff one way or the other must present evidence showing that she is in a class protected by the statute, that she suffered the requisite adverse action (depending on her theory), and that a rational jury could conclude that the employer took that adverse action on account of her protected class, not for any non-invidious reason. Put differently, it seems to me that the time has come to collapse all these tests into one. We have already done so, when it comes to the trial stage of a case. It is time to finish the job and restore needed flexibility to the pre-trial stage." (citations omitted)).

87. *Barrett v. Salt Lake Cnty.*, 754 F.3d 864, 867 (10th Cir. 2014).

88. Alan Rupe & Jeremy Schrag, *Gorsuch Would Lay McDonnell Douglas Test to Rest*, LAW 360 (Jan. 31, 2017, 11:10 PM), https://lewisbrisbois.com/assets/uploads/files/Gorsuch_Would_Lay_McDonnell_Douglas_Test_To_Rest.pdf [<https://perma.cc/BQK3-JZK6>] (quoting *Barrett*, 754 F.3d. at 867).

89. *Walton*, 821 F.3d at 1210.

motive—and not ‘mixed motives.’”⁹⁰

In Part IV of this Article, I will argue that the Supreme Court, in light of *Bostock*, should judicially overturn the use of *McDonnell Douglas* by lower courts.⁹¹ The majority’s but-for analysis is all trial court judges need to evaluate evidence at pre-trial stages. The Court did not know, or at least could not have anticipated in 1973, that *McDonnell Douglas* would become a beast waging war *against* plaintiffs. While some federal judges bemoan its use, federal district court and appellate court judges feel constrained to use this byzantine paradigm in almost every case.⁹² The model of proof established by *McDonnell Douglas*, far from assisting plaintiffs, is now a hurdle nearly impossible to overcome. The Court should exert tremendous courage and erase *McDonnell Douglas*, recalibrating the balance in employment discrimination law. Justice Gorsuch has “set the table” in *Bostock* for doing so, and he should lead the way. As he approvingly wrote, “[M]ore than a few keen legal minds have questioned whether the *McDonnell Douglas* game is worth the candle even in the Title VII context”⁹³

B. *PRICE WATERHOUSE V. HOPKINS*

The Supreme Court did not fully address causation in Title VII until it decided *Price Waterhouse v. Hopkins* in 1989, a case involving mixed motives—one potentially discriminatory and the other not.⁹⁴ Instead of overruling *McDonnell Douglas* and clarifying causation, the Court created a model of proof that competes, albeit ineffectively, with the *McDonnell Douglas* paradigm.⁹⁵

First, the Court explicitly recognized that the facts at hand illustrated a case of “mixed-motives,” including both unlawful discrimination and a lawful motive.⁹⁶ At this point, the Court should have rejected the binary approach of *McDonnell Douglas* and started over. Unfortunately, the Court did not overrule *McDonnell Douglas*, but instead, a plurality created a separate model of proof that included a lower causation standard for plaintiffs: that of “motivating factor.”⁹⁷ The Court explicitly stated that Title VII did not require but-for causation.⁹⁸

90. *Id.* at 1211.

91. See discussion *infra* Part IV. The Court has stated that one “traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law . . . because of inherent confusion created by an unworkable decision.” *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1988). *McDonnell Douglas* is an unworkable case that has created confusion and inconsistency in the law of civil rights for almost fifty years.

92. SPERINO, *supra* note 70, at 2.

93. *Walton*, 821 F.3d at 1211; see also Rupe & Schrag, *supra* note 88.

94. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion).

95. See generally Charles Sullivan, *Making Too Much of Too Little?: Why “Motivating Factor” Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357 (2020).

96. *Price Waterhouse*, 490 U.S. at 234–35.

97. *Id.* at 250–52.

98. *Id.* at 240. Beginning in 2009, the Court has overruled this portion of *Price Waterhouse*, which explicitly rejected but-for causation in most individual disparate treat-

The facts of *Price Waterhouse*, said the Court, created the need for a two-part model of proof.⁹⁹ Plaintiff Ann Hopkins was denied partnership in an accounting firm, a decision which she argued occurred because of impermissible sex stereotyping.¹⁰⁰ The defendant–employer alleged the reason for the decision was because Hopkins was rude to the staff.¹⁰¹ A plurality of the Court held that, to recover damages, Hopkins needed only to prove that discrimination was a “motivating factor” of the denial.¹⁰² However, the employer could avoid paying damages altogether by proving at step two that it would have made the same decision anyway, despite the plaintiff’s success at step one.¹⁰³ Note that the Court explicitly recognized that more than one reason—one discriminatory and one innocent—could motivate an employer’s decision.¹⁰⁴

On its face, the term “motivating factor” meant that a factor’s causal quality was something less than but-for causation. The plurality of the Court concluded that the phrase “because of” could not possibly require a plaintiff to prove but-for causation given workplace decision-making realities.¹⁰⁵ But-for causation was too high a burden for plaintiffs.¹⁰⁶ In 1991, Congress codified the *Price Waterhouse* model of proof, allowing awards of attorneys’ fees and injunctive and declaratory relief, even if the defendant sustains its affirmative defense.¹⁰⁷

This case recognized that decision-making in employment is complex and often comprised of more than a single reason.¹⁰⁸ In essence, a motivating factor (discrimination) was not necessary to the result (failure to make partner), and the employer had the ability to prove that an innocent reason was a but-for cause of Hopkins’s failure to make a partner.¹⁰⁹

ment cases. See discussion *infra* Sections III.C–E for a full discussion of these cases. For a thoughtful critique of the Court’s causation rhetoric, see Mary Ellen Maatman, *Choosing Words and Creating Worlds: The Supreme Court’s Rhetoric and its Constitutive Effects on Employment Discrimination Law*, 60 U. PITT. L. REV. 1, 5–6, 14–25 (1998).

99. *Price Waterhouse*, 490 U.S. at 240–42.

100. *Id.* at 231–32.

101. *Id.* at 234–35.

102. *Id.* at 240–42.

103. *Id.*

104. *Id.* at 252. It took the Court another thirty-one years to recognize this reality. See *Bostock v. Clayton Cnty*, 140 S. Ct. 1731, 1734–35 (2020).

105. *Price Waterhouse*, 490 U.S. at 240–41.

106. *Id.* at 241–42.

107. Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-5(g)).

108. *Price Waterhouse*, 490 U.S. at 252.

109. *Id.* at 249. Unfortunately, Justice O’Connor’s concurrence stated that a “motivating factor” model of proof required “direct evidence.” *Id.* at 276 (O’Connor, J., concurring). Such a statement conflicts with the Federal Rules of Evidence, which do not distinguish between direct evidence and circumstantial evidence. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 97–100 (2003) (clarifying that in “motivating factor” cases, either direct evidence or circumstantial evidence will suffice). The dichotomy between the types of evidence persists, as lower courts hold that the *McDonnell Douglas* model of proof uses only circumstantial evidence. Because direct evidence is so rare in discrimination cases, it is not clear what model of proof would be used if a case indeed had direct evidence. One court stated that direct evidence is so rare that “outside the world of fiction, one does not ordinarily see that kind of evidence.” *Hester v. Ind. State Dep’t of Health*, 726 F.3d 942, 947 (7th

C. *GROSS v. FBL FINANCIAL SERVICES*

The Court remained silent on causation in employment discrimination cases for twenty years after *Price Waterhouse*. But over the last twelve years, the Court's causation jurisprudence in employment discrimination has exploded.

In 2009, Justice Thomas wrote for the majority in an age discrimination case, *Gross v. FBL Financial Services*, holding that the Age Discrimination in Employment Act's "because of" language meant but-for causation.¹¹⁰ Using no tools of statutory construction, Justice Thomas concluded that "because of" meant "but-for,"¹¹¹ citing, with no discussion, *Prosser and Keeton on the Law of Torts*.¹¹² The Court held that the motivating factor model of proof was unavailable to an age discrimination plaintiff, refusing to apply *Price Waterhouse*'s logic under Title VII to an age discrimination case.¹¹³ Inappositely, the Court held that the logic of *Price Waterhouse* itself did not apply to age claims because Congress expressly codified *only* Title VII's motivating factor model of proof.¹¹⁴

The Court in *Gross* could have used a lesser causation standard, such as contributing factor causation, that would have given greater effect to the laudatory civil rights goals of the law. That it did not do so suggests the Court intended to (and indeed did) raise the causation barrier for employees to a very high level. Subsequent cases have affirmed the use of this onerous but-for causation standard in discrimination claims.¹¹⁵

Cir. 2013); *accord* *Walsdorf v. Bd. of Comm'rs for the E. Jefferson Levee Dist.*, 857 F.2d 1047, 1049, 1052–53 (5th Cir. 1988) (discussing a rare case of direct evidence when a supervisor stated, "Ain't no bitch going to get this job").

110. *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 176 (2009) (holding that "because of" meant "by reason of: on account of" and therefore required but-for causation in disparate treatment claims brought under the Age Discrimination in Employment Act). The Court ruled that under the "plain language" of the ADEA, a plaintiff "must prove by a preponderance of the evidence (which may be direct or circumstantial) that age was the 'but-for' cause of the challenged employer decision." *Id.* at 177–78. The Court did not address multiple causation cases in *Gross*. At one point, the Court in *Gross* uses the words "the 'but-for' cause." *Id.* at 176. Grasping onto the word "the," some courts even post-*Bostock* hold that under the ADEA there can be only a single but-for cause. *See Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021). In *Pelcha*, the Sixth Circuit blatantly cast aside the clear language in *Bostock* interpreting identical "because of" language in Title VII and the ADEA. *Id.* The court in *Pelcha* interpreted the ADEA to require a binary choice, either age or something else caused the adverse action. *Id.*

111. *Gross*, 557 U.S. at 177.

112. *KEETON ET AL.*, *supra* note 3, at 265.

113. *Gross*, 557 U.S. at 174.

114. *Id.* In response to this portion of the *Gross* opinion, some members of Congress have sought to restore the motivating factor model of proof to age claims. *See* Protecting Older Workers Discrimination Act of 2021, H.R. 2062, 117th Cong. (2021). Even if passed, the Act would not override *Bostock* in any way and would simply restore the two-part motivating factor test to age claims and retaliation claims along with the severe limitations of damages provision currently found in Title VII. *Id.*; *see also* Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071. Congress can do better than the pending bill.

115. *See generally* *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013); *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

D. *UNIVERSITY OF TEXAS SOUTHWEST MEDICAL CENTER v. NASSAR*

Perhaps even more importantly, in 2013, the Court in *University of Texas Southwestern Medical Center v. Nassar*¹¹⁶ interpreted the phrase “because of” in a retaliation case under Title VII to require but-for causation.¹¹⁷ Retaliation claims are the most common of all claims in anti-discrimination law.¹¹⁸ One can see how an employer would get frustrated with an employee who engages in “protected activity” under retaliation clauses. No one likes to be called “racist,” “sexist,” or the like, even if it is true. This protected activity can result in an employer straining to find any wrongdoing on the part of an employee, which, in turn, may constitute retaliation against that employee.

