

**UNIFICATION OF STANDARDS IN
DISCRIMINATION LAW: THE
CONUNDRUM OF CAUSATION AND
REASONABLE ACCOMMODATION UNDER
THE ADA**

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INTRODUCTION	68
I. CAUSATION STANDARDS UNDER <i>PRICE WATERHOUSE</i> AND THE CIVIL RIGHTS ACT OF 1991	76
II. <i>GROSS V. FBL FINANCIAL SERVICES, INC.’S</i> IMPACT ON UNIFORMITY	81
III. MIXED-MOTIVE CLAIMS UNDER THE ADA?	89
A. <i>The ADA of 1990 Contemplated</i> <i>Mixed-Motive Claims</i>	90
B. <i>Protecting Older Workers Against</i> <i>Discrimination Act</i>	97
IV. CAUSATION AND REASONABLE ACCOMMODATION	100
A. <i>Causation as a Prima Facie Element</i> <i>of Title I Accommodation Claims</i>	101
B. <i>Justice Scalia’s Dissent in US Airways, Inc.</i> <i>v. Barnett: But-for Causation Necessary</i> <i>in Reasonable Accommodation Cases</i>	107
C. <i>“Necessity-Causality” Under Title II</i>	111
V. BUT-FOR CAUSATION AND REASSIGNMENT TO A VACANT POSITION	119
CONCLUSION.....	126

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INTRODUCTION

At the heart of all antidiscrimination law lies the issue of causation. The plaintiff must prove that an adverse action occurred “because of” a protected characteristic, such as race, sex, age, or disability.¹ After the Supreme Court’s 1989 decision in *Price Waterhouse v. Hopkins*, the law seemed fairly established that discrimination claims involving a mixture of legitimate and illegitimate motives generally required something less than prima facie proof of “but-for” causation in order to shift the burden to the employer.² The Supreme Court altered this landscape with its decision in *Gross v. FBL Financial Services, Inc.*, concluding that when a statute requires discrimination “because of” a protected characteristic, the “ordinary default rule” is that the plaintiff must indeed show that but for the protected characteristic, the employer would not have taken the adverse action.³ No burden of proof shifts to the employer.⁴

The result of *Gross* has been to create disparate standards of causation among related federal antidiscrimination statutes.⁵ The Court had previously suggested that statutes such as Title VII of the Civil Rights Act of 1964,⁶ the Age Discrimination in Employment Act (ADEA),⁷ and the Americans with Disabilities Act (ADA) of 1990⁸ should be construed in a similar fashion when Congress used similar language in each statute.⁹ Each of these

¹ See, e.g., 29 U.S.C. § 623(a)(1) (2006) (prohibiting discrimination “because of” age); 42 U.S.C. § 2000e-2(a)(1) (2006) (prohibiting discrimination “because of” race, color, religion, sex, or national origin). The Americans with Disabilities Act, prior to amendment in 2008, similarly prohibited discrimination “because of the disability” of an otherwise qualified individual. See 42 U.S.C. § 12112(a) (2006).

² *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989).

³ *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009).

⁴ *Id.* at 180.

⁵ See Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857, 857-58 (2010) (noting the Court in *Gross* “completely rejected” the ideal of uniformity it had embraced for many years prior).

⁶ 42 U.S.C. §§ 2000e-1 to -17 (2006).

⁷ 29 U.S.C. §§ 621-34 (2006).

⁸ 42 U.S.C. §§ 12101-213 (2006).

⁹ See *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233 (2005) (citing *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973) (per curiam)) (reasoning in ADEA case that the Court “begin[s] with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the

statutes had similar causation language in their basic prohibition: Discrimination must be “because of” a protected characteristic.¹⁰ Title VII was unaffected by *Gross*, however, because the Civil Rights Act of 1991 amended that statute to make clear that it is governed by the “motivating factor” causation standard, which allows the burden shifting on something less than proof of strict but-for causation.¹¹ The ADEA, by contrast, has no further definition of its causation standard and is governed by *Gross*’s but-for causation standard.¹² Any other federal civil rights law that is premised on showing an action was taken “because of” a prohibited reason, including the ADA, would seemingly also be subject to that same standard.¹³ The parameters of this but-for standard are unclear, with some suggesting it will require proof of sole causation.¹⁴

same meaning in both statutes”); *see also* *Bragdon v. Abbott*, 524 U.S. 624, 626 (1998) (“When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, Congress’ intent to incorporate such interpretations as well.”).

¹⁰ *See* 42 U.S.C. § 2000e-2(a)(1) (2006) (prohibiting discriminated “because of” race, color, religion, sex, or national origin under Title VII); 29 U.S.C. § 623(a)(1) (2006) (prohibiting discrimination “because of” age under ADEA). The ADA originally prohibited discrimination “because of” disability. Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 331 (codified at 42 U.S.C. § 12112(a) (2006)). The statute was amended in 2008 to prohibit discrimination “on the basis of disability.” 42 U.S.C. § 12112(a) (Supp. III 2009). It does not appear that Congress intended this change to establish a standard different than that applicable under Title VII. *See infra* notes 140-44 and accompanying text.

¹¹ *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(m) (2006)) (providing that violation of the Act is established when plaintiff demonstrates prohibited characteristic was a “motivating factor” in adverse decision); *Id.* § 107(b)(3), 105 Stat. at 1075-76 (codified at 42 U.S.C. § 2000e-5(g)(2)(B) (2006)) (providing that once plaintiff demonstrates a motivating factor, the burden shifts to employer to demonstrate it would have taken the “same action” absent consideration of the protected characteristic).

¹² *See* *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009).

¹³ *See* *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961 (7th Cir. 2010) (in ADA cases, reading *Gross* as “suggest[ing] that when another anti-discrimination statute lacks comparable language [to Title VII’s motivating factor provisions], a mixed-motive claim will not be viable under that statute”); *see also* *Katz*, *supra* note 5, at 859 (“*Gross*’s reasoning suggests that the Court is likely to apply this . . . standard to all employment discrimination statutes other than the part of Title VII that was amended by the Civil Rights Act of 1991.”).

¹⁴ *See, e.g.*, Michael Foreman, *Gross v. FBL Financial Services—Oh so Gross!*, 40 U. MEM. L. REV. 681, 692-93 (2010) (noting lower courts that have already interpreted *Gross* to require plaintiffs prove age was the sole cause of the employer’s adverse

In reaction to *Gross*, sponsors in both houses of Congress introduced a statute entitled the Protecting Older Workers Against Discrimination Act (POWADA).¹⁵ POWADA would have reversed *Gross* and established a new default rule, namely that unless Congress indicates otherwise, “because of” causation requires only proof that a prohibited factor was a motivating factor in the defendant’s decision.¹⁶ POWADA explicitly provided that it would extend to any claims for intentional discrimination under any federal statute using the “because of” standard.¹⁷ The net effect of POWADA would have been to bring the law back to the state of unity in mixed-motive claims many assumed had existed prior to *Gross*.¹⁸ Despite having a substantial amount of support, POWADA did not make it out of subcommittee, perhaps a victim of the 2010 midterm election.¹⁹

Commentators have made several arguments as to why unification of causation standards within discrimination law is important to efficient and evenhanded application of the law.²⁰

action). If *Gross* means that courts will apply the *McDonnell Douglas* pretext model for proving disparate treatment claims, commentators have disagreed whether that model requires proof of sole causation. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Compare William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549, 1568 (2005) (arguing that the *McDonnell Douglas* pretext model may more accurately be seen as requiring proof of sole causation), with Michael C. Harper, *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 76-77 (2010) (arguing that the *McDonnell Douglas* analysis rejects sole causation).

¹⁵ H.R. 3721, 111th Cong. § 1 (2009); S. 1756, 111th Cong. § 1 (2009).

¹⁶ H.R. 3721 at § 3; S. 1756 at § 3.

¹⁷ H.R. 3721 at § 3; S. 1756 at § 3.

¹⁸ See Brian S. Clarke, *Grossly Restricted Pleading: Twombly/Iqbal, Gross, and Cannibalistic Facts in Compound Employment Discrimination Claims*, 2010 UTAH L. REV. 1101, 1136-37 (2010) (suggesting that POWADA would “bring consistency to employment discrimination law by applying Title VII’s mixed-motive framework to other antidiscrimination statutes”).

¹⁹ In the House of Representatives, POWADA had one sponsor and forty-five co-sponsors when it was referred to Committee, and likewise one sponsor and twenty-four co-sponsors in the Senate. See *H.R. 3721 (111th): Protecting Older Workers Against Discrimination Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/111/hr3721> (last visited Dec. 14, 2012); *S. 1756 (111th): Protecting Older Workers Against Discrimination Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/111/s1756> (last visited Dec. 14, 2012).

²⁰ See Katz, *supra* note 5, at 867-68; see also *infra* notes 95-102 and accompanying text.

For the ADA, unity plays an additional role. Courts have been slow to embrace disability as a matter of civil rights, instead taking more of a welfare-benefits approach to interpreting the rights granted under the Act.²¹ The ADA's protected class was construed extremely narrowly by the Supreme Court in several employment discrimination cases on the premise that Congress intended to reach only a select group of individuals as having qualifying disabilities.²² Congress passed the ADA Amendments Act of 2008 (ADAAA) to overturn that narrow interpretation.²³ Congress also amended the basic causation language in Title I of the statute, changing "because of" to "on the basis of" disability,²⁴ and the legislative history indicates the rationale for this was "to mirror the structure of nondiscrimination protection provision [sic] in Title VII of the Civil Rights Act of 1964."²⁵ In general, it enhances the ADA as an effective rights-protecting statute for it to be understood as imposing standards similar to Title VII.²⁶

But there may be pitfalls to unifying disability discrimination standards with other antidiscrimination laws. Courts may fail to make important distinctions between the ADA and statutes like Title VII. Specifically, *Gross* may lay the groundwork for a renewed effort to inject additional causation elements into the ADA's unique reasonable-accommodation mandate. A majority of the Court seemingly rejected doing so in *US Airways, Inc. v.*

²¹ See Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 193 (2010) ("Many cases suggest that courts tend to view the ADA through the framework of welfare benefits rather than the framework of civil rights.").

²² See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002) (asserting that the definition of disability must be "interpreted strictly to create a demanding standard for qualifying as disabled"); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488 (1999) (concluding that corrective measures, such as medications, must be considered when determining whether an individual's impairment substantially limits a major life activity).

²³ ADA Amendments Act of 2008, Pub. L. No. 110-325, §§ 2(b)(2)-(5), 122 Stat. 3553, 3554 (2008) (stating the congressional purposes of ADAAA).

²⁴ *Id.* § 5(a)(1), 122 Stat. at 3557 (codified at 42 U.S.C. § 12112(a) (Supp. III 2009)).

²⁵ 154 CONG. REC. S8347 (statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments of 2008).

²⁶ See Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 863 (2004) ("[I]f the ADA is understood as lying outside of our society's ongoing antidiscrimination project, the Act may be deprived of the moral authority that antidiscrimination laws (while not wholly uncontroversial) tend to enjoy." (footnote omitted)).

Barnett, refusing to adopt Justice Scalia's arguments that plaintiffs should have to show but for their disability, they would not have been denied the requested accommodation.²⁷ *Gross* demonstrates, however, that no precedent is necessarily safe, especially if there is a backdoor through which those with countervailing views can slip. A statute like POWADA would not on its face preclude this backdoor reversal from occurring, and there are already cases where causation issues have predominated over reasonable accommodation analysis.²⁸

I have previously written about how causation has been misapplied to require plaintiffs establish a causal relationship between the major life activity they allege to have been substantially limited as part of their proof of a covered disability and the reasonable accommodation they seek.²⁹ The ADA in fact has no such requirement, instead requiring employers to accommodate the "known physical or mental limitations" of the covered plaintiff.³⁰ While this misreading of the statute might be mitigated under the ADAAA because plaintiffs no longer have to stretch to find a major life activity they can prove is substantially limited,³¹ it nonetheless demonstrates the traditional notions of causation some courts insist on inserting into ADA accommodation analysis.

²⁷ See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 398 (2002) (rejecting the argument that accommodations that amount to preferences are not required under the ADA). Justice Scalia would have dismissed the plaintiff's claims because he failed to show that he was excluded from the job in question because of a "disability-related obstacle" that would not have been an obstacle but for his disability. See *id.* at 413 (Scalia, J., dissenting).

²⁸ See *infra* Part IV.A.

²⁹ See generally Cheryl L. Anderson, *What Is "Because of the Disability" Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 323 (2006).

³⁰ See 42 U.S.C. § 12112(b)(5)(A) (2006) (defining "discriminate" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee").

³¹ See Stephen F. Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the "Regarded as" Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 1016 (After ADAAA, "some individuals will be able to establish coverage under the Act without describing the activities in which they are limited so long as they have a serious medical condition that results in a substantial limitation on a major bodily function.").

In the post-*Gross* regime, causation could similarly creep into another aspect of reasonable accommodation analysis—as a requirement that plaintiffs show their disability is a but-for cause of their need for the accommodation. There is case law rejecting ADA Title I employment claims because the plaintiffs could not show they needed the requested accommodations in order to do their job.³² The but-for test could take it a step further and require plaintiffs to show their disability is the but-for reason the accommodation itself is necessary. Although not directly the issue decided in *Gross*, such a rule may be a fairly simple extension of *Gross*'s understanding of the default rules of causation. At least in the Seventh Circuit, a similar but-for standard has already crept into ADA Title II analysis.³³ The Seventh Circuit requires Title II plaintiffs establish that their need for accommodation is based on something that is not a characteristic shared with the general public.³⁴ The leap from Title II to Title I for applying such a standard may not be too large.³⁵

Why might courts make this leap? As has been extensively discussed in the literature, reasonable accommodation law has an uneasy fit into our understanding of discrimination law.³⁶ Reasonable accommodation claims do not require proof of intent to discriminate.³⁷ They also do not require proof of an adverse effect

³² See, e.g., *Nichols v. Unison Indus., Inc.*, No. 99-C-50194, 2001 WL 849528, at *8 (N.D. Ill. July 24, 2001) (dismissing ADA claim because plaintiff failed to show that he needed the requested accommodation in order to be able to perform his job).

³³ Title II prohibits disability discrimination in the services, programs, and activities of public entities. See 42 U.S.C. § 12132 (2006).

³⁴ See *Wisc. Cmty. Servs., Inc., v. City of Milwaukee*, 465 F.3d 737, 754 (7th Cir. 2006).

³⁵ As discussed in Part IV.C below, the Seventh Circuit's Title II analysis mirrors that urged by Justice Scalia in his *Barnett* dissent.

³⁶ See, e.g., Crossley, *supra* note 26, at 867-75 (summarizing the literature asserting distinctions between the ADA and other civil rights statutes based on the accommodation mandate); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 631 (2004) (describing the Supreme Court's ADA rulings as reflecting justices who "subscribe to the notion that disability-based rights differ in kind from more traditional civil rights, are contingent on humanitarian concerns rather than equality, and are thus subject to the availability of competing resources").

³⁷ See *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999) ("[A]ny failure to provide reasonable accommodations for a disability is necessarily 'because of a disability'—the accommodations are only deemed reasonable (and, thus,

on an entire group of individuals.³⁸ Courts have shown themselves uneasy about interpreting the law in a way that appears to give preference to a particular individual.³⁹ This unease has been especially apparent in circumstances when an employee with a disability seeks reassignment to a vacant position as a reasonable accommodation and the employer asserts another employee is entitled to or more qualified for that position.⁴⁰ Focusing on causation may mitigate that unease, because it seems to distinguish between those whose disadvantage is related to their disability and those who will receive an unfair advantage over others.⁴¹

In general, the *Gross* but-for standard eases courts' concerns about discrimination claims because it requires plaintiffs to carry the burden of proof throughout the process of proving discrimination. That stands in contrast to the statutory provisions setting out the ADA's reasonable accommodation mandate, which requires plaintiffs establish only that an accommodation is reasonable and then shifts the burden to employers to prove the accommodation poses an undue hardship on the business.⁴² It has been suggested that *Gross* is the product of a Court majority hostile to imposing burdens on the employer,⁴³ perhaps out of fear that doing so will make it too easy for undeserving plaintiffs to

required) if they are needed because of the disability—and no proof of a particularized discriminatory animus is exigible.”).

³⁸ Cf. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566-67 (1999) (emphasizing the individualized nature of disability determinations under the ADA).

³⁹ See *Equal Emp't Opportunity Comm'n v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1029 (7th Cir. 2000) (“[T]he ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it's the employer's consistent and honest policy to hire the best applicant for the particular job in question rather than the first qualified applicant.”); see also *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 (8th Cir. 2007) (favorably citing the Seventh Circuit's reasoning in *Humiston-Keeling*).

⁴⁰ See, e.g., *US Airways, Inc. v. Barnett*, 535 U.S. 391, 406 (2002) (A “plaintiff must present evidence of that ‘more,’ namely, special circumstances surrounding the particular case that demonstrate the assignment [to a vacant position] is nonetheless reasonable.”); see also *infra* Part V.

