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Causation in Civil Rights Legislation

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CAUSATION IN CIVIL RIGHTS LEGISLATION

*Hillel J. Bavli**

Employees are often left unprotected from discrimination because they are unable to satisfy the requirement of causation. Courts have made clear that to obtain legal redress for discrimination, it is generally insufficient to show that a protected characteristic such as race or sex was a "motivating factor" of an adverse employment decision. Rather, under Supreme Court precedent—including the Court's Comcast *and* Babb *decisions in the 2020 term—the antidiscrimination statutes generally require a showing of "but-for" causation. Consequently, many victims of discrimination will be unable to prevail because an employer can readily refute allegations of discrimination by asserting a legitimate purpose—true or not—for the adverse decision. Therefore, although there is good reason to reject the motivating-factor test, the but-for requirement undermines the objectives of antidiscrimination law.*

In this Article, I draw on notions of cause and effect in the sciences and in tort law to propose a new standard of causation for antidiscrimination law. In particular, I formulate a simple test—which I call the "fortified NESS" test, or "FNESS"—for courts and legislatures to apply as a uniform and effective standard of causation in all disparate-treatment cases. I then employ this formulation to propose concrete amendments to the civil rights statutes, and I demonstrate why these amendments are necessary and how they allow courts to uphold the critical aims of antidiscrimination law.

INTRODUCTION

Employees are often left unprotected from discrimination. An employee who is passed over for hire or promotion due to sex, race, religion, or another protected characteristic is often left with little ability to obtain legal redress.

To establish a claim for disparate treatment, a plaintiff must prove that a characteristic protected by the antidiscrimination laws *caused* the alleged adverse outcome.[1] "Few legal principles are better established than the rule requiring a plaintiff to establish causation."[2] This is the battleground on which disparate-treatment claims are frequently decided. While causation is a difficult issue in torts cases generally, it is particularly difficult in discrimination cases, in which establishing causation requires understanding the complex motivations underlying an actor's employment or contracting decisions.[3]

It is by now clear that to obtain legal redress for discrimination under the nation's civil rights statutes, it is generally insufficient to show that a protected

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1. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 342 (2013) ("When the law grants persons the right to compensation for injury from wrongful conduct, there must be some demonstrated connection, some link, between the injury sustained and the wrong alleged. The requisite relation between prohibited conduct and compensable injury is governed by the principles of causation . . . .").

2. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1013 (2020).

3. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228, 239–42 (1989).

characteristic was a "motivating factor" of an adverse decision.[4] Rather, as demonstrated by the Supreme Court's many decisions regarding causation in antidiscrimination law—including its *Comcast* and *Babb* decisions in the 2020 term—the antidiscrimination statutes generally require a showing of "but-for" causation.[5] That is, to obtain damages or remedial injunctive relief for discrimination, it is generally necessary to demonstrate that in the absence of the discrimination, or of the protected characteristic in particular, the adverse outcome would not have occurred.[6]

This is problematic. Courts and legislatures reject the motivating-factor test as a standard of causation because rather than reflecting actual cause and effect, it ambiguously asks the factfinder to determine whether the protected characteristic played a role in the actor's decision.[7] Effectively, it is a test of responsibility based on intuition rather than a test of factual causation, thus violating the bedrock torts principle requiring a plaintiff to prove causation.[8] However, the but-for test is overly restrictive. In the context of complex and multifaceted employment decisions, the stringent requirements of but-for causation frequently end claims of disparate treatment before they begin.[9] Consequently, the but-for standard—the predominant test of causation in antidiscrimination law—prevents the antidiscrimination statutes from fulfilling their critical objectives.[10]

Consider, for example, a case in which a female employee, Michelle, alleged that her employer promoted a male employee over her based on the employer's sexist view that male employees are more capable than female employees. Assume, however, that Michelle's employer can show that Michelle was less qualified for the promotion or that she simply performed worse than her male colleague. Under the but-for standard of causation, Michelle is unlikely to establish a discrimination claim against her employer, even if Michelle's allegations are true. As a definitional matter, Michelle's claim fails to meet the but-for test because, even in the absence of the employer's discrimination, the employer is likely to have promoted the male employee over Michelle. Moreover, as an evidentiary matter, regardless of whether Michelle would have

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4. *See infra* Part I.A.

5. *See Comcast Corp.*, 140 S. Ct. at 1013–16; Babb v. Wilkie, 140 S. Ct. 1168, 1177–78 (2020).

6. *See Comcast Corp.*, 140 S. Ct. at 1014 ("Under [the but-for] standard, a plaintiff must demonstrate that, but for the defendant's unlawful conduct, its alleged injury would not have occurred."); DAN B. DOBBS ET AL., HORNBOOK ON TORTS 317 (2d ed. 2016). I use the term "remedial injunctive relief" to refer to injunctive relief related to the outcome of the employment decision. *See generally* 42 U.S.C. § 2000e-5(g)(2)(B); *Babb*, 140 S. Ct. at 1177–78 ("[P]laintiffs who demonstrate only that they were subjected to unequal consideration cannot obtain reinstatement, backpay, compensatory damages, or other forms of relief related to the end result of an employment decision.").

7. *See* DOBBS ET AL., *supra* note 6, at 323.

8. *See infra* Part I.B.

9. *See infra* Part I.A.

10. *See* Hillel J. Bavli, *Cause and Effect in Antidiscrimination Law*, 106 IOWA L. REV. 483, 485 (2021) [hereinafter *Cause and Effect*].

been promoted had she been a male employee, it would be difficult for Michelle to prove that her employer's motivation was discriminatory. Employment decisions are complex, and an employer can frequently refute allegations of discrimination by asserting a legitimate purpose for the adverse decision.[11]

Thus, courts and legislatures have been forced to choose between two inadequate standards of causation.[12] By permitting liability based on intuition regarding responsibility rather than a finding of cause and effect, the motivating-factor test violates fundamental principles of fairness and tort law and has therefore been rejected clearly and repeatedly by courts and legislatures.[13] On the other hand, the but-for test forecloses redress for victims of discrimination, thereby disincentivizing discrimination claims and thwarting the deterrence and fairness objectives of federal and state antidiscrimination statutes.[14]

This situation has created a "swamp" of inconsistent and frequently incoherent rules and conditions as courts have sought to apply a but-for standard in order to uphold legislative intent and basic principles of tort law, while deviating from this standard in order to obtain intuitive outcomes in particular cases.[15] As a consequence of this situation, judgments in disparate-treatment cases are frequently inconsistent with the aims of the antidiscrimination statutes.[16] Moreover, the law is rife with difficulties and inconsistencies, and similar cases can arbitrarily result in different causal standards and different outcomes based on intricacies in the language of a statute.[17] Additionally, there are circuit splits regarding the causal standard applicable to a particular statute, as well as inconsistencies within circuits.[18] Notwithstanding numerous Supreme Court decisions regarding causation in disparate-treatment cases, the Court has failed to supply necessary clarification or a logical standard. Instead, the Supreme Court and lower courts have continued to choose between two inadequate standards and to compensate for their inadequacies by applying ad hoc measures that have caused the law to become increasingly complex and illogical.[19]

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11. *Id.* at 485–86.

12. *Id.* at 487.

13. *See infra* Part I.

14. *See infra* Part I.

15. Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 645 n.8 (2008) ("Courts and commentators have routinely referred to current disparate treatment doctrine as a 'swamp,' a 'morass,' and a 'quagmire.'" (citing Costa v. Desert Palace, Inc., 299 F.3d 838, 851–53 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003), and other sources)); *see Cause and Effect*, *supra* note 10, at 487.

16. *See infra* Part I.B; *see also Cause and Effect*, *supra* note 10, at 490–504, 536–49.

17. *See infra* Part I.A.

18. *See generally* BARBARA T. LINDEMANN ET AL., EMPLOYMENT DISCRIMINATION LAW 13-197–99 (5th ed. 2012).

19. *See infra* Part I; *see also Cause and Effect*, *supra* note 10, at 487, 490–501.

To address this high-stakes problem, I have proposed a third possibility—a standard of causation that, unlike the but-for and motivating-factor tests, satisfies both legislative intent and good policy, and reflects the meaning of actual cause and effect.[20] The proposed causal framework makes three innovations for causation in antidiscrimination law.

First, it employs the "potential-outcomes" model—a predominant model for conceptualizing and proving cause and effect in the sciences—to introduce a standard of causation that applies the but-for test's central feature, the "necessity condition," but in a less restrictive form.[21] By appropriately placing the causal inquiry within this broader counterfactual model, the proposed framework not only permits a causal measure that retains the analytical structure of the but-for test, as well as the actual, scientific, and common meaning of cause and effect, but also permits a finding of causation in a far broader set of situations.[22] Second, the proposed framework employs the NESS (Necessary Element of a Sufficient Set) test as its measure of causation.[23] This test is satisfied if a factor "was necessary for the sufficiency of a set of existing antecedent conditions that was sufficient for the occurrence of the consequence."[24] When applied within the broader potential-outcomes framework, this test serves as a refinement of the but-for and motivating-factor tests, and it provides an appropriate standard of actual causation that fulfills the objectives of antidiscrimination law.[25] Finally, the proposed framework views "mixed-motive" disparate-treatment claims as a special type of torts claim.[26] In particular, it applies a basic torts structure of proof, and it treats these claims as a type of "multiple-sufficient-cause" (msc) situation—a situation in tort law in which two or more forces produce an outcome where each force alone would have produced the same outcome.[27]

The proposed framework functionalizes the NESS test for the antidiscrimination context by embedding it in a robust counterfactual model of cause and effect and by supplying a conceptual framework that permits its logical application. By applying the NESS test within the potential-outcomes

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20. *See Cause and Effect*, *supra* note 10, at 487.

21. *See id.* at 487–88.

22. *See id.* at 488.

23. *See id.*

24. Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1441 (2003) [hereinafter Wright, *Grounds and Extent*]; Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1102–03 (2001).

25. *See Cause and Effect, supra* note 10, at 488.

26. *Id.* at 489.

27. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 27 (AM. L. INST. 2010); DOBBS ET AL., *supra* note 6, at 321; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 266 (5th ed. 1984) ("[T]here is one type of situation in which [the but-for test] fails. If two causes concur to bring about an event, and either one of them, operating alone, would have been sufficient to cause the identical result, some other test is needed.").

model, the proposed approach in a sense fortifies the NESS test and permits its application as an ideal standard of causation in antidiscrimination law.[28]

In this Article, I operationalize the proposed framework by encapsulating it in a simple test—which I call the "fortified NESS" test, or "FNESS"—for courts and legislatures to apply as a uniform and effective standard of causation in all disparate-treatment cases. I show that, combined with the conceptual framework provided by the potential-outcomes model, the NESS test can serve as a logical standard that avoids the substantial problems associated with the but-for and motivating-factor tests. I then apply this standard to propose legislation. In particular, I argue that, although courts can and arguably should apply the proposed FNESS standard under the current antidiscrimination statutes, in light of FNESS and the substantial inadequacies of the but-for and motivating-factor tests, it is insufficient for legislatures to leave the causal standard in these statutes open to judicial interpretation. I therefore apply the FNESS formulation to propose concrete amendments to the nation's civil rights statutes in line with this standard, and I demonstrate why these amendments are necessary and how they allow courts to uphold the critical aims of antidiscrimination law.

