Bizarro Statutory Stare Decisis

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In Smith v. City of Jackson, *the Supreme Court applied* Wards Cove Packing Co. v. Atonio, *dealing with disparate impact theory and burdens of proof under Title VII of the 1964 Civil Rights Act, to the Age Discrimination in Employment Act—even though Congress had overridden* Wards Cove *with the Civil Rights Act of 1991. The Court relied on two interpretive approaches to arrive at this result: the presumption that identical language in the ADEA and Title VII should be interpreted consistently, and the strong presumption of statutory stare decisis. This convergence of circumstances led to the odd result of duplicating the congressionally disfavored* Wards Cove *interpretation.*

Prenkert uses the comic book story of Bizarro, Superman's imperfect duplicate, as an allegory for the Smith *Court's flawed invocation of statutory stare decisis to duplicate* Wards Cove, *labeling it Bizarro statutory stare decisis. None of the justifications for the regular presumption of statutory stare decisis supports the result in* Smith, *and Bizarro statutory stare decisis interferes with the proper balance of power between Congress and the Court. The Article explores this and other contexts in which Bizarro statutory stare decisis could be ruinously applied.*

Ultimately, Prenkert presents an alternative to Bizarro statutory stare decisis. In situations like that in Smith, *the Court should not treat an overridden interpretation as binding precedent, but should instead interpret the statute before it as a matter of first impression. In doing so, an overridden interpretation should not be duplicated without clear textual, purposive, or historical evidence of its appropriateness. The Article concludes by applying this alternative to Smith and explaining why* Wards Cove *should never have been revived.*

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"[W]hen 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."

— Smith v. City of Jackson, 544 U.S. 228, 233 (2005).

"While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination. Hence, Wards Cove's pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA."

— Smith v. City of Jackson, 544 U.S. 228, 240 (2005)

"What am me?"

— Bizarro

I.
INTRODUCTION

In *Smith v. City of Jackson*,[1] the Supreme Court of the United States relied on, incorporated, and applied a prior decision that Congress had subsequently overridden[2] when it passed the Civil Rights Act of 1991 (hereinafter the "1991 Act").[3] That Act treated *Wards Cove Packing Co. v. Atonio*,[4] an opinion that interpreted Title VII of the 1964 Civil Rights Act (Title VII),[5] as binding precedent for the disparate impact theory of liability[6] as applied pursuant to a different statute—the Age Discrimination in Employment Act of 1967 (ADEA).[7] Justice Stevens, writing for the Court

1. 544 U.S. 228 (2005).

2. In this Article, I use the terms "override," "overriding," and "overridden" as they are used in William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 332 n.1 (1991) [hereinafter, Eskridge, *Overriding*] ("This Article will use the term "override" to mean any time Congress reacts consciously to, and modifies a statutory interpretation decision."). In contrast, "overrule," "overruling," or "overruled," as used in this Article and by Eskridge, refers to Supreme Court reversal of its prior statutory interpretation decision. *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) [hereinafter, Eskridge, *Overruling*].

3. Pub. L. No. 102-166, 105 Stat. 1071.

4. 490 U.S. 642 (1989).

5. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

6. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971). See also *infra* Part II for a general overview of the disparate impact theory of discrimination under federal anti-discrimination laws.

7. 29 U.S.C. §§ 621-34 (2000).

in *Smith*, used language evoking the doctrine of enhanced statutory stare decisis,[8] which the Court often applies to its statutory interpretations.[9] Based on the presumption that any ADEA language that was "derived *in haec verba*" from Title VII should be interpreted the same as that language was interpreted in Title VII, the court relied on its Title VII decisions to interpret the ADEA.[10] Congress did not amend the ADEA in response to *Wards Cove* as it had Title VII, so the Court treated that congressional inaction as an adoption of the *Wards Cove* interpretation for the ADEA.[11] Yet, this was no normal implementation of statutory stare decisis. It was at best an imperfect duplicate, sharing some characteristics with the traditional form, but mutated and problematic. As such, the statutory stare decisis employed in *Smith* bears a metaphorical resemblance to the comic book character Bizarro. *Smith* has introduced a new doctrine to the statutory interpretation milieu: Bizarro statutory stare decisis.

