Another Move away from Title VII: Why Gross Got It Right

Jacqueline Go
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I. INTRODUCTION

The recent recession that began in 2008 is hindering job growth, and unemployment is hovering around 9 percent.¹ Because older and higher-ranking employees typically receive higher salaries and expensive medical and pension perks,² it is not uncommon for companies to trim costs and maximize cost savings by letting these employees go during a recession.³ As a result, higher numbers of older workers are hunting for jobs, but are faced with more hurdles to employment and endure considerably longer periods of unemployment than their younger counterparts.⁴ Although recruiters maintain that experience is still valued, older workers face significant age-bias stereotypes, which label them as overqualified and overpriced, as well as lower

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3. James, supra note 2.

performers than younger candidates, and less motivated and energized.\(^5\)

The combination of job losses and trouble finding new employment has contributed to the highest number of age discrimination complaints being filed with the Equal Employment Opportunity Commission ("EEOC") in two decades.\(^6\) Specifically, age discrimination charges filed with the EEOC jumped 33 percent during the past two fiscal years and are expected to increase as unemployment rates continue to rise.\(^7\) As more unemployed, older workers face sinking home values, evaporating retirement savings, and bleak job prospects, ageism emerges as a noticeable but unpunished employer trend.\(^8\) Because the number of older-worker layoffs is expected to rise, older workers will continue to turn to federal employment law for protection against any form of discrimination, especially when financial security is grim, as it is now.\(^9\)

Protection against age discrimination in the workplace is conferred by the Age Discrimination in Employment Act ("ADEA").\(^10\) The ADEA is similar to Title VII of the Civil Rights Act of 1964 ("Title VII"), which prohibits workplace discrimination based on race, color, religion, sex, or national origin.\(^11\) Because both statutes use nearly identical language, some courts deciding ADEA cases apply precedents developed

\(^5\) Id. (noting that these negative stereotypes are often untrue because research has shown older workers commonly stay with a company longer than younger workers); Associated Press, supra note 2 (citing an American Association of Retired Persons ("AARP") study that showed older workers received fewer interviews, and that those older workers who did receive an interview, flaunted the younger qualities in their resumes).


\(^7\) Id. (stating that claims are rising because laid-off workers feel unfairly targeted, and more inexperienced managers are conducting lay-offs without sufficient safeguards before issuing pink slips like statistical tests); see also Allison Linn, Age Bias Complaints Surge in Weak Economy, NBC SAN DIEGO (June 29, 2010), http://www.nbcsandiego.com/news/business/Age_bias_complaints_surge_in_weak_economy-97378139.html.

\(^8\) See Wolgemuth, supra note 4 (noting the difficulties in studying age discrimination because stereotypes are often concealed).

\(^9\) This could potentially lead to more age-discrimination complaints being filed with the EEOC. See Elmer, supra note 6.


in Title VII cases, thus leading to inconsistent results. A quagmire of standards of proof was used across the circuits, and this ultimately led to the Supreme Court’s decision in *Gross v. FBL Financial Services, Inc.*

First, this comment will examine the parallels and key differences between the ADEA and Title VII. Second, this comment will analyze the Civil Rights Act of 1991 and the influential Supreme Court cases that have shaped courts’ interpretations of the ADEA and Title VII. Third, this comment will explore how *Gross* significantly altered the standard of proof applicable to plaintiffs under the ADEA, and why the standard set forth by the Supreme Court is appropriate—namely because it coincides with congressional intent, applies the appropriate burden-shifting framework, and effectively corresponds to practical employer compliance. Finally, this comment recommends that future legislation akin to the recently proposed Protecting Older Workers Against Discrimination Act should adopt the “but for” standard of causation in order to provide damages for plaintiffs and to further differentiate between the ADEA and Title VII.

13. See, e.g., id. at 382 n.13 (citing Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974)).
15. See infra Parts II.A.1–2.
16. See infra Parts II.A.3–II.B.
17. See infra Parts II.C–IV.
19. See infra Part V.
II. THE ADEA AND TITLE VII

A. Overview of Title VII and the ADEA

Title VII and the ADEA use nearly identical language. Title VII makes it unlawful for employers to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such an individual’s race, color, religion, sex, or national origin.” Age was not originally included in Title VII. But in 1964, sensing age discrimination occurring in the workplace, Congress asked the Secretary of Labor, W. Willard Wirtz, to investigate age discrimination in the workplace. After finding that age discrimination was a common practice, Congress passed the ADEA to prohibit employers from “discrimin(ating) against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such an individual’s age.” Despite the two statutes’ similarities, their individual legislative histories and congressional purposes, and subsequent Supreme Court decisions, reveal important differences.

1. Legislative Histories and Purposes

Originally, age was not afforded protected status under Title VII because Congress did not have enough evidence of

20. Compare 42 U.S.C. § 2000e-2(a) (2006) (“It shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin.”), with 29 U.S.C. § 623(a) (2006) (“It shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual ... because of such individual's age.”).


22. See id.


24. See Burke, supra note 23, at 48 (“Congress passed the [ADEA] in an effort to eradicate arbitrary discrimination and negative stereotypes about the performance level of older workers.”).

age discrimination in the workplace. In 1964, Secretary of Labor W. Willard Wirtz investigated age discrimination and uncovered that it varied significantly from other forms of discrimination. Namely, he discovered that age discrimination is usually based upon mistaken, preconceived notions of ability rather than on feelings of hostility and dislike of members of a certain group. This distinction was important enough that the Secretary of Labor advised against extending race and gender antidiscrimination laws to age discrimination.

The ADEA's remedial and procedural provisions originated from the Fair Labor Standards Act ("FLSA"). The ADEA is "something of a hybrid, reflecting, on the one hand, Congress's desire to use an existing statutory scheme [(Title VII)] and a bureaucracy with which employers and employees would be familiar [(the FLSA)] and, on the other hand, its dissatisfaction with some elements of each of the preexisting schemes."

Just as the legislative histories and origins of Title VII differ from the ADEA, so do the underlying purposes of the two statutes. Congress initially passed Title VII to combat race discrimination against African-Americans in the workplace. Title VII condemns all discrimination based

27. See id. at 652 ("[In contrast to other forms of discrimination, employers did not demonstrate animus or intolerance of older workers."); see also supra note 5 and accompanying text.
29. Id.; see also Harvard Note, supra note 12, at 383–84 (distinguishing race discrimination because race has no correlation to ability to perform well at a job but age is inherently related to ability at some point).
30. Leigh A. Van Ostrand, A Close Look at ADEA Mixed-Motives Claims and Gross v. FBL Financial Services, Inc., 78 FORDHAM L. REV. 399, 405 (2009) (explaining that, like the FLSA, the ADEA may be enforced either by the Secretary of Labor or by the victim and that the remedies available are similar to those available under the FLSA); see also 29 U.S.C. § 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b) . . . and 217 of this title, and subsection (c).")
31. Lorillard v. Pons, 434 U.S. 575, 578 (1978). “[T]he prohibitions of the ADEA were derived in haec verba from Title VII.” Id. at 584.
32. Green, supra note 28, at 414 ("Title VII served as the nation’s first legislation requiring employers to make employment decisions about
upon race, color, religion, sex, or national origin.\textsuperscript{33} The ADEA is narrower in scope and was enacted \textquotedblleft to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.\textquotedblright\textsuperscript{34} The ADEA aims to prevent \textquotedblleft arbitrary use of age as a proxy for lack of ability.\textsuperscript{35} Although the ADEA derives its substantive language from Title VII and shares the purpose of eliminating workplace discrimination,\textsuperscript{36} the statutes have considerable differences that become apparent in an analysis of the ADEA\textquotesingle s substantive statutory provisions.