Title VII retaliation charges with the EEOC have skyrocketed from 20.3% in 1997 to 41.5% in 2020.¹¹⁹ Retaliation charges asserted under all discrimination statutes have seen an even more profound increase from 22.6% to 55.8%.¹²⁰

In *Nassar*, the Court held that the motivating factor model of proof, contained within Title VII itself, was unavailable to plaintiffs claiming retaliation, as “because of” meant only but-for causation.¹²¹ The tortured 5–4 decision rested on a series of judicial backflips to ensure that retaliation plaintiffs could not use the lesser motivating factor standard.¹²² Reflecting its implicit desire to close the “floodgates” to meritorious claimants, the Court showed its hand when it partially justified its decision by noting that retaliation claims were “being made with ever-increasing frequency.”¹²³ According to this logic, the common occurrence of retaliation by employers—or at least the existence of claims asserting retaliation—justified placing a higher causation burden on plaintiffs.

116. *Nassar*, 570 U.S. at 338.

117. *Id.* at 351–52.

118. Jack Flynn, *31 Alarming Employment Discrimination Statistics [2022]: The State of Employment Discrimination in the U.S.*, ZIPPPIA (Apr. 5, 2022), <https://www.zippia.com/advice/employment-discrimination-statistics> [<https://perma.cc/2ZJ7-PSN3>].

119. *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021> [<https://perma.cc/S4J6-VJPY>].

120. *Id.*

121. *Nassar*, 570 U.S. at 352. The Court relied on *Gross* for its interpretation that “because of” mandated but-for causation. *See id.*

122. Joanna L. Grossman & Deborah L. Brake, *Revenge: The Supreme Court Narrows Protection Against Workplace Retaliation in University of Texas Southwestern Medical Center v. Nassar*, VERDICT (July 9, 2013), <https://verdict.justia.com/2013/07/09/revenge-the-supreme-court-narrows-protection-against-workplace-retaliation-in-university-of-texas-southwestern-medical-center-v-nassar> [<https://perma.cc/B6KD-6TN3>].

123. *Nassar*, 570 U.S. at 358 (“The proper interpretation and implementation of § 2000e-3(a) and its causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems. *This is of particular significance because claims of retaliation are being made with ever-increasing frequency. The number of these claims filed with the Equal Employment Opportunity Commission (EEOC) has nearly doubled in the past 15 years*—from just over 16,000 in 1997 to over 31,000 in 2012 Indeed, the number of retaliation claims filed with the EEOC has now outstripped those for every type of status-based discrimination except race.” (emphasis added)).

E. *COMCAST CORP. V. NATIONAL ASSOCIATION OF AFRICAN
AMERICAN-OWNED MEDIA*

In both *Gross* and *Nassar*, the Court purported to justify its ever-heightening model of proof on Title VII's statutory language, but it abandoned this approach entirely in the recent case of *Comcast Corp. v. National Association of African American-Owned Media*.¹²⁴ In *Comcast*, the Court held that § 1981, which prohibits intentional discrimination in employment,¹²⁵ requires the use of but-for causation, despite the total absence of statutory causation language.¹²⁶ The Court recognized this absence in construing the statutory guarantee that “[a]ll persons . . . have the same right . . . to make and enforce contracts . . . as is enjoyed by [W]hite citizens.”¹²⁷ The Court held that this language was “suggestive” of but-for causation and that it is “‘textbook tort law’ that a plaintiff seeking redress for a defendant’s legal wrong typically must prove but-for causation.”¹²⁸

But-for causation is thus cemented into the Court’s employment discrimination jurisprudence. As a result, *Bostock* should fully apply to age, retaliation, and § 1981 claims, allowing discrimination (or retaliation) to be a but-for cause of the adverse action,¹²⁹ while other innocent but-for causes may exist or even predominate.¹³⁰ *Bostock* extended the use of but-for causation, but perhaps this time with unintended consequences; the Court’s logic could easily be applied to age, retaliation, and § 1981 claims where, as with Title VII cases, discriminatory and innocent reasons often combine to motivate an employer’s adverse action.

124. *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020).
125. 42 U.S.C. § 1981 (2018).

126. *Comcast*, 140 S. Ct. at 1015 (“The guarantee that each person is entitled to the ‘same right . . . as is enjoyed by [W]hite citizens’ directs our attention to the counterfactual—what would have happened if the plaintiff had been [W]hite? This focus fits naturally with the ordinary rule that a plaintiff must prove but-for causation. If the defendant would have responded the same way to the plaintiff even if he had been white, an ordinary speaker of English would say that the plaintiff received the ‘same’ legally protected right as a [W]hite person. Conversely, if the defendant would have responded differently but for the plaintiff’s race, it follows that the plaintiff has not received the same right as a white person.” (alterations in original)).

127. *Id.* (quoting 42 U.S.C. § 1981).

128. *Id.* at 1014 (citing *Nassar*, 570 U.S. at 347).

129. In retaliation claims, the adverse action is defined by the Court as a “material adversity” that would have “dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 54 (2006) (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

130. The *Nassar* decision expounded on the use of tort law in construing causation: “[T]his standard requires the plaintiff to show ‘that the harm would not have occurred’ in the absence of—that is, but for—the defendant’s conduct This, then, is the background against which Congress legislated in enacting Title VII, and these are the default rules it is presumed to have incorporated” *Nassar*, 570 U.S. at 346–47. The Court will likely be called upon to clarify that its logic fully applies to age and § 1981 claims, as employers will argue those statutes demand that plaintiffs prove discrimination was the but-for cause. *See, e.g., Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) (“[T]he rule in *Bostock* extends no further than Title VII and does not stretch to the ADEA.”). *Pelcha*’s logic is nonsense, as but-for causation should be interpreted across discrimination statutes, including the ADEA, § 1981, and retaliation claims.

IV. *BOSTOCK V. CLAYTON COUNTY*: BUT-FOR AND THEN SOME

A. BUT-FOR AND COUNTERFACTUAL CAUSATION

In June 2020, *Bostock v. Clayton County* received national attention for the Court's holding, "An employer who fires an individual merely for being gay or transgender violates Title VII,"¹³¹ and its prohibition on sex discrimination.¹³² Writing for the 6–3 majority, Justice Neil Gorsuch also wrote extensively on causation under Title VII, seeking to guide litigants and judges. He appeared to set the stage for the possible demise of *McDonnell Douglas* and lower courts' misuse of the nonsensical paradigm.¹³³ Just as importantly, *Bostock* explicitly creates a new "mixed-motive" framework that will apply in most individual employment discrimination cases.

In *Bostock*, like cases preceding it, the Court held that "because of" means but-for causation.¹³⁴ But in *Bostock*, the Court went further than it had in previous decisions.¹³⁵ First, the Court stated that but-for causation is established "whenever a particular outcome would not have happened 'but-for' the purported cause. In other words, a but-for test directs us to

131. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

132. See Ariane de Vogue & Devan Cole, *Supreme Court Says Federal Law Protects LGBTQ Workers from Discrimination*, CNN (June 15, 2020, 12:22 PM), <https://www.cnn.com/2020/06/15/politics/supreme-court-lgbtq-employment-case/index.html> [<https://perma.cc/YH56-GP5K>]; Tim Fitzsimons, *Supreme Court Sent 'Clear Message' with LGBTQ Ruling, Plaintiff Gerald Bostock Says*, NBC NEWS (June 16, 2020, 7:35 PM), <https://www.nbcnews.com/feature/nbc-out/supreme-court-sent-clear-message-lgbtq-ruling-plaintiff-gerald-bostock-n1231190> [<https://perma.cc/Y2WD-P94X>]; see also *Bostock*, 140 S. Ct. at 1747–48; 42 U.S.C. § 2000e-2(a)(1) (2018).

133. Again, Justice Gorsuch himself disdained the use of *McDonnell Douglas*. See *supra* notes 88–90 and accompanying text.

134. See *Bostock*, 140 S. Ct. at 1739. Scholarly critiques of Justice Gorsuch's approach to causation exist. One such critique argued:

[Justice Gorsuch] simply assumed that decades of case law accurately interpreted Title VII. Indeed, he treated decades of precedent as *part* of the "law's ordinary meaning" in 1964. Moreover, Justice Gorsuch failed to recognize the relationship between two essential phrases in Title VII: "discriminate against" and "because of." These terms cannot be considered in splendid isolation. When combined, they reference discrimination based on *bias* or *prejudice*. In short, Justice Gorsuch built an elaborate textualist framework on a shaky foundation. Regrettably, this *halfway textualism* led Justice Gorsuch astray.

Josh Blackman & Randy Barnett, *Justice Gorsuch's Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT'L REV. (June 26, 2020, 6:30 AM), <https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints> [<https://perma.cc/29BA-FXAG>]. I agree with these authors' conclusion that Gorsuch simply assumed, based on ill-reasoned precedent, that but-for causation correctly interpreted the statutory language prohibiting discrimination. Nevertheless, but-for causation is firmly cemented in the Court's logic, and at this point, appears intractable.

135. Compare *Bostock*, 140 S. Ct. at 1739, with *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009) ("[U]nder [29 U.S.C.] § 623(a)(1), the plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action."), and *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020) ("[P]laintiff bears the burden of showing that race was a but-for cause of its injury [under 42 U.S.C. § 1981].").

change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.”¹³⁶ Second, and most importantly, the Court recognized:

This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff’s sex was one but-for cause of that decision, that is enough to trigger the law.¹³⁷

In doing so, Justice Gorsuch broke from the monolith of defining but-for as the sole cause in employment discrimination; he returned but-for causation to its traditional tort law meaning as one among many causes. Justice Gorsuch used prior case law to create a precedential foundation for the new mixed-motive analysis.¹³⁸

The Court in *Bostock* cited three of its prior cases that supported the majority’s ruling: *Phillips v. Martin Marietta Corp.*,¹³⁹ *Los Angeles Department of Water and Power v. Manhart*,¹⁴⁰ and *Oncale v. Sundowner Offshore Services, Inc.*¹⁴¹ Utilizing these cases as a platform, the Court

136. *Bostock*, 140 S. Ct. at 1739 (citation omitted).

137. *Id.* (citations omitted). Justice Gorsuch acknowledged in his majority opinion that Congress could have used the word “solely” to indicate that multiple causation cases do not violate the law, or the words “primarily because of” to indicate that the prohibited factor had to be the main cause of the adverse action, but the omission meant that “none of this is the law we have.” *Id.* Thus, Justice Gorsuch found these omissions persuasive evidence that Congress intended but-for causation to apply. *Id.* at 1739–40. Similarly, he recognized the codified motivating factor test, but declined to focus on it. *See id.* Instead, writing for the Court, he suggested that Congress has moved away from that “more forgiving” motivating factor test, and “focus[ed] on the more traditional but-for causation standard that continues to afford a viable, if no longer exclusive, path to relief under Title VII.” *Id.* at 1740.

138. *See id.* at 1740–45.

139. 400 U.S. 542 (1971) (per curiam) (holding that discrimination against women with young children violates Title VII’s “because of” of language, defeating the employer’s argument that it ultimately favored hiring women over men). Title VII focuses on the individual, and the employer’s argument that it employed men with young children was no defense to the intentional discrimination against women with young children. *Id.* at 546–48 (Marshall, J., concurring); *see also Bostock*, 140 S. Ct. at 1740–41, 1743; 42 U.S.C. § 2000e-2 (2018).

140. 435 U.S. 708–18 (1978) (holding that requiring women to make larger pension fund contributions than men constituted discrimination because of sex, even though women as a class lived longer than men). The Court noted that any individual woman might make the larger pension contributions and still die as early as a man. *Id.* at 708–09. The employer could not pass the simple test that asked whether an individual female employee would have been treated the same regardless of her sex. *See id.* at 711.