In Part I, I provide a brief overview of the state of disarray surrounding causation in disparate-treatment cases, and I discuss explicitly the inadequacies of the but-for and motivating-factor tests. In Part II, I formulate the FNESS standard, and I show how it applies as an effective standard of causation in antidiscrimination law, and disparate-treatment cases in particular. Then, I apply this formulation to propose concrete amendments to Title VII,[29] the Age Discrimination in Employment Act (ADEA),[30] the Americans with Disabilities Act (ADA),[31] the Civil Rights Act of 1866,[32] and other antidiscrimination statutes. In Part III, I discuss implications of the proposed standard and amendments. In particular, I discuss judicial interpretation of causal language in antidiscrimination statutes, and I explain why the proposed amendments are necessary and how they restore logic and effectiveness in antidiscrimination law.

28. The proposed approach also promotes its application as an ideal standard of causation in tort law more broadly.

29. 42 U.S.C. § 2000e-2.

30. 29 U.S.C. § 623.

31. 42 U.S.C. § 12112.

32. *Id.* § 1981.

I. CAUSATION IN DISPARATE-TREATMENT CASES

A. *Current Standards*

Title VII of the Civil Rights Act of 1964 forbids discrimination "because of [an] individual's race, color, religion, sex, or national origin."[33] To establish a claim, a plaintiff must prove a causal link between the defendant's discriminatory conduct and the alleged adverse employment decision.[34] However, this can be extraordinarily difficult under the but-for test. After all, employment decisions are complex and frequently involve multiple factors, some of which may be legitimate and sufficient for the adverse decision. Moreover, regardless of whether an employer was in fact motivated by a legitimate purpose, it is frequently easy for an employer to contrive a legitimate purpose for the adverse decision.[35]

For these reasons, Title VII involves a complicated proof scheme surrounding the issue of causation. In *McDonnell Douglas Corp. v. Green*, the Supreme Court held that to establish a prima facie discrimination claim under Title VII, the plaintiff must show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[36]

Upon such a showing, under *McDonnell Douglas*, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[37] Then, the plaintiff "must . . . be afforded a fair opportunity to show that [the employer's] stated reason for [the plaintiff's] rejection was in fact pretext"—"that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision."[38]

In 1989, in *Price Waterhouse v. Hopkins*, the Supreme Court again addressed the meaning of Title VII's causation requirement, and particularly its "because of" language.[39] Six Justices agreed (although not in a majority opinion) on a burden-shifting proof scheme that involved (1) a plaintiff proving his or her claim by showing that "one of the prohibited traits was a 'motivating' or 'substantial' factor in the employer's decision," followed by (2) a defendant

33. *Id.* § 2000e-2(a).
34. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 342 (2013).
35. *See Cause and Effect*, *supra* note 10, at 486.
36. 411 U.S. 792, 802 (1973).
37. *Id.*
38. *Id.* at 804–05.
39. 490 U.S. 228, 239–47 (1989) (plurality opinion); *Nassar*, 570 U.S. at 348.

"prov[ing] that it would have taken the same employment action in the absence of all discriminatory animus"—i.e., "that a discriminatory motive was not the but-for cause of the adverse employment action."[40]

Shortly after *Price Waterhouse*, "Congress passed the Civil Rights Act of 1991."[41] "This statute . . . codified the burden-shifting and lessened-causation framework of *Price Waterhouse* in part but also rejected it to a substantial degree."[42] The statute provides that "[a]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[43] But it also "abrogated a portion of *Price Waterhouse*'s framework by removing the employer's ability to defeat liability once a plaintiff proved the existence of an impermissible motivating factor."[44] At the same time, however, the statute provides that if "[the employer] demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor," the plaintiff may obtain "declaratory relief, injunctive relief . . . and [limited] attorney's fees and costs" but not "damages or . . . an order requiring any admission, reinstatement, hiring, promotion, or payment . . . ."[45] In summary, a plaintiff who proves discrimination under the motivating-factor test but not under the but-for test "could obtain declaratory relief, attorney's fees and costs, and some forms of injunctive relief" but could not obtain "monetary damages [or] a reinstatement order."[46]

The Civil Rights Act of 1991 therefore explicitly incorporates the motivating-factor test as an alternative to proving but-for causation. However, the statute arguably also renders claims under the motivating-factor test relatively ineffective (with respect to the deterrence and fairness[47] objectives of the statute) because it disallows damages and remedial injunctive relief for claims established only under this standard.[48]

The Supreme Court again addressed the meaning of causation in disparate-treatment claims in 2009, in *Gross v. FBL Financial Services, Inc.*,[49] and again in

40. *Nassar*, 570 U.S. at 348 (citing *Price Waterhouse*, 490 U.S. at 258 (plurality opinion); *id.* at 259–60 (White J., concurring); *id.* at 276–77 (O'Connor, J., concurring)).

41. *Id.*

42. *Id.*

43. *Id.* at 348–49 (internal quotation marks omitted) (quoting 42 U.S.C. § 2000e-2(m)).

44. *Id.* at 349.

45. *Id.* (alterations in original) (quoting 42 U.S.C. § 2000e-5(g)(2)(B)).

46. *Id.*

47. Throughout this Article, I use the term "fairness" to include compensation and other remedial goals of the antidiscrimination statutes.

48. Importantly, if a plaintiff establishes a claim under the motivating-factor test and the employer is unable to show that "[it] would have taken the same action in the absence of the impermissible motivating factor," then the plaintiff is not excluded from recovering damages and remedial injunctive relief under the statute. *Nassar*, 570 U.S. at 349 (alterations in original) (quoting 42 U.S.C. § 2000e-5(g)(2)(B)).

49. 557 U.S. 167 (2009).

2013, in *University of Texas Southwestern Medical Center v. Nassar*.[50] In *Gross*, the Supreme Court interpreted causal language in the ADEA, which forbids discrimination "because of [an] individual's age."[51] The Court held that "[t]he words 'because of' mean 'by reason of: on account of,'" and that "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."[52] The Court thus rejected arguments in favor of applying Title VII's burden-shifting framework, holding that "[t]o establish a disparate-treatment claim under the plain language of the ADEA, . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision."[53]

In *Nassar*, the Supreme Court interpreted causal language in Title VII's antiretaliation provision, which forbids retaliation against an employee "because" he has challenged or assisted in challenging a discriminatory employment practice under Title VII.[54] The Court once again interpreted the language of the statute at issue, and specifically the term "because," to require a but-for standard.[55] In arriving at its conclusion, the Court analyzed principles of causation in the broader torts context and examined Supreme Court precedent regarding causation and the meaning of causal terms such as "because of."[56] It ultimately held that a plaintiff seeking to prove a Title VII retaliation claim must prove "that the desire to retaliate was the but-for cause of the challenged employment action."[57]

In two separate decisions in 2020, the Supreme Court again turned its attention to the issue of causation in disparate-treatment claims.[58] In *Comcast Corp. v. National Ass'n of African American-Owned Media*, Entertainment Studios Network and the National Association of African American-Owned Media brought an action against Comcast under 42 U.S.C. § 1981 for discrimination based on race in "mak[ing] and enforc[ing] contracts."[59] In response, Comcast "offered legitimate business reasons" for its adverse contractual decisions.[60]

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50. 570 U.S. 338.

51. 29 U.S.C. § 623(a).

52. *Gross*, 557 U.S. at 176 (quoting 1 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 194 (1966)).

53. *Id.*

54. *Nassar*, 570 U.S. at 352; *see also* 42 U.S.C. § 2000e-3(a) (prohibiting retaliation against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter").

55. *See Nassar*, 570 U.S. at 352.

56. *Id.* at 346–52.

57. *Id.* at 352.

58. *See* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009 (2020); Babb v. Wilkie, 140 S. Ct. 1168 (2020); *see also* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

59. 140 S. Ct. at 1013 (quoting 42 U.S.C. § 1981).

60. *Id.*

The Supreme Court held unanimously that § 1981 requires a plaintiff to prove that discrimination was a but-for cause of the alleged adverse outcome.[61]

The Court's decision begins by clearly stating the ironclad requirement of causation and its meaning: "Few legal principles are better established than the rule requiring a plaintiff to establish causation. In the law of torts, this usually means a plaintiff must first plead and then prove that its injury would not have occurred 'but for' the defendant's unlawful conduct."[62] The Court applied well-established Supreme Court precedent and held that "[t]his ancient and simple 'but for' common law causation test . . . supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated when creating its own new causes of action," and that "[n]ormally, too, the essential elements of a claim remain constant through the life of a lawsuit."[63] As in earlier cases, the Court analyzed the meaning of causal terms such as "because of," "on the basis of," and "on account of," as well as precedent regarding causation, and ruled that these terms imply a but-for standard.[64]

The decision in *Comcast* can be contrasted with the Supreme Court's decision in *Babb v. Wilkie*, which the Court handed down only a few weeks later.[65] In *Babb*, a clinical pharmacist brought an action against her employer, the Department of Veterans Affairs Medical Center (VA), under 29 U.S.C. § 633a(a), the federal-sector provision of the ADEA, for age-based discrimination.[66] In this case, as in *Comcast*, the defendant "offered non-discriminatory reasons for the challenged actions."[67] In contrast to *Comcast*, however, the Court held that "age need not be a but-for cause of an employment decision in order for there to be a violation of § 633a(a)."[68] Contrary to *Comcast*, the Court held that the relevant language of § 633a(a)—that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age"—implies a standard more in line with the motivating-factor test.[69] In particular, the Court held that "[t]he plain meaning of the critical statutory language ('made free from any discrimination based on age') demands that personnel actions be untainted by any consideration of age."[70]

Thus, according to the Court, under § 633a(a), "age need not be a but-for cause of an employment decision in order for there to be a violation of [the

61. *See id.* at 1013–16.
62. *Id.* at 1013.
63. *Id.* at 1014 (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346–47 (2013)).
64. *See id.* at 1014–16.
65. Babb v. Wilkie, 140 S. Ct. 1168 (2020).
66. *Id.* at 1171.
67. *Id.* at 1171–72.
68. *Id.* at 1172.
69. *Id.* at 1172–74 (internal quotation marks omitted) (quoting 29 U.S.C. § 633a(a)).
70. *Id.* at 1171 (quoting 29 U.S.C. § 633a(a)).

statute]."[71] Instead, the Court applied an "any-consideration" standard that seems to be a form of the motivating-factor test and permits a finding of liability even if age, although considered, made no difference (in a but-for sense) in the employment decision.[72]

At the same time, however, the Court placed severe limits on the relief available to a plaintiff who is able to prove her case under the any-consideration test but not the but-for test. The Court reaffirmed "that but-for causation is important in determining [an] appropriate remedy," and that "[i]t is bedrock law that 'requested relief' must 'redress the alleged injury.'"[73] The Court then held that "plaintiffs who demonstrate only that they were subjected to unequal consideration cannot obtain reinstatement, backpay, compensatory damages, or other forms of relief related to the end result of an employment decision."[74] According to the Court, "To obtain such remedies, these plaintiffs must show that age discrimination was a but-for cause of the employment outcome."[75]

One interpretation of the Court's decision in *Babb* (and decisions in other disparate-treatment cases) is this: Due to the circumstances surrounding disparate-treatment claims—and specifically, the difficulty of proving but-for causation and the under-effectiveness of a statute that would require a plaintiff to meet this standard—it is plausible, based on the "free from any discrimination" language of § 633a(a), that Congress did not intend for the but-for standard to apply, notwithstanding the ironclad principle requiring a plaintiff to prove causation. However, because proof of causation is central to a claim, and because the Court could not, based on the most strongly rooted principles of law, award damages for injury that was not caused by the alleged misconduct, a plaintiff could establish liability and "seek injunctive or other forward-looking relief" but could not obtain damages or "other forms of relief related to the end result of an employment decision."[76]

Therefore, as with Title VII claims, based on the language of § 633a(a), a plaintiff can rely on a form of the motivating-factor test as an alternative to proving but-for causation. But, once again, the statute is arguably rendered ineffective under the motivating-factor test because, pursuant to the Supreme Court's interpretation, it disallows damages and remedial injunctive relief for claims established under this standard.

