A MATTER OF PERSPECTIVE: TEXTUALISM, STARE DECISIS, AND FEDERAL EMPLOYMENT DISCRIMINATION LAW

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INTRODUCTION

When the Supreme Court rules on matters of statutory interpretation, it does not establish "methodological precedents."[1] The Court is not bound to follow interpretive practices employed in a prior case even if successive cases concern the same statute. Instead, the Court's interpretive practices may change without warning or explanation, and at times they do so as part of a broader transition between interpretive regimes independently of any substantive change to the statute interpreted.[2] Stare decisis appears to require no justification for changes in the Court's interpretive practices.

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1. *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1902 (2011) ("Five votes in agreement with respect to the interpretive principles used to decide one case do not create a methodological precedent that carries over to the next case, even where the same statute is being construed.").

2. *See generally* Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971 (2005) (discussing the Court's shift toward an embrace of textualism in statutory cases). Professors William Eskridge and John Ferejohn originally used the term "interpretive regime" to refer to interpretative practices understood as "systems of norms or conventions that regulate the interpretation of legal materials." William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, *in* THE RULE OF LAW 265, 267 (Ian Shapiro ed., 1994). *See also* Willliam N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26, 66 (1994) ("An interpretive regime is a system of background norms and conventions against which the [Supreme] Court will read statutes . . . [that] tells lower court judges, agencies, and citizens how strings of words in statutes will be read, what presumptions will be entertained as to statutes'[] scope and meaning, and what auxiliary materials might be consulted to resolve ambiguities.").

This is striking because abrupt changes in the interpretive practices applied to a statute have the power to disrupt the consistency and predictability of a statute's enforcement and the rationality of its design.

The Court's decisions involving federal employment discrimination law illustrate this problem. For decades, the Supreme Court ascribed to this body of law a particular constellation of congressional purposes, assumptions, and regulatory objectives that it consulted in order to navigate difficult questions of statutory interpretation and to integrate new interpretations into a coherent legal framework. The Court's interpretations of Title VII of the 1964 Civil Rights Act[3] seemed to guide the interpretation of other employment discrimination statutes.[4] Scholars have long described certain of the Court's Title VII decisions as prime examples of purposivist interpretation.[5] Moreover, the seminal decisions establishing the building blocks of the statute's doctrine share a common interpretive perspective that allowed the Court to determine statutory meaning against the background of a particular set of legislative purposes, assumptions, and

3. 42 U.S.C. § 2000e (2012). Title VII shares with subsequent statutes a homologous set of terms and structural provisions that make this family of statutes an interesting venue in which to test principles of statutory interpretation. *See, e.g.*, *Id.* § 2000e-2(a) (providing that it is an "unlawful employment practice" for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"); 29 U.S.C. § 623(a) (2012) (providing that it is "unlawful" for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age"); 42 U.S.C. § 12112(a) (2012) (providing that an employer may not "discriminate against a qualified individual" on the basis of disability in regard to "terms, conditions and privileges of employment").

4. *See infra* Part IV.A.

5. *See, e.g.*, William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 495 (2001) (explaining that *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), relied on the Court's determination that the statute embodied an "integrative purpose"); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1239 (2001) (describing the "*Griggs* precept that Title VII should be construed liberally and aggressively to achieve its integrative goals"); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 333 (1990) (characterizing *United Steelworkers v. Weber*, 443 U.S. 193 (1979), as an example of purposivism); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71 n.5 (2006) (describing *Weber*'s "rel[iance] on legislative history to discern Title VII's general purpose"). *See also* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1101 (2001) (describing the majority and dissenting opinions in *Weber* as "engaged in a thorough and illuminating discussion of the policy and deliberative context of the statutory language, as well as the subsequent history and interpretation of Title VII, to try to figure out which great antidiscrimination principle should have been read into the law for that case"); Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CALIF. L. REV. 685, 719 ("In *Weber* . . . the broad goal inherent in Title VII's purpose and the incongruities of the contrary result trumped the plain meaning of the statutory text and original legislative expectations.").

objectives.[6]

In recent years, however, the Court has abandoned that perspective. It now privileges textualist interpretive practices that require it, whenever possible, to confine interpretation to the statute's "plain meaning."[7] The purposes and objectives that once structured the Court's decisions have consequently receded in significance. Over the last decade, the Court has issued several decisions that seem at odds with once venerated statutory purposes and that undermine the coordination and validity of established legal doctrines and the interpretive rationales on which they were based.

The hypothesis that the Court's recent decisions track a purely ideological shift among its members is easily dismissed. While some of these decisions have had demonstrably conservative consequences, they do not yield an ideologically consistent pattern. What is significant about the Court's recent decisions is not their clear articulation of a new substantive legal agenda, but rather the fragile uncertainty of their relationship to prior precedents, which is the result of their apparent departure from the interpretive perspective established by those precedents. The ascendance of textualism explains the Court's rejection of prior interpretive rationales that depended upon constructions of statutory purpose. To reject those rationales is to do more, however, than to abandon certain purposivist methods.[8] It is to reject the very perspective from which the Court previously approached this body of law. In so doing, the Court has undermined the basis for the prediction of future interpretations and the harmonization of interpretations across time that came with that perspective. The practical assumptions, logical connections, and value commitments that structured prior decisions have come to have uncertain precedential value and can no longer function effectively to reinforce statutory coherence.[9] This is the dilemma of the present moment for employment discrimination law, and it is symptomatic of and enabled by an even more fundamental legal problem: neither interpretive theory nor stare decisis enforces a norm of methodological consistency that could aid the Court to manage the transition between interpretive regimes without sacrificing statutory coherence.

6. *See infra* Part II.A.

7. *See infra* Part III.

8. *See, e.g.*, Frickey, *supra* note 2, at 1972–74 (arguing that textualist regime change has not resulted in a complete rejection of purposivist practices and is unlikely to ever do so completely).

9. Throughout this Article, I use the term "statutory coherence" to refer to the predictability and consistency of a statute's enforcement and to a statute's rationality, or the coordination of its provisions to function as an integrated whole.

The failure of precedent to constrain the Court's interpretive practices suggests that the principle of stare decisis does not attach precedential value to interpretive methods. This is indeed the canonical view, and courts and scholars frequently rely on the distinction between holding and dictum to explain why interpretive methods do not possess precedential value.[10] This formulation sidesteps the critical question here. The question is not whether stare decisis binds courts to follow a particular set of interpretive practices once those practices have been applied either to statutory questions generally or to a particular statute, but rather whether courts must honor the rationales of prior decisions, which may, in addition to interpretive methods, include other assumptions and intermediate determinations that may not be considered the Court's holding even though they are integral to the Court's decision. I call this the "interpretive perspective" established by prior decisions.[11]

This reframing of the issue may seem strange. It is black letter law

10. *See, e.g.*, Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1880 (2008) ("Not only does the [Supreme] Court make watershed decisions about statutory interpretation methodology without engaging in stare decisis analysis, but also it alternates between opposing interpretive principles over relatively short periods of time without any mention of stare decisis."); Frickey, *supra* note 2, at 1976 (opining that stare decisis does not apply to interpretive theories because they are not part of a court's holding); Gluck, *supra* note 1, at 1910 ("[T]he [Supreme] Court does not generally give formal stare decisis effect to its statements about statutory interpretation methodology. Even when a majority of Justices agrees on an interpretive principle in a particular case . . . that principle is not viewed as 'law' for the next case."); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1766 n.54 (2010) ("The [Supreme] Court applies heightened stare decisis to substantive (as opposed to methodological) statutory precedents."); Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 682 n.183 (2002) (describing "the Court's practice of not affording stare decisis effect to the methodologies that it employs"); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2144–45 (2002) (observing that the Supreme Court "do[es] not seem to treat methodology as part of the holding of case law" and that Justice [Antonin] Scalia in particular does not acknowledge the application of stare decisis to the Court's decisions approving of the use of legislative history); Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 385 (2005) ("When the [Supreme] Court decides a statutory interpretation case, stare decisis effect attaches to the interpretation that the Court gives to a statute, but the Court does not adhere to the interpretive methods used to reach that interpretation."). *See also infra* Part I.A.

11. By "interpretive perspective," I mean the point of view adopted by the Court when interpreting a particular statute or a distinct body of law. This perspective will include, first, the Court's guiding interpretive theory, including the norms and conventions (such as particular interpretive methods and canons of construction) informing the exercise of such a theory. Second, in the context of any given statute or family of statutes that has been the subject of interpretation over time, it also includes a set of intermediate values, assumptions or findings that prior interpretations have attached to a statute (such as legislative purposes, regulatory assumptions regarding how such purposes may be achieved, or the attribution of specific meaning to a particular statutory term or phrase) and that courts often consider when interpreting the same statute or related statutes.

that statutory interpretations enjoy especially robust stare decisis protection—a strong presumption of correctness.[12] One of the leading cases setting forth this principle, *Patterson v. McLean Credit Union*,[13] is itself an employment discrimination case. In *Patterson*, the Court determined that it was bound by precedent to apply § 1981 to permit actions against private parties, but was not bound by the same precedent to give credence to the statute's legislative history when assessing the substantive meaning of its provisions. *Patterson* thus supports the prevailing view that precedential value attaches only to the holding of prior decisions and not to interpretive methods. There is, however, a contrary view expressed oddly enough in one of the Court's more recent employment discrimination decisions, *CBOCS West, Inc. v. Humphries*.[14] In that case, the Court concluded that stare decisis requires statutory decisions to be rationally consistent with one another whether or not the trend of the Court's interpretive practices changes.[15]

These two accounts present very different understandings of the relationship between interpretive methods and stare decisis. This Article explores this relationship through close study of several decisions in employment discrimination law. Due to their linguistic, structural, and policy similarities, the family of federal employment discrimination statutes provides a uniquely transparent field in which to observe how changes in the Court's interpretive perspective undermine statutory coherence. Often without distinguishing or overruling prior cases, these decisions appear to render some of the Court's most venerated antidiscrimination precedents either mistaken[16] or superfluous,[17] to

12. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) ("We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation . . . ."). *See also* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) ("Statutory precedents . . . often enjoy a super-strong presumption of correctness.").

13. *Patterson*, 491 U.S. at 164.

14. CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008).

15. *Id.* at 451–52.

16. *Compare* Bazemore v. Friday, 478 U.S. 385, 386–87 (1986) (per curiam) (holding that an employer violated Title VII and triggered a new charging period with each pay-check issued on the basis of a racially discriminatory pay structure), *with* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 621 (2007) (holding that the Title VII limitations period runs from the discriminatory pay decision and is not renewed with each paycheck that reflects sex bias).

17. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 101–02 (2003) (holding that plaintiff-friendly motivating factor analysis is available whether the plaintiff proceeds through direct or circumstantial evidence, thus calling into question when, if ever, plaintiffs may prefer to elect the more onerous route of pretext analysis established under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

interpret virtually identical language occurring in separate but related statutes to have substantially different meanings,[18] and to announce potentially insurmountable conflicts between basic statutory provisions never previously thought to have been in conflict.[19] Whether the Court should be required to justify these destabilizing departures from the rationales of its prior decisions is the central question posed by this Article.

The Article will proceed as follows. Part I will discuss the relationship between interpretive theory and stare decisis by examining the competing explanations of stare decisis provided in the *Patterson* and *CBOCS* decisions. This part will demonstrate that both explanations are flawed. Each conceptualizes stare decisis as fidelity to prior interpretations. *Patterson*, however, defines binding interpretations too narrowly by restricting them to the discrete holding of a case. *CBOCS* resists the limiting equation of precedent and holding, but it fails to provide a clear explanation of a more robust view of precedent that might constrain the Court's choice or implementation of interpretive methods. Part II will introduce and apply the concept of interpretive perspective through a reading of the Court's early employment discrimination decisions. Part III will illustrate several of the harms that may result when the Court departs from an established interpretive perspective. It will analyze several recent decisions in which textualist interpretive methods have undermined both the substance and rationales of prior decisions without expressly overruling them, thus eroding the predictability, consistency, and internal rationality of this body of law. The Article will close in Part IV by arguing that stare decisis is incapable of resolving the fundamental question raised by these cases of when and under what circumstances the Court may abandon a prior interpretive perspective. That is, it cannot answer this question

18. *Compare* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (interpreting Title VII's prohibition of discrimination "because of . . . sex" to permit the plaintiff to proceed by motivating factor analysis which shifts the burden to the employer to show that it would have made the same decision absent sex bias), *with* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175–77 (2009) (interpreting the Age Discrimination in Employment Act's ("ADEA") prohibition of discrimination "because of . . . race" to exclude claims in which age is a motivating factor for the challenged employment decision, requiring instead that the plaintiff carry the burden of showing age to be a but-for cause). *Compare also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295 (1976) (interpreting Title VII's prohibition of discrimination "because of . . . race" to protect white plaintiffs just as it protects plaintiffs who are members of a racial minority), *with* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (interpreting the ADEA's prohibition of discrimination "because of . . . age" to exclude claims of discrimination in favor of older workers, even if the plaintiffs themselves are covered by the statute because they are at least 40 years of age).

19. Ricci v. DeStefano, 557 U.S. 557, 580 (2009) (announcing a conflict between Title VII's disparate treatment and disparate impact provisions). *See also id.* at 625 (Ginsburg, J., dissenting) (objecting that no prior decision by the Court had provided "even a hint" of such a conflict).

without jeopardizing its ability to answer other questions. In sum, stare decisis cannot regulate transitions in the Court's interpretive practices without undermining its ability to police the distinction between holding and dictum that is otherwise so fundamental to its doctrine.

I. STATUTORY PRECEDENT AND MATTERS OF INTERPRETIVE METHOD

In our legal system, the values associated with stare decisis are at once multiple and fundamental. By adhering to the results of prior decisions,[20] courts exercise self-governance, subordinating the personal and political views of individual judges in order to preserve the rule of law.[21] Stare decisis is a principle of judicial restraint by which precedent is used to constrain future decisions. It therefore performs an institutional role of enforcing consistency and resource efficiency that is unique to the judiciary.[22] Its appeal as a matter of judicial policy extends, however, beyond that role. Stare decisis is thought to enhance the validity of judicial decisions by enforcing the principle that like cases be treated alike, at once a measure of fairness and credibility.[23] It also serves the public's reliance interests by enhancing the predictability of legal enforcement and maintaining consistency regarding the application of substantive law.[24] Of course the degree to which it may enhance fairness and predictability depends in large measure on the level of generality at which courts define

20. BLACK'S LAW DICTIONARY 1537 (9th ed. 2009) (defining stare decisis as "[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation").

21. Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) ("[I]t is indisputable that stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" (quoting THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (H. Lodge ed., 1888)); Vasquez v. Hillery, 474 U.S. 254, 265 (1986) ("[Stare decisis] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals."). *See also* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 600 (1987) ("Using a system of precedent to standardize decisions subordinates dissimilarity among decisionmakers, both in appearance and in practice.").

22. *See* Schauer, *supra* note 21, at 599. *See also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149–50 (1921) (observing that without stare decisis "the labor of judges would be increased almost to the breaking point" and the outcome of decisions may fluctuate with a court's composition); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 286–87 (1990) (counting among the "merits" of stare decisis judicial resource efficiency, "stability in the law," and "public legitimacy").

23. Powell, *supra* note 22, at 286–87; Schauer, *supra* note 21, at 595–96, 600–01.

24. Schauer, *supra* note 21, at 597–98. *See also* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (praising stare decisis because "it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process").

binding precedent: if defined too narrowly, these goals will not be served, and, if defined too broadly, they will be served at the expense of innovation and the correction of prior judicial errors. Thus, courts and commentators have often recognized that stare decisis must balance stability against desirable change,[25] viewing "the orderly development of the law" as the principle's "central goal."[26]

Additional considerations affect the stare decisis treatment of statutory precedents. Substantive interpretations of a statute are generally entitled to a "super strong presumption of correctness" and, therefore, enjoy greater protection than constitutional and common law precedents.[27] In federal practice, the heightened presumption in favor of statutory precedents is thought to serve important purposes such as maintaining consistency and predictability of legislative enforcement and preserving for Congress its proper lawmaking function by respecting its responsibility for statutory amendment.[28] The presumption serves in the main to facilitate "vertical coherence," or historical continuity, with past decisions, which are viewed as authoritative sources of interpretive meaning.[29] It serves this purpose by slowing the rate of interpretive innovation and allowing substantive statutory meaning to remain relatively stable provided that the resolution of future cases depends on the settled meanings of provisions that have been interpreted in prior cases.

The presumption is, however, not generally thought to apply to matters of interpretive method. Though widely observed, the reasons for

25. *See, e.g.*, *Vasquez*, 474 U.S. at 265 (noting that stare decisis is intended to ensure that "the law will not merely change erratically"); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1175 (2006) ("Stare decisis seeks to preserve stability, but the doctrine must also leave room for innovation and correction of error.").

26. Eskridge, *supra* note 12, at 1392 (advocating an "evolutive" approach to overruling statutory precedents, whereby "the Court would overrule a statutory precedent when the reasoning underlying the precedent has been discredited over time; the precedent's consequences are positively troublesome, unfair, or contrary to current statutory policies; and practical experience suggests that the statutory goals are better met by a new rule that does not unduly undermine . . . reliance interests").

27. *Id.* at 1362 (describing a "three-tiered hierarchy of stare decisis" in which "[s]tatutory precedents . . . often enjoy a super strong presumption of correctness"). *See also, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989) ("Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."); Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) ("[W]e must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.").

28. *See generally* Eskridge, *supra* note 12.

29. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 239 (1994) (noting that the idea that a particular statutory interpretation is "coherent with authoritative sources situated in the past" was important to liberal legal theorists, though it was later challenged by the legal realists).

this distinction are far from clear. Professor Abbe Gluck has conjectured that "[t]he Justices either believe that they cannot bind other Justices' (or future Justices') methodological choices or have implicitly concluded that it would not be wise to do so."[30] Gluck has noted several problems with this distinction, stating that it "wastes resources, deprives Congress of an incentive to coordinate its drafting of statutes with the Court's interpretive methods, and provides little guidance to the lower courts."[31] The notion that the Court cannot bind future members to particular interpretive methods is curious. It may be that the Court and legal scholars view interpretive methods as simply a matter of personal style.[32] They are often seen to express something unique about the judicial philosophy of the particular jurist, and so perhaps they deserve protection as a matter of judicial independence. But stare decisis, with its attendant limits, already intrudes upon judicial independence. The point is that it is a limitation on the craft of judging recognized by courts, constraining judicial conduct to promote the rule of law.

Precedential value might be assigned to matters of interpretive methodology for the very same reason. We do not truly believe that interpretive methods are exclusively a matter of judicial style, more akin to judicial rhetoric than they are an aspect of legal order. We would not tolerate purely idiosyncratic approaches to legal interpretation. Because they inform the rationale for legal substance, they are in a sense inextricable from that substance. The integrity and legitimacy of statutory law depends in no small measure on the perception that judges adhere to familiar and credible standards of interpretation. Therefore, the prevailing view that stare decisis divides sharply interpretive method and legal substance is suspect and yet profoundly consequential. It has dominated the discourse regarding precedent and statutory interpretation and shaped the trajectory of employment discrimination law. But even within that field the Court has recognized the limitations of that view and suggested an alternative.

30. *See* Gluck, *supra* note 1, at 1910.

31. *Id.* at 1911. *See also* Gluck, *supra* note 10, at 1766–67 (discussing the negative effects of the "absence of 'methodological stare decisis'" in the Supreme Court's reasoning).

32. I thank Rebecca Brown for first suggesting to me this possibility. *See also* Gluck, *supra* note 10, at 1849 (criticizing a "romantic vision of judging, one that views statutory interpretation as a 'craft,' and, as such, a task ill-suited for constraining rules").

A. THE CANONICAL VIEW OF STARE DECISIS: *PATTERSON V. MCLEAN CREDIT UNION*

The very Supreme Court employment discrimination decision most often cited to express the strength of the presumption of correctness for statutory precedents also illustrates the limitations of stare decisis protection regarding matters of interpretive method. The Court famously applied the presumption in *Patterson v. McLean Credit Union*,[33] a case concerning claims of racial harassment and race discrimination brought under § 1981 by an African American plaintiff against a private employer. The *Patterson* case required the Court to consider the overlapping coverage of § 1981, which prohibits race discrimination in the making and enforcement of contracts,[34] and Title VII, which prohibits race discrimination in the workplace.[35]

The Court raised sua sponte the question whether it should overrule its prior decision, *Runyon v. McCrary*,[36] which held that § 1981 is not limited to claims against public institutions.[37] The Court in *Patterson* upheld *Runyon* in that it permitted the application of § 1981 to claims of race discrimination asserted against private employers.[38] The Court acknowledged the "special force" given to considerations of stare decisis "in the area of statutory construction," and it explained the basis for this principle, stating that "unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what

33. Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

34. 42 U.S.C. § 1981(a) (2012) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . .").

35. *Id.* § 2000e-2(a)(1) (2012) (providing that it is "an unlawful employment practice for an employer" to discriminate because of an individual's "race, color, religion, sex, or national origin").

36. Runyon v. McCrary, 427 U.S. 160 (1976) (holding that § 1981 prohibits private schools from excluding otherwise qualified students on the basis of race).

37. *Id.* at 168–75 (1976) (noting that "there is no basis for deviating from well-settled principles of stare decisis applicable to this Court's construction of federal statutes" in holding that § 1981 was applicable to private acts of racial discrimination).

38. *Patterson*, 491 U.S. at 189; *id.* at 171 ("We now decline to overrule our decision in *Runyon v. McCrary*." (citation omitted)). Though the Court has made relatively infrequent references to the presumption in employment discrimination law cases, it did apply the presumption again. In the area of sexual harassment law, it upheld the rule of *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 69–73 (1986), that an employer's vicarious liability for harassing conduct by a supervisory employee must be governed by agency principles, and concluded that a qualified affirmative defense is available to employers who take prudent steps to curb such behavior. *See also* Faragher v. City of Boca Raton, 524 U.S. 775, 792 (1998) (noting the Court's "customary adherence to stare decisis in statutory interpretation" (citing *Patterson*, 491 U.S. at 172–73)); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763–64 (1998) ("Congress has not altered *Meritor*'s rule even though it has made significant amendments to Title VII in the interim.").

[the Court] ha[s] done."[39] Only four justices, however, upheld the interpretive rationale of *Runyon*: that Congress had considered and rejected a proposal to make Title VII the exclusive remedy for discrimination by private employers (thereby restricting the enforcement of § 1981 to claims brought against public employers) when it amended Title VII to extend its prohibitions to public employers in 1972.[40] Indeed, no consideration of legislative history—whether Congress's rejection of the exclusivity proposal found so compelling by the Court in *Runyon* or Congress's subsequent failure to amend § 1981 following *Runyon*—persuaded the Court to uphold *Runyon*.[41]

The Court was instead persuaded by the doctrine of stare decisis and its strong preference for maintaining continuity with its own precedents, selecting the doctrine over legislative intent as the basis for upholding *Runyon*. Justice Kennedy's majority opinion made clear that the Court eschewed any consideration of legislative intent because it considered the *Runyon* Court's methods for deriving interpretive meaning from congressional inaction a "danger" to the integrity of its decision.[42] Vertical coherence, however, was not the Court's only concern in *Patterson*. Indeed, the decision to reconsider *Runyon* was spurred by the Court's concern for "horizontal coherence," or "consistency with the rest of law,"[43]

39. *Patterson*, 491 U.S. at 172–73.

40. *Id.* at 203 (Brennan, J., concurring in part and dissenting in part) ("Thus, Congress in 1972 assumed that § 1981 reached private discrimination, and declined to alter its availability as an alternative to those remedies provided by Title VII."). Justice Brennan excoriated the Court for its refusal to reaffirm that *Runyon* was rightly decided. *See id.* at 203–04 ("The Court in *Runyon* properly relied upon Congress's refusal to adopt an amendment that would have made § 1981 inapplicable to racially discriminatory actions by private employers, and concluded . . . that '[t]here could hardly be a clearer indication of congressional agreement with the view that § 1981 *does* reach private acts of racial discrimination.'" (quoting *Runyon*, 427 U.S. at 174–75)). Justice Brennan also argued that, although "the absence of legislative correction is by no means in all cases determinative," Congress's inaction following *Runyon* should be probative of its acquiescence in the Court's interpretation, given that the interpretation was at least plausible and Congress had acted several times to overturn rulings regarding civil rights statutes during the intervening period. *Id.* at 200–01.

41. *Id.* at 175 n.1 (majority opinion) ("We think also that the materials relied upon by Justice Brennan as 'more positive signs of Congress's views,' which are the *failure* of an amendment to a *different statute* offered *before* our decision in *Runyon*, and the passage of an attorney's fee statute having nothing to do with our holding in *Runyon*, demonstrate well the danger of placing undue reliance on the concept of congressional 'ratification.'" (citations omitted)).

42. *Id.*

43. ESKRIDGE, *supra* note 29, at 239 (describing horizontal coherence as "consistency with the rest of law" (internal quotation marks omitted)); *id.* at 259 (observing that the Court declined to overrule *Runyon* "for reasons of horizontal as well as vertical coherence"). *See also* Charles P. Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407, 423 (1950) ("Personally I believe that the most important criterion [in gauging a court's approach to interpretation] is simply consistency with all the rest of the law.").

because *Patterson* presented the question of how best to construe the relationship between § 1981 and Title VII. The *Patterson* Court pursued horizontal coherence by construing § 1981 to exempt employer behavior occurring after contract formation[44] (thereby reducing the legislative redundancy caused by the overlapping reach of § 1981 and Title VII in regulating employment discrimination). The Court agreed that, "after *Runyon*, there is some necessary overlap between Title VII and § 1981," but it also concluded that it "should be reluctant . . . to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute."[45] *Patterson* therefore restricted the reach of § 1981 while invoking the rule of law values associated with stare decisis.[46]

The *Patterson* Court listed three considerations related to the overruling of statutory precedents: (i) whether there has been an "intervening development of the law" that has weakened the conceptual foundations of the Court's precedent or rendered that precedent "irreconcilable with competing legal doctrines or policies"; (ii) whether the relevant precedent has been revealed as a "positive detriment to coherence and consistency in the law," either internally or in relation to policy objectives associated with other laws; and (iii) whether the precedent has been proved outdated and contrary to contemporary understandings of justice and social welfare.[47] Each of these considerations reflects a preference that stare decisis not be applied in a manner that unduly disrupts horizontal coherence.

The *Patterson* Court found none of these considerations satisfied with respect to *Runyon*. No intervening statute or judicial opinion had undermined the *Runyon* holding; to the contrary, congressional inaction following *Runyon* signaled to some justices acquiescence in the Court's

44. Specifically, the Court held that the plaintiff could not sustain a claim for racial harassment under § 1981 and that the employer's refusal to promote her could only form the basis for a proper § 1981 claim if the promotion represented "an opportunity for a new and distinct relation between the employee and employer." *Patterson*, 491 U.S. at 178–85. Noting that, unlike § 1981, Title VII imposes exhaustion requirements and provides administrative review of claims and opportunities for conciliation, the Court concluded that "[w]here conduct is covered by both § 1981 and Title VII, the detailed procedures of Title VII are rendered a dead letter," because the plaintiff may evade those procedures by pursuing only the § 1981 claim. *Id.* at 180–81.

