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The Case for Applying Comcast's Causal Canon to the Pregnant Workers Fairness Act

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NOTE

The Case for Applying *Comcast*'s Causal Canon to the Pregnant Workers Fairness Act

Comcast Corporation v. National Association of African American-Owned Media, 589 U.S. 327 (2020).

Taylor Todd [*]

I. INTRODUCTION

For as long as there have been employer-employee relationships, there has been the potential for problems in those relationships—some of which are rooted in discrimination. In an ideal world, employees and prospective employees would not face adverse decisions based on protected characteristics. Unfortunately, the world is not always ideal and such decisions can and do happen. That said, the law attempts to bring justice when discrimination claims arise, working to balance the interests and rights of wronged employees while also setting forth standards that require employees to meet certain thresholds when making those claims.[1] Throughout modern history, the United States Supreme Court has analyzed and determined what those thresholds are, holding that different principles apply in various employment situations.[2] Causation standards, specifically, have evolved over time and have been applied differently based on the claim asserted.

In 2020, the Supreme Court in *Comcast Corporation v. National Association of African American-Owned Media* made a bold claim about

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[1] *See* Denson v. Steak 'n Shake, Inc., 910 F.3d 368, 370 (8th Cir. 2018); Smith v. Wrigley Mfg. Co., LLC, 749 F. App'x. 446, 448 (6th Cir. 2018).

[2] *See generally* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013); Gross v. FBL Financial Services, 557 U.S. 167 (2009); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

causation in a rather understated way.[3] It held that while causation standards were previously determined under each unique employment statute, the presumptive standard when interpreting any statute thereafter would be but-for causation.[4] Supporting its decision with questionable reasoning,[5] the Court ultimately created a new canon of causation and potentially changed the way employment discrimination claims would be litigated.[6] With this causal canon in place, it remains to be seen whether, and how, courts apply it in the future.

In a post-*Comcast* era, existing employment discrimination statutes may or may not be subject to interpretation under the newly established canon of causation. The same is true of newly enacted statutes that have gone into effect since *Comcast* was handed down, like the Pregnant Workers Fairness Act ("PWFA").[7] In 2022, Congress passed the PWFA,[8] which went into effect in June of 2023.[9] This Note is the first to consider how courts should interpret the PWFA's causal language and advocates for the application of the causal canon set forth in *Comcast*.

This Note explores the PWFA, the history of causation standards in employment discrimination law, the *Comcast* decision, and how courts should apply the causal standard set forth in *Comcast* in future cases. Part II discusses the facts and holding of *Comcast*. Part III offers the historical background of causation, examining how causation standards have evolved over time and some of the most consequential decisions that were part of that evolution. It then introduces the PWFA. Part IV details the Court's ruling in *Comcast*, which held that but-for causation would be the presumptive standard in employment discrimination law moving forward. Finally, Part V discusses the implications of the causal canon for employers and employees and argues that courts should apply the causal canon to the PWFA.

II. FACTS AND HOLDING

Comcast Corporation ("Comcast"), one of the largest cable providers in the United States, and Entertainment Studios Network ("ESN"), a group of

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[3] 589 U.S. 327 (2020); Sandra F. Sperino, *The Causation Canon*, 108 IOWA L. REV. 703, 723 (2023).

[4] Sperino, *supra* note 3, at 723.

[5] *Id.* at 704–05.

[6] *Id.*

[7] 42 U.S.C. § 2000gg-1(5) (2022).

[8] Daniel Wiessner, *U.S. Senate Passes Increased Protections for Pregnant Workers*, REUTERS (Dec. 22, 2022, 4:37 PM), https://www.reuters.com/legal/government/us-senate-passes-increased-protections-pregnant-workers-2022-12-22/ [https://perma.cc/C7HD-ZWSW].

[9] *What You Should Know About the Pregnant Workers Fairness Act*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act [https://perma.cc/QWF3-5UHF] (last visited May 16, 2024) [hereinafter *What You Should Know About the PWFA*].

cable networks, spent years in contract negotiations over an agreement for Comcast to carry ESN's channels.[10] After these negotiations failed, ESN and the National Association of African American-Owned Media jointly sued Comcast.[11] ESN claimed that Comcast's refusal to carry its channels was predicated on racially discriminatory reasons and, as such, violated 42 U.S.C. § 1981, a statute that guarantees all people the same right "to make and enforce contracts . . . as is enjoyed by white citizens."[12] To remedy the alleged harm, ESN sought billions in damages.[13]