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71. *Id.* at 1172.

72. *See id.* at 1174; *see also id.* at 1179 (Thomas, J., dissenting) (criticizing "[t]his novel 'any consideration' standard").

73. *Id.* at 1177 (quoting Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 103 (1998)); *see also* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1014 (2020) ("It is 'textbook tort law' that a plaintiff seeking redress for a defendant's legal wrong typically must prove but-for causation." (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347 (2013))).

74. *Babb*, 140 S. Ct. at 1177–78.

75. *Id.* at 1177–78.

76. *Id.*

The *Comcast* and *Babb* decisions follow a long line of Supreme Court decisions regarding causation in disparate-treatment claims. Unfortunately, these decisions, like earlier ones, provide neither clarity nor satisfying results. In this Part, I focused on a few Supreme Court decisions surrounding particular antidiscrimination statutes. However, it is important to realize that the frequency with which the issue of causation in disparate-treatment claims is addressed by the Supreme Court is indicative of the difficulty of the issue, the state of disarray in law surrounding the issue, and the pressing need for an improved standard. Moreover, the state of confusion, instability, and ineffectiveness that surrounds the statutes discussed extends beyond these statutes to other federal statutes—such as the ADA—as well as to state antidiscrimination laws.[77]

The discussion above suggests a few important takeaways:

(1) The law surrounding standards of causation in antidiscrimination law—and disparate-treatment cases in particular—is in a state of disarray. It is complex, inconsistent, and ineffective, and courts have struggled immensely to resolve the underlying inadequacies in existing standards of causation.

(2) The Supreme Court and lower courts determine causal standards based on the language of each individual antidiscrimination statute. Combined with a choice between two inadequate causal standards, this has resulted in a variety of standards across statutes, even if the aims and policies underlying the statutes are the same.

(3) Courts and legislatures are reluctant to allow plaintiffs to rely on the motivating-factor test (and derivative tests, such as *Babb*'s any-consideration test) as an alternative to the but-for test, and when they permit a plaintiff to rely solely on the motivating-factor test, they generally place severe limits on the relief that is available to such a plaintiff. In particular, they generally disallow damages and remedial injunctive relief.[78]

(4) The 2020 Supreme Court decisions in *Comcast* and *Babb* are indicative of the broader problem. The Supreme Court and lower courts continue to struggle with the inadequacies of the but-for and motivating-factor tests—but to no avail. As in previous cases, the Court analyzed the language of the statutes in the respective cases and determined two *distinct* standards of causation in these cases.

(5) Like previous decisions regarding causation in antidiscrimination law, the decisions in *Comcast* and *Babb* employ complex logic (e.g., "age must

77. *See* 42 U.S.C. § 12112(a) (prohibiting discrimination against "individual[s] on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment"); *see also, e.g.*, LINDEMANN ET AL., *supra* note 18 (discussing causation standards in ADA claims).

78. *See supra* notes 41–48, 65–76, and accompanying text.

> be a but-for cause of discrimination—that is, of differential treatment—but not necessarily a but-for cause of a personnel action itself"[79]) and result in unsatisfying standards—with the Court holding in one case that a discriminatory defendant could avoid liability as long as the discrimination is accompanied by a sufficient nondiscriminatory factor, and the Court holding in the other case that a plaintiff may establish a claim in such circumstances but obtain no damages or remedial injunctive relief as a result.[80]

B. The Inadequacy of the But-For Test and the Motivating-Factor Test

The primary objectives of the antidiscrimination statutes are deterrence and fairness. As Justice O'Connor stated in her concurring opinion in *Price Waterhouse v. Hopkins*:

> Like the common law of torts, the statutory employment "tort" created by Title VII has two basic purposes. The first is to deter conduct which has been identified as contrary to public policy and harmful to society as a whole. As we have noted in the past, the award of backpay to a Title VII plaintiff provides "the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination in employment. The second goal of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination."[81]

Additionally, causation must reflect actual cause and effect. Whether understood as a fundamental component of the fairness and deterrence objectives of antidiscrimination law or as a standalone principle, it is an ironclad requirement of tort law that a plaintiff must prove a causal connection between the defendant's misconduct and the harm to the plaintiff, and that this connection must reflect cause and effect in the common and scientific sense of the term.[82] As the Supreme Court stated in the first sentence of *Comcast*, "Few

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79. *Babb*, 140 S. Ct. at 1173.

80. *See supra* notes 58–76 and accompanying text.

81. 490 U.S. 228, 264–65 (1989) (O'Connor, J., concurring) (citation omitted) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975)); *see supra* note 47.

82. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 342 (2013) ("When the law grants persons the right to compensation for injury from wrongful conduct, there must be some demonstrated connection, some link, between the injury sustained and the wrong alleged. The requisite relation between prohibited conduct and compensable injury is governed by the principles of causation . . . ."); James E. Viator, Note, *When Cause-in-Fact Is More than a Fact: The Malone-Green Debate on the Role of Policy in Determining Factual Causation in Tort Law*, 44 LA. L. REV. 1519, 1526–27 (1984) ("A common belief . . . is that policy considerations have no role to play in the determination of cause-in-fact, 'because no policy can be strong enough to warrant the imposition of liability for loss to which the defendant's conduct has not *in fact* contributed.'" (quoting JOHN G. FLEMING, THE LAW OF TORTS 170 (6th ed. 1983))); *see also* James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957, 958–61, 966–85 (2019).

legal principles are better established than the rule requiring a plaintiff to establish causation."[83]

The but-for test satisfies this foundational principle of law. Moreover, it comports with intuition and good policy in a very high proportion of cases in tort law (and law generally). But the but-for test is too stringent, and this weakness is brought to the fore in disparate-treatment cases. It is well-accepted that in msc situations, "the but-for test denies the existence of cause in fact while everything in human experience and intuition cries out that cause in fact was present."[84] In disparate-treatment cases—a special type of msc situation—the but-for test frequently precludes a finding of liability. First, it prevents a finding of liability definitionally when there is a sufficient legitimate purpose for an adverse outcome, even when the defendant's discrimination alone would have been sufficient for the same outcome.[85] Second, it also prevents findings of liability evidentiarily because it is difficult to prove an employer's true motivations for an employment decision, and it is easy for an employer to invent a sufficient nondiscriminatory reason for an adverse decision—even when discrimination was the true cause of the decision.[86]

As in other msc situations, the but-for test is inadequate as applied to disparate-treatment claims. As one prominent torts treatise states: "[T]here is one type of situation in which [the but-for test] fails. If two causes concur to bring about an event, and either one of them, operating alone, would have been sufficient to cause the identical result, some other test is needed."[87] It is well-accepted that—in the words of another leading torts treatise—"[t]he but-for test in such cases leads to a result that is almost always condemned as violating both an intuitive sense of causation and good legal policy."[88]

Most significantly, the but-for test yields outcomes that are contrary to the policy objectives of the antidiscrimination statutes. As Justice O'Connor remarked:

> There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. . . . Reliance on such factors is exactly what the threat of Title VII liability was meant to deter. While the main concern of the statute was with employment opportunity, Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex. This Court's decisions under the Equal Protection Clause have long recognized that whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and

83. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1013 (2020).

84. David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1777 (1997); *see also* Macleod, *supra* note 82, at 961, 991–1012.

85. *See Cause and Effect*, *supra* note 10, at 485–86.

86. *Id.*

87. KEETON ET AL., *supra* note 27, at 266 (discussing msc situations).

88. DOBBS ET AL., *supra* note 6, at 321.

> the individual. At the same time, Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor *caused* a tangible employment injury of some kind.[89]

The but-for test under-deters and under-compensates. It requires a finding of no liability when discrimination is accompanied by a sufficient legitimate purpose, and it permits a finding of no liability in a wide range of cases in which discrimination may be masked retroactively by evidence regarding the possibility of a nondiscriminatory purpose. In turn, victims of discrimination are less likely to recover damages and therefore less likely to initiate discrimination actions, and employers are substantially less deterred from discriminating.

On the other hand, the motivating-factor test is at least equally problematic. First, it is not a test of factual causation. As discussed above, a central principle of tort law is that a plaintiff may only recover damages for misconduct that in fact caused her harm.[90] But the motivating-factor test does not reflect causation in any common, scientific, or philosophic sense. It asks the factfinder to determine an apportioning of responsibility based on intuition rather than to determine a question of factual causation. It is a particular form of tort law's "substantial factor test," which is well-understood to be "not so much a test as an incantation."[91] Specifically, it "points neither to any reasoning nor to any facts that will assist courts or lawyers in resolving the question of causation. Put differently, the substantial factor test requires no particular mental operation. It invites the jury's intuition."[92]

Relatedly, the motivating-factor test does not have a consistent or meaningful definition. It is intentionally vague.[93] For example, if a racist employer refused to hire an African-American applicant, but the applicant also did not meet minimal requirements of the position—e.g., a driver's license for a driving position or a medical degree for a position as a medical doctor—a jury could apply the motivating-factor test to make a finding of causation *or a finding of no causation*. The test provides no guidance in this regard. Indeed, a jury could arguably make a finding of causation even if there was no job opening in the first instance, or even if the plaintiff *was* offered a position. Similarly, a racist or sexist jury could find that there was no causation in cases in which a causal link clearly existed.

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89. Price Waterhouse v. Hopkins, 490 U.S. 228, 265 (1989) (O'Connor, J., concurring) (citation omitted).

90. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1013 (2020) ("Few legal principles are better established than the rule requiring a plaintiff to establish causation.").

91. DOBBS ET AL., *supra* note 6, at 323.

92. *Id.*

93. *See generally* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. j (AM. L. INST. 2010) ("The substantial-factor test has not . . . withstood the test of time, as it has proved confusing and been misused.").

Because the motivating-factor test relies on intuition regarding responsibility rather than any particular logic or analytical process regarding causation, the causal determination under the motivating-factor test is unpredictable. Frequently, the jury can decide the matter however it likes, regardless of whether its determination is connected to how other juries would decide the matter or whether it is tethered to any meaningful conception of causation. This unpredictability has important implications not only for the law's fairness objectives (implications inherent in the unpredictability) but also for its deterrence objectives. For example, it may cause overdeterrence in the form of socially undesirable practices by employers and suboptimal levels of job offerings, promotion offerings, and other employment opportunities. It may also cause underdeterrence if juries in a particular region are known to be more lenient for employers. Finally, it may lead to windfall recoveries and undesirable incentives for employees.

Oddly, the motivating-factor test implicitly asks the jury to make its determination based on policy rather than fact—that is, based on the jury's intuition regarding responsibility. However, the jury is provided with no direction for how to accomplish this. The jury is not informed of the law's deterrence or fairness objectives, or other guiding principles.[94] Rather, it is simply expected to intuit a determination.

For the above reasons, the motivating-factor test cannot be said to be a standard of causation or to fulfill antidiscrimination law's broader fairness and deterrence objectives. For this reason, it has not been—and is unlikely to be—adopted as the standard of causation in antidiscrimination law. We have seen that under certain statutes and Supreme Court decisions, the motivating-factor test can play a role—generally as an ancillary, catch-all test.[95] But when this occurs, the relief available to a plaintiff who proves a claim under only the motivating-factor test is severely limited. Generally, such a plaintiff may be able to obtain certain forms of injunctive relief, costs, and fees, but cannot recover damages or remedial injunctive relief.