2. Exceptions to the ADEA

Some of the considerable differences between the ADEA and Title VII derive from the exceptions codified in the ADEA.\textsuperscript{37} The ADEA contains two exceptions unavailable in Title VII claims.\textsuperscript{38} First, an employer is not liable for discriminatory employment practices under the ADEA where, \textquotedblleft age is a bona fide occupational qualification \textsuperscript{[\textquotedblright\textquotedblleft BFOQ\textquotedblright\textsuperscript{]}} reasonably necessary to the normal operation of the particular business.\textsuperscript{39} Second, the employer is not acting unlawfully if the \textquotedblleft differentiation is based on reasonable factors other than age \textsuperscript{[\textquotedblright\textquotedblleft RFOA\textquotedblright\textsuperscript{]}}.\textsuperscript{40} By codifying these exceptions, Congress recognized that age can be a legitimate individual strictly based upon their ability, as opposed to protected characteristics such as race or gender.	extsuperscript{33}


35. Lane, supra note 33, at 346 (emphasis added). \textquotedblleft [The ADEA] has both a remedial goal to compensate age discrimination victims and a broad social policy goal to eliminate arbitrary age discrimination in society.\textsuperscript{34} Id. at 344–45.

36. See Green, supra note 28, at 418 (indicating that courts have relied upon Title VII analysis for ADEA claims because of these similarities).

37. See Ostrand, supra note 30, at 406.


39. \textit{Id.} The statute also provides employer defenses if the differentiation is part of a bona fide seniority system or observes the terms of a bona fide employee benefit plan. § 623(f)(2).

40. § 623(f)(1).
consideration by employers in certain instances, while also underlining its concern for arbitrary differentiation of older workers.41

3. The Civil Rights Act of 1991

In 1991, Congress amended the Civil Rights Act of 1964 and broadened the scope of Title VII.42 The amendment (the "1991 Act") codified the ban on disparate impact discrimination "when a facially neutral employment practice adversely impacts one group more harshly than another and cannot be justified by a business need."43 The 1991 Act also transformed Title VII in two other respects. First, the amendment made it unlawful for race, color, religion, sex, or national origin to be a motivating factor for any decision regarding an employment practice, even if the employer considered other factors.44 Second, Congress made it unlawful for employers to consider a protected trait in its decision making process whereby the allegedly discriminatory treatment is prohibited even if the employer can demonstrate that it would have made the same employment decision regardless of the illegitimate factor.45 Congress passed the amendment to punish discriminatory behavior, even if the employer would have made the same decision, to achieve the statute's purpose of prohibiting "'invidious consideration' of race, color, religion, sex or national origin."46

However, Congress remained silent as to whether the 1991 Act applied to the ADEA, leaving the courts to interpret its meaning.47 Some courts concluded that Congress's silence signified its intent to only limit Title VII because Congress could have easily extended it to other types of

41. See Lane, supra note 33, at 346 ("It is equally clear that Congress did not intend the ADEA to provide a general remedy for unemployment among older workers.").
43. See Green, supra note 28, at 421 (distinguishing disparate impact from disparate treatment by not requiring a plaintiff to prove discriminatory motive).
46. See Ostrand, supra note 30, at 415.
47. Bitter, supra note 26, at 674–75.
discrimination. Conversely, other courts applied the 1991 Act to claims brought under the ADEA because of the "consistency presumption," that exists where interpretation of one statute is binding on another statute when similar or identical language is found in both.49

Given the existence of these differing judicial interpretations, an overview of Supreme Court decisions is necessary to evaluate both how the ADEA has evolved in the courts, and what questions remain regarding the applicability of Title VII standards of proof to ADEA claims.

B. Pre-Gross Supreme Court Precedent

In 1973, the Supreme Court set out a burden-shifting framework for Title VII claims in McDonnell Douglas Corp. v. Green.50 Under this analysis, a plaintiff carries the burden of establishing a prima facie case of discrimination.51 To establish a prima facie case, the plaintiff must show:

(i) he is a member of a protected class; (ii) he is competent to perform the job or is performing his duties satisfactorily; (iii) he suffered an adverse employment decision or action; and (iv) the decision or action occurred under circumstances giving rise to an inference of discrimination based on his membership in the protected class.52

After the plaintiff establishes his or her prima facie case, the burden then shifts to the defendant to articulate a "legitimate, nondiscriminatory" reason for the adverse employment decision.53 If the defendant employer can

49. Jamie Darin Prenkert, Bizarre Statutory Stare Decisis, 28 BERKELEY J. EMP. & LAB. L. 217, 234–35 (2007); see also Green, supra note 28, at 418–19 (noting that courts used Title VII as the standard for ADEA claims because of similar statutory construction and purpose); Bitter, supra note 26, at 657 (observing that courts used Lorillard's reasoning to support similar Title VII disparate impact standards in ADEA claims).
51. Id.; see also Green, supra note 28, at 420 ("The significance of the McDonnell Douglas prima facie case is that it 'creates a legally mandatory, rebuttable presumption of unlawful motive. If the defendant remains silent . . . the plaintiff wins.' ").
53. Id.
articulate a nondiscriminatory reason for its actions, the plaintiff is afforded the opportunity to prove the defendant's allegedly nondiscriminatory reason is actually pretext.\footnote{Id. (stating that the plaintiff must prove the defendant's pretext by a preponderance of the evidence).} It is this Title VII framework that some courts have applied to ADEA claims, based upon the similarity of Title VII and the ADEA's statutory language.\footnote{This ADEA interpretation and Title VII framework application is an example of judicial use of the "consistency presumption." See supra note 49 and accompanying text. See, e.g., O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311 (1996) ("We have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it.").}

1. Mixed-Motive Analysis and Price Waterhouse

In a disparate treatment claim,\footnote{"Disparate treatment" discrimination refers to discrimination in cases where the employer had a discriminatory motive or intent for its adverse employment decision. Ann Marie Tracey, Still Crazy After All These Years? The ADEA, the Roberts Court, and Reclaiming Age Discrimination as Differential Treatment, 46 AM. BUS. L.J. 607, 613 (2009).} it is not uncommon for a fact-finder to determine that the employer had both legitimate and illegitimate reasons for its adverse employment decision.\footnote{Green, supra note 28, at 420 ("More often than not, mixed-motive cases only arise when a plaintiff provides direct evidence of the employer's discriminatory behavior; therefore, the McDonnell Douglas burden shifting analysis is inapplicable.").} These cases are referred to as "mixed-motive" cases.\footnote{Id.}