⁴¹ This is an example of the so-called “windfall doctrine.” See *Anderson, supra* note 29, at 327 (describing courts' concerns about awarding windfalls to undeserving plaintiffs as a basis for denying reasonable accommodations to individuals who proceed under the “regarded as” prong of the definition of disability).

⁴² See 42 U.S.C. § 12112(b)(5)(A) (2006).

⁴³ See *Katz, supra* note 5, at 878-80.

prevail. Thus, *Gross* insists that the risk of sorting out whether discrimination was in fact the reason for an action rests firmly with the plaintiff. The Court could apply a similar construct to accommodation claims and do an end run around the undue hardship burden-shift: The plaintiff could be required to show that what she seeks is indeed related to her disability in a way that distinguishes her limitations from the barriers faced by the general public. Otherwise, much as the “motivating factor” standard in a mixed-motive claim is (arguably) overbroad in finding discrimination when legitimate factors predominate, the reasonable accommodation standard would be (arguably) overbroad in providing accommodations to individuals not actually burdened by their disability but by the same burdens everyone else faces. As this Article will demonstrate, however, that reasoning misconstrues the reasonable accommodation mandate.

If there is a renewed legislative move toward causation unification, the less obvious consequence of *Gross* for reasonable accommodation claims should be addressed. This Article will examine how but-for causation may creep into reasonable accommodation analysis and why that would be wrong. Part I sets out what “because of” causation meant prior to the Court’s decision in *Gross*, and the extent to which courts adopted uniform causation standards across various federal antidiscrimination statutes. Part II addresses *Gross*’s impact on that uniformity. One result of *Gross* was to create disunity in disparate treatment law between Title VII and other antidiscrimination statutes, but another result was that we now have a default rule the Court has indicated it will apply to causation unless explicitly told otherwise by Congress. This different locus of unity may have consequences beyond the disparate treatment context. Part III then briefly examines the legislative history of the Act, which contains direct evidence Congress contemplated liability under the ADA without requiring plaintiffs to prove but-for causation when it eliminated the Rehabilitation Act’s requirement that discrimination be “solely” because of disability. This section also examines how proposed legislation, like POWADA, would restore the uniformity in disparate treatment law undone by *Gross*, including its application to ADA mixed-motive claims, but would not go far enough to address all the tentacles put out by that decision.

Part IV demonstrates the consequences of those tentacles reaching reasonable accommodation law. This part first shows how causation analysis in ADA Title I reasonable accommodation cases diverts courts away from proper consideration of the essential functions of a job and the reasonableness of a requested accommodation. This part next examines Justice Scalia's dissent in *Barnett*, which advocates for applying the but-for standard to accommodation claims. It then turns to ADA Title II cases applying what they call a "necessity-causality standard," which is in essence a but-for requirement similar to Justice Scalia's. A similar causation requirement might creep into Title I analysis. Finally, Part V examines one particular issue that may be ripe for erroneous application of a but-for standard: reassignment to a vacant position.

I. CAUSATION STANDARDS UNDER *PRICE WATERHOUSE* AND THE CIVIL RIGHTS ACT OF 1991

As has been demonstrated by a number of commentators, intent to discriminate is proven under Title VII and related antidiscrimination laws, not by a showing of hostile animus toward a protected characteristic, but by proving a causal link between an adverse action taken against the plaintiff and the protected characteristic.⁴⁴ This link establishes that the action was "because of" the protected characteristic.⁴⁵ Congress used similar "because of" language across several federal

⁴⁴ See, e.g., Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 503 (2001) ("[T]he Supreme Court's disparate treatment decisions, properly construed, would view the motive or intent inquiry not as a search for hostile animus or for adverse effects but as a search for causation."); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 294 (1997) ("[I]n a case of intentional discrimination, the plaintiff must prove that the defendant treated a member of a protected group . . . differently *because* of his or her race" and "no additional proof of animus or motive is necessary."); see also *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (reasoning that the decision maker must have "selected or reaffirmed a particular course of action at least in part 'because of,' and not merely 'in spite of,' its adverse effects upon an identifiable group").

⁴⁵ See Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 215 (2010) (stating that in a Title VII claim, "[t]he assertion of discriminatory intent . . . provides the causal link between the employer's prohibited actions and the characteristics protected by the statute").

antidiscrimination laws, including Title VII, the ADEA, and the ADA.⁴⁶ The Supreme Court has generally found that this similarity indicates Congress' intent for these statutes to be construed in a similar fashion.⁴⁷ Thus, courts frequently look to decisions under one statute to assist them in determining similar issues under another statute.⁴⁸ This has been referred to by Professor Jamie Durin Prekert as "second-order uniformity," or uniformity "in the aggregate" across several statutes.⁴⁹ It stands in contrast to "first-order uniformity," which would be uniformity of interpretation of the disaggregated parts of a particular statute, like Title VII.⁵⁰

As Professor Martin Katz demonstrates, the Supreme Court generally followed second order uniformity when interpreting federal antidiscrimination laws, at least until the passage of the Civil Rights Act (CRA) of 1991 and the Court's subsequent decision in *Gross v. FBL Financial Services, Inc.*⁵¹ In regard to mixed-motive causation, this unity was built largely on two cases—*Mt. Healthy City School District Board of Education v. Doyle*,⁵² a First Amendment case, and *Price Waterhouse v. Hopkins*,⁵³ a Title VII case that looked to *Mt. Healthy*.

In *Mt. Healthy*, the Court unanimously determined that a teacher who contacted a local radio station and made comments critical of the school administration met his standard of prima facie causation under the First Amendment by alleging his public comments were a "substantial factor" in the decision not to rehire him.⁵⁴ The Court indicated that the school should then have been

⁴⁶ See *supra* note 10 and accompanying text.

⁴⁷ See *supra* note 9.

⁴⁸ Jamie Durin Prekert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511, 542 (2008).

⁴⁹ The term "second-order uniformity" was coined by Professor Prekert to describe uniformity of "disparate treatment law in the aggregate." *Id.* at 518-19. "First-order considerations" refer to "the disaggregated, constituent . . . parts [of a statute], such as Title VII." *Id.* at 518.

⁵⁰ See *id.* Professor Prekert suggests, for example, that all disparate treatment claims under Title VII might be unified under the mixed-motive approach. *Id.* at 518-19.

⁵¹ See Katz, *supra* note 5, at 871-73.

⁵² 429 U.S. 274 (1977).

⁵³ 490 U.S. 228 (1989).

⁵⁴ *Mt. Healthy*, 429 U.S. at 287.

required to prove it would have made the same decision not to rehire even if it had not considered the radio station incident.⁵⁵ Subsequently, in *Price Waterhouse v. Hopkins*, a majority of the justices agreed that mixed-motive claims were similarly viable under Title VII but split on the degree of causation required to prove such claims.⁵⁶ The Court analogized to *Mt. Healthy*, suggesting both cases raised “contexts where the law announces that a certain characteristic is irrelevant to the allocation of burdens and benefits.”⁵⁷

Although the Court in *Price Waterhouse* fractured over what was required to prove an adverse action was “because of” a protected characteristic, a majority of the Court nonetheless agreed it did not require plaintiffs to prove but-for causation in order to meet their prima facie case. Justice Brennan’s plurality opinion noted that Title VII required proof an action was taken “because of” a protected characteristic, not that the actions were taken “solely” because of that characteristic.⁵⁸ He thus rejected the assertion the statutory language required proof of but-for causation from the plaintiff.⁵⁹ Neither Justice O’Connor’s nor Justice White’s concurring opinions took issue with this narrow point.⁶⁰ Instead, the Justices debated whether the burden shift

⁵⁵ *Id.*

⁵⁶ Compare *Price Waterhouse*, 490 U.S. at 250 (“[P]laintiff who shows an impermissible motive played a motivating part in an adverse employment decision has thereby placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive.”) (majority opinion), with *Id.* at 265-266 (“Where an individual disparate treatment plaintiff has shown by a preponderance of the evidence that an illegitimate criterion was a *substantial* factor in an adverse employment decision,” the employer can be required to prove it would have made the same decision, regardless.) (O’Connor, J., concurring).

⁵⁷ *Id.* at 248; see also *id.* at 258 (White, J., concurring in judgment) (“[T]o determine the proper approach to causation in this case, we need look only to the Court’s opinion in *Mt. Healthy*.”). The *Price Waterhouse* dissent apparently would have distinguished *Mt. Healthy* because it was a First Amendment case, without further explanation. See *id.* at 289-90. (Kennedy, J., dissenting).

⁵⁸ *Id.* at 241 (plurality opinion). Justice Brennan noted for the plurality that Congress in fact rejected an amendment to Title VII that would have added “solely” to the “because of” standard. *Id.* at 241 n.7.

⁵⁹ *Id.* at 240.

⁶⁰ Justice O’Connor “disagree[d] with the plurality’s dictum that the words ‘because of’ do not mean ‘but-for’ causation” but found the plurality’s approach consistent with her own because “[t]he question for decision in this case is what allocation of the burden of persuasion on the issue of causation best conforms with the intent of

was triggered when the plaintiff showed the protected characteristic was a “motivating part” in the employer’s decision (the plurality’s standard)⁶¹ or when the plaintiff presented “direct evidence that decisionmakers [sic] placed substantial negative reliance on an illegitimate criterion in reaching their decision” (Justice O’Connor’s standard).⁶²

Because of that debate, *Price Waterhouse* left causation in a state of disarray, and, subsequently, the lower courts split regarding what was required to support the mixed-motive burden shift.⁶³ Several circuits adopted O’Connor’s direct-evidence approach in Title VII claims and applied it “as if it actually required a plaintiff to present direct evidence in the sense of ‘evidence, which if believed, proves the existence of a fact in issue without inference or presumption.’”⁶⁴ Some courts extended mixed-motive burden shifting to ADEA claims under either the motivating-factor or direct-evidence approach,⁶⁵ although others refused to recognize mixed-motive claims for the separate reason that the ADEA has a “reasonable factors other than age” defense not available under Title VII.⁶⁶

Congress and the purposes behind Title VII.” *Id.* at 262-63 (O’Connor, J., concurring in judgment).

⁶¹ *Id.* at 250 (plurality opinion).

⁶² *Id.* at 277 (O’Connor, J., concurring in judgment).

⁶³ See Steven M. Tindall, Note, *Do as She Does, Not as She Says: The Shortcomings of Justice O’Connor’s Direct Evidence Requirement in Price Waterhouse v. Hopkins*, 17 BERKELEY J. EMP. & LAB. L. 332, 354-355 (1996) (“[C]ourts of appeal fall into one of three categories: courts which apply or attempt to apply the traditional definition of direct evidence, those which apply O’Connor’s non-standard definition, and those which apply neither, allowing the plaintiff to present any evidence of discrimination to help carry its burden. Each of these three categories requires the plaintiff to meet a different standard of proof.”).

⁶⁴ *Id.* at 356 (finding that the First, Fifth, Sixth, and Tenth Circuit Courts of Appeals took the literal direct evidence approach).

⁶⁵ See, e.g., *Equal Emp’t Opportunity Comm’n v. Warfield-Rohr Casket Co.*, 364 F.3d 160, 163 (4th Cir. 2004) (finding that one way to establish an ADEA claim was through a “mixed-motive” framework of proof, requiring that an employee’s age motivated an employer’s adverse decision); *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216 (5th Cir. 1995) (“[A] plaintiff can prove age discrimination in two ways. . . . [B]y direct evidence or by an indirect or inferential method of proof.”).

⁶⁶ See, e.g., *Mullin v. Raytheon Co.*, 164 F.3d 696, 701-02 (1st Cir. 1999) (reasoning that the “reasonable factors other than age” defense creates “[a] critical asymmetry in the texts of the ADEA and Title VII [that] counsels convincingly against recognizing a disparate impact cause of action under the former statute”). The First Circuit’s position was subsequently rejected by the Supreme Court. *Smith v. City of Jackson, Miss.*, 544

In the 1991 CRA, Congress resolved one part of the causation issue: It adopted the motivating-factor standard in Title VII claims.⁶⁷ The 1991 CRA did not, however, address what level of evidence was required to prove that standard, specifically whether direct evidence was required or whether circumstantial proof would suffice.⁶⁸ The Court would later resolve this in *Desert Palace, Inc., v. Costa*, holding that direct evidence was not required.⁶⁹ More significant to second order uniformity, the provisions regarding mixed motive in the CRA amended only Title VII. Thus, while courts almost universally recognized mixed-motive claims under the ADEA and applied Justice O'Connor's direct-evidence standard, they also concluded that *Price Waterhouse's* affirmative defense to liability applied.⁷⁰ The relationship between the 1991 CRA and ADEA claims remained unclear until the Supreme Court granted certiorari in *Gross v. FBL Financial Services, Inc.*

U.S. 228, 243 (2005) (recognizing disparate impact claims under the ADEA); *see also* *Smith v. Allstate Ins. Co.*, 195 F. App'x 389, 396 n.6 (6th Cir. 2006) (“[T]he Supreme Court determined last term that the ADEA allows for disparate impact claims, although ‘the scope of disparate-impact liability under ADEA is narrower than under Title VII because the ADEA contains a ‘reasonable factors other than age’ defense”).

⁶⁷ *See* 42 U.S.C. § 2000e-2(m) (2006) (providing that violation of the Act is established when plaintiff demonstrates the prohibited characteristic was a “motivating factor” in an adverse decision).

⁶⁸ *See* William R. Corbett, Casenote, McDonnell Douglas, 1973-2003: *May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 205 (2003) (“After the Civil Rights Act of 1991, courts continued to decide which proof structure applied based on whether the evidence was direct or circumstantial.”).

⁶⁹ *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92 (2003). Because *Desert Palace* was a Title VII claim, as was *Price Waterhouse*, it remained unclear whether the Court's holding in *Desert Palace* applied to other antidiscrimination statutes. *See, e.g.*, Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith*, 44 HOUS. L. REV. 349, 374-75 (2007).

⁷⁰ *See, e.g.*, *Baqir v. Principi*, 434 F.3d 733, 745 n.13 (4th Cir. 2006) (“By way of the Civil Rights Act of 1991, Congress eliminated an employer's ability to avoid liability in certain Title VII cases upon proof that it would have taken the same adverse employment action absent a discriminatory motive. Because Congress did not similarly amend the ADEA, . . . ADEA mixed-motive cases remain subject to the *Price Waterhouse* analysis.” (citations omitted)); Harper, *supra* note 14, at 102 (noting the lower courts' “almost unanimous” embrace of mixed-motive claims applying the direct evidence evidentiary standard).

II. *GROSS V. FBL FINANCIAL SERVICES, INC.*'S IMPACT ON UNIFORMITY

The Court granted certiorari in *Gross* on the question of “whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction . . . under the [ADEA].”⁷¹ As Justice Stevens pointed out in his dissent, however, the Court went beyond this question to determine that mixed-motive burden shifting was not appropriate under the ADEA.⁷²

Although it did not explicitly overrule *Price Waterhouse*, the majority in *Gross* adopted the same but-for causation standard argued by the dissent and rejected by the plurality in that case.⁷³ Under that standard, there is no burden shift to the employer regardless of whether the plaintiff showed the protected characteristic was either a motivating or a substantial factor in the adverse employment decision.⁷⁴ The plaintiff retains the burden throughout to prove that but for consideration of the protected characteristic, the adverse action would not have occurred.⁷⁵ To be clear, *Price Waterhouse*'s plurality formulation ultimately also results in finding but-for causation.⁷⁶ If the jury finds the protected characteristic motivated the employer, at least in part, and rejects the employer's argument it would have made the same decision absent consideration of that characteristic, the jury will have found that but for the improper consideration, the

⁷¹ *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 169 (2009).

⁷² *Id.* at 181 (Stevens, J., dissenting).

⁷³ *See id.* at 180 (Stevens, J., dissenting) (noting that the majority's but-for standard was advanced in *Price Waterhouse* but rejected).

⁷⁴ *See id.* at 179 (majority opinion).

⁷⁵ *Id.* at 180.

⁷⁶ William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683, 722-23 (2010) (describing “mixed-motives analysis” as “initially employ[ing] a motivating factor standard of causation and then but-for causation when it shifts the burden to the employer on the same-decision defense”). Title VII was subsequently amended to allow for some recovery even after the employer meets its burden of proof. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2006) (permitting an award of declaratory and injunctive relief as well as attorneys fees, but not damages or reinstatement, upon plaintiff proving a violation of § 2000e-2(m)).

adverse action would not have occurred.⁷⁷ Under the *Gross* formulation, as pointed out by Justice Breyer in his dissent, the difference lies in who bears the risk of persuasion regarding what would have happened in the hypothetical situation without the improper consideration.⁷⁸

This has led some courts to interpret *Gross* as requiring plaintiffs to show sole causation—the plaintiff bears the burden throughout to eliminate any other non-discriminatory reason that explains the employer’s actions.⁷⁹ The Tenth Circuit, by contrast, has interpreted *Gross* as not requiring plaintiffs to prove sole causation.⁸⁰

⁷⁷ See Katz, *supra* note 5, at 863 (noting that *Price Waterhouse*’s “same decision formulation is a but-for test; it requires the defendant to prove a lack of but-for causation”)

⁷⁸ See *Gross*, 557 U.S. at 191 (Breyer, J., dissenting) (noting that cases involving multiple motives require the parties to “engage in a hypothetical inquiry about what would have happened if the employer’s thoughts and other circumstances had been different”). Justice Breyer also points out that the employer is in much better position to address this question, in that the employer knows what it was thinking at the time. *Id.* Moreover, the hypothetical inquiry is a negative one, requiring the plaintiff to prove that something that did not actually happen would not have happened. This makes it all the more difficult. See Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 655-56 (2008) (outlining how but-for causation requires proof of a negative and the difficulties inherent in that exercise).