ESN alleged that, in refusing to carry its channels, Comcast "systematically disfavored '100% African American-owned media companies.'"[14] Comcast, however, cited myriad business-related reasons for its refusal, including a lack of demand for ESN programming, bandwidth limitations, and its preference to carry news and sports programming, which ESN did not offer.[15] ESN disputed this reasoning, alleging that Comcast's business reasons were meant to serve only as a "pretext" to hide its discriminatory intentions.[16] The company further asserted that Comcast had paid civil rights groups to advocate publicly on its behalf to hide these unlawful intentions.[17]

After ESN filed suit, Comcast moved to dismiss the complaint.[18] The United States District Court for the Central District of California agreed, holding that ESN's pleading failed to state a claim as a matter of law, but nonetheless allowed ESN several chances to amend its complaint and add supporting facts to its case.[19] Despite ESN's subsequent attempts to amend its complaint, the district court concluded that ESN failed to state a plausible claim that "but for racial animus, Comcast would have contracted with ESN."[20] The district court concluded that after three amendment attempts, further amendments would be "futile," ultimately entering a final judgment for Comcast.[21]

On appeal, however, the United States Court of Appeals for the Ninth Circuit reversed, reasoning that the district court applied the incorrect

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[10] Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. 327, 330 (2020).

[11] *Id.*

[12] *Id*. 42 U.S.C. § 1981 was part of the Civil Rights Act of 1866, which was passed after the Civil War in an attempt to establish and "vindicate" rights of former slaves. *Id.* at 333.

[13] *Id.* at 330.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id*.

[19] *Id*.

[20] *Id*. at 330–31.

[21] *Id*. at 331.

causation standard when assessing the pleadings.[22] The Ninth Circuit asserted that a Section 1981 plaintiff was not actually required to put forth facts showing that racial animus was plausibly a but-for cause of the alleged misconduct.[23] Rather, it held that a plaintiff must only plead facts plausibly showing that race played at least "some role" in the defendant's decision.[24] Applying this more lenient standard of causation, the Ninth Circuit decided that ESN had made a sufficiently plausible and viable claim.[25] This decision spurred disputes from other circuits, namely the Seventh Circuit, which held that but-for causation was the correct standard in a Section 1981 action.[26] To resolve the disagreement, the Supreme Court granted certiorari.[27] The Court reversed the Ninth Circuit, holding that the plaintiff bears the burden of establishing that their[28] race was a but-for cause of their injury and that this burden remains constant throughout the lawsuit.[29]

III. LEGAL BACKGROUND

A. The History of Causation

Employment discrimination statutes are designed to bar adverse employment decisions on the basis of a plaintiff's protected status.[30] Because most employment discrimination statutes explicitly contain causal language, establishing causation is central in employment discrimination suits.[31] Tort claims require a party to establish both factual causation and proximate causation.[32] Factual causation establishes whether an actor's conduct contributed to an outcome and whether it was significant enough to warrant legal responsibility.[33] It usually involves determining two key questions: which party must establish causation and what substantive factual causation standard governs their action.[34] Proximate cause, on the other hand, requires showing that the defendant's conduct was not only the actual cause of the alleged harm but the legal cause as well.[35] What constitutes proximate cause

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] This Note uses gender-inclusive language and, as such, will employ the term "their" when referring to a singular person.

[29] *Comcast Corp.*, 589 U.S. at 327.

[30] D'Andra Millsap Shu, *The Coming Causation Revolution in Employment Discrimination Litigation*, 43 CARDOZO L. REV. 1807, 1814 (2022)

[31] *See id*.

[32] Sperino, *supra* note 3, at 706.

[33] *Id*. at 706.

[34] *Id*.

[35] *See* Bank of Am. Corp. v. City of Miami, 581 U.S. 189, 201 (2017).

is determined by the statute controlling an action, and because factual causation is at issue in *Comcast*, this Note does not further expand on the proximate causation requirement.[36] The factual causation standards most prominent in employment discrimination litigation are motivating factor causation and but-for causation.[37]

B. An Overview of Employment Discrimination Law Causal Standards

Traditionally, tort law has not required plaintiffs to use one specific test in establishing factual cause; it has instead permitted a variety of context-dependent tests.[38] This is contrary to the Court's assertion in *Comcast* that tort causation has traditionally required plaintiffs to establish factual causation by using one specific test—a but-for causation standard.[39] Under the but-for standard, a plaintiff establishes causation where the plaintiff's injury would have occurred "if and only if" the alleged condition occurred, something a plaintiff can satisfy if they show the factor played a significant role in the action at issue.[40] As an illustration of this standard, if an employee had a history of discipline problems and was fired based on that history, she generally could not establish that sex was a but-for cause for her termination, even if she suspected it to be a factor. She could, however, establish but-for causation in this circumstance by showing that sex played a significant role in her employer's decision.