141. 523 U.S. 75 (1998); *Bostock*, 140 S. Ct. at 1743 (“In *Oncale*, a male plaintiff alleged that he was singled out by his male co-workers for sexual harassment. The Court held it was immaterial that members of the same sex as the victim committed the discrimination. . . . Because the plaintiff alleged that the harassment would not have taken place but for his sex—that is, the plaintiff would not have suffered similar treatment if he were female—a triable Title VII claim existed.” (citation omitted)).

doubled down on multiple sufficient causation in holding,

[T]he plaintiff's sex *need not be the sole or primary cause of the employer's adverse action*. In *Phillips, Manhart, and Oncale*, the defendant easily could have pointed to some other, nonprotected trait and insisted it was the more important factor in the adverse employment outcome. So, too, it has no significance here if another factor—such as the sex the plaintiff is attracted to or presents as—might also be at work, or even play a more important role in the employer's decision.¹⁴²

Justice Gorsuch concluded for the majority opinion by stating,

In *Phillips*, for example, a woman who was not hired under the employer's policy might have told her friends that her application was rejected because she was a mother, or because she had young children. Given that many women could be hired under the policy, it's unlikely she would say she was not hired because she was a woman. But the Court did not hesitate to recognize that the employer in *Phillips* discriminated against the plaintiff because of her sex. *Sex wasn't the only factor, or maybe even the main factor, but it was one but-for cause—and that was enough*. You can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law.¹⁴³

B. THE PURPOSEFUL DEMISE OF “THE” BUT-FOR CAUSE, REPLACED BY “A” BUT-FOR CAUSE

What is new about Gorsuch's explanation of but-for causation in *Bostock*? First, several preceding cases stated that discrimination must be “the” but-for causation of the adverse action.¹⁴⁴ But in *Bostock*, the Court used “a” rather than “the” but-for cause, signaling that discrimination can be one cause among several.¹⁴⁵ The majority's use of “a” versus “the” seems intentional.

An in-depth analysis of the use of “a” versus “the” is in order. Both “a”

142. *Bostock*, 140 S. Ct. at 1744 (emphasis added).

143. *Id.* at 1745 (emphasis added). Justice Alito's dissent was almost exclusively confined to arguing against the textual approach to the statute utilized by the majority to reach its holding that sexual orientation and transgender status are protected under “sex” discrimination in Title VII. *See id.* at 1755–56, 1776 (Alito, J., dissenting). Justice Alito briefly mentions causation, but curiously focuses only “motivating factor” causation: “[A]n employer cannot escape liability by showing that discrimination on a prohibited ground was not its sole motivation. So long as a prohibited ground was a motivating factor, the existence of other motivating factors does not defeat liability.” *Id.* at 1775. He concludes that the Court's extensive discussion of causation was only “so much smoke.” *Id.*

144. *See, e.g.,* *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009). *See also* discussion *supra* Section III.C.

145. *See Bostock*, 140 S. Ct. at 1741 (“[T]he employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge.” (emphasis added)); D'Andra Millsap Shu, *The Coming Causation Revolution in Employment Discrimination Litigation*, 43 CARDOZO L. REV. 1807, 1835 (2022) (“*Bostock*'s language is striking The most immediate difference is the article—liability attaches if discrimination based on the protected status is ‘a’ but-for cause, not ‘the’ but-for cause.” (citation omitted)).

and “the” are articles.¹⁴⁶ Articles identify nouns and clarify whether nouns are “specific or general, singular or plural.”¹⁴⁷ As relevant here, the indefinite article “a” identifies indefinite and unspecific nouns—one of many—while “the” refers to definite and specific nouns.¹⁴⁸ For example, “a cat” does not refer to one specific cat, but “the cat” does.¹⁴⁹

The majority’s intentional use of “a” versus “the” emphasizes that discrimination need not be the only cause of the adverse action.¹⁵⁰ Second, the Court emphasized that many decisions will involve more than one reason, some legal, some not.¹⁵¹ Lastly, and critically, the Court emphasized that actionable discrimination “need not be the sole or primary cause of the adverse action.”¹⁵² These statements illustrate that actionable discrimination exists *even though* another lawful reason was the predominant reason for the adverse action. This logic is revelatory and leads to what is known as “overdetermined causality” or “multiple sufficient causes” for the adverse action.¹⁵³

146. Bracken Business Communications Clinic, *Definite and Indefinite Articles*, MONT. STATE U., <https://www.montana.edu/business/bracken/bbcc/documents/article-handout.pdf> [<https://perma.cc/Y4VH-PX8Q>].

147. *Id.*

148. *Id.*

149. *Id.*

150. *See Bostock*, 140 S. Ct. at 1741; Jennifer A. Knackert, *Necessary Coverage for Authentic Identity: How Bostock Made Title VII the Strongest Protection Against Employer-Sponsored Health Insurance Denial of Gender-Affirming Medical Care*, 105 MARQ. L. REV. 179, 190 (2021) (“[T]he employee’s sex need not be the only cause [of termination], but a cause of the termination for the employer’s actions to be a violation of Title VII.”). Lower courts have just begun to recognize *Bostock*’s impact. *See, e.g.*, *Smith v. Nautic Star, LLC*, No. 1:20-CV-242-DMB-DAS, 2021 U.S. Dist. LEXIS 98669, at *5–11 (N.D. Miss. May 25, 2021) (relying on *Bostock* in a § 1981 claim to deny the employer’s motion to dismiss where plaintiff pled both legitimate and discriminatory reasons in his pleading). The *Smith* court’s logic is absolutely correct. If followed, *Bostock* should apply to any “because of” or similar language in employment discrimination statutes. In other words, “because of” means “but-for,” which means the possibility of multiple but-for causes. A plaintiff need not plead nor prove sole causation to prevail. Discrimination need only be a but-for cause. This logic should apply to the full spectrum of employment discrimination statutes.

151. *See Bostock*, 140 S. Ct. at 1739.

152. *Id.* at 1744. *Bostock* should impact any federal statutory language that uses the causation standard “because of” or similar causation language. Such language should now permit the existence of multiple but-for causes. *See, e.g.*, *U.S. ex rel. Barrick v. Parker-Migliorini Int’l, LLC*, No. 2:12-cv-00381-JNP-CMR, 2021 U.S. Dist. LEXIS 123820, at *8 (D. Utah June 20, 2021) (“[B]ut-for’ does not mean ‘sole cause,’ and an event can have multiple but-for causes. The Supreme Court’s car accident example in *Bostock* is particularly illuminating of the latter point. The court will instruct the jury on the causation standard of [a False Claims Act] retaliation claim accordingly.”). If *Barrick*’s sound logic takes hold, the effect of *Bostock* on dozens (if not more) of federal statutes will be profound. “Because of” will allow the plaintiff to prevail when multiple causes occur, some lawful, others not. The full effect of *Bostock* on a multitude of federal claims merits an essay or even another law review article.

153. *See* Samuel Ferey & Pierre Dehez, *Overdetermined Causation Cases, Contribution and the Shapley Value*, 91 CHI.-KENT L. REV. 637, 641–42 (2016). This Article is not focused on explaining the intricacies of the philosophy or metaphysics of causation. Battles on causation have been fought through the literature’s history. However, it is important to understand that the subject is not settled despite the legal community’s attempt to affix these causal theories into law. *See id.*

C. FOUR CAUSATION MODELS, INCLUDING MULTIPLE SUFFICIENT CAUSES

Bostock's explicit language sets up four possibilities in the quest to determine why an adverse action occurred.¹⁵⁴ Returning to the example above: Why did Employer Jones Manufacturing fire Employee Smith, a Black employee who recently violated company procedures? The answer is the holy grail in individual discrimination cases. However difficult the inquiry, post-*Bostock*, it can be reduced to four causation alternatives. The following is a taxonomy of those alternatives:

1) *A non-discriminatory reason*: violating company procedures. But-for his excessive absences, Smith would not have been fired. Employer Jones prevails.

2) *A discriminatory reason*: Smith is a Black man, and the decisionmaker acted on his belief that only White employees should be managers. But-for racism, the employee would not have been fired. Employee Smith prevails.

The above options illustrate a binary choice: there was either a non-discriminatory reason for the termination or there was a discriminatory reason for it. Because the choice is binary, either (1) or (2) was the reason, but not both.

3) *Causal, but not but-for factors*: One of the reasons for termination may in fact *not* be a but-for cause, but simply a causal factor that contributed to the decision.¹⁵⁵ Here, if Employee Smith can prove but-for causation, he prevails. If Smith can prove only that discrimination was a motivating factor, he is limited to the modest relief provided for by the codified mixed-motives model of proof. Either the plaintiff's or the defendant's reasons could be less than but-for reasons.

4) *Multiple Sufficient Cause Cases*, as set forth in *Bostock*: Commonly, some combination of (1) and (2) and possibly even other innocent but-for reasons for the termination. For simplicity, this Article will refer to option (4) as "multiple sufficient cause" (MSC) cases. The reasons, one lawful and one not, coexist as but-for reasons. Each alone would have resulted in the firing, regardless of the existence of the other. The employee will prevail under the Court's decision in *Bostock*.

154. I have taught Employment Discrimination Law since 1990. On the first day of class, I write the question "Why?" on the board to guide the class through the entirety of the course. "Why" an adverse action occurred weaves its way into case law throughout the semester.

155. Under *Price Waterhouse*, the plaintiff can prove that discrimination was a motivating factor, less than but-for, thus shifting the causation burden to the employer to prove it would have made the decision anyway, even in the absence of the illegitimate factor. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249 (1989) (plurality opinion). The Civil Rights Act of 1991 codified a modified *Price Waterhouse* analysis for Title VII cases, allowing the plaintiff to recover attorneys' fees and declaratory and injunctive relief, even if the employer proves an innocent reason was the but-for cause of the adverse action. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; *Comcast Corp. v. Nat'l Ass'n Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1017 (2020); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1095 n.4 (3d Cir. 1995). See also discussion *infra* Section VI.D.2.

This Article focuses on the common occurrence of example (4) that was explained with precision in *Bostock*. Its introduction into the Court's jurisprudence—an explicit recognition of how decision-making often works—is the essential component of the causation coup in that case.

V. INSTRUCTIONS FROM TORT LAW: BUT-FOR CAUSATION AND MULTIPLE SUFFICIENT CAUSES

The Court has made it clear that the “‘because of’ test incorporates the simple and traditional standard of but-for causation.”¹⁵⁶ The Court has also made it clear that it has borrowed but-for causation from tort law.¹⁵⁷ The but-for inquiry addresses a hypothetical situation: what would have happened in the absence of the defendant's wrongful conduct? The but-for test asks whether an identified causal candidate (discrimination) was necessary for an identified outcome.

While Congress could lower this causation standard,¹⁵⁸ it has been thirty years since Congress did so with the motivating factor model of proof.¹⁵⁹ When Congress did modify the model, it simply provided a few limited remedies for successful plaintiffs under the mixed-motive model of proof.¹⁶⁰ From a plaintiff's perspective, the full panoply of remedies under Title VII is much more desirable than the limited remedies under the codified mixed motive model of proof.¹⁶¹ Hence, most (if not almost

156. *Bostock*, 140 S. Ct. at 1739 (internal quotations omitted).

157. *See, e.g.*, *Univ. Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013).