⁷⁹ See *Love v. TVA Bd. of Dirs.*, No. 3:06-00754, 2009 WL 2254922, at *10 (M.D. Tenn. July 28, 2009) (asserting that under *Gross*, “[p]laintiff must prove that his age was the reason for his nonselection”); *Wardlaw v. Phila. Sts. Dep’t*, Nos. 05-3387, 07-160, 2009 WL 2461890, at *4 (E.D. Pa. Aug. 11, 2009) (rejecting plaintiff’s ADEA claim because her evidence failed to establish age was “the sole cause” of the alleged discrimination and retaliation against her), *aff’d* 378 F. App’x. 222, 226 (3d Cir. 2010) (upholding, without further explanation, the reasoning of the district court); see also Foreman, *supra* note 14, at 692 (discussing the post-*Gross* district court decisions). The Eleventh Circuit may have signaled it would apply a sole-causation standard. The Court recently described *Gross*’s reasoning as follows: “Because an ADEA plaintiff must establish ‘but for’ causality, no ‘same decision’ affirmative defense can exist: the employer either acted ‘because of’ the plaintiff’s age or it did not.” *Mora v. Jackson Mem’l Found., Inc.*, 597 F.3d 1201, 1204 (11th Cir. 2010) (citing *Gross*, 557 U.S. at 180). The issue was not ultimately determinative, and the court did not elaborate on whether it intended to set out a sole-causation standard. See *id.* *Gross* left significant questions of exactly what other proof models are to be applied to non-Title VII cases. See David Sherwyn & Michael Heise, *The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 938 (2010) (noting that some defendants have argued the *McDonnell Douglas* pretext model no longer applies to ADEA claims).

⁸⁰ See *Jones v Okla. City Pub. Sch.*, 617 F.3d 1273, 1277-78 (10th Cir. 2010) (rejecting employer’s argument that if there is any other reason for the adverse action,

Whether *Gross* requires proof of sole causation, or something less, the burden it imposes on plaintiffs is nonetheless an extremely difficult one to meet. Even in light of persuasive evidence they considered a prohibited characteristic, employers need only produce some other, legitimate consideration that they allege was part of a mixture of reasons for the employment decision.⁸¹ The ADEA plaintiff then has to show that regardless of any legitimate considerations, the improper consideration was itself necessary to the employer's decision—that without it, the same decision would not have been made.⁸² It should not be difficult for an employer to attach a legitimate rationale to one motivated by bias, which suggests that ADEA plaintiffs' chance of sorting out this mixture in their favor is quite limited.⁸³

It was quickly apparent that *Gross's* rationale would not be limited to the ADEA. A primary thrust of *Gross* was that Congress could have, but did not, amend the other antidiscrimination statutes when it added the “motivating factor” and burden-shifting provisions to Title VII, although it did amend other

plaintiff cannot prevail). Similar conclusions have been reached in the academic literature:

In that regard, the but-for requirement does not mean that an employee must establish that an illegitimate reason was the *sole* reason for the adverse action, despite the dissent in *Gross* protesting otherwise. In his *Price Waterhouse* dissent, Justice Kennedy acknowledged that a protected category did not need to be the “sole cause” but rather “merely a necessary element of the set of factors that cause the decision, *i.e.*, a but-for cause.” This language likely means that an employee would need to establish that a discriminatory motive was such a strong motivating reason for the adverse action that, without consideration of it, any other legitimate reasons the employer had would not have resulted in that adverse action.

Bran Noonan, *The Impact of Gross v. FBL Financial Services, Inc. and the Meaning of the but-for Requirement*, 43 SUFFOLK U. L. REV. 921, 928 (2010) (footnotes omitted).

⁸¹ *Gross*, 557 U.S. at 180 (“The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.”).

⁸² See Foreman, *supra* note 14, at 691 (“[S]howing the employer improperly considered age in the employment decision is no longer a sufficient basis to establish liability.”).

⁸³ See *id.* at 693 (suggesting that *Gross* “send[s employers] a message that age may be a factor in employment decisions, so long as it is not the determining factor”).

aspects of the ADEA.⁸⁴ The majority rejected its prior approach of construing Title VII and the ADEA in similar fashion because of Congress' explicit actions in amending Title VII but not the ADEA.⁸⁵ A similar argument could be, and soon was, made that Congress amended certain aspects of the ADA in the 1991 Act as well, but did not incorporate the motivating factor language. In *Serwatka v. Rockwell Automation, Inc.*,⁸⁶ the Seventh Circuit reversed a verdict in favor of an ADA plaintiff on a mixed-motive claim, finding that she had failed to show but-for causation.⁸⁷ The court reasoned that the ADA, like the ADEA, lacked language comparable to Title VII's mixed motive provisions, and that "*Gross* ma[de] clear that in the absence of any additional text bringing mixed-motive claims within the reach of the statute," the plaintiff had the burden to prove discrimination under the but-for standard.⁸⁸ The Seventh Circuit's approach suggests courts will treat *Gross* as establishing a uniform rule for any antidiscrimination statute that prohibits actions "because of" a particular characteristic.⁸⁹

⁸⁴ *Gross*, 557 U.S. at 174. Congress modified the ADEA's notice of limitations period provisions. See Civil Rights Act of 1991, Pub. L. 102-166, § 115, 105 Stat. 1071, 1079 (codified as amended at 29 U.S.C. § 626(e) (2006)). It also extended antidiscrimination protections to employees of the Senate and specifically enumerated the ADEA among the statutes under which they were now covered. See *id.* § 302(2), 105 Stat. at 1088.

⁸⁵ See *Gross*, 557 U.S. at 174. *Gross* emphasized the opposite of unification, namely that "[w]hen conducting statutory interpretation, [the Court] 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'" *Id.* (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)).

⁸⁶ 591 F.3d 957 (7th Cir. 2010).

⁸⁷ *Id.* at 963. The jury found that the plaintiff in *Serwatka* was terminated due to the employer's perception that she was limited in her ability to walk or stand, but also found that the employer would have discharged her even if it did not believe she had been substantially limited in that regard. *Id.* at 958.

⁸⁸ *Id.* at 962. The Sixth Circuit has recently agreed with the Seventh Circuit, employing a similar statutory interpretation approach. See *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 317-21 (6th Cir. 2012). Judge Clay filed a strong dissent, asserting that the majority "fail[ed] to critically examine the relationship between Title VII . . . and the ADA in interpreting the ADA's language." *Id.* at 322 (Clay, J., concurring in part and dissenting in part).

⁸⁹ The Seventh Circuit itself has gone further to hold that *Gross* makes mixed-motive claims improper in any case where the statute at issue lacks motivating-factor language. See *Serafinn v. Local 722, Int'l Bhd. of Teamsters*, 597 F.3d 908, 915 (7th Cir. 2010) (denying a mixed-motive instruction to a plaintiff in a claim under the Labor

The Seventh Circuit's approach may be justified under *Gross* because the majority's conclusion in *Gross* rested on an asserted plain language interpretation of the term "because of." According to the *Gross* majority, "the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act."⁹⁰ The majority asserted, "It follows, then, that under [the ADEA], the plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action."⁹¹ The majority justified this as the "ordinary default rule" when a statute is "silent on the allocation of the burden of persuasion."⁹²

What the majority failed to explain, however, was how *Price Waterhouse* could have reached the conclusion it did if there was indeed an "ordinary default rule."⁹³ By the majority's theory, the

Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (2006), because that statute did not contain language comparable to Title VII); *Fairley v. Andrews*, 578 F.3d 518, 525-26 (7th Cir. 2009) (interpreting *Gross* to hold that "unless a statute . . . provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law"). Not all courts agree; some have distinguished *Gross* as applying to ADEA claims. *See Smith v. Xerox Corp.*, 602 F.3d 320, 328-29 (5th Cir. 2010) (rejecting "simplified application" of *Gross* to Title VII retaliation claim and finding *Price Waterhouse* continues to govern such claims); *Hunter v. Valley View Local Sch.*, 579 F.3d 688, 691-92 (6th Cir. 2009) (distinguishing *Gross* in Family and Medical Leave Act (FMLA) claim because it had previously found Department of Labor regulation reasonable that provided employers "cannot use the taking of FMLA leave as a negative factor in employment decisions" (internal quotation marks omitted)). *But see Humboldt*, 681 F.3d at 317 (applying *Gross* to ADA claim). The Fifth Circuit most clearly indicated it was reluctant to overrule its prior decisions allowing mixed-motive-retaliation claims, at least under Title VII, without the Supreme Court having explicitly overruled *Price Waterhouse* in *Gross*. *See Xerox*, 602 F.3d at 329 (reasoning that it was not the court's "place, as an inferior court, to renounce *Price Waterhouse* as no longer relevant to mixed-motive retaliation cases [under Title VII]").

⁹⁰ *Gross*, 557 U.S. at 176.

⁹¹ *Id.* at 177.

⁹² *Id.* (quoting *Schaffer v. Weast*, 546 U.S. 49, 56 (2005)) (internal quotation marks omitted).

⁹³ Rather than addressing *Price Waterhouse* head-on, the *Gross* majority instead suggested that the current Court might not reach the same decision, especially in light of what the majority claimed is difficulty applying the mixed-motive approach. *Id.* at 178. The authority cited by the *Gross* majority, however, does not support the assertion of difficulty. *See Catherine T. Struve, Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 293 (2010) ("[T]he authorities the *Gross* Court cited in support of [its] assertion provide no evidence on the question."); Harper, *supra* note 14, at 108-09 (noting the only majority opinion cited in support of

Court should have rejected any burden shift in *Price Waterhouse* and insisted that but-for causation by default meant the plaintiff bore the burden to persuade that sex alone played the determinative role in her firing. But the *Price Waterhouse* Court did not reject burden shifting; it instead adopted an approach that was consistent with its other cases interpreting “because of” causation.⁹⁴ If there was a “default rule,” one from which Congress might be supposed to have been legislating, it rested causation on something less than *Gross*’s formulation of but-for proof.

There have been strong critiques of the Court’s decision in *Gross* and its weak basis for rejecting what Professor Katz refers to as the “presumption of uniformity” that had previously governed.⁹⁵ Several arguments have been made that at least within a particular proof model, such as disparate treatment, there should be a symmetry of standards across overlapping antidiscrimination laws, absent substantial justification.⁹⁶ Among those arguments are efficiency, evenhandedness, and common-sense understanding.

As a practical matter, having the same standards apply across multiple antidiscrimination statutes makes it more efficient to litigate and resolve such claims.⁹⁷ Parties do not have to spend time sorting out differing summary judgment standards, and jury instructions would be less confusing.⁹⁸ Litigants as well

the “difficulty” assertion concerned the difficulty of determining the meaning of “direct evidence,” not burden shifting).

⁹⁴ See *supra* notes 51-56 and accompanying text.

⁹⁵ See Katz, *supra* note 5, at 868. Several other articles criticize the Court’s reasoning in *Gross*. See Harper, *supra* note 14; Foreman, *supra* note 14; Corbett, *supra* note 76; Sherwyn & Heise, *supra* note 79; Noonan, *supra* note 80; Struve, *supra* note 93; Sean Graham, Recent Case, *Gross v. FBL Financial Services, Inc.: Supreme Court Requires Plaintiffs to Prove Age Is a “but-for” Cause in Disparate-Treatment Claims Under the Age Discrimination in Employment Act (ADEA)*, 30 BERKELEY J. EMP. & LAB. L. 571 (2009); Leigh A. Van Ostrand, Note, *A Closer Look at ADEA Mixed-Motives Claims and Gross v. FBL Financial Services, Inc.*, 78 FORDHAM L. REV. 399, 451 (2009). But see Jaqueline Go, Comment, *Another Move Away From Title VII: Why Gross Got It Right*, 51 SANTA CLARA L. REV. 1025, 1027 (2011) (arguing that *Gross* is consistent with congressional intent and “effectively corresponds to practical employer compliance”).

⁹⁶ See, e.g., Corbett, *supra* note 76, at 690-91.

⁹⁷ Katz, *supra* note 5, at 867.

⁹⁸ See *id.* at 867-68 (“[A] unified standard would permit the judge and jury to apply a single standard to all of the claims—as opposed to having to apply different standards to different claims.”); see also Corbett, *supra* note 76, at 691 (“The difficulty

as the public are also more likely to be supportive of antidiscrimination laws if those laws are perceived as treating similarly situated individuals in a similar fashion.⁹⁹ Asymmetry, by contrast, fosters cynicism.¹⁰⁰ Further, there is common sense, as reflected in the general assumption of uniformity in statutory interpretation.¹⁰¹ If Congress uses the same terminology across different but broadly related statutes, the most sensible conclusion is that it had the same standard in mind.¹⁰² *Gross* recognizes this but distorts it, suggesting that what Congress had in mind was some theretofore unknown default rule requiring but-for causation.

The *Gross* majority can argue it did not reject uniformity *per se*. Its default rule of construction is premised on uniformity. Congress is the party that undermined uniformity by amending only Title VII when it should have known the default rule would otherwise apply.¹⁰³ Thus, the Court approached the issue with an assumption of uniformity among antidiscrimination laws, just one with the locus in a different position. Professor Katz has suggested that *Gross* more likely stems from the current Court's hostility to burden shifting, which is probably the most reasonable interpretation of the outcome.¹⁰⁴ For example, the Court previously demonstrated this hostility in its disparate-impact decisions by making the plaintiff's *prima facie* case more onerous and lessening the employer's defense burden to one of production

of analyzing cases should be of even greater concern with the availability of jury trials in most disparate treatment cases.”).

⁹⁹ Corbett, *supra* note 76, at 691-92.

¹⁰⁰ *Id.* at 691. This is certainly demonstrated by the public debate regarding affirmative action and, to a degree, by the “windfall” concerns raised regarding reasonable accommodations under the ADA.

¹⁰¹ Katz, *supra* note 5, at 867.

¹⁰² *Id.*

¹⁰³ This rationalization would necessarily have to ignore the Court's prior precedent in which it looked to a pre-CRA Title VII decision to determine that a post-CRA claim was available under the ADEA. See *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240 (2005) (concluding that ADEA disparate impact claims were governed by its pre-CRA Title VII decision, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)). The *Gross* majority does not acknowledge this case, although as the dissent points out, it “is precisely on point.” See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 186 (2009) (Stevens, J., dissenting).

¹⁰⁴ Katz, *supra* note 5, at 878.

rather than proof.¹⁰⁵ In the context of disability law, the Court's decision in *US Airways, Inc. v. Barnett*¹⁰⁶ can be seen as an attempt to side step burden shifting.¹⁰⁷ In that case, the Court imposed on plaintiffs a burden to show "special circumstances" make an accommodation deviating from a seniority system reasonable, with the only burden on employers being to produce evidence of such a system.¹⁰⁸ This burden allocation arguably contradicts the statutory scheme that would require employers to prove the accommodation posed an undue hardship on that system.¹⁰⁹

Regardless, there is an underlying premise at work here that is problematic when applied in other contexts. While there may be disagreement about the content of the standards themselves, there is a general desire for uniformity. When the issue is whether an age discrimination plaintiff should be able to proceed under the same disparate-treatment proof models as a Title VII plaintiff, it makes sense to support that desire. The disarray that currently exists within disparate-treatment law serves no substantial purpose. A problem arises, however, when this desire for

¹⁰⁵ *Wards Cove*, 490 U.S. at 656-60; see also Katz, *supra* note 5, at 879 (characterizing the Court's post-*Price Waterhouse* cases as "accepting the possibility of unification in cases that did not involve . . . [E]xpand[ing] burden-shifting").

¹⁰⁶ 535 U.S. 391 (2002).

¹⁰⁷ I have previously addressed the import of *Barnett* on the basic accommodation burden of proof. See generally Cheryl L. Anderson, "Neutral" Employer Policies and the ADA: The Implications of *US Airways, Inc. v. Barnett Beyond Seniority Systems*, 51 DRAKE L. REV. 1, 43 (2002).

¹⁰⁸ *Barnett*, 535 U.S. at 404.