At common law, a plaintiff was often required to establish but-for causation in the employment context.[41] That said, courts have since recognized that common law but-for causation was actually not the most appropriate standard in some circumstances.[42] Instead, a motivating factor standard,[43] which asks whether the plaintiff's protected status was *one of* the motivating factors in the employer's adverse decision or action, has been frequently applied in employment discrimination cases. This makes it easier for a plaintiff to establish causation because an employer can be found liable for discrimination even if the plaintiff's protected status was not a "determinative component" of the decision.[44]

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[36] *Id*.

[37] Shu, *supra* note 30, at 1814.

[38] Sperino, *supra* note 3, at 706.

[39] Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. 327, 338–39 (2020).

[40] Sperino, *supra* note 3, at 706.

[41] *Id.* at 705.

[42] *Id.*

[43] *Id.* at 718.

[44] Shu, *supra* note 30, at 1815.

Until 1989, the Supreme Court had not opined on the required minimum causal standard under any federal employment discrimination statute.[45] From 1989 to 2013, the Court individually analyzed the causation standard for each employment discrimination statute.[46] In 2013, the Court provided dicta that laid the groundwork for establishing but-for causation as the default standard for plaintiffs attempting to establish factual cause in employment discrimination suits.[47] The 2020 *Comcast* decision reaffirmed this dicta when the Court used it as the basis for its holding that but-for causation is the presumptive default in federal statutory interpretation: the new causal canon.[48]

Since *Comcast*, the Court has applied the new causal canon where a statute contains no causal language but instead contains words which merely suggest causation.[49] Under the canon, courts will presume that statutes require but-for causation unless the statutory language explicitly shows otherwise.[50] This standard, which provides a new and significant framework for statutory interpretation, is neither rooted in common law nor previous caselaw that had established varying causal frameworks in employment discrimination statutes.[51]

C. Causation Under Title VII: The Price Waterhouse *Causal Framework*

The first notable caselaw decision came in *Price Waterhouse v. Hopkins*, a case decided twenty-five years after the passage of Title VII but decades before *Comcast*'s causal canon was established.[52] In this case, a female candidate, up for partner in an accounting firm, sued the firm under the Civil Rights Act of 1964.[53] She alleged that her employer discriminated against her on the basis of sex after partners made comments about her that were rooted in sex-based stereotypes.[54] The United States District Court for the District of Columbia ruled in her favor and the United States Court of Appeals for the

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[45] 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 199*1, 58 BUFF. L. REV. 69, 75 (2010).

[46] Sperino, *supra* note 3, at 704.

[47] *Id.* at 704–05.

[48] *See id.*

[49] *Id.* at 705.

[50] Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. 327, 332 (2020).

[51] Sperino, *supra* note 3, at 711.

[52] 490 U.S. 228 (1989); Harper, *supra* note 45, at 75; *id.* at 712.

[53] *Price Waterhouse*, 490 U.S. at 228.

[54] Partners at the firm "praised her character as well as her accomplishments," describing her as "an outstanding professional," but also said she was difficult to work with, overly aggressive, and should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235.

District of Columbia Circuit affirmed, holding that when a discriminatory "motive" played a role in an employment decision, an employer must prove by clear and convincing evidence that it would have made the same decision without that discriminatory motive in place.[55]

The Supreme Court reversed and remanded the case, holding that when a plaintiff in a Title VII case proves sex to be a "motivating part" of an employment decision, the defendant employer can avoid liability only by showing by a preponderance of the evidence that it would have made the same decision absent sex as a factor.[56] Effectively, the Court lowered the standard of proof from clear and convincing to a preponderance of the evidence.[57] The Court interpreted Title VII as requiring plaintiffs to establish part of the causal burden but to then shift the burden to the employer in the form of an affirmative defense.[58] This led to one of the most notable implications of *Price Waterhouse*: a recognition that tort law included multiple causal standards and that the plaintiff in employment discrimination cases would not be required to "carry the full causal burden in all multiple cause cases."[59] While the *Price Waterhouse* framework was inspired by tort law, it was ultimately designed to specifically serve Title VII purposes.[60]

D. Factual Causation Under the Age Discrimination in Employment Act: Gross v. FBL Financial Services

Twenty years after *Price Waterhouse*, the Supreme Court handed down its decision in *Gross v. FBL Financial Services*.[61] There, Jack Gross, a fifty-four year-old plaintiff, sued his employer, FBL Financial Services, after the company transferred him to a different position and reassigned many of his responsibilities to a woman in her early forties, who Gross had previously supervised.[62] Gross sued under the Age Discrimination in Employment Act ("ADEA"), a statute that makes unlawful any action taken by an employer against an employee forty or older "because of such individual's age."[63] The United States District Court for the Southern District of Iowa instructed the jury to enter a verdict for Gross if he proved that his age was a motivating factor in FBL's decision to demote him, which the jury did.[64] The United States Court of Appeals for the Eighth Circuit reversed and remanded, holding

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[55] *Id.* at 232.