In \textit{Price Waterhouse} v. Hopkins, the Supreme Court set forth the necessary burden-shifting framework in Title VII "mixed-motive" claims.\footnote{Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).} The plurality opinion rejected an interpretation of Title VII's "because of" language to mean "but for" causation.\footnote{Id. at 240 ("To construe the words 'because of' as a colloquial shorthand for 'but-for causation' . . . is to misunderstand them.").} The opinion articulated that in a "mixed motive" case, if a plaintiff can show the discriminatory motive was a "motivating factor" in the employment decision, the burden shifts to defendant to prove that the same decision would have been made regardless of the discriminatory reason.\footnote{Id. at 244-45 (explaining that Title VII attempts to balance employees' rights and employers' freedom of choice).} Thus, an employer will "avoid a finding of liability
only by proving that it would have made the same decision even if it had not allowed [the protected trait] to play such a role."\(^6\)

Yet, in most subsequent cases, courts have applied the Title VII "mixed-motive" framework set out in Justice O'Connor's concurring opinion instead.\(^6\) Justice O'Connor's concurrence has been more widely adopted because her vote was needed for the requisite five votes, and her opinion contained a narrower rationale.\(^6\) Justice O'Connor agreed with the plurality that the burden of persuasion should shift to the employer after the plaintiff has put forth a prima facie case.\(^6\) However, she departed from the plurality's interpretation of Title VII's "because of" language, and concluded that "if a decisional process is 'tainted' by awareness of sex or race in any way, the employer has violated the statute, and Title VII thus commands that the burden shift to the employer to justify its decision."\(^6\) If the employer can justify its decision, then Justice O'Connor proposed that the plaintiff should be required to show "direct evidence" that the impermissible criterion was a "substantial factor" in the employer's decision.\(^6\) The Supreme Court has, thus far, declined to decide whether Justice O'Connor's concurring opinion is binding precedent.\(^6\)

Two years after Price Waterhouse, Congress amended Title VII, with the 1991 Act, and expanded protections for ADEA plaintiffs.\(^6\) Although Congress codified Price

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62. Id.; see also Brod, supra note 42, at 354.
64. Id. (citing Marks v. United States, 430 U.S. 188, 193 (1977)).
66. Id. at 276 ("The plurality thus effectively reads the causation requirement out of [Title VII], and then replaces it with an 'affirmative defense.'").
67. Id. at 276–77; see also Ostrand, supra note 30, at 413 n.95 (explaining that "Justice O'Connor did not define 'direct evidence,' but she provided examples of what did not constitute direct evidence," including "'stray remarks in the workplace,' 'statements by nondecisionmakers [sic], or statements by decisionmakers [sic] unrelated to the decisional process'").
68. Brod, supra note 42, at 354 (quoting Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (2003), which states that the Supreme Court will not address which Price Waterhouse opinion is controlling).
69. See Ostrand, supra note 30, at 416; see also supra notes 42–46 and
Waterhouse’s “motivating factor” mixed-motive framework,\textsuperscript{70} Congress overruled the Supreme Court’s affirmative defense provision, allowing the employer to escape liability if it could prove it would have made the same decision even if it had not considered the protected trait.\textsuperscript{71} The 1991 Act made it unlawful for an employer to have any discriminatory motive.\textsuperscript{72} Even though Congress used the Price Waterhouse plurality’s “motivating factor” language in the 1991 Act, subsequent courts have continued to utilize Justice O’Connor’s “direct evidence” requirement in Title VII discrimination cases.\textsuperscript{73}

2. Direct Evidence Requirement Eliminated?

In 2003, the Supreme Court unanimously eliminated Justice O’Connor’s direct evidence requirement for Title VII claims in Desert Palace v. Costa.\textsuperscript{74} The Court determined that the 1991 Act did not explicitly mention any requirement of a heightened showing of discrimination through direct evidence.\textsuperscript{75} Moreover, the Court refused to interpret Title VII as requiring a showing of direct evidence because Congress explicitly defined “demonstrates” as used in the 1991 Act. Under the 1991 Act, a plaintiff need only “demonstrate” the employer considered an impermissible factor when making its employment decision, a showing that does not require direct evidence.\textsuperscript{76} The Court declined to depart from the “conventional rule of civil litigation” that requires a plaintiff to prove his or her claim through direct or circumstantial

\textsuperscript{70} See supra note 44 and accompanying text.
\textsuperscript{71} 42 U.S.C. § 2000e-2(m) (2006); see also Ostrand, supra note 30, at 416 n.109 (explaining that Title VII’s section 107 language adopted the Price Waterhouse plurality’s “motivating factor” analysis).
\textsuperscript{72} 42 U.S.C. § 2000e-5(g)(2)(B); see also Brod, supra note 42, at 355 (stating that the employee is not entitled to “damages, reinstatement, hiring or promotion” if the employer would have made the same decision); see also Ostrand, supra note 30, at 450–51 (explaining that by providing only limited remedies, Title VII’s goal to eradicate workplace discrimination is met without overburdening employers who would have made the same adverse employment decision).
\textsuperscript{73} Ostrand, supra note 30, at 418.
\textsuperscript{74} Desert Palace, Inc. v. Costa, 539 U.S. 90, 101–02 (2003).
\textsuperscript{75} Id. at 98–99.
\textsuperscript{76} Id. at 99 (indicating that Congress’s failure to specify a heightened showing is significant because other provisions of Title 42 explicitly impose heightened standards).
Thus, Desert Palace does not require a plaintiff to present direct evidence to obtain a Title VII mixed-motive jury instruction. Following Desert Palace, there were clear instructions from the Court on Title VII cases; however, the federal circuits were split with respect to the type of evidence required in non-Title VII mixed-motive cases. Because the Supreme Court relied on the 1991 Act’s amendment of Title VII when it decided Desert Palace, it remained unclear going forward whether it was binding precedent in ADEA mixed-motive cases as a result of Congress’s silence with respect to the 1991 Act’s applicability to claims brought under the ADEA. The Fifth, Seventh, Ninth, Tenth, and District of Columbia Circuits have followed Desert Palace’s holding, and do not require an ADEA plaintiff to make a showing of direct evidence. Conversely, the First, Second, Third, Fourth, Sixth, and Eighth Circuits have continued to follow Justice O’Connor’s concurring opinion in Price Waterhouse, and have required an ADEA plaintiff to show direct evidence to obtain a mixed-motive instruction. Thus, the Supreme Court’s silence with respect to whether Desert Palace applied to ADEA mixed-motive claims has left the lower courts with little guidance as to the appropriate proof structure. Before addressing the Supreme Court’s decision in Gross, it is important to examine how the Court previously decided claims brought under the ADEA.