158. It is hard to imagine practically how a lowered causation standard would solve the issues currently facing employment discrimination law. Sullivan, *supra* note 95, at 365 n.40 (noting that the relative success of plaintiffs pre- and post-motivating factor remained the same). One might think to the causal standard of “contributing” factors, drawing from the tort law causation paradigm. However, even if one were to ascribe percentages to each causal factor's “contribution” to an employer's decision, the test ultimately sounds like but-for causation. For instance, take Factors A and B. Factor B is a discriminatory reason; Factor A is an innocent reason. Factor A may hold 95% of the “causal force” and Factor B may be motivating the decision-maker by only 5%. Yet, if the Employee would not have made the decision without the last little causal motivation, Factor B, then that discriminatory reason would be a “motivating factor” or would have “contributed to the decision” and would still qualify as a but-for cause. Absent Factor B, the decision would not have occurred. Even at 5%, Factor B was the straw that broke the camel's back, so to speak.

159. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

160. *See* Andrew Verstein, *The Failure of Mixed-Motive Jurisprudence*, 86 U. CHI. L. REV. 725, 791 (2019). Congress can and should amend Title VII, § 1981, the ADEA, and the ADA to ensure that a lesser-causation standard will allow plaintiff employees to recover. *See generally id.* (providing complete treatment of this issue); Sullivan, *supra* note 95, at 366 (attempting to explain the failure of the motivating factor paradigm). Importantly, Sullivan notes that “plaintiffs’ attorneys have shied away from robustly framing their claims in terms of motivating factor liability because that litigation structure subjects their clients to an employer's remedy-limiting affirmative defense of ‘same decision anyway.’” Sullivan, *supra* note 95, at 358–59.

161. *Compare* 42 U.S.C. § 2000e-5 (2018), *with* 42 U.S.C. § 1981a (2018). But even these remedies are woefully inadequate. Compensatory and punitive damages are capped under Title VII and the ADA depending on the size of the employer. *See* 42 U.S.C. § 1981a(b)(3) (2018). Congress added these damages in 1991. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981a(b)(3)). These damages are insufficient to deter employers from discrimination, and their small size often leads to nuisance-value settlements. Inflation alone has cut the value

all) individual plaintiffs utilize but-for causation.

A. BUT-FOR CAUSATION IN TORT LAW

Given that *Bostock* borrowed but-for causation from tort law, it is appropriate to analyze causation in tort law. Specifically, but-for causation comes from negligence law, which provides a starting vehicle to examine causation.¹⁶²

A leading textbook emphasizes the difficulty with this question: “At its core this inquiry is speculative; it asks about a state of affairs that never existed in the world. Because the but-for test calls for inquiry into a hypothetical state of affairs, often there will be room for significant doubt”¹⁶³ The Third Restatement of Torts notes that “but-for causation” is known as a “counterfactual” inquiry for factual cause.¹⁶⁴ The re-

of these damages in half. See Michael Selmi, *Bending Towards Justice: An Essay in Honor of Charles Sullivan*, 50 SETON HALL L. REV. 1465, 1493 (2020). Without question, Congress should increase these damage amounts, not just to account for inflation, but again, to adequately deter discrimination. See discussion *infra* Section VI.D.2 for a discussion of Title VII damages. Illustratively, a Wisconsin jury awarded more than \$125 million to a longtime Walmart employee with Down Syndrome who was fired in a failure to reasonably accommodate him under the ADA. Cara Salvatore, *Walmart Owes \$125M For Firing Disabled Employee, Jury Says*, LAW 360 (July 16, 2021, 4:09 PM), <https://www.law360.com/articles/1403828/walmart-owes-125m-for-firing-disabled-employee-jury-says> [https://perma.cc/K48H-2NN5]. However, those damages were reduced to \$300,000, the maximum amount of compensatory and punitive damages allowed under the ADA and Title VII, and Walmart plans to appeal. *Id.*

162. A negligence cause of action has five elements: (1) existence of a duty, usually of reasonable care; (2) breach of that duty (negligence); (3) cause in fact; (4) proximate cause (scope of liability); and (5) damages. KEETON ET AL., *supra* note 3, § 30, at 164–65. The most widely accepted test for cause in fact is the but-for test, which “may be stated as follows: The defendant’s conduct is a cause of the event if the event would not have occurred but for that conduct.” DAVID. W. ROBERTSON, WILLIAM POWERS, JR., DAVID A. ANDERSON & OLIN GUY WELLBORN, III, CASES AND MATERIALS ON TORTS, 114–115 (4th ed. 2011) (quoting *Rudeck v. Wright*, 709 P.2d 621, 628 (Mont. 1985)). Section 26(h) of the Third Restatement of Torts does not limit “tortious conduct” to negligence claims. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26(h) (AM. LAW INST. 2010). Importantly, it includes intentional torts, more akin to intentional discrimination under Title VII:

“Tortious conduct” as used in this Restatement refers to the act, omission, or activity of an actor that satisfies the conduct requirement for a prima facie action in tort for physical or emotional harm based on intent, negligence, or strict liability. It does not include all of the prima facie elements, only the conduct element. Thus, tortious conduct includes entire acts, such as leaving an obstruction on an unlit sidewalk; marginal conduct, such as driving at a speed in excess of a reasonable one; or omissions with regard to existing risks, such as ignoring a slippery condition in the public area of a retail business. Identifying the conduct is crucial, however, for any causal inquiry. This usage of “tortious conduct” is consistent with the usage in Restatement Third, Torts: Apportionment of Liability.

Id.

163. ROBERTSON ET AL., *supra* note 162, at 115. “There is a great vagueness in counterfactual judgments. The vagueness lies in specifying the possible world in which we are to test the counterfactual.” Michael Moore, *Causation in the Law*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2019), <https://plato.stanford.edu/entries/causation-law> [https://perma.cc/8Y2E-HS5C].

164. RESTATEMENT (THIRD) OF TORTS, *supra* note 162, § 26 cmt. e. While Restatements are not law, they are the studied work of judges, professors, and practitioners at the

quirement that the actor's tortious conduct be *necessary* for the harm to occur requires a counterfactual inquiry. One must ask what would have occurred if the actor had not engaged in the tortious conduct.¹⁶⁵

And yet, this inquiry must be made in individual discrimination cases, an inquiry that requires a nearly impossible task of the factfinder.¹⁶⁶ At the front line, of course, this inquiry occurs first at the motion to dismiss stage and then more commonly at the summary judgment stage. As noted above, few cases in this area ever reach juries.

The Third Restatement of Torts elucidates but-for causation. Section 26 is entitled "Factual Cause" and states: "Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under § 27."¹⁶⁷ Subsection (b) notes that but-for is the standard for factual cause:

The standard for factual causation in this Section is familiarly referred to as the "but-for" test, as well as a *sine qua non* test. Both

American Law Institute (ALI). The ALI was first founded in 1923 in response to perceived uncertainty and complexity in American law. *The Story of ALI*, AM. L. INST., <https://www.ali.org/about-ali/story-line> [<https://perma.cc/93QM-TF6R>]. The First Restatement of Torts was published in 1934. *Id.* The work of the ALI Restatements of Law have traditionally exerted significant influence over court decisions and the development of common law. *See, e.g.*, *Ranger Conveying & Supply Co. v. Davis*, 254 S.W.3d 471, 480 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (noting that prior cases have relied on the Third Restatement of Torts). As seen in *Bostock*, this influence extends to the interpretation of federal law as well.

165. KEETON ET AL., *supra* note 3, § 41, at 264–65 ("This question of 'fact' ordinarily is one upon which all the learning, literature and lore of the law are largely lost. It is a matter upon which lay opinion is quite as competent as that of the most experienced court."). For a discussion of the use of counterfactual reasoning generally in law, see Robert N. Strassfeld, *If . . . : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339 (1992).

166. *See Moore, supra* note 163 ("Counterfactuals by their nature are difficult to prove with any degree of certainty, for they require the fact finder to speculate what would have happened if the defendant had not done what she in actual fact did. Suppose a defendant culpably destroys a life preserver on a seagoing tug. When a crewman falls overboard and drowns, was a necessary condition of his death the act of the defendant in destroying the life preserver? If the life preserver had been there, would anyone have thought to use it? thrown it in time? thrown it far enough? gotten it near enough to the victim that he would have reached it? We often lack the kind of precise information that could verify whether the culpable act of the defendant made any difference in this way." (citations omitted)). *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 162, § 26 cmt. e. ("This Section's definition of factual cause, 'would not have occurred absent the [tortious] conduct,' invokes a hypothetical inquiry. Perhaps because the but-for inquiry is so obvious in certain cases involving entire acts, . . . a conclusion on causation may be reached without the mental reasoning of explicitly considering a hypothetically different world and what would have happened there.") (citing ARNO C. BECHT & FRANK W. MILLER, *THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES* § 1, at 21 (1961)). It is always necessary, even if only implicitly, to walk through hypothetical counterfactuals in determining causation. *See generally* HART & HONORÉ, *supra* note 3, at lxi; Glanville Williams, *Causation in the Law*, 1961 CAMBRIDGE L.J. 62, 70 n.22 ("In one sense, hypothesis and speculation are essential for determining causal connection, since every statement of causal connection asserts what would have happened if the facts had been different."). Even Becht and Miller recognize the possibility that a counterfactual inquiry is essential for all causal inquiries. BECHT & MILLER, *supra*, at 66. *See also* RESTATEMENT (THIRD) OF TORTS, *supra* note 162, § 5 (Factual Cause).

167. RESTATEMENT (THIRD) OF TORTS, *supra* note 162, § 26.

express the same concept: an act is a factual cause of an outcome if, in the absence of the act, the outcome would not have occurred. With recognition that there are multiple factual causes of an event, . . . a factual cause can also be described as a necessary condition for the outcome.¹⁶⁸

The simplest visualization of but-for causation is that if *X* (discrimination) had not occurred, *Y* (the adverse action) would not have occurred. However, this means that *X* must have been necessary for the outcome *Y* but does not require that *X* be sufficient solely by itself. There are always multiple causes of any event, and *X* need not be the only cause; so long as *X* causes *Y*, it is sufficient.¹⁶⁹

From this example, we convert a tortious act to a discriminatory act and ask whether the same result—the adverse action—would have occurred absent that discriminatory act. If the adverse action would not have occurred, the employer is liable. This hypothetical construct is difficult for even the most seasoned judge to understand and apply. Just as in tort cases, the but-for inquiry inquires into a state of being, a reality, that did not exist at the time the employer took an adverse action. Just as in tort cases, the plaintiff bears the burden of showing by a preponderance of the evidence that the employer's discrimination was a factual but-for cause of the adverse action.¹⁷⁰

168. *Id.* cmt. b. The Restatement Second utilized “substantial factor,” which the Restatement Third rejected by explicitly reinstating but-for causation in MSC cases. *Id.* One scholar called the now-defunct “substantial factor” test “unfortunate and obfuscating.” Michael D. Green, *The Intersection of Factual Causation and Damages*, 55 DEPAUL L. REV. 671, 687 (2006); see also John Morris, *Dirty Harriett: The Restatement (Third) of Torts and the Causal Relevance of Intent*, 92 TEX. L. REV. 1685, 1688 (2014); Burrage v. United States, 571 U.S. 204, 217 (2014) (The substantial-factor test “‘cannot be reconciled with sound policy,’ given the need for clarity and certainty in the criminal law.”); Rutherford v. Owens-Illinois, Inc., 941 P.2d 1203, 1214 (Cal. 1997) (“The term ‘substantial factor’ has not been judicially defined with specificity, and indeed it has been observed that it is ‘neither possible nor desirable to reduce it to any lower terms.’” (quoting KEETON ET AL., *supra* note 3, § 41, at 267)); Ford Motor Co. v. Boomer, 736 S.E.2d 724, 730 (Va. 2013) (“In sum, some jurors might construe the term to lower the threshold of proof required for causation while others might interpret it to mean the opposite. We do not believe that substantial contributing factor has a single, common-sense meaning . . .”).