For example, as discussed above, Title VII provides that a plaintiff who proves causation only under the motivating-factor test—i.e., under the motivating-factor test but not under the but-for test—can obtain "declaratory relief, injunctive relief . . . and [certain] attorney's fees and costs," but not "damages or . . . an order requiring any admission, reinstatement, hiring, promotion, or payment . . . ."[96] Similarly, in the recent case *Babb v. Wilkie*,

94. *Cause and Effect*, *supra* note 10, at 539–40. For a detailed discussion of the inadequacies of the but-for and motivating-factor tests, see *id.* at Parts II–III.

95. *See supra* Part I.A.

96. 42 U.S.C. § 2000e-5(g)(2)(B)(i)–(ii); *see supra* notes 39–48 and accompanying text. To the extent that Title VII's burden-shifting scheme gains effectiveness by shifting the burden to the defendant to demonstrate that there was a sufficient legitimate purpose for an adverse outcome—i.e., that the outcome would have been the same regardless of whether there was discrimination—this benefit only goes so far. *See*

although the statute at issue, 29 U.S.C. § 633a(a), included extremely liberal language ("shall be made free from any discrimination"[97]) rather than the usual causal language that has been held to imply but-for causation (e.g., "because of . . . age"[98]), the Supreme Court nevertheless concluded that a plaintiff who only proves "unequal consideration" rather than but-for causation may "seek injunctive or other forward-looking relief" but "cannot obtain reinstatement, backpay, compensatory damages, or other forms of relief related to the end result of an employment decision."[99]

II. A PROPOSAL TO AMEND THE NATION'S ANTIDISCRIMINATION LAWS

As the previous Part explains, courts currently choose between two inadequate standards of causation. Moreover, as courts have attempted to compensate for the inadequacies of the but-for and motivating-factor tests, disparate-treatment proof schemes have become increasingly complex, inconsistent, and ineffective. The proposed approach seeks to address the inadequacies of the but-for and motivating-factor tests by placing the but-for test within the context of the broader causal framework on which it is based.[100] The but-for test is only one narrow measure of causation whereas the broader counterfactual reasoning that gives rise to the but-for test also allows for valid and well-accepted causal measures that retain the same basic logic but are far less restrictive than the but-for test.[101] These less restrictive measures of counterfactual causation allow for a more appropriate standard of causation in disparate-treatment cases.[102]

Cause and Effect in Antidiscrimination Law (*Cause and Effect*) provides a theoretical and practical examination of the proposed framework and its implications for the policy objectives of antidiscrimination law.[103] Additionally, it recommends a proof scheme for disparate-treatment cases based on this framework, and it argues that courts can and should apply the proposed standard even under the causal language currently contained in the antidiscrimination statutes.[104] In the current Part, I aim to operationalize the

supra notes 39–48 and accompanying text. As explained previously, employment decisions are complex, and it is frequently possible for an employer to assert a sufficient legitimate purpose in retrospect. *See supra* notes 1–11 and accompanying text; *see also supra* notes 81–95 and accompanying text.

97. 29 U.S.C. § 633a(a).

98. *Id.* § 623(a); *see also* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

99. 140 S. Ct. 1168, 1177–78 (2020).

100. *Cause and Effect*, *supra* note 10, at 487–88, 501.

101. *Id.*

102. *See id.* at 501–16; *see also* Hillel J. Bavli, *Counterfactual Causation*, 51 ARIZ. ST. L.J. 879, 905–15 (2019) [hereinafter *Counterfactual Causation*].

103. *See Cause and Effect*, *supra* note 10, at Parts III–V; *see also Counterfactual Causation*, *supra* note 102, at 905–15.

104. *See Cause and Effect*, *supra* note 10, at 516–36, 545–49; *see also infra* Part III.

proposed framework. In particular, I encapsulate the proposed framework in a simple test—which I call the fortified NESS test, or FNESS—and I argue that this test is suitable for immediate use by courts and legislatures as a logical and effective standard of causation in all disparate-treatment cases. In Part II.A, I formulate the FNESS standard and show how and why it applies as an ideal standard of causation in disparate-treatment claims. Then, in Parts II.B and II.C, I apply this formulation to propose concrete amendments to the nation's antidiscrimination statutes.

A. *The FNESS Standard*

As a standard of causation in the antidiscrimination context, the proposed framework can be formulated as an adaption of the NESS test and the standard of causation articulated in the *Restatement (Third) of Torts*, with an underlying meaning and conceptual framework grounded in the broader counterfactual model of cause and effect known as the potential-outcomes framework.[105] In simple terms, the proposed FNESS standard can be stated as follows:

> **The protected characteristic is a factual cause of the adverse outcome if the adverse outcome would not have occurred in the absence of the protected characteristic—that is, if the protected characteristic was a but-for cause of the adverse outcome. The protected characteristic may also be a factual cause of the adverse outcome if it was one of multiple factors that preceded the adverse outcome, and it would have been a but-for cause of the adverse outcome in the absence of another factor or combination of factors.**

This standard employs the basic structural model of the *Restatement (Third) of Torts*, although with modifications aimed at strengthening the standard and adapting it for the antidiscrimination context.[106] It begins with a simple

105. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §§ 26, 27 (AM. L. INST. 2010); Tirthankar Dasgupta et al., *Causal Inference from 2^K Factorial Designs by Using Potential Outcomes,* 77 J. ROYAL STAT. SOC'Y SERIES B (STAT. METHODOLOGY) 727 (2015); Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1737–41, 1788–1803 (1985); Donald B. Rubin, *Estimating Causal Effects of Treatments in Randomized and Nonrandomized Studies*, 66 J. EDUC. PSYCH. 688 (1974); *see also Cause and Effect*, *supra* note 10, at 501–16.

106. An alternative formulation is as follows:

> The protected characteristic is a factual cause of the adverse outcome if the adverse outcome would not have occurred in the absence of the protected characteristic. The protected characteristic may also be a factual cause of the adverse outcome if it was part of a set of antecedent factors that were sufficient for the adverse outcome, and in the absence of the protected characteristic, the remaining set of factors would be insufficient for the adverse outcome.

This formulation leads the factfinder to an alternative, but equivalent, mode of reasoning. Linguistically and logically, it is more similar to the NESS formulation than that of the *Restatement (Third)*. Like NESS, it asks the factfinder to consider whether the protected characteristic belonged to a sufficient set of antecedent

statement of the but-for test,[107] followed by a broader standard that applies effectively to msc situations, and to disparate-treatment cases in particular.[108] At the center of the proposed standard are two innovations over current tests of causation in disparate-treatment cases: (1) the application of tort law's NESS standard, and the adaption of it for the disparate-treatment context; and (2) a fortification and operationalization of this standard with the conceptual framework of the potential-outcomes model.

Let us consider an example that the Supreme Court discussed in *Babb v. Wilkie* to illustrate its reasoning with respect to the any-consideration standard that the Court applied in that case. Assume that a company used a point system to make promotion decisions. Assume that a 55-year-old had a score of 85 and a 35-year-old had a score of 90, but that the 55-year-old also had a 5-point deduction based on his age, lowering his score to 80 points.[109] Let us call the 55-year-old Jim and assume that he sued his employer for its consideration of Jim's age in arriving at the promotion decision.

First, realize that, as applied to this situation, the but-for and motivating-factor tests suffer from the problems described in Part I. Jim would be unable to establish a claim under the but-for test because, although the employer used a discriminatory formula in arriving at its promotion decision, Jim would not have received the promotion even in the absence of the discrimination. After all, even without the 5-point age-based deduction, Jim had fewer points than his 35-year-old colleague. A court could apply a form of the motivating-factor test to allow a finding of liability in this situation—as the Supreme Court did in *Babb*—but this gives rise to the wide-ranging problems discussed in Part I. For this reason, even in the limited circumstance in which a court is willing to interpret the relevant statutory language as not requiring the plaintiff to satisfy the element of causation with respect to the adverse employment outcome (e.g., "made free from any discrimination"[110]), as in *Babb*, the court will generally not permit the plaintiff to obtain damages or remedial injunctive relief.

However, FNESS is different. Unlike the any-consideration standard applied in *Babb*, FNESS supplies a logic that is outcome-oriented and that reflects actual cause and effect. At the same time, by incorporating the statistical notion of a "potential outcome"—and specifically, by employing a less stringent form of the necessity condition within the potential-outcomes model—it

factors and then to test whether the protected characteristic was necessary for the sufficiency of the set. *See* Wright, *Grounds and Extent*, *supra* note 24, at 1441. There are certain advantages of this formulation and mode of reasoning, but these advantages are arguably outweighed by its more technical and complex terminology.

107. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 26 (AM. L. INST. 2010).

108. *See id.* § 27.

109. Babb v. Wilkie, 140 S. Ct. 1168, 1174 (2020).

110. *Id.* at 1171 (quoting 29 U.S.C. § 633a(a)).

permits a finding of causation even when the discriminatory conduct does not satisfy the but-for standard.

Without delving into the intricacies of the potential-outcomes model,[111] the FNESS standard asks whether the protected characteristic was a but-for cause of the adverse outcome *or* whether it *would have been* a but-for cause of the adverse outcome in the absence of another factor or combination of factors. Therefore, under the FNESS standard, Jim's age is a factual cause of his non-promotion if, in the absence of the legitimate factor—that is, assuming Jim and his 35-year-old counterpart otherwise had an equal amount of points—age would have made the difference between Jim receiving and not receiving the promotion. Based on the 5-point age-based point deduction, the answer is "yes"—age would have meant the difference between Jim receiving and not receiving the promotion—and the FNESS standard is satisfied.[112] Moreover, because, contrary to the motivating-factor test, FNESS reflects actual cause and effect, a plaintiff who proves a causal link between the defendant's discrimination and an adverse outcome under the FNESS standard should be eligible—subject to a damages analysis—to obtain the full range of remedies available to a plaintiff who proves a discrimination claim under the but-for test.[113]

Now, to illustrate in greater detail how FNESS differs from the but-for test, Figure 1 depicts a 2x2 matrix that contains potential outcomes for the example above—that is, values of the outcome quantity of interest that would occur for each combination of age and qualification.[114] For simplicity, I define "age" and "qualification" as binary variables that take the values "Elderly" and "Not Elderly," and "Strongly Qualified" and "Weakly Qualified," respectively.[115] The but-for test asks the factfinder to compare the two entries in the bottom row of the matrix: given that the plaintiff was weakly qualified for the position (relative to his younger counterpart), did the protected characteristic—age—make a difference?[116] The answer is "no" because comparing the entries for Elderly and Not Elderly, given that Jim was Weakly Qualified for the promotion relative to his 35-year-old counterpart, age made no difference. In other words, Jim would not have been promoted either way.

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111. See *Cause and Effect*, *supra* note 10, at 504–12 for a detailed discussion of this model; *see also Counterfactual Causation*, *supra* note 102, at 893–905.

112. For a more complex scenario—one involving three factors where any two of the factors would be sufficient for the adverse outcome—see *infra* notes 151–154 and accompanying text.

113. For a discussion of damages under the proposed framework, see *Cause and Effect*, *supra* note 10, at 532–36.

114. This is a simplified application of concepts central to the potential-outcomes framework. *See generally* GUIDO W. IMBENS & DONALD B. RUBIN, CAUSAL INFERENCE FOR STATISTICS, SOCIAL, AND BIOMEDICAL SCIENCES: AN INTRODUCTION 3–30 (2015).

115. A more complex version of this example could consider a range of values for age and qualification.

116. *See Cause and Effect*, *supra* note 10, at 522–23.