45. *Id.* at 181.

46. *Id.* at 172 ("The Court has said often and with great emphasis that 'the doctrine of stare decisis is of fundamental importance to the rule of law.'" (quoting Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 494 (1987)).

47. *Id.* at 173–74.

decision.[48] The Court concluded that the relationship between § 1981 and Title VII precipitated by *Runyon* was not "unworkable" provided that § 1981 was not construed to prohibit postformation discriminatory conduct, which *Patterson* itself established by denying the plaintiff recovery for racial harassment and setting conditions upon recovery for tangible employment actions.[49] Finally, the Court found that, far from being outdated, *Runyon*'s interpretation of § 1981 was "entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin."[50]

The Court did not consider *Runyon*'s satisfaction of these factors to be a reason to uphold its interpretive rationale, only its result. The decision to decouple *Runyon*'s holding from its rationale follows a familiar pattern in the Court's statutory interpretation cases. This distinction between holding and rationale may reflect an assumption that, while adhering to prior holdings provides benefits of enhanced consistency and predictability in matters of substantive legal policy, a similar adherence to prior interpretive methods would yield no such benefits; interpretive methods are not substantive law, and particular interpretive methods do not guarantee particular substantive outcomes. Private parties and regulatory targets therefore should not be expected to rely on such rationales when making predictions about the law's application. This assumption may have influenced the Court's reasoning in *Patterson*, but if so this would be unfortunate because it is a false assumption.

Judicial decisions resolve individual cases and of necessity cannot address all possible future applications of a statute. Litigants, courts, and legislatures will at times have no other recourse but to consider how the statute may reasonably be interpreted in light of prior interpretive approaches adopted by the highest court. In fact, the practical consequence of the Court's ruling in favor of the petitioner, Brenda Patterson, was that she lost on claims for postformation racial harassment and failure to promote that could have been brought under Title VII. Patterson, however, had by that time waived her Title VII claims because she had not complied

48. *Id.* at 200–01 (Brennan, J., joined by Marshall and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (writing that Congress's "failure to enact legislation to overturn *Runyon* appears at least to some extent indicative of a congressional belief that *Runyon* was correctly decided").

49. *Id.* at 173. Plaintiffs would not be permitted to recover for tangible employment actions occurring after contract formation, such as the failure to promote the claim asserted by the plaintiff in *Patterson*. *See id.* at 177 ("[T]he right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established . . . . Such postformation conduct . . . [is] more naturally governed by state contract law and Title VII.").

50. *Id.* at 174.

with the statute's exhaustion requirements, reasonably believing after *Runyon* that she could bring those claims under § 1981.[51] Patterson was in effect penalized for properly applying the Court's prior rationales, as articulated in *Runyon* and other precedents, because they were dicta and therefore the Court was under no doctrinal or jurisprudential obligation to adhere to those rationales, particularly once it had jettisoned *Runyon*'s practice of consulting legislative history.

In this way, *Patterson* abandoned the interpretive perspective set by its predecessors. Doing so freed the Court to impose its own particular vision of policy coherence upon the relationship between § 1981 and Title VII. *Patterson* cast aside not only *Runyon*'s rationale, but also similar rationales adopted in intervening precedents in which the Court had upheld the application of § 1981 to private employers and had interpreted the statute's substantive protections expansively.[52] As Justice Brennan saw the issue, *Runyon* and these other precedents already established that the 39th Congress enacted section 1 of the 1866 Civil Rights Act (from which § 1981 derives its terms) at least in part to respond to private conduct through which whites had sought to maintain a system of segregation and racial brutality that perpetuated many of the racially subordinating patterns and practices of slaveholding society.[53] Therefore, if the *Runyon* Court was right that Congress had intended to regulate private conduct, then its prohibition of discrimination in the making and enforcement of contracts should be read comprehensively to include postformation conduct demonstrating that the employment contract was not made on racially neutral terms.[54] By contrast, the majority views its ability to strike an

51. *See* ESKRIDGE, *supra* note 29, at 250.

52. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 285–96 (1976) (concluding that § 1981 prohibits reverse discrimination by private employers, notwithstanding the statute's guarantee of "the same right to make and enforce contracts . . . *as is enjoyed by white persons*" (emphasis added in original) (internal quotation marks omitted)); Johnson v. Ry. Express Agency, 421 U.S. 454, 459–60 (1975) (deducing from the legislative history regarding Title VII's amendment that "the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under [§ 1981]" and permit suit against private employers (quoting H.R. REP. NO. 92-238, at 19 (1971))); Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974) ("[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.").

53. *Patterson*, 491 U.S. at 194–95 n.4 (Brennan, J., concurring in part and dissenting in part) (discussing congressional consideration of whites' efforts to retain "the relation of master and slave" with freed blacks who labored on their plantations "partly by terrorizing them into submission" (citation omitted)).

54. *Id.* at 205–08 ("[T]he language of § 1981 is quite naturally read as extending to cover postformation conduct that demonstrates that the contract was not really made on equal terms at all."). Another reason to apply § 1981 to postformation conduct is to preclude employers from using race discrimination to intimidate plaintiffs from asserting their contractual rights.

alternative balance between the statutes as a reason why it should not be permitted to reject stare decisis.

As *Patterson* illustrates, adherence to particular theories of statutory interpretation is not commanded by the presumption favoring statutory precedents. The Court may follow its statutory precedents while abandoning prior interpretative rationales. A substantive interpretation constitutes the legislative meaning necessary to support, and settled by, a judicial decision, which then becomes "part of the warp and woof of the legislation."[55] *Patterson* dictates that the theory of statutory interpretation that a court employs to reach a substantive decision is distinct from the holding and therefore not binding precedent. This distinction frees the Court to cycle to a new interpretive method arguably without sacrificing rule of law values. Yet, the abandonment of prior interpretive rationales has a destabilizing effect on legal frameworks—one that is underestimated by the Court's facile assumption in *Patterson* that if it adheres to a prior determination of legal substance, then the rule of law has been respected.

B. AN ALTERNATIVE VIEW OF STARE DECISIS: *CBOCS V. HUMPHRIES*

The canonical view expressed in *Patterson* is not without its challengers. Members of the Court have sometimes described interpretive methods as if they were settled law. Justice Scalia has endorsed something resembling full stare decisis protection for interpretive methods, suggesting that the Supreme Court's precedents show the adoption of "a regular method for interpreting the meaning of language in a statute,"[56] which perhaps not surprisingly, strongly resembles the theory of textualism expounded in his scholarly work. This view has two problems. First, it is obviously untrue. Interpretive methods are subject to change and may do so, as in *Patterson*, in ways that are not predictable. It is true that the Court frequently invokes the rule that "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."[57] Invoking this rule, however, determines very little about what comes next in the Court's analysis. Even decisions that begin by prioritizing textual interpretation sometimes quickly evolve into more fulsome discussions of

55. Francis v. S. Pac. Co., 333 U.S. 445, 450 (1948).

56. Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

57. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 (2009) (internal quotation marks omitted). *See also, e.g.*, Marx v. Gen. Revenue Corp., 133 S. Ct. 1166, 1172 (2013) ("As in all statutory construction cases, we assume that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose." (alteration in original) (internal quotation marks omitted)).

legislative history and purpose.[58] Second, while it also seems true that, if the Court were to attach stare decisis protection to interpretive methods, this would solve the problem of methodological unpredictability in statutory interpretation,[59] it would simultaneously result in the loss of interpretive perspectives that have accrued to particular statutes over time whenever newly imposed interpretive methods reject the rationales of prior decisions. Full stare decisis protection for interpretive methods would thus prize predictability of interpretive methods across statutes above preserving coherence in the interpretation of particular statutes.

In *CBOCS West, Inc. v. Humphries*,[60] the Court articulated a third way. The *CBOCS* Court considered whether § 1981's prohibition against race discrimination in the "mak[ing] and enforce[ment] of contracts" includes "a complaint of retaliation against a person who has complained about a violation of another person's contract-related 'right.'"[61] To resolve this question, the Court began with an examination of "the pertinent interpretive history."[62] The Court examined its precedents interpreting § 1981 and § 1982, each of which originated in § 1 of the Civil Rights Act of 1866.[63] This historical review preceded any discussion of the statute's text.[64] The starting question for the Court was not "what does the plain language of the statute show?" but, "how do the Court's precedents instruct it to determine the meaning of this particular statute?"

The Court began its examination of "the pertinent interpretive history" by discussing *Sullivan v. Little Hunting Park, Inc.*,[65] a § 1982 case in which the Court found viable a claim of retaliation based on statutory text parallel to that of § 1981.[66] In *Sullivan*, a white homeowner rented his home to a black tenant and assigned that tenant a membership share in a corporation "organized to operate a community park and playground facilities for the

58. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 420–37 (1968) (purporting to "begin with the language of the statute itself," which the Court found "plain and unambiguous," but then discussing at length the statute's history in order to ascertain its broad, remedial scope).

59. *See* Foster, *supra* note 10, at 1884–97.

60. CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008).

61. *Id.* at 445 (citation omitted).

62. *Id.* at 446.

63. *Id.* at 448.

64. *Id.* at 458 (Thomas, J., dissenting) ("The Court's analysis of the statutory text does not appear until Part III of its opinion, and then only as a potential reason to depart from the interpretation the Court has already concluded, on other grounds, 'must carry the day.'").

65. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).

66. 42 U.S.C. § 1982 (2012) ("All citizens of the United States shall have the same right . . . as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.").

benefit of [community] residents."[67] The corporation refused to approve the assignment and expelled the homeowner from its membership when he objected.[68] Referring to "the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866," ("the 1866 Act") the Court recognized the claims of both men.[69] It concluded that the expulsion of Sullivan "for trying to vindicate the rights of minorities protected by § 1982" provided an "impetus to the perpetuation of racial restrictions on property."[70] *Sullivan* thus determined that § 1982's "general prohibition on racial discrimination . . . cover[ed] retaliation against those who advocate the rights of groups protected by that prohibition."[71] As described by *CBOCS*, § 1982 "provide[d] protection from retaliation for reasons related to the *enforcement* of the express statutory right."[72] Section 1982, like § 1981, relies on claimants to exercise and, if necessary, to enforce their statutory rights.

After discussing *Sullivan*, the Court then drew upon its long history of maintaining that the "considered holdings [of its precedents] with respect to the purpose and meaning of § 1982 necessarily apply to both statutes in view of their common derivation."[73] Justice Powell's phrasing here in his *Runyon* concurrence is interesting. The Court's "holdings" were not, in his mind, limited to constructions of statutory meaning, but included the Court's conclusions with respect to the purpose and scope of § 1982. As the Court succinctly stated in *CBOCS*, it "ha[d] construed §§ 1981 and 1982 alike because it ha[d] recognized the sister statutes' common language, origin, and purposes."[74] In *Runyon*, the Court applied this principle to find that its § 1982 precedents "necessarily require[d] the conclusion that § 1981, like § 1982, reaches private conduct."[75] In *CBOCS*, the Court applied this principle to conclude that § 1981, like § 1982, authorizes claims of retaliation.

The common perspective assumed by the Court in *Sullivan*, *Runyon*, and *CBOCS* turned largely on the Court's prior determination that the 1866 Act's legislative history revealed a broad, remedial congressional purpose.

67. *Sullivan*, 396 U.S. at 234.
68. *Id.* at 234–35.
69. *Id.* at 237.
70. *Id.*
71. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 176 (2005).
72. CBOCS West, Inc. v. Humphries, 553 U.S. 442, 452 (2008).
73. *Id.* at 447 (quoting Runyon v. McCrary, 427 U.S. 160, 187 (1976) (Powell, J., concurring)).
74. *Id.* at 448.
75. *Runyon*, 427 U.S. at 173.

In *Jones v. Alfred H. Mayer Co.*,[76] the Court performed an extensive analysis of § 1982's legislative history and concluded that the statute's prohibition against race discrimination in the purchase or sale of property covers private action because Congress's discussion of the statute during its enactment showed its intent to pursue such a purpose.[77] The Court concluded that Congress was responding to "an imposing body of evidence pointing to the mistreatment of Negroes by private individuals and unofficial groups," including assault, denial of payment, and efforts to perpetuate the social and civil bonds of enslavement.[78] The Court referenced that analysis in *Runyon* and *CBOCS*[79] as well as other cases involving §§ 1981 and 1982. For example, in *Tillman v. Wheaton-Haven Recreation Association*,[80] the Court reviewed parallel applications of § 1981 and § 1982 to the racially discriminatory policy of a private swimming club, and it concluded that the statutes were identical in their application to the common set of facts.[81] In *Johnson v. Railway Express Agency*,[82] the Court relied on *Jones*'s legislative history analysis to conclude that, like § 1982, § 1981 applies to private conduct and so could be invoked to state a claim of race discrimination against a private employer.[83] *Runyon* upheld *Johnson*'s ultimate conclusion, as did *Patterson*, but, unlike *Patterson*, *Runyon* also adopted *Johnson*'s interpretive rationale. It relied on *Jones*'s analysis of legislative history to craft its ruling to serve the broad, remedial purposes of the statute.

CBOCS followed in this vein, adopting the interpretive perspective common to the Court's pre-*Patterson* decisions, each of which adhered to the *Jones* rationale. The Court in *CBOCS* approached § 1981 from the perspective that the statute's broad terms should be construed within an "immediately post-Civil War legislative effort to guarantee the then newly freed slaves the same legal rights that other citizens enjoy."[84] The interpretive perspective assumed in *CBOCS* included a substantive but not

76. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

77. *Jones*, 392 U.S. at 421–37. *See also Runyon*, 427 U.S. at 173 (citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973), for their prior reliance on the legislative history analysis of *Jones*).

78. *Id.* at 426–29.

79. *Runyon*, 427 U.S. at 170; *CBOCS*, 553 U.S. at 447–48.

80. Tillman v. Wheaton Haven Recreation Ass'n, 410 U.S. 431 (1973).

81. *Id.* at 440 (construing the statutes' "historical interrelationship" to counsel there was "no reason to construe these sections differently when applied, on these facts, to the claim of [the respondent] that it is a private club").

82. Johnson v. Ry. Express Agency, 421 U.S. 454 (1975).

83. *Id.* at 471–73.

84. *CBOCS*, 553 U.S. at 448.

controlling conclusion regarding a related statute (i.e., *Sullivan*'s holding that § 1982 authorizes claims of retaliation) and two critical assumptions: that § 1981 and § 1982 should be interpreted to mirror one another's breadth and application because of their common terms and purposes, and that a prior legislative history analysis should be trusted to have established those purposes.

CBOCS calls this stare decisis.[85] It is, however, a curious expression of that principle for several reasons. First, as Justice Thomas argued in dissent, the Court could not have meant that it was compelled to uphold a prior decision in which it ruled that § 1981 encompasses retaliation claims, because the Court had never so ruled.[86] Under this view, *Sullivan* may influence but it could not control the outcome in *CBOCS* because it interpreted a different statute. Justice Thomas called the Court's arguments to the contrary "the figleaf of ersatz stare decisis."[87] Second, *CBOCS* rejects the familiar division in stare decisis doctrine between holding and dicta, between substance and method. *CBOCS* cites *Patterson* for the proposition that "considerations of stare decisis 'have special force in the area of statutory interpretation,'"[88] but rejects *Patterson*'s distinction between holding and interpretive rationale.

Third, in a more fundamental way, *CBOCS* rejects *Patterson*. It refuses to be bound by either *Patterson*'s holding or its rationale. The first is understandable; Congress enacted an amendment to § 1981 overriding *Patterson*'s holding as part of the Civil Rights Act of 1991.[89] The second, however, is ironic, even jarring, given *CBOCS*'s adherence to the rationales of *Patterson*'s predecessors. The Court acknowledged in *CBOCS* that the 1991 amendments overriding *Patterson*'s holding did not expressly provide a claim of retaliation,[90] and it recognized that retaliation claims would not be cognizable under *Patterson* because most actions opposing

85. *See id.* at 451 (stating, based on the "long line of related cases where we construe §§ 1981 and 1982 similarly," that "considerations of stare decisis" supported its conclusion that § 1981 includes a claim of retaliation); *id.* at 457 ("Principles of stare decisis, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same.").

86. *Id.* at 464 (Thomas, J., dissenting) ("[N]one can conceal the irony in the Court's novel use of stare decisis to decide a question of first impression.").

87. *Id.*

88. *Id.* at 452 (majority opinion) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989)).

89. The amended statute clarifies that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." 42 U.S.C. § 1981(b) (2012).

90. *CBOCS*, 553 U.S. at 450–51.

discriminatory behavior will take place after a contract is formed.[91] Indeed, under *Patterson*, lower federal courts had rejected retaliation claims brought under § 1981.[92] *CBOCS* attempted to minimize *Patterson*'s preference for avoiding overlap between § 1981 and Title VII by underscoring *Patterson*'s allowance of "necessary overlap."[93] But the Court never seriously engaged *Patterson*'s rationale. Instead, it interpreted the 1991 amendments as an effort to return the law to its pre-*Patterson* interpretation.[94] It noted that lower federal courts before *Patterson* had "on the basis of *Sullivan* or its reasoning" concluded that § 1981 authorized claims of retaliation[95] and that, following the 1991 amendments, lower courts had again "uniformly interpreted § 1981 as encompassing retaliation actions."[96] It also recounted statements by legislators during the passage of the 1991 amendments opining that by overriding *Patterson*, Congress would be restoring the viability of § 1981 retaliation claims.[97] In this way, *CBOCS* adopted the interpretive perspective of pre-*Patterson* law, first interpreting § 1981 after the fashion in which it had interpreted § 1982 and then interpreting the 1991 amendments and their impact on *Patterson* by relying on methods endorsed by *Runyon* and its predecessors.

The Court directly confronted the petitioner's assertion that *Patterson* and more recent case law showed that textualism had won the contest of interpretive methods. Justice Thomas also raised this point as a challenge to the Court's application of stare decisis. Justice Thomas argued that, if *Sullivan* must be read to infer a retaliation claim from the text of § 1982 (a reading of the case that he disputed), *Sullivan*'s interpretation was erroneous and should not be followed.[98] The majority answered that, even if textualism were now the Court's established interpretive theory, this would not require the Court to abandon *Sullivan*. It explained:

> "[E]ven were we to posit for argument's sake that changes in interpretive approach take place from time to time, we could not agree that the

91. *Id.* at 449.

92. *See id.* (noting that, "[w]ith one exception," the Court found "no federal court of appeals decision between the time [it] decided *Patterson* and 1991 that permitted a § 1981 retaliation claim to proceed").

93. *Id.* at 455.

94. *Id.* at 454 ("[T]he 1991 amendments themselves make clear that Congress intended to supersede the result in *Patterson* and embrace pre-*Patterson* law.").

95. *Id.* at 448.

96. *Id.* at 451.

97. *Id.* at 450–51.

98. *Id.* at 469 (Thomas, J., dissenting) ("[E]rroneous precedents need not be extended to their logical end, even when dealing with related provisions that normally would be interpreted in lockstep.").

> existence of such a change would justify reexamination of well-established prior law. Principles of stare decisis, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends."[99]

Justice Breyer's phrasing here is elegant but ambiguous. It does not specify whether the Court is bound to adhere to the substance of *Sullivan* or to reprise the interpretive approach that it shares with pre-*Patterson* precedents. *Patterson* itself agrees with the view that stare decisis should be unaffected by changes in interpretive method. This is why it upholds *Runyon*'s substance but rejects its rationale. If Justice Breyer's phrasing means nothing more than that *Sullivan*'s precedential value is not affected by a change in interpretive method, then *CBOCS* and *Patterson* are in full agreement. Each would stand for the principle that prior rulings do not fall with the ascendancy of new interpretive theories. The contrary view would, as Justice Breyer warns, threaten "legal stability."

Therefore, following precedent in *CBOCS* may mean that the Court should adhere to the substance of prior decisions when they have resolved matters of statutory interpretation in parallel statutes or involving identical statutory language. This would mean that the Court is bound by the substance of *Sullivan* because it finds *CBOCS* indistinguishable; both cases consider identical language in two related statutes and raise the same interpretive question. The strength of this reading emerges when one considers whether the Court would have invoked stare decisis without a decision such as *Sullivan* that had resolved the same interpretive question in a related statute. If the question of the validity of retaliation claims under either § 1981 or § 1982 were a matter of first impression in *CBOCS*, it is far from clear that the Court would have labeled its reliance on *Jones* and its progeny to identify the proper interpretive approach to its decision stare decisis. There would have been no holding to apply and no basis to contend that its precedents were controlling.

Alternatively, *CBOCS* may stand for the proposition that following precedent means preserving the reasoning of prior cases.[100] The Court

99. *Id.* at 457.

100. This approach may require stare decisis doctrine in statutory cases to become more like the application of the doctrine in constitutional cases. *See, e.g.*, Seminole Tribe of Fla. v. Florida. 517 U.S. 44, 67 (1996) (when deciding an issue of state sovereign immunity, construing stare decisis to mean that "it is not only the result but also those portions of the opinion necessary to that result by which we are bound"). *See also* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 764–65 (stating in a discussion of constitutional adjudication, "there seems to me no reason to exclude the underlying reasoning from the concept of the precedent"). This approach is not

would therefore be bound, for example, by its own prior constructions of the interpretive context in which a statute must be read, just as *CBOCS* adhered to constructions § 1 of the 1866 Act's origin and purpose that had been consistently developed from *Jones* to *Runyon*. Even when describing the basis on which lower federal courts prior to *Patterson* had inferred a retaliation claim under § 1981, Justice Breyer equivocated as to whether that basis was *Sullivan*'s holding or its reasoning.[101] Thus, as a theory of stare decisis, *CBOCS* falters because it fails to specify what it is that receives precedential value or why, in particular, interpretive methods appear to serve as precedent in some circumstances but not in others.

II. INTERPRETIVE PERSPECTIVE IN FEDERAL EMPLOYMENT DISCRIMINATION LAW

Interpretive methods do not attach to the statutes they have been used to interpret. The prevailing view of stare decisis maintains that precedential value attaches to the holdings, or legal substance, of statutory interpretations, not the methods used to elucidate a statute's meaning. Yet, as the Court comes to employ certain methods, principles, assumptions, and findings in successive cases interpreting the same statute, it establishes a perspective from which to interpret that statute, one on which the Court itself and the public may come to rely.

Stare decisis does not address the issue of interpretive perspective. A review of the Supreme Court's employment discrimination law decisions, however, well illustrates how the Court develops an interpretive perspective and the importance of adhering to such a perspective. The Supreme Court's employment discrimination cases evidence a change in interpretive methods from purposivism to textualism. The Court initially adopted a perspective in which it resolved legal questions by ascribing to Congress certain legislative purposes, complimenting those purposes with its own practical assumptions, and consulting those purposes and assumptions when a statute's terms were ambiguous. The resulting legal doctrine permitted successive cases to be understood in light of prior

ordinarily associated with statutory interpretation. *See, e.g.*, Siegel, *supra* note 10, at 389 ("The Court has said that, '[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.' . . . [H]owever, the Court's actual cases make clear that when the Court issues opinions interpreting statutes, stare decisis effect attaches to the ultimate holding as to the meaning of the particular statute interpreted, but not to general methodological pronouncements . . . .").

101. *CBOCS*, 553 U.S. at 448 ("[I]t is not surprising that following *Sullivan*, federal appeals courts concluded, on the basis of *Sullivan* or its reasoning, that § 1981 encompassed retaliation claims.").

rationales and doctrinal frameworks to fit together in a relatively well-integrated fashion. A consistent interpretive perspective anchored the Court's early decisions and preserved statutory coherence without sacrificing doctrinal innovation. Part III will demonstrate, however, that the Court's recent decisions are organized around a textualist approach that rejects the constellation of purposes and interpretive assumptions that governed prior decisions.

A. THE COURT'S PURPOSIVIST PERSPECTIVE IN ITS INITIAL EMPLOYMENT DISCRIMINATION DECISIONS

1. Purposivism

Purposivism is a species of intentionalist interpretation, proposing that courts resolve questions of statutory meaning by interpreting the statute's text in the manner most consistent with the enacting legislature's purposes. The seminal example of this approach is the Court's decision in *Church of the Holy Trinity v. United States*,[102] at the turn of the twentieth century. In *Holy Trinity*, the Court considered the scope of the Alien Contract Labor Law, which prohibited "any person . . . in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens . . . to perform labor or service of any kind in the United States"[103] In holding that, despite its broad language, the statute did not prohibit Holy Trinity Church from hiring an English pastor and providing for his transportation to the United States, the Court relied on the "familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[104] The *Holy Trinity* Court articulated several methods a court may use to ascertain the legislature's purpose, including examination of the statute's legislative history,[105] its title,[106] the evil that it was intended

102. Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

103. Act of Feb. 26, 1885, ch. 164, 23 Stat. 332; *Holy Trinity*, 143 U.S. at 458.

104. *Holy Trinity*, 143 U.S. at 459. The Court conceded that the church's actions fell within no explicit exception drawn by the statute, but instead fell squarely within its terms. *Id.* at 458–59. In *United Steelworkers v. Weber* the Court famously invoked the "familiar rule" of *Holy Trinity* in support of its ruling that Title VII's prohibition against race discrimination does not preclude employers from establishing voluntary affirmative action programs in appropriate circumstances. United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 201, 208–09 (1979) (holding that to avoid violating Title VII, the employer's affirmative action policy must address a "manifest racial imbalance" in a traditionally segregated job category and must not "unnecessarily trammel" the interests of nonminority employees).

105. *Holy Trinity*, 143 U.S. at 464–65.

106. *Id.* at 462–63.

to remedy,[107] and the absurd results that might flow from a contrary construction of the statute.[108]

Over time, the Court would refine purposivism by attaching it to an account of the constitutional relationship between the legislature and the judiciary and a concern for the integrity of democratic governance, which would not so easily support rejection of the plain meaning of the statutory language unless that language were revealed to be ambiguous.[109] The origins of modern purposivism can be traced to the work of scholars and jurists who, following the New Deal, sought to explain the role of courts within the evolved legal process of the administrative state, which represented a departure from the liberal social contract model of the nineteenth century.[110] Legal process purposivism embodies a flexible approach to statutory interpretation in which courts are instructed to act as "faithful agents" of the legislature by interpreting ambiguities in the statutory text in light of the legislature's general purposes.[111] According to

107. *Id.* at 463–64.

108. *Id.* at 459.

109. *See, e.g.*, Johnson v. United States, 529 U.S. 694, 706 n.9 (2000) ("[I]n relying on an uncommon sense of the word, we are departing from the rule of construction that prefers ordinary meaning. But this is exactly what ought to happen when the ordinary meaning fails to fit the text and when the realization of clear congressional policy . . . is in tension with the result that customary interpretive rules would deliver." (citation omitted)).