169. The Reporter's Comment (c) to the Third Restatement notes:

[A] party's tortious conduct need only be a cause of the plaintiff's harm and not the sole cause is well recognized and accepted in every jurisdiction.

. . .

This understanding of causation and the causal-set model is derived from Mill's explanation of causation: “The cause, then, philosophically speaking, is the sum total of the conditions positive and negative taken together; the whole of the conditions of every description, which being realized, the consequence invariably follows.”

RESTATEMENT (THIRD) OF TORTS, *supra* note 162, § 26, reporters note to cmt. e (quoting 3 JOHN STUART MILL, A SYSTEM OF LOGIC, RATIOCINATIVE AND INDUCTIVE, ch. V, § 3 (1843), reprinted in 7 THE COLLECTED WORKS OF J.S. MILL 323, 332 (John M. Robson ed., 1974)).

170. See, e.g., Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177 (2009). The question of “why” an adverse action occurred is entirely fact dependent. Federal district court judges cling to *McDonnell Douglas* like a lifeboat; can they be persuaded to untether themselves and deal with counterfactual causation? The Supreme Court should instruct that they do

B. MULTIPLE SUFFICIENT CAUSES: THE RESTATEMENT, THIRD, OF TORTS

The existence of multiple tortfeasors in a tort case is analogous to multiple sufficient *causes* in discrimination cases, albeit the causes emanate from only two actors: the employer and the employee. In the latter, both innocent and discriminatory causes may both be but-for causes of the harm, i.e., the adverse action. Because of the importance of multiple sufficient causes in *Bostock*, the doctrinal genesis of multiple sufficient causes in tort law will be examined.¹⁷¹

In the Restatement, § 27 unambiguously provides that multiple sufficient causes—that is multiple but-for causes—do exist.¹⁷² However, in tort law, the reporter’s note to § 27 indicates that MSC cases should be “rare.”¹⁷³ The Court’s language in *Bostock* would likely make MSC cases *common* in individual discrimination cases. Still, tort law can be instructive.

Expressed another way, scholars have expressed two but-for causes as “Co-Equal Sufficient Causes”:

These are cases in which each of a pair of two events, *c1* and *c2*, is independently sufficient for some third event *e*. Logically, the sufficiency of *c1* and of *c2* entails that neither *c1* nor *c2* is individually necessary for *e*, and thus, on the counterfactual analysis of causation, neither of them can be the cause of *e*. The law uniformly rejects this conclusion.¹⁷⁴

The Third Restatement of Torts includes an entire section on multiple sufficient causes: § 27. The Restatement plainly states, “If multiple acts occur, each of which under § 26 alone have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm.”¹⁷⁵ The Restatement gives this illustration, often known to torts students as the “two-fire” case:

Rosaria and Vincenzo were independently camping in a heavily forested campground. Each one had a campfire, and each negligently

so, just as in every other civil case that has but-for causation. It is a difficult, but not impossible, inquiry. This inquiry is at the heart of intentional discrimination claims.

171. The Third Restatement is far from a model of clarity when it discusses causation as it relates to multiple tortfeasors. *Cf.* RESTATEMENT (THIRD) OF TORTS § 27 cmts. c–i. The drafters, with little success, attempt to distinguish multiple causes (and multiple sufficient causal sets) from multiple sufficient causes.

172. *Id.* cmt. c.

173. *Id.* cmt. b.

174. Moore, *supra* note 163; accord RESTATEMENT (THIRD) OF TORTS, *supra* note 162, § 27 cmt. a, illus. 1; Hillel J. Bavli, *Counterfactual Causation*, 51 ARIZ. STATE L.J. 879, 885 n.18 (2019).

175. RESTATEMENT (THIRD) OF TORTS, *supra* note 162, § 27 cmt. c (“Perhaps most significant is the recognition that, while the but-for standard provided in § 26 is a helpful method for identifying causes, it is not the exclusive means for determining a factual cause. Multiple sufficient causes are also factual causes because we recognize them as such in our common understanding of causation, even if the but-for standard does not. Thus, the standard for causation in this Section comports with deep-seated intuitions about causation and fairness in attributing responsibility.”).

failed to ensure that the fire was extinguished upon retiring for the night. Due to unusually dry forest conditions and a stiff wind, both campfires escaped their sites and began a forest fire. The two fires, burning out of control, joined together and engulfed Centurion Company's hunting lodge, destroying it. Either fire alone would have destroyed the lodge. Each of Rosaria's and Vincenzo's negligence is a factual cause of the destruction of Centurion's hunting lodge.¹⁷⁶

The difficulty with this example is that, technically, because either fire is a but-for cause, an early and strict application of this reality was that neither alone was necessary to the burning of the lodge.¹⁷⁷ As noted above, the Restatement rejects this application, holding that each fire was a factual cause of the harm.¹⁷⁸ Subsection (d) provides additional on-point language, again drawing from torts, but applying fully to *Bostock*:

One cause tortious, the other innocent. This Section applies in a case of multiple sufficient causes, regardless of whether the competing cause involves tortious conduct or consists only of innocent conduct. So long as each of the competing causes was sufficient to produce the same harm as the defendant's tortious conduct, this Section is applicable. Conduct is a factual cause of harm regardless of whether it is tortious or innocent and regardless of any other cause with which it concurs to produce overdetermined harm.

When one of multiple sufficient causes is not tortious, the question of damages is a different matter from the causal question. The question of what (if any) damages should be awarded against these tortfeasors properly belongs to the law of damages and is not addressed in this Restatement.¹⁷⁹

The Third Restatement of Torts reflects the decades-long evolution of causation law within the three Restatements of Torts. The influence of the Restatements of Torts on our courts is inestimable.¹⁸⁰ The great legal minds of the American Law Institute, who draft Restatements to guide our courts, have considered and dwelled on causation since the adoption of the First Restatement of Torts in 1934, and they have provided a blueprint in the Third Restatement of Torts for causation analysis in employment discrimination cases. Indeed, as detailed above, the latest Restatement provides complete affirmation for *Bostock's* multiple sufficient cause analysis.

176. *Id.* at illus. 1.

177. *Id.*

178. *Id.*

179. *Id.* at cmt. d.

180. The ALI's work on torts has arguably been the most influential of the Institute's efforts to restate the common law. Courts have cited to the Torts Restatements more than 80,000 times. See Richard L. Revesz, *Completing the Restatement Third of Torts*, A.L.I. REP., Spring 2019, at 1, 3, <https://www.ali.org/news/articles/completing-restatement-third-torts> [<https://perma.cc/K4PM-GPBM>].

VI. BOOTS ON THE GROUND: APPLYING *BOSTOCK* TO EACH STAGE OF LITIGATION

A. *IQBAL*, *TWOMBLY*, AND *BOSTOCK*: A POST-*BOSTOCK* GUIDE TO PLEADING A PLAUSIBLE CLAIM OF CAUSATION

Employers often use Rule 12(b)(6) of the Federal Rules of Civil Procedure, seeking to dismiss an employee's suit by arguing that the employee has failed to state a claim upon which relief can be granted. *Twombly* and *Iqbal* require plaintiffs to assert facts that make their claim of discrimination not just possible but "plausible."¹⁸¹ All inferences are taken in favor of the plaintiff.¹⁸² And, at this stage of litigation, the plaintiff may not have had the opportunity to gather evidence through the discovery process.¹⁸³ If so, the plaintiff would have no access to critical information under the control of the employer. Among other critical information, this would include the employer's documents, depositions of those under the control of the employer, and the employer's data that might show statistical support for the plaintiff's claim of discrimination.

The Court in *Comcast* instructs,

Normally, too, the essential elements of a claim remain constant through the life of a lawsuit. What a plaintiff must do to satisfy those elements may increase as a case progresses from complaint to trial, but the legal elements themselves do not change. So, to determine what the plaintiff must plausibly allege at the outset of a lawsuit, we usually ask what the plaintiff must prove in the trial at its end.¹⁸⁴

Because *Bostock* clarifies that to prevail, the plaintiff need only prove that discrimination was a but-for cause, and that other, innocent but-for causes exist, trial court judges will need to focus their attention on this new reality. Of course, these cases require that the plaintiff employee allege facts—not mere conclusions—in support of discrimination being a but-for cause.¹⁸⁵ However, if a plaintiff pleads facts that discrimination played a role in the adverse action, it will be difficult for judges to ascertain at this stage what causal role discrimination played.

Importantly, the employee need not plead facts that negate innocent

181. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

182. *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 897 (6th Cir. 2019).

183. See FED. R. CIV. P. 26. A defendant employer often strategically moves to dismiss a case under Rule 12 before it files its answer. See Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 227 n.61 (2011). Doing so precludes the plaintiff from gathering discovery. See *Twombly*, 550 U.S. at 557–60. Under the Federal Rules of Civil Procedure, a Rule 26(f) conference must occur before the plaintiff can conduct discovery, and such a conference generally cannot be held until the defendant answers the plaintiff's complaint or by consent of the parties or other action by the court. FED. R. CIV. P. 26(f).

184. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S.Ct. 1009, 1014 (2020) (collecting cases).

185. See, e.g., *Iqbal*, 556 U.S. at 678 (“[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”); see *supra* note 139.

but-for causes set out by the employer.¹⁸⁶ The *Twombly/Iqbal* pleading standards specify that a complaint must be plausible on its face and that the complaint must bring forth sufficient factual allegations to nudge a claim across the line.¹⁸⁷ In our ongoing example of plaintiff Smith, Smith would need to plead not only that he was discriminated against when fired (mere conclusion), but that the manager who fired him remarked shortly before his firing, “Blacks make lousy managers.” Pleading such a fact makes the claim of discrimination plausible on its face.

If trial court judges apply *Bostock* carefully, more cases should survive employers’ 12(b)(6) motions. Again, the focus should be whether the plaintiff has pled plausible facts such that discrimination may be a but-for cause of an adverse employment action, perhaps one reason among several.

B. SUMMARY JUDGMENT POST-*BOSTOCK*

The summary judgment stage is where the rubber meets the road with the *Bostock* majority’s new causation paradigm. It is here that many claims are dismissed. If *Bostock* has any meaningful effects on individual discrimination claims—and it should—it will be at the summary judgment stage. If trial judges and their clerks do not understand and apply *Bostock* at this stage, the Court’s causation language will be left languishing in research databases and briefs opposing summary judgment motions nationwide.

I encourage trial court judges and their clerks to analyze the Court’s explicit causation language in *Bostock*. Having read hundreds of federal district court employment discrimination cases, I have seen judges rely on overruled precedent and use “stock” language to fit most discrimination cases, with a seemingly jaundiced eye toward most plaintiffs’ cases.¹⁸⁸

Justice Gorsuch’s causation language is crystal clear. To start, judges must remember that discrimination need only be a but-for cause of the adverse action and that other innocent causes of the adverse action also may be but-for causes of the adverse action. Perhaps an innocent action is the *primary* reason for the action. But the latter innocent causes do not defeat what a plaintiff must create at the summary judgment level: a gen-

186. See Brian S. Clarke, *Grossly Restricted Pleading; Twombly/Iqbal, Gross, and Cannibalistic Facts in Compound Employment Discrimination Claims*, 2010 UTAH L. REV. 1101, 1111 (2010) (“The[] two working principles, suggest a two-pronged inquiry in determining whether to dismiss a complaint pursuant to Rule 12(b)(6): first, a court should determine which allegations in a complaint are facts and which are conclusions and disregard the latter; second, accepting the pleaded facts as true, the court must then determine whether those facts ‘plausibly give rise to an entitlement to relief.’” (citation omitted)). See also *Smith v. Nautic Star, LLC*, No. 1:20-CV-242-DMB-DAS, 2021 U.S. Dist. LEXIS 98669, at *4–6 (N.D. Miss. May 25, 2021) (relying on *Bostock* in § 1981 claim to deny the employer’s motion to dismiss where plaintiff pled both legitimate and discriminatory reasons in his pleading).