In the *Superman* comic series, Bizarro is a recurring character.[12] A likely homage to Frankenstein's monster,[13] Bizarro is an imperfect replica of Superman, created by a faulty "duplicating ray."[14] Bizarro's appearance

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8. Smith v. City of Jackson, 544 U.S. 228, 240 (2005) ("While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination. Hence, *Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA."). Throughout this Article, the adjectives "enhanced," "heightened," or "strengthened" are used to modify "statutory stare decisis." This usage is intended to reflect that the Supreme Court often applies stare decisis with increased vigor when the precedent involves an interpretation of statutory interpretation to which Congress has not objected. *See infra* note 117 and accompanying text. In using the modifiers to highlight this point, I follow the lead of scholars who have written previously on this topic. *See, e.g.*, Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 331 n.74 (2005); Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 223 (1989); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1417 (2005).

9. Barrett, *supra* note 8, at 319 (describing the Supreme Court's historical use of statutory stare decisis).

10. *Smith*, 544 U.S. at 234 (citing Lorillard v. Pons, 434 U.S. 575 (1973)).

11. *Id.* at 240.

12. What follows is an overly-simplified version of the Bizarro mythos, relying mostly on the "Silver Age" incarnation of Bizarro. As with most comic book characters, Bizarro's appearances in various comic book series over the years create a multi-layered and complex (as well as arguably internally contradictory) biography. I hope true fans of the Superman comic books will allow me to simplify and streamline the story.

13. *See generally* MARY SHELLEY, FRANKENSTEIN (Simon & Schuster 2004) (1818).

14. In his many incarnations, Bizarro is typically created by someone (e.g., Lex Luthor or a scientist acquaintance) shooting Superman with a "duplicating ray," either accidentally or purposefully. *See, e.g.*, Otto Binder, *Superboy*, *in* THE GREATEST SUPERMAN STORIES EVER TOLD 115-17 (John Byrne and Mike Gold eds., 1987) (Professor Dalton creates Bizarro by accidentally hitting Superboy with his malfunctioning "duplicator ray"). The duplicating ray creates a copy of Superman, but Bizarro is an "imperfect duplicate." He often is depicted with a pasty complexion, angular rock-like features, and wearing a copy of the traditional Superman outfit (though the "S" emblem on his chest is often backwards). *See* Superman Super Site, Bizarro, http://www.supermansupersite.com/bizzarro.html (last visited Oct. 20, 2006).

and abilities resemble Superman's.[15] He also shares some of Superman's memories and sensibilities.[16] In his early comic book appearances, Bizarro is not the opposite of Superman.[17] He is not evil; he is simply a mutation.[18]

From this origin, the word *Bizarro* has come to refer to an imperfect version or mutation.[19] Though a Bizarro version shares aspects of the original, it is not equivalent to the original. And, usually, it is seriously flawed.[20]

Like the Bizarro character, the origin of Bizarro statutory stare decisis is the result of an odd convergence of circumstances. In general, where the ADEA and Title VII have identical language, the Court will treat a decision interpreting one as a binding interpretation of the other.[21] This is where the mutation of the statutory stare decisis logic takes root in *Smith*. It is the duplicating ray, if you will.

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15. The many appearances of Bizarro in the Superman comics share a few common threads. One is his odd grammar. Bizarro typically uses only the accusative case pronouns "me," "him," "her," and "them" and conjugates verbs incorrectly. *See* Binder, *supra* note 14, *passim*. Another is the origin of the name "Bizarro." Always, shortly after Bizarro's creation, someone describes him as "bizarre." Superman Home Page, Superman: Special Reports: Bizarro, http://www.supermanhomepage.com/comics/comics.php?topic=special-reports/bizarro (last visited Aug. 29, 2006). In the original *Superboy* comic, Superboy comments, "Gosh, that creature is bizarre." To that, Bizarro responds, "Him call me . . . Bizarro. Is . . . Is that my name?" *See* Binder, *supra* note 14, at 117.

16. For instance, in his initial appearance in *Superboy*, Bizarro tries to go "home" to the Kent farm, but feels rejected when his "mom" asks him to leave. Binder, *supra* note 14 at 120. Bizarro also pines for Lois Lane, as does Superman, and kidnaps her. Lois is saved when she turns the duplicating ray on herself and creates Bizarro-Lois. *See* Superman Home Page, *supra* note 15.