FNESS, on the other hand, asks the factfinder to consider two sets of counterfactuals in this example. FNESS can yield a finding of causation if the but-for test is satisfied—that is, if there is a contrast in potential outcomes in the bottom row of the 2x2 matrix (comparing the potential outcomes for Elderly and Not Elderly, *given that Jim was Weakly Qualified*). However, it can also yield a finding of causation if there is a contrast in potential outcomes in the *top row* of the matrix: if, assuming Jim were Strongly Qualified for the promotion (like his younger counterpart), being Elderly versus Not Elderly would have made the difference between being Promoted and Not Promoted, then FNESS is satisfied.[117] More broadly, FNESS asks the following: in the absence of the legitimate factor—here, in the absence of Jim's lesser qualifications—would the protected characteristic have made a difference? The answer in the example above is "yes"—if Jim were otherwise equally qualified for the promotion, being 55 rather than 35 would have meant the difference between receiving and not receiving the promotion.[118]

Another way of understanding FNESS is as using the full set of counterfactuals associated with age and qualification rather than only those in the bottom row. If comparing Elderly to Not Elderly yields a contrast in potential outcomes for *either* Strongly Qualified *or* Weakly Qualified—rather than just for Weakly Qualified, as in the but-for test—the FNESS standard is satisfied.[119]

	Not Elderly	**Elderly**
Strongly Qualified	Promoted	Not Promoted
Weakly Qualified	Not Promoted	Not Promoted

Figure 1. 2x2 matrix depicting potential outcomes in an age-based disparate-treatment case. FNESS asks the factfinder to compare potential outcomes associated with age = Not Elderly to potential outcomes associated with age = Elderly for both qualification = Strongly Qualified and qualification = Weakly Qualified and to determine that age is a cause of the adverse outcome if either comparison exposes a contrast in potential outcomes.[120]

Thus, FNESS refines the but-for test in the sense of adapting it for the multifactor situation. It incorporates a less restrictive and more appropriate version of the necessity condition, thereby allowing a finding of causation even when discrimination is accompanied by a sufficient legitimate factor. In this

117. *See id.*
118. *See id.*
119. *Id.* at 514–16.
120. *See id.* at 522–23.

sense, it also refines the motivating-factor test by fulfilling that test's primary purpose—allowing a finding of causation in msc situations—but doing so in a way that is consistent with principles of counterfactual causation. In particular, it allows a finding of causation in msc situations based on potential outcomes associated with the full range of counterfactuals that arise from the factors at issue, rather than only those associated with the protected characteristic while conditioning on a particular value of the other factor (or factors).[121]

Now, because FNESS is far more liberal than the but-for test—and specifically, because it reflects a less restrictive form of the necessity condition—it gives rise to certain serious concerns regarding inappropriate findings of liability and windfall recoveries. For example, assume that a plaintiff, Kevin, sued a potential employer for race-based discrimination in hiring a delivery driver, where the employer hired a white applicant over Kevin, an African-American applicant, but where Kevin did not even have a driver's license or know how to drive. In this scenario, the version of the NESS test employed in the *Restatement (Third) of Torts* could expose the employer to liability. This is because the test would ask whether, assuming the plaintiff had a driver's license, being African-American versus white would have made a difference in the employment decision.[122]

However, the FNESS standard and the language of the amendments proposed herein both negate this problem definitionally through the causal concept of antecedence. In particular, the proposed framework identifies these scenarios as a form of "preemption," or "preemptive causation"—a concept in the msc literature that involves a force that precedes and forecloses the possibility of causation by a second force.[123] The proposed framework employs the potential-outcomes model to precisely define the concept of antecedence and to identify whether a legitimate purpose is "preemptive" of a discriminatory effect.

A technical discussion of preemption and of the fundamental role of the potential-outcomes model is beyond the scope of the current Article.[124] My aim here is to provide just an introduction and overview of the problem of

121. As explained in *Cause and Effect*, it would be illogical to rule out consideration of the full range of counterfactuals on the basis that it involves consideration of counterfactuals associated with circumstances that we know did not occur—for example, consideration of counterfactuals associated with Jim being equally qualified as his 35-year-old counterpart when we know that he was not in fact equally qualified. *Id.* at 512–14. "This is because the very essence of the counterfactual model, and the but-for test in particular, is the comparison of counterfactuals—the inference of cause and effect based not only on what actually occurred but also what would have occurred, but did not, under counterfactual circumstances." *Id.* at 512. Indeed, our intuition regarding cause and effect, as well as well-accepted scientific notions of cause and effect, frequently consider a broader range of counterfactuals than those considered in the but-for test. *Id.* For a detailed explanation of the logic of considering the full range of counterfactuals rather than only those associated with the discriminatory factor, see *id.* at 512–14; *Counterfactual Causation*, *supra* note 102, at 911–12.

122. *Cause and Effect*, *supra* note 10, at 528–32.

123. Wright, *supra* note 105, at 1794–98.

124. For a detailed discussion of these issues, see *Cause and Effect*, *supra* note 10, at 525–36.

legitimate forces as preemptive causes and how FNESS addresses it through the requirement of antecedence—that is, the requirement that the discriminatory factor precede the legitimate factor.

To take an extreme example, assume that Diana, a woman seeking employment as a delivery driver, approached a man named Max. She handed him her resume and requested that he employ her as a delivery driver. As it turns out, Max is a sexist who has remarked clearly and publicly that he would never hire a female employee were he ever in a position to do so. However, Max had no opportunity to hire Diana or anyone else. Max himself was unemployed and looking for work.

Max is a sexist, and if he had been given an opportunity to reject Diana's application on the basis of her sex, he is very likely to have done so. However, in no sense can it be said that Max's sexism was a cause of Diana's adverse outcome. He was unemployed and in no position to hire anyone.

This poses a problem for the NESS test as formulated in the *Restatement (Third) of Torts*. In particular, as with the driver's license example above, the *Restatement (Third)*'s approach would ask whether, in the absence of the legitimate factor, the protected characteristic would have made a difference.[125] In this scenario, it would ask whether Diana's sex would have made the difference between being hired and not being hired had Max been in a position to hire Diana. The answer is "yes" since it is highly likely that Max's sexism would have precluded Diana's hiring had he been in a position to hire her. Similarly, in the driver's license scenario, the test would ask: in the absence of the legitimate factor—i.e., if Kevin in fact had a driver's license and knew how to drive—would Kevin's race have made a difference? Again, the answer is "yes" since it is highly likely that Kevin's race would have precluded Kevin's hiring even if Kevin had a driver's license and knew how to drive.

The proposed framework addresses this substantial concern through the concept of antecedence—a well-accepted concept in scientific, philosophic, and common notions of cause and effect that requires that, for a factor to constitute a cause of an outcome, it must *precede* that outcome in time.[126] Again, a technical discussion of causal-inference concepts surrounding antecedence is beyond the scope of this Article.[127] Simply stated, however, under the proposed framework, Diana's sex cannot be a cause of her adverse employment outcome because at the time that Max *perceived* Diana's sex, the outcome variable—to hire Diana or not to hire Diana as a delivery driver—was already determined.[128] In

125. *Id.* at 540–41.

126. *Id.* at 528–31.

127. See *id.* for a detailed discussion explaining the notions of antecedence and preemption using statistical concepts.

128. *See* D. James Greiner & Donald B. Rubin, *Causal Effects of Perceived Immutable Characteristics*, 93 REV. ECON. & STAT. 775, 775–78 (2011); D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 HARV. L. REV. 533, 576–79; *see also Cause and Effect*, *supra* note 10, at 519–20, 528–31. For various important technical

other words, at the time that Max perceived Diana's sex, the outcome of the employment decision was not a "random variable" that could take on multiple values, but was rather fixed, or determined, at a certain value—not to hire—based on the absence of an employment opportunity.

To borrow language from the NESS literature, the discriminatory force was *preempted* by the absence of an employment opportunity and therefore could not be a cause of Diana's adverse employment outcome.[129] In other words, the absence of an employment opportunity was a preemptive cause that precluded the possibility of a causal link between Diana's sex and the adverse outcome. Similarly, in the driver's license example, Kevin's race was preempted by the absence of minimal qualification for the position—a driver's license and knowing how to drive—and therefore could not be a cause of Kevin's adverse employment outcome.

In the FNESS formulation, this notion of antecedence is reflected in the requirement that to be a factual cause "[t]he protected characteristic . . . [must] precede[] the adverse outcome . . . ."[130] In neither Diana's case nor Kevin's case did the protected characteristic precede the adverse outcome. In both cases, at the time that the defendant perceived the protected characteristic, the adverse outcome had already been determined. That is, in both cases, a legitimate factor preempted the protected characteristic as a cause of the adverse outcome.

Discerning the ordering of a hypothesized causal factor (or a "treatment," to use terminology from the causal-inference literature) and an outcome is sometimes straightforward or even obvious. Other times, however, it is more complex and requires clear thinking regarding the causal problem. It is important to realize that the question of antecedence can require judgment. For example, in Diana's case above, if Max had in fact run a delivery business but clearly had no plans for making a new hire, it may be concluded that the absence of an employment opportunity preempted any possibility that discrimination caused the adverse employment outcome. On the other hand, if Max had in fact run a delivery business and had no specific plans for making a new hire—*but had a long track record of making impromptu hirings*—it is less clear: perhaps, then, the outcome was determined only after Max perceived Diana's sex. This would not necessarily imply that sex caused the adverse outcome, but antecedence is a *prerequisite* of causation.

Sharp thinking about the causal elements—including the discriminatory and legitimate factors (defined as "treatments" in the causal framework), the

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and substantive reasons, the *perception* of a plaintiff's protected characteristic is fundamental to both the timing and meaning of the protected characteristic as a hypothesized causal factor (or "treatment variable"). *Cause and Effect*, *supra* note 10, at 519–20, 528–31; Greiner & Rubin, *supra*, at 775–78; Greiner, *supra*, at 576–79. For purposes of antecedence in particular, the time of perception is the operative timing of the protected characteristic as a potential causal factor. *Cause and Effect*, *supra* note 10, at 519–20.

129. *See* Wright, *supra* note 105, 1794–98; *Cause and Effect*, *supra* note 10, at 520–21, 528–31.

130. *Supra* notes 105–106 and accompanying text.

employment outcome (defined as the "outcome variable"), the individual whose protected characteristic is at issue (defined as the "unit"), and the timing of the treatments, units, and outcomes—is fundamental.[131] The suitability of FNESS therefore relies on its role as a causal measure within the broader potential-outcomes framework.

Without this broader framework, one could, for example, apply FNESS to conclude that discrimination was a cause of a job candidate not being hired for a driving position even if the applicant did not have a driver's license or even if there had been no open position in the first instance. Without a framework for defining the broader causal question and for sharply analyzing the question of antecedence, the FNESS standard would not function well. Additionally, the potential-outcomes framework provides a well-established scientific framework to validate the FNESS measure as an analytical process that reflects actual cause and effect and employs the but-for test's central counterfactual reasoning—just in broader form. The potential-outcomes framework also imparts substantial evidentiary advantages and a better alignment between the meaning of causation and empirical proof thereof.[132] By drawing on the conceptual framework of the potential-outcomes model, FNESS operationalizes the NESS test for effective use in antidiscrimination law.

Importantly, although the concepts of antecedence and preemption are fundamental to FNESS as a coherent standard of causation, in practice, the complexities associated with these concepts can be largely avoided by incorporating the two most important forms of preemption—the absence of an open employment opportunity controlled by the defendant and the failure of the plaintiff to satisfy minimal requirements of the employment opportunity—directly into the disparate-treatment proof scheme, as proposed in *Cause and Effect*.[133] There is strong precedent for this: both are components of the *McDonnell Douglas* criteria for establishing a prima facie discrimination claim under Title VII.[134]

In summary, the FNESS standard refines the but-for and motivating-factor tests and can serve as an ideal standard of causation that can be applied simply and uniformly to all disparate-treatment claims.