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77. See id. at 99–100 (noting that direct evidence is often difficult for a plaintiff to obtain where the employer’s mental processes must be revealed).
78. Id. at 101.
79. Brod, supra note 42, at 357 (commenting on the split that emerged with respect to the type of evidence required in non-Title VII mixed-motive cases).
80. See id. at 356–57 (observing that Congress did not extend the 1991 Act to the Americans with Disabilities Act, ADEA, and Title VII retaliation claims).
81. Id. at 357 n.63 (listing Fifth, Seventh, Ninth, Tenth, and District of Columbia Circuit decisions that allowed the plaintiff to present circumstantial or direct evidence).
82. Id. at 357 n.64 (listing First, Second, Third, Fourth, Sixth, and Eighth Circuit decisions noting Price Waterhouse as binding precedent requiring direct evidence).
3. ADEA Supreme Court Precedent

The Supreme Court first suggested that claims brought under the ADEA were evaluated differently from claims brought under Title VII in *Hazen Paper Co. v. Biggins.*

There, a sixty-two-year-old employee was fired a few weeks before his pension vested, and he subsequently brought a claim under the ADEA against his former employer. The Court began the opinion by analyzing the ADEA's purpose—to eradicate age discrimination in the workplace where “[t]he employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.” The Court went on to recognize that if age is not the determinative factor in the employer's decision, no issue of ageist stereotyping exists.

Thus, “a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in [the decision making] process and had a determinative influence on the outcome.”

The Court cautioned against assuming age discrimination merely based upon a company's decision to fire an older employee nearing a vested pension. Disparate treatment does not occur if the employer considers other factors besides age, even if the age factor might be related. Accordingly, the Supreme Court vacated the lower court's

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84. See Green, *supra* note 28, at 423 (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)); see also Burke, *supra* note 23, at 53 (stating that the Supreme Court in *Hazen Paper* indicated in dicta that the burden shifting analysis in the 1991 Act was inapplicable).


86. *Id.* at 611 (explaining how the ADEA was prompted by Congress's concern that older workers were being deprived of employment opportunities based upon inaccurate and stigmatizing stereotypes).

87. *Id.* (“The prohibited stereotype . . . would not have figured in [the employer's] decision, and the attendant stigma would not ensue.”).

88. *Id.* at 610; see also Ostrand, *supra* note 30, at 420 (stating the “played a role/determinative influence” standard is cited in subsequent ADEA cases).

89. *Hazen Paper*, 507 U.S. at 612. (“Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily ‘age based.’”)

90. See Burke, *supra* note 23, at 53–54 (explaining that an ADEA violation does not automatically occur merely because age and number of years of service are correlated). *But see Hazen Paper*, 507 U.S. at 616 (stressing that an ADEA violation could be found if facts indicate the employer knows or recklessly disregards ADEA provisions).
judgment, and remanded the case to ensure that the lower court did not improperly link the employee's age with the time of the pension vesting. More importantly, *Hazen Paper* differentiated ADEA claims from Title VII claims by indicating that disparate impact claims, where the plaintiff can only claim and demonstrate a discriminatory result as opposed to demonstrating discriminatory intent, are not available under the ADEA.

In 2005, the Supreme Court, in *Smith v. City of Jackson*, declared that because the provisions and purposes of the ADEA parallel Title VII, both should be interpreted similarly. In *Smith*, a group of police and public safety officers alleged that salary increases received in 1999 violated the ADEA because the increase was "less generous to officers over the age of [forty] than to younger officers." The Court held that disparate impact claims were not available under the ADEA and thereby narrowed the scope of protection provided by the ADEA in comparison with Title VII, because of textual differences between the statutes. Namely, the ADEA's disparate impact scope is narrower because its RFOA provision allows the employer to consider "reasonable factors other than age" in its decision making process. Furthermore, the Court determined that the employer's use of any non-age factor in its employment practice decisions is placed under a reasonableness standard, despite the availability of other, heightened standards. Thus, the

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92. *Green*, supra note 28, at 426 (explaining that even though Title VII and the ADEA share similar histories and purposes, they are different due to the ADEA's protected class). "Disparate impact [discrimination] occurs when a facially neutral employment practice adversely impacts one group more harshly than another and cannot be justified by a business need. Unlike disparate treatment, a plaintiff need not prove any discriminatory motive when she alleges disparate impact." *Id.* at 421.
94. *Id.* at 230.
95. *Id.* at 240 ("Two textual differences between the ADEA and Title VII make it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under ADEA is narrower than under Title VII.").
96. *Id.*
97. *Id.* at 243 ("[The method] selected [by the defendant] was not unreasonable. Unlike [Title VII's] business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in disparate impact on a protected class, the reasonableness inquiry includes no
disparate impact analysis in ADEA claims is narrower than in Title VII claims because of the ADEA’s RFOA provision and the reasonableness standard applied to the employer’s practice under the ADEA.98

The Supreme Court’s decisions in Hazen Paper and Smith left no clear evidentiary standard for ADEA disparate impact claims.99 Likewise, the circuit court split that arose after Desert Palace left the evidentiary standard for ADEA disparate treatment claims undecided.100 The appropriate legal framework for the ADEA was in desperate need of clarification.

C. Mixed-Motive Instructions Obliterated in ADEA Cases: Gross v. FBL Financial Services, Inc.

In 2008,101 the Supreme Court granted certiorari in Gross v. FBL Financial Services, Inc. to address the circuit court split that had ensued following the decision in Desert Palace.102 The issue presented to the Court was whether a plaintiff needed to present direct evidence of discrimination to obtain a mixed-motive instruction in a non-Title VII discrimination case.103

1. Factual Background and the Lower Court Decisions

Jack Gross worked for FBL Financial Services, Inc. (“FBL”) for seven years before voluntarily leaving the company.104 After being rehired in 1987, FBL promoted Gross numerous times before he reached the position of Claims Administration Director in 2001.105 In 2003, when Gross was fifty-four years old, FBL reassigned Gross to the Claims Project Coordinator position and ultimately replaced

98. See Burke, supra note 23, at 58–59.
100. See supra notes 74–78 and accompanying text.
102. See Gross, 129 S. Ct. at 2348.
103. Id.
104. Id.; see also Ostrand, supra note 30, at 424 (citing the district court opinion).
105. Ostrand, supra note 30, at 424 (citing the district court opinion).
him with a forty-year-old female co-worker. Gross believed FBL demoted him "because of his age," and he sued FBL, alleging a violation of the ADEA.