¹⁰⁹ See 42 U.S.C. § 12112(b)(5)(A) (2006) (discrimination includes "not making reasonable accommodations . . . unless a covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business"); see also Samuel A. Marcossan, *Of Square Pegs and Round Holes: The Supreme Court's Ongoing "Title VII-ization" of the Americans with Disabilities Act*, 8 J. GENDER RACE & JUST. 361, 384-85 (2004) (arguing that the Court "rendered the hardship inquiry irrelevant, creating out of thin air a general rule that any accommodation request that would violate existing seniority systems 'ordinarily' is not reasonable, without reference to any hardship it may or may not create for the employer"); Monica G. Renna, Casenote, *An Accommodation Is Ordinarily Presumed To Be Unreasonable if It Violates an Employer's Bona Fide Seniority System Unless the Employee Can Show Special Circumstances That Make It Reasonable: U.S. Airways, Inc. v. Barnett*, 68 J. AIR L. & COM. 655, 661 (2003) ("[T]he Supreme Court's holding [in *Barnett*] creates the very burden of proof dilemma to which *Barnett* is referring. The Court unduly raises the bar for the employee to establish a prima facie case of an RA, when the burden should really be on the employer to prove undue hardship.").

uniformity is taken to other contexts where there are in fact substantial reasons to apply distinct standards.

III. MIXED-MOTIVE CLAIMS UNDER THE ADA?

Should the ADA be subject to *Gross*'s default rule, or should it allow mixed-motive burden shifting? There is good evidence that Congress considered the ADA to be similar to Title VII, which allows for mixed-motive claims with the burden of persuasion shifting to the employer on evidence less than proof of but-for causation.¹¹⁰ Although the CRA muddied the waters somewhat, lower courts assumed mixed-motive claims were available under the ADA and generally applied Title VII standards to those claims.¹¹¹ When Congress amended the ADA in 2008, it addressed the causation language in the statute, but not in a way that corrected what the lower courts had been doing.¹¹² Consistent with the language and purpose of the ADA, courts were justified in taking a unified approach to causation.¹¹³

The fact that courts tended to take this unified approach prior to *Gross*, however, means they failed to give much consideration to whether the ADA poses unique causation considerations. The ADA's distinct treatment of causation includes

¹¹⁰ See *infra* Part III.A.

¹¹¹ See, e.g., *Head v. Glacier Nw., Inc.*, 413 F.3d 1053, 1065 n.63 (9th Cir. 2005) (noting cases that similarly adopt mixed-motive standards under the ADA); *Patten v. Wal-Mart Stores E., Inc.*, 300 F.3d 21, 25, 25 n.2 (1st Cir. 2002) (assuming 1991 CRA standards apply and that a plaintiff with direct evidence of discriminatory intent need only prove such intent was a motivating factor in employer's adverse action). Much like the Title VII cases, the ADA cases reflect courts with differing opinions regarding the level of proof needed in order to get a mixed-motive instruction. Compare *Yates v. Rexton, Inc.*, 267 F.3d 793, 799 (8th Cir. 2001) (concluding that a plaintiff who lacks direct evidence of discrimination must proceed under the *McDonnell Douglas* pretext standard), with *Head*, 413 F.3d at 1065 (finding the "motivating factor" standard is most consistent with the plain language of the statute and the purposes of the ADA). The Sixth Circuit stood alone in requiring ADA plaintiffs prove sole causation. See *Jones v. Potter*, 488 F.3d 397, 403 (6th Cir. 2007) (acknowledging the Sixth Circuit to be in the minority in applying a "solely by reason of" standard of proof in ADA claims).

¹¹² See *infra*, notes 138-42 and accompanying text.

¹¹³ Cf. *Harper*, *supra* note 14, at 100-01 (reasoning that Congress' failure to amend the ADEA in response to *Price Waterhouse* made it "reasonable . . . to interpret [that case] as the Court's default system for proof of causation under at least similar vaguely written federal employment discrimination statutes").

not making reasonable accommodations,¹¹⁴ and that should counsel against applying an “ordinary default rule” to causation issues raised under the statute. As the Seventh Circuit’s recent *Serwatka* decision indicates, however, arguments distinguishing ADA causation are not likely to prevail absent explicit statutory direction to do so.¹¹⁵ Proposed legislation overruling *Gross*, such as the POWADA,¹¹⁶ would make Congress’ intent clear to allow burden-shifting mixed-motive claims under the ADA, but that would resolve only disparate treatment discrimination claims. Given the breadth of the majority’s rationale in *Gross*, it might be expected the justices will approach other causation issues from a similar mindset.

The following sections look more closely at what the ADA’s legislative history tells us about causation and why proposed legislation to overrule *Gross* doesn’t adequately address the ADA’s unique causation concerns.

A. *The ADA of 1990 Contemplated Mixed-Motive Claims*

The legislative history of the ADA contains substantial evidence that Congress did not contemplate that plaintiffs would be required to prove but-for causation as envisioned by the *Gross* majority. The ADA largely incorporates the standards developed under section 504 of the Rehabilitation Act of 1974, with one specific difference. Section 504 provides that “[n]o otherwise qualified individual with a disability . . . shall, *solely* by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹¹⁷ This requirement of sole causation was not incorporated into any relevant portion of the ADA.¹¹⁸ Title II of the ADA, which

¹¹⁴ See 42 U.S.C. § 12112(b)(5)(A) (2006).

¹¹⁵ See *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010); see also *infra* notes 130-31 and accompanying text.

¹¹⁶ H.R. 3721, 111th Cong. (2009); S. 1756, 111th Cong. (2009).

¹¹⁷ 29 U.S.C. § 794(a) (2006) (emphasis added).

¹¹⁸ See 42 U.S.C. § 12112(a) (Supp. III 2009) (prohibiting “discriminat[ion] against a qualified individual on the basis of disability”); *id.* § 12132 (2006) (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, program, or activities of a public entity, or be subjected to discrimination by any such entity.”).

prohibits discrimination by public entities, most closely tracks the language of section 504, except Congress deliberately deleted the term “solely.”¹¹⁹ The Committee explained that it

recognize[d] that the phrasing of [the ADA’s substantive prohibition] differs from section 504 by virtue of the fact that the phrase “solely by reason of his or her handicap” has been deleted. The deletion of this phrase is supported by the experience of the executive agencies charged with implementing section 504. . . .

A literal reliance on the phrase “solely by reason of his or her handicap” leads to absurd results.¹²⁰

The Committee then gave an example that illustrated how a decision may be based on more than one factor:

[A]ssume that an employee is black and has a disability and that he needs a reasonable accommodation that, if provided, will enable him to perform the job for which he is applying. . . . Nevertheless, the employer rejects the applicant because he is black and because he has a disability.

In this case, the employer did not refuse to hire the individual solely on the basis of his disability—the employer refused to hire him because of his disability and because he was black. Although the applicant might have a claim of race discrimination under title VII of the Civil Rights Act, it could be argued he would not have a claim under section 504 because the failure to hire was not based solely on his disability and as a result he would not be entitled to a reasonable accommodation.¹²¹

The Committee concluded more broadly that “the existence of non-disability related factors in the rejection decision does not

¹¹⁹ *Id.* § 12132.

¹²⁰ H.R. REP. NO. 101-485, pt. 2, at 85 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 368-69. The legislative committee report indicates that the burden of proof in ADA cases was to be the same as set out in the 1989 Rehabilitation Act regulations. Those regulations deleted the “solely” requirement: “No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.” 34 C.F.R. 104.4(a) (2010).

¹²¹ H.R. REP. NO. 101-485, pt. 2, at 85.

immunize employers. The entire selection procedure must be reviewed to determine if the disability was improperly considered.”¹²²

In other words, Congress had Title VII–like, mixed-motive situations in mind when it articulated the ADA’s causation language. Of course, this does not necessarily mean that Congress had in mind burden shifting.¹²³ Support for that proposition comes from the Committee’s citation of *Pushkin v. Regents of the University of Colorado*,¹²⁴ a Tenth Circuit case articulating a detailed proof model that shifts a burden of persuasion to the defendant:

1) The plaintiff must establish a prima facie case by showing that he was an otherwise qualified handicapped person *apart from* his handicap, and was rejected under circumstances which gave rise to the inference that his rejection was based solely on his handicap;

2) Once plaintiff establishes his prima facie case, *defendants have the burden of going forward and proving* that plaintiff was not an otherwise qualified handicapped person, that is one who is able to meet all of the program’s requirements *in spite of* his handicap, *or that his rejection from the program was for reasons other than his handicap*;

3) The plaintiff then has the burden of going forward with rebuttal evidence showing that the defendants’ reasons for rejecting the plaintiff are based on misconceptions or unfounded factual conclusions, and that reasons articulated for the rejection other than the handicap encompass unjustified consideration of the handicap itself.¹²⁵

¹²² *Id.* at 86.

¹²³ See Struve, *supra* note 93, at 325 (noting that the comparison between the ADA and the Rehabilitation Act on the issue of sole causation does not “establish whether the plaintiff bears the burden of proving but-for causation”).

¹²⁴ 658 F.2d 1372 (10th Cir. 1981).

¹²⁵ *Id.* at 1387 (second and fourth emphasis added). *Pushkin* involved a plaintiff with multiple sclerosis who applied to a psychiatry residency program and was rejected. *Id.* at 1376. Pushkin argued he was rejected because of a negative reaction to his multiple sclerosis, and the school argued it was because he scored low in interviews. See *id.* at 1387. The court concluded that it was not possible to separate the interview scores from the reaction to the plaintiff’s disability and that the plaintiff had

The italicized language indicates not only that Congress contemplated mixed-motive situations under the ADA but also that the case it cited explicitly placed the burden of proof on the defendant to prove it was motivated by reasons other than disability.

Interestingly enough, the burden-shifting approach referred to in the ADA's legislative history came from a case decided under the Rehabilitation Act, which contains the "solely" requirement.¹²⁶ Then-existing Rehabilitation Act regulations explicitly eliminated the "solely" requirement, and the ADA legislative committee report favorably referenced those regulations as establishing the proper burden of proof.¹²⁷ Altogether, this presents a strong case that Congress rejected the but-for regime envisioned by *Gross*.

Further, the ADA was enacted in 1990.¹²⁸ Unlike the ADEA, which had been enacted prior to the Supreme Court applying mixed-motive burden shifting to Title VII,¹²⁹ the ADA was enacted after *Price Waterhouse* (i.e., at a time when the Court had interpreted "because of" not to require plaintiffs to disprove the significance of all other possible reasons for the employer's actions). If Congress had disagreed with this interpretation of "because of," it seems unlikely it would have used the same language in the ADA without qualifying it in some fashion.¹³⁰

The 1991 CRA does muddy the waters to a degree. The 1991 CRA amended only Title VII in regard to mixed-motive standards, a fact that was heavily relied upon by the *Gross* majority.¹³¹ The

established his prima facie case that he was rejected from the program "under circumstances which support a finding that his rejection was based solely on his handicap." *Id.* at 1386-87.

¹²⁶ See 29 U.S.C. § 794(a) (2006).

¹²⁷ See *supra* note 118.

¹²⁸ Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327.

¹²⁹ The ADEA was enacted in 1967. Age Discrimination in Employment Act (ADEA) of 1967, Pub. L. No. 90-202, 81 Stat. 602.

¹³⁰ When Congress amended the ADA in 2008 to modify the language from "because of" to "based on," it again had an opportunity to establish a different causation standard but did not. Instead, it asserted its desire to make the ADA structurally similar to Title VII. See *infra* notes 138-41 and accompanying text.

¹³¹ *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173-74 (2009). That part of the majority's opinion mentioned *Price Waterhouse* briefly, to set up its discussion of the CRA. See *id.* The majority subsequently noted *Price Waterhouse* again only to make the questionable argument that the proof model that the case endorsed was confusing to

Gross majority does not at any point acknowledge that a majority of justices in *Price Waterhouse*, without more specific statutory language, found the term “because of” allowed for a shift in the burden of proof. The *Gross* majority instead rests on the failure of Congress to add explicit endorsement of mixed-motive claims to the ADEA at the same time it amended Title VII. Moreover, as noted above, Congress did amend some portions of the ADEA but not to include mixed-motive claims.¹³²

Applying *Gross* simplistically, it could similarly be argued Congress amended some portions of the ADA when it passed the 1991 Act; therefore, its failure explicitly to endorse mixed-motive claims evidences its intent not to allow such claims. The Seventh Circuit in *Serwatka* indeed follows this line of interpretation. The court acknowledged that Title I’s remedial section, 42 U.S.C. § 12117(a), provides that “the same ‘powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9’” of Title VII are available to ADA claimants, and that § 2000e-5(g)(2)(B) was in fact amended by the CRA of 1991 to provide for remedies in mixed-motive cases.¹³³ Rather than finding this implicitly to endorse mixed-motive claims, the Seventh Circuit instead focused on the fact that the *liability* portions of the ADA had *not* been amended.¹³⁴ The court analyzed the statutory language as a simple failure to be explicit—the lesson drawn from *Gross*.

There are several strong critiques of *Gross*’s take on the 1991 CRA, which are beyond the scope of this Article.¹³⁵ Even if there

apply. See Struve, *supra* note 93, at 293-96 (finding no evidence to support the assertion that a mixed-motive model causes undue confusion for juries).

¹³² See *supra* note 84 and accompanying text.

¹³³ *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010) (quoting 42 U.S.C. § 12117(a) (2006)).

¹³⁴ See *id.*

¹³⁵ Among those critiques are that Congress amended Title VII not so much to authorize mixed-motive claims but to settle uncertainty about the standard of causation caused by the fracturing of the Court in *Price Waterhouse*. See Allison P. Sues, Comment, *Gross’ed Out: The Seventh Circuit’s Over-Extension of Gross v. FBL Financial Services into the ADA Context*, 5 SEVENTH CIRCUIT REV. 356, 403-04 (2010), <http://www.kentlaw.edu/7cr/v5-2/sues.pdf> (“[I]t is reasonable to conclude that Congress meant only to clarify that the statutory language, ‘because of,’ does indeed support a mixed-motive causation scheme” and the 1991 CRA “did not vitiate the continued applicability of *Price Waterhouse*’s instructive value.”). Because *Price Waterhouse* was a Title VII claim, it is not surprising Congress amended that statute to correct the

were ambiguities in the 1991 Act, however, Congress' subsequent actions, or inactions, when amending the ADA in 2008 add strength to the argument it endorsed mixed-motive burden shifting in disability discrimination claims. By that time, all the federal circuit courts to have considered the issue except one had recognized mixed-motive burden shifting as appropriate under the ADA.¹³⁶ Yet, while the ADA Amendments Act (ADAAA) of 2008 extensively modified the ADA in order to undo several judicial decisions construing the statute inappropriately,¹³⁷ it did not single out the mixed-motive decisions. Following the familiar canon of statutory construction, evaluation of Congress' actions in amending the ADAAA "must take into account [the] contemporary legal context."¹³⁸ That context strongly endorsed applying the same mixed-motive proof model as established under Title VII.¹³⁹

situation created by that decision. Given the state of the law, which generally recognized mixed-motive burden shifting, there was no need to fix or change other antidiscrimination statutes. If Congress intended to undo the unity that existed in regard to the availability of mixed-motive burden shifting, more than a backhanded approach could be expected. As Sues points out, this interpretation also assumes that Congress engaged in a nonsensical act. *See id.* at 382. Because the 1991 Act amends 42 U.S.C. § 2000e-5 to provide a limited remedy in mixed-motive cases even if the employer proves it would have made the same decision anyway, and § 12117(a) of the ADA cross-references § 2000e-5, to read the 1991 Act as intending mixed-motive burden shifting only under Title VII creates an absurdity—a remedy is offered under the ADA for a claim that cannot be pursued. *See id.*

¹³⁶ *See, e.g., Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 337 (2d Cir. 2000) (finding that Congress' elimination in the ADA of "solely" from "because of" is "forceful[]" evidence it recognized mixed-motive causation). The lone standout was the Sixth Circuit. *See McLeod v. Parsons Corp.*, 73 F. App'x 846, 858 (6th Cir. 2003) (rejecting plaintiff's argument that prior Sixth Circuit decisions requiring proof of sole causation were no longer good law); *see also Anderson, supra* note 29, at 342-43 (discussing the Sixth Circuit's analysis).

¹³⁷ Congress singled out two Supreme Court cases with which it disagreed and rejected an EEOC regulation it found too stringent. ADA Amendments Act (ADAAA) of 2008, Pub. L. No. 110-325, §§ 2(b)(3)-(4), (6), 122 Stat. 3553 (2008).

¹³⁸ *Morse v. Republican Party of Va.*, 517 U.S. 186, 231 (1996) (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 698-99 (1979)).