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131. Greiner & Rubin, *supra* note 128, at 775–78; Greiner, *supra* note 128, at 576–79.

132. For a discussion of these advantages, see *Cause and Effect*, *supra* note 10, at 525–32.

133. *See id.* at 517–24.

134. *See supra* note 36 and accompanying text. Courts can adapt these factors for different contexts—e.g., retaliation claims—as they currently adapt the *McDonnell Douglas* elements to suit various types of claims. Note that to further mitigate concerns regarding windfall recoveries while ensuring that the deterrence objectives of antidiscrimination law are upheld, the proposed framework allows for a damages scheme that permits an allocation of damages based on causation and other considerations. *See Cause and Effect*, *supra* note 10, at 532–36 (examining possible approaches to damages); *see also id.* at 534 n.199 ("One way of viewing windfall recoveries in discrimination cases is as follows: Allowing a plaintiff to obtain a windfall recovery is necessary in order to deter discrimination. Moreover, a *defendant* arguably obtains a windfall if he commits discrimination and is relieved from paying damages because the plaintiff happened to be less qualified or a poor performer.").

B. Amending the Antidiscrimination Statutes

Legislatures generally leave the causal standard in antidiscrimination statutes open to judicial interpretation.[135] Courts, in turn, interpret these statutes by choosing between two inadequate standards—the but-for test and the motivating-factor test. Indeed, legislatures may choose to avoid specifying a causal standard precisely because doing so would involve specifying an inadequate standard. When the choice is between two inadequate standards of causation, there are good arguments in favor of flexibility—in favor of relying on courts to interpret causal language as it applies to the particular circumstances of a case.

However, these arguments fail if a suitable causal standard exists—especially in light of the disarray that has resulted from judicial interpretation based on the intricacies of each statute's causal language. As argued in Part II.A, FNESS is more than a suitable standard. It is ideal for disparate-treatment claims, and it arguably fulfills the purposes of both the but-for test and the motivating-factor test. Moreover, in the absence of legislation specifying the causal standard applicable in disparate-treatment cases, the current state of confusion and ineffectiveness will continue, as will the inconsistent and often-counterintuitive outcomes that emerge under current standards.

Therefore, I propose that legislatures amend the nation's civil rights statutes to include language specifying a causal standard based on the FNESS standard formulated in Part II.A. In particular, I propose amending these statutes to include the following language:

> **The term "because of" [or other causal language] implies that the protected characteristic must be a factual cause of the adverse employment outcome. The protected characteristic is a factual cause of the adverse outcome if the adverse outcome would not have occurred in the absence of the protected characteristic—that is, if the protected characteristic was a but-for cause of the adverse outcome. The protected characteristic may also be a factual cause of the adverse outcome if it was one of multiple factors that preceded the adverse outcome, and it would have been a but-for cause of the adverse outcome in the absence of another factor or combination of factors.**

This language can be inserted directly into the definitions sections of Title VII (Section 2000e),[136] the ADEA (Section 630),[137] and the ADA (Section 12102, 12103, or 12111).[138] Similar language can also be inserted in the Civil

135. *See supra* Part I.A.

136. *See* 42 U.S.C. § 2000e.

137. *See* 29 U.S.C. §§ 623, 630.

138. *See* 42 U.S.C. §§ 12102, 12103, 12111, 12112.

Rights Act of 1866—either in subsection (b), which provides for the meaning of the statute's term "to make and enforce contracts," or in a new subsection.[139] Finally, this or similar language should be considered for inclusion in other federal and state antidiscrimination statutes not considered explicitly herein.

C. Discussion

The proposed amendment, like the FNESS formulation introduced in Part II.A, is an adaption of the NESS test and the standard of causation articulated in the *Restatement (Third) of Torts*—again with an underlying meaning and conceptual framework grounded in the potential-outcomes model.[140] It adopts the basic structure and linguistic style of the *Restatement (Third)* but modifies it to strengthen the causal standard, capture the broader meaning of FNESS as a measure within the potential-outcomes framework, and optimize the standard for the antidiscrimination setting.[141]

The proposed language begins in the first sentence by explicitly aligning the standard of causation in antidiscrimination law with the broader torts context. It indicates that factual causation is required to prove a discrimination claim.[142] As in the *Restatement (Third)*, the language then proceeds to define the meaning of factual causation.[143]

The second sentence adopts the *Restatement (Third)*'s articulation of the but-for standard, which requires that "the harm would not have occurred absent the conduct."[144] That is, it requires that in the absence of the discrimination—or, in particular, the protected characteristic—the adverse employment outcome would not have occurred.[145] This component of the test operates well in single-factor scenarios—for example, in cases in which a plaintiff establishes a prima facie discrimination claim and the defendant is unable to establish a

139. *Id.* § 1981.

140. *See supra* notes 105–108 and accompanying text.

141. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §§ 26, 27 (AM. L. INST. 2010).

142. *See generally id.* § 26 ("Tortious conduct must be a factual cause of harm for liability to be imposed.").

143. *See id.*

144. *Id.*

145. Throughout this Article, I generally treat the protected characteristic—and specifically, the defendant's perception of the protected characteristic—as the causal factor. Sometimes, I refer to "discrimination" as the causal factor, e.g., to emphasize that, as in all tort claims, there must be a causal link between the misconduct (the discrimination) and the harm (the adverse outcome). The causal factor can be stated in either form, but for various technical, substantive, and definitional reasons (e.g., "because of . . . race," 42 U.S.C. § 2000e-2(a); "because of . . . age," 29 U.S.C. § 623), it is clearer and, in certain respects, more precise to refer to the protected characteristic as the causal factor. As discussed previously, references to either discrimination or the protected characteristic as a causal factor should be interpreted in terms of the defendant's perception of the protected characteristic. *See supra* note 128; *Cause and Effect*, *supra* note 10, at 519–20.

legitimate purpose. As in tort law generally, in single-factor situations, the but-for test is simple and it comports with intuition and good policy.[146]

Additionally, it is important to realize that the but-for test similarly applies well to many multifactor scenarios. For example, assume that an employer had three employees and laid off his one female employee due to a combination of two factors: (1) business had been slow and he no longer required three employees, and (2) the employer held sexist beliefs that female employees are less capable than male employees. In this case, the employer's discrimination combined with his business and financial circumstances to bring about the adverse outcome. His discrimination against his female employee *is* a but-for cause of the adverse outcome: in the absence of the employer's discrimination, the employee is unlikely to have been laid off. The discriminatory factor in this situation can be understood as a type of "necessary-but-not-sufficient" factor, and it is a but-for cause.

On the other hand, the but-for test is inadequate as a test of causation in a specific type of multifactor scenario—situations involving multiple sufficient causes.[147] Therefore, the third sentence of the proposed amendment applies the central logic of the but-for test—the necessity condition—but in a less stringent form, in order to allow the standard to perform well in situations involving more than one sufficient factor or set of factors. The test is simple: as described in Parts II.A and II.B, it asks the factfinder to determine whether the protected characteristic would be a but-for cause in the absence of another factor or combination of factors.[148] For example, in the *Babb* illustration involving two factors—Jim's (worse) qualifications and his (older) age—the test asks whether, assuming Jim and his younger counterpart were otherwise equally qualified, would Jim's age have meant the difference between him receiving and not receiving the promotion.

Similar to the *Restatement (Third)*, the FNESS formulation achieves its simplicity by dividing the standard into two components: (1) a simple articulation of the but-for test, and (2) an extension for msc situations that relies on the but-for test but applies its reasoning in less stringent form. Moreover, while maintaining simple terminology and a straightforward analytical test that a jury can easily apply, FNESS carefully incorporates important elements of the

146. I assume that establishing factual causation in the common, scientific, and philosophic sense of the term is central to the objectives of tort law and antidiscrimination law in particular. This assumption has strong support in the case law and literature. *See supra* Part I.A; *Cause and Effect*, *supra* note 10, at 537–38 nn.206–07 and accompanying text; *see, e.g.*, Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1013 (2020) ("Few legal principles are better established than the rule requiring a plaintiff to establish causation. In the law of torts, this usually means a plaintiff must first plead and then prove that its injury would not have occurred 'but for' the defendant's unlawful conduct.").

147. *See supra* Part I.B.

148. *See supra* notes 106–121 and accompanying text.

NESS test and the potential-outcomes framework.[149] Relatedly, FNESS reflects actual cause and effect in the common, scientific, and philosophic notions of the term. Indeed, both components of the standard—the but-for test and the extension aimed at addressing msc situations—are regularly employed to infer cause and effect in the hard and social sciences, as well as in our common intuition.[150]

Let us now consider how the proposed language would apply to a more complex case—one involving more than two factors. Assume that an employer promoted a male employee over Rhonda, a female employee, based on three factors: discrimination, performance, and education.[151] Assume for simplicity that although Rhonda had all three factors disfavoring her in the employer's promotion decision, any two of these factors would have been sufficient to prevent Rhonda from receiving a promotion. In this case, the employer's discrimination is not a but-for cause of the adverse promotion outcome because Rhonda's performance and her education were alone sufficient to preclude her promotion. The employer's discrimination is, however, a cause of the adverse outcome under the FNESS standard because, in the absence of a legitimate

149. In Part II.A, in addition to the FNESS formulation proposed in the text, I provided a second, somewhat more technical, formulation of FNESS. Accordingly, an alternative way to formulate the proposed amendment in Part II.B is as follows:

> The term "because of" [or other causal language] implies that the protected characteristic must be a factual cause of the adverse employment outcome. The protected characteristic is a factual cause of the adverse outcome if the adverse outcome would not have occurred in the absence of the protected characteristic. The protected characteristic may also be a factual cause of the adverse outcome if it was part of a set of antecedent factors that were sufficient for the adverse outcome, and in the absence of the protected characteristic, the remaining set of factors would be insufficient for the adverse outcome.

This formulation, like the alternative provided in Part II.A, leads to a somewhat different—but equivalent—analytical process relative to the formulation in the text. This alternative has certain advantages. However, these advantages are arguably outweighed by the disadvantages of the more complex and technical language of this formulation. *See supra* note 106. In any event, the two formulations produce the same outcome. For example, if an employer promoted a male employee over Rhonda, a female employee, based on Rhonda's sex and qualifications (relative to her male counterpart), where either would have been sufficient to prevent Rhonda's promotion, the employer's discrimination would not be a cause of the adverse outcome under the but-for test, but would be a cause under either FNESS formulation. Specifically, applying the formulation in the text, had Rhonda been equally qualified for the promotion relative to her male counterpart, her sex would nevertheless have prevented her from receiving the promotion. It is therefore a cause of the adverse outcome. Applying the formulation in this footnote, Rhonda's sex was one factor in a set of antecedent factors—a set that included her sex but not her qualifications—that was sufficient for the employer not to award her the promotion, and it was necessary for the sufficiency of that set because had she been male rather than female, she may well have received the promotion. Her sex is therefore a cause of the adverse outcome under this formulation also.

150. *See Cause and Effect, supra* note 10, at 501–16; *Counterfactual Causation*, *supra* note 102, at 905–15. As explained in *Cause and Effect*, the second component of the test is intended to reflect an "unconditional main-effects" analysis in the fields of causal inference and experimental design. *See Cause and Effect*, *supra* note 10, at 512–16; discussion *infra* note 153; *see generally* Hillel J. Bavli & Reagan Mozer, *The Effects of Comparable-Case Guidance on Awards for Pain and Suffering and Punitive Damages: Evidence from a Randomized Controlled Trial*, 37 YALE L. & POL'Y REV. 405, 420–32 (2019); Dasgupta et al., *supra* note 105.