[56] *Id.* at 258.

[57] *Id.*

[58] *Id.* at 250. In her concurrence, Justice O'Connor agreed with the judgment but disagreed with the plurality's statement that Title VII's "because of" causal language did not mean "but-for." *Id.* at 261–63 (O'Connor, J., concurring).

[59] Sperino, *supra* note 3, at 715.

[60] *Id.*

[61] 557 U.S. 167 (2009).

[62] *Id.* at 170.

[63] *Id.* (citing 29 U.S.C. § 623).

[64] *Id.* at 167.

that the district court erred in instructing the jury to effectively follow the *Price Waterhouse* standard.[65]

The Supreme Court granted certiorari and vacated the decision of the Eighth Circuit, holding that a plaintiff bringing a claim under the ADEA must establish but-for causation to prevail on the claim.[66] With legislative history as a basis for its reasoning, the Court noted that Congress had amended Title VII to include the *Price Waterhouse* motivating factor framework but had not done the same to the ADEA, evincing no intent to codify the motivating factor standard under the ADEA.[67] This decision was not based on traditions of tort law.[68] Rather, the Court focused its decision on the text of the statute itself, which used the causal language "because of," and interpreted it to mean that the plaintiff must show age to be *the* reason his employer decided to act.[69] This decision departed from precedent that interpreted the ADEA and Title VII the same way and effectively established two different standards of causation for the respective statutes, even though the statutes share similar structure, language, and history.[70]

This historical split between the ADEA and Title VII had significant ramifications for the interpretation of employment discrimination statutes, causing a shift in the way plaintiffs must show causation and thus establish a winning claim.[71] Further, it left open questions about how courts should interpret causation requirements under different statutes.[72] Notably, the Court when deciding *Gross* did not definitively set forth any presumptive causal canon.[73] But subtle pieces of the *Comcast* canon did begin to appear in *Gross*, as the Court asserted that a default causal principle existed and placed the burden of persuasion on the plaintiff unless a statute stated differently.[74]

E. Title VII Causation and University of Texas Southwestern Medical Center v. Nassar

One notable application of the *Gross* decision came in 2013, further interpreting and clarifying causality under Title VII.[75] In *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court stated that the motivating factor standard that applied to Title VII discrimination claims did not apply to retaliation claims under the same statute.[76] This case arose when

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[65] *Id.*
[66] *Id.* at 180.
[67] *Id.* at 174.
[68] *Id.*
[69] Shu, *supra* note 30, at 1820.
[70] *Id.* at 1821.
[71] *Id*.
[72] *Id*.
[73] Sperino, *supra* note 3, at 716.
[74] *Id*. at 717.
[75] *Shu*, supra note 30, at 1821–22.
[76] 570 U.S. 338 (2013).

Nassar, a physician of Middle Eastern descent, brought a Title VII claim against his employer, a state university, alleging that he had been constructively discharged from his faculty position after he complained of a superior harassing him for racial and religious reasons.[77] The jury found in favor of Nassar.[78] The United States Court of Appeals for the Fifth Circuit vacated the judgment concerning Nassar's constructive discharge claim but affirmed the trial court's decision on his retaliation claim on the basis that the claim required Nassar only to show that his race and religion were a motivating factor in the adverse employment decision.[79] The Supreme Court held that Nassar was required to prove but-for causation, citing the similarity between Title VII's anti-retaliation provision and the ADEA's "because of" causal language, which required but-for causation following *Gross*.[80] Ultimately, the Court asserted that but-for causation is the default rule and that Congress presumptively incorporates this causation standard into a statute, unless the statute states otherwise.[81] This decision was a particularly significant application of *Gross* because, in the year prior, the Court in *Pacific Operators Offshore, LLP v. Valladolid* refused to adopt a default standard when it interpreted yet a different employment statute.[82] Ultimately, the Court in *Gross* laid the groundwork for the default rule developed in *Nassar*, but the *Nassar* Court still recognized flexibility where circumstances warranted a causal standard other than but-for causation.[83]

F. An Introduction to the Pregnant Workers Fairness Act

The PWFA makes it unlawful for a covered employer to "take adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee."[84] The statute extends protections for pregnant employees beyond the protections afforded by the Pregnancy Discrimination Act of 1978 ("PDA") and the Americans with Disabilities Act ("ADA").[85] The PDA prohibits discrimination against

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[77] *Id.* at 344.