187. *Iqbal*, 556 U.S. at 678 (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” (quoting *Twombly*, 550 U.S. at 570)).

188. See *supra* note 56 and accompanying text.

genuine issue of material fact on the issue of whether discrimination was a but-for cause of the adverse action.¹⁸⁹

1. Summary Judgment Rules

Summary judgment rules are well known, yet worth reiterating here. Summary judgment is appropriate only if there is no genuine dispute as to any material fact.¹⁹⁰ Once the movant (the employer) moves for summary judgment, “[t]he burden is on the nonmoving party to show that there is a genuine issue of material fact for trial.”¹⁹¹ Usually, this is done by offering “sufficient proof[] in the form of admissible evidence.”¹⁹² A dispute is genuine if the evidence presented could permit a reasonable factfinder to find for the nonmoving party, while a “fact is material if it ‘might affect the outcome of the suit under governing law.’”¹⁹³ In ruling on a motion for summary judgment, the court views all facts and draws all inferences in the light most favorable to the nonmoving party (the employee).¹⁹⁴ Summary judgment “cannot be granted merely because the court believes that the movant will prevail if the action is tried on the merits,” and any such assumption is entirely premature.¹⁹⁵

As tempting as it may be, a court is not a super-factfinder and does not make credibility determinations or weigh the evidence¹⁹⁶ but rather determines whether there is a genuine issue for trial. After *Bostock*, this can be done by introducing relevant evidence that discrimination was a but-for cause of the adverse action. If this evidence is sufficient, the judge must deny the employer’s motion for summary judgment.

Back to the simple example of James Smith, a Black employee who was excessively absent and fired by his employer. If Smith can present facts

189. FED R. CIV. P. 56. Recently, a federal district court utilized *Bostock*’s logic to deny an employer’s motion for summary judgment. See *Keller v. Hyundai Motor Mfg.*, 513 F. Supp. 3d 1324, 1330 (M.D. Ala. 2021) (denying employer’s motion for summary judgment on plaintiff’s ADEA claim, relying on *Bostock*). The court in *Keller*, referencing *Bostock*, humorously wrote that the employer’s argument that age must be the sole cause of an adverse action “crashes, Wile E. Coyote-esque, into veritable mountains of contrary precedent.” *Id.* The *Keller* court then directly quoted the *Bostock* opinion, stating that “the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision.” *Id.* (quoting *Bostock*, 140 S. Ct. at 1739). More such opinions should follow as *Bostock*’s logic becomes better known among judges and litigants. Indeed, the goal of this Article, in large part, is to help educate the judiciary and practitioners about *Bostock*’s transformative, yet common sense, causation logic.

190. See FED R. CIV. P. 56.

191. *Guessous v. Fairview Prop. Inv., LLC*, 828 F.3d 208, 216 (4th Cir. 2016) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986)).

192. *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993).

193. *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013) (quoting *Anderson*, 477 U.S. at 248).

194. *Anderson*, 477 U.S. at 255.

195. *Jacobs v. N.C. Admin. Off. of the Cts.*, 780 F.3d 562, 568 (4th Cir. 2015) (quoting CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, 10A FEDERAL PRACTICE & PROCEDURE § 2728 (3d ed. 1998)).

196. *Anderson*, 477 U.S. at 255 (1986); see *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659–60 (4th Cir. 2018).

that create a genuine issue of material fact as to whether discrimination was a but-for cause of his being fired, the judge should overrule the employer's motion for summary judgment. The judge must keep in mind that other innocent causes also may be but-for causes of the action.

In our hypothetical, Smith's excessive absences may be the *primary* but-for cause of the employee's firing. As hard as it will be for trial court judges, they must focus on evidence that may create a genuine issue of material fact on whether discrimination was *a* but-for cause of the firing, even if the judge feels like the employer was justified in firing the employee.¹⁹⁷ Such justification is not *Bostock's* legal rule. Judges must ask themselves whether the plaintiff has produced relevant evidence that discrimination was a but-for cause—not the *sole* nor the *primary* cause—but just a but-for cause of the adverse action. One might picture a pint glass. The racism may be only two ounces of what filled the glass, and the absences the other fourteen ounces. But *both* were necessary to fill the glass. For a judge to pretend otherwise is to compound artificiality with harmful results.

As noted above, this counterfactual analysis is difficult for any factfinder.¹⁹⁸ It requires the judge to imagine facts where the discrimination did not exist and ask whether the same result would have occurred anyway. Simultaneously, the judge must also consider that other innocent but-for causes may have existed. As has been long noted, requiring a judge, or anyone for that matter, to engage in such a hypothetical inquiry is almost impossible.¹⁹⁹ The inquiry itself is imaginative rather than an examination of reality. But this thought experiment is exactly what the Court in *Bostock* requires judges to do at the summary judgment stage: this is the *sine qua non* analysis. *McDonnell Douglas* should not exist at this stage, as it would further obfuscate this difficult, hypothetical analysis.²⁰⁰ The Court's counterfactual demands in *Bostock* are quite enough.

197. See generally Sperino, *supra* note 54.

198. I remain unconvinced that a judge could easily find discrimination to be only a motivating factor rather than a but-for factor. In reality, either causation standard requires a judge to evaluate evidence to determine the existence of discrimination. The counterfactual construct of a but-for analysis is opaque at best. For a judge's temptation, see *Woods v. City of Greensboro*, 855 F.3d 639, 652 (4th Cir. 2017) ("There is . . . a real risk that legitimate discrimination claims, particularly claims based on more subtle theories of stereotyping or implicit bias, will be dismissed should a judge substitute his or her view of the likely reason for a particular action . . .").

199. See *supra* notes 3–4; see also *supra* note 163.

200. As noted earlier, the lower courts and the Supreme Court have struggled to interpret and apply *McDonnell Douglas* for decades. To the extent it calls for a binary choice, the precedent should be abandoned post-*Bostock*. In other words, *Bostock* overrules *McDonnell Douglas* to the extent it requires the plaintiff employee to disprove the employer's articulated non-discrimination reason. With regard to the Court's authority to make procedural constructs, such as *McDonnell Douglas*, see generally Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324 (2006). Concomitantly, the Court has the power to undo procedural constructs like the *McDonnell Douglas* paradigm that no longer align with subsequent Court precedent, such as *Bostock*. See I.H. Jacob, *The Inherent Jurisdiction of the Court*, 23 CURRENT LEGAL PROBS. 33, 37 (1970).

2. *Relevant Evidence of Causation at the Summary Judgment Stage and the Emergence of Doctrines to Exclude Such Relevant Evidence*

A judge will examine the evidence to determine whether any relevant evidence exists on the issue of a but-for cause. The Federal Rules of Evidence define relevant evidence as that which “has any tendency to make a fact more or less probable than it would be without the evidence” when that fact is of consequence to the matter at issue.²⁰¹ Courts repeatedly stress that the definition is permissive and that any increase (or decrease) in probability suffices.²⁰²

Unfortunately, at the summary judgment stage, courts often use what Professor Sandra Sperino terms “Disbelief Doctrines” to believe employers and not workers and to exclude otherwise relevant evidence.²⁰³ Judges often deploy “these disbelief doctrines to dismiss cases at the summary judgment stage.”²⁰⁴ In particular, judges sometimes use the “stray remarks” doctrine to exclude discriminatory words said that are relevant evidence of discrimination.²⁰⁵ Judges should determine relevance without these doctrines, which of course are not a part of the Rules of Evidence.

201. FED R. EVID. 401. Courts repeatedly stress that the definition is permissive and any increase (or decrease) in probability suffices. *See, e.g.,* *Ayers v. City of Cleveland*, 773 F.3d 161, 169 (6th Cir. 2014) (“[T]he standard for relevancy under Rule 401 is ‘extremely liberal.’” (quoting *Dortch v. Fowler*, 588 F.3d 396, 400 (6th Cir.2009))). Relevant evidence is generally admissible, FED R. EVID. 402, although this permissive standard is offset by rules allowing the exclusion of even relevant evidence, *see, e.g.,* FED R. EVID. 403 (permitting exclusion of relevant evidence, *inter alia*, when the danger of prejudice outweighs its “probative value”).

202. *See, e.g.,* *Ayers*, 773 F.3d at 169.

203. *See generally* Sperino, *supra* note 54.

204. *Id.* at 231.

205. *Id.* at 233 (“The stray remarks doctrine is a court-created doctrine that allows courts to declare that certain discriminatory remarks are not relevant to an underlying claim of discrimination. Some examples are helpful. In a race discrimination case, a worker presented evidence that his supervisor referred to African-Americans as ‘lazy,’ ‘worthless,’ and ‘just here to get paid.’ The judge refused to consider these comments as supporting the plaintiff’s claim that he was fired because of his race, reasoning that they were stray remarks not probative of race discrimination. In an age discrimination case, a court similarly rejected a claim where the worker presented evidence that his supervisor told him ‘you are too damn old for this kind of work’ two weeks before he was fired [J]udges commonly invoke the stray remarks doctrine to exclude evidence presented by workers, allowing the court to grant summary judgment or other motions in favor of the employer.” (citations omitted) (first quoting *Chappell v. Bilco Co.*, 2011 WL 9037, at *9 (E.D. Ark. 2011), *aff’d*, 675 F.3d 1110 (8th Cir. 2012), and then quoting *O’Connor v. Consol. Coin Caterers Corp.*, 56 F.3d 542, 551 (4th Cir. 1995) (Butzner, J., dissenting), *rev’d*, 517 U.S. 308 (1996))). Professor Sperino also notes:

If there is no possible way that any reasonable juror could infer discrimination from a comment and there is no other evidence suggesting discrimination, the worker’s case should not be allowed to proceed. However, this is not because of any special function of the stray remarks doctrine. Rather, the worker simply has no evidence of discrimination. The federal courts do not need to rely on any special, discrimination-specific rule to find for the employer in such a case. Unfortunately, when judges invoke the stray remarks doctrine, the allegedly stray remarks are often ones that a jury might credibly use (especially along with other evidence) to find in favor of the worker.

Id. at 235 (citing FED. R. CIV. P. 56(a)).

Relevant evidence is generally admissible,²⁰⁶ although this permissive standard is offset by rules allowing the exclusion of even relevant evidence.²⁰⁷ Rule 403 permits exclusion of relevant evidence when the danger of prejudice outweighs its “probative value.”²⁰⁸ Probative value signifies the extent to which relevant evidence will tend to prove the proposition for which it is proffered.²⁰⁹

Thus, in our ongoing example, Mr. Smith should be able to create a genuine issue of material fact on discrimination being a but-for cause of his termination. He would do so through deposition testimony that the manager who fired him told him that “Blacks make lousy managers” close in time to his termination. Such a remark should not be considered “stray,” as Mr. Smith himself was a Black manager. A jury should be allowed to weigh the weight and credibility of the remark and the evidence of the excessive absences.