110. *See* ESKRIDGE, *supra* note 29, at 141–42 (describing legal process purposivism as a rejection of liberal assumptions and explaining that "[w]hereas liberal theory posits mutually suspicious humans who form a social contract to escape the state of nature, . . . [l]egal process views law as a purposive activity, a continuous striving to solve the basic problems of social living" (internal quotation marks omitted)); William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2032–45 (1994) (describing the invention of legal process purposivism from the work of Justices Oliver Wendell Holmes, Louis Brandeis and Felix Frankfurter during the New Deal to the creation of Henry Hart's and Albert Sacks's legal process materials during the 1950s). *See also* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("When [plain] meaning has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed that purpose rather than the literal words." (footnotes omitted) (internal quotation marks omitted)).

111. *See, e.g.*, Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 374 (1947) (stating that judges may resolve ambiguous cases by consulting "the general purpose" that lies "behind the statutory words," even where the legislature formed no specific intent regarding the matter at issue); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539 (1947) (suggesting that judges should be guided by an objective account of legislative purpose "evinced in the language of the statute, as read in the light of other external manifestations of that purpose," rather than by "tests that have overtones of subjective design"); Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 398 (1942) ("The statute . . . was enacted to achieve a purpose. . . . The legislature that put the statute on the books had the constitutional right and power to set this purpose as a desirable one for the community, and the court or administrator has the undoubted duty to obey it."); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (expressing the realists' critique that a multimember legislature could not possess a specific intent on a

the most influential exponents of legal process purposivism, Henry Hart and Albert Sacks, when the statutory text is ambiguous, courts should engage in a two-step process of identifying the purpose for which the legislature enacted the statute and then interpreting the statutory text "so as to carry out [that] purpose."[112] In other words, courts should attempt to adopt the position of the legislature and to assume that the legislature consisted of "reasonable persons pursuing reasonable purposes reasonably."[113] It is this version of purposivism that guided many of the Supreme Court's early Title VII decisions[114] and continues to influence the jurisprudence of individual justices.[115]

2. The Interpretive Perspective Established by the Court's Early Employment Discrimination Decisions

Statutory interpretation scholars searching for clear examples of purposivist interpretation have frequently turned to the Supreme Court's employment discrimination decisions. Two decisions in particular are favorite examples of purposivism: *Griggs v. Duke Power Co.*[116] and *United Steelworkers v. Weber*.[117] These decisions concern two issues that could

matter not expressed by the statute's terms, because "[t]he chances that of several hundred [legislators] each will have exactly the same determinate situations in mind . . . are infinitesimally small"). *See also* ESKRIDGE, *supra* note 29, at 26 ("Because an inquiry into legislative purpose is set at a higher level of generality than an inquiry into specific intentions, statutory interpretation becomes more flexible and is better able to update statutes over time.").

112. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). *See also* ESKRIDGE, *supra* note 29, at 25–26 ("[S]tatutory ambiguities can be resolved, first, by identifying the purpose or objective of the statute, and then by determining which interpretation is most consistent with that purpose or goal.").

113. HART & SACKS, *supra* note 112, at 1378.

114. *See infra* Part III.A.

115. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 625 (2009) (Ginsburg, J., dissenting) ("[O]ur task in interpreting separate provisions of a single Act is to give the Act the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose." (quoting Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 631–32 (1973)); United States v. Wells, 519 U.S. 482, 510–11 (1997) (Stevens, J., dissenting) ("Even the Court's recent jurisprudence affirms that the purpose of Congress is the ultimate touchstone." (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 96 (1992)).

116. Griggs v. Duke Power Co., 401 U.S. 424, 429–33 (1971) (establishing disparate impact liability under Title VII for facially neutral employment practices that produce racially disproportionate impacts unless the defendant establishes that the challenged practice is job-related and consistent with business necessity). *See also, e.g.*, ESKRIDGE, *supra* note 29, at 74–80 (discussing *Griggs* as an example of "dynamic statutory interpretation" whereby evolving socio-political understandings of statutory purpose permit courts to adopt and evolutive approach to the determination of statutory meaning); Eskridge & Ferejohn, *supra* note 5, at 1238–39 (explaining *Griggs* and *Weber* in terms of the Supreme Court's ascription of an "integrative" purpose to Title VII).

117. United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 208 (1979) (holding

not be neatly resolved by a simple consultation of the statute's text or by an archeological effort to unearth Congress's specific intentions concerning two controversial issues: respectively, employer liability for racially disparate impacts produced from facially neutral employment practices and employer discretion to implement voluntary race-conscious affirmative action policies. These decisions are representative of a period[118] in which the Supreme Court relied on purposivist interpretation in order to establish doctrinal frameworks that gave meaning and practical effect to the general liability provisions of the statute. In the course of rendering these early decisions, the Court arrived at an interpretive perspective that guided its interpretations of Title VII and consisted of a complex account of the statute's purposes, including also certain assumptions regarding how those purposes might be fulfilled under different theories of liability.

That the Court built its initial interpretive perspective around a theory of purposivism is no doubt in part a function of legislative design. Congress enacted the 1964 Act in reaction to evolving social norms, putting forth a policy framework intended to promote social integration. Congress drafted key provisions of Title VII in broad strokes,[119] allowing the judiciary to determine when and how the statute's prohibitions may apply in the context of actual cases.[120] This approach to legislative drafting increased the

that employers may avoid liability for reverse discrimination when a challenged employment decision is made pursuant to a voluntary affirmative action policy instituted to remedy a manifest racial imbalance in a traditionally segregated job category). *See also, e.g.*, ESKRIDGE, *supra* note 29, at 25 (describing *Weber* as "an important proving ground for intentionalism's failures" and "the basis for a different foundational theory of interpretation—purposivism"); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1491 (1987) (describing the *Weber* Court's attempt to fulfill Title VII's purpose and recognizing that neither the text nor the legislative record could be counted upon to resolve the case because the particular situation it presented was neither discussed nor anticipated by Congress); Eskridge & Frickey, *supra* note 5, at 336–37 (discussing *Weber* as an example of purposivist interpretation); Frickey, *supra* note 2, at 1972 & n.8 (citing *Weber* as an example of purposivist interpretation and also opining that, because of its exaltation of purpose over "first-best textual meaning," it is "[p]erhaps the most visible, and controversial, opinion of statutory interpretation in the modern era"); Manning, *supra* note 5, at 71 & n.5 (citing *Weber* as an example of a case in which the Supreme Court interpreted the statute in terms of a "statutory purpose reflected in various *contextual* cues," which was otherwise "incongruous" with the statutory text).

118. I refer to roughly the first decade of Title VII decisions by the Supreme Court, although having established this interpretive perspective in its early decisions, the Court continued to rely on it robustly into the twenty-first century.

119. For example, section 703(a), the provision at the heart of the statute's antidiscrimination protections, prohibits an employer from "discriminat[ing] against any individual . . . because of such individual's" status, but nowhere does the statute define "discrimination." 42 U.S.C. § 2000e-2(a) (2012). *See also* Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 69–93 (2011) (discussing the ambiguities in the statute's text and in the language used by the Supreme Court to clarify its meaning).

120. Congress considered and refused to adopt an amendment to section 703(a) to restrict

interpretive latitude given to the Court and the Equal Employment Opportunity Commission ("EEOC"), the agency charged with administering the statute. As a consequence, some scholars have referred to Title VII as a "common law statute"[121] or a "super statute"[122] that ceded to courts the responsibility to interpret its provisions in terms of evolving social practices. The Supreme Court's reliance on purposivism may be seen as a means to maintain legislative supremacy by subordinating the Court's doctrinal innovations to Congress's regulatory purposes.

Griggs was the Court's first attempt to articulate a set of statutory purposes and to develop legal doctrine in light of those purposes. The case originated as a class action lawsuit brought by African American employees of Duke Power Company, challenging the employer's use of facially neutral employment criteria (i.e., high school education and qualifying performance on two standardized tests) to determine eligibility for assignment into any non-labor department within its organization, because these criteria had the effect of disqualifying a disproportionate number of black employees from non-labor department jobs.[123] Prior to the effective date of Title VII, the company had maintained a racially segregated workforce, permitting black employees to hold no position outside of the labor department, the lowest paid department within its organization.[124] Neither the standardized tests nor the high school diploma requirement was shown to predict job performance for any particular position in the company,[125] and the disparate impact produced by its reliance on revised, facially neutral criteria effectively perpetuated the racial segregation of its workforce.

discrimination to conduct committed "solely" because of the plaintiff's status. *See* Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1198–99 (2003) (describing the process by which the amendment was offered and defeated).

121. Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U. L. REV. 1409, 1433 n.129 (2000) (opining that the Supreme Court has treated Title VII as "a common law statute" and that this view "may be defensible because the statute draws on a judicially developed constitutional background while using open-ended terms such as 'discrimination'").

122. Eskridge & Ferejohn, *supra* note 5, at 1216 (describing "super-statutes" as laws that establish a new normative framework for legal policy and stating that, "[a]lthough the courts do not have to consider the super-statute beyond the four corners of its plain meaning, they will often do so because the super-statute is one of the baselines against which other sources of law . . . are read"). *See also id.* at 1237 (identifying Title VII as a super-statute).

123. Griggs v. Duke Power Co., 401 U.S. 424, 427–28 (1971).

124. *Id.* at 426–27.

125. *Id.* at 431 (concluding that neither requirement was "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used," and noting the company's position that these requirements were "instituted on the Company's judgment that they generally would improve the overall quality of the work force").

The Court held that a facially neutral employment practice may violate Title VII if it results in a racially disparate impact and the employer fails to show that the practice is job-related and consistent with business necessity.[126] The Court did not rest its decision on a textual analysis of any particular provision, and it did not identify in the legislative record a specific congressional intent to outlaw facially neutral employment policies that yield racially disproportionate results. Rather, the Court concluded that "[t]he objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[127] The Court found this objective to be "plain from the language of the statute[,]"[128] and it therefore did not require any archeological investigation of legislative intent.

The Court did, however, discuss legislative intent in order to rebut an argument made by the defendant that it could not be held liable for "act[ing] upon the results of a professionally developed ability test" under section 703(h) of Title VII.[129] In fact, the Court relied on several interpretive techniques, first, to show that the statute's endorsement of such tests is textually ambiguous (a test may form the basis for liability if "*used* to discriminate") and, second, to conclude that the provision should be read as limiting protection only to job-related tests based on the Court's examination of legislative intent and its deference to the EEOC's interpretation as disclosed in its guidelines.[130] In support of its own and the commission's position, the Court cited an interpretive memorandum by Senators Clifford Case and Joseph Clark, co-managers of the original bill,

126. *Id.* ("If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."). The Court disregarded the district court's conclusion that Duke Power had adopted these requirements without a discriminatory purpose, and overruled the conclusion of the court of appeals that such a showing was a prerequisite for a violation of the statute. *Id.* at 428–29. The court of appeals's ruling made an exception for blacks employed in the labor department before the high school diploma and testing requirements were implemented, requiring that these workers could not now be subject to a requirement that whites employed in the operating departments during the same period had never faced. *Id.* at 429 n.4.

127. *Id.* at 429–30. *See also id.* at 431 ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.").

128. *Id.* at 429.

129. 42 U.S.C. § 2000e-2(h) (2012) (providing in relevant part that it shall not be an unlawful employment practice "for an employer to give and to act upon the results of any professionally developed ability test provided that such test . . . is not designed, intended or used to discriminate because of the race, color, religion, sex or national origin"); *Griggs*, 401 U.S. at 433–36.

130. *Griggs*, 401 U.S. at 433–34 (placing special emphasis on the term "used" as it appears in the statutory text, and describing the EEOC's guidelines for interpreting the statute).

explaining that Title VII would permit the use of tests "measur[ing] 'applicable job qualifications'" and otherwise "protect[] the employer's right to insist" that its employees "*must meet the applicable job qualifications*."[131] The Court also cited Congress's refusal to adopt alternative language that would have immunized employment decisions based on virtually any professionally developed employment test as evidence that it intended to limit special protection to job-related tests.[132] Thus, by developing a rich understanding of the congressional purposes behind Title VII's enactment, the Court rendered a complex statement of legal and social policy in which the law's commitment to equal employment opportunity must be balanced against its recognition of a norm of private industrial control.[133]

Following *Griggs*, the Court decided a series of cases in which it invoked Title VII's remedial purposes in support of further doctrinal innovation. Unlike *Griggs*, several of these cases did not involve the types of difficult enforcement situations that might be expected to compel courts to seek general guidance from broad constructions of the statute's purposes. For example, in *McDonnell Douglas v. Green*,[134] the Court held that a plaintiff may sustain a claim for disparate treatment discrimination under section 703(a)(1) of the statute based on circumstantial evidence by demonstrating a prima facie case of discrimination and by rebutting the employer's "legitimate, nondiscriminatory reason" for its action as a pretext for discrimination.[135] The interpretive question posed by

131. *Id.* at 434–35 (quoting 110 CONG. REC. 7247).

132. *Id.* at 434–35 (discussing an amendment offered by Sen. John Tower that would have immunized any employment action based on "professionally developed ability tests" which was opposed by Title VII supporters who claimed that it would have applied "whether it was a good test or not, so long as it was professionally designed" (internal quotation marks omitted)).

133. *See* Rich, *supra* note 119, at 58 ("Thus, disparate treatment doctrine is constructed to permit the factfinder to differentiate between unequal treatment because of the plaintiff's status and legitimate exercises of business discretion concerning the employer's methods of employee evaluation, reward, and discipline."). As further evidence of its nuanced understanding, the Court cautioned that "Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications" and did not mandate that persons be hired because they were "formerly the subject of discrimination" or belonged to a minority group. *Griggs*, 401 U.S. at 430–31. Rather, "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress proscribed." *Id.* at 431. The Court thus attributed to Congress the assumption that the elimination of preferences for all groups is, if not the best method, at least a reasonably effective method of securing the objective to remove employment barriers that had historically favored whites. The Court has repeated this assumption on several occasions since its decision in *Griggs*. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 243 (1989) ("When an employer ignored the attributes enumerated in the statute, Congress hoped, it naturally would focus on the qualifications of the applicant or employee.").

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

135. *Id.* at 802–05.

McDonnell Douglas was not an especially difficult one: it was simply "what is meant by the statute's prohibition against discrimination 'because of' the plaintiff's race?"[136] The Court decided, however, that this question should be addressed based on the same understanding of the statute's purposes as had guided its decision in *Griggs* and, on that basis, developed a burden-shifting approach to structure the litigation of such claims of disparate treatment discrimination.[137] Because the two cases concerned different theories of liability, the Court might have resolved *McDonnell Douglas* without relying on any aspect of the *Griggs* rationale. The Court instead preferred to harmonize the two theories of liability by relating both to the same overarching statutory purpose.[138]

The *McDonnell Douglas* Court carried forward not only the *Griggs* Court's appreciation of the statute's purposes, but also its assumption that the statute's antidiscrimination objectives would be accomplished by directing employers to rely on legitimate, job-related criteria when making employment decisions.[139] Within the decade following *Griggs*, numerous decisions reaffirmed this interpretive perspective. For example, in *International Brotherhood of Teamsters v. United States*,[140] the Court invoked its conclusion in *McDonnell Douglas* that the statute's "primary purpose" to eliminate discriminatory practices that had "fostered racially

136. Section 703(a) provides that it is an "unlawful employment practice" for an employer to discriminate "because of [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (2012). In *McDonnell Douglas*, the plaintiff contended that he had been the victim of race discrimination when, following a termination due to a reduction of the workforce, the employer refused to rehire him. The employer contended that the decision not to rehire the plaintiff resulted from his participation in illegal protest activities. *McDonnell Douglas*, 411 U.S. at 793–96. To satisfy the terms of the statute, the plaintiff was required to prove that his race rather than his protest activities caused the employer's decision. *McDonnell Douglas*, 411 U.S. at 802.

137. *Id.* at 800 ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." (citing *Griggs*, 401 U.S. at 429)). *See also id.* at 801 ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." (quoting *Griggs*, 401 U.S. at 430–31)).

138. As the Court explained, the two cases employed different theories of liability not because they related to different statutory purposes or because only one required consultation of those purposes, but because the plaintiffs in *McDonnell Douglas* and *Griggs* "appear[ed] in different clothing." *Id.* at 806. The *Griggs* plaintiffs complained of the discriminatory impact resulting from facially neutral practices, whereas the plaintiff in *McDonnell Douglas* had engaged in disruptive and unlawful protests against his employer that, if relied on, would have constituted a legitimate basis for its decision not to rehire him following a plant-wide layoff. *Id.*

139. *See, e.g.*, *id.* at 801 ("The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions.").

140. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

stratified job environments" and "to assure equality of employment opportunities,"[141] in order to explain how an employer may be held liable for systemic disparate treatment discrimination (a class-based claim of intentional discrimination) even though the employer's reliance on a statutorily protected seniority policy otherwise made disparate impact liability unavailable.[142] The *Teamsters* Court also adopted the same set of fundamental premises that it formed its interpretive perspective in *Griggs* when it explained the significance of the government's statistical showing, stating that persistent gross disparities between the racial composition of the employer's workforce and that of "the population in the community from which employees are hired" may be probative of discrimination because nondiscriminatory hiring practices would presumably result in a racially balanced workforce.[143] Moreover, the Court extended its interpretive perspective to cases in which it recognized causes of action for reverse discrimination[144] and rational discrimination.[145] The Court also expanded its understanding of the statute's purposes and their relationship to the preservation of legitimate exercises of employer discretion by interpolating within the structure of Title VII evidence of Congress's

141. *Id.* at 348 (quoting *McDonnell Douglas*, 411 U.S. at 800).

142. Seniority policies are protected from liability except if "intended or used to discriminate." *See* 42 U.S.C. § 2000e-2(h) (2012). Pattern or practice discrimination (or systemic disparate treatment discrimination), provides a cause of action for intentional discrimination, requiring the plaintiff to show that the employer's discriminatory practices were its "standard operating procedure—the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336. A showing of substantial statistical disparities among racial groups accompanied by evidence of specific instances of discrimination established a prima facie case of pattern or practice discrimination, shifting the burden to the employer to rebut the inference of discrimination. *Id.* at 334–43.

143. *Teamsters*, 431 U.S. at 339 n.20.

144. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279–80 (holding that Title VII recognizes reverse discrimination claims by white plaintiffs consistent with its purpose to prohibit "[d]iscriminatory preference for any [racial] group, *minority* or *majority*" (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (alterations in original) (internal quotation marks omitted))). Justice Marshall's opinion for the Court indeed went even further, recognizing reverse discrimination claims under 42 U.S.C. § 1981, notwithstanding the statute's guarantee of "the same right . . . to make and enforce contracts . . . *as is enjoyed by white citizens*," because the statute's purpose should not be understood as confined to addressing only those societal wrongs that Congress expressly identified and debated prior to enactment. *Id.* at 276, 280 (emphasis added). *Cf. Griggs*, 401 U.S. at 430–31 (interpreting Title VII to reach facially neutral practices and not merely the segregationist practices that preceded the statute's effective date).

145. *See, e.g.*, City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 & n.13 (1978) (interpreting section 703(a)(1) of the Civil Rights Act's general prohibition of sex discrimination as evidence that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes" regardless of whether the stereotype at issue (that women live longer than men, and so should pay higher rates into a common pension fund) is "unquestionably true" and regardless whether congressional proponents of Title VII expected that it would have no impact on existing pension programs (internal quotation marks omitted)).

preference to encourage employers to pursue voluntary compliance strategies.[146] The latter development was again significant when the Court was forced to address the legality of voluntary affirmative action programs.

In *United Steelworkers v. Weber*,[147] the Court held that the employer, Kaiser Aluminum & Chemical Corp. ("Kaiser"), did not violate Title VII when it denied Brian Weber a position in a worker training program that reserved 50 percent of its slots for African American workers pursuant to "an affirmative action plan designed to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craftwork forces."[148] Kaiser had a policy that required that craft positions be awarded only to workers with prior craft experience, and this requirement had led to severe underrepresentation of black workers who had historically been barred from membership in craft unions. Kaiser and the union agreed upon the affirmative action plan as a means to improve the racial diversity of the workforce while continuing to enforce the same hiring standards for craft positions. The Supreme Court concluded that under Title VII Kaiser's affirmative action program lawfully excluded Weber because the program was instituted in response to a manifest racial imbalance in a "traditionally segregated job categor[y]," provided the program did not "unnecessarily trammel" the interests of nonminority workers.[149] In reaching this conclusion, the Court acknowledged the statute could be read to prohibit such programs. It relied, however, on the "familiar rule" of *Holy Trinity* that "a thing may be within the letter of the statute and yet not within the

146. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975) (inferring from Title VII's structure Congress's objective to provide employers incentives "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of workplace discrimination (internal quotation marks omitted)); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (stating that "[c]ooperation and voluntary compliance were selected as the preferred means for achieving" Congress's goal of assuring equal employment opportunity). *See also Teamsters*, 431 U.S. at 364 (1977) ("The prospect of retroactive relief for victims of discrimination serves [Title VII's] purpose by providing 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 their discriminatory practices" (internal quotation marks omitted)); Local No. 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501, 515 (1986) ("We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII.").

147. United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979).

148. *Id.* at 197–98. The affirmative action plan also contained hiring goals "set for each Kaiser plant equal to the percentage of blacks in the respective local labor forces." *Id.* at 198. Weber, a white male employee, instituted a class action challenging the plan under Title VII's section 703(a) (prohibiting discrimination "against any individual . . . because of such individual's race") and section 703(d) (prohibiting race discrimination in connection with training programs). *Id.* at 199–200 & nn.2–3. *See also* 42 U.S.C. § 2000e-2(a) (2012); *id.* § 2000e-2(d).

149. *Weber*, 443 U.S. at 208–09.

statute, because not within its spirit, nor within the intention of its makers."[150]

The Court's examination of Title VII's purpose advanced two arguments. First, the Court found that, when viewed in light of the statute's legislative history and the social context in which it was enacted, an interpretation of the statute forbidding such voluntary plans "would 'bring about an end completely at variance with the purpose of the statute' and must be rejected."[151] Echoing the first articulation of the statute's purpose provided in *Griggs*, the Court stated that the legislature's "primary concern . . . was with 'the plight of the Negro in our economy'" and the widening unemployment gap between whites and blacks, as well as other racial minorities.[152] The Court also found support in the House Report accompanying the Civil Rights Act, which predicted that federal legislation would "*create an atmosphere conducive to voluntary . . . resolution of other forms of discrimination*."[153] In sum, the Court concluded that Congress could not have set a purpose for Title VII that private employers would then be prohibited from pursuing voluntarily.[154] Second, the Court reaffirmed Title VII's purpose of promoting voluntary compliance.[155] It strengthened this conclusion in relation to voluntary affirmative action plans by interpreting section 703(j) of the statute[156] to permit such preferential treatment to correct racial imbalances on a voluntary basis.[157] Again citing the assumption that Title VII was not intended to undermine private control over the employment relationship, the Court concluded that to permit employers to institute such voluntary programs was important not only to fulfill Congress's goals, but also to avoid a form of overregulation that Congress had not sanctioned.[158]

150. *Id.* at 201 (quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892)).

151. *Id.* at 201–02 (quoting United States v. Pub. Utils. Comm'n, 345 U.S. 295, 315 (1953)).

152. *Id.* at 202 (quoting 110 CONG. REC. 6548 (1964) (statement of Sen. Humphrey)). *See also id.* (finding support in Sen. Clark's statement that high and rising black unemployment was "one of the principal reasons" to pass Title VII); *id.* at 203 (quoting President Kennedy's 1963 address to Congress after the passage of the Civil Rights Act, in which he supported equal employment as part of the Act because "[t]here is little value in a Negro's obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job." (internal quotation marks omitted)).

153. *Id.* at 204 (quoting H.R. REP. NO. 914, pt. 1, at 18 (1963)) (internal quotation marks omitted).

154. *Id.*

155. *Id.*

156. 42 U.S.C. § 2000e-2(j) (2012) (providing in relevant part that "[n]othing contained in [Title VII] . . . shall be interpreted to *require* any employer . . . to grant preferential treatment . . . to any group because of the race [of such group] . . . [or] on account of an imbalance" (emphasis added)).

157. *Weber*, 443 U.S. at 205–06 ("The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action.").

158. *Id.* at 207.

Justice Rehnquist authored a dissenting opinion in which only Chief Justice Burger joined, pursuing two critiques of the majority's position, one based on the statute's text and the other based on congressional intent. Justice Rehnquist's textual argument was that, rather than relying on the canon of *expressio unius est exclusio alterius* to infer that Congress meant to permit voluntary affirmative action programs, the Court should have read section 703(j) *in light of* the prohibitions against race discrimination in sections 703(a) and 703(d), thus interpreting section 703(j) not to grant permission to employers to discriminate by granting racial preferences.[159] This aspect of Justice Rehnquist's opinion attempts to use semantic context in order to resolve statutory ambiguity. Of course, the majority and dissent disagree about where the ambiguity lies: for the dissent, section 703(j) is ambiguous concerning the question whether voluntary affirmative action is *permitted*; for the majority, sections 703(a) and 703(d) are ambiguous concerning the question whether affirmative action programs responding to specific racial imbalances count as "discrimination."

Justice Rehnquist's opinion differs from present-day textualist interpretations of Title VII, however, in that it blends its textual argument with strategic references to the Court's purposivist precedents and an extensive examination of the legislative record on the specific question of remedial racial preferences. For Justice Rehnquist, the interpretation of section 703(a) as ambiguous is simply too inconsistent with the Court's own prior purposivist interpretations.[160] While Justice Rehnquist generally decries the use of legislative history,[161] in *Weber* he employed it himself, eager to conclude that the legislative history prohibits the use of affirmative action in terms "as clear as the language of §§ 703(a) and (d)."[162]

Although they reach different conclusions, Justice Brennan's and

159. *Id.* at 226–29 (Rehnquist, J., dissenting).

160. *See, e.g.*, *id.* at 220 (Rehnquist, J., dissenting) (citing *McDonald* for the proposition that Title VII "prohibits *all* racial discrimination in employment" and *Griggs* for the proposition that the statute proscribes "discriminatory preference, for any group, minority or majority" (internal quotation marks omitted)).

161. *Id.* at 229–30 (Rehnquist, J., dissenting) ("In most cases, legislative history is more vague than the statute we are called upon to interpret." (alterations omitted) (internal quotation marks omitted)).

162. *Id.* at 230 (Rehnquist, J., dissenting). For example, Justice Rehnquist cited an earlier interpretive memorandum by Senators Clark and Case than the one cited in *Griggs*, stating that "any deliberate attempt to maintain a racial balance . . . would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race." *Id.* at 239 (Rehnquist, J., dissenting) (quoting 110 CONG. REC. 7213 (1964)). The *Griggs* Court had explicitly declined to rely on this earlier memorandum when rendering its decision, although it also claimed that it could be interpreted to be consonant with the later memorandum on the question of employment testing. Griggs v. Duke Power Co., 401 U.S. 424, 434–35 n.11 (1971).