¹³⁹ By analogy to Title VII, courts also found plaintiffs met their prima facie case by presenting sufficient evidence that their disability was a motivating factor in the employer's decision. *See, e.g., Parker*, 204 F.3d at 337 (finding plaintiff had presented prima facie proof that his disability was a motivating factor in his employer's decision); *Head v. Glacier Nw., Inc.*, 413 F.3d 1053, 1065 (9th Cir. 2005) (concluding that the "motivating factor" standard is the most consistent with the plain language and purposes of the ADA). Pattern jury instructions at the time similarly incorporated the mixed-motive, motivating-factor language. *See Collado v. United Parcel Serv., Co.*, 419

Moreover, although Congress did not explicitly address mixed-motive issues in the ADAAA, it did address the very “because of” language at issue in *Gross*. In the original ADA, discrimination included adverse actions taken against an individual “with a disability because of the disability of such individual.”¹⁴⁰ The ADAAA strikes that language and substitutes in its place “on the basis of disability.”¹⁴¹ While the Supreme Court has asserted those two terms are substantively interchangeable,¹⁴² Congress’ expressed reason for the change is significant. As explained in the Managers’ Report accompanying the ADAAA, the change was made in order to more closely conform the structure of the ADA to that of Title VII.¹⁴³ Given that Congress made the very causation language at issue more Title VII-like, it would be anomalous to conclude it did not expect courts to apply Title VII disparate-treatment standards to ADA claims, absent some specific statutory provision directing otherwise.¹⁴⁴

Beyond the specific language, the ADAAA itself suggests something about the Court’s recent interpretive approach toward discrimination statutes. The ADA had to be amended because the Court went considerably off track in construing the statute. Yet, in those opinions, the Court made repeated assertions about congressional intent ostensibly drawn from the language of the

F.3d 1143, 1152 n.5 (11th Cir. 2005) (quoting Eleventh Circuit Pattern Jury Instruction 1.5.2, which stated the final element in the plaintiff’s prima facie case as: “[T]he Plaintiff’s disability was a substantial or motivating factor that prompted the Defendant to take that action”).

¹⁴⁰ Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, § 12112(a), 104 Stat. 327, 331.

¹⁴¹ 42 U.S.C. § 12112(a) (Supp. III 2009).

¹⁴² See *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63, 64 n.14 (2007) (cited in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009)).

¹⁴³ 154 CONG. REC. S8347 (2008) (statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments of 2008). This change was part of Congress’ move to undo the narrowness brought about by the Supreme Court’s interpretation of the Act. See *Sues*, *supra* note 135, at 407-08. Congress was clarifying that the statute applied to cases involving uncorrected vision standards. See *id.*

¹⁴⁴ The Seventh Circuit left open the possibility that the change in language supported a different conclusion regarding the viability of mixed-motive ADA claims. *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 n.1 (7th Cir. 2010).

Act.¹⁴⁵ Similarly, the majority in *Gross* justifies its interpretation of “because of” causation as based on the ordinary meaning of the term, despite legislative indications that it was not Congress’ ordinary understanding. In both regards, the Court reflects its view of what *should be* required more than what Congress actually enacted, wrapped in the guise of “ordinary” meaning. This has implications for issues outside the disparate-treatment context.

One positive potential outcome of *Gross* may be that Congress is more comprehensive when enacting or amending statutes in the future, to forestall the Court’s “default” rule. Along those lines, a recent attempt to undo *Gross* is discussed in the next section. While comprehensively addressing disparate-treatment claims, that bill would not have been as comprehensive as it needed to be to address all but-for causation issues.

B. Protecting Older Workers Against Discrimination Act

Shortly after *Gross* was decided, the Protecting Older Workers Against Discrimination Act (POWADA) was proposed in both houses of Congress.¹⁴⁶ POWADA would have amended the ADEA to incorporate the same motivating-factor and burden-shifting standards that are currently found in Title VII.¹⁴⁷ POWADA also would have permitted plaintiffs the choice to prove but-for causation, specifically that “the practice complained of would not have occurred in the absence of an impermissible factor.”¹⁴⁸ Plaintiffs would have been permitted to rely on “[e]very method for proving either such violation, including the evidentiary framework set forth in *McDonnell-Douglas* [sic] *Corp. v. Green*,

¹⁴⁵ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999) (finding, for example, that “[h]ad Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings”); see also *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002) (reiterating *Sutton*’s assertion of congressional findings as indicating the definition of disability must be “interpreted strictly to create a demanding standard”).

¹⁴⁶ H.R. 3721, 111th Cong. (2009); S. 1756, 111th Cong. (2009). The language of the two versions is identical. To be concise, only the House version will be cited from this point forward.

¹⁴⁷ H.R. 3721 at § 3 (proposing the addition of new subsection (g) to § 4 (29 U.S.C. § 623)).

¹⁴⁸ *Id.* (quoting proposed § 4(g)(1)(B)).

411 U.S. 792 (1973).”¹⁴⁹ The Act further clarified that plaintiffs “may rely on any type or form of admissible circumstantial or direct evidence and need only produce evidence sufficient for a reasonable trier of fact to conclude that a violation” has occurred.¹⁵⁰

A striking component of this Act was that it not only would have amended the ADEA, but every federal law prohibiting discrimination or retaliation, including constitutional claims. A new subsection (g)(5) provided that:

This subsection shall apply to any claim that the practice complained of was motivated by a reason that is impermissible, with regard to that practice, under—

(A) this Act, including [the ADEA’s prohibition on retaliation];

(B) any Federal law forbidding employment discrimination;

(C) any law forbidding discrimination of the type described in [the ADEA’s prohibition on retaliation] or forbidding other retaliation against an individual for engaging in, or interference with, any federally protected activity including the exercise of any right established by Federal law (including a whistleblower law); or

(D) any provision of the Constitution that protects against discrimination or retaliation.¹⁵¹

POWADA was, therefore, an attempt to anticipate the causation tentacles put out by *Gross*. It reached any discrimination statute that utilized a “because of” standard under which there could be a question about mixed-motive causation. POWADA thus seemingly would have achieved causation unification in disparate-treatment claims.¹⁵²

¹⁴⁹ *Id.* (quoting proposed § 4(g)(4)).

¹⁵⁰ *Id.* (quoting proposed § 4(g)(3)).

¹⁵¹ *Id.* (quoting proposed § 4(g)(5)).

¹⁵² Indeed, the Act’s purpose section explicitly states this intent:

The purpose of this Act is to ensure that the standard for proving unlawful disparate treatment under the Age Discrimination in Employment Act of

POWADA would almost certainly have effectively addressed *Gross*'s impact on disparate-treatment claims. But POWADA went no further than this. It would not have explicitly overruled the overarching assertion in *Gross* that the ordinary standard of causation requires the plaintiff to meet a but-for test. The statute attempted to comprehensively identify all potential statutes to which Congress intends the special causation rule to apply instead of simply broadly announcing that but-for causation is not required in any circumstance unless the statute specifically calls for it. In a sense, POWADA would have confirmed *Gross*'s thesis—that any change from that default must come from explicit statutory language. Left in place is the proposition that ordinary causation requires plaintiffs to show the precise causal role played by a protected characteristic.

Moreover, POWADA spoke only to claims that a practice “was motivated by a reason that is impermissible.”¹⁵³ Causation issues that arise outside of disparate treatment would, therefore, have had to account with *Gross*'s default rule. For example, in the reasonable-accommodation context, the issue is not whether the employer acted upon improper motivation when deciding whether to grant the employee's request, but whether the employee has a need for accommodation and the feasibility of such accommodation.¹⁵⁴ There can be an element of causation in the latter analysis, in regard to whether the employee in fact needs the accommodation because of a disability.¹⁵⁵ Nothing in

1967 and other anti-discrimination and anti-retaliation 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.

Id. § 2(b).

¹⁵³ *Id.* § 3 (proposed § 4(g)(5)).

¹⁵⁴ See *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001) (articulating the test for reasonable accommodation as requiring plaintiff to show “that the proposed accommodation would enable her to perform the essential functions of her job” and “that, at least on the face of things, it is feasible for the employer under the circumstances”); see also 42 U.S.C. § 12111 (10)(B)(i)-(iv) (2006) (factors to be considered in determining whether a reasonable accommodation poses an undue hardship); see also 45 C.F.R. § 605.12 (c)(1)-(3) (2010).

¹⁵⁵ The ADA specifically provides that the employer has an obligation to reasonably accommodate the “known physical or mental limitations of an otherwise qualified individual with a disability.” 42 U.S.C. § 12112(b)(5)(A) (2006). As discussed in Part IV

POWADA directs the Court to what, if any, causation analysis is appropriate in that context. Presumably, causation that does not rest on motivation would have remained vulnerable to some kind of but-for analysis. POWADA would not, therefore, have been sufficient to eliminate all of *Gross*'s problematic implications.

IV. CAUSATION AND REASONABLE ACCOMMODATION

The limitations of a statute like POWADA are significant because problems with causation already impact reasonable-accommodation claims. The duty of reasonable accommodation is a subcategory of the general substantive prohibition on discrimination “on the basis of” (previously “because of”) an individual’s disability.¹⁵⁶ Currently, the role of causation in the reasonable-accommodation, prima facie case is confusing. Some courts articulate the prima facie case in reasonable-accommodation claims as having a causation element; some do not.¹⁵⁷ Some cases suggest that it is not necessary to consider causation in accommodation cases because the employer concedes it.¹⁵⁸

Justice Scalia in his dissent in *US Airways, Inc. v. Barnett* would require accommodation claims meet a but-for standard.¹⁵⁹ He believes the ADA “eliminates workplace barriers only if a disability prevents an employee from overcoming them—those barriers that would not be barriers *but for* the employee’s disability.”¹⁶⁰ The Seventh Circuit adopted a similar standard for

below, some courts have read the standard to require plaintiffs show the need for the accommodation because of their disability.

¹⁵⁶ Subsection (a) of the ADA’s general prohibition provides that “[n]o covered entity shall discriminate against a qualified individual on the basis of disability.” 42 U.S.C. 12112(a) (Supp. III 2009). Subsection (b) entitled “Construction” then provides that “[a]s used in subsection (a) of this section, the term ‘discriminate against a qualified individual on the basis of disability’ includes . . . not making reasonable accommodations.” *Id.* § 12112(b)(5)(A) (2006 & Supp. III 2009).

¹⁵⁷ See *infra* Part IV.A.

¹⁵⁸ See *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1032-33 (7th Cir. 1999) (noting that in plaintiff’s prima facie case, proving that a disability caused an adverse employment action is “frequently left unstated because employers will concede that the disability was the reason for the job action but will argue the ‘otherwise qualified’ or ‘reasonable accommodation’ issues”).

¹⁵⁹ 535 U.S. 391, 413 (2002) (Scalia, J., dissenting).

¹⁶⁰ *Id.*

claims arising under ADA Title II.¹⁶¹ That circuit requires claimants seeking accommodation in public services meet what it calls the “necessity-causality” standard.¹⁶² Plaintiffs must show that the barrier to obtaining the benefits sought is one not shared with the public generally.¹⁶³ In other words, plaintiffs must show that “but-for [their] disability, [they] would have been denied access to the services or benefits desired.”¹⁶⁴

In each of these three areas, requiring proof of but-for causation undermines the purpose of accommodation law. The core value noted at the opening of this Article—that causation lies at the heart of all antidiscrimination law—works against reasonable accommodation because it confuses the issues.

A. Causation as a Prima Facie Element of Title I Accommodation Claims

Whether and when causation is an element of prima facie proof in an ADA claim depends on the court and the nature of the claim. When a disability-discrimination claim is postured as a disparate-treatment claim, courts typically set forth prima facie elements similar to those in Title VII, which require the plaintiff show the adverse action was caused by the protected characteristic.¹⁶⁵ When courts spell out the plaintiff’s prima facie case in ADA reasonable accommodation claims, they may also include a requirement that the plaintiff show a causal link between his disability and the alleged adverse employment

¹⁶¹ See *Wisc. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 752 (7th Cir. 2006).

¹⁶² See *id.* at 755.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 752 (citation omitted).

¹⁶⁵ See, e.g., *Bones v. Honeywell Int’l, Inc.*, 366 F.3d 869, 878 (10th Cir. 2004) (articulating plaintiff’s prima facie case as requiring her to “establish that: (1) she is a disabled person within the meaning of the ADA; (2) she is qualified to perform the essential functions of the job, with or without accommodation; and (3) the employer terminated her employment under circumstances which give rise to an inference that the termination was based on her disability”); *Buchsbaum v. Univ. Physicians Plan*, 55 F. App’x 40, 45 (3d Cir. 2002) (noting that plaintiff’s disparate treatment claim under ADA may proceed under either the pretext approach established by *McDonnell Douglas* or mixed-motive approach established by *Price Waterhouse*). Cf. *Humphrey v. Mem’l Hosps. Ass’n*, 239 F.3d 1128, 1139 (9th Cir. 2001) (“Unlike a simple failure to accommodate claim, an unlawful discharge claim requires a showing that the employer terminated the employee because of his disability.”).

action.¹⁶⁶ Some courts say this element can be met by showing reasonable accommodation was requested and denied.¹⁶⁷ The Seventh Circuit explained that causation is always required as part of the plaintiff's prima facie case, but that it will often go unstated because employers concede disability was the reason for their decision.¹⁶⁸ Instead, employers argue the plaintiff was not otherwise qualified for the position or that the accommodation sought was not reasonable.¹⁶⁹

What if the employer does not concede that disability was the reason for adverse action? For example, in *Foster v. Arthur Andersen, LLP*, the employer argued that it fired the plaintiff not because she requested an accommodation of her carpal tunnel syndrome, but because she violated company policy regarding notifying the company about being late for work.¹⁷⁰ Arguably the plaintiff's reason for being late was related to her disability, in that she was at her doctor's office, and she framed her case as raising denial of a reasonable accommodation.¹⁷¹ The court, however, framed the case more like a disparate-treatment claim.¹⁷² It emphasized that even in failure-to-accommodate claims, the plaintiff has to show that her disability motivated the employer's decision to terminate.¹⁷³ The court dismissed the claim because it found the only evidence of such intent was the timing between the plaintiff's request and her dismissal, which standing alone in that circuit was legally insufficient to prove causation.¹⁷⁴

¹⁶⁶ See, e.g., *Turner v. Hershey Chocolate USA*, 440 F.3d 604, 611 (3d Cir. 2006) (articulating prima facie case in reasonable-accommodation claim to require plaintiff show she "has suffered an adverse employment action because of [her] disability").

¹⁶⁷ See *id.* at 611 n.4 (suggesting that once plaintiff shows failure to accommodate, she has also shown adverse action because of disability); see also *McKane v. UBS Fin. Servs., Inc.*, 363 F. App'x 679, 681 (11th Cir. 2010) (articulating the prima facie standard to require plaintiff show "he was discriminated against by way of the defendant's failure to provide a reasonable accommodation").

¹⁶⁸ See *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1032-33 (7th Cir. 1999).

¹⁶⁹ See *id.*

¹⁷⁰ *Id.* at 1033.

¹⁷¹ *Id.* at 1032.

¹⁷² *Id.* at 1033 (noting analogy to Title VII, 42 U.S.C. § 2000e-2(a)(1) (2006), which contains similar "because of" language).

¹⁷³ See *id.*

¹⁷⁴ See *id.* at 1034 (citing *Hunt-Golliday v. Metro. Water Reclamation Dist. of Greater Chi.*, 104 F.3d 1004, 1014 (7th Cir. 1997)); see also *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 878 (10th Cir. 2004) (finding plaintiff failed to prove her dismissal

Cases like *Foster* would now apparently also be subject to *Gross*'s default rule requiring the plaintiff to disprove all other proffered reasons for her dismissal, with no burden shift to the employer other than a burden to produce admissible reasons.¹⁷⁵

What if but-for causation is required? A district court case arising out of the Sixth Circuit illustrates the problems causation issues can present when the relationship between the failure to accommodate and the reason for the employer's discharge decision is not clear.¹⁷⁶ In *Whitfield v. Tennessee*, the employer asserted that it discharged the plaintiff because of deficiencies in her performance, although it was not entirely clear from the facts whether these performance deficiencies related to her disability, whether they involved essential functions of her job, or whether she would have avoided those deficiencies if she had received the accommodations she requested.¹⁷⁷ Indeed, the court found the plaintiff had raised a jury question regarding whether she was qualified to do the job, either with or without reasonable accommodation.¹⁷⁸ The court, however, characterized her claim as proceeding under indirect proof of discrimination, which in that circuit at that time required her to show prima facie evidence that

was based on her need for an accommodation when employer knew of her physical restrictions for over ten months before her termination).

¹⁷⁵ The Supreme Court has indicated that when the plaintiff bears the burden of proving discrimination, the defendant's evidence need only "raise[] a genuine issue of fact as to whether it discriminated against the plaintiff." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981).

¹⁷⁶ See *Whitfield v. Tennessee*, No. 3:08-1010, 2009 WL 3839753 (M.D. Tenn. Nov. 16, 2009).

¹⁷⁷ The facts in *Whitfield* regarding the plaintiff's job duties and her needed accommodations are fairly complicated, which in itself suggests summary judgment was not appropriate. Essentially, the plaintiff alleged that her deficiencies in the tasks assigned to her as an administrative assistant were related to the failure of her employer to give her proper equipment and training in light of her vision and mobility impairments. See *id.* at *1-4. Other courts have been careful to note that "with a few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination." See *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1139-40 (9th Cir. 2001) (footnote omitted) (citing *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1086 (10th Cir. 1997) (finding evidence sufficient to create issue of fact regarding whether plaintiff's attendance problems were caused by her OCD)).