C. JURY INSTRUCTIONS

Many attorneys evaluate cases by looking at a state’s or, less often, federal court’s pattern jury charge in a given substantive area. Pattern jury charges do not constitute law but should reflect the law. Jury questions and instructions should be consistent with the question asked of judges at pre-trial stages.

Not every Circuit Court of Appeals has published pattern jury instructions for employment discrimination cases. Indeed, only six regional Circuit Courts have published civil pattern jury instructions of any kind, while the other five have published none.²¹⁰ As to individual discrimination instructions addressed within those six circuits, all existing jury instructions are outdated, save one.²¹¹ The Fifth Circuit Court of Appeals updated its jury instructions to reflect *Bostock*. Here is the salient excerpt of those instructions:

To prove unlawful discrimination, Plaintiff [name] must prove by a preponderance of the evidence that:

206. FED. R. EVID. 402.

207. *See, e.g.*, FED. R. EVID. 403.

208. *Id.*

209. *Id.* In our ongoing example, the manager’s comment that “Blacks make lousy managers” has probative value, as it tends to prove that discrimination was a but-for cause of the manager’s decision to fire Smith.

210. *Jury Instructions Research Guide: United States Courts of Appeals*, MARQUETTE UNIV. L. SCH., <https://libraryguides.law.marquette.edu/c.php?g=318617&p=3680634> [<https://perma.cc/3TP2-4HND>]. Only the Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits have published civil pattern jury instructions. *Id.* The First, Second, Fourth, Sixth, and Tenth Circuits have no published civil pattern jury instructions. *Id.*

211. *See, e.g.*, ELEVENTH CIR. PATTERN JURY INSTRUCTIONS, CIV. CASES § 4.5 (JUD. COUNCIL OF THE U.S. ELEVENTH JUD. CIR. 2020) (covering only motivating factor analysis); MANUAL OF MODEL CIV. JURY INSTRUCTIONS FOR THE DIST. CTS. OF THE NINTH CIR., § 10.1 (NINTH CIR. JURY INSTRUCTIONS COMM. 2022) (instructing that the employment discrimination claim must be the sole reason or a motivating factor). All these pattern instructions neglect to articulate the but-for causal standard as illustrated by *Bostock* and incorporated by the 5th circuit.

1. Defendant [name] [specify adverse employment action] Plaintiff [name]; (The Committee notes that the adverse action usually is not disputed and can be easily inserted here) and
2. **(For a § 2(a) case)** Defendant [name] would not have [specify adverse employment action] Plaintiff [name] in the absence of—in other words, but for—[his/her] [protected trait]. Plaintiff [name] does not have to prove that unlawful discrimination was the only reason Defendant [name][specify adverse employment action][him/her]. But Plaintiff [name] must prove that Defendant [name]'s decision to [specify adverse employment action] [him/her] would not have occurred in the absence of such discrimination.

. . . .

JURY QUESTION

Has Plaintiff [name] proved that
(For a § 2(a) case) [he/she] would not have been [specify adverse employment action] in the absence of—in other words, but for [his/her] [protected trait]?
 Answer “Yes” or “No.”²¹²

To use our ongoing example, with no dispute that the adverse action was a termination, this would be the Fifth Circuit's charge:

To prove unlawful discrimination, Plaintiff James Smith must prove by a preponderance of the evidence that:
 Defendant Jones Manufacturing would not have terminated Plaintiff James Smith in the absence of—in other words, but for—his being Black.
 Plaintiff James Smith does not have to prove that unlawful discrimination was the only reason Defendant Jones Manufacturing terminated him. But Plaintiff James Smith must prove that Defendant Jones Manufacturing's decision to terminate him would not have occurred in the absence of such discrimination.²¹³

The paragraph immediately above recognizes the *Bostock* decision's effect on jury instructions. Working backward from this jury charge, federal district court judges should approach the motion-to-dismiss stage—and critically, summary-judgment motions—with this important language in mind. *McDonnell Douglas* is nowhere to be found in this jury charge, nor should it be. As discussed above, *McDonnell Douglas* has no place at any stage of litigation; it is irrelevant post-*Bostock*.²¹⁴ The jury would then be asked:

212. PATTERN CIV. JURY INSTR. (CIV. CASES) § 11.1.B (COMM. ON CIV. PATTERN JURY INSTRUCTIONS & DIST. JUDGES ASS'N, FIFTH CIR. 2020) [hereinafter FIFTH CIRCUIT CHARGE]. I am purposely not including the “motivating factor” questions included in the Fifth Circuit's pattern jury charge in order to focus solely on *Bostock* and its effects on jury questions and instructions.

213. *See id.*

214. The Fifth Circuit retains a footnote that is incorrect post-*Bostock*:
 The defendant may be entitled to a mixed-motive-affirmative-defense instruction. The mixed-motive affirmative defense should be submitted only when properly raised and when there is credible evidence from which a reasonable jury could conclude that a mix of permissible and impermissible reasons factored into the employer's decision-making process. When this

JURY QUESTION

Has Plaintiff James Smith proved that he would not have been fired in the absence of—in other words, but for his protected [protected trait]?

Answer “Yes” or “No.”²¹⁵

What changes could be made to the jury question and instructions above? There is one important change to be made. Consistent with *Bostock*, the instruction should note that discrimination need not be the “main” or “primary” reason. A juror would not glean that legal possibility from the Fifth Circuit’s instruction above. Instead, at best, one could infer that two equal but-for reasons could exist. But this is inconsistent with *Bostock*’s language. Plaintiff’s attorneys should argue for the inclusion of this language, as it is the statement of the law found in *Bostock*.

Thus, the instruction could be amended to read: “Plaintiff James Smith does not have to prove that unlawful discrimination was the only reason *nor even the primary reason* Defendant Jones Manufacturing terminated him.” This instruction mirrors *Bostock*’s explicit language and could assist the jury in understanding the complex nature of decision-making.²¹⁶ One could argue that even the suggested language does not go far enough in letting the factfinder know that one or more other but-for reasons could exist. Instructing a jury on multiple sufficient causes is fraught with difficulty. That said, the Fifth Circuit’s pattern jury charge—unlike those of any other circuit—recognizes the critical mixed-motives law of *Bostock*. While not a perfect model for other circuit courts to follow, the instructions provide a meaningful beginning point.

D. PUSHING THE BOUNDARIES: NEW IDEAS FOR NEW TIMES

1. Rethinking the Model of Proof in Individual Disparate Treatment Cases

What will the model of proof look like under *Bostock*? The Court in *Comcast* instructs that we should engage in this analysis with the end in mind, moving back toward the beginning of litigation and stepping through each phase along the way.²¹⁷ The likely model of proof will keep

defense applies, the standard is whether the defendant shows that it would have made the same decision regardless of the plaintiff’s protected status.

Id. § 11.1.B, at 134 n.2.

This footnote states that the mixed-motive instruction should be used when both permissible and impermissible reasons factored into the employer’s decision-making process. *Id.* That is true, but it is not updated; the footnote infers that a mixture of such motives does not exist under the but-for model. It also contradicts the Fifth Circuit’s own jury instruction on but-for causation quoted in the text. Thus, it could lead to confusion for the reader.

215. *See id.* § 11.1.B.

216. Judges should take care not to focus a jury instruction on “pretext.” All a plaintiff must establish for liability is that discrimination is a but-for cause of the adverse action; she need not prove the employer’s reason false. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020).

217. *Comcast v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020); *see* quotation accompanying *supra* note 184.

the burden of production and persuasion with the plaintiff employee, who must prove by a preponderance of the evidence that discrimination was a but-for cause of the adverse action. Lower courts will use this burden, consistent with prior case law, unless the Court creates a burden-shifting paradigm.²¹⁸ Who should bear the burden to prove that innocent conduct was a but-for cause of the action? Likely, the plaintiff employee will be forced to negate the employer's but-for causes. However, because the plaintiff need not prove the employer's innocent reason is "pretextual," arguably, the Court could take an altogether different approach, which leads to the discussion below.

The following is a novel, yet not unprecedented, proposal. The Supreme Court has the authority to create a burden-shifting model of proof under *Bostock*. It has done so in the past. First, a plurality of the Court in *Price Waterhouse* created the motivating factor model of proof under Title VII.²¹⁹ The plaintiff using that model had to prove that discrimination was a motivating factor. If she did so, the burden of proof shifted to the defendant to prove that even in the absence of discrimination, it would have made the same decision.²²⁰ The Court created this shifting burden-of-proof paradigm out of whole cloth, though Congress later codified and amended it.²²¹

Given the nature of MSCs, the Court could create a burden-shifting scheme under the logic of *Bostock*. First, the employee must prove that discrimination was a but-for cause of the adverse employment decision, with the burden shifting to the employer to prove that innocent but-for cause(s) produced the adverse action.²²²

The Court could create shifting burdens of proof; that is the plaintiff first would have to prove that discrimination was a but-for cause, and then the employer would have the burden to prove that an innocent cause was a but-for cause.²²³ If the above cases are taken to heart, the

218. See generally Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 344–61 (2010).

219. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249 (1989) (plurality opinion).

220. See discussion *supra* Section III.B. The Court has similarly created a shifting model of proof in another context. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (creating shifting burdens of proof in a constitutional case involving a public school teacher); see also Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1111 (2018) ("Courts seldom venture far from the instant controversy in search of approaches to mixed motives, even though mixed motives questions have been addressed in myriad domains: legal ethics, constitutional law (voter districting, school desegregation, jury selection, free speech and censorship, takings), labor law, landlord-tenant law, intentional torts, vicarious liability, evidence, property, health law, contract law, corporate law, employment discrimination, securities enforcement, taxation, bankruptcy, and more."). Verstein also notes the self-evident truism that "human beings are complex, and our motivations are often mixed." Verstein, *supra*, at 1108.

221. See Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 2000e–2(k)).

222. The employer's burden would be in the nature of an affirmative defense, which must be plead and proven.

223. See *Price Waterhouse*, 490 U.S. 228, 244–46. Return to our early example of a Black employee with excessive absences. Assume the employee can prove discrimination on the basis of race was a but-for cause of his termination. The burden of proof would shift

employer will avoid liability altogether upon such a showing. But the Court in *Bostock* instructs otherwise, expressly contemplating liability under Title VII in an MSC case, even where the discrimination is not the main or primary cause, as long as the plaintiff can show that discrimination was a but-for cause.²²⁴ Shifting burdens of proof align with apportionment schemes adopted in tort law. The Section below introduces the novel idea of allocation of damages in discrimination cases, which, were the Court to adopt shifting burdens of proof, accords with common sense and established doctrine in the law of torts.

2. *Allocation of Damages: Heretical to Some, But a Necessary Proposal*

How then should damages be allocated when an adverse action (decision) results from both innocent and discriminatory reasons? The Court in *Bostock* did not address this issue nor carry the MSC to its logical conclusion. As discussed above, the very likely result is that the plaintiff will still have the burden to prove that discrimination was a but-for cause of the decision. No other questions will be asked of the jury. At that point, if the jury answers “yes,” that discrimination was a but-for cause of the adverse action, the employer will be liable for the entirety of the plaintiff’s damages.

This comports with the goal of Title VII to make the plaintiff whole. It also comports with recent torts MSC cases, where each of the tortfeasors whose conduct was a but-for cause of the injury would be jointly and severally liable²²⁵ for the entirety of the damages.²²⁶ The plaintiff would

to the employer to prove innocent action(s) were a but-for cause of the firing. Unlike *Price Waterhouse* and *Mt. Healthy*, the employer would not be relieved of liability. *Cf. Mt. Healthy*, 429 U.S. at 285. This burden-shifting model of proof is highly unlikely unless Congress steps in to amend Title VII and creates an apportionment scheme for those at fault in the adverse action.