Justice Rehnquist's opinions are remarkable for the similarity of their interpretive approaches. That one may be described as purposivist and the other textualist ultimately reveals less about their approaches than the fact that they both adopt very similar interpretive perspectives based on the holdings, interpretive methods, and policy assumptions that had previously defined the Court's Title VII precedents. That is, each competes to be viewed as the true adherent to the Court's longstanding interpretive perspective. Even though Justice Rehnquist puts forth a strong critique of the majority's position, he does so by relying on a restatement of the statute's purpose, an examination of much of the same legislative material that informed the Court's opinions in prior cases, and an overall concern for vertical coherence in relation to the Court's precedents and horizontal coherence in terms of how the statute's provisions relate to one another. Justice Rehnquist's effort to maintain continuity of interpretive perspective, critiquing the majority's positions without wholly rejecting established interpretive methods or assumptions, distinguishes his opinion from the Court's more recent textualist decisions, which generally do not consider how the rationales of established precedents may be undermined by departure from the Court's longstanding interpretive perspective. While the Court's ideological perspective continued to become more conservative in the 1980s and 1990s, not until very recently did the Court abandon the interpretive perspective established by its earliest decisions.[163] Prior to that time, the Court continued to deploy purposivist methods of interpretation and retrace the substance of its prior decisional rationales,[164] maintaining continuity with its precedents even as it innovated new doctrinal frameworks.[165]

163. *See infra* Part III.B.

164. By "substance of its prior decisional rationales," I mean to include such things as the particular statutory purposes identified and the assumptions formed regarding the relationship between discrimination and legitimate exercises of business discretion, or how particular statutory provision may succeed in shaping social behavior.

165. *See, e.g.*, Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (relying on "a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment" to recognize a claim for hostile work environment discrimination (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978))); Price Waterhouse v. Hopkins, 490 U.S. 228, 242–45, 243 (1989) (recognizing a cause of action for mixed-motive discrimination and citing *Griggs* and *McDonnell Douglas* and their interpretations of legislative history as evidence of "Title VII's balance between employee rights and employer prerogatives"); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 652 (1989) (finding that the circuit court's conclusion that the burden of persuasion should be shifted based on the plaintiffs' showing that nonwhites dominated the employer's cannery positions constituted a "result [that] cannot be squared with our cases or with the goals behind the statute" because it would compel employers to adopt quota-based hiring policies in order to avoid expensive litigation).

B. THE APPLICATION OF THE NEW TEXTUALISM TO FEDERAL EMPLOYMENT DISCRIMINATION LAW

In Part III, this Article will discuss in detail several employment discrimination decisions from the past decade in which the Supreme Court's analysis has been guided by the new textualism.[166] Methodologically, these decisions are characterized by their rejection of legislative history materials and other non-textual sources of statutory meaning, either because the plain meaning of the statute is considered to be sufficiently unambiguous[167] or because any ambiguities may be adequately resolved by consulting dictionary definitions or relying on textualist canons of construction.[168] Textualism's rejection of purposivist and intentionalist sources enables the Court in these cases to ignore the substantive determinations made in its precedents regarding what statutory purposes and regulatory assumptions ought to inform its interpretation of federal employment discrimination statutes. Thus, the Court's reliance on textualist methods helps to support its more fundamental rejection of its longstanding interpretive perspective in employment discrimination cases, which historically has included not only purposivist interpretive methods but also a continuing commitment to upholding those purposes and regulatory assumptions identified by prior decisions.

1. "New" Textualism

Early twentieth century formalists characterized statutory interpretation as a task to be executed, "if possible, within the four corners of the act."[169] As Justice Oliver Wendell Holmes stated, "[w]e do not inquire what the legislature meant; we ask only what the statute means."[170] In its strictest version, the formalist plain meaning rule posits that, where the statutory language is unambiguous, "the duty of interpretation does not arise"[171] and "the words employed are to be taken as the final expression of

166. *See infra* Part III.D–E.

167. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 579–80 (2009) (finding no analysis of the relevant statutory provision necessary to conclude that the defendant's compliance-driven conduct constituted discrimination "because of" race).

168. *E.g.*, Gross v. FBL Fin. Servs., 557 U.S. 167, 176–77 (2009); Desert Palace, Inc. v. Costa, 539 U.S. 90, 98–101 (2003); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109–11 (2002).

169. White v. United States, 191 U.S. 545, 551 (1903). *See also* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 108 (2001) (noting that early-twentieth century practitioners of textualism subscribed to this brand of statutory interpretation).

170. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

171. Caminetti v. United States, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to

the meaning intended."[172] The notion that a plain text delivers its meaning without interpretation is, of course, a fiction, and one that is doubtful as a description of the plain meaning rule in practice, however well it may describe its central ideal.[173]

"New" textualism first emerged in the 1980s as a response to the perceived excesses of legal process purposivism.[174] Philosophically, new textualism is grounded in "public choice theory, strict separation of powers, and ideological conservatism."[175] Textualism's most influential advocates on the federal bench are Justice Antonin Scalia[176] and Judge Frank Easterbrook.[177] Justice Scalia has criticized judicial reliance on legislative history materials (e.g., committee reports) as authoritative sources of statutory meaning because individual legislators and legislative committees "do not reliably speak for Congress as a whole, but rather generate

aid doubtful meanings need no discussion."). *See also* Procter & Gamble Co. v. United States, 225 U.S. 282, 293 (1912) ("No resort to exposition can add to the cogency with which the conclusion stated is compelled by the plain meaning of the words themselves."); Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1299 (1975) ("The plain meaning rule has many formulations, but its essential aspect is a denial of the need to 'interpret' unambiguous language.").

172. United States v. Mo. Pac. R.R., 278 U.S. 269, 278 (1929) ("[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended.").

173. *See, e.g.*, Bos. Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) ("It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.").

174. John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1292 (2010). The phrase "'new' textualism" was coined by Professor William Eskridge to distinguish it from the "traditional" approach, which followed a "'soft' plain meaning rule," allowing text-based interpretation to be interrupted by consultation of legislative materials, and from the strict plain meaning rule of the early twentieth century, which lacked the new textualism's intellectual foundations. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 621–30 & n.11 (1990).

175. Eskridge, *supra* note 174, at 623 n.11. *See also* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1511–12 (1998) (book review) (describing new textualism as defined by a "strict formal separation of powers," assumptions regarding the institutional capabilities of courts, and a rejection of legislative history).

176. For examples of Justice Scalia's advocacy of textualism, see *Chisom v. Roemer*, 501 U.S. 380, 404–17 (1991) (Scalia, J., dissenting), *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528–30 (1989) (Scalia, J., concurring in the judgment), and *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 657–67 (1987) (Scalia, J. dissenting); and see generally ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

177. For an example of Judge Easterbrook's advocacy of textualism, see *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 294–95 (7th Cir. 1992); and see generally Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441 (1990); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

legislative history strategically at the behest of client interest groups."[178] As textualism's public choice assumptions fell under harsh academic scrutiny,[179] Justice Scalia and other leading textualists deemphasized skepticism regarding the integrity of the legislative process and more vigorously pursued a constitutional justification for textualism. The use of legislative history is proscribed under this more evolved view not because it is considered untrustworthy, but because reliance on it violates the constitutional requirement of bicameralism and the rule of nondelegation.[180]

Methodologically, new textualism's "most distinctive feature" is its firm prohibition against the consultation of legislative history materials.[181] It prescribes that the statutory text itself is the best—indeed the only

178. Manning, *supra* note 174, at 1294 (footnote omitted) (interpreting Justice Scalia's concurrence in *Blanchard v. Bergeron*, 489 U.S. 87, 97–100 (1989)). *See also* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 620 (1991) (Scalia, J., concurring in the judgment) (arguing that committee reports "do[] not necessarily say anything about what Congress as a whole thought"); *Blanchard*, 489 U.S. at 98–99 (Scalia, J., concurring in part and concurring in the judgment) (decrying the majority's reliance on lower court opinions discussed favorably in congressional committee reports, because they "were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction"); Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring in the judgment) ("Committee reports, floor speeches, and even colloquies between Congressmen are frail substitutes for bicameral vote upon the text of a law and its presentment to the President." (citation omitted)). *See also* Easterbrook, *Text, History, and Structure in Statutory Interpretation*, *supra* note 177, at 61 (stating that "clues" provided by legislative materials "are slanted, drafted by the staff and perhaps by private interest groups"). For a discussion of textualism's public choice foundations, see Manning, *supra* note 174, at 1290–97.

179. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 89 (1991) (rejecting the view of Justice Scalia and Judge Easterbrook that legislative intent is impossible to discover in the context of statutory interpretation, though admitting that public choice theory "can illuminate the task of statutory interpretation"); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 874–75 (1987) (same). *See also* Manning, *supra* note 174, at 1298–1303 (discussing the empirical critique of early textualism, and noting that "Farber and Frickey contested the empirical underpinning of the textualists' claim that legislation represents a commodity purchased by bargain-hunting groups who prefer, wherever possible, to slip policy details into the legislative history rather than into the more expensive statutory text").

180. Manning, *supra* note 174, at 1305. *See also, e.g.*, Bank One Chi., N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 280 (1996) (Scalia, J., concurring in part and concurring in the judgment) (concluding that Article I, Section 1 of the Constitution forbids Congress from "leaving minor details" of a statute's meaning to be determined by committees).

181. Eskridge, *Textualism, the Unknown Ideal?*, *supra* note 175, at 1512 ("Doctrinally, the new textualism's most distinctive feature is its insistence that judges should almost never consult, and never rely on, the legislative history of a statute." (citation omitted)). *See also* Eskridge, *supra* note 174, at 623 ("The new textualism posits that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant. Legislative history should not even be consulted to confirm the apparent meaning of a statutory text.").

legitimate—record of such compromises and their attendant purposes.[182] New textualists believe that to infer statutory meaning from statements and reports within the legislative record would elevate those sources to the status of enacted law, resulting in a delegation of lawmaking responsibility to congressional committees and individual legislators that even Congress cannot perform under Article I of the Constitution.[183] They also offer jurisprudential reasons for their rejection of legislative history, arguing that holding the statute to the semantic meaning of its text provides the legislature an incentive to engage in clear and comprehensive drafting[184] and that "clear interpretive rules" permit the legislature to anticipate the effect of its chosen language.[185] Consequently, statutory purposes and legislative history are off limits as potential sources of statutory meaning, unless they are evident from the text or design of the statute and ambiguities in the statutory language make consultation of such sources

182. *See, e.g.*, E. Associated Coal Corp. v. United Mine Workers, Dist. 17, 531 U.S. 57, 68–69 (2000) (Scalia, J., concurring in the judgment) ("The final form of a statute of regulation . . . is often the result of compromise among various interest groups, resulting in a deision to go so far and no farther."); Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself*." (internal quotation marks omitted)); City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 450 (2002) (Scalia, J., dissenting) ("[E]vidence of [] purpose is sought in the *text and structure* of the statute at issue." (internal quotation marks omitted)). *See also* Eskridge, *Textualism, the Unknown Ideal?*, *supra* note 175, at 1511 (attributing to new textualists a "strict formal separation of powers" doctrine on the basis of which "the constitutional role of the legislature is to enact statutes, not to have intent or purposes, and the role of courts is to apply the words and only the words, without regard to arguments of fairness or political equilibrium").

183. *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 698 (1997) ("If Congress effectively relies on its components to speak for the institution—to express *Congress's* detailed intent—the practice offends the Lockean injunction against the delegation of legislative authority."). *See also id.* at 710–25 (discussing nondelegation doctrine as the best argument for the non-authoritative status of legislative history); Manning, *supra* note 5, at 84 n.52 ("In recent years, some textualists have justified their reluctance to credit internal legislative history on the ground that it effectively transfers authority from the body as a whole to the committees or sponsors who, under established judicial practice, are capable of producing particularly 'authoritative' expressions of legislative intent."); Eskridge, *Textualism, the Unknown Ideal?*, *supra* note 175, at 1528 & n.66 (situating this argument within existing Supreme Court precedent).

184. *See* Manning, *supra* note 5, at 111 ("By allowing legislators to set the level of generality at which they express their policies, semantic detail enables legislators with leverage in the process to express the limits that are necessary to secure their assent.").

185. Finley v. United States, 490 U.S. 545, 556 (1989). However, by denying the authority of prior interpretive rationales and the means by which they deduced statutory meaning from legislative history, textualists may in fact undermine the legislative process. *See, e.g.*, Eskridge, *Textualism, the Unknown Ideal?*, *supra* note 175, at 1550 ("Textualist decisions are less likely to reflect original congressional preferences and much less likely to reflect ongoing congressional preferences . . . and so deals and compromises would be harder to reach because of less certainty of enforcement and practical elaboration on the part of a textualist Court.").

necessary.[186] Textualists may be more willing than purposivists to ignore potential ambiguities in the statutory language because the cost of finding such an ambiguity is that one may be required to abandon a purely textual interpretation. In a sense, textualism and purposivism reflect different tolerances when assessing ambiguity, as well as different approaches to resolving ambiguity.[187]

Professor John Manning has argued that both purposivism and textualism appeal to a certain interpretive context in order to construct an objective account of what a reasonable person would understand to be the statute's meaning. The context invoked, however, by each theory is significantly different. Whereas textualists privilege the semantic context ("evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words"), purposivists privilege policy context ("evidence that goes to the way a reasonable person conversant with the circumstances underlying enactment would suppress the mischief and advance the remedy").[188] Manning acknowledges that relying on policy context to elucidate the meaning of a statute's terms "should make [the] statute more internally coherent" as well as "more coherent with the policy aims of other statutes."[189] This concern, however, with preserving policy coherence by interpreting statutes in a manner responsive to the legislature's objectives is not a principle that operates generally across the range of interpretive theories. It is endemic to purposivism,[190] but rejected by new textualism.[191] Thus, purposivism has internal reasons to pursue policy coherence over time, thus enhancing vertical coherence, and to avoid upsetting legislative design by ignoring the

186. Manning, *supra* note 5, at 84–85.

187. Textualists believe that the best means for identifying the legislature's purpose is the text and structure of the statute. Purposivists will look more broadly to legislative history and the circumstances surrounding enactment, as well as to understandings that have accrued within law or popular culture over time. This may lead each approach to yield very different answers to questions of legal meaning.

188. Manning, *supra* note 5, at 91. Recourse to extrinsic sources of semantic meaning makes clear that textual interpretation *is* interpretation. For this reason, Justice Scalia has refused to equate textualism with "strict constructionism." SCALIA, *supra* note 176, at 23 ("Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy [of textualism] into disrepute. I am not a strict constructionist, and no one ought to be . . . . A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.").

189. Manning, *supra* note 5, at 99.

190. *See* John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2036 (2006) (suggesting that purposivism presumes that a legislature's policy aims are coherent even if its drafting process isn't, whereas textualism begins from the premise that policy compromise is messy but drafting is deliberate).

191. *See id.* at 2026 (describing new textualism as "tak[ing] the text as it finds it rather than imposing purpose-driven coherence on a messy text").

need for horizontal coherence. However, as demonstrated by *Patterson*,[192] these reasons (as well as purposivism's methods for enhancing coherence) will not necessarily influence jurists who do not subscribe to its methodology. Textualism's rejection of purposivist methods leaves jurists free to substitute semantic meaning for the analysis of legislative purpose and overall policy coherence that may have guided past interpretations.

2. Anticipating the Shift in Interpretive Perspective.

One might argue that the Court dismisses the significance of its precedents in these recent decisions not because of a change in its interpretive practices, but because its textualism is little more than a thinly veiled attempt to justify results that are otherwise consistent with the conservative ideology held by a majority of its members. The modern Court's textualism has often been identified by the conservatism of its practitioners.[193] This view has merit in the context of employment discrimination law.

Certainly one of the first robust new textualist interpretations of Title VII appeared in Justice Scalia's dissent in *Johnson v. Transportation Agency of Santa Clara County*.[194] In that case, the Court reaffirmed *Weber* by upholding a sex-based voluntary affirmative action plan by a public employer. The Court reprised not only the holding of *Weber* but also its rationale, including its reliance on the legislative record,[195] its respect for the purpose of promoting voluntary compliance, and its regulatory assumption that this purpose would be undermined if employers were forced to provide evidence of a prima facie case of discrimination before they would be permitted to use voluntary affirmative action programs.[196]

Justice Scalia's blistering dissent advanced two lines of argument that merit discussion here. First, Justice Scalia argued that to apply *Weber* to public employers threatened horizontal coherence by creating discord between Title VII and other statutory and constitutional provisions

192. *See supra* Part I.A.

193. *See, e.g.*, Eskridge, *supra* note 174, at 623 n.11 ("What is 'new' about the new textualism is its intellectual inspiration: public choice theory, strict separation of powers, and *ideological conservatism*." (emphasis added)).

194. Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616 (1987).

195. *Id.* at 627–29 (reiterating *Weber*'s adherence to Title VII objective of "break[ing] down old patterns of racial segregation and hierarchy" and its reasoning that it would therefore be "ironic" if Title VII precluded "all voluntary, private, race-conscious efforts to abolish" those patterns (alteration in original) (internal quotation marks omitted)).

196. *Id.* at 632–33 & n.10.

governing public affirmative action.[197] Second, Justice Scalia declared in forceful terms that the language of section 703(a) was simply not ambiguous and therefore should not be interpreted through the prism of the statute's purposes to permit race- or sex-based affirmative action.[198] For this reason, Justice Scalia concluded that *Weber* "rewrote the statute it purported to construe" and "disregarded the text of the statute, invoking instead its spirit,"[199] and he labeled the *Weber* doctrine "a judicially crafted code of conduct, the contours of which are determined by no discernible standard"[200] and an "engine of discrimination" that the Court had "finally completed."[201]

Had Justice Scalia's position prevailed in *Johnson*, it surely would have resulted in an overturning of *Weber* and a complete rejection of *Weber*'s rationale. Of course, Justice Scalia did not prevail in *Johnson*. Moreover, those decisions from the same period most commonly viewed as evidence of the Court's conservatism did not rely on textualist arguments.[202] Instead, they followed a familiar trend in the Court's employment discrimination jurisprudence: that once the Court has established a particular doctrinal framework, subsequent decisions build upon or clarify that framework, typically by reinterpreting the language of the Court's own precedents rather than by returning to the statutory text.[203]

197. Justice Scalia reiterated the very argument previously rejected by the Court in *Weber* that section 703(a) should be read *in pari materia* with parallel language in Title VI, which the Court had previously concluded prohibited discrimination by public institutions in terms at least as stringent as the Equal Protection Clause. *Id.* at 664–65 (Scalia, J., dissenting). Justice Scalia's attempt to rely on this textualist canon was weakened, however, by the fact that the plain language of Title VII makes no distinction between the prohibition against discrimination by public and private employers. *Id.* at 627 n.6 (majority opinion).

198. *Id.* at 657 (Scalia, J., dissenting) (describing section 703(a) as demonstrating "a clarity which, had it not proven so unavailing, one might well recommend as a model of statutory draftsmanship"); *id.* at 670 (Scalia, J., dissenting) ("The language of [section 703(a)] . . . is unambiguous . . . .").

199. *Id.* at 670 (Scalia, J., dissenting) (internal quotation marks omitted).

200. *Id.* at 670–71 (Scalia, J., dissenting).

201. *Id.* at 658 (Scalia, J., dissenting).

202. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656–58 (1989) (revising the *Griggs* disparate impact test to increase the burdens placed on plaintiffs and decrease those placed on defendants); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 505–12 (1993) (interpreting *McDonnell Douglas* pretext analysis to deny the plaintiff automatic entitlement to judgment upon disproving the defendant's proffered nondiscriminatory reason). The *Wards Cove* decision so profoundly altered the holding of *Griggs* as to compel swift corrective action from Congress, which amended Title VII to codify the primary features of the *Griggs* test. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 2(2), 105 Stat. 1071, (codified as amended at 42 U.S.C. § 1981 (2012)) (finding that "the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio has weakened the scope and effectiveness of Federal civil rights protections" (citation omitted)).

203. *See, e.g.*, *Wards Cove*, 490 U.S. at 659 ("Though we have phrased the query differently in different cases, it is generally well established [by those cases] that at the justification stage of such a

In addition, the current Court's reliance on textualist methods does not always result in decisions that are immediately at odds with the Court's precedents. In fact, several times over the past decade, the Court has produced interpretations relying on textualist methods which have either enlarged or maintained the rights of plaintiffs.[204]

disparate-impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate goals of the employer."); *Hicks*, 509 U.S. at 506–12 (quoting and reinterpreting significant portions of the Court's opinions in *McDonnell Douglas* and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981)). This practice of "perfecting" employment discrimination doctrine by reinterpreting and elaborating upon the language of prior decisions had been commonplace since the 1970s. For example, the Burger Court twice refined the burden-shifting approach to resolving individual disparate treatment cases by reinterpreting the phrase "legitimate, nondiscriminatory reason" originally coined by the Court in *McDonnell Douglas*. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256–58 & n.8 (1981) (clarifying that the proffer of a legitimate, nondiscriminatory reason is intended only to rebut the prima facie case and to sharpen the ultimate inquiry, and that it does not require the defendant to meet a burden of persuasion, only production); Furnco Constr. Corp. v. Waters, 438. U.S. 567, 577–78 (1978) (clarifying that rebuttal of the prima facie case with evidence of a legitimate nondiscriminatory reason does not require the defendant to show that its employment practice was in fact the method best calculated to enhance the employment opportunities of minority workers). The Court made similar clarifications with respect to its doctrines of systemic disparate treatment and disparate impact, each of which required the Court to reevaluate the language of its own precedents with little if any new discussion of the statutory language. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 445–46 (1982) (interpreting disparate impact liability not to include a "bottom line" defense, such that a plaintiff's showing that any particular selection device produced a disparate impact is sufficient to establish a prima facie case regardless of whether the defendant's employment practice as a whole produce such an impact); City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 708–11 (1978) (holding that systemic disparate treatment may be proved based on a facially discriminatory policy alone, because regardless of the statistical impact Title VII protects individuals from status-based discrimination); Hazelwood Sch. Dist v. United States, 433 U.S. 299, 308 (1977) (clarifying that the statistical showing required to prove a "gross disparity" under *Teamsters* requires comparison of the racial composition of the employers' workforce to the racial composition of the qualified labor pool); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (restating the burden-shifting framework of *Griggs*, and interpreting it to include at the final stage an opportunity for the plaintiff to show that the employer was using its test or selection device as a pretext for discrimination by producing evidence that other tests or devices were available that would not have produced a disparate impact). Contrary to the Court's more recent new textualist approach of ignoring the interpretive rationales of its precedents, the Court's prior practice of returning to and elaborating upon its prior rationales served to maintain significant statutory coherence even when the Court altered the direction of the substantive law.

204. *See, e.g.*, Crawford v. Metro. Gov't of Nashville, 555 U.S. 271, 276–80 (2009) (performing a textualist analysis to conclude that the "opposition" clause of Title VII's section 704(a) does not afford protection only to those plaintiffs who initiated a complaint of discrimination against the employer); Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 61–67 (2006) (holding that plaintiffs may bring retaliation claims under section 704(a) of Title VII based on materially adverse employment actions that do not necessarily affect the terms or conditions of employment, as is required for race and sex discrimination claims under section 703(a)(1), because differences in the language of the two provisions demonstrate that the term "discriminate" should not be read *in pari materia*); Desert Palace, Inc. v. Costa, 539 U.S. 90, 98–100 (2003) (performing a textualist interpretation of section 703(m) of Title VII to conclude that direct evidence of discrimination is not required in order for plaintiffs to avail themselves of motivating factor analysis).

In sum, the disruptive impact of the Court's embrace of textualism results from the loss of interpretive perspective that has accompanied this change in interpretive approach, resulting ultimately in a body of law that lacks fundamental coherence not by legislative design but as a result of judicial inconsistency. One might argue that stare decisis will enforce policy coherence by making it difficult to overrule the Court's statutory decisions, but this argument is flawed because it assumes that the source of statutory incoherence is the overruling of precedent rather than the rejection of prior interpretive rationales. As Part IV will demonstrate, substantial incoherence may occur without any direct overruling of precedent when the Court abandons its prior interpretive perspective to pursue new interpretive methods.

III. THE CURRENT REGIME: NEW TEXTUALISM AND THE LOSS OF INTERPRETIVE PERSPECTIVE

In this part, I will discuss several examples of the Court's new textualist approach to the interpretation of federal employment discrimination statutes. This part will show that the Court's textualism substantially drives, but cannot fully account for, the Court's abandonment of its prior interpretive perspective regarding employment discrimination law. Textualism's focus on the statutory text has tended to translate into indifference and even hostility toward the rationales of prior decisions in which discussions of statutory purpose were fundamental to the Court's reasoning. The resulting loss of perspective has made many of the Court's recent decisions difficult to integrate with its precedents, thus calling into question the continued legitimacy of prior decisions and their rationales.

A. *DESERT PALACE, INC. V. COSTA*

The Court had no occasion to interpret the liability provisions of the 1991 Civil Rights Act ("the 1991 Act") until its decision in *Desert Palace, Inc. v. Costa*.[205] The decision shows that textualism is not simply a cover for the current Court's conservatism, because its holding takes an expansive view of the availability of motivating factor liability under the statute.

In *Desert Palace*, the Court considered the question whether a plaintiff must present direct evidence of discrimination in order to be entitled to a motivating factor jury instruction under Title VII, as amended by section

205. *Desert Palace*, 539 U.S. at 90.

107 of the 1991 Act.[206] In *Price Waterhouse v. Hopkins*,[207] the Court held that Title VII recognizes a cause of action for mixed-motive discrimination, but no particular standard for assessing the defendant's liability won the approval of a majority of the Court's members. Justice O'Connor proposed a direct evidence requirement in her *Price Waterhouse* concurrence, and several circuits had held prior to *Desert Palace* that Justice O'Connor's concurrence expressed the holding of *Price Waterhouse* and that the direct evidence requirement applied to the 1991 amendments.[208] In *Desert Palace*, the district court had provided the instruction, and the jury returned a verdict for the plaintiff. That ruling was initially overturned by a panel of the Ninth Circuit—which concluded that the mixed-motive instruction had been provided in error because the plaintiff lacked direct evidence that the plaintiff's sex had motivated her termination—but was later reinstated by the circuit court sitting *en banc*.[209]

The Supreme Court affirmed the Ninth Circuit's conclusion that the district court had properly rejected the direct evidence requirement because the statutory text contained no express limitation concerning the type of evidence necessary to demonstrate that the plaintiff's status was a motivating factor in the defendant's decision.[210] Justice Thomas began his analysis by declaring that "[o]ur precedents make clear that the starting point for our analysis is the statutory text . . . . [a]nd where, as here, the words of the statute are unambiguous, the 'judicial inquiry is complete.'"[211] Justice Thomas described as "unambiguous" section 703(m)'s requirement that the plaintiff "need only 'demonstrat[e]' that an employer used a forbidden consideration with respect to 'any employment practice.'"[212] Though he might have rested his analysis there, Justice Thomas went on to provide additional semantic context for the Court's interpretation. For example, he invoked the canon of *expressio unius est exclusio alterius* to conclude that, if Congress had intended the plaintiff's burdens to be "met by direct evidence or some other heightened showing, it could have made that intent clear" by including the appropriate language in section

206. *Id.* at 92.

207. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).

208. *Desert Palace*, 539 U.S. at 95 (listing cases that relied on Justice O'Connor's *Price Waterhouse* concurrence).

209. *Id.* at 96–97.

210. *Id.* at 101–02.

211. *Id.* at 98 (citations omitted) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992)).

212. *Id.* (quoting 42 U.S.C. § 2000e-2(m) (2012)) (alteration in original).

703(m).[213] He also invoked the whole act rule, observing that the defendant's burden in establishing the same decision affirmative defense is also described using the term "demonstrate" with no additional qualification.[214] Moreover, Justice Thomas also argued that the conventional rules of civil and criminal litigation did not disfavor circumstantial evidence, and he also noted that the Court had acknowledged the value of such evidence specifically in the context of employment discrimination.[215]

Desert Palace presented the Court an opportunity to renegotiate its interpretive perspective with regard to Title VII as a whole, by signaling just how it construed the legislative purposes of the 1991 amendments and explaining in what ways Congress's revision of the statute's text indicated a revision of its regulatory objectives. Justice Thomas's opinion, however, did not treat it that way. Instead, his decision is a textbook example of textualist interpretation. The decision is surprisingly consistent in terms of its substance with precedents that explicitly considered the remedial purposes of Title VII in support of progressive interpretations of the statute's procedures and prohibitions.[216] Nevertheless, Justice Thomas declined opportunities to draw upon the Court's Title VII precedents in order to explain why circumstantial evidence might be critical to a Title VII plaintiff for whom evidence of the defendant's illicit motive may otherwise be difficult to obtain.[217] Indeed, the plaintiff, Catharina Costa, had provided

213. *Id.* at 99. Reliance on this canon was strengthened by the fact that the 1991 Act defines "demonstrates" as "meeting the burdens of production and persuasion" without limiting the manner in which those burdens are met. *Id.* ("Congress has been unequivocal when imposing heightened proof requirements in other circumstances, including in other provisions of Title 42."); 42 U.S.C. § 2000e(m).

214. *Desert Palace*, 539 U.S. at 100–01 (discussing 42 U.S.C. § 2000e-5(g)(2)(B)). *See also id.* at 101 ("Absent some congressional indication to the contrary, we decline to give the same term in the same Act a different meaning depending on whether the rights of the plaintiff or the defendant are [sic] at issue.")

215. *Id.* at 99–100 ("[W]e recognized that evidence that a defendant's explanation for an employment practice is 'unworthy of credence' is 'one form of *circumstantial evidence* that is probative of intentional discrimination.'") (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (deciding a disparate treatment claim under the ADEA)).

216. In this sense, *Desert Palace* also demonstrates that the selection of an interpretive perspective and the decision to rely on a particular interpretive methodology do not necessarily predict outcome. Indeed, *Desert Palace* is not alone among the Court's recent textualist decisions with pro-plaintiff consequences. *See, e.g.*, Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 59–67 (2006) (holding that the plaintiff in a retaliation case need not demonstrate an "ultimate" employment action but only a negative action sufficient to dissuade a reasonable person from exercising opposing the employer's practices).

217. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800–03 (1973) (setting

evidence that she, like Ann Hopkins in *Price Waterhouse*, had been a victim of sex stereotyping, including sex-based derogatory comments made by her coworkers and superiors.[218] Justice Thomas might have addressed the importance of circumstantial evidence to prove such a claim as a further reason to interpret section 703(m) broadly; or he might have focused on substantive similarities in the evidence provided by Hopkins and Costa to support the latter's entitlement to the motivating factor instruction.

Justice Thomas might also have made some effort to harmonize his interpretation of section 703(m) with the Court's prior interpretations of Title VII's other liability provisions. The distinction between direct and circumstantial evidence that *Desert Palace* displaced had aided courts in avoiding application of the motivating factor and *McDonnell Douglas* pretext frameworks to the same set of facts. Justice Thomas did not discuss the relationship between section 703(m) and pretext analysis, and yet the difference between them is significant; the causation standard by which the plaintiff's burden of persuasion is assessed is significantly lower under the mixed-motive framework. Therefore, when *Desert Palace* mooted the distinction between direct and circumstantial evidence so far as section 703(m) is concerned, it created a new problem for Title VII doctrine without even gesturing toward a possible solution. After *Desert Palace*, pretext and mixed-motive analyses might both apply to virtually all circumstantial evidence in individual disparate treatment cases; they might break down according to different fact patterns (e.g., single motive vs. dual motive cases); or they might break down on procedural grounds, with each framework being available only at certain stages of litigation. The Court's silence on these questions stands in stark contrast to its prior interpretive perspective, which included a strong tendency to maintain policy coherence

out the requirements for a plaintiff to establish a prima facie case under Title VII, and noting that "Title VII tolerates no racial discrimination, subtle or otherwise").

218. Though not recounted in Justice Thomas's opinion, the Ninth Circuit described Costa's evidence that she was identified in written reports as "'the lady Teamster' who was called a 'bitch,' and told '[y]ou got more balls than the guys.'" Costa v. Desert Palace, Inc., 299 F.3d 838, 845 (9th Cir. 2002) (en banc) (alteration in original). While male employees were seldom disciplined for their rude language, Costa was also suspended for three days for "engaging in [a] verbal confrontation with [a] co-worker in the warehouse resulting in use of profane and vulgar language by [the] other employee" who called her a "fucking cunt." *Id.* at 846 (internal quotation marks omitted). This evidence is arguably less "direct" than Hopkins's evidence that partners who participated in the decision to hold her consideration for partnership thought she was "macho" and "overcompensated for being a woman," and that she should walk and talk more "femininely," "wear make-up," or "take a course at charm school." Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (internal quotation marks omitted). Even if technically correct, the determination that Hopkins, but not Costa, proffered *direct* evidence of stereotyping may provide a significant reason to conclude that circumstantial evidence must be considered when resolving such claims.

by revisiting its own past decisions in order to perfect its articulation of the doctrine.

B. *GROSS V. FBL FINANCIAL SERVICES, INC.*

The Supreme Court granted certiorari in *Gross v. FBL Financial Services, Inc.*,[219] in order to answer a question left unresolved after *Desert Palace*: "whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the Age Discrimination in Employment Act of 1967."[220] The 1991 Act's motivating factor test does not apply to the ADEA. However, because the operative language of Title VII and the ADEA are parallel regarding status-based causation,[221] a majority of circuit courts applied *Price Waterhouse* to ADEA claims.[222] In *Gross*, the only dispute between the parties concerned exactly how it should apply.[223] The Court's decision, however, carried the issue much further, holding that neither the 1991 Act nor *Price Waterhouse* applies to the ADEA because the plain meaning of the statute's prohibition of discrimination "because of . . . age" requires a showing of but-for causation.

The structure of the Court's argument is simple and deeply consequential: the 1991 Act established that the Court was not bound to

219. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009).

220. *Id.* at 169–70.

221. *Compare* 42 U.S.C. § 2000e-2(a)(1) (2012) (prohibiting employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race"), *with* 29 U.S.C. § 623(a)(1) (2012) (prohibiting employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age"). *See also Gross*, 557 U.S. at 183 (Stevens, J., dissenting) ("The relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII's language apply with equal force in the context of age discrimination, for the substantive provisions of the ADEA were derived *in haec verba* from Title VII." (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)) (internal quotation marks omitted)).

222. *E.g.*, Febres v. Challenger Caribbean Corp., 214 F.3d 57 (1st Cir. 2000); Ostrowski v. Atl. Mut. Ins. Cos., 968 F.2d 171 (2d Cir. 1992); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089 (3d Cir. 1995); EEOC v. Warfield-Rohr Casket Co., 364 F.3d 160 (4th Cir. 2004); Rachid v. Jack in the Box, Inc., 376 F.3d 305 (5th Cir. 2004); Wexler v. White's Fine Furniture, Inc., 317 F.3d 564 (6th Cir. 2003); Visser v. Packer Eng'g Assocs., Inc., 924 F.2d 655 (7th Cir. 1991) (en banc); Hutson v. McDonnell Douglas Corp., 63 F.3d 771 (8th Cir. 1995); Lewis v. YMCA, 208 F.3d 1303 (11th Cir. 2000). *See also Gross*, 557 U.S. at 183–84 (Stevens, J., dissenting) ("[T]he Courts of Appeals to have considered the issue unanimously have applied *Price Waterhouse* to ADEA claims.").

223. The defendant contended that the direct evidence requirement applied because Justice O'Connor's concurrence in *Price Waterhouse* expressed the Court's holding. *Gross*, 557 U.S. 172–74. The plaintiff contended that, although the *Price Waterhouse* burden-shifting framework applied, the direct evidence requirement did not because the ADEA does not expressly require direct evidence, and thus no such requirement should be inferred consistent with the logic (though not the holding) of *Desert Palace*. *Id.*

adopt the holding of *Price Waterhouse*, and the limits of stare decisis meant that the Court was free to perform its textual analysis without any obligation to harmonize its interpretation with the rationales of the Justices who spoke for the *Price Waterhouse* majority. Justice Thomas began his analysis for the majority by invoking legislative inaction as a means to justify both the Court's refusal to apply stare decisis to either *Price Waterhouse* or *Desert Palace* and its ultimate reliance on textual analysis to resolve the meaning of the ADEA. Rejecting the canon of *in pari materia*, the Court cautioned that it "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."[224] Because of the 1991 Act, the Court concluded that the statute's provisions are meaningfully different. The ADEA contains no explicit authorization of a motivating factor test.[225] In addition, though the 1991 Act amended the ADEA in certain respects, it did not extend the motivating factor test to the ADEA.[226] The Court found significant Congress's decision to add the motivating factor test to Title VII but not to the ADEA, and as a result concluded that its interpretation of the ADEA was bound by neither *Desert Palace* nor *Price Waterhouse*.[227]

The Court then examined the "ordinary meaning" of the ADEA's prohibition of discrimination "because of [an] individual's age."[228] Consulting multiple dictionary definitions, the Court determined that the phrase "because of" is synonymous with "by reason of," or "on account of." The Court assumed this construction expressed the ordinary meaning of the statutory language in order to support the syllogism 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."[229] On the one hand, the Court's use of contemporaneous dictionary definitions to elucidate the statute's plain meaning represents a classic textualist approach. On the other hand, the Court's reasoning demonstrates that the choice to adhere to a particular interpretive method does not necessarily command any particular result, though it does constrain how the Court may justify that result. In *Gross*, the Court's textualism renders irrelevant past determinations of legislative

224. *Id.* at 174 (quoting Fed. Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008)).

225. *Id.* at 175.

226. Civil Rights Act of 1991, Pub. L. No. 102-166, secs. 115, 302, 105 Stat. 1071, 1079, 1088 (codified as amended at 29 U.S.C. § 626(e) (2012) and 2 U.S.C. § 1202 (2012)); *Gross*, 557 U.S. at 174.

227. *Gross*, 557 U.S. at 175.

228. *Id.* at 175–76 (quoting 29 U.S.C. § 623(a)(1)).

229. *Id.* at 176.

purpose and the common origins shared by Title VII and the ADEA. Textualism, however, afforded the Court considerable latitude when deciding whether to apply the canon of *in pari materia* to reconstruct the statute's ordinary meaning based on prior constructions of parallel terms.

The Court also exercised its discretion when selecting among possible definitions of the statute's terms. For example, while dictionaries typically define "because" as "for the reason that" and "because of" as "by reason of," they also define "because" as "for the . . . *cause* that,"[230] and, indeed, the word "reason" has as its secondary definition "a cause or motive."[231] These alternative definitions indicate that discrimination because of age need not be defined by an intention to discriminate on the basis of age, or that age must be a but-for cause as opposed to a contributing factor or motivation. Nevertheless, the Court concluded that the phrase "because of" requires a showing of but-for causation—the very showing rejected by a majority of the Court in *Price Waterhouse*[232]—thus ruling out the motivating factor test. In addition, the Court opined that, based on its current textualist approach, it was "far from clear" that it would reach the same approach as described in *Price Waterhouse* if it were to decide the issue today[233] and that, over time, its approach had proven unworkable due in part to the difficulty in crafting adequate jury instructions.[234]

In *Gross*, no Justice—including the author of the Court's opinion in *CBOCS*, Justice Breyer—argued that the Court had ignored the very principle of stare decisis announced in that case: that "respect for precedent" must be granted "whether judicial methods of interpretation change or stay the same."[235] Under that approach, it should be irrelevant whether the Court today would employ its preferred textual approach to reach a different result than had been reached in *Price Waterhouse*. Against

230. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 125 (David B. Guralnik ed., 2d ed. 1972) (emphasis added).

231. *Id.* at 1183. The primary definition, "an explanation or justification of an act," hardly seems applicable, as status-based discrimination is hardly a justification for an action in any socially or legally acceptable sense. *Id.*

232. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989) (Brennan, J.) ("To construe the words 'because of' as colloquial shorthand for 'but for causation,' as does Price Waterhouse, is to misunderstand them."); *id.* at 259–60 (White, J., concurring in the judgment) (agreeing with Justice Brennan's approach to analyzing causation in the plurality opinion). *But see id.* at 262–63 (O'Connor, J., concurring in the judgment) (disagreeing with the plurality's analysis of causation and calling it "dictum").

233. *Gross*, 557 U.S. at 178. *See also* Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 102 (2008) (stating that the ADEA must be "read . . . the way Congress wrote it").

234. *Gross*, 557 U.S. at 179. Of course, the Court had affirmed the adequacy of motivating factor jury instructions in *Desert Palace*. *See supra* text accompanying notes 210–15.

235. CBOCS West Inc. v. Humphries, 553 U.S. 442, 457 (2008).

this position, the Court argued that the 1991 Act did not just supersede *Price Waterhouse* but in fact showed *Price Waterhouse* to have been wrongly decided, because if Congress had thought that the motivating factor test was a proper construction of section 703(a)(1), it would not have included section 703(m).[236] Justice Breyer wrote in dissent that litigating claims of discrimination involving multiple motives would be rendered much more difficult without a motivating factor test because of the information asymmetry between the plaintiff and the employer.[237] In other words, Justice Breyer continued in *Gross* (just as he had in *CBOCS*) to favor an interpretation that harmonized the current rule with previously established rules, but he did not characterize the Court's failure to do so as a breach of the principle of stare decisis.

The result in *Gross* was unexpected and has been much criticized.[238] Perhaps even more unsettling to established legal policy, however, was the Court's representation that, despite all appearances,[239] it had not previously concluded that parallel language found in Title VII and the ADEA required congruent interpretation of parallel terms. In particular, the Court denied that it had ever determined that the *McDonnell Douglas* framework should apply to ADEA claims, and it declined to hold that *Gross* should be governed by that framework even after it determined that the motivating factor test did not apply.[240] In his dissent, Justice Stevens took aim at this contention, arguing that the Court had "long recognized that our interpretations of Title VII's language apply with equal force in the context of age discrimination, for the substantive provisions of the ADEA were derived *in haec verba* from Title VII."[241] He further argued that the Court had in fact applied *McDonnell Douglas* in its ADEA precedents.[242] Indeed,

236. *Gross*, 557 U.S. at 178 n.5. *CBOCS*'s treatment of *Patterson* is distinguishable in that Congress there intended to restore § 1981 doctrine to its pre-*Patterson* interpretation, whereas here Congress had no intention to return Title VII to its pre-*Price Waterhouse* structure.

237. *Id.* at 190–91 (Breyer, J., dissenting).

238. *See, e.g.*, Martin J. Katz, Gross *Disunity*, 114 PENN. ST. L. REV. 857, 858 (2010) (arguing that the Supreme Court's inconsistency regarding employment discrimination law is "normatively problematic").

239. The Court had previously applied the *McDonnell Douglas* test in prior cases brought under the ADEA. *E.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141–49 (2000).

240. *Gross*, 557 U.S. at 175 n.2 (stating that "the Court has not definitively decided whether the evidentiary framework of [*McDonnell Douglas*] utilized in Title VII cases is appropriate in the ADEA context" (citation omitted)).

241. *Id.* at 183 (Stevens, J., dissenting) (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)) (internal quotation marks omitted).

242. *Id.* at 184–85 (citing *Reeves*, 530 U.S. at 141–43; Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)).

in *Hazen Paper v. Biggins*,[243] the Court elected not to discuss whether a plaintiff who disproves the defendant's proffered legitimate, nondiscriminatory reason at the final stage of the *McDonnell Douglas* framework is automatically entitled to relief, because that question was already set to be answered by *St. Mary's Honor Center v. Hicks*,[244] a Title VII case in which the Court later addressed the issue directly.[245] *Hazen Paper* thus suggested the two statutes are so closely related as to render interchangeable decisions that interpret their parallel provisions.

The canon of *in pari materia* was only one of the textualist arguments that Justice Stevens wielded against the majority opinion. The other concerned the Court's reliance on legislative inaction to conclude that no version of mixed-motive analysis could apply under the ADEA because, when Congress had the opportunity to amend the ADEA to include the liberal Title VII test provided in the 1991 Act, it did not do so. Though Justice Stevens might have relied on the Court's own statements in *Patterson*[246] or Justice Scalia's arguments in *Johnson*,[247] he instead suggested that the Court should merely adopt the rule that it had followed in its recent decisions regarding the availability of disparate impact liability under the ADEA. In *Smith v. City of Jackson*,[248] the Court held that language in the ADEA that mirrored language in section 703(a) of Title VII should be read to provide a cause of action for disparate impact discrimination, even though Congress had declined to amend the ADEA to include a disparate impact provision when it passed the 1991 Act and had expressly provided for disparate impact liability under Title VII.

Unlike *Gross*, in *Smith*, the Court did not interpret the absence of an amendment to the ADEA as evidence that Congress intended for no disparate impact cause of action to be authorized under the Act. Rather, the Court "beg[an] with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."[249] The Court recognized that section 4(a)(2) was derived "*in haec verba* from Title

243. *Hazen Paper*, 507 U.S. at 604.

244. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

245. *Hazen Paper*, 507 U.S. at 613–14 (electing to remand the case rather than address this issue "prematurely," given that the question would be addressed in *Hicks*).

246. *See supra* Part I.A.

247. *See supra* Part II.B.2.

248. Smith v. City of Jackson, Miss., 544 U.S. 228, 232–33 (2005).

249. *Id.* at 233.

VII,"[250] and as a consequence named *Griggs* "a precedent of compelling importance" with respect to the proper interpretation of that provision.[251] The Court ultimately concluded that disparate impact analysis was available to plaintiffs, but on the more restrictive terms provided in *Wards Cove Packing Co. v. Atonio*.[252] Thus, although Congress had explicitly repudiated *Wards Cove* when it enacted the 1991 Act,[253] the Court's interpretation of section 703(a) in *Wards Cove* remained controlling with respect to the structure of disparate impact liability under the ADEA because the Court recognized that the language of the ADEA is parallel to the language of Title VII as originally enacted.

The *Gross* decision represents a profound shift in the Court's interpretive perspective in employment discrimination cases. Although the turn toward textualist interpretation is part of that shift, the Court's new interpretive perspective is also defined by its rejection of the interpretive rationales of precedents that relied on a remedial construction of the statute. Textualism need not be practiced in this way; members of the Court appear to have chosen a form of textualism that is especially disdainful of vertical coherence, perhaps because these members wished to free the Court from the influence of its precedents. To support this new approach, the Court deviated from textualism in *Gross* and relied on legislative inaction to explain why *Price Waterhouse* should not apply to the ADEA. The Court also rejected the borrowed statute rule as a means for obtaining further semantic context. The result is a statute newly and decisively cleaved from the statute on which its basic provisions were modeled. The Court thus uses its plain meaning interpretation of the ADEA to provide something of a clean break from precedents that it would otherwise have been compelled to confront.

250. *Id.* at 233–34. The language of section 4(a)(2) of the ADEA, 29 U.S.C. § 623(a)(2), parallels the language of section 703(a)(2), 42 U.S.C. § 2000e-2(a)(2), the provision on which the Court relied in *Griggs* and other precedents leading up to *Wards Cove* to support the conclusion that Title VII establishes a cause of action for disparate impact discrimination. In his plurality opinion, Justice Stevens also referred to *Griggs* as "a precedent of compelling importance" due to the linguistic parallels between the two statutes. *Id.* at 234.

251. *Id.* at 234.

252. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989) (holding that *Griggs* should not be understood to transfer a burden of persuasion to the employer upon a prima facie showing of disparate impact or to require a showing that practices producing a disparate impact are "'essential' or 'indispensable' to the employer's business"). *See also Smith*, 544 U.S. at 240 (recognizing the *Wards Cove* test as "applicable to the ADEA").

253. Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 2(2), 105 Stat. 1071, 1071 (criticizing *Wards Cove* for having "weakened the scope and effectiveness of Federal civil rights protections"); *id.* sec. 105, 105 Stat. 1071, 1074 (codifying the *Griggs* test and restoring disparate impact to its pre-*Wards Cove* form).

C. *UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER V. NASSAR*

The ironies of the Court's reasoning in *Gross* did not end with its interpretation of the ADEA. One critical question following *Gross* concerned where else the Court might apply the same reading of the "because of" discrimination construct articulated in that case. Like the liability provisions of the ADEA, Title VII's antiretaliation provision had not been amended by the 1991 Act. But, that provision was also located within the same statute to which the 1991 Act's motivating factor test applied and under which the Court had decided *Price Waterhouse*.[254] This raised the question of which test should apply to retaliation claims—the motivating factor test of the 1991 Act, the *Price Waterhouse* mixed-motive test, or the *Gross* but-for causation test. In *University of Texas Southwestern Medical Center v. Nassar*,[255] the Court held that a plaintiff must show but-for causation to sustain a retaliation claim under Title VII. A textualist interpretation of the term "because of . . . age" under the ADEA had led the Court in *Gross* to set aside the reasoning of *Price Waterhouse*, and in doing so the Court asserted that it had never held that Title VII and the ADEA must be governed by the same interpretation where they share identical terms; in *Nassar*, the Court again relied on textualism, but this time to apply its construction of liability for age discrimination under the ADEA in *Gross* to liability for retaliation under Title VII.

The Court acknowledged that *Gross* "restrict[ed] its analysis to the statute before it and with[held] judgment on the proper resolution of a case . . . which arose under Title VII rather than the ADEA."[256] However, it found that *Gross* continued to have "persuasive force,"[257] and so ruled that "[g]iven the lack of any meaningful textual difference between the text in this statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action."[258] The Court observed that the language of the 1991 Act "says nothing about retaliation claims," and it stated that "[g]iven this clear language, it would be

254. Title VII's antiretaliation clause provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . 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." 42 U.S.C. § 2000e-3(a) (2012).

255. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

256. *Id.* at 2527.

257. *Id.*

258. *Id.* at 2528.

improper to conclude that what Congress omitted from the statute is nevertheless within its scope."[259] The Court also presented a "structural" argument that, because Congress inserted the motivating factor test within the same subsection that contains status-based claims for discrimination, but not retaliation claims, the amendment must be limited to the former.[260] This structural argument is fundamentally textualist in nature, for it explains why the motivating factor test should be construed to define the meaning of "discrimination" and "unlawful employment actions" in one section of the statute but not another. As the Court explained, "[t]ext may not be divorced from context."[261] In other words, the structure of Title VII provides further insight into the semantic context in which the Court interprets the statutory text.

The Court considered the respondent's argument that *CBOCS* established that "broadly worded" statutory bans against status-based discrimination should be read to include claims of retaliation.[262] The Court concluded that *CBOCS* was "not controlling" because it did not support the proposition that any reference to race or other protected status in a federal civil rights statute should "be treated as a synonym for 'retaliation.'"[263] The Court's reading of *CBOCS*, however, addresses only its substance, and not its rationale or its theory of stare decisis. It in fact dismisses that rationale on textualist grounds, rather than accepting it on its terms. As already discussed, *CBOCS* can be read to establish that the Court should adopt the same interpretive perspective when reading statutes that share a common origin and purpose. That interpretive perspective led the Court to address the question whether retaliation claims are viable under § 1981 on the basis of the broad remedial purposes established by the Court's § 1981 and § 1982 precedents, including *Sullivan*, which had held that relation claims are available under § 1982.[264]

Reasoning from the interpretive perspective established in its prior Title VII cases, the Court should have explained its reasoning in the same terms regarding the construction of the statute's broad remedial purposes and the limitations of a but-for causation test that had motivated it to establish mixed-motive liability in *Price Waterhouse*. For example, Justice Brennan explained in *Price Waterhouse* that mixed-motive liability was

259. *Id.*
260. *Id.* at 2529.
261. *Id.* at 2530.
262. *Id.* at 2529 (quoting CBOCS West, Inc. v. Humphries, 553 U.S. 442, 452 (2008)) (internal quotation marks omitted).
263. *Id.* at 2530.
264. *See supra* text accompanying notes 71–73.

necessary in order to aid women in avoiding the catch-22 of being disadvantaged both for exhibiting stereotypically masculine traits and for failing to exhibit those traits to the extent that, when held by men, they are viewed as indicators of effective management.[265] Seeking consistency with its established retaliation precedents, the *Nassar* Court might have looked to its recent decision in *Burlington Northern & Santa Fe Railway v. White*,[266] establishing that protection against retaliation serves the purpose of preventing claimants and witnesses from being dissuaded from opposing discriminatory practices.[267] An employer shown to have a retaliatory motive, even if he also acted upon other legitimate motives, will no doubt undermine the willingness of future claimants and witnesses to object to discriminatory practices or to participate in proceedings related to claims of discrimination. Restricting plaintiffs to a standard of but-for causation undermines not only the statute's purposes but the very reading that the Court had previously given the retaliation provision of the statute.[268] The majority opinion in *Nassar*, however, never once mentioned *Burlington Northern*, and instead used the textualist approach modeled by *Gross* to distance itself from all considerations of purpose and prior interpretations that would have been required had the Court maintained an interpretive perspective consistent with that of its Title VII precedents.

D. THE LIMITATIONS PERIOD DECISIONS: *NATIONAL RAILROAD PASSENGERS V. MORGAN* AND *LEDBETTER V. GOODYEAR TIRE & RUBBER*

In an act reminiscent of its response to the *Wards Cove* decision,[269] Congress passed the Lilly Ledbetter Fair Pay Act of 2009 after finding that the Court's decision in *Ledbetter v. Goodyear Tire & Rubber*[270] had "significantly impair[ed] statutory protections against discrimination in compensation . . . . by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress."[271] The *Ledbetter* Court overturned a jury verdict for the

265. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

266. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53 (2006).

267. *Id.* at 69–70.

268. *See id.* at 61–63 (concluding, on textualist grounds, that under section 704(a), the retaliation provision, a claim for retaliation may be sustained on the basis of employer conduct that would not support a claim of status-based discrimination under section 703(a)(1), because the former provision does not contain the limiting language present in the latter).

269. *See supra* note 253 and accompanying text.

270. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

271. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, sec. 2, 123 Stat. 5, 5 (2009) (codified as amended at 42 U.S.C. § 2000e-5 (2012)).

plaintiff, Lilly Ledbetter, and held that her claims of sex-based pay discrimination were time-barred because the employer's discriminatory pay decision occurred more than 180 days prior to her filing of a charge with the EEOC, even though Ledbetter had otherwise provided evidence that the pay that she received within that statutory limitations period was unequal to that of her male peers because it reflected a prior discriminatory employment decision. The statutory basis for the Court's decision was section 706(e)(1) of Title VII, which provides that, before a plaintiff may bring a civil action, "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred."[272] The Court concluded that no unlawful employment practice had occurred within the limitations period. Rather than defining pay discrimination in terms of the employer's ongoing practice of paying the plaintiff an unequal wage, the Court described it as a "discrete act"[273] limited to a sex-based "pay-setting decision"[274] and concluded that no such decision had occurred within the limitations period.

To reach this conclusion, the Court relied on its holding in *National Railroad Passengers v. Morgan*[275] that "a Title VII plaintiff 'can only file a charge to cover discrete acts that occurred within the appropriate time period.'"[276] Like *Desert Palace*, *Morgan* was decided late in the tenure of the Rehnquist Court, and Justice Thomas authored the majority opinion. Justice Thomas consulted the dictionary definition of "occur" to conclude that "[a] discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.'"[277] The phrase "discrete acts" does not appear in the statutory text, but was used by Justice Thomas to explain what the statute means by "an unlawful employment practice" and how the statute intends for a court to determine when "an unlawful employment practice occurred."[278] Justice Thomas distinguished between "discrete acts" of discrimination and hostile work environment harassment, which by its "very nature involves repeated conduct."[279] Justice Thomas reasoned that a

272. 42 U.S.C. § 2000e-5(e)(1).

273. *Ledbetter*, 550 U.S. at 621 (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002)).

274. *Id.*

275. *Morgan*, 536 U.S. at 101.

276. *Ledbetter*, 550 U.S. at 628 (quoting *Morgan*, 536 U.S. at 114).

277. *Morgan*, 536 U.S. at 109–10 & n.5.

278. *Id.* at 110–11.

279. *Id.* at 115. Hostile work environment harassment is cumulative and continuing in nature because the liability standard of severe or pervasive conduct makes the repetition of harassing conduct salient to a determination of liability, and "a single act of harassment may not be actionable on its own." *Id.* at 115–16.

claim of hostile work environment harassment is therefore timely if "an act contributing to the claim occur[red] within the filing period."[280] Relying on the canon of *ejusdem generis*, Justice Thomas concluded that unlawful employment practices under section 703(a) should typically be discrete acts because the specific acts enumerated in that section (i.e., "to fail or refuse to hire or to discharge any individual . . .") are themselves discrete.[281] The plaintiff's discrete acts of discrimination occurring outside the limitations period were therefore time-barred even though they occurred in a series and were of an escalating nature, ending in termination. In *Ledbetter*, the Court followed this logic and determined that the pay discrimination challenged by Ledbetter was reducible to specific, discrete decisions in which Ledbetter's pay was set on a discriminatory basis.[282]

The distinction between discriminatory practices that are discrete and those that are cumulative or continuing is fundamental to the outcome of *Morgan*, even though that case otherwise represents an aggressive textualist interpretation of sections 703(a) and 706(e). The critical flaw in *Morgan*'s reasoning is that the distinction on which it so heavily relies—between discrete and cumulative acts—was not derived from the statutory text itself, but rather was adapted to address the cumulative structure of hostile work environment doctrine, which had been developed by the Court in order to fulfill the statute's purposes.[283] Furthermore, Justice Thomas's opinion had been explicit in disclaiming that the Court's interpretation of the limitations period provisions in that case would control pattern or practice claims.[284] *Ledbetter* took a step toward resolving these ambiguities by enforcing the uniform application of the limitations period that the statute appeared to convey.

To do so, however, the Court was forced to confront its prior decision of *Bazemore v. Friday*,[285] a race-based pay discrimination case, which held

280. *Id.* at 117.

281. *Id.* at 111.

282. Regarding Ledbetter's notice of the pay discrimination, the Court required only that her compensation was communicated to her, not that a basis for her to believe that she had received unequal pay was communicated to her. *Ledbetter*, 550 U.S. at 627–28. Ledbetter contended that discriminatory performance evaluations had caused her salary to be set artificially low, because Goodyear's policy was to use those evaluations to guide compensation. The pay decisions that used those evaluations occurred outside the limitations period.

283. *See supra* note 268–72 and accompanying text. Justice O'Connor's dissent in *Morgan* raises this argument, and she was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy in concluding that hostile work environment claims should be governed by the same standard as claims based on "discrete acts" of discrimination. *Morgan*, 536 U.S. at 124–26 (O'Connor, J., dissenting).

284. *Morgan*, 536 U.S. at 115 n.9 (majority opinion).

285. Bazemore v. Friday, 478 U.S. 385 (1986) (per curiam).

that pattern-or-practice plaintiffs could bring suit based on salary disparities between black and white workers that originated from segregationist policies preceding the effective date of Title VII because "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII."[286] In *Ledbetter*, the plaintiff and Justice Ginsburg in dissent both contended that *Bazemore* controlled and that a proper reading of that decision required that Ledbetter's charge be considered timely because she received paychecks during the limitations period that reflected the defendant's discriminatory pay-setting decision.[287] Although *Bazemore* predated *Morgan*, the *Morgan* Court did not purport to overrule *Bazemore*. In fact, the *Morgan* Court reaffirmed *Bazemore* as consistent with its "discrete acts" interpretation of the statute, citing the *Bazemore* Court's determination that each paycheck paying the discriminatory wage was "a wrong actionable under Title VII."[288] The *Ledbetter* Court distinguished *Bazemore* by drawing a distinction between the facially discriminatory policy in that case that had continued to be applied after Title VII's effective date (even though the policy had in fact been dismantled) and a facially neutral policy linking pay to performance that merely happened to rely on discriminatory performance evaluations through a pay decision that took place outside of the limitations period.[289]

In her dissent, Justice Ginsburg reiterated the *Bazemore* Court's conclusion that the payment of an unequal wage is discrimination,[290] and she observed that, even under the distinction made in *Morgan*, pay discrimination resembles hostile work environment harassment in that it

286. *Id.* at 395 (Brennan, J., concurring in part and joined by all members of the Court).

287. *Ledbetter*, 550 U.S. at 633; *id.* at 646–48 (Ginsburg, J., dissenting). The Supreme Court had also enforced strict interpretations of the limitations period prior to *Bazemore*, and the *Morgan* Court contended in this regard that, though it was presented in a new textualist guise, its fundamental conclusion with respect to "discrete acts" of discrimination was nothing new. *Morgan*, 536 U.S. at 112–13. *See also, e.g.*, Del. State Coll. v. Ricks, 449 U.S. 250, 257–58 (1980) (holding that a professor who was denied tenure and then offered a terminal contract could not calculate his time to file a charge based on his actual termination, because the tenure decision and the termination were not a single, continuing violation); United Air Lines, Inc. v. Evans, 431 U.S. 553, 557–60 (1977) (holding that a flight attendant terminated for violating the airline's "no marriage" policy, who failed to file a timely charge challenging that action, could not pursue a claim based on her loss of seniority after she was rehired). *Bazemore* was therefore decided against the background of those precedents, which the Court had not found to undermine its conclusions.

288. *Morgan*, 536 U.S. at 111–12 (internal quotation marks omitted).

289. *Ledbetter*, 550 U.S. at 634–36 ("In other words, a freestanding violation may always be charged within its own charging period regardless of its connection to other violations.").

290. *Id.* at 647 (Ginsburg, J., dissenting) ("Paychecks perpetuating past discrimination . . . are actionable not simply because they are 'related' to a decision made outside the charge-filing period, but because they discriminate anew each time they issue." (citation omitted) (citing *Bazemore*, 478 U.S. at 395–96)).

represents "the cumulative effect of individual acts."[291] Indeed, victims of pay discrimination may be unable to discover that they have received a discriminatory wage until significant time has passed, either because the pay disparity unfolds in small increments or because the employer keeps information about employee compensation confidential.[292] Justice Ginsburg also criticized the Court's reliance on *Lorance v. AT&T Technologies*,[293] which held that female employees laid off due to low seniority in 1982 failed to bring a timely charge because the company's challenged revision of its policy on calculating seniority occurred in 1979. The 1991 Act expressly superseded *Lorance*, providing that, for purposes of challenging discriminatory seniority decisions, "an unlawful employment practice occurs . . . when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system."[294] Moreover, according to Justice Ginsburg, the *Ledbetter* majority overlooked an important purpose of the 1991 Act as revealed in the legislative history: to repudiate *Lorance* and affirm the holding of *Bazemore* that when "an employer adopts a rule or decision with an unlawful discriminatory motive, each application of that rule or decision is a new violation of the law."[295] The Court also overlooked Title VII's purpose to end sex-based pay discrimination, which would be frustrated by permitting such discrimination to go without remedy on technical grounds.[296]

291. *Id.* at 648 (Ginsburg, J., dissenting) (internal quotation marks omitted).

292. *Id.* at 645 (Ginsburg, J., dissenting). Goodyear in fact followed such a practice of keeping compensation confidential. *Id.* at 650 (Ginsburg, J., dissenting).

293. Lorance v. AT&T Techs., Inc., 490 U.S. 900, 904–13 (1989).

294. 42 U.S.C. § 2000e-5(e)(2) (2012). *See also Ledbetter*, 550 U.S. at 652 (Ginsburg, J., dissenting) ("The Court's extensive reliance on *Lorance*, moreover, is perplexing for that decision is no longer effective: In the 1991 Civil Rights Act, Congress superseded *Lorance*'s holding." (citation omitted)).

295. *Ledbetter*, 550 U.S. at 653–54 (Ginsburg, J., dissenting) (citing S. REP. NO. 101-315, at 54 (1990), which was submitted with the Civil Rights Act of 1990). Justice Ginsburg also observed a legislative purpose to permit challenges to pay discrimination for acts outside the limitations period based on Congress's provision of backpay for a period of up to two years *prior to the filing of the charge*. *Id.* at 654 (Ginsburg, J., dissenting); 42 U.S.C. § 2000e5(e)(1).

296. *Ledbetter*, 550 U.S. at 659 (Ginsburg, J., dissenting) (arguing that "the Court has strayed from interpretation of Title VII with fidelity to the Act's core purpose"). *See also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 348 (1977) ("The primary purpose of Title VII was to assure equality of employment opportunities and to eliminate . . . discriminatory practices and devices . . . ." (internal quotation marks omitted)); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) ("It is . . . the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination."); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (stating that, under Title VII, Congress required "the removal of artificial, arbitrary, and unnecessary barriers to employment . . . [that] operate invidiously to discriminate" on the basis of the plaintiff's status).

The *Ledbetter* decision thus demonstrates the Court's shift in interpretive perspective toward a strict textualism that rejects consideration of any purpose not clearly disclosed by the text or structure of the statute. Although this shift had certainly begun already in *Morgan*, that case differed substantially in that the Court was willing to consider how the statute could be interpreted so that its procedural provisions would be consistent with the liability standards that the Court had developed over time.[297] The *Ledbetter* Court chose a strict interpretation of the statutory text over consideration of the statute's purposes and legislative history, or of the practical effects of its interpretation. In superseding *Ledbetter*, Congress took the extraordinary step of repudiating its interpretation as contrary to the intent of Congress. Of course, congressional intent is precisely what the *Ledbetter* Court was determined not to consider, at least not as manifested outside of the statute's text. Moreover, there is little basis for believing that Congress could restore the authority of its own intent: first, because a subsequent Congress's pronouncement of the enacting body's intent can hold very little weight except as a prediction of the present Congress's future legislative actions; and second, because the manner of statutory interpretation is a purely jurisprudential matter. While Congress may guide the Court's interpretations through the design and drafting of its statutes, whether it may require the Court to prefer certain interpretive methods over others is far from certain.[298]

E. *RICCI V. DESTEFANO*

In *Ricci v. DeStefano*,[299] the Supreme Court held that the City of New Haven committed race-based disparate treatment when it refused to certify the results of a test to determine the eligibility of firefighters for promotion because it feared that certification would lead to a successful disparate impact challenge by African American firefighters, none of whom were

297. Hostile work environment harassment is a cause of action inferred by the Court from the broadly articulated antidiscrimination protections of section 703(a). It is a judicial creation of a cause of action, unlike the discrete examples of discrimination provided by the text of the statute (i.e., hiring and discharge), and because it is so different it necessitated the *Morgan* Court's distinction between discrete and cumulative acts of discrimination. *Ledbetter* makes no such allowances, but appears to agree with the *Morgan* dissenters regarding the hostile work environment claims that the statute makes no distinction between types of claims for purposes of assessing when they occur. *Morgan*, 536 U.S. at 124–25 (O'Connor, J., dissenting) (arguing that "§ 2000e-5(e)(1) serves as a limitations period for all actions brought under Title VII, including those alleging discrimination by being subjected to a hostile working environment").

298. For example, the 1991 Act instructs the courts that they may not rely on legislative history regarding those provisions overruling *Wards Cove*, except for a particular interpretive memorandum. Congress did not attempt to forbid all uses of legislative history.

299. Ricci v. DeStefano, 557 U.S. 557 (2009).

eligible for promotion based on those results. Several white firefighters and one Hispanic firefighter challenged the city's decision under Title VII and the Equal Protection Clause.[300] The Court reversed an order of summary judgment for the defendants and entered summary judgment on behalf of the plaintiffs.[301] Confining its decision to the Title VII claim, the Court rejected the district court's conclusion that the city's motivation to comply with the statute did not constitute discriminatory intent as a matter of law.[302] Rather, the Court began its own analysis from the "premise" that "[t]he City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense."[303] The Court looked to its constitutional decisions regarding voluntary public uses of race-based remedies to conclude that the city could make no such defense because it lacked a "strong basis in evidence" to conclude that certification of the test results would have exposed it to disparate impact liability.[304]

In stating its "premise" that the city had violated section 703(a)(1) absent a valid defense, the Court's reasoning was, in a sense, textual. The Court declared a statutory provision to be unambiguous, and, as a consequence, no other consideration of statutory purposes or prior decisions was required. The Court's refusal to distinguish between invidious and compliance-oriented race-based reasons[305] is consistent with the plain meaning of the provision on which the Court relied, section 703(a)(1); its text makes no such distinction. Furthermore, the statute makes no distinction between race discrimination plaintiffs based on any plaintiff's particular racial status. In addition, the Court rightly pointed out that the 1991 Act, in codifying the disparate impact theory, makes no special allowances for compliance based measures intended to avert disparate impact liability.[306]

300. *Id.* at 574.

301. *Id.* at 575–76.

302. *Id.* at 592–93. *See also* Ricci v. DeStefano, 554 F. Supp. 2d 142, 160 (D. Conn. 2006) (granting defendants' motion for summary judgment on their Title VII claim in the district court and finding that their "motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent").

303. *Ricci*, 557 U.S. at 579.

304. *Id.* at 585. *See also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (Powell, J.) (mandating the application of a "strong basis in evidence" test to determine whether race-conscious remedial action is necessary to eliminate racial segregation or discrimination in public employment); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989) (citing *Wygant*, 576 U.S. at 277) (same).

305. *Ricci*, 557 U.S. at 579–80 ("Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race.").

306. *Id.* at 581–82.

The *Ricci* Court's reasoning most resembles that of the other decisions discussed in this part in its stark departure from the interpretive perspective assumed in Title VII's foundational decisions.[307] Its initial treatment of the statute's text facilitates this departure. *Ricci*'s textualism is manifest not in any extended examination of the statute's text, but in the decisiveness with which it declares the statute's meaning unambiguous and thus frees itself of the need to consider countervailing statutory purposes and interpretive rationales. Like Justice Scalia in his *Johnson* dissent,[308] the *Ricci* majority found the meaning of section 703(a)(1) to be clear and unambiguous from the ordinary meaning of its text. This is why it stated as a premise what would ordinarily be considered a conclusion—that the city's actions violated Title VII absent special justification. The Court did not entertain the obvious point that "to discriminate" ought not to be read in its ordinary meaning to include "to comply." The question of what is meant by "discriminate" under the statute is very much at issue in *Ricci*. Is it discrimination to attempt to comply with the statute by avoiding racially disparate impacts? The Second Circuit thought not,[309] and the answer is far from clear. But the Court simply had no tolerance for the question.

In fact, the Court attempted to discredit this question at the outset. Looking at the "original wording" of section 703, before the 1991 Act's passage, the Court concluded that it provided only for disparate treatment liability.[310] The very existence of the amendments was taken as evidence of this reading. Disparate impact was treated as a theory of liability that was never legitimately part of the statute until the *Griggs* test was codified by the 1991 Act.[311] Disparate treatment and disparate impact then had to be harmonized after the fact because, in the *Ricci* Court's view, they did not originate in the same legislative moment. Congress, according to this view, could not have intended disparate treatment discrimination to exclude the employer's consideration of race in an effort to avoid disparate impact liability because the latter theory of liability did not exist at the time of Title VII's enactment.

The Court's reasoning is sharply disconnected from its precedents in yet other ways. Section 703(a)(1) makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms,

307. *See supra* Part II.A.2.

308. *See supra* notes 194–201 and accompanying text.

309. *See* Hayden v. Cnty. of Nassau, 180 F.3d 42, 51 (2d Cir. 1999) (holding that the defendant's intent to remedy a disparate impact resulting from the administration of employment-related exams "is not equivalent to an intent to discriminate").

310. *Ricci*, 557 U.S. at 577.

311. *Id.* at 577–78.

conditions, or privileges of employment, because of *such individual's* race."[312] It does not prohibit the consideration of race generally; it prohibits the employer from making *the plaintiff's* race salient to its employment decision. The Court did not conclude—and indeed could not have concluded at summary judgment—that the city decided to invalidate the results of its promotion test because the firefighters who were made eligible for promotion based on those results were almost exclusively white, and would have upheld the results had the eligible firefighters been instead minorities. It concluded only that the city invalidated the test results because it observed that they had resulted in a racially disproportionate impact.[313]

Still other aspects of *Ricci* contradicted established disparate treatment analysis. For example, the Court might have treated the city's consideration of racial disparities as either direct or circumstantial evidence of its discriminatory intent and reversed the grant of summary judgment on those more familiar grounds.[314] In addition, section 703(a)(1) makes unlawful discrimination that produces an adverse employment action—i.e., an adverse change in the plaintiff's "compensation, terms, conditions, or privileges of employment."[315] The requirement of an adverse employment action is reflected by "orthodox Title VII doctrine" from *McDonnell Douglas* to the present day.[316] The city's decision to invalidate the test results did not in the usual sense constitute an adverse employment action against the plaintiffs. They were not penalized by the decision except insofar as they may have been required, along with other applicants for

312. 42 U.S.C. § 2000e-2(a)(1) (2012) (emphasis added).

313. *Ricci*, 557 U.S. at 579 ("All the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race – i.e., how minority candidates had performed when compared to white candidates."). The Court, in fact, completely neutralizes the question of the city's intent. *See id.* at 585 (holding that the defendants would be liable for discrimination even if they "*were motivated as a subjective matter* by a desire to avoid committing disparate-impact discrimination" (emphasis added)).

314. The majority instead left that argument to Justice Samuel Alito in his concurrence, and, although he advanced what should have been a more modest and familiar interpretation of the statute, his opinion failed to attract a majority of the Justices. *Id.* at 596–605 (Alito, J., concurring) (arguing for reversal of summary judgment on the grounds that evidence that political influence by a local pastor who advocated for the promotion of black firefighters had swayed the city's decision raised a genuine issue of intentional discrimination).

315. 42 U.S.C. § 2000e-2(a)(1).

316. Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1356 (2010) (citing numerous Court of Appeals decisions). *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (holding that an adverse employment action is an element of a prima facie case of racial discrimination); Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 57 (2006) (discussing adverse employment action requirement in relation to retaliation claims).

promotion, to take a revised test in the future.[317]

Finally, the *Ricci* Court eschewed other significant statutory precedents. As I have previously argued, the Court failed to explain why, under *Weber* and *Johnson*, an employer is permitted to engage in voluntary affirmative action by awarding status-based preferences to employees in response to a manifest racial imbalance in its workforce (whether or not the employer's practices caused the imbalance), and yet, under *Ricci*, the same employer is prohibited from suspending its ordinary employee evaluation and promotion procedures in response to its observation that those procedures create racial disparities.[318] *Ricci* thus appears to provide less discretion to employers who take non-preference-based action to prevent a violation of the statute than *Weber* and *Johnson* provide to employers who adopt status-based affirmative action measures without admitting any possible predicate violation.

As discussed above, the Court justified upholding the race- and sex-based affirmative action plans in *Weber* and *Johnson* by referring to Congress's preference that employers' voluntary compliance with Title VII be the dominant means by which the statute's purposes are satisfied.[319] The *Ricci* Court purported to give this policy preference fair consideration when it imposed the strong basis in evidence test in lieu of the plaintiffs' argument that the employer must "know, with certainty" that it has committed disparate impact discrimination in order to justify taking action to comply with the statute.[320] The Court's conclusion that the strong basis in evidence standard "leaves ample room for employers' voluntary

317. Primus, *supra* note 316, at 1357 ("To be sure, setting aside the test results almost surely reduced the plaintiffs' average probability of promotion. But whether that sort of probabilistic concern rises to the level of an adverse employment action for Title VII purposes is a question over which courts have divided in the past." (footnote omitted)).

318. Rich, *supra* note 119, at 72–74. *See also Ricci*, 557 U.S at 629 (Ginsburg, J., dissenting) (remarking at "the discordance of the [*Ricci*] Court's opinion with the voluntary compliance ideal"). Simply having a "manifest racial imbalance" in one's labor force is not a violation of Title VII, nor does it provide a strong basis in evidence to believe that such a violation exists. For this reason, Justice Harry Blackmun argued in a concurring opinion in *Weber* that the employer should at least be held to an "arguable violation" standard before being permitted to voluntarily use a race-conscious remedy. United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 211–15 (1979) (Blackmun, J., concurring). Interestingly, the plaintiffs in *Ricci* had argued below that, in both designing the promotion test and invalidating its results, the city had been motivated by a desire to promote racial diversity and the district court had found that the "real crux of [the] plaintiffs' argument" was that the city "had already decided" upon its preferred promotional results and that its "diversity rationale [was] prohibited as reverse discrimination under Title VII." Ricci v. DeStefano, 554 F. Supp. 2d 142, 156–57 (D. Conn. 2006).

319. *See supra* text accompanying notes 153–57 & 196. For other cases in which the Court has referenced a congressional intent to foster voluntary compliance with Title VII, see *supra* note 146.

320. *Ricci*, 557 U.S. at 581.

compliance efforts"[321] may have seemed credible in the absence of *Weber* and *Johnson*, but it seems absurdly restrictive in comparison with the latitude that they provide. The Court acknowledged the additional "important purpose of Title VII—that the workplace be an environment free of discrimination, where race is not a barrier to opportunity."[322] However, it made no mention of *Griggs* as the source of that phrase.[323] Had it done so, it would also have had to confront *Griggs*'s interpretation of that purpose: that it requires that employers not be permitted "to favor an identifiable group of white employees over other employees" by relying on facially neutral workplace policies that entrench historical patterns of racial segregation.[324]

Because *Ricci* concerned conduct by a public employer, there is some logic to harmonizing the statutory and constitutional standards. Justice Scalia had himself advocated this approach to voluntary affirmative action programs by public employers in his dissent in *Johnson*; his arguments failed then, but they prevailed in *Ricci*.[325] Still, *Ricci* provides an interpretation of Title VII that applies to all employers, and there are reasons to hold private employers to a more deferential standard than public employers.[326] Yet another way to think of the *Ricci* majority's and Justice Scalia's arguments for unification of the statutory and constitutional standards is that they use the Court's constitutional precedents as semantic context from which to understand what is meant by "race discrimination" when one is discussing voluntary remedial action. These arguments pose the question of why race discrimination should mean one thing under one body of law and another under a different body of law, particularly when both laws govern the same conduct.[327] In this sense, *Ricci* was meant to enforce horizontal coherence between the statutory and constitutional

321. *Id.* at 583.

322. *Id.* at 580.

323. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) (identifying Congress's objective in enacting Title VII as "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees").

324. *See id.* at 430 ("Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

325. *See supra* notes 197–201 and accompanying text.

326. Private employers are not governed by the Equal Protection Clause, and the Supreme Court has long defended the interests of private employers in avoiding undue encroachment by courts on legitimate exercises of their business discretion. *See* Rich, *supra* note 119, at 56–58 (demonstrating that, within its Title VII jurisprudence, the Supreme Court has protected employers' interests in the free exercise of their legitimate business discretion).

327. *See* Stephen M. Rich, *One Law of Race?*, 100 IOWA L. REV. (2014) (discussing the importance of this question across race equality law).

regimes. It does so, however, by shifting the Court's interpretive perspective, turning the Court away from its Title VII precedents and toward constitutional precedents and principles of greater elasticity, allowing it to substitute new concerns for those established by its prior interpretations.

In sum, the Court's interpretive perspective in *Ricci* demonstrates a remarkable shift from the interpretive perspective it held during the foundational period of its Title VII jurisprudence. As in *Gross*, the *Ricci* Court supplements its textual analysis with interpretive assumptions that either discredit or marginalize prior decisions. Although those prior decisions concern related subject matters, their rationales receive no stare decisis protection and their holdings have not been controlling in the recent cases discussed here. This shift in interpretive method and assumptions makes new, even radical, interpretations of familiar texts or phrases possible, just as it releases the Court from strict adherence to its own precedents by freeing it from adherence to their rationales. The price of doing so, however, is the loss of statutory coherence in employment discrimination law, and the undermining of interpretive rationales that could have otherwise provided a means for its restoration in the future.

IV. STARE DECISIS AND STATUTORY COHERENCE

The cases discussed in Part III illustrate what the Court's decisions look like when it abandons its prior interpretive perspective in favor of a new textualist approach. This part will discuss the result of this abandonment of perspective, which may constitute a loss of either intra- or inter-statutory coherence. Loss of intra-statutory coherence takes many forms. It may occur in the form of a loss of vertical coherence (that is, consistency with past precedent) that renders statutory meaning and enforcement unpredictable. It may also lead to a loss of horizontal coherence by disrupting interpretive assumptions that have previously been used to explain the rationality of a statute's provisions or of the relationship between one statute and a surrounding body of statutory law.[328] In this

328. Particular dynamic theories may propose principles and assumptions that courts ought to rely upon to maintain horizontal coherence. *See, e.g.*, ESKRIDGE, *supra* note 29, at 257–58 (describing an "evolutive" approach to statutory interpretation in which courts' assumptions when interpreting a statute reflect evolving social and legal norms and seek to identify statutory meaning within a field of existing law and policy). These normative aspirations for dynamic interpretation, however, may be distinguished from descriptive claims about the ordinary exercise of judicial discretion concerning matters of interpretive method. Though an alignment of practical interpretation with certain guiding normative principles may produce desirable results, no existing doctrine requires courts to observe such principles when selecting between interpretive methods.

sense, the law loses its internal rationality, because new interpretations cannot be harmonized with prior interpretations given that both appeal to different, even antagonistic, sources of meaning. Inter-statutory coherence is principally a form of horizontal coherence, though as shown by *Nassar*, once the meaning of statutory terms is disrupted across statutes, it may be disrupted within a statute.