The district court judge gave the jury a mixed-motive instruction, the jury returned a verdict in Gross's favor, and it awarded him lost compensation. FBL appealed the decision and challenged the jury instructions, arguing that Gross did not present the requisite direct evidence for the mixed-motive instruction. The Eighth Circuit reversed and remanded, holding that the jury had been improperly instructed. The appellate court conceded that Desert Palace abrogated the direct evidence requirement in Title VII cases, but concluded that it did not apply to ADEA cases. Gross filed a petition for a writ of certiorari to resolve whether a plaintiff needed to present direct evidence to obtain this mixed-motive instruction.

2. Majority Holding and its Rationale

The Supreme Court ultimately did not determine the direct evidence issue on appeal. Instead, the Court first examined whether the burden of proof ever shifted to the defendant in a mixed-motive claim under the ADEA. The Court explained that "[t]his Court has never held that [the mixed-motive] burden-shifting framework applies to ADEA claims . . . . Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." Thus,

107. Id. at 2347 (stating that Gross presented evidence at trial to suggest that age was at least a factor in FBL's decision making process, while FBL contended that Gross's reassignment was due to corporate restructuring).
108. Id.
109. Id.
110. Id. at 2348 (stating that the district court incorrectly used Justice O'Connor's "direct evidence" standard in Price Waterhouse despite the Circuit precedent).
111. Ostrand, supra note 30, at 425 n.170 (citing the appellate court decision that cited Price Waterhouse as controlling precedent).
112. See Gross, 129 S. Ct. at 2348.
113. Id.
114. Id.
115. Id. at 2349 ("When conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'").
the Court concluded that a mixed-motive “jury instruction is never proper in an ADEA case.”

The Court’s analysis focused primarily on statutory construction and interpretation. The Court observed that Title VII is “materially different with respect to the relevant burden of persuasion.” The majority opinion declined to follow precedent in Price Waterhouse and Desert Palace because of the textual differences between Title VII and the ADEA. The statutory text of Title VII diverges from the ADEA because Title VII specifically authorizes discrimination claims where the protected trait was a “motivating factor” in the employment decision. Additionally, the Court interpreted Congress’s decision not to explicitly extend the 1991 Act amendment to the ADEA as an intentional act. Thus, the Court decided that the burden-shifting framework was inappropriate for use in ADEA cases, and accordingly, it did not apply the Price Waterhouse or Desert Palace precedents in its ADEA analysis.

3. Justice Stevens’s Dissenting Opinion

In his dissenting opinion, Justice Stevens argued that the Court had “engage[d] in unnecessary lawmaking” by considering issues not on appeal. Justice Stevens contended that the “most natural reading” of the ADEA’s “because of” language prohibits adverse employment decisions motivated wholly or partially by the employee’s

116. Id. at 2346.
117. See, e.g., id. at 2349 (describing Congress’s decision to amend only Title VII and not the ADEA); see also id. at 2350 (focusing on the ADEA’s “because of” textual language and interpreting the term according to Webster’s Dictionary).
118. Id. at 2348.
119. See id. at 2349.
120. Id.
121. Id. (“We cannot ignore Congress’s decision to amend Title VII’s relevant provisions but not make similar changes to the ADEA . . . . [N]egative implications raised by disparate [impact] provisions are strongest’ when the provisions were ‘considered simultaneously when the language raising the implication was inserted.’”).
122. Id. at 2351–52 (arguing that the burden-shifting analysis in Price Waterhouse is difficult for lower courts to apply and that any benefit that might be achieved by extending it to the ADEA is outweighed by the burdens).
123. Id. at 2353 (Stevens, J., dissenting) (pointing out that the Court did not grant certiorari to decide if a mixed-motive instruction is ever appropriate in an ADEA case).
Specifically, Justice Stevens maintained that because the relevant language in both statutes is identical, the majority should not have departed from the preceding interpretation of the "because of" language from the Price Waterhouse case. Thus, Justice Stevens concluded that a plaintiff should not be required to present direct evidence to receive a mixed-motives instruction for claims brought under the ADEA.

D. Proposed Legislation: Protecting Older Workers Against Discrimination Act

In response to Gross's elimination of the availability of mixed-motive jury instructions for ADEA plaintiffs, Congress introduced a bill to overturn the decision—the Protecting Older Workers Against Discrimination Act ("POWADA"). POWADA asserts that because the ADEA contains language that is identical to Title VII, Congress intended the statutes, including the 1991 Act, to be interpreted consistently. The proposed legislation contends that Gross narrowed the ADEA's scope of protection, consequently eliminating the protection Congress intended to provide. If Congress fails to take action, then "victims of age discrimination will find it unduly difficult to prove their claims and victims of other types of discrimination may find their rights and remedies uncertain and unpredictable."

POWADA combats the Gross decision by adding a subsection to the ADEA that creates a finding of liability if an impermissible factor, such as age, was a "motivating factor"

124. Id. at 2353–54 (Stevens, J., dissenting) ("[W]hen 'an employer considers both [the protected trait] and legitimate factors at the time of making a decision, that decision was 'because of' [the protected trait].'").

125. Id. at 2354 (Stevens, J., dissenting) ("[W]e have long recognized that our interpretations of Title VII's language apply 'with equal force in the context of age discrimination, for the substantive provisions of the ADEA were derived in haec verba from Title VII.'").

126. Id. at 2357 (following Desert Palace's holding and declining to follow Justice O'Connor's concurring opinion in Price Waterhouse).


128. See § 2(a)(3) ("The Supreme Court's decision in Gross . . . has eroded this long-held understanding of consistent interpretation and circumvented well-established precedents.").

129. § 2(a)(4).

130. § 2(a)(6).
in an employment practice decision.\textsuperscript{131} Like Title VII, POWADA limits a plaintiff's remedies if the defendant can show it would have taken the same adverse action without considering an impermissible factor.\textsuperscript{132} If a defendant can make out this "same-action" requisite showing, a court may only grant declaratory relief, injunctive relief, and attorneys' fees to the plaintiff.\textsuperscript{133} If the defendant makes the "same-action" showing, a court "shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment."\textsuperscript{134}

Thus, using POWADA, Congress intends "to ensure that the standard of proving unlawful disparate treatment under the [ADEA] and other anti-discrimination . . . laws is no different than the standard for making such a proof under title VII of the Civil Rights Act of 1964, including amendments made by the Civil Rights Act of 1991."\textsuperscript{135} But Congress tempers this intention by providing only limited remedies for a plaintiff if the defendant can prove that it would have taken the same adverse action, regardless of its use of an impermissible factor.\textsuperscript{136}

POWADA did not become law.\textsuperscript{137} The bill was referred to the Subcommittee on Health, Employment, Labor, and Pensions where hearings were held, but the bill did not progress any further before the close of the 111th Congressional session.\textsuperscript{138} The bill may or may not be reintroduced in the next Congressional session.