[78] *Id.* at 345.

[79] *Id.*

[80] *Id.* at 352. The Court supported its reasoning by noting the "lack of any meaningful textual difference between the text in this statute and the one in *Gross*." *Id.*

[81] Shu, *supra* note 30, at 1822.

[82] 565 U.S. 207, 221–22 (2012); Sperino*, supra* note 3, at 720.

[83] Sperino, *supra* note 3, at 721.

[84] 42 U.S.C. § 2000gg-1(5).

[85] April Boyer et al., *US Labor, Employment, and Workplace Safety Alert*, K&L GATES HUB (Jun. 28, 2023), https://www.klgates.com/New-Pregnant-Workers-Fairness-Act-Provides-Protections-For-Pregnancy-Related-Conditions-6-28-2023 [https://perma.cc/D3VE-7L35].

pregnant employees but offers accommodations only to the extent that non-pregnant people receive them, and the ADA requires employers to reasonably accommodate employees with certain pregnancy-related conditions that qualify as a disability.[86] The ADA uses the causal language "on the basis of."[87] The PDA, which amended Title VII, uses the causal language "because of."[88] The Supreme Court had previously interpreted the PDA as requiring the plaintiff to establish that gender was a factor in their employer's alleged discriminatory decision.[89] The text of the PWFA, however, includes no explicit causal words.[90] For courts, this presents a complex road ahead; precedent will conflict with the canon, as could future cases involving the interpretation of employment discrimination statutes and the PWFA specifically.[91]

IV. INSTANT DECISION

In *Comcast*, the Supreme Court held that a plaintiff bringing a Section 1981 action has the burden of showing that racial discrimination was the but-for cause of the injury.[92] In doing so it reversed the Ninth Circuit's holding that a Section 1981 plaintiff only need plead facts showing that race played "some role" in a defendant's act or decision.[93] The Court noted that the "ancient and simple" common law test of but-for causation provided the presumptive standard that Congress legislates when creating new causes of actions.[94] More specifically, the Court held that a plaintiff in a Section 1981 lawsuit has the burden of establishing that their race was the but-for cause of their injury.[95]

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[86] Jamie B. Ashton et al., *Pregnant Workers Fairness Act Mandates Reasonable Accommodations*, OGLETREE DEAKINS (Mar. 9, 2023), https://ogletree.com/insights/pregnant-workers-fairness-act-mandates-reasonable-accommodations [https://perma.cc/9CTB-2VZJ].

[87] 42 U.S.C. § 12112(a).

[88] "The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin." 42 U.S.C. § 2000e; *Pregnancy Discrimination and Pregnancy-Related Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/pregnancy-discrimination [https://perma.cc/WS6E-54JY] (last visited Sept. 30, 2023); Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989). Relevant in *Price Waterhouse* was the provision of Title VII prohibiting employers from discriminating on the basis of sex. *Id.* at 240.

[89] *See* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. 327, 337 (2020) (citing *Price Waterhouse*, 490 U.S. at 249–50).

[90] 42 U.S.C. § 2000gg-1(5).

[91] Sperino, *supra* note 3, at 739.

[92] *Comcast Corp.*, 589 U.S. at 341.

[93] *Id.* at 327.

[94] *Id.* at 332.

[95] *Id.* at 341.

Departing from the rationale in *Gross* and *Nassar*, the Court characterized its assertion that plaintiffs must prove but-for causation as "textbook tort law."[96] The Court analyzed the plaintiffs' cause of action under Section 1981, which afforded a "remedy against discrimination . . . *on the basis of* race," and noted that this was a strong suggestion for a but-for causal standard.[97] The "because of" causal language in Section 1981, according to the Court, was frequently associated with the concept of but-for causation.[98] The Court further noted that while Section 1981 did not explicitly discuss causation, the statute was designed to address whether the plaintiff would have faced the same result had he or she been white.[99] This presented a counterfactual, which naturally fit with the "ordinary" rule that a plaintiff has to prove but-for causation.[100] Where statutes do not contain specific, contrary causal language, the Court held that the common law should govern, reasoning that the common law often required but-for causation in tort suits.[101] Though ESN asserted that the motivating factor causation standard, adopted in *Price Waterhouse*, should apply during the pleading stage, the Court held that historical context provided sufficient reasons for why the but-for standard should persist throughout every stage of a Section 1981 claim.[102]

In reaching its conclusion to reverse the Ninth Circuit, the Court considered legislative intent, noting that Congress amended the Title VII discrimination provisions to include the motivating factor test, but it did not similarly amend Section 1981.[103] According to the Court, this sufficiently evinced Congress's intention *not* to permit the motivating factor test and to instead require the presumptive standard of but-for causality.[104] In its analysis, the Court found that a neighboring section of the Civil Rights Act of 1866 used terms like "by reason of" and "on account of," both of which it identified as phrases indicating but-for causation.[105] The Court then reiterated that unless otherwise provided for by the Act of 1866, common law governed and served as a "prerequisite to a tort suit."[106] Ultimately, the Court held that plaintiffs must show race to be a but-for cause of their injury.[107]

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[96] *Id.* at 331 (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347 (2013)).