This part will conclude by explaining why the doctrine of stare decisis provides insufficient protection from the particular disruptions of statutory coherence that may result from abandonment of an interpretive perspective. This disruption cannot be explained as a passive consequence of statutory interpretation; it is, rather, the result of the conflict of different judicial decisions undertaken from different interpretive perspectives.

A. INCOHERENCE IN THE CURRENT REGIME

1. Intra-Statutory Incoherence

The most obvious problem raised by radical and abrupt changes in a court's interpretive perspective is the erosion of intra-statutory coherence that occurs when present interpretations of a statute cannot be reconciled with prior interpretations of the same statute because present interpretations rely on fundamentally different rationales than those endorsed by prior interpretations. Such changes in a court's interpretive perspective may alter the relationship between statutory provisions, the meaning of statutory terms, enforcement practices, compliance efforts, and litigation strategies. Though not necessarily predictive of the outcome, adherence to a prior interpretive perspective preserves an internally consistent and rational relationship between statutory provisions, and it also permits future courts and litigants to form their own reasonable interpretations of other terms in the statute by extrapolating from prior interpretive guidance.

Whether intra-statutory incoherence *should* be avoided through judicial interpretation is a question that may receive different answers depending on the interpretive theory to which one subscribes. Viewing legislators as "reasonable persons pursuing reasonable purposes reasonably,"[329] purposivists envision a statute as a coherent whole intended to fulfill the statute's purposes. By contrast, while textualists advocate the interpretation of statutory language on a holistic basis, this interpretive method is meant to elucidate the sense in which specific terms are being used and not to impose a norm of intra-statutory coherence. For textualists,

329. *E.g.*, *id.* at 144.

the judiciary is obliged to provide a linguistically accurate interpretation that will reveal internal inconsistencies, if they exist, but leaves them in place for the legislature to remedy. The problem posed by radical changes in a court's interpretive perspective, however, is not whether inconsistencies in the statute's drafting are corrected or merely exposed. Rather, it is whether changes in the Court's interpretive practices produce discontinuities in the statute's meaning or enforcement. Neither textualism nor purposivism authorizes the judiciary to disrupt statutory coherence due to inconsistencies in its interpretive practices.

The Court's recent employment discrimination decisions provide several provocative illustrations. Consider first *Desert Palace*. Its holding that Title VII plaintiffs are not required to provide direct evidence of discrimination in order to receive a motivating factor jury instruction may be read to enhance the predictability of Title VII's enforcement. The destabilizing effects of the decision, however, are profound. *Desert Palace* undermines the rationality of Title VII's disparate treatment doctrine, because it introduces uncertainty regarding the degree of overlap between the motivating factor and pretext tests, how they might be applied simultaneously, whether the statute conveys a principled basis for restricting their application to different circumstances, and indeed whether they can be distinguished at all. It also undermines consistency in the statute's enforcement because individual circuit courts must now experiment with different approaches to addressing the difficulties presented by the decision.

Before *Desert Palace*, several circuit courts that had considered whether to apply the direct evidence requirement to the 1991 Act concluded that it should apply.[330] Congress had been explicit in overriding other features of the motivating factor test, but it had been silent regarding the type of evidence necessary to prove that the plaintiff's status was a motivating factor in the employer's decision. As a consequence, most courts that found Justice O'Connor's opinion to be controlling in *Price Waterhouse*[331] also concluded that, in the absence of any explicit discussion of evidence, the 1991 Act should be interpreted to maintain the status quo. This interpretation made some good doctrinal sense: the motivating factor test provides a substantially weaker causation standard than the but-for standard applied in pretext analysis. If no heightened

330. Desert Palace, Inc. v. Costa, 539 U.S. 90, 95 (2003) (citing cases in which circuit courts relied on Justice O'Connor's *Price Waterhouse* concurrence to apply this requirement but reaching the opposite conclusion).

331. For a discussion of decisions in this vein, see *supra* text accompanying note 208.

evidentiary burden were required before a plaintiff could obtain access to the motivating factor test, then it might swallow pretext analysis.

The Court's decision has produced widespread confusion. Where does pretext analysis end and motivating factor analysis begin? *Desert Palace* rejected the direct evidence requirement that had, for over a decade, supplied the answer to this question. Justice Thomas included in his majority opinion in *Desert Palace* an important caveat, stating that "[t]his case does not require us to decide when, if ever, § 107 [of the 1991 Act] applies outside of the mixed motive context."[332] This statement preserves the possibility that whether the claim is presented as a single motive or dual (i.e., mixed) motive claim marks the appropriate dividing line between pretext analysis and motivating factor analysis following the 1991 Act. One district court judge has gone so far as to describe the footnote as "a strategically placed fig leaf designed to obscure the otherwise clear implications of *Desert Palace*'s reading of § 2000e-2(m)."[333]

There is a serious problem with Justice Thomas's suggested distinction: the statute itself makes no mention of a distinction between dual and single motive claims. Instead, it states that "an 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."[334] The final phrase, beginning with the words "even though," hardly necessitates that a restriction be placed on the circumstances under which the test may be used, provided that the plaintiff provides evidence that her status was a motivating factor for an employer's practice.[335] As written, the statute seems to obviate the need for any inquiry into the employer's legitimate business reasons for the challenged practice, while pretext analysis turns on the employer's proffer of such reasons to

332. *Desert Palace*, 539 U.S. at 94 n.1. Section 107 of the 1991 Act established standards applicable to mixed motive employment discrimination claims. *Id.* at 94.

333. Carey v. FedEx Ground Package Sys., Inc., 321 F. Supp. 2d 902, 915 (S.D. Ohio 2004) (arguing that the first footnote in *Desert Palace* is an attempt to conceal the way in which the Court's rejection of a direct evidence requirement in the 1991 Act alters the existing judicial understanding of employment discrimination law).

334. 42 U.S.C. § 2000e-2(m) (2012).

335. A more natural reading, based on dictionary definitions of these two words, should lead us to construe them to mean "in spite of the fact" or "even if." *See* WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1481 (David B. Guralnik ed., 2d ed. 1972) (listing the second and third definitions of "though"). To avoid treating "even" as redundant (a move that seems inappropriate here), we might construe it to mean "particularly" under a secondary definition, *see id.* at 485, but this would mean that motivating factor liability would be especially appropriate when other motives are at play but not *only* when they are.

sharpen the factual inquiry.[336] After repudiating the distinction between direct and circumstantial evidence, the only text-based avenue open to the Court to distinguish between pretext and mixed motive claims was to discuss what it means for the plaintiff's status to have served as a motivating factor, a phrase which Congress adopted from the *Price Waterhouse* plurality opinion without modification or elaboration.[337] Indeed, what is a motivating factor claim but a claim in which the plaintiff fails to disprove the defendant's proffered reason (i.e., to prove that the defendant's proffered reason is a pretext for discrimination) and yet still produces some evidence that her status played a motivating part in the employer's decision? Failed pretext claims easily mutate into motivating factor claims, and nothing in the statute forbids a plaintiff from describing her case from the outset as one in which her status was a motivating factor for the challenged employment decision, thereby sidestepping pretext analysis altogether. *Desert Palace* provides no guidance for working through this dilemma, and does nothing to avoid it, in large part because the Court refused to consider the relationship between the statutory motivating factor test and its own prior decisions.

The conclusion that the 1991 Act obviates the need for the *McDonnell Douglas* framework and thereby supplants two decades of caselaw that preceded its passage flows naturally from the textualist approach of *Desert Palace*. The leading case to take this position presents the argument succinctly, explaining that "the plain language of the statute allows a plaintiff to prevail if he or she can prove . . . that a single, illegitimate motive was a motivating factor in an employment decision, without having to allege that other factors also motivated the decision."[338] The policy implications of this approach are clear: Congress must have "sought to penalize employers for considering the [status of their] employees when making employment decisions" regardless whether employers were acting because of a single motive or multiple motives.[339] Moreover, to apply motivating factor analysis to single motive claims not only invades the

336. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981) ("In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination."); *id.* at 255 (noting that once the defendant meets his burden of proffering a legitimate, nondiscriminatory reason, "the factual inquiry proceeds to a new level of specificity").

337. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 238 n.2 (1989) (discussing the motivating factor standard's development in the circuit courts prior to the Court's decision). *See also id.* at 244–47 (explaining why a motivating factor test was superior to forcing the plaintiff to "squeeze her proof" into the *McDonnell Douglas* framework).

338. Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 991 (D. Minn. 2003).

339. *Id.*

doctrinal territory formerly held by *McDonnell Douglas*, but it also suggests that the *McDonnell Douglas* model of employer decisionmaking is false: employers do not act exclusively on the basis of either legitimate or illegitimate motivations, and single motive claims are largely legal fictions that obscure the complex and multi-layered pattern of most employment decisionmaking. Although this application of *Desert Palace* is not prevalent among the lower federal courts, it has won the support of several legal scholars.[340] Even the U.S. Department of Justice has made a version of this argument in a case brought against the U.S. Marshall Service, when it contended that the addition of section 107 of the 1991 Act reduced Title VII's section 703(a)(1) to a mere "definition" of discrimination, whereas section 107 established the new standard for liability in both single and mixed motive cases.[341]

Reaching this radical conclusion voids, or at the very least abrogates, a significant body of Supreme Court and circuit court law. In addition, it amounts to something akin to an implied repeal of pretext analysis—that is, an attempt to strip section 703(a)(1) of the content that it acquired as a consequence of the Court's longstanding interpretations. Implied repeals are generally disfavored,[342] even by textualists who prefer that Congress make its intention to repeal prior legislation explicit. For these reasons, most courts to have addressed the issue have found some way to affirm the viability of pretext analysis. Their rationales, however, have varied considerably.

As a practical matter, far from establishing a new clarity and uniformity in the adjudication of motivating factor claims, *Desert Palace* has in fact led to inconsistent results. The lower federal courts are sharply divided as to the impact of *Desert Palace* on *McDonnell Douglas* and the many Supreme Court and circuit court cases that have built upon its pretext analysis.[343] Some courts have proposed that pretext analysis and motivating factor analysis be treated like parallel tracks, applied, or not, at the

340. *E.g.*, William R. Corbett, *McDonnell Douglas, 1973–2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199 (2003); Jeffrey A. Van Detta, *"Le Roi Est Mort, Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71 (2003); Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *Is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887 (2004).

341. *See* Fogg v. Gonzales, 492 F.3d 447, 452–54 (D.C. Cir. 2007) (describing and rejecting the government's argument).

342. *E.g.*, Tenn. Valley Auth. v. Hill, 437 U.S. 153, 189–90 (1978). *See also Fogg*, 492 F.3d at 453 (applying the presumption against implied repeals to the 1991 Act in relation to section 703(a)(1)).

343. This division remains notwithstanding the fact that several circuits have expressly decided not to decide the issue when the opportunity otherwise presented itself.

plaintiff's election.[344] Other courts have recognized a practical consequence for Title VII doctrine, amending the final stage of pretext analysis to permit a plaintiff who fails to disprove the defendant's proffered reason the opportunity to demonstrate that her status was a motivating factor for the challenged practice.[345]

Ironically, the first court to champion this view of *Desert Palace* as a modest amendment to *McDonnell Douglas*[346] was later overruled in an unrelated case. In *Griffith v. City of Des Moines*,[347] the Eighth Circuit held that *Desert Palace* had no effect on its longstanding practice of applying the *McDonnell Douglas* framework to circumstantial evidence cases at the summary judgment stage because it concerned only a ruling on jury instructions.[348] Declining the invitation to modify the *McDonnell Douglas* framework, the Eighth Circuit noted that *Desert Palace* "did not even cite *McDonnell Douglas*, much less discuss how [the 1991 Act] impact[s] our prior summary judgment decisions."[349] The Eighth Circuit recognized that its holding deviated from the black letter rule of procedural law that summary judgment standards should reflect the liability and evidentiary standards that will ultimately be applied at trial.[350] It was motivated,

344. *E.g.*, Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004). *Cf. Fogg*, 492 F.3d at 453 (declining to overturn a jury verdict in a case tried under a "single motive" theory and without jury instructions limiting the defendant's liability on the basis of the 1991 Act because "[o]n its face Title VII provides alternative ways of establishing liability for employment practices based on the impermissible use of race or other proscribed criteria").

345. *E.g.*, White v. Baxter Healthcare Corp., 533 F.3d 381, 400 (6th Cir. 2008); Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004); Carey v. FedEx Ground Package Sys., Inc., 321 F. Supp. 2d 902, 916 (S.D. Ohio 2004); Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc., 285 F. Supp. 2d 1180, 1197–98 (N.D. Iowa 2003); Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 992 (D. Minn. 2003).

346. *Dunbar*, 285 F. Supp. 2d at 1197–98.

347. Griffith v. City of Des Moines, 387 F.3d 733 (8th Cir. 2004).

348. *Id.* at 735. The Eleventh Circuit appears to have at least partially joined in this view. *See* Cooper v. S. Co., 390 F.3d 695, 725 n.17 (11th Cir. 2004) (noting that "after *Desert Palace* was decided, this Court has continued to apply the *McDonnell Douglas* analysis in non-mixed motive cases").

349. *Griffith*, 387 F.3d at 735.

350. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252–56 (1986) (holding that whether libel plaintiff survived summary judgment should be assessed on the basis of the clear and convincing evidence standard that would be used at trial, notwithstanding that summary judgment prohibits the court from weighing evidence). *Accord* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (applying the rule of *Liberty Lobby* in an employment discrimination case). *See also Griffith*, 387 F.3d at 735 (recognizing that *Reeves* requires summary judgment standards to "mirror" the standard for judgment as a matter of law). In deciding to break from this venerated rule, the Eighth Circuit relied on an erroneous characterization of the "same decision" defense applicable to motivating factor claims under the 1991 Act as an issue for trial and not summary judgment, ignoring the availability of partial summary judgment under FED. R. CIV. P. 56(a) and the determination of material facts in the absence of

however, by a desire to keep in place its own summary judgment precedents, which required application of the *McDonnell Douglas* framework, and by its opinion that the Court could not have intended to overrule any aspect of *McDonnell Douglas* without comment.[351]

The *Morgan* and *Ledbetter* decisions have produced similar doctrinal disarray due to the inconsistent manner in which they too manage the relationship between contemporary textualist interpretations and established precedent. As in *Desert Palace*, the Court confronted in *Morgan* a facially inclusive statutory provision; in fact, the exhaustion requirements of § 2000e-5(e)(1) made no distinction between different types of discrimination claims.[352] The Court granted certiorari in *Morgan* in order to resolve the question of what, if any, continuing violation exception there might be to the limitations period set forth in the statute and to settle a circuit split on this issue, as several circuit courts and the EEOC had recognized some form of continuing violation doctrine but iterations of the doctrine varied substantially.[353] Again, as in *Desert Palace*, the Court set forth a rule in *Morgan* based on the plain meaning of the applicable statutory provision—specifically, that "discrete acts" of discrimination occur on the day that they happen regardless of the type of act or the fact that it was committed within a series of related discriminatory acts.[354] And, as occurred after *Desert Palace*, the simplicity and uniformity of *Morgan*'s primary rule unraveled as it was exposed to liability doctrines each of which had its origins in Supreme Court authority.

Like *Desert Palace*, *Morgan* and *Ledbetter* could be read as enhancing the predictability, and even the consistency, of legal enforcement by displacing several substantively different tests for determining whether a plaintiff's charge could be construed as timely that had proliferated in the

an order of summary judgment under FED. R. CIV. P. 56(g).

351. The latter motivation was strengthened, in the Eighth Circuit's view, by the Supreme Court's subsequent application of the *McDonnell Douglas* framework to a disability discrimination claim at the summary judgment stage. *See Griffith*, 387 F.3d at 735 (discussing *Raytheon Company v. Hernandez*, 540 U.S. 44 (2003), "a post-*Desert Palace* decision in which the Court approved use of the *McDonnell Douglas* analysis at the summary judgment stage"). However, the Americans with Disabilities Act, which was at issue in *Raytheon*, was not amended by the 1991 Act's addition of the motivating factor test (since it applied by its terms only to Title VII claims). Nevertheless, the Eighth Circuit interpreted *Raytheon* and other Supreme Court decisions issued after the 1991 Act was passed, but before *Desert Palace* was decided, as evidence that the Supreme Court intended to maintain a doctrinal framework in Title VII cases that was highly compartmentalized, and reminiscent of the earlier compartmentalization of circumstantial pretext claims and direct evidence mixed motive claims.

352. 42 U.S.C. § 2000e-5(e)(1) (2012).

353. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 106–07 & n.3, 110 n.6 (2002).

354. *Id.* at 110–15.

lower federal courts.[355] Immediately, however, the clarity of the Court's new rule fell prey to new exceptions and qualifications that undermined both values. The *Morgan* Court itself acknowledged that the aggregative nature of hostile work environment harassment claims meant that they could not be measured by the "discrete acts" standard despite the fact that harassment necessarily will consist of discrete acts. The Court has since recognized an exception for disparate impact claims because the 1991 Act's codification of the disparate impact standard specifies that an unlawful employment practice occurs whenever a policy or practice having a disparate impact is "used," precluding an interpretation of disparate impact as a discrete act of discrimination consisting of the institution of a discriminatory policy.[356] And in response to the *Ledbetter* decision, Congress imposed an additional exception for pay discrimination claims by enacting the Lilly Ledbetter Fair Pay Act of 2009 ("the 2009 Act").[357]

Following these rulings, the lower federal courts have sought equilibrium by attempting to interpret *Morgan*'s discrete acts rule and its exceptions as a coherent whole. Though ostensibly settled by Congress, the rationality of the relationship between the *Morgan* rule and the pay discrimination exception remains troubled in ways that the new statute has not clearly resolved. The interpretive question after *Ledbetter* is much the same as it was before—that is, how does the statute orient the relationship between a "standard" case involving discrete acts of discrimination and exceptions to the standard case. In *Ledbetter*, the question was whether pay discrimination is sufficiently aggregative and difficult for the plaintiff to promptly discover to justify an exception like the one that the *Morgan* Court awarded to hostile work environment claims. The *Ledbetter* majority held that it was not, leading four Justices who were members of the *Morgan* majority to join together in a dissenting opinion by Justice Ginsburg, in which she expressed surprise and outrage that the Court had refused to conclude that pay discrimination claims were worthy of a similar exception in light of *Bazemore*, which had described such claims in terms of their continuing nature.[358]

355. *Id.* at 106–07 (discussing a split among the federal circuit courts concerning continuing violation doctrine).

356. Lewis v. City of Chi., 130 S. Ct. 2191, 2197 (2010).

357. *See supra* note 271 and accompanying text.

358. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting) (arguing that, because pay discrimination occurs over time and often involves small increments of pay disparity not easily detected by the plaintiff, it is "significantly different" from discrete acts of discrimination that are "fully communicated" and "easy to identify" (quoting *Morgan*, 536 U.S. at 114)). Notably, the four Justices who joined the *Morgan* majority only as to its articulation of the discrete acts rule, O'Connor, Rehnquist, Kennedy and Scalia, would have made no exception for

By enacting the 2009 Act, Congress sided with the *Ledbetter* dissenters and recorded in section 2 of the Act its legislative findings that the *Ledbetter* decision "ignore[d] the reality of wage discrimination" and interpreted Title VII in a manner "at odds with the robust application of the civil rights laws that Congress intended."[359] Justice Ginsburg's dissent similarly concluded that the *Bazemore* rule—that a pay discrimination claim is renewed with each issuance of a discriminatory paycheck—is "more faithful to precedent, more in tune with the realities of the workplace, and more respectful of Title VII's remedial purpose."[360] By "realities of the workplace," Justice Ginsburg meant that, unlike discrete acts involving matters such as hiring or promotion, pay discrimination is often concealed from the plaintiff, produces cumulative debilitating effects for the plaintiff, and produces cumulative benefits for the employer that provide it with a unique incentive to engage in such discrimination.[361] The Act corrected the Court's interpretation by providing that "discrimination in compensation" occurs whenever "an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits or other compensation is paid."[362]

The fact that Congress engaged in extensive examination of pay discrimination and recorded its findings not only in a substantial House Report but also in the text of the Act itself, suggests that Congress envisioned that greater attention to the remedial purpose of Title VII would have counseled the Court to reach a different conclusion in *Ledbetter*. This is not the same, however, as requiring a return to an interpretive perspective in which purposivism plays a more substantial role. Congress did not expressly impose such a perspective on the Court, leaving to its discretion whether to revert to the interpretive regime that it had followed during the early enforcement of Title VII or to continue along the new textualist path charted by the Court's recent decisions.[363] Indeed, one might

harassment claims, and indicated as much in an opinion authored by Justice O'Connor. *See Morgan*, 536 U.S. at 124 (O'Connor, J., dissenting) (noting that § 2000e-5(e)(1) "draws no distinction between claims based on discrete acts and claims based on hostile work environments").

359. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, sec. 2(2), 123 Stat. 5, 5 (2009) (codified as amended at 42 U.S.C. § 2000e-5 (2012)).

360. *Ledbetter*, 550 U.S. at 646 (Ginsburg, J., dissenting).

361. *See, e.g.*, *id.* at 649 (Ginsburg, J., dissenting) ("The realities of the workplace reveal why the discrimination with respect to compensation that Ledbetter suffered does not fit within the category of singular discrete acts 'easy to identify.'"); *id.* at 650–51 (Ginsburg, J., dissenting) (discussing the pay discrimination plaintiff's cumulative harms and the employer's cumulative benefits).

362. Pub. L. No. 111-2, sec. 3, 123 Stat. 5, 5–6 (2009) (codified as amended at 42 U.S.C. § 2000e-5(e)(3)(A)).

363. Some scholars have argued that Congress does have the authority to restrict the judiciary's interpretive practices with respect to any substantive law that Congress authors. *See generally*

read the 2009 Act as a concession to the Court's new textualism that closes certain interpretive ambiguities identified by textualist readings by imposing an express exception for "discrimination in compensation." However, the language of the Act remains ambiguous in important respects—including its use of the phrase "discriminatory compensation decision *or other practice*"—because Congress intended both to target pay discrimination and to address the specific facts of the *Ledbetter* case, which involved not a facially discriminatory compensation decision but a decision that had tied pay to performance and, in Ledbetter's situation, relied upon sex-biased performance evaluations to set pay.[364] The need to address such scenarios led to an inclusive expression of the practices prohibited by the Act, making it difficult to rely on the text alone to exclude from coverage discrete acts of discrimination such as promotion decisions that include decisions regarding compensation. If such employment decisions cannot be excluded from coverage, then the rationality of the 2009 Act and its relationship to pre-*Ledbetter* law is in jeopardy. The lower federal courts have been forced to grapple with this issue.

Courts interpreting the 2009 Act have repeatedly noted that it "did not overturn *Morgan*."[365] Discrete acts of discrimination remain immediately actionable and therefore the plaintiff's time to file an administrative charge runs from the day the acts occur, regardless of whether they occur as a series. The question that lingers after the passage of the 2009 Act is the extent to which otherwise discrete acts of discrimination that result in discriminatory compensation are subject to the statute's new exception because they are now actionable whenever they directly affect the plaintiff's compensation. As with *Desert Palace* and its textualist

Rosenkranz, *supra* note 10 (proposing that Congress adopt federal rules of statutory construction that would be binding upon the judiciary and also empower the Supreme Court to promulgate further rules that would be subject to congressional ratification). Congress took a limited opportunity to do so in the 1991 Act, in which it directed that "[n]o statements other than the interpretive memorandum . . . shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to *Wards Cove*." Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 105(b), 105 Stat. 1071, 1075 (1991) (codified as amended at 42 U.S.C. § 1981 note).

364. *See, e.g.*, H.R. REP. NO. 110-237, at 5 (2007) (rejecting an amendment to an early version of the bill offered by Representative Ric Keller that would have removed "other practices" from the bill because that phrase "captures the fact pattern in *Ledbetter*, where sex-based performance evaluations were used in conjunction with a performance-based pay system to effectuate the discriminatory pay"); 155 CONG. REC. S757 (daily ed. Jan. 22, 2009) (statement of Sen. Mikulski) (explaining that a similar amendment offered by Senator Arlen Specter should be rejected because its limiting construction of the bill's scope would prevent its application to discrete personnel decisions).

365. Daniels v. United Parcel Serv., Inc., 797 F. Supp. 2d 1163, 1185 (D. Kan. 2011). *Accord* Almond v. Unified Sch. Dist. No. 501, 749 F. Supp. 2d 1196, 1211 (D. Kan. 2010) ("Congress expressed no intent to overturn *National Railroad Passenger Corp. v. Morgan*.").

interpretation of section 703(m), the new textualism has left lower courts with few interpretive resources to explain why the exception should not swallow the discrete acts rule. Because "discrimination in compensation" receives no additional qualifier under the statute, and in fact is broadly articulated as "a discriminatory compensation decision or other practice," a strict textualist would have difficulty explaining why discrimination in compensation should not include discriminatory promotion and hiring decisions that confer among their injuries to the plaintiff a denial or loss of compensation. This result would not square with prior interpretations of Title VII, including *Morgan*, and in effect would cause the exemption to swallow the rule.

Several district courts have interpreted the 2009 Act to include denials of promotion, tenure and other positions with increased remunerative benefits as discrimination in compensation, with the result that the plaintiff's time to exhaust is measured not from the discrete act of the decision denying her the position but from the most recent occurrence of her having received a discriminatory payment.[366] The circuit courts, however, have overwhelmingly held that it does not extend the plaintiff's time to file a charge arising from a discriminatory decision to demote, or to refuse to promote, the plaintiff because of her status even if this decision also adversely affected the plaintiff's compensation.[367] These courts have sometimes relied on textual analysis. Notably, some courts concluded that, whether applied to Title VII claims or age discrimination claims,[368] the phrase "discrimination in employment" should be read in light of prevailing interpretations of preexisting statutory prohibitions against "discriminat[ing] against any individual with respect to his compensation."[369] For example, compensation claims brought on this basis

366. *See, e.g.*, Gentry v. Jackson State Univ., 610 F. Supp. 2d 564, 566–67 (S.D. Miss. 2009) (relying on the plain meaning of the 2009 Act's text to reject the defendant university's motion for summary judgment on claims of discrimination arising out of the university's denial of tenure and a resulting salary increase); Bush v. Orange Cnty. Corr. Dep't, 597 F. Supp. 2d 1293, 1296 (M.D. Fla. 2009) (holding that the 2009 Act preserved claims of discriminatory demotions and pay reductions that occurred sixteen years before the filing of a charge). *See also* Rehman v. State Univ. of N.Y., 596 F. Supp. 2d 643, 651 (E.D.N.Y. 2009) (denial of tenure); Shockley v. Minner, No. 06-478 JJF, 2009 U.S. Dist. LEXIS 31289, at *1–3 (D. Del. Mar. 31, 2009) (denial of promotion).