151. Rhonda's performance and education can be considered in absolute terms or relative to the performance and education of her male colleague.

factor or a combination of legitimate factors, Rhonda's sex would have meant the difference between her receiving the promotion and not receiving the promotion. In particular, had she been on equal footing with her male counterpart with regard to either performance or education, her sex would have been a but-for cause of her non-promotion.[152] Had she been on equal footing with regard to education, for example, then her sex would have been a but-for cause of her non-promotion. This is because her performance and her sex would still have combined to prevent her promotion, whereas had she been a male employee, she could very well have received the promotion.[153]

Finally, note the language requiring that the protected characteristic be one of multiple factors "that preceded" the adverse outcome. This language incorporates the requirement of antecedence and the exclusion of discrimination as a cause when it is preempted by a legitimate factor—concepts discussed in detail in Part II.A.[154] As explained, this requirement and the role of the potential-outcomes framework in defining and identifying preemptive causes are critical to the coherent application of the proposed standard. Nevertheless, the question of antecedence can be greatly simplified by incorporating the two most important forms of preemption—the absence of an open employment opportunity controlled by the defendant and the failure of the plaintiff to satisfy minimal requirements of the opportunity—directly into the disparate-treatment proof scheme, as seen in *McDonnell Douglas*.[155]

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152. Alternatively stated, sex was an element in a set of antecedent factors—a set containing the factors discrimination and performance, or a set containing the factors discrimination and education—that was sufficient for the occurrence of the adverse promotion outcome, and in the absence of this factor, the set—again, containing either discrimination and performance or discrimination and education—would be insufficient for the occurrence of the adverse outcome.

153. *See generally* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 27 cmt. f, illus. 3 (AM. L. INST. 2010). Another way of understanding this is explicitly in terms of the potential-outcomes framework. If the factor sex takes values "female" and "male," performance takes values "low" and "high," and education takes values "low" and "high" (to reflect Rhonda's performance and education relative to those of her male colleague), the combination of factor values, or "levels," that in fact led to the adverse outcome is sex = female, performance = low, and education = low. The but-for test asks whether sex = female versus sex = male made a difference in the outcome, conditional on performance = low and education = low. The answer is no—it made no difference. The FNESS measure employed in the proposed amendment, however, allows for a finding of causation if a change from sex = female to sex = male would make a difference when performance = low *or high* or education = low *or high*. This standard is satisfied in the example above because changing sex = female to sex = male would have made a difference—i.e., sex = male would not have resulted in the adverse outcome whereas sex = female would have resulted in the adverse outcome—if either performance = low while education = high or performance = high while education = low. In other words, sex would have made a difference if, rather than conditioning on particular values of performance and education, we considered all possible combinations of these values. One alternative way of understanding this is that the employment outcome would have been different, on average, for sex = female versus sex = male, given certain mild assumptions. *See Counterfactual Causation*, *supra* note 102, at 905–15.

154. *See supra* notes 122–134 and accompanying text.

155. *See supra* notes 36–38, 133–134 and accompanying text; *see also Cause and Effect*, *supra* note 10, at 517.

III. IMPLICATIONS

The proposed standard carries a wide range of implications for antidiscrimination law. I focus on three categories of implications. First, I summarize the implications of the proposed standard for the fairness and deterrence objectives of antidiscrimination law. Second, I discuss implications for the courts' interpretation of causal language in current antidiscrimination statutes. Third, I discuss the importance of amending the antidiscrimination statutes rather than relying on the courts to institute a logical causal standard.

A. The Policy Aims of Antidiscrimination Law

The but-for test is a simple and well-accepted standard of causation that performs well—in line with intuition and good policy, as well as actual cause and effect—in most cases.[156] However, for the reasons discussed above, the but-for test is inadequate as a test of causation in msc situations, and disparate-treatment cases in particular.[157] The purpose of the substantial-factor test is to address the inadequacy of the but-for test in msc situations.[158] The purpose of the motivating-factor test—an adaption of the substantial-factor test for the antidiscrimination context—is to address the inadequacy of the but-for test in disparate-treatment cases and other msc situations in the antidiscrimination context.[159] This test is, however, at least equally problematic. Among other problems, it is inherently vague, and it does not reflect actual cause and effect.[160]

The FNESS standard retains the central component of the but-for test—the necessity condition—but in a less restrictive form. It accomplishes the aims of both the but-for test and the motivating-factor test while eliminating the negative aspects of each. Like the but-for test, the FNESS standard involves a simple, logical test that reflects actual cause and effect. Indeed, it is based on the same causal framework and the same counterfactual reasoning. At the same time, it avoids the primary weakness of the but-for test by extending the counterfactual reasoning to permit a logical and intuitive application to multifactor situations. As such, the FNESS standard fulfills the core function of the motivating-factor test: it allows findings of causation in msc situations, thereby permitting outcomes that are consistent with common sense and good

156. *See generally* DOBBS ET AL., *supra* note 6, at 317.

157. *See supra* Part I.B.

158. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. j (AM. L. INST. 2010).

159. *See supra* Part I; *Cause and Effect*, *supra* note 10, at 494–501.

160. *See supra* Part I.B.

policy.[161] At the same time, the FNESS standard does not suffer from the substantial weaknesses of the motivating-factor test. In particular, rather than abandoning a standard that reflects actual cause and effect in favor of a test that relies on intuition regarding responsibility, FNESS employs a well-established analytical process that reflects actual cause and effect.

A detailed analysis of the fairness and deterrence objectives of antidiscrimination law and the implications of FNESS with respect to these objectives is beyond the scope of this Article.[162] However, even without a thorough examination, it is clear from precedent and bedrock principles of tort law that a causal standard in antidiscrimination law should have three fundamental features of causation: (1) the standard should yield a finding of causation when the but-for test is satisfied, (2) the standard should be capable of yielding a finding of causation even when discrimination is accompanied by sufficient legitimate factors, and (3) the standard of causation should involve reasoning that reflects actual cause and effect. If a causal standard lacks one of these three features, it will lead to legal outcomes that do not align with the fairness and deterrence objectives of tort law, and antidiscrimination law in particular.

First, there is overwhelming support for the proposition that a factor should be deemed a cause of an outcome when it is a but-for cause of that outcome. The but-for test is by far the dominant test of causation in tort law.[163] It is the default test of causation in law, in everyday references to cause and effect, and in clear Supreme Court precedent in discrimination cases. As the Supreme Court has stated clearly in its 2020 decision in *Comcast Corp. v. National Ass'n of African American-Owned Media*, "Few legal principles are better established than the rule requiring a plaintiff to establish causation. In the law of torts, this usually means a plaintiff must first plead and then prove that its injury would not have occurred 'but for' the defendant's unlawful conduct."[164] The Court followed well-established precedent that "[i]t is . . . textbook tort law that an action 'is not regarded as a cause of an event if the particular event would have occurred without it.'"[165] Thus, "[t]his ancient and simple 'but for' common law causation test . . . supplies the 'default' or 'background' rule

161. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. j (AM. L. INST. 2010) (explaining that the substantial-factor test's "primary function was to permit the factfinder to decide that factual cause existed when there were multiple sufficient causes").

162. For a detailed examination of the implications of FNESS for the fairness and deterrence objectives of antidiscrimination law, see *Cause and Effect*, *supra* note 10, at 536–45.

163. *See* DOBBS ET AL., *supra* note 6, at 317.

164. 140 S. Ct. 1009, 1013 (2020).

165. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347 (2013) (quoting KEETON ET AL., *supra* note 27, at 265).

against which Congress is normally presumed to have legislated when creating its own new causes of action," including antidiscrimination causes of action.[166]

Second, there is strong support for the proposition that the converse of item (1) does not hold. Specifically, courts and Congress have made clear that an ideal standard of causation should be capable of permitting a finding of causation even in msc situations—that is, even when discrimination is accompanied by sufficient legitimate factors. This is clear from the abandonment of the but-for test in msc situations in tort law, as well as caselaw and legislation that limit the applicability of the but-for test in certain antidiscrimination contexts.[167] As indicated in Part I, courts have struggled immensely to preserve the requirement of actual causation while permitting liability in certain disparate-treatment cases even when discrimination is accompanied by other sufficient factors.[168] The Supreme Court has attempted to accomplish this via burden-shifting schemes involving both the but-for test and the motivating-factor test, as has Congress in its amendments to Title VII. As Justice O'Connor stated in her concurring opinion in *Price Waterhouse*:

> There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. . . . Reliance on such factors is exactly what the threat of Title VII liability was meant to deter. While the main concern of the statute was with employment opportunity, Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex. This Court's decisions under the Equal Protection Clause have long recognized that whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual.[169]

Importantly, having a causal standard that *permits* a finding of causation even when a discriminatory purpose is accompanied by other sufficient factors does not imply that it would *require* a finding of causation in such circumstances. While Congress and the courts have generally required a but-for standard of

166. *Comcast Corp.*, 140 S. Ct. at 1014 (quoting *Nassar*, 570 U.S. at 346–47); *see also* Burrage v. United States, 571 U.S. 204, 210–11 (2014) ("'Results from' imposes, in other words, a requirement of actual causality. In the usual course, this requires proof that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct." (internal quotation marks and citations omitted)); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176–78 (2009) (holding that "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," meaning that "under the plain language of the ADEA . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision").

167. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 27 (AM. L. INST. 2010); RESTATEMENT (SECOND) OF TORTS § 431 (AM. L. INST. 1965); KEETON ET AL., *supra* note 27 ("[T]here is one type of situation in which [the but-for test] fails. If two causes concur to bring about an event, and either one of them, operating alone, would have been sufficient to cause the identical result, some other test is needed.").

168. *See supra* Parts I.A–B.

169. Price Waterhouse v. Hopkins, 490 U.S. 228, 265 (1989) (O'Connor, J., concurring).

causation, they have made clear that an ideal causal standard would be capable of yielding a finding of causation—although not necessarily requiring such a finding—in msc situations. In other words, they have made clear that an ideal causal standard would not altogether preclude causation simply because discrimination is accompanied by a second sufficient factor.

Third, it is an ironclad principle of law—and tort and antidiscrimination law in particular—that a plaintiff must establish a causal link between the defendant's misconduct and the plaintiff's injury, and that this causal link must reflect actual cause and effect. As the Supreme Court has stated, "When the law grants persons the right to compensation for injury from wrongful conduct, there must be some demonstrated connection, some link, between the injury sustained and the wrong alleged. The requisite relation between prohibited conduct and compensable injury is governed by the principles of causation . . . ."[170] As the Supreme Court has recently reiterated, "Few legal principles are better established than the rule requiring a plaintiff to establish causation."[171] Simply stated, "Tortious conduct must be a factual cause of harm for liability to be imposed."[172]

The but-for test inheres features (1) and (3) but lacks feature (2), while the motivating-factor test is designed to inhere feature (2) but lacks features (1) and (3). The FNESS standard, however, entails all three fundamental features of causation: it yields a finding of causation when the but-for test is satisfied, it permits a finding of causation even when discrimination is accompanied by sufficient legitimate factors, and it employs simple reasoning that reflects actual cause and effect. By employing a less stringent form of the necessity condition (the central logic of the but-for test) to better account for multifactor situations, the FNESS standard refines and unifies the but-for and motivating-factor tests, and it achieves the fairness and deterrence objectives of antidiscrimination law better than either of these tests can individually.[173]

170. *Nassar*, 570 U.S. at 342.