[97] *Id.* at 335 (quoting Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459–60 (1975)).

[98] *Id.* at 336.

[99] *Id.*

[100] *Id.* at 333.

[101] *Id.* at 334–35.

[102] *Id.* at 332–338.

[103] *Id.* at 338.

[104] *Id.*

[105] *Id.* at 334.

[106] *Id.* at 335.

[107] *Id.* at 327.

V. COMMENT

The *Comcast* Court made a bold assertion in its creation of the causal canon. It offered questionable support for its claim that but-for causation has historically been the default standard of causation in tort law, citing only *Nassar* and a torts treatise from 1984 as evidence of that "history."[108] Now, courts face decisions about whether to apply *Comcast*'s canon in their interpretations of employment discrimination statutes moving forward. When laying the groundwork for the causal canon, the Court decided to apply the canon even in contexts where the canon has previously been held not to govern.[109]

In the context of the PWFA, it is yet to be determined how the courts will define causality under the statute. If, and when, the Court is faced with this inquiry, whatever decision it makes will have major ramifications for employers and employees alike. As such, this Note posits that the Court should apply the canon of causation set forth in *Comcast* to the PWFA, and thus extend but-for causation to the statute.

A. Bostock: *The Canon Applied*

Only a few months after its ruling in *Comcast*, the Court applied the canon in *Bostock v. Clayton County, Georgia*.[110] In *Bostock,* the Court held that Title VII also protects against discrimination because of gender identity and sexual orientation.[111] The Court found this by expanding its application of the causal canon in the Title VII context.[112] Although but-for causation is not the causal standard under Title VII discrimination claims, the Court based its analysis in those principles, asserting that the words "because of" referred to the but-for "traditional" standard.[113]

Bostock departed from previous interpretations of Title VII, which previously employed the motivating factor standard as the amended legislative standard governing Title VII disparate treatment claims.[114] This

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[108] Sperino, *supra* note 3, at 724. This warrants questions about why the Court would not cite to older sources, especially in light of the fact that this statement is used to support the interpretation of a Reconstruction-era statute. *Id.* Further, the Court asserted that the default principle applied to federal discrimination law and cited *Gross* and *Nassar*, but *Gross* specifically, did not apply a default canon of construction—rather, it examined causation within the context of the ADEA alone. *Id.*

[109] The Court applied the causal canon in two Title VII cases, even though Title VII claims have been interpreted to apply the congressionally sanctioned motivating factor standard. *Id.* at 726.

[110] 590 U.S. 644 (2020).

[111] *Id.*

[112] *Id.* at 657.

[113] *Id.* at 656–57.

[114] *Id.* at 657.

case is also significant in its descriptions of but-for causation.[115] The Court noted that a case cannot be dismissed simply because an employer presented other factors that contributed to the decision in dispute.[116] It asserted that but-for causation does not equate to establishing sole cause, as operating under that assumption is not "legally viable."[117] Rather, the Court noted that but-for causation can be a "sweeping standard" and that employment decisions often have more than one but-for cause.[118]

B. Babb: *Overcoming the Default in the ADEA*

Roughly a month after the Court handed down its decision in *Comcast*, it found that the default standard was not applicable in the context of the ADEA.[119] In *Babb v. Wilkie*, the Court closely analyzed the statutory language of the ADEA, which provided that employment decisions concerning individuals forty years of age or older "shall be made free from any discrimination based on age."[120] It rested its analysis on the assertion that the statute does not require a showing that an employment decision would have been different if age was not considered.[121] Rather, any consideration of age in an employment decision would be a violation of the ADEA.[122] Based on this reasoning, the Court concluded that the ADEA requires age to be a but-for cause of *discrimination* but not necessarily of a personnel action.[123] At least in one context, then, the Court has already limited application of the default rule.