367. *See, e.g.*, Schuler v. PricewaterhouseCoopers, LLP, 595 F.3d 370, 374–75 (D.C. Cir. 2010) ("[W]e do not understand 'compensation decision or other practice' to refer to the decision to promote one employee but not another to a more remunerative position.").

368. The 2009 Act also applies to claims brought under the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, sec. 6, 123 Stat. 5, 7 (2009) (codified as amended at 42 U.S.C. § 2000e-5 note (2012)).

369. Almond v. Unified Sch. Dist. No. 501, 665 F.3d 1174, 1181 (10th Cir. 2011).

under section 703(a)(1) of Title VII require a showing that the plaintiff has been paid less than similarly situated persons not within his status group, and this typically means "unequal pay for equal work."[370] While perhaps consistent with textualism's commitment, where appropriate, to maintaining consistent usage of terms across a given statute, this reading is not particularly convincing. Section 703(a)(1) describes those harms caused by discriminatory practices that are legally salient, regardless of the mode of discrimination; it does not purport to identify a mode of discrimination that is distinct from other modes of discrimination. In addition, this reading does not explain why the 2009 Act could have remedied the outcome in *Ledbetter* when applied to the facts of that case, which involved lower pay based on performance that was rated below that of the plaintiff's male peers. The only way to include the *Ledbetter* facts under the 2009 Act, as courts have noted, is to adhere to the interpretation of "discriminatory compensation decision *or other practice*" propounded by congressional supporters of the bill.[371]

The strongest support for this interpretation is not the amended text of § 2000e-5(3)(A), but a purposivist approach that relies heavily on the legislative history and reclaims the interpretive perspective that the Supreme Court appeared to abandon in *Morgan* and *Ledbetter*. For example, in *Almond v. Unified School District No. 501*,[372] the district court performed an exhaustive review of the legislative history and concluded that it showed "that the bill was drafted in response to, and in reliance on, Justice Ginsburg's dissent in *Ledbetter*."[373] Justice Ginsburg herself supported the distinction between promotion claims that include a loss of compensation and pay discrimination claims that involve no other change in the plaintiff's job title or position.[374] Supporters of the bill in both the

370. *Id. See also* Noel v. Boeing Co., 622 F.3d 266, 273–74 (3d Cir. 2010) ("[T]he plain language of the [2009 Act] covers compensation decisions and not other discrete employment decisions."); *Schuler*, 595 F.3d at 374 ("[I]n employment law the phrase 'discrimination in compensation' means paying different wages or providing different benefits to similarly situated employees, not promoting one employee but not another to a more remunerative position.").

371. *See supra* note 364. *See also Schuler*, 595 F.3d at 375 ("That the Congress drafted and passed the [2009 Act] specifically in order to overturn *Ledbetter* strongly suggests the statute is directed at the specific type of discrimination involved in that case . . . ."); Almond v. Unified Sch. Dist. No. 501, 749 F. Supp. 2d 1196, 1209–10 (D.Kan. 2010) ("Reading 'other practices' to mean 'discriminatory compensation practices' is also consistent with [c]ongressional intent as revealed in the legislative history.").

372. *Almond*, 749 F. Supp. 2d at 1196, *aff'd* 665 F.3d 1174 (10th Cir. 2011).

373. *Almond*, 749 F. Supp. 2d at 1210. *See also Almond*, 665 F.3d at 1183 (appealing to the legislative history of the 2009 Act to support its conclusion that "discrimination in compensation" does not include promotion claims); *Noel*, 622 F.3d at 273–74 (same); *Schuler*, 595 F.3d at 375 (same).

374. *See, e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 645 (Ginsburg, J.,

House and Senate similarly concluded that pay discrimination differs from matters of hiring, promotion or transfer because salary confidentiality makes it difficult to detect.[375] Moreover, Justice Ginsburg's concern that, unlike discrete acts of discrimination, pay discrimination is often incremental and concealed from the plaintiff was encapsulated by her criticism that the *Ledbetter* majority ignored the "realities of the workplace," and Congress reiterated this view by recording in the text of the statute its finding that *Ledbetter* "ignores the reality of wage discrimination."[376]

In *Ricci*, the Court took its boldest position yet in permitting its change in interpretive perspective to undermine Title VII's coherence. In that case, for the first time, the Court observed a "statutory conflict" between Title VII's disparate treatment and disparate impact provisions.[377] It is too early to tell what will be the consequences of raising such a conflict, though they may be profound,[378] and may even include striking down the statute's disparate impact provisions as unconstitutional.[379] If one

dissenting) ("Pay disparities are . . . significantly different from adverse actions such as termination, failure to promote, . . . or refusal to hire, all involving fully communicated discrete acts, easy to identify as discriminatory." (internal quotation marks omitted)); *id.* at 649 (Ginsburg, J., dissenting) ("A worker knows immediately if she is denied a promotion or transfer, if she is fired or refused employment. . . . When an employer makes a decision of such open and definitive character, an employee can immediately seek out an explanation and evaluate it for pretext.").

375. *See, e.g.*, H.R. REP. NO. 110-237, at 6 (2007) ("While workers know immediately when they are fired, refused employment or denied a promotion or transfer, the secrecy and confidentiality associated with employees' salaries make pay discrimination difficult to detect."); *id.* at 7 ("Unlike hiring, firing, promotion and demotion decisions where an individual immediately knows that she has suffered an adverse employment action, there is often no clearly adverse employment event that occurs with a discriminatory pay decision."); 155 CONG. REC. S558 (daily ed. Jan. 15, 2009) (statement of Sen. Leahy) (the bill "allows workers who are continuing to be short-changed to challenge that ongoing discrimination when the employer conceals its initial discriminatory pay decision."). *See also* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, sec. 2, 123 Stat. 5, 5 (2009) (setting out a summary of the legislative findings) (codified as amended at 42 U.S.C. § 2000e-5 note (2012)).

376. *See supra* text accompanying notes 359–62.

377. Ricci v. DeStefano, 557 U.S. 557, 583 (2009) (discussing a "statutory conflict" between disparate treatment and disparate impact whereby the obligations created by the latter must be constrained so that they do not, except in "certain, narrow circumstances," result in violation of the former). *But see id.* at 624 (Ginsburg, J., dissenting) ("Neither Congress's enactments nor this Court's Title VII precedents . . . offer even a hint of 'conflict' between an employer's obligations under the statute's disparate-treatment and disparate-impact provisions.").

378. *See, e.g.*, Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 159–62 (2010) (suggesting that employers' efforts to design employment tests so as to avoid disparate impact are stifled by fear of *Ricci*-type litigation).

379. *See* Ricci, 557 U.S. at 595–96 (Scalia, J., concurring) (prophesying a "war between disparate impact and equal protection"). *See generally* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003) (discussing the constitutionality of disparate

assumes that intra-statutory conflict is wholly the product of compromised legislative design, then to raise such a conflict is to provide a service to the legislature, for it now is aware of and has the opportunity to correct its error. This reading of *Ricci* is, however, unconvincing. In prior decisions, the Court had observed a fundamental consistency between disparate impact and disparate treatment theories of discrimination, explaining that they reflect identical and overlapping statutory purposes.[380] In those precedents, references to statutory purpose were used by a purposivist Court as expressions of congruity and complementarity between the disparate impact and disparate treatment provisions. Based on these precedents, lower courts had identified ways to manage the competing interests of workers who may have wanted to assert conflicting disparate impact and disparate treatment claims arising from the same employment practices or remedial responses to those practices.[381] Viewed under the cold light of the Court's new textualism, the doctrines seem fundamentally opposed and perhaps even irreconcilable. Furthermore, the undisclosed conflict that *Ricci* creates between its interpretation of disparate treatment and the Court's affirmative action precedents is entirely judicially created. That is, the exception to disparate treatment doctrine carved out by *Weber* and *Johnson* is a judicial construct, and the failure to acknowledge its salience in *Ricci* represents an interpretive choice.

Finally, one may argue that the strong basis in evidence standard is evidence of the Court's effort to resolve the conflict and to preserve harmonious interaction between disparate treatment and disparate impact doctrines. It does so, however, by borrowing from constitutional doctrine

impact liability).

380. *See supra* Part II.A.2. The Supreme Court established disparate impact liability as a fulfillment of the principle of equal treatment, *see* Griggs v. Duke Power Co., 401 U.S. 424, 431 (stating that "[d]iscriminatory preference for any group . . . is precisely and only what Congress has proscribed" and arguing that Congress intended to fulfill that purpose by "the removal of artificial, arbitrary and unnecessary barriers to employment), and disparate treatment liability as a fulfillment of the principle of equal opportunity, *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800, 802–03 (announcing, as it had in *Griggs*, Congress's purpose "to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens" and establishing pretext analysis to aid that purpose).

381. To the extent that circuit courts had, in the past, confronted potential conflicts between disparate impact and disparate treatment claims, they had resolved such differences either by holding that compliance with the disparate impact provisions of the statute could not form the basis for a disparate treatment claim, Hayden v. Cnty. of Nassau, 180 F.3d 42, 51–53 (2d Cir. 1999), or by holding that whether third-parties might be injured by a remedy to a disparate impact claim was of no moment in determining whether disparate impact plaintiffs were entitled to relief, NAACP v. Harrison, 940 F.2d 792, 805–08 (3d Cir. 1991) (workers who obtain benefits from discriminatory employment practices have no right to those benefits and cannot assert them as the basis for a disparate treatment claim).

when it already had multiple models under the statute to choose from—those provided by *Weber* and *Johnson*, and the model provided by *Hayden v. County of Nassau*,[382] a Second Circuit decision holding that the intent to remedy a disparate impact is not equal to an intent to discriminate and therefore cannot support a disparate treatment claim.[383] By sidestepping *Weber* and *Johnson*, *Ricci* rendered the scope of their future application less predictable.[384] Moreover, the strong basis in evidence standard undermines the rationality of the Court's statutory affirmative action decisions by making voluntary compliance with the statute "a hazardous venture."[385] It forces the employer to trust that its admission of probable disparate impact liability will lead to a successful defense against disparate treatment liability (unlike in *Ricci*) and will not be raised in support of a future disparate impact claim. In addition, the strong basis in evidence standard actually resolves very few of the issues that may arise from the disparate treatment vs. disparate impact conflict.[386] *Ricci* thus introduces radical discontinuities into Title VII jurisprudence, having inexplicably shaken free from the Court's disparate treatment and affirmative action precedents and cast aside their interpretive assumption that disparate impact and disparate treatment reflect a complementary set of regulatory objectives and should therefore be construed in the manner that best harmonizes them.

2. Inter-Statutory Incoherence

Inter-statutory incoherence is a less prominent consequence of radical shifts in the Court's interpretive perspective, though its consequences may be no less significant than those of intra-statutory incoherence. When

382. *Hayden*, 180 F.3d at 42.

383. *Id.* at 51. As the Second Circuit recognized, to hold otherwise—that all racial considerations are "automatically suspect"—would mean that "[e]very antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect a concern with race" and so would be unconstitutional. *Id.* at 49 (internal quotation marks omitted).

384. *See, e.g.*, United States v. Brennan, 650 F.3d 65, 72 (2d Cir. 2011) (attempting to harmonize *Ricci* with *Weber* and *Johnson* by distinguishing between forward-looking affirmative action plans of general application and race-based individualized relief, and construing *Ricci* to have concerned only the latter).

385. Ricci v. DeStefano, 557 U.S. 557, 629 (2009) (Ginsburg, J., dissenting).

386. For example, it seems absurd to assume that the Court would authorize the use of racial quotas to avoid disparate impact liability having a strong basis in evidence. Whether it would sanction any affirmative action or diversity program under such circumstances is also unclear, since, after all, *Ricci* concerns only the invalidation of test results, not the institution of a remedial program. It is also unclear whether the Court would sanction employers' efforts to design a test that avoided disparate impact for the purpose of establishing workforce diversity where previous tests had failed, or whether the only way to justify such efforts is to find a strong basis in evidence that past practices had violated the statute's disparate impact provisions.

statutes share significant language, origin, or purposes in common, courts may use interpretations of one statute as persuasive precedent when considering how best to interpret another. We saw this initially with respect to the Court's decision in *CBOCS*.[387] The interpretive relationship between statutes may be drawn closer still if they regulate overlapping or parallel social practices.

Title VII shares such a relationship with the ADEA. The Supreme Court discussed this relationship at some length in *Smith v. City of Jackson*.[388] In support of its conclusion that the ADEA does provide for disparate impact liability following the model of Title VII prior to the 1991 Act, the Court recounted the history of the ADEA's passage. This included Congress's original consideration of amendments to Title VII that would have prohibited age discrimination, and its delay in considering legislation on age discrimination pending a request that the Secretary of Labor "make a full and complete study" of the issue. After considering the report, Congress passed the ADEA, borrowing heavily from the language that it had used to combat race and sex discrimination under Title VII.[389] Until *Gross*, the Supreme Court had "consistently applied" to "language in the ADEA that was derived *in haec verba* from Title VII" the presumption that Congress intended for such language to carry the same meaning in both statutes.[390]

By interpreting the phrase "because of age" more restrictively in *Gross* than it had interpreted "because of sex" in *Price Waterhouse*, the Court departed from its usual guiding presumption, and introduced a discontinuity between the meaning and application of Title VII and the ADEA that was not indicated by a difference in the text of the two statutes. It in fact went further, expressing doubt as to whether *Price Waterhouse* would have been decided the same way had it been subjected to the Court's current textualist approach.[391] Like the examples of intra-statutory incoherence discussed above, this interpretation rejects the set of interpretive assumptions on which the Court had previously relied, and, as a consequence, undermines private parties' and lower courts' reasonable

387. *See supra* Part I.B.

388. Smith v. City of Jackson, Miss., 544 U.S. 228, 232–33, 240–43 (2005).

389. *Id.* at 232. Secretary William Wirtz's report catalogued evidence of "arbitrary" discrimination against older workers, including the observation that "[i]nstitutional arrangements" indirectly resulted in such discrimination. *Id.* (internal quotation marks omitted).

390. *Id.* at 233–34 (Stevens, J.) (plurality opinion). *But see* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 at 177–78 (2009) (denying that the uniform application of legal standards across the two statutes was ever the Court's established practice).

391. *Gross*, 557 U.S. at 178–79.

expectations regarding the application of the ADEA based on what the Court had already established about the application of Title VII.

The significance of *Gross* manifested itself again in *Nassar*. Justice Kennedy reminds the reader in *Nassar* that the Court went so far in *Gross* as to suggest that "the motivating factor standard was not an organic part of Title VII and thus could not be read into the ADEA" and that *Price Waterhouse* would not have been decided the same way today based on the Court's current preference for textual interpretation.[392] By discrediting the rationale of *Price Waterhouse*, *Gross* had created an interesting conundrum. Two different Courts had now read the term "because of" in two very different ways. However, *Price Waterhouse* had dealt only with the prohibition against status-based discrimination under section 703(a)(1), and the same term was used again to define discrimination in retaliation for an employee's activities in opposition to employer discrimination. Now, *Gross*, an interpretation of the ADEA, stood in between the Court's interpretations of two provisions within Title VII, and in that position *Gross* was determined to still have "persuasive force."[393]

Nassar demonstrates just how significant a shift in the Court's interpretive perspective can be. The shift in perspective wrought in *Gross* effectively rewrote the past in a way that had consequences for future interpretations of both Title VII and the ADEA. The Court is not now doing away with the concept of interpretive perspective and promising to approach all future decisions *tabula rasa*. It is instead working through the uncomfortable and disruptive process of abandoning one interpretive perspective and trying to establish another. And the full consequences of this shift may not yet have been fully realized. The Court is careful in *Nassar* to confine its decision to section 704(a), emphasizing that this portion of the statute prohibits conduct- and not status-based discrimination.[394] If, however, the motivating factor test was never an organic part of Title VII, then why would future interpretations of disparate treatment discrimination under section 703(a)(1) not also follow *Gross*? If *Gross* has now demonstrated the proper way to adjudicate claims of disparate treatment discrimination and has neutralized the *Price Waterhouse* rationale with regard to section 704(a), will it also control

392. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2527 (2013) (citing *Gross*, 557 U.S. at 178 n.5).

393. *Id.*

394. *Id.* at 2525–27 (emphasizing the distinction between conduct- and status-based discrimination, and concluding that the motivating factor test provided by the 1991 Act applies only to status-based discrimination).

future interpretations of section 703(a)(1), notwithstanding the Court's numerous precedents construing that provision directly? Perhaps *Gross* is now more authoritative on this question than *McDonnell Douglas*.

The Court may in the future follow *Gross*'s invitation and apply its textualist approach to hold that the *McDonnell Douglas* burden-shifting framework does not apply under the ADEA, and, if it does so, perhaps it will also conclude that whatever formula is articulated in its place provides a more convincing interpretation of Title VII's section 703(a)(1). In this way, the Court's loss of interpretive perspective poses very serious problems not only for statutory coherence but also for the canonical view of statutory stare decisis.[395] It is not hard to imagine a future in which *McDonnell Douglas* gives way to *Gross* because the former is adjudged to rest upon "removed or weakened . . . conceptual underpinnings" and to constitute "a positive detriment to coherence and consistency in the law."[396] If, however, this were to come to pass, it would be because the Court itself had weakened support for *McDonnell Douglas* by abandoning the interpretive perspective from which *McDonnell Douglas* and its first generation of progeny were decided.

In sum, the Court's change of interpretive perspective in the employment discrimination context has two important features: its embrace of textualism as its guiding interpretive theory *and* its rejection of the interpretive rationales and assumptions reflected in its own precedents. The Court's new textualist turn is significant not just because of the constraints that the theory places on judicial interpretation. The theory also permits the Court to cast aside a set of practical and substantive assumptions that formerly guided its decisions without explanation. It is this combination of a change in theory and abandonment of guiding values and assumptions that together mark the Court's shift in interpretive perspective. It is important to note that an embrace of textualism alone would not necessarily have resulted in the degree of statutory incoherence unleashed by the Court's current cases. The Court might have recognized a limitation on its new textualist approach, concluding that even after its change of interpretive theory it was bound to respect the rationales of its prior decisions. Its failure to do this has fueled the difficulties discussed in this section. The remaining section will consider whether the doctrine of stare decisis could have been used to enforce greater interpretive consistency.

395. *See supra* Part I.A.

396. *E.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) (declining to overrule *Runyon v. McCrary*, 427 U.S. 160 (1976)).

B. THE LIMITATIONS OF STARE DECISIS

Stare decisis is often invoked as if it were, in the realm of judicial interpretation, the guardian knight of the rule of law, the champion of stability and order that staves off interpretive caprice. *Patterson* and *CBOCS* show, however, that in the area of statutory interpretation, stare decisis is an overworked piece.[397] It relies upon the boundary between holding and dictum, but it cannot maintain that boundary without sacrificing continuity. If it varies too much in where it draws that boundary, then, rather than a defender of the law's "orderly development,"[398] it becomes nothing more than a "figleaf" used to conceal vagaries of interpretive method and ideology.[399] This leaves both accounts of stare decisis unsatisfying—*Patterson*'s because its sharp division between holding and dictum undervalues the stability and coordination that comes from adhering to prior rationales, and *CBOCS*'s because under its account no clear explanation is given of what aspects of a decision deserve precedential value and why.

Under the canonical view of stare decisis expressed in *Patterson*, the problem of statutory incoherence is unrecognizable. Precedential value attaches only to holdings. Stare decisis, within its limited sphere, performs the function of preserving predictability and consistency. However, this understanding of predictability and consistency relates only to vertical coherence and is therefore limited. It does not guarantee consistent interpretation of identical statutory language used in similar circumstances, even when two statutes share a common origin or purpose. The public is not encouraged to have confidence in predictions of how future cases will be decided because it cannot trust that the Court will adhere to prior interpretive rationales. Moreover, it may even lose confidence in particular precedents because the Court's rejection of their rationales raises questions about the viability of their holdings. Problems such as the difficulty in determining when the motivating factor test may be applied after *Desert Palace* or the need to manage a fundamental conflict between disparate treatment and disparate impact theories of discrimination after *Ricci* are simply not relevant, even if the rationales of prior decisions would have suggested that these conflicts should be worked out in particular ways.

The Court, however, renders new decisions against the backdrop of its prior rulings, and not upon a clean slate. Textualists may presume that

397. *See supra* notes 42–51, 84–101 and accompanying text.

398. Eskridge, *supra* note 12, at 1371.

399. CBOCS West, Inc. v. Humphries, 553 U.S. 442, 464 (2008) (Thomas, J., dissenting).

incoherence is a consequence of legislative compromise reflected by a statute and therefore beyond the Court's responsibility or control.[400] This Article, however, points to a different problem. Statutory incoherence arises not just from legislative compromise or drafting, but also as a consequence of contemporary decisions—not because the Court suddenly happens upon a conflict between statutory terms, but rather because decisions made today cast doubt upon the interpretive basis, and perhaps also the continuing validity, of decisions rendered in the past. Textualism may not authorize the Court to supply statutory coherence—that is, judicial interpretation may not be an appropriate *source* of statutory coherence—but that does not mean that changes in the Court's interpretive methods are themselves permitted to be a source of incoherence.

CBOCS makes a plea for statutory coherence in the face of interpretive regime change, but not *against* regime change. Justice Breyer did not argue that the Court's turn toward textualism must be held in abeyance when it decides employment discrimination cases. Rather, he argued that the change in regimes should not upset the precedential value of past decisions.[401] In other words, prior cases do not become wrongly decided simply because today, using different interpretive methods, they would likely be decided differently. This may seem an unremarkable claim. Even *Patterson* agrees with this view, and this explains why it does not overrule *Runyon*.[402] The Court's more recent textualist decisions sometimes forget to make this concession,[403] and so it is good to be reminded of its importance.

The trouble, however, with *CBOCS* is that it is difficult to know just how far the Court meant to stray beyond the theory of stare decisis presented in *Patterson*. If the Court believed that it was bound to follow *Sullivan* because § 1981 and § 1982 must be read in unison, this would make *CBOCS* look more like *Patterson*. But of course *CBOCS* was not bound to follow *Sullivan* in any conventional sense because the two cases concerned different statutes. The precedential weight of *Sullivan* is

400. *See supra* notes 181–87 and accompanying text.

401. *Id.* at 451–52 (majority opinion).

402. *Patterson*, 491 U.S. at 171–75.

403. *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 178–79 (2009) (suggesting that the Court need not follow *Price Waterhouse* because it was unlikely that the case would be decided the same way today). *See also CBOCS*, 553 U.S. at 468–69 & n.4 (Thomas, J., dissenting) (arguing, based on a "linguistic argument" not raised in *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), that "even if *Sullivan* had squarely and unambiguously held that § 1982 provides an implied cause of action for retaliation, it would have been wrong to do so because § 1982, like § 1981, prohibits only discrimination based on race, and retaliation is not discrimination based on race").

dependent on the Court's view that applying the substance of § 1982 precedents to § 1981 cases is the right approach based on the interpretive perspective that it had developed in resolving cases under both statutes from *Jones v. Alfred H. Mayer Co.* forward.[404] *CBOCS* does not, however, stand clearly for the proposition that adherence to its prior interpretive perspective compelled the Court to find retaliation claims to be authorized under § 1981 even in the absence of a precedent deciding the same issue under § 1982. In such a circumstance, it is not clear whether *CBOCS* requires any attention to be paid the Court's prior interpretive perspective at all. Therefore, on its facts, *CBOCS*'s theory of stare decisis appears to be attentive to established interpretive perspective and protective of statutory coherence, but perhaps this is so only because following *Sullivan* offered the Court a rare opportunity to support continuity under a textualist approach. Otherwise, *CBOCS* articulates no clear theory for adhering to an old interpretive perspective in the absence of a precedent resolving an indistinguishable issue. In fact its concession that interpretive methods may change suggests just the opposite, because interpretive perspectives are constituted in part by the theories that grant significance to the assumptions and values that guide past decisions.

The Court's interpretive perspective cannot be reduced to its interpretive theory and the canons of construction recognized by that theory. Interpretive theories are often important predictors of judicial outcomes, and to think of such theories in the broader context of interpretive regimes enriches our understanding by underscoring that the theories carry with them associated canons of construction and other conventions, and that a court's use of such conventions is an important aspect of observance of a particular theory.[405] In the context of a particular statute or family of statutes, however, legal actors and regulatory subjects do not rely exclusively on interpretive theories or their associated conventions when attempting to predict the law's application in particular cases or otherwise to justify interpretive outcomes. This is because the Court's interpretive perspective is not limited to its theory of interpretation; it also includes the assumptions, doctrines, and interpretive meanings that guided the Court's prior interpretations in a particular field of law. The Court's own precedents may provide constructions of relevant statutory provisions, and the rationales used to justify those precedents may include attributions of statutory purpose, legislative intent, or semantic meaning, that hold continuing significance for interpretations of the same statute

404. *See supra* text accompanying notes 76–83.

405. *See supra* note 2.

even in cases that hinge on different specific provisions. In this sense, aspects of the Court's prior decisions may in subsequent cases serve as interpretive assumptions and demonstrate why a court's interpretive perspective is necessarily statute-specific.

Whether the Court's impact on statutory coherence is neutral depends on its maintaining some measure of consistency in its interpretive perspective. And here, stare decisis is at a loss for it includes no such mechanism. Under the canonical view of stare decisis, a strong presumption of correctness will apply to the holdings of statutory cases, but changes in the Court's interpretive method will be freely permitted. The view proposed in *CBOCS*, on the other hand, is ambiguous. Either *CBOCS* merely repackages *Patterson*'s distinction between holding and dictum, or it casts doubt upon that distinction without articulating a reliable alternative basis for the assignment of stare decisis protection. The Court, therefore, remains free to manipulate the concept of stare decisis in ways that justify its decisions regardless of whether they adopt or abandon prior interpretive perspectives, and to treat the resulting loss of statutory coherence as if it were a matter beyond its responsibility. The analysis of federal employment discrimination law presented in this Article, however, demonstrates that whether the Court's interpretive perspective is consistently maintained is a matter both uniquely within its control and of enormous consequence for statutory coherence.

CONCLUSION

Interpretive theories are subject to change. Stare decisis does not constrain the Supreme Court's discretion to alter its interpretive practices over time. This does not mean, however, that shifts in the Court's interpretive practices are without consequence. With its adoption of new textualist methods the Court has rejected interpretive methods, assumptions, and determinations that were once critical to its interpretations of federal employment discrimination statutes. The Court thus abandoned the interpretive perspective by which it had previously organized its interpretations of this body of law. This Article has illustrated several ways in which the loss of interpretive perspective may produce statutory incoherence. The Article demonstrates that, by abandoning its prior interpretive perspective, the Court has contributed to statutory incoherence in the area of employment discrimination law, and that stare decisis doctrine has been inadequate to prevent this outcome.