171. *Comcast Corp.*, 140 S. Ct. at 1013; *see supra* notes 163–166 and accompanying text.

172. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 26 (AM. L. INST. 2010); *see* DOBBS ET AL., *supra* note 6, at 312–17 (explaining the requirement of factual causation); *Counterfactual Causation*, *supra* note 102, at 900–02 (arguing that "[f]actual causation is intended to capture the meaning of 'actual,' or 'scientific,' cause and effect," and citing sources); David W. Robertson, *Causation in the* Restatement (Third) of Torts: *Three Arguable Mistakes*, 44 WAKE FOREST L. REV. 1007, 1008 (2009) ("[T]he cause-in-fact requirement is the 'linchpin' of the corrective-justice theory. Indeed, it has long been regarded as a truism that 'a defendant should never be held liable to a plaintiff for a loss where it appears that his wrong did not contribute to it, and no policy or moral consideration can be strong enough to warrant the imposition of liability in such [a] case.'" (second alteration in original) (footnote omitted) (first quoting Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 LAW & PHIL. 1, 12 (1987); and then quoting Charles E. Carpenter, *Concurrent Causation*, 83 U. PA. L. REV. 941, 947 (1935))).

173. *Cause and Effect*, *supra* note 10, at 489, 554.

B. Interpreting Causal Language in Antidiscrimination Statutes

Causal language in current antidiscrimination statutes can and should be interpreted to include the FNESS standard. This follows from the analysis above indicating that FNESS can be viewed as a refinement of the but-for and motivating-factor tests, given that courts currently interpret such language as implying one of these two tests. Moreover, it is clear from dictionary entries associated with causal language in the antidiscrimination statutes—a source commonly relied on by the Supreme Court and lower courts for interpreting such language[174]—that causal terms such as "because of," "results from," and "based on" incorporate the scientific meaning of cause and effect, which includes the FNESS measure.[175]

Thus, although courts have interpreted such language in antidiscrimination statutes to imply but-for causation based on the dictionary meaning of the language,[176] they would be justified to extend this reasoning to interpret such language as implying the FNESS standard, which itself is an extension of the central logic of the but-for test adapted for the multifactor context and disparate-treatment claims in particular.[177] Moreover, as Justice O'Connor and others have highlighted, Congress almost certainly intended to target discriminatory conduct, or the reliance on race or gender, in making employment decisions—even if it does not amount to a but-for cause.[178] Regardless of whether Congress explicitly had the broader meaning of the necessity condition in mind when formulating Title VII and other antidiscrimination statutes, it is this meaning—and not the but-for or motivating-factor tests—that most comports with the policy objectives of the antidiscrimination statutes, as well as with the ordinary and scientific notions of cause and effect in disparate-treatment cases and other multifactor situations.[179]

Finally, in circumstances in which courts have employed the motivating-factor test, this test is arguably no longer justified in light of FNESS. In considering this proposition, let us immediately put aside two categories of cases. First, the Supreme Court has been clear that causal terms such as "because of," "results from," and "based on" imply factual causation and generally preclude use of the motivating-factor test to satisfy the causal requirement.[180] Cases involving such language are discussed immediately

174. *Id.* at 545–49; *see, e.g.*, *Nassar*, 570 U.S. at 350; Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009); Burrage v. United States, 571 U.S. 204, 210–11 (2014).

175. *Cause and Effect*, *supra* note 10, at 545–49.

176. *See supra* Part I.A.

177. Interpreting the causal language in current antidiscrimination statutes to include the FNESS standard can be understood as an extension of existing Supreme Court precedent rather than a deviation from it.

178. *See supra* note 169 and accompanying text.

179. *Cause and Effect*, *supra* note 10, at 548–49.

180. *See supra* Part I.

above.[181] Second, there are certain statutes that have explicitly incorporated in the language of the statute the possibility of a motivating-factor test as an alternative to but-for causation.[182] I have, however, already discussed—as a matter of policy rather than statutory interpretation—the problems associated with the motivating-factor test and the policy reasons to employ the FNESS standard.[183]

Thus, we are left here with a relatively narrow category of cases that are not clearly governed by the motivating-factor test or the but-for test based on statutory language. In these cases, however, when courts have interpreted vague causal language to imply the motivating-factor test (or some variation thereof), this interpretation is based on the presumed absence of an alternative to the but-for and motivating-factor tests, combined with the conclusion that, for a particular statute, Congress must have intended to capture as a cause an employer's consideration of a protected characteristic, even if such consideration did not affect the outcome of an employment decision.[184] For this reason, although courts may allow a finding of liability in these cases, they generally place severe limits on the relief that can be obtained by a plaintiff who cannot establish but-for causation.[185]

For example, in the Supreme Court's 2020 decision in *Babb v. Wilkie*, the Court interpreted the relevant language of the federal-sector provision of the ADEA—"shall be made free from any discrimination based on age"[186]—as only requiring "that personnel actions be untainted by any consideration of age."[187] However, while the Court permitted a finding of liability for a plaintiff who can prove "unequal consideration," it held that if the plaintiff is unable to prove but-for causation, the relief that the plaintiff can obtain is limited to "injunctive or other forward-looking relief" and does not include "reinstatement, backpay, compensatory damages, or other forms of relief related to the end result of an employment decision."[188] Title VII similarly places severe limits on the relief that can be obtained by a plaintiff who proves that discrimination was a motivating factor but not a but-for cause of an employment decision.[189]

Therefore, although courts have in limited circumstances—based on the language of a statute—permitted a finding of liability under the motivating-factor test, they have been reluctant to do so, and they have so limited the relief

181. *See supra* notes 176–179 and accompanying text.
182. *See supra* Part I.A.
183. *See supra* Parts I–III.
184. *See supra* Part I.
185. *See supra* Part I.
186. 29 U.S.C. § 633a(a).
187. 140 S. Ct. 1168, 1171 (2020).
188. *Id.* at 1177–78.
189. *See supra* notes 42–46.

available to a plaintiff that proves a claim under the motivating-factor test, but not the but-for test, as to render the law relatively ineffective with respect to such claims. This treatment again results from the fact that—as with the substantial-factor test in other torts contexts—courts allow the motivating-factor test only as a workaround to the inability of the but-for test to yield a finding of causation in msc situations. The test is, however, inconsistent with the fundamental legal rule requiring a plaintiff to prove causation, leading to inconsistencies, confusion, and judicial reluctance in applying this test, as well as unusual limits on relief.

The motivating-factor test is thus applied only as a result of a combination of two factors: (1) a court's conclusion that for a particular statute, Congress must have intended to outlaw discrimination even when it did not "make a difference" with respect to an employment decision; and (2) the presumption that there is no alternative to the but-for test that would both reflect actual cause and effect *and* permit a finding of causation even when discrimination is accompanied by other sufficient factors. After all, the requirement of causation is beyond reproach. It is fundamental to longstanding tradition and to the fairness and other objectives of tort law. Congress surely could not be presumed to have intended its abandonment if an alternative standard exists that both reflects actual cause and effect and addresses the inadequacy of the but-for test as applied to msc situations.

FNESS supplies such a standard. In light of this, and for the reasons discussed earlier in this Part, courts arguably are not justified in interpreting statutes that contain vague causal language to require or allow a motivating-factor test. Rather, if a statute does not require but-for causation and does not specify the motivating-factor test as an alternative to the but-for test, courts should consider generally interpreting it as requiring the plaintiff to satisfy FNESS. Moreover, because, unlike the motivating-factor test, FNESS reflects actual cause and effect, a plaintiff who proves that discrimination is a FNESS cause of an adverse outcome should be eligible to obtain the full range of remedies that would be available to her had she proved her case under the but-for test—including damages and remedial injunctive relief.

C. The Importance of Amending the Antidiscrimination Statutes

In Part III.B, I explained why courts can and arguably should apply the FNESS standard even under the causal language of current antidiscrimination statutes. However, legislatures should not leave the causal standard for judicial interpretation. Legislatures should consider amending the antidiscrimination statutes to incorporate the FNESS standard pursuant to the language provided in Part II.B.

As discussed previously, legislatures have generally left the issue of causation to judicial interpretation.[190] This has caused confusion, inconsistency, and ineffectiveness, as courts have individually applied inadequate standards on a statute-by-statute, case-by-case basis while interweaving complexities and loose logic to compensate for the standards' inadequacies and arrive at acceptable outcomes. The legislatures may well have been correct to leave the issue of causation to the courts. After all, a legislature would have had to decide between two inadequate standards—the but-for test and the motivating-factor test—and the inadequacies of the chosen standard would undoubtedly result in counterintuitive and counterproductive outcomes. Therefore, rather than prescribing an inadequate standard, legislatures have left the causal standard to the courts. Courts have substantial experience interpreting the meaning and intention of legislation and navigating the complexities of causation. Moreover, they are able to develop causal standards more intricately through common law and to tailor their application to particular cases.

However, leaving the causal standard to judicial interpretation is just the best of poor alternatives when legislatures and courts must choose between two inadequate standards. This is not the case when a good option exists. FNESS can easily be incorporated into antidiscrimination statutes pursuant to Part II.B, and it can be applied simply and effectively to discrimination cases brought under these statutes. The proposed language applies to single-factor cases and multifactor cases, and it follows well-established methods in tort law.

Importantly, the proposed amendment does not reinvent the wheel. Rather, it builds on and adapts the NESS test and the approach to causation in the *Restatement (Third) of Torts*, and it fortifies this method with a robust causal framework that draws on the meaning and methods of cause and effect in the sciences and their relationship to causation in the broader torts context.

The proposed amendment ensures a consistent and effective application of the FNESS standard. It provides a clear test that courts can apply simply across the full spectrum of disparate-treatment cases. At the same time, the fundamental features of a particular causal question must be specified based on the particular facts of a case.[191] The proposed amendment therefore allows substantial flexibility for a court to craft its application of FNESS based on the details of a case. Moreover, because the proposed language builds on standards and caselaw from the msc torts context, courts can turn to this body of law to develop their applications of the FNESS standard.

In summary, because FNESS provides a logical and effective standard that reflects actual cause and effect and that can be applied in all disparate-treatment cases, legislatures should consider amending the antidiscrimination statutes to incorporate this standard.

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190. *See supra* Parts I.A, II.B.

191. *See Cause and Effect*, *supra* note 10, at 505–12, 525–31.

CONCLUSION

Legal standards surrounding causation in disparate-treatment claims require repair. The inadequacies of the but-for and motivating-factor tests have thrown antidiscrimination law into a state of disarray. The proposed FNESS standard resolves these inadequacies and is capable of restoring logic and effectiveness to this area of the law. The proposed framework applies the NESS test and a predominant model of cause and effect in the sciences—the potential-outcomes model—to develop a causal standard that is suitable for msc situations, and disparate-treatment claims in particular.

This Article operationalizes the proposed framework by encapsulating it in a simple test for courts and legislatures to apply as the standard of causation in all disparate-treatment cases. It is sufficiently simple for juries to apply even to complex fact patterns. At the same time, it builds on established methods in tort law, it comports with good policy and legislative intent, and it reflects actual cause and effect.

After formulating the FNESS standard, the Article applies this standard to propose concrete amendments to the antidiscrimination statutes. Although I show that courts can and arguably should apply FNESS under the causal language in current antidiscrimination statutes, I argue that in light of the availability of FNESS as a standard of causation, legislatures are not justified to leave the causal standard open to judicial interpretation. Rather, they should consider adopting FNESS for incorporation in the antidiscrimination statutes and thereby restore the effectiveness of disparate-treatment litigation and promote the crucial aims of antidiscrimination law.