C. Applying the Causal Canon to the PWFA: Implications for Employers and Employees

Although *Babb* was notable in that the Court chose not to explicitly apply the causal canon it had just created,[124] the Court may be more likely to apply the canon when interpreting the PWFA. The difference between the language in the ADEA and the PWFA is one of the primary reasons for this possibility. Where the ADEA uses the causal language of "based on," the PWFA more closely mirrors statutes that employ a but-for causal standard with its use of the causal language "on account of."[125]

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[115] *Id.* at 655–59.
[116] *Id*. at 659.
[117] Shu, *supra* note 30, at 1842–43.
[118] *Bostock*, 590 U.S. at 656.
[119] Babb v. Wilkie, 589 U.S. 399, 406–07 (2020).
[120] *Id.* at 404 (quoting 29 U.S.C. § 633a(a)).
[121] *Id.* at 406–07.
[122] *Id.* at 406.
[123] *Id.*
[124] *Id.* at 406–07.
[125] 29 U.S.C. § 623(f)(1); 42 U.S.C. § 2000gg-1(5).

The PWFA provides employees a pathway of relief in situations where employers fail to reasonably accommodate known limitations as a result of pregnancy, childbirth, or related conditions.[126] The Equal Employment Opportunity Commission ("EEOC") began accepting charges of discrimination under the PWFA in June of 2023.[127] For both pregnant workers seeking relief under the statute and for employers accused of discrimination, a lack of clarity about the causal standard could be detrimental to securing a favorable judgment.

From the employer's perspective, but-for causation provides a layer of protection against discrimination claims that are either illegitimate or too complex under a motivating factor standard. As previously set forth, the motivating factor standard of causation requires a plaintiff to prove only that their protected status played a part in the employer's allegedly discriminatory decision—a requirement that can result in significant legal consequences for employers who made decisions on a much more nuanced basis.[128] The but-for standard, on the other hand, protects employers by requiring a plaintiff to show that had their status as a member of a protected class not existed, the decision would have been different.[129]

From an evidentiary standpoint, it is important to note that the PWFA is a cause of action, which typically requires plaintiffs to meet both the burden of production and the burden of persuasion by a preponderance of the evidence.[130] Interpreting the PWFA through the causal canon would mean that plaintiffs would not have to prove with "absolute certainty" that the employer's decision would have been different but for the plaintiffs' status as members of a protected class.[131] Instead, plaintiffs would be required to establish that it was more likely than not that the outcome would have been different but for their membership in a protected class.[132] Further, the but-for causal standard would not require employees bringing a claim to establish that their membership in the protected class was the *sole* cause of the employer's decision not to reasonably accommodate their known condition.[133] It also would not require plaintiffs to disprove that their employer's decision involved other legitimate business considerations.[134] Instead, if the causal canon were to apply and govern the interpretation of the PWFA, plaintiffs would have to establish that their membership in the protected class was a determinative factor.[135] The existence of other reasons for an employer's

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[126] *What You Should Know About the PWFA*, *supra* note 9.

[127] *Id*.

[128] *See supra* Part II.B.

[129] *See supra* Part II.B.

[130] Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1654 (2021).

[131] *Id.* at 1654–55.

[132] *Id.* at 1655.

[133] *Id.* at 1656.

[134] *Id.*

[135] *Id.*

decision would not be dispositive and therefore would not end the case.[136] But plaintiffs would have to *plausibly* establish disparate treatment "but for" their membership in a class of pregnant employees or employees dealing with known conditions relating to pregnancy or childbirth.[137] Finally, relevant to both employers and employees, the causal canon as set forth by the *Comcast* Court prohibits courts from applying more difficult or substantive standards at different stages of litigation and requires the burden to remain constant throughout all procedural stages.[138]

D. Key Support for Applying the Causal Canon to the PWFA

While the PWFA contains no explicit causal language, applying *Comcast* would be the most prudent and best decision for several reasons. Most significant is that a decision in favor of applying but-for causation to the statute would best align with congressional intent. The *Comcast* decision was handed down in 2020, at which time the Court set forth the default standard as but-for causation and officially instituted the canon.[139] As discussed above, the Court has since inconsistently applied the canon in multiple cases and contexts.[140] While questions remain about whether and how the court will apply the canon moving forward, there is an important argument to be made—and one that the Court made in *Comcast*—for applying the standard to the PWFA: the argument that courts should interpret statutes through the lens of congressional intent.[141]

In *Comcast*, part of the Court's reasoning for applying the default standard to Section 1981 claims was rooted in Congress's amendment of the Civil Rights Act of 1991 to include the motivating factor standard but its decision *not* to amend Section 1981 in a similar manner.[142] The Court was convinced that Congress had an opportunity to set forth a motivating factor standard in related legislation and chose not to, therefore evincing its intent for the motivating factor standard not to apply.[143] In light of this decision and

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[136] Kelly S. Hughes, *'But-For' Causation Under* Bostock, OGLETREE DEAKINS (June 24, 2020), https://ogletree.com/insights-resources/blog-posts/but-for-causation-under-bostock/ [https://perma.cc/S7T2-T43X].