224. RESTATEMENT (THIRD) OF TORTS, *supra* note 162, § 26, note to cmt. c (“Common understanding and usage [of causation] often look for a single ‘responsible cause’ and attribute an event to that unusual or extraordinary action or conduct This common usage may lead juries, lawyers, and courts astray in a case where two or more relevant events may have been actual causes of plaintiff’s harm.” (citing BECHT & MILLER, *supra* note 166, at 20)). This is critical to understanding *Bostock*’s causal significance.

225. *See, e.g.,* KEETON ET AL., *supra* note 3, § 47, at 328. Joint and several liability refers to a situation where a plaintiff is harmed by multiple tortfeasors. Edward J. Kionka, *Recent Developments in the Law of Joint and Several Liability and the Impact of Plaintiff’s Employer’s Fault*, 54 LA. L. REV. 1619 (1994). The plaintiff may recover and collect judgment against one or more of them up to but not exceeding the full amount of the judgment. *Id.* In turn, the paying tortfeasor has a right of contribution against those who also were liable but did not pay. *Id.*

226. KEETON ET AL., *supra* note 3, § 170, at 413. In its most traditional usage, joint and several liability does not refer to a cause-in-fact doctrine but rather to what might be loosely called a procedural doctrine whereby a plaintiff harmed by multiple tortfeasors can sue one or more of them, recover judgment against one or more of them, and enforce (collect on) the judgment against one or more of them, up to but not exceeding the full amount of the judgment. *See id.* Joint and several liability necessarily contemplates multiple tortfeasors, unlike discrimination cases in which the defendant is ordinarily only the employer, i.e., a single wrongdoer. Joint and several liability would not be imposed against

not be held liable for her own fault, but rather the defendant–employer would be completely responsible.

But is it fair to the employer? What if the employer’s innocent reason was by *far* the predominant reason for the adverse action? Does—or should—that count for nothing? If an employer has one or more but-for innocent reasons for the adverse decision, both the Court’s recognition of a gradient in the causal factors as well as the dilution of the discriminatory motive would seem to counsel that the defendant employer is due some reduction in damages.²²⁷ But will the Court create a burden-shifting paradigm as it did in *Price Waterhouse* to allocate fault according to responsibility?

Price Waterhouse—as codified by the CRA of 1991—created such a paradigm;²²⁸ it allowed the employer to escape liability if it could prove that, even if discrimination was a motivating factor, it would have made the same decision anyway based on legitimate factors.²²⁹ Another solution, less elegant but common in tort law, would be to *apportion* liability between the plaintiff employee and defendant–employer. Some precedent and direction for this can be found in federal maritime law.²³⁰

Congress alone has the authority to create such an apportionment scheme for employment discrimination laws.²³¹ Let me preface my suggestions for congressional action with a few words of pragmatism: Congress is highly unlikely to touch any of the anti-discrimination statutes, given the political polarization that gridlocks our country. The tremendous differences between Republicans and Democrats prior to the enactment of the Civil Rights Act of 1991 were nothing compared to today’s bitter partisanship culture, which, alas, shows no sign of abating.²³²

plaintiffs; otherwise, in cases with both innocent and discriminatory but-for causes, the employer would owe nothing.

227. Of course, this Article is largely devoted to the current judicial system’s unfairness toward plaintiffs. *See supra* note 161, detailing the reasons Congress should act to remove or, at a minimum, increase the outdated caps on damages. In their current form, unchanged since 1991, these damages caps do not serve the deterrent effect necessary to accomplish Title VII’s goals.

228. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (plurality opinion).

229. *Id.*

230. *See North Star*, 106 U.S. 17, 20–22 (1882). The abrogation of the contributory negligence defense in admiralty has a venerable pedigree. As early as the seventeenth century, in cases of collisions at sea where both parties were at fault, damages were divided evenly. *See id.* Admittedly, maritime law is, in effect, federal negligence law and not akin to statutory discrimination schemes.

231. Amy J. St. Eve & Bryce C. Pilz, *The Fault Allocation Provisions of the Private Securities Litigation Reform Act of 1995—A Roadmap for Litigants and Courts*, 3 N.Y.U. J.L. & BUS. 187 (2006) (providing example of Congress enacting proportionate fault scheme in securities litigation).

232. *See* Peter M. Leibold, Stephen A. Sola & Reginald E. Jones, *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991*, 45 RUTGERS L. REV. 1043 (1993), for a complete discussion of the legislative history and bitter debates preceding the Civil Rights Act of 1991. Justice Kavanaugh noted in his dissent in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1836 (2020) (Kavanaugh, J., dissenting). His acknowledgment came in the context of chas-

The Supreme Court likely does not have the ability to enact an apportionment scheme. State courts, on the other hand, sit as common law courts when they create apportionment schemes in negligence law. The Supreme Court only has “supervisory authority” over the lower courts and does not have the authority to make substantive law, which an apportionment scheme surely is.²³³

Again, speaking hypothetically, an apportionment scheme would work much like it does in negligence law.²³⁴ A plaintiff employee’s fault—too many absences, in our hypothetical—would be akin to contributory negligence. The defendant’s discrimination would be akin to the tort (discrimination) it caused. The factfinder could assign percentages of responsibility (for each but-for cause) adding up to 100%. I suggest below that a pure comparative fault scheme be adopted by the Court or Congress.

Thus, in our example, assume that Employee Smith proves that discrimination was a but-for cause of his firing. In turn, assume that the Employer Jones Manufacturing proves that the excessive absences were a but-for cause of the firing. Just as in tort cases, the factfinder could assign percentages of responsibility to each party. Assume the employee suffered \$100,000 in damages, and the factfinder assigned the employee 30% of the fault and the employer 70% of the fault. Under a pure comparative apportionment scheme, the employee would recover \$70,000. Conversely, if the percentages were switched, the plaintiff should recover 30%, or

tising the majority for acting like a legislature in holding that sex discrimination included discrimination based on sexual orientation and transgender status. *See id.* at 1822–37.

233. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 38–39 (1988) (Scalia, J., dissenting); *Danforth v. Minnesota*, 552 U.S. 264, 289 (2008).

234. In tort law, liability apportionment arose as a matter of public policy. Both state supreme courts and state legislatures created rules of apportionment. MATTHIESEN, WICKERT & LEHRER, S.C., CONTRIBUTORY NEGLIGENCE/COMPARATIVE FAULT LAWS IN ALL 50 STATES (2022), <https://www.mwl-law.com/wp-content/uploads/2018/02/COMPARATIVE-FAULT-SYSTEMS-CHART.pdf> [<https://perma.cc/MNV6-QYNL>]; *see also* MELISSA M. LESSELL ET AL., DEUTSCH KERRIGAN, 50 STATE SURVEY OF COMPARATIVE FAULT AND CONTRIBUTORY NEGLIGENCE IN THE CONTEXT OF A LEGAL MALPRACTICE ACTIONS (2016), https://www.americanbar.org/content/dam/aba/events/lawyers_professional_liability/lpl_2016_fall_conf_50_state_survey_comparative_fault.auth_checkdam.pdf [<https://perma.cc/8P5P-NAYG>]. The chart in the first link above notes that twelve states created pure comparative apportionment schemes, most commonly through legislative action but also through judicial action. Four states retain the archaic and harsh contributory negligence rule, which bars a plaintiff from any recovery even if she is only 1% at fault. The most common form of comparative fault in negligence cases is modified comparative fault, where each party is held responsible for damages in proportion to their own percentage of fault, unless the plaintiff’s negligence reaches a certain designated percentage, either 50% or 51%. If the plaintiff’s own negligence reaches this percentage bar, then the plaintiff cannot recover any damages. MATTHIESEN, WICKERT & LEHRER, *supra*. Some twelve states have adopted Pure Comparative Fault schemes, which allow plaintiffs to recover proportionally all the way up to being 99% at fault; these states did so either through legislative or judicial action. *See id.* (“The term ‘comparative fault’ refers to a system of apportioning damages between negligent parties based on their proportionate shares of fault. Under a comparative fault system, a plaintiff’s negligence will not completely bar recovery like states that employ the harsh Pure Contributory Negligence Rule, but it will reduce the amount of damages the plaintiff can recover based on the plaintiff’s percentage of fault.”).

\$30,000 of his damages.²³⁵

But in the hypothetical world, if Congress ever amends discrimination laws, it could do much more than adopt an employer-friendly allocation scheme. An allocation scheme benefits an employer who can prove innocent causes. Currently, if a plaintiff proves that discrimination is a but-for cause of the adverse action, that plaintiff recovers all of his damages. An apportionment scheme thus could be part of the necessary negotiations process in Congress. If Congress were to amend discrimination laws, it could lessen *Bostock's* causation standard to “motivating factor” or “substantial factor” for all individual discrimination claims. Congress could—and should—increase or even remove the cap on compensatory and punitive damages allowed in such claims; the thirty-year cap is arbitrary and has never been adjusted for inflation.²³⁶ Congress should also consider removing the cap on punitive damages to deter especially egregious conduct.²³⁷ Until Congress prioritizes strengthening employment discrimination laws, we are left with Supreme Court precedents to guide our courts and juries. An apportionment scheme could be an employer-friendly change that could assist in compromise legislation.

I hesitate to write such heretical words about a possible apportionment scheme absent Congressional action to remove the caps on damages. However, getting into the bowels of how tort law works is a necessary evil. The Court has led us there since 2009.

VII. CONCLUSION

Bostock should transform the way judges and attorneys approach individual employment discrimination cases. The opinion clearly articulates the common coexistence of both innocent and discriminatory multiple sufficient causes; in doing so, the Court creates a new mixed-motive paradigm that should significantly affect summary judgment practice in this country. If judges apply *Bostock's* clear logic at the summary judgment stage, more cases will move on to a jury trial.

235. A pure comparative fault scheme is discussed *supra* at note 234. Another idea would merge a pure comparative fault scheme with a modified comparative fault scheme. For example, the plaintiff would continue to receive her proportion of damages regardless of the defendant employer's proportionate share of fault. However, an apportionment statute could then say, “If the defendant employer's degree of discriminatory fault exceeds 50%, the plaintiff employee shall receive the full amount of damages awarded by the jury.” Such an allocation of damages scheme could accomplish the multiple purposes of being fair to employers while recognizing the importance of the deterrent function of damages. The plaintiff would be awarded the full amount of damages when the defendant's discriminatory reason was more than 50% of the cause of the adverse action.

236. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981a(b)(3) (2020)). Currently, the maximum amount of punitive and compensatory damages (combined) for intentional discrimination cases under Title VII and the ADA range from \$50,000 to \$300,000, depending on the size of the employer. See 42 U.S.C. § 1982(b)(3) (1964); see also *id.* § 12188(b)(4) (1990).

237. The Due Process Clause of the U.S. Constitution would still rein punitive damages in. See U.S. CONST. amend. V. In addition, the Court created an affirmative defense to the imposition of punitive damages in *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999).

Too many cases have been dismissed at summary judgment through the tangled net of *McDonnell Douglas* and evidentiary doctrines that have no basis in the rules of evidence. It is time to rid litigants and judges of *McDonnell Douglas*, clear the air, and apply the law set out by the Court in *Bostock* at each stage of litigation.

If lower courts, including federal courts of appeal, appropriately apply *Bostock's* recognition of multiple sufficient causes, plaintiffs will more often find their way to a jury, the best factfinder of all.