¹⁷⁸ *Whitfield*, 2009 WL 3839753 at *10.

she “was discriminated against solely because of the disability.”¹⁷⁹ The court concluded that she had “not produced sufficient other evidence to show that Defendants’ reason for terminating her employment had no basis in fact, that it did not actually motivate the Defendants’ challenged conduct, or that it was insufficient to warrant the challenged conduct.”¹⁸⁰ In other words, she failed to produce evidence that her disability was the sole reason she was fired.

Because the court found the plaintiff raised a jury question regarding her ability to do the job with or without reasonable accommodation, the jury should have been asked to resolve whether her performance deficiencies were disability related.¹⁸¹ Instead, the but-for standard confused the issue. The court in *Whitfield* transformed what should have been a case about qualification and reasonableness of accommodation into a case about causation. *Gross* will likely reinforce this outcome.¹⁸² Even in accommodation cases, if the employer argues it had a legitimate reason for discharge, plaintiffs risk dismissal unless they

¹⁷⁹ *Id.* at *9. Even after *Desert Palace*, the Sixth Circuit continued to require ADA plaintiffs who lack sufficient direct evidence prove that the adverse employment action was based solely on their disability. See *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 454 (6th Cir. 2004) (reaffirming that plaintiffs in that circuit must “show that [their] disability was the sole reason for” the employment action). That court has only very recently reconsidered its position and held that sole causation is not required by the language of the ADA. See *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 317 (6th Cir. 2012).

¹⁸⁰ *Whitfield*, 2009 WL 3839753 at *11.

¹⁸¹ See, e.g., *Criado v. IBM Corp.*, 145 F.3d 437, 444 (1st Cir. 1998) (finding jury question whether employee’s absenteeism was legitimate basis for her termination where employee’s request for an absence was related to her disability). Cf. Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 241 (2005) (asserting that in the context of a plaintiff discharged for violating work-related rules, such individual “should be able to . . . establish[] a prima facie case of disability discrimination . . . by demonstrating that he or she was discharged because of conduct causally connected to the disability. Such an approach would provide more protection to plaintiffs, many of whom will have disabilities that manifest themselves through conduct”).

¹⁸² While the Sixth Circuit subsequently rejected the “solely” standard, it simultaneously found that *Gross* required it to reject the mixed-motive standard, directing the lower court that the jury instructions should focus on whether the plaintiff’s disability “is a ‘but-for’ cause of the employer’s adverse decision.” *Humboldt Acquisition*, 681 F.3d at 317, 321 (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009)) (internal quotation marks omitted).

demonstrate but for their disability, that discharge would not have occurred.¹⁸³

By contrast, other cases have recognized that juries should determine if a work deficiency is disability related.¹⁸⁴ In *Gambini v. Total Renal Care, Inc.*, the Ninth Circuit concluded that a jury should have determined whether an employee's outburst at a meeting, for which she was terminated, arose out of her bipolar disorder.¹⁸⁵ Even in this context, however, there is still a causation question. The court in *Gambini* framed the issue as requiring the plaintiff to demonstrate "a causal link between the disability-produced conduct and the termination."¹⁸⁶ Because *Gambini* did not require sole causation, but rather applied a "substantial factor" test, the plaintiff's task was not as onerous.¹⁸⁷ The court concluded that "a decision motivated even in part by the disability is tainted and entitles a jury to find that an employer violated antidiscrimination laws."¹⁸⁸ After *Gross*, the Ninth Circuit may retreat from that interpretation and require ADA disparate treatment plaintiffs to show the causal link under the heightened but-for standard.

Even when courts recognize the difference between disparate treatment and reasonable accommodation claims, they may still look for causation in reasonable accommodation claims. For example, in *Nichols v. Unison Industries, Inc.*,¹⁸⁹ the federal district court characterized disparate treatment and "failure to accommodate" as "two distinct categories of disability

¹⁸³ Cases under the Rehabilitation Act similarly demonstrate the dominating role of causation issues. See *Ragsdale v. Holder*, 668 F. Supp. 2d 7, 25-26, (D.D.C. 2009) (finding Rehabilitation Act plaintiff failed to present sufficient evidence to raise inference that she was denied her requested leave on the basis of disability).

¹⁸⁴ See, e.g., *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1093 (9th Cir. 2007) (finding lower court erred by refusing to give instruction that conduct arising from a disability is part of the disability and cannot be a separate basis for termination); *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1139-40 (9th Cir. 2001) (stating similar rule).

¹⁸⁵ *Gambini*, 486 F.3d at 1093. The Sixth Circuit has rejected this approach, holding instead that "an employer may legitimately fire an employee for conduct . . . that occurs as a result of a disability, if that conduct disqualifies the employee from his or her job." *Macy v. Hopkins Cnty. Sch. Bd.*, 484 F.3d 357, 366 (6th Cir. 2007).

¹⁸⁶ *Gambini*, 486 F.3d at 1093.

¹⁸⁷ See *id.* at 1094.

¹⁸⁸ *Id.*

¹⁸⁹ No. 99-C-50194, 2001 WL 849528 (N.D. Ill. July 24, 2001).

discrimination claims.”¹⁹⁰ The employer in that case argued that the plaintiff’s failure-to-accommodate claim was “based solely on a theory that the company discharged him because he requested the heat breaks [during his shift] as an accommodation,” which would apparently be considered a form of disparate treatment.¹⁹¹ The court disagreed with the defendant’s assertion, finding the plaintiff had sufficiently alleged that his claim was based on the denial of the heat breaks, which would be a failure-to-accommodate claim.¹⁹² When the court proceeded to evaluate that failure-to-accommodate claim, however, it found a causation problem.

The court noted that an employer is required to grant an accommodation request only “when the accommodation makes it possible for the disabled individual to: (1) perform the essential functions of the job in question; (2) pursue therapy or treatment for the disability; or (3) enjoy the privileges and benefits of employment equal to those enjoyed by non-disabled employees.”¹⁹³ In that case, the court concluded that the plaintiff lacked prima facie evidence to meet any of these three reasons.¹⁹⁴ Most significantly, the court found the plaintiff was able to continue to perform his job despite having been denied the requested heat breaks.¹⁹⁵ Without explicitly stating so, the court apparently concluded that the accommodation was not reasonable because there was no evidence of causation—the denial of the accommodation did not cause the plaintiff to have difficulty performing his job.¹⁹⁶

¹⁹⁰ *Id.* at *6.

¹⁹¹ *See id.*

¹⁹² *See id.*

¹⁹³ *Id.* at *7.

¹⁹⁴ *See id.* at *8. The plaintiff’s disparate treatment claim also failed because he failed to present sufficient evidence his discharge was caused by his disability. *Id.* The company argued it was based on statements the plaintiff made to other co-workers that created a hostile working environment. *Id.* at *2. The plaintiff relied on the temporal relationship between his formal request for reasonable accommodation and his discharge, but the court found that evidence insufficient because the company actually knew of his accommodation request long before the decision to discharge him was made. *Id.* at *8.

¹⁹⁵ *Id.*

¹⁹⁶ *Nichols*’s interpretation of the prima facie test means that employees would not be protected from discrimination when the failure to accommodate makes it much harder, although not impossible, to perform work tasks. *Nichols* was decided prior to

While *Nichols* did not involve an issue of sole causation, it did contain a but-for element. The court seemed to be suggesting that part of the plaintiff's prima facie case must include a showing that but for being denied accommodation, the plaintiff would have been able to perform the job. Here, the plaintiff failed to show how denial of the heat breaks impacted his ability to do the job.¹⁹⁷ Without evidence that the denial posed a work-related barrier because of his disability, his claim failed.¹⁹⁸

As this section illustrates, causation issues are present in courts' analysis regardless of whether the claim is one for disparate treatment, to which *Gross* more directly applies, or denial of reasonable accommodation. Even in accommodation cases, plaintiffs have been required to show prima facie evidence that the adverse employment action would not have occurred but for the plaintiff's need or request for accommodation. Employers have been able to take the focus away from determining the essential functions of a position and whether the accommodation was reasonable by asserting they had a legitimate, non-discriminatory reason for discharging the plaintiff, even when that reason seems to have some connection to the plaintiff's disability. Although disparate treatment and reasonable accommodation are identified as separate theories, these causation cases suggest the distinction between the two can easily be blurred.

B. Justice Scalia's Dissent in US Airways, Inc. v. Barnett: But-for Causation Necessary in Reasonable Accommodation Cases

The necessity analysis in a case like *Nichols* has similarities to that articulated by Justice Scalia in his dissenting opinion in

Barnett and its endorsement of lower courts' definition of "reasonable" as "ordinarily or in the run of cases." See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002). As that prima facie test is configured, there is no requirement that employees also prove that they were unable to do the job without the accommodation. See *id.*; see also *infra* notes 281-84 and accompanying text.

¹⁹⁷ See *Nichols*, 2001 WL 849528 at *8.

¹⁹⁸ The Eleventh Circuit has taken this consideration one step further and required a plaintiff to show the refused accommodation would have "completely obviated" the difficulty his impairment caused him in the workplace. See *McKane v. UBS Fin. Servs., Inc.*, 363 F. App'x 679, 682 (11th Cir. 2010).

US Airways, Inc. v. Barnett.¹⁹⁹ In that case, Justice Scalia, joined by two other Justices, argued that “because of disability” under the ADA required plaintiffs to show the sought accommodation had a but-for relationship with the plaintiff’s disability—that but for the plaintiff’s disability, the plaintiff would not need the accommodation.²⁰⁰ While a majority of the Court rejected Scalia’s arguments in the context of *Barnett*, those arguments may find greater success in a post-*Gross* regime.

The main issue in *Barnett* was whether an employee was entitled to reassignment to a position despite the employer’s assertion that assignment would violate its non-contractual seniority system.²⁰¹ In reaching its decision, the majority interpreted the ADA to allow an individual with a disability to seek reassignment to a vacant position as a reasonable accommodation even if the barrier to that reassignment was a workplace rule that affected all employees, not just those with disabilities.²⁰² In other words, employers may be required to modify otherwise neutral workplace rules. The workplace barrier in question was a seniority rule, which the employer asserted did not allow the plaintiff to retain a position to which he had been temporarily transferred after an injury.²⁰³ Justice Scalia dissented, joined by Justice Thomas, and argued that the statutory structure of the ADA did not permit accommodation claims in that circumstance.²⁰⁴

Scalia asserted that the majority ignored the fact the ADA did not simply prohibit discrimination against a qualified individual; it specifically prohibited discrimination “because of the disability of such individual” and required accommodation “to the known physical or mental limitations of an otherwise qualified individual with a disability.”²⁰⁵ He interpreted that to require employers to remove workplace barriers “only if a disability prevents an employee from overcoming them—those barriers that

¹⁹⁹ 535 U.S. 391 (2002).

²⁰⁰ *Id.* at 411-14 (Scalia, J., dissenting).

²⁰¹ *See id.* at 394 (majority opinion).

²⁰² *Id.* at 397-98.

²⁰³ *See id.* at 394-95.

²⁰⁴ *Id.* at 412 (Scalia, J., dissenting).

²⁰⁵ *Id.* at 412-13 (quoting 42 U.S.C. §§ 12112(a), 12112(b)(5)(A) (2006)) (internal quotation marks omitted).

would not be barriers *but for* the employee's disability."²⁰⁶ The seniority barrier at issue in *Barnett* did not pose a special burden for individuals with disabilities as opposed to every other less senior employee and, therefore, was not the but-for cause of the plaintiff's failure to be permanently reassigned.²⁰⁷

By contrast, the *Barnett* majority focused on arguments regarding whether granting reassignment worked as an unlawful preference.²⁰⁸ It reasoned that nothing in the ADA indicated Congress intended to exempt workplace rules simply because they can be characterized as neutral.²⁰⁹ To the contrary, Congress expected that individuals with disabilities might have to be treated differently on an individualized basis in order to obtain equal opportunity.²¹⁰ The Court reasoned that "[t]he Act requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy."²¹¹ While it did not address the substance of Scalia's but-for argument directly, the majority viewed his argument as tapping into the preference argument and explicitly rejected it on that ground.²¹²

While the Court could have been clearer, its rejection of Justice Scalia's position was correct. Under Scalia's vision of accommodation causation, rules or policies that "bear no more heavily upon a disabled employee than upon others" do not have

²⁰⁶ *Id.* at 413.

²⁰⁷ *Id.* at 413-14.

²⁰⁸ *Id.* at 397-98 (majority opinion).

²⁰⁹ *Id.* at 398.

²¹⁰ *Id.* at 397.

²¹¹ *Id.* The Court further elaborated its understanding of the statutory relationship by noting that "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal." *Id.*

²¹² *See id.* at 398 ("The simple fact that an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself*, automatically show that the accommodation is not 'reasonable.' As a result, [the Court] rejects the position taken by U.S. Airways and Justice Scalia to the contrary."). Professor Mark Weber has noted that many courts have missed this part of the majority's opinion. *See* Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1176-77 (2010) (noting that it is "surprising . . . that so many courts have failed to realize that the majority of the Supreme Court rejected" the argument that "the ADA does not require 'preferences' for employees with disabilities or departures from neutral rules").

to be accommodated.²¹³ This rule would appear to swallow many otherwise reasonable accommodations. For example, a work rule such as one establishing an 8:00 a.m. starting time might not need to be accommodated for an individual who has difficulty rising in the morning due to medication taken at night or who has transportation limitations due to a mobility impairment. Individuals without disabilities have their own difficulties with early work times,²¹⁴ and the start-time rule is an obstacle regardless of, not but for, the employee's disability.²¹⁵ Yet, the reason the employee requires accommodation at all is because of the employee's disability-related limitations.

In Mr. Barnett's case, Justice Scalia would have found a failure to prove but-for causation because Barnett did not show he was in any different position because of his disability than any other person who lacked seniority to get the job.²¹⁶ But because of his disability, he was in the position of having much more limited options.²¹⁷ The ADA requires reasonable accommodations to the employee's known physical or mental limitations, and failure to make such accommodations is discrimination because of disability.²¹⁸ It is simply irrelevant whether other, non-disabled individuals might also face obstacles to getting the job.

The starting point of Justice Scalia's analysis cannot be denied. As noted above, the accommodation mandate is a specific application of the substantive prohibition on discrimination "because of" (now "based on") disability. While the *Barnett* majority rejected Justice Scalia's attempt to inject but-for causation into accommodation claims, it did so by framing the argument as involving preferences.²¹⁹ The lasting strength of the *Barnett* majority is not clear post-*Gross*. Scalia's but-for approach

²¹³ *Id.* at 413 (Scalia, J., dissenting).

²¹⁴ Such as childcare and commuting, among others.

²¹⁵ Justice Scalia does suggest that a modified work schedule might be a reasonable accommodation, but he frames this in reference to an employee needing breaks from "work for protracted periods." *Barnett*, 535 U.S. at 415 (Scalia, J., dissenting).

²¹⁶ *Id.* at 413-14.

²¹⁷ See Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 962 (2004) ("Disabled employees, once they are bumped from their jobs by more senior employees, have fewer options than their able-bodied counterparts.").

²¹⁸ See 42 U.S.C. § 12112(b)(5)(A) (2006).

²¹⁹ See *Barnett*, 535 U.S. at 398.

may prevail in another case presenting a different context while still raising the same core issue.

C. “Necessity-Causality” Under Title II

Although the *Barnett* Court refused to adopt Justice Scalia’s but-for standard in a Title I claim, some courts have applied similar reasoning in Title II claims. These cases demonstrate how but-for analysis can creep into accommodation analysis. The potential for the standard, if not restrained, to “take on a life of its own”²²⁰ is substantial.

These Title II cases come out of the Seventh Circuit. Title II applies to the benefits, programs, and activities of public entities.²²¹ The regulations implementing Title II define discrimination to include not “mak[ing] reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”²²² In *Wisconsin Community Services, Inc. v. City of Milwaukee*, the Seventh Circuit concluded the term “necessary” added a but-for causation element to Title II accommodation claims.²²³

As the en banc court explained it, a modification would be “‘necessary’ only when it allows the disabled to obtain benefits that they ordinarily could not have by reason of their disabilities, and not because of some quality they share with the public generally.”²²⁴ The court called this “necessity-causality,”²²⁵ which

²²⁰ Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1698 (1999) (defining this phenomenon as “doctrinal creep”).

²²¹ 42 U.S.C. § 12132 (2006).

²²² 28 C.F.R. § 35.130(b)(7) (2010).

²²³ *Wisc. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 752 (7th Cir. 2006) (en banc). A prior Seventh Circuit panel hearing the case had determined that Title II did not contain an accommodation requirement apart from disparate impact situations, which meant plaintiffs had to show the zoning board’s actions bore more heavily on individuals with disabilities than on the general populace. *See Wisc. Cmty. Servs., Inc. v. City of Milwaukee*, 413 F.3d 642, 645-46 (7th Cir. 2005). While the en banc court reversed the disparate impact requirement, it retained the underlying rationale that Title II plaintiffs had to show how denying the accommodation impacted them distinct from the general public. *See Wisc. Cmty. Servs.*, 465 F.3d at 753.