III. WHAT IS THE APPROPRIATE STANDARD FOR PROVING UNLAWFUL AGE DISCRIMINATION?

The holding in \textit{Gross} shocked the employment law community because of its complete elimination of the mixed-motive instruction that had been commonly used for ADEA cases.\textsuperscript{139} Some scholars suggest that Congress should amend

\begin{itemize}
  \item \textsuperscript{131} § 3 (proposing to extend the 1991 Act remedies to the ADEA).
  \item \textsuperscript{132} See generally § 3(g)(1)(A).
  \item \textsuperscript{133} § 3(g)(2)(A).
  \item \textsuperscript{134} § 3(g)(2)(B).
  \item \textsuperscript{135} § 2(b).
  \item \textsuperscript{136} § 3.
  \item \textsuperscript{137} See supra note 18.
  \item \textsuperscript{138} See id.
  \item \textsuperscript{139} See, e.g., Ostrand, supra note 30, at 438–39 (citing sources indicating that businesses applauded \textit{Gross}, and that the decision may have impacted
the ADEA to broaden the scope of the ADEA's protection of older workers, in a similar manner to POWADA. However, while passage of the proposed legislation seems to be the next logical move to broaden the protection for older workers, it is important to explore the positive effects that resulted from the Gross decision when it held "but for" causation to be the appropriate standard in ADEA cases. By considering the benefits of Gross as well as the pitfalls, lawyers, scholars, and lawmakers can be wholly informed, and better able to determine whether Gross's "but for" causation or the post-1991 Title VII mixed-motive instruction is a better outcome for ADEA litigation.

IV. RECONCILING GROSS AND PROPER ADEA CAUSAL FRAMEWORK

A. The Differences Between the ADEA and Title VII Overcome the Statutes' Similarities

Title VII and the ADEA were both enacted to eradicate discrimination in the workplace. Similarly, because the ADEA and Title VII use identical language, courts have traditionally relied on precedent developed in Title VII cases for guidance on how to properly analyze claims arising under the ADEA. Nevertheless, there are some significant distinctions between the statutes that should not be overlooked.

1. The ADEA and Title VII Should Be Interpreted Differently Because of Their Distinct Protected Classes

The differences between the ADEA and Title VII's policies, congressional purposes, and substantive statutory provisions outweigh the fact that both statutes use nearly whether plaintiffs can file suits under the ADEA at all).

140. See, e.g., Tracey, supra note 56, at 661 (arguing Congress should amend the ADEA to permit mixed-motive instructions); see also Corbett, supra note 83, at 108–09 (contending that Congress should adopt the mixed-motive structure for all discrimination cases); see also Ostrand, supra note 30, at 446 (claiming that Congress should amend the ADEA to be consistent with Title VII).

141. See Corbett, supra note 83, at 108; see also Tracey, supra note 56, at 659–60 (arguing that Gross makes it difficult for plaintiffs to claim ADEA violations except in blatant cases).

142. Green, supra note 28, at 418.

143. Id.
identical language. The different policy considerations stem from the way in which the protected classes are defined.\textsuperscript{144} Age is not an "immutable characteristic," but it is a characteristic that changes naturally and eventually as a person grows older.\textsuperscript{145} Basically, "age discrimination differs from discrimination based upon race or sex, because age, the defining class factor, is a continuum."\textsuperscript{146}

Courts have treated age and other forms of discrimination in completely different ways, based upon the mutability of age and the proper standard of review for age classifications.\textsuperscript{147} But some scholars and courts argue that the statutes should be treated similarly because both were intended to combat employment discrimination as a whole.\textsuperscript{148} The Court in \textit{Smith v. City of Jackson}, however, recognized that disparate impact claims under the ADEA should be interpreted more narrowly than Title VII claims because age is often relevant to one's ability to perform specific types of work, unlike Title VII's protected traits.\textsuperscript{149}

2. Policy Differences Dictate Separate Interpretations

The ADEA and Title VII were enacted to address different concerns. In \textit{Hazen Paper}, the Court distinguished age discrimination from other forms of discrimination because it was not founded upon general feelings of hostility but rather inaccurate misconceptions with respect to an individual's capabilities.\textsuperscript{150} Accordingly, because Title VII's protected characteristics lack any relation to ability, Title VII's broad scope—protecting workers from the most subtle and subconscious forms of discrimination—is justified.\textsuperscript{151} One

\begin{itemize}
  \item \textsuperscript{144} Id. at 425.
  \item \textsuperscript{145} Id. ("Inevitably, it is this factor that will cause every employee, if he or she lives long enough, to become an economic liability to his or her employer.").
  \item \textsuperscript{146} Id. (distinguishing Title VII's distinct and concrete characteristics as readily identifiable).
  \item \textsuperscript{147} See Bitter, supra note 26, at 659–60 (reasoning that older persons have not experienced a "history of purposeful unequal treatment" or other stereotypical negatives untrue of their abilities). Also, the Supreme Court has held that rational basis is the appropriate standard of scrutiny for age classifications. Id.
  \item \textsuperscript{148} Id. at 660 (citing McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995) and Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979)).
  \item \textsuperscript{149} Smith v. City of Jackson, 544 U.S. 228, 236–37 (2005).
  \item \textsuperscript{151} See Bitter, supra note 26, at 676 (analyzing the differences between age
\end{itemize}
cannot make the same argument for age discrimination, however, because at some point, age is inherently related to the ability to perform particular tasks.  

3. The Statutes' Unique Substantive Provisions Justify Individual Analyses

Certain statutory provisions in both the ADEA and Title VII further distinguish the two statutes, and indicate that they should not be interpreted similarly. Most notably, when Congress failed to extend the 1991 Act to the ADEA, it did so with full awareness that ADEA claims were commonly litigated under the same framework as Title VII claims. But some commentators argue that Congress's silence regarding the applicability of the 1991 Act to ADEA claims meant Congress intended the courts to resolve the issue. This argument overlooks the ADEA's two substantive exceptions that allow employers to consider age in employment decisions. Title VII has no similar exceptions that permit employers to consider its protected traits in any situation.

Another substantial difference between the ADEA and Title VII is visible upon application of the ADEA's RFOA provision. Under this provision, employers do not violate the ADEA if the employment decision was "based on reasonable factors other than age." Conversely, employers can escape liability under Title VII if they can prove a "business necessity." Because something that is "reasonable" is not always "necessary" for business

152. Id. ("In addition, disparate impact theory seeks to redress the cumulative effects of past discrimination. However, there is not an extensive history of discrimination against older persons, and thus the disparate impact model cannot be automatically applied to the ADEA.").

153. Id. at 674 ("[Congress] obviously knew that courts consistently interpreted the ADEA and Title VII in haec verba, and therefore, Congress arguably drafted the amendment to pertain only to Title VII.").


155. See supra notes 37-41 and accompanying text.


158. See id.

operations, employers are given more leeway in terms of making employment decisions under the ADEA than under Title VII. The Supreme Court recognized that the scope of the disparate impact liability under the ADEA is narrower than under Title VII because the employer need only prove the non-age factor was reasonable. Unlike in Title VII cases, the employer does not have to meet the higher standard and show that the employment practice decision was a "business necessity."