[137] *Id.*

[138] *Id.* Courts have often applied more challenging standards to motions for summary judgment or motions to dismiss, but this would not be permissible under the canon. *Id.* The burden would remain steady at any point in litigation, simplifying and streamlining at least that piece of procedural uncertainty and, as a result, streamlining expectations for both parties as litigation begins. *Id.* This is important in that most anti-discrimination claims today are dismissed before trial, usually during a period of time where varying doctrines would be employed. Eyer, *supra* note 130, at 1656.

[139] Comcast Corp. v. Nat'l Ass'n of Afr. Am.- Owned Media, 589 U.S. 327, 333 (2020).

[140] Sperino, *supra* note 3, at 726.

[141] *Comcast*, 589 U.S. at 335–39.

[142] *Id.* at 338.

[143] *Id.*

the emphasis placed on congressional intent, one must consider the fact that Congress did not include a motivating factor standard, or any other causal standard, explicitly in the text of the PWFA.[144] Considering that Congress passed the PWFA only three years after the *Comcast* decision set forth the causal canon, it is reasonable and proper to assume that the decision not to include causal language was intentional and that Congress meant for the default standard to apply.[145] In light of the relationship between the legislative and judicial branches of government, one can presume that Congress crafted the statutory language in the PWFA with the *Comcast* standard in mind.

Beyond the importance of congressional intent, additional reasons to apply *Comcast* are the potential for irresponsible allocation of judicial resources and the need to prevent a flood of litigation if the causal canon is not employed. In *Nassar*, the Court specifically responded to arguments about the increasing frequency of retaliation claims and the dangers of lowering causation standards as a potential accelerant of this issue.[146] At the time of its decision in 2013, the Court cited statistics from the EEOC and noted that the number of retaliation suits under all statutes had almost doubled; by 2022, the number had increased by almost thirty percent.[147] The Court also raised the potential for employers and courts alike to spend resources combatting false claims where expending those resources may not always be warranted.[148] As such, there is a Court-sanctioned interest in preventing unnecessary or "frivolous" litigation.[149] While questioning the validity of personal and serious claims is a delicate topic, the need to protect resources of the judicial system, employers, *and* employees remains important, too. The value of a but-for standard of causation, then, at least partially lies in the ability to devote resources to where they are most appropriate.

Finally, the importance of consistency supports application of the default causal canon to the PWFA. Some PWFA claims will be brought in conjunction with Title VII discrimination claims or ADA claims—the former having a motivating factor standard and the latter having no prescribed standard but is often interpreted to require but-for causation. Applying the default but-for causal standard under the PWFA would remain consistent with most federal discrimination laws.[150]

Further, and on a broader level, there is value in the Court being consistent with its own holding in *Comcast*, where it asserted a bold principle. While multiple causal standards exist, according to the Court, there is a default canon that is presumptively applicable in discrimination statutes that do not

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[144] 42 U.S.C. § 2000gg-1.

[145] *What You Should Know About the PWFA*, *supra* note 9.

[146] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 340 (2013).

[147] *Id.* at 358.

[148] *Nassar*, 570 U.S. at 358.

[149] *Id.*

[150] Eyer, *supra* note 130, at 1643–44.

expressly state otherwise.[151] The Court's own credibility could be called into question if it fails to apply the *Comcast* causal standard to the PWFA, especially if it is soon after it set forth the causal canon.

VI. CONCLUSION

Like tort law at large, employment discrimination suits require a plaintiff to establish causation. Historically, which standard of causation to apply depended on the applicable statutes and judicial interpretations of those statutes. As exhibited by this Note, the *Comcast* decision has the potential to greatly impact and influence employment discrimination suits going forward. *Comcast* could, on a procedural level, make establishing a valid claim of employment discrimination more structured and streamlined for employees while offering a level of protection to employers by requiring more from plaintiffs' claims. On a broader scale, the decision could also simplify employment discrimination suits where former varying standards may have complicated processes, prevent a flood of litigation and promote efficiency in the judiciary, and ensure that application of employment statutes remains aligned with congressional intent. While the path forward is uncharted and it remains to be seen how courts will apply *Comcast*, specifically in the context of the PWFA, the proposed discussions set forth in this Note offer robust reasons to employ the canon's causal standard.

[151] Comcast Corp. v. Nat'l Ass'n of Afr. Am.- Owned Media, 589 U.S. 327, 333 (2020).