²²⁴ *Id.* at 754.

could be “satisfied only when the plaintiff shows that, ‘but for’ his disability, he would have been able to access the services or benefits desired.”²²⁶

In that case, the plaintiff sought a special use permit to open a mental health clinic.²²⁷ The permit had been denied twice by the zoning board, first largely because of negative sentiment from the neighborhood toward mental health clinics,²²⁸ and second in part because the zoning board found insufficient evidence that the location was necessary to the patients’ treatment, and also in part because it considered modifying the zoning plan to accommodate a nonprofit organization that would not generate taxes or additional business unreasonable.²²⁹ In regard to the necessity issue, the lower court articulated a standard that asked whether the accommodation “enhance[d] affirmatively [the plaintiff’s] disabled patients’ quality of life by ameliorating the effects of the disability.”²³⁰ The lower court suggested this standard made more sense than one that compared access by those with and without disabilities, since the general public does not require mental health services.²³¹

The Seventh Circuit believed, however, that the issue had been decided by the Supreme Court in *Alexander v. Choate*.²³² This was despite the fact that *Choate* was a disparate-impact case involving state allocation of Medicaid benefits that raised a

²²⁵ *Id.* at 755.

²²⁶ *Id.* at 754.

²²⁷ *Id.* at 740.

²²⁸ *See id.* at 742-43 (noting several zoning board members attributed their vote to “overwhelming’ opposition from neighborhood residents”).

²²⁹ *See id.* at 744-45. The zoning board also concluded that granting the request would fundamentally alter the city’s zoning plan because

[e]very time a social service agency [or similar treatment facilities] wanted to locate their business in a zoning district requiring a special use to do so, the City or this Board would have to automatically consider giving them an accommodation under the ADA regardless of the special use criteria in the City’s ordinance.

Id. at 745.

²³⁰ *Id.* (internal quotation marks omitted).

²³¹ *Id.*

²³² *Id.* at 747-48 (citing *Alexander v. Choate*, 469 U.S. 287 (1985)).

distinct set of principles.²³³ In *Choate*, the Supreme Court rejected a class-action claim under the Rehabilitation Act that alleged Tennessee's reduction of Medicaid coverage for inpatient medical care to fourteen days disproportionately affected individuals with disabilities.²³⁴ The Court's standard asked whether the plaintiffs had "meaningful access" to Medicaid services.²³⁵ The Court concluded there was no evidence the program as defined had a "particular exclusionary effect" on the plaintiffs because of their disability.²³⁶ They were able to access and benefit meaningfully from the fourteen days of coverage.²³⁷

According to the Seventh Circuit, *Choate* created a generalized but-for standard in public service cases that requires comparison to the general public.²³⁸ The Seventh Circuit read *Choate* as articulating a "meaningful access" standard that would apply to accommodation claims similar to the way it applied to the Medicaid benefit claim in *Choate*: "The Rehabilitation Act's promise of 'meaningful access' to state benefits, according to the Court, means that 'reasonable accommodations in the grantee's program or benefit may have to be made.'"²³⁹ The Seventh Circuit then read *Choate* to find the plaintiffs did not lack meaningful access because the benefits program did not distinguish based on any criteria individuals with disabilities would be less likely to meet.²⁴⁰

²³³ See *Choate*, 469 U.S. at 290 (describing plaintiffs' claim as alleging the state's reduction in medical benefits "would have a disproportionate effect on the handicapped and hence was discriminatory").

²³⁴ *Id.* at 309. In an earlier part of the opinion, the Court unanimously concluded that at least some disparate impact claims would be cognizable under section 504. *Id.* at 299.

²³⁵ *Id.* at 301.

²³⁶ *Id.* at 302. The plaintiffs in *Choate* tried to argue the issue was broader, namely whether they had meaningful access to adequate health care. See *id.* at 302-03. They asserted that individuals with disabilities had greater need for health care services than individuals without disabilities and fourteen days did not provide them with meaningful benefit. See *id.* The Court rejected this broader view of the issue, suggesting nothing in the law required the State to provide an alternative benefit, just to provide equal access to the benefit that was provided. *Id.* at 305. The Court was not convinced individuals with disabilities would be unable to benefit from fourteen days' worth of benefits. See *id.* at 302 n.22.

²³⁷ *Id.*

²³⁸ *Wisc. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 748 (7th Cir. 2006).

²³⁹ *Id.* at 747 (quoting *Choate*, 469 U.S. at 301).

²⁴⁰ *Id.*

While it is correct that *Choate* found no lack of meaningful access because it found no particular exclusionary effect, the context of the Court's conclusion has to be considered. *Choate* was not presented as a typical accommodation claim, where a specific modification is sought by a particular individual in a particular case. Instead, the plaintiffs in *Choate* sought to enjoin a state from rewriting its Medicaid program.²⁴¹ The Court began its discussion of meaningful access by stating it was deciding "which disparate impacts § 504 might make actionable."²⁴² Although the Court mentioned an obligation to make reasonable modifications, it did so only to illustrate that a neutral benefit plan cannot be constructed so as to deny meaningful access to its benefits.²⁴³ The Court then concluded that this neutral plan did not create a disparate impact because both individuals with disabilities and those without would receive value from fourteen days of inpatient coverage.²⁴⁴ The Seventh Circuit extrapolated this reasoning and applied it to reasonable-accommodation claims, creating an additional element plaintiffs must establish.²⁴⁵

The leap the Seventh Circuit took from *Choate* to an individualized, reasonable-accommodation claim was substantial. While what the *Choate* plaintiffs wanted could be characterized as a reasonable modification of the benefits program, the case was

²⁴¹ See *Choate*, 469 U.S. at 290 (describing the "major[] thrust of [Choate's] attack" as "directed at the use of *any* annual limitation on the number of inpatient days covered").

²⁴² *Id.* at 299.

²⁴³ See *id.* at 301 ("The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made.").

²⁴⁴ *Id.* at 302.

²⁴⁵ The better view is illustrated by one of the cases *Wisconsin Community Services* cites. See *Wisc. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 748 (7th Cir. 2006) (en banc) (citing *Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003)). In *Henrietta D.*, the Second Circuit rejected the City of New York's argument that the plaintiffs needed first to establish a disparate impact before their reasonable accommodation claim could be considered. *Henrietta D.*, 331 F.3d at 273. That court noted the Department of Justice's regulations, which prohibit not only failing to provide services and benefits that are not equal or as effective as those afforded others but also preventing individuals with disabilities from enjoying those services and benefits "regardless of whether other individuals are granted access." *Id.* at 274 (citing 28 C.F.R. §§ 35.130(b)(1)(i)-(iii) (2002)). The court concluded its own precedent also did "not invite comparisons to the results obtained by individuals without disabilities." *Id.*

not analyzed on the individualized basis that reasonable-accommodation cases are. The *Choate* plaintiffs sought to require Tennessee to change its Medicaid program by eliminating durational limitations on coverage.²⁴⁶ The facts in the Seventh Circuit case illustrate the difference between that sort of disparate impact claim and an individualized reasonable modification claim. The plaintiff in *Wisconsin Community Services* sought a modification of zoning ordinances to allow it to build a mental health clinic; it did not seek to strike the city's special use permit requirement.²⁴⁷ The issue should have been whether the variance sought by the plaintiff was reasonable, not whether the zoning ordinance impacted individuals with disabilities in a fashion similar to others in the community.²⁴⁸ The circuit court found the plaintiffs failed to show but-for causation because the court credited the testimony from city aldermen that their main concern was loss of tax revenue from a nonprofit organization.²⁴⁹ The court concluded this concern did not distinguish the mental health clinic from any other nonprofit organization.²⁵⁰ In other words, the accommodation was not necessary because of the disability of the clinic's patients but because the clinic was not-for-profit.

Wisconsin Community Services thus illustrates the barrier an additional causation element can pose to accommodation claims.²⁵¹ It also illustrates doctrinal creep—in that case, from

²⁴⁶ See *Choate*, 469 U.S. at 291.

²⁴⁷ See *Wisc. Cmty. Servs.*, 465 F.3d at 754 (“WCS submits that the City must waive application of its normal special-use criteria for WCS because it has shown that granting the permit will ameliorate overcrowding, a condition that particularly affects its disabled clients.”).

²⁴⁸ See 28 C.F.R. § 35.130(b)(7) (2010). Section 35.130(b)(7) provides that “[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” *Id.*

²⁴⁹ See *Wisc. Cmty. Servs.*, 465 F.3d at 754 (reasoning that the plaintiffs’ “inability to meet the City’s special use criteria appears due not to its client’s disabilities but to its plan to open a non-profit health clinic in a location where the City desired a commercial, taxpaying tenant instead”).

²⁵⁰ See *id.*

²⁵¹ Building on *Wisconsin Community Services*’s reasoning, a federal district court in Illinois recently upheld denial of housing for individuals with mental illnesses because, while the project in question may have been necessary to provide affordable housing, there was no evidence the specific variances in question were necessary to

disparate-impact issues regarding provision of federally assisted, state-benefit programs to individualized Title II reasonable-modification claims.²⁵² The consequence of this creep is to allow courts to engage in universalist reasoning that disregards the particular nature of the limitations experienced by individuals with disabilities. Two contrasting cases involving plaintiffs with transportation limitations illustrate the difference that type of approach can make.²⁵³

In *Sudduth v. Donnelly*, the plaintiff was a witness in a criminal matter attempting to get to the courthouse from out of town.²⁵⁴ Because of visual limitations, the plaintiff alleged he could not drive or fly, so he had to take the train.²⁵⁵ The train arrived late, and despite the fact the plaintiff contacted the State's

ameliorate the effects of the plaintiffs' disabilities. *Nikolich v. Village of Arlington Heights, Ill.*, No. 10 C 7395, 2012 WL 2359313, at *4 (N.D. Ill. June. 20, 2012).

²⁵² A similar illustration can be found in a Minnesota Supreme Court case, albeit with a different factual conclusion. See *Hinneberg v. Big Stone Cnty. Hous. & Redev. Auth.*, 706 N.W.2d 220 (Minn. 2005). In *Hinneberg*, the plaintiff sought to use a Section 8 voucher outside of the Housing Authority's jurisdiction. *Id.* at 222. She asserted her medical condition made this necessary because she could not find suitable housing within the county. *Id.* The housing authority's residency policy, however, required that she have physical residence in the county and reside there at least twelve months before the voucher would be portable. *Id.* at 223. The plaintiff sued the housing authority under Title II as well as the Fair Housing Act, alleging it failed to reasonably modify its policy. *Id.* at 222. The lower court applied *Choate's* "meaningful access" standard to deny the plaintiff's claims. *Id.* at 227. The plaintiff argued that because her claim was not a disparate impact claim, the "meaningful access" standard did not apply. *Id.* The Minnesota Supreme Court disagreed, reading *Choate* as "treat[ing] 'meaningful access' and 'reasonable accommodations' as . . . equivalent as applied." *Id.* The court then concluded that "the holding in *Alexander [v. Choate]* on meaningful access is fully applicable to reasonable accommodations claims made under the ADA and FHAA." *Id.* The court next defined the benefit in question, which it concluded was portability of housing vouchers. *Id.* at 227-28. The court concluded the plaintiff was not given meaningful access to this benefit, because individuals without disabilities could move to the county and establish residency, and obtain a portable voucher, but individuals such as the plaintiff could not due to their disability. *Id.* at 228. Although the court framed the question as one of equal access, its reasoning is ultimately similar to that of the Seventh Circuit in that it compares the plaintiff to individuals without disabilities as if the case were a disparate impact claim.

²⁵³ Compare *Sudduth v. Donnelly*, No. 08 C 4227, 2009 WL 918090, *7 (N.D. Ill. April 1, 2009) (finding no right to reasonable modification in Title II case because plaintiff's transportation problems were similar to that experienced by general public), with *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 505 (3d Cir. 2010) (finding shift-change accommodation needed because of transportation difficulties reasonable in Title I case).

²⁵⁴ *Sudduth*, 2009 WL 918090 at *1.

²⁵⁵ See *id.*

Attorney's Office prior to leaving on his trip, as well as the courthouse when it became clear he would be late, the case was dismissed without him being able to testify against the defendant.²⁵⁶ The court rejected the claim he was denied reasonable accommodation, employing *Wisconsin Community Service's* but-for analysis to conclude he "was not denied access to the court because of his disability when everyone in the general population faces the risk of late arrival due to travel complications."²⁵⁷ The court reasoned that he did not arrive on time for the hearing "because his train was late, not because he suffered from diabetes."²⁵⁸ The court thus transformed a question that should have been about the reasonableness of delaying the hearing to accommodate the plaintiff's vision-related transportation limitations into one seeking proof of a disparate impact.

By contrast, in *Colwell v. Rite Aid Corp.*, the Third Circuit found a plaintiff had stated a claim for violation of ADA Title I when she alleged her employer refused to accommodate her night-driving limitations by granting her a change to the day shift.²⁵⁹ The employer argued that her driving difficulties "amounted to a commuting problem unrelated to the workplace."²⁶⁰ The court disagreed, focusing instead on the reasonableness of the requested change.²⁶¹ The court reasoned that a shift change to accommodate "an employee's disability-related difficulties in getting to work [would be] reasonable" when "the requested accommodation is a change to a workplace condition that is entirely within an employer's control and would allow the employee to get to work and perform her job."²⁶² The court properly kept the focus on the policies and practices of the employer and whether the requested accommodation (which clearly related to the employee's known disability-related limitations) was a reasonable modification of those policies and practices, rather than asking for proof of but-for causation.

²⁵⁶ *See id.*

²⁵⁷ *Id.* at *7.

²⁵⁸ *Id.*

²⁵⁹ *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 505 (3d Cir. 2010).

²⁶⁰ *Id.* at 504.

²⁶¹ *See id.* at 505.

²⁶² *Id.*

So far, it appears that only ADA Title II cases have explicitly applied this necessity-causality standard. Title II differs from Title I in that there is no direct mention of reasonable accommodation in Title II.²⁶³ Instead, the requirement is found in the regulations implementing that title.²⁶⁴ Those regulations in turn are derived in large part from the ones adopted under section 504 of the Rehabilitation Act.²⁶⁵ ADA Title II regulations define reasonable accommodation as a modification “necessary to avoid discrimination on the basis of disability.”²⁶⁶ Similar language does not appear in the ADA Title I.²⁶⁷ Nonetheless, in a post-*Gross* but-for regime, there is a serious question whether this same reasoning will eventually be reflected in Title I analysis.

Justice Scalia’s reasoning in his *Barnett* dissent suggests that the absence of such language will not bar applying the same “necessity” approach to Title I. Both Scalia and the Seventh Circuit essentially employ the same reasoning—that disability plaintiffs have to establish the non-universal character of their limitations and need for accommodation.²⁶⁸ It adds up to

²⁶³ Title II’s substantive prohibition provides simply that, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132(a) (2006).

²⁶⁴ 28 C.F.R. § 35.130(b)(7) (2010); *see supra* note 248.

²⁶⁵ 34 C.F.R. § 104.12 (2010). This provision has not been substantively amended since first promulgated in 1980. *See* Reasonable Accommodation, 45 Fed. Reg. 30,940 (May 9, 1980).

²⁶⁶ *See* 28 C.F.R. § 35.130(b)(7) (2010). The Rehabilitation Act regulations do not contain this “necessity” language. *See* 34 C.F.R. § 104.4(a) (2010).

²⁶⁷ *See* 42 U.S.C. § 12112(b)(5)(A) (2006) (prohibiting “not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee”); *id.* § 12112(b)(5)(B) (prohibiting “denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant”).

²⁶⁸ I am using “universal” here a bit differently than others have used it. In other contexts, scholars have discussed the “minority model” and the “universal model” of coverage under the ADA. *See generally* Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203 (2010). Under the universal model, the ADA’s civil rights protections would not be dependent on establishing “disability” class status but are seen to apply to all who are denied opportunity because of an impairment. *See id.* at 217-18 (citing Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 475 (2000)). Similar arguments have been made to expand the protections in

something that may have major impact on Title I accommodation claims. As discussed in the next Part, it effectively has the potential to derail an entire category of accommodation.

V. BUT-FOR CAUSATION AND REASSIGNMENT TO A VACANT POSITION

Barnett raised issues about the duty to reassign employees with disabilities to vacant positions.²⁶⁹ *Barnett*, however, was presented in a narrow context: reassignment when a seniority system would otherwise make the employee ineligible for the open position.²⁷⁰ *Barnett* did not provide courts with much guidance on how to determine if reassignment is reasonable in other contexts, such as when the employer has other candidates for the open slot that it believes are more qualified.²⁷¹ Justice Scalia argued but-for standards should apply to reassignment claims.²⁷² This would presumably prevent reassignment when there are more qualified candidates because the employee could not show that but for his disability he would have been reassigned to the vacant position.²⁷³

other areas of antidiscrimination law, such as sexual harassment law. *See generally* Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1220-23 (2011) (summarizing the trend toward universalism in workplace bullying and work-life accommodations). Professor Clarke cautions that the general trend toward universalism in antidiscrimination law may “create new problems of inequality, by requiring all workers to assimilate to biased norms masquerading as neutral rules, and by diluting protections for those who need them most.” *Id.* at 1223. While I think there are strong benefits to viewing accommodation issues from a universal perspective, because it pushes against the notion accommodations are preferences, the cases discussed in this Part demonstrate how the concept can be turned on its head to make accommodations more difficult to obtain, lending credence to Professor Clarke’s concerns.