B. Mixed-Motive Instructions Are Not So Instructive After All

The Court's ruling in Gross effectively eliminated the availability of mixed-motive instructions for ADEA cases. This doctrinal step away from Title VII allows for more clarity and consistency as to the appropriate causal framework for ADEA cases, and it resolved the circuit split with respect to the direct or circumstantial evidence requirement.

1. The ADEA Does Not Incorporate a Clear Mixed-Motive Standard

The "consistency presumption" of the ADEA's "because of" language often dictated how courts applied the McDonnell Douglas and Price Waterhouse burden-shifting frameworks to ADEA cases. Still, it remains unclear whether mixed-motive instructions can easily incorporate the distinct aspects of the ADEA in the first place.

160. Prenkert, supra note 49, at 246 (explaining that the employer must prove Title VII's "business necessity" defense while the ADEA's RFOA provision provides a safe harbor).

161. Smith v. City of Jackson, 544 U.S. 228, 239 (2005) ("[I]n cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'").

162. See id.


164. See Prenkert, supra note 48, at 562 ("The distinction between direct and circumstantial evidence serves no good purpose and only confuses the courts.").

165. See generally id. at 542-47 (explaining that courts took a restrictive view of the 1991 Act and continued to preserve Justice O'Connor's Price Waterhouse direct evidence requirement).

166. Id. at 548-49 (stating that courts have struggled distinguishing the McDonnell Douglas and Price Waterhouse frameworks and also with incorporating the ADEA's RFOA provision).
The causal standard language used in the burden-shifting framework of mixed-motive jury instructions is inconsistent with the Supreme Court's causal standard of proof language as set out in *Hazen Paper*. According to *Hazen Paper*, the plaintiff must prove the protected trait actually played a role in the employment decision and had a determinative influence on the outcome. Conversely, *Price Waterhouse* and the 1991 Act require that the plaintiff demonstrate that a protected trait was a "motivating factor" in the adverse employment decision. Thus, the "played a role/determinative influence" language in *Hazen Paper* creates a higher standard than the "motivating factor" language in *Price Waterhouse* and the 1991 Act.

Even though most courts that have adjudicated ADEA claims have applied some form of mixed-motive analysis, the application of the specific type of burden shifting framework has not been uniform. Because Congress failed to explicitly extend the 1991 Act to the ADEA, courts continued to interpret the ADEA in conformity with the pre-1991 *Price Waterhouse* framework. Thus, the resulting "mixed-motive mess" has left courts without a clear standard for adjudicating ADEA claims.

2. A "Motivating Factor" Should Not Matter

Another impractical feature of the availability of mixed-motive jury instructions, is the caveat that this framework still punishes an employer if the protected trait was a

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167. *Id.* at 549; see also *supra* notes 59–62 and accompanying text.
168. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("Whatever the employer's decisionmaking [sic] process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.").
169. See *supra* notes 59–62, 69–73 and accompanying text.
171. See *id*.
172. See *id.* at 550 (citing *Mereish v. Walker*, 359 F.3d 330, 340 (4th Cir. 2004)).
173. Professor Prenkert refers to the inconsistent application of the mixed-motives framework in disparate treatment law claims outside of Title VII as the "mixed-motives mess." *Id.* at 547.
174. See *id.* at 547 ("The 1991 Act's motivating-factor/same-decision framework cannot be the uniform, unifying force that it might be, because the courts continue to adhere to the fragmented pre-1991 setup outside the Title VII context.").
"motivating factor" in its decision making process.175 Before the 1991 Act, an employer was not liable under Title VII if it could prove it would have fired the employee regardless of the protected trait.176 However, Congress's amendment to Title VII allows for limited remedies if the protected characteristic was a "motivating factor" in order to achieve Title VII's goal of eradicating all "invidious consideration" of race, color, national origin, sex, or religion.177 Even if the above reason rightfully justifies the "motivating factor" caveat, the same reason cannot easily be extended to the ADEA because Title VII and the ADEA's purposes are not identical.178

Furthermore, if the employer could prove it would have made the same employment decision regardless of the illegitimate reason, one must wonder why it should matter whether the employer even considered the illegitimate reason.179 One often overlooked concern is the impact that expanding ADEA protection would have on the competitive employment market, specifically that the presence of older employees in the workplace could prove detrimental to the employment market.180

Moreover, the ADEA's RFOA provision, as compared to Title VII's higher "business necessity" standard, exemplifies that disparate impact claims are meant to be narrower under the ADEA than Title VII.181 If the employer can prove its decision was based upon a "reasonable factor other than age,"

175. See supra notes 69–73 and accompanying text.
177. See supra note 44–46 and accompanying text.
178. See Bitter, supra note 26, at 674–75 (describing the ADEA's legislative history, focusing on the fundamental differences between age discrimination and other forms of discrimination); see also Green, supra note 28, at 414–16 (noting that a purpose of the ADEA is to prohibit arbitrary age discrimination); supra Part IV.A.2.
179. See Price Waterhouse, 490 U.S. at 282 (Kennedy, J., dissenting) ("Our decisions confirm that Title VII is not concerned with the mere presence of impermissible motives; it is directed to employment decisions that result from those motives.").
180. Tracey, supra note 56, at 658 (noting that broadening the ADEA's scope would unfairly prolong the presence of older workers in the workplace); see also Price Waterhouse, 490 U.S. at 242 ("The other important aspect of [Title VII] is its preservation of an employer's remaining freedom of choice.").
181. See Corbett, supra note 83, at 99 (claiming that Congress wrongly presumed that these terms obtained adequate pre-Wards Cove definitions); see also Prenkert, supra note 49, at 232 (stating that the new terms replaced the more lenient standard laid out on Wards Cove).
even if age was a "motivating factor," the employer has technically still not violated the ADEA.\footnote{182} Thus, unless Congress agrees that ADEA cases should be easier to win than Title VII cases, any "motivating factor" language should be inapplicable to claims brought under the ADEA.\footnote{183}

C. Gross's "But for" Causation is Workable, While the Mixed-Motive Standard Remains Difficult for Courts to Apply

The Supreme Court's ruling in Gross, which selected a single causal framework from among the conflicting ADEA precedents, depended largely upon statutory interpretation.\footnote{184} Yet, the Court mentioned in dicta that "it has become evident in the years since [Price Waterhouse] was decided that its burden-shifting framework is difficult to apply . . . . [I]n cases tried to a jury, courts have found it particularly difficult to craft an instruction to explain its burden-shifting framework."\footnote{185} Mixed-motive cases allow plaintiffs to escape the burden of proving a discriminatory motive and instead place that burden on the defendant to prove the discrimination had no impact on its decision making process.\footnote{186} Once the burden shifts to the employer, it has the difficult challenge of proving a negative, and defending a decision by demonstrating that it was not the result of age discrimination.\footnote{187} Thus, the shifting standard of proof inherent in mixed-motive analyses presents practical problems for courts.\footnote{188}

Conversely, under the "but for" causal standard, the plaintiff retains the burden of proof at all times to show that

\begin{footnotes}
\footnotetext{182. Smith v. City of Jackson, 544 U.S. 228, 253 (2005).}
\footnotetext{183. See Corbett, supra note 83, at 112 (arguing Title VII and ADEA disparate impact claims should be interpreted similarly for simplicity and "nondiscrimination").}
\footnotetext{184. See Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2348-51 (2009).}
\footnotetext{185. Id. at 2352.}
\footnotetext{186. Paul J. Gudel, Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law, 70 TEX. L. REV. 17, 106 (1991) ("Mixed motives analysis is generally used by courts as an evasion device in factually difficult discrimination cases, as a method of simplifying these cases.").}
\footnotetext{188. See supra notes 186–87 and accompanying text.}
\end{footnotes}
his or her age was the "but for" cause of the adverse employment action.\textsuperscript{189} The burden of persuasion never shifts to the defendant.\textsuperscript{190} This alleged "lower standard" for defendants in ADEA cases coincides with Congress's recognition that age and Title VII's protected classes should not be afforded the same scope of protection.\textsuperscript{191} Even though the "but for" causal framework is a seemingly higher bar for ADEA plaintiffs than the mixed-motive "motivating factor" requirement, it provides a clearer, bright line test that does not interfere with the ADEA's remedial purpose.\textsuperscript{192}

\textbf{D. Extending Mixed-Motive Instructions to the ADEA is Not Doctrinally Sound and Will Not Ease Confusion in the Courts}

Many commentators have urged Congress to repudiate \textit{Gross} and pass legislation to extend the 1991 Act to the ADEA.\textsuperscript{193} These scholars argue that Congress is attempting to prohibit all forms of discrimination in the workplace and that the decision in \textit{Gross} undermines the ADEA's deterrent purpose.\textsuperscript{194} Moreover, they argue that it will be more difficult for ADEA plaintiffs to prove their case with \textit{Gross}'s higher "but for" standard since the defendant employer typically has most of the evidence.\textsuperscript{195} Another criticism of the \textit{Gross} decision is that juries will be faced with the challenge of separating out two sets of instructions if a plaintiff claims violations of both Title VII and the ADEA.\textsuperscript{196}

\begin{itemize}
  \item \textsuperscript{189} \textit{Gross}, 129 S. Ct. at 2352.
  \item \textsuperscript{190} See Ostrand, supra note 30, at 439 (stating that now employers only need to show that other factors affected their decision).
  \item \textsuperscript{191} See supra notes 175–78 and accompanying text.
  \item \textsuperscript{192} See generally Gudel, supra note 186, at 107 (commenting that although the "but for" causation is difficult to establish, it does not interfere with Title VII's remedial purpose).
  \item \textsuperscript{193} See, e.g., Ostrand, supra note 30, at 446; see also Corbett, supra note 83, at 108–09.
  \item \textsuperscript{194} See, e.g., Ostrand, supra note 30, at 447 ("Although age discrimination is not necessarily invidious, it is discrimination nonetheless and should be eradicated from the workplace.").
  \item \textsuperscript{195} Id. at 440; see also Martin J. Katz, \textit{Gross Disunity}, 114 PENN ST. L. REV. 857, 882–83 (2010) (mentioning that many plaintiffs do not get past summary judgment motions).
  \item \textsuperscript{196} Ostrand, supra note 30, at 440 (presenting two standards to a jury will "amplify] the difficulty" instead of easing it (quoting Darrell VanDeusen, \textit{Darrell VanDeusen on New Standards in Age Discrimination Litigation}: Gross v. \textit{FBL} Fin. Services, Inc., 2009 EMERGING ISSUES 4021 (Jul. 15, 2009), available at http://www.lexisnexis.com/Community/estate-
Yet the flaw in most of these criticisms is that the purpose of the ADEA is not to eradicate all forms of age discrimination in the workplace, but only arbitrary age discrimination.197 Because Title VII's remedial purpose is to eradicate all forms of subtle discrimination based on Title VII's protected classes, even considering the protected trait constitutes a violation of the statute.198 Nonetheless, the application of mixed-motive instructions to ADEA cases has created an improper precedent, and it has confused the purpose of the remedial statute.199 When reductions in the workforce are necessary during recessions, it is important to allow employers to make legitimate, non-discriminatory decisions based upon criteria that are naturally correlated to age.200 Therefore, Gross's repudiation of the mixed-motive instruction to ADEA cases finally affords the ADEA its unique and separate standard from Title VII, corresponding with its purpose and allowing courts to discern the appropriate precedent for ADEA cases.201

V. GROSS GOT IT RIGHT

This comment proposes that expanding the ADEA's protection by passing the Protecting Older Workers Against Discrimination Act, or any other similar Act in the future, does not comport with the ADEA's intended purpose and scope. Instead, Congress should clarify that Gross's "but for" causation standard applies only to ADEA cases, and that it has no effect on Title VII legislation. By limiting "but for" causation to the ADEA, there would be no confusion as to the appropriate precedent for either a claim brought under Title VII or the ADEA, and Congress would further differentiate the two statutes. Moreover, Congress would be formally acknowledging the substantial distinctions between Title VII

197. See supra notes 32–36 and accompanying text.
198. See supra notes 156–58 and accompanying text.
199. See Prenkert, supra note 48, at 560–62.
200. See Lemley, supra note 187.
201. See Bitter, supra note 26, at 679–81 ("[T]he legislative findings would assert that . . . by allowing for an employer to be held liable even if a non-age factor motivates its employment practice, [it has] undermined Congress's original intent in passing the ADEA.").
and the ADEA through the separate causal standards. Congress should not extend the 1991 Act to the ADEA because doing so would improperly expand the ADEA’s protection to include all forms of age discrimination and thus would invalidate the ADEA’s original RFOA provision. Even if the “but for” causal standard makes it harder for ADEA plaintiffs to prove age discrimination, the courts will be properly adjudicating the claims in accordance with the statute’s true purpose and congressional intent. Confusion in the courts will decrease and varying statutory interpretations will no longer yield conflicting judicial outcomes.

If Congress revives the POWADA in the future, it should be rewritten to codify the “but-for” standard of causation for ADEA cases and to allow for plaintiffs to recover damages. That way, employers will be deterred from committing arbitrary age discrimination, but will be allowed to make legitimate, non-discriminatory decisions based upon factors that are naturally correlated to age.

VI. CONCLUSION

Congress should not codify the mixed motive standard of proof for causation and extend the ADEA’s protections. Even though the ADEA and Title VII share similar roots and statutory language, their fundamental purposes, substantive provisions, and underlying congressional intentions remain distinct. By formally recognizing the differences between Title VII and the ADEA, Congress will finally set the correct tone for interpreting the ADEA and will thereby make precedent clearer and easier for the courts to follow. This clarification will in turn help streamline ADEA cases and alleviate confusion regarding the proper standard of proof for causation.