²⁶⁹ *See* US Airways, Inc. v. Barnett, 535 U.S. 391, 396 (2002) (noting that the ADA explicitly includes reassignment to a vacant position as a form of reasonable accommodation).

²⁷⁰ *See id.* at 395-96.

²⁷¹ The Court granted certiorari in 2008 in an Eighth Circuit case raising a more general issue about employee eligibility for reassignment as a reasonable accommodation, but the case was later dismissed when the parties settled. *See* Huber v. Wal-Mart Stores, Inc., 552 U.S. 1136 (2008) (dismissing writ of certiorari).

²⁷² *Barnett*, 535 U.S. at 413 (Scalia, J., dissenting).

²⁷³ Justice Scalia’s reasoning in reassignment cases might be signaled by this passage in *Barnett*:

In particular cases, seniority rules may have a harsher effect upon the disabled employee than upon his co-workers. If the disabled employee is

Justice Scalia's argument in this regard is not necessarily tethered to the preferences argument the *Barnett* majority rejected.²⁷⁴ After *Gross*, he may find the four votes he needs to insert this but-for analysis into accommodation law. It would, however, be an incorrect interpretation of the ADA.

The ADA provides that reassignment may be a reasonable accommodation and that failure to accommodate violates the prohibition on discrimination.²⁷⁵ While the statutory language does not directly incorporate the "because of" language that *Gross* emphasized, it also does not clearly articulate a contrary standard. Also, as noted above, the ADA's reasonable accommodation provisions are a subset of the broader prohibition on discrimination "based on" disability.²⁷⁶ Because of this, at least some lower courts have taken a standard disparate-treatment approach to reassignment cases, finding no discrimination for failure to reassign when the employer asserts it gave the vacant position to a more qualified individual.²⁷⁷

physically capable of performing only one task in the workplace, seniority rules may be, for him, the difference between employment and unemployment. But that does not make the seniority system a disability-related obstacle, any more than harsher impact upon the more needy disabled employee renders [a] salary system a disability-related obstacle.

Id. Employer policies to select the most qualified individual for an open position may have harsher effect on individuals with disabilities, this reasoning would say, but that is not a disability-related obstacle simply because it means the employee with a disability will become unemployed.

²⁷⁴ Justice Scalia refers to accommodations as merely "mak[ing] up" for a disability if the but-for relationship is not shown, which may be the basis for the majority's view he was making a preference argument. *See id.* That view may also stem from Justice Scalia's citation of cases, such as one from the Seventh Circuit that follows a preference-based line of reasoning. *See id.* at 416 (citing Equal Emp't Opportunity Comm'n v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028-29 (7th Cir. 2000)); *see also infra* note 278 and accompanying text discussing *Humiston-Keeling*.

²⁷⁵ 42 U.S.C. §§ 12111(9)(B) (2006), 12112(b)(5) (2006).

²⁷⁶ *See supra* note 156 and accompanying text.

²⁷⁷ *See* *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483-84 (8th Cir. 2007) (employer not required to reassign employee to vacant position when it has a policy to prefer the most qualified candidate); *Humiston-Keeling, Inc.*, 227 F.3d at 1028 (employee with a disability is only entitled to be considered for position); *see also* *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995) (reading the ADA as not "requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled"). Other circuits have held that the individual with a disability is

So far, those courts rejecting the right to reassignment have primarily framed their analysis in the language of preferences, such as the following from the Seventh Circuit's opinion in *EEOC v. Humiston-Keeling, Inc.*:

The contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees. A policy of giving the job to the best applicant is legitimate and nondiscriminatory. Decisions on the merits are not discriminatory.²⁷⁸

Humiston-Keeling was decided prior to *Barnett*, and as such, its objection to the reassignment accommodation on preference grounds is suspect.²⁷⁹ This has not, however, kept other courts,

entitled to be reassigned to the vacant position if she is qualified for the position, notwithstanding the employer's claim it chose a more qualified applicant. See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1169 (10th Cir. 1999) (holding employee with a disability is entitled to be reassigned); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1305 (D.C. Cir. 1998) (declining to adopt rule that right to reassignment is nothing more than a right to submit an application along with other candidates); see also *Alston v. Wash. Metro. Area Transit Auth.*, 571 F. Supp. 2d 77, 83 (D.D.C. 2008) ("To find that th[e affirmative] duty [to reassign] is excused by an employer's policy of hiring the most qualified candidate would be to hold that the employer's obligation to a disabled employee is limited to considering him along with every other applicant for the vacant position."); *Thornton v. Providence Health Sys.-Or.*, No. 05-40-KL, 2005 WL 3303944, at *5 (D. Or. Dec. 5, 2005) (concluding that requiring employee to "compet[e] for a vacant position as would any member of the public who did not have a disability" would be "an inadequate accommodation under the ADA"). The Federal District Court for the District of Pennsylvania appears to have recently adopted a unique position, requiring the plaintiff to meet *Barnett's* "special circumstances" test to justify departing from the employer's asserted "neutral" rule of preferring the most qualified applicant. See *Haynes v. AT & T Mobility, LLC*, No. 1:09-CV-450, 2011 WL 532218, at *4-5 (M.D. Pa. Feb. 8, 2011) (concluding that because the plaintiff sought "reassignment over another candidate who [wa]s more qualified for the job, when the most qualified candidate would normally be entitled to the job under the employer's established hiring practices," the accommodation was not reasonable in the run of cases and the plaintiff could "only avoid summary judgment by showing special circumstances which establish that, in the circumstances of his case, the accommodation he requested is reasonable").

²⁷⁸ *Humiston-Keeling, Inc.*, 227 F.3d at 1028 (internal quotation marks omitted); see also *Huber*, 486 F.3d at 483 (quoting *Humiston-Keeling*, 227 F.3d at 1028).

²⁷⁹ *Barnett* specifically rejected the argument that accommodations are inappropriate when they can be construed as a form of preference for the individual with a disability. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 398 (2002). The Eighth Circuit in *Huber* failed to acknowledge that aspect of the opinion. To the contrary, it

such as the Eighth Circuit, from citing *Humiston-Keeling's* reasoning favorably.²⁸⁰

In *Barnett*, the Court appears to adopt the “run of cases” standard of reasonableness.²⁸¹ Under this rule, the plaintiff need only establish that an accommodation would be reasonable “in the run of cases” as part of her prima facie case.²⁸² The burden would then shift to the employer to show that this otherwise-reasonable accommodation poses an undue hardship.²⁸³ Because the ADA expressly refers to reassignment as a form of reasonable accommodation, there is a good argument that its reasonableness in the run of cases should be presumed, and that the onus should be on the employer to establish a specific reason it would pose an undue hardship under the circumstances of the particular case.²⁸⁴ To read “reassignment” in the statute as only giving employees the right to be considered for a vacant position would make that language redundant with other aspects of the statute that bar discrimination in job application procedures, rendering the reasonable accommodation language superfluous.²⁸⁵ Moreover, the statute speaks of “reassignment,” not “consideration of reassignment.”²⁸⁶ The statute mandates affirmative acts by the

cited *Barnett* as favorable to its finding, finding it to be consistent with that court’s prior ruling that “an employer is not required to make accommodations that would subvert other, more qualified applicants for the job.” See *Huber*, 486 F.3d at 483-84 (quoting *Kellogg v. Union Pac. R.R. Co.*, 233 F.3d 1083, 1089 (8th Cir. 2000) (per curiam)) (internal quotation marks omitted).

²⁸⁰ See *Huber*, 486 F.3d at 483.

²⁸¹ *Barnett*, 535 U.S. at 401-02 (favorably citing rule in lower courts as interpreting “reasonable” to mean “ordinarily or in the run of cases”).

²⁸² *Id.* at 401. The “run of cases” standard originated in Rehabilitation Act cases. See *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 258 (1st Cir. 2001) (citing *Barth v. Gelb*, 2 F.3d 1180, 1187 (D.C. Cir. 1993)).

²⁸³ See *id.* at 259 (concluding that “[i]f plaintiff succeeds in carrying [the prima facie] burden, the defendant then has the opportunity to show that the proposed accommodation is not as feasible as it appears but rather that there are further costs to be considered, certain devils in the details”).

²⁸⁴ See Joanne Jocha Ervin, *Reasonable Accommodation and the Collective Bargaining Agreement Under the Americans with Disabilities Act of 1990*, 1991 DET. C.L. REV. 925, 963 (1991) (“The specific mention of ‘reassignment’ in section 101 of the ADA suggests, therefore, that a covered entity must consider reassignment unless it would impose an undue hardship.”).

²⁸⁵ Nicholas A. Dorsey, Note, *Mandatory Reassignment Under the ADA: The Circuit Split and Need for a Socio-Political Understanding of Disability*, 94 CORNELL L. REV. 443, 461 (2009).

²⁸⁶ *Id.* (internal quotation marks omitted).

employer.²⁸⁷ It must take more than an employer asserting it prefers another candidate to defeat the individual with a disability's right to the accommodation.²⁸⁸

Embedded in the Seventh Circuit's reasoning, however, is the issue of causation. The court characterized the employer's policy of "giving the job to the best applicant" as a "[d]ecision on the merits," and "legitimate and nondiscriminatory."²⁸⁹ In other words, the court was applying basic Title VII law regarding what is (and is not) discrimination "because of" a protected characteristic.²⁹⁰ The court's reasoning can be readily translated to "the plaintiff did not lose out on the job because of his disability, but because there was someone more qualified than he for that job; thus, his disability did not cause the failure to accommodate with a reassignment." Its reference to preferences is arguably dicta to the Seventh Circuit's underlying theory that language could be eliminated and the same conclusion reached.²⁹¹

This may be how *Gross's* interpretative approach influences the outcome in a reassignment case. While it is unlikely that a majority of the Court would explicitly overrule *Barnett's* conclusion that the ADA does not bar accommodations merely because they can be characterized as preferences, this does not preclude reading the statutory language to require causation. Being denied the reassignment was not but for the plaintiff's

²⁸⁷ *Id.*

²⁸⁸ The EEOC's interpretive guidance characterizes reassignment to a vacant position as the accommodation of last resort, available when the employee can no longer perform the essential functions of the job she currently holds. 29 C.F.R. app. § 1630.2(o) (2010). Crafting further barriers to the individual's right to be reassigned virtually insures that the individual will lose her position. *Cf. Ball, supra* note 217, at 962 (noting that individuals with disabilities have fewer options to shift between positions and will almost surely end up losing employment whereas individuals without disabilities will be able to continue to work and accumulate seniority that will assist them in future job transfers).

²⁸⁹ *Equal Emp't Opportunity Comm'n v. Humiston-Keeling*, 227 F.3d 1024, 1028 (7th Cir. 2000).

²⁹⁰ *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (describing employer's burden in a disparate treatment claim as "to articulate some legitimate, nondiscriminatory reason for the employee's rejection").

²⁹¹ This is in essence what the Eighth Circuit did in *Huber*. That court framed the issue instead as whether the employer had to "subvert" or "turn away" someone with greater entitlement to the position. *See Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 484 (8th Cir. 2007).

disability; it was based on lesser qualification.²⁹² This reasoning is *Gross* in action—causation standards applied consistently across different types of antidiscrimination claims, absent explicit congressional direction to apply a different standard.

Of course, the problem is that reasoning misconstrues the nature of discrimination involving reasonable accommodations. Not making reasonable accommodation is a self-executing form of causation—it is, in itself, discrimination based on disability.²⁹³ At least some courts show they understand this when they note why employers often do not contest causation.²⁹⁴ If reassignment is reasonable in the run of cases, which its inclusion in the statute suggests it is, then the only causation element at work is the plaintiff's showing that she can no longer perform the essential functions of the job in question but is otherwise qualified for and can perform the tasks associated with the equivalent vacant position.²⁹⁵ There is not a second level of causation that requires plaintiffs to show (again) that the accommodation was denied based on disability.

Moreover, that a policy can be characterized as “legitimate and non-discriminatory” is not a defense to the obligation to make an otherwise reasonable accommodation. The proper statutory defense is that the accommodation poses an undue hardship.²⁹⁶ “Undue hardship” is defined to mean “significant difficulty or expense.”²⁹⁷ If construed broadly, some of the statutory interpretive factors for undue hardship arguably allow consideration of employers’ need to select a more qualified

²⁹² This ties to the non-essentialism required in the necessity-causality cases, because being less qualified than the preferred candidate is something shared with others who are not disabled.

²⁹³ See *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999) (“[A]ny failure to provide reasonable accommodations for a disability is necessarily ‘because of a disability.’”).

²⁹⁴ See *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1032-33 (7th Cir. 1999); see also *supra* note 168 and accompanying text.

²⁹⁵ This argument presumes there are no other arguments about the reassignment being unreasonable, such as the need to change the position from full to part-time or the vacant position being a promotion.

²⁹⁶ See 42 U.S.C. § 12112(b)(5)(A) (2006).

²⁹⁷ *Id.* § 12111(10)(A).

individual.²⁹⁸ But any such factors would be applied in the context of an affirmative defense, which is not to be construed broadly.²⁹⁹

Therein lies the connection to *Gross* and the need for a comprehensive legislative rejection of all forms of but-for causation—if the result in *Gross* came from a court that is hostile to burden shifting, a court using causation standards as a means to prevent that shift, then it may turn the same technique on reasonable-accommodation claims, especially reassignment claims. The burden-shifting-adverse court would seek to avoid running this issue through an affirmative defense such as undue hardship, choosing instead to make a showing of but-for causation part of the plaintiff's prima facie burden. This approach effectively diverts the conversation away from what is reasonable to whether the plaintiff can disprove all other possible legitimate reasons for the employer's actions. This is not the vision of the ADA. If there is a legislative response that overturns *Gross* because it misconstrues Congress' intent regarding causation, that response must be broad enough to prevent but-for causation from undermining reasonable accommodation standards as well.³⁰⁰

²⁹⁸ For example, one factor directs the court to look at “the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility.” *Id.* § 12111(10)(B)(ii). Similarly, another factor looks at “the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity.” *Id.* § 12111(10)(B)(iv). In certain cases, where there are few employees or the nature of the job is especially sensitive, an employer might possibly be able to persuasively argue it would be a significant difficulty not to be able to prefer a more highly qualified individual.

²⁹⁹ *See id.* § 12112(b)(5)(A) (requiring reasonable accommodations “unless [a] covered entity can demonstrate that the accommodation would impose an undue hardship”); 29 C.F.R. app. § 1630.15(d) (2011) (“[E]mployer cannot simply assert that a needed accommodation will cause it undue hardship,” but must “present evidence and demonstrate that the accommodation will, in fact, cause it undue hardship.”); *Rodal v. Anesthesia Grp. of Onondaga, P.C.*, 369 F.3d 113, 121-122 (2d Cir. 2004) (“‘Undue hardship’ is an employer’s affirmative defense, proof of which requires a detailed showing that the proposed accommodation would ‘requir[e] significant difficulty or expense’ in light of specific enumerated statutory factors.”) (quoting *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 221 (2d Cir. 2001)); *see also Weber, supra* note 212, at 1131 (“The text and structure of the [ADA] suggest a substantial obligation to provide accommodation up to the limit of hardship demonstrated by the employer.”).

³⁰⁰ The final irony here is, of course, that *Gross* itself cautions against doctrinal creep. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (“When conducting statutory interpretation, [we] ‘must be careful not to apply rules applicable under one

CONCLUSION

The purpose of this Article has not been to suggest that unified standards in discrimination law are undesirable. As noted above, there is no justification for the differing standards of causation in disparate treatment law that *Gross* has introduced. Rather, the purpose is to show that because *Gross* is not really anti-unification, the Court's "default rule" has consequences beyond disparate treatment law. Once but-for causation creeps into reasonable accommodation law, it creates its own special havoc. The legislative history of the ADA, as reflected in the structure of the statute itself, demonstrates that Congress did not intend for accommodation decisions to be caught up in the web that causation standards weave. If courts permit this to happen, they will make the same fundamental mistake they made with their interpretation of the original ADA—they will create unduly difficult barriers to the full participation of individuals with disabilities in the workplace (and quite possibly beyond that to the other aspects of social and economic interaction protected by other parts of the statute).

A statute like POWADA would be well-intentioned to overturn the Court's misstep in *Gross*. It would not, however, eradicate but-for standards as applied to all prima facie burdens of proof. Any legislative response to *Gross* needs to be sufficiently comprehensive to preclude but-for analysis in reasonable accommodation claims. The ADA Amendments Act reached only the courts' misinterpretation of the definition of disability. Congress should now turn its attention to the reasonable accommodation provisions and forestall a similar decade or more of inappropriately narrow application.

statute to a different statute without careful and critical examination.”) (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)).