17. Readers familiar with the television series *Seinfeld* will recall the episode in which Elaine meets a group of three friends who are, in many respects, the opposite of her friends Jerry, George, and Kramer. Jerry surmises that Elaine's new friends are the "Bizarro" version of himself, George, and Kramer. *See Seinfeld: The Bizarro Jerry* (NBC television broadcast October 3, 1996). A short video clip from the episode, including a reference to "Bizarro world" by Elaine can be found at http://www.sonypictures.com/tv/shows/seinfeld/site/player/player.html?path=../video/promos/0803 (last visited Nov. 12, 2006). This understanding of Bizarro comes from his more recent appearances in the Superman comics, in which his manner of speaking is no longer marked only by the third person accusative, but also by saying the opposite of what he means. Furthermore, in these more recent appearances, Bizarro's behavior is intended to be evil, rather than confused or misguided. *See, e.g.*, Superman Homepage, Who's Who in the Superman Comics: Bizarro, http://www.supermanhomepage.com/comics/who/who-intro.php?topic=bizarro (last visited Oct. 20, 2006).

18. *See* Don Markstein's Toonpedia, Bizarro, http://www.toonopedia.com/bizarro1.htm (last visited Oct. 20, 2006) ("Comics writer Alvin Schwartz, who scripted the *Superman* newspaper strip in the 1950s, said many years later that he saw the Superman character, at that time, as a creature of radiant light, and conceived Bizarro as sort of a dark Superman—not evil, as opposed to Superman's goodness, but a Superman without radiance.")

19. *See* Superman Super Site, *supra* note 14.

20. *See id.*

21. Smith v. City of Jackson, 544 U.S. 228, 233-34 (2005) ("[W]hen 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. We have consistently applied that presumption to language in the ADEA that was 'derived *in haec verba*' from Title VII." (internal citations omitted)).

Congress enacted the 1991 Act in part to repudiate several Supreme Court decisions from the Court's October 1989 term, including *Wards Cove*, which narrowly interpreted the disparate impact theory of recovery under Title VII. While the 1991 Act explicitly overrode the *Wards Cove* interpretation of Title VII, the *Smith* Court treated the decision as controlling precedent nevertheless because it involved mostly[22] identical statutory language. The doctrine of statutory stare decisis arguably supports the Court's interpretive move. Yet, it is strange for the Supreme Court to treat Congress's silence regarding the ADEA as tacit approval of an interpretation Congress had overridden nearly a decade and a half earlier. The presumption of consistency between interpretations of Title VII and the ADEA, combined with the acquiescence justification for a strong presumption of statutory stare decisis,[23] resulted in an unreasoned and unsound (i.e., Bizarro) interpretation of the ADEA.

Regrettably, the *Smith* Court's application of Bizarro statutory stare decisis is not destined to be an exceptional occurrence. Just as Bizarro was allowed to roam, wreaking havoc along his way, Bizarro statutory stare decisis might be used to apply other overridden interpretations of Title VII to the ADEA. If allowed to flourish, this Bizarro version of statutory stare decisis would place the onus on Congress to amend every statute to which the Supreme Court could theoretically extend a misguided interpretation.

This Article describes why Bizarro statutory stare decisis is a flawed interpretive approach. The *Smith* Court erroneously relied on the approach to revive *Wards Cove*, and thereby failed to serve the purposes of ordinary statutory stare decisis.[24] As an alternative, this Article advocates that situations like *Smith* require the Court to interpret the statutory language in the first instance, with due care not to revive congressionally overridden interpretations without substantial justification.

Part II provides the background for the Court's creation of Bizarro statutory stare decisis in the *Smith* decision.[25] In particular, it discusses the landmark cases in which the Supreme Court recognized, endorsed, and fashioned the disparate impact theory under Title VII, culminating in *Wards Cove*. Part II then describes the congressional repudiation of *Wards Cove* in the 1991 Act. Finally, Part II summarizes the history of the application of disparate impact theory under the ADEA before the *Smith* decision, which unfolds in two chapters. First, the theory was applied consistently and without controversy, relatively speaking. Second, following the

22. Title VII has no defense similar to the ADEA's "reasonable factor other than age" defense in section 4(f)(1). *See* 29 U.S.C. 623(f)(1) (2000). See Parts IV and VI, *infra*, for discussions of the significance of that textual difference.

23. *See infra* Part III.B.1 for a fuller description of the acquiescence justification.

24. *See infra* Part IV.B.

25. Part II parallels the Superman mythos, which is essential to a full understanding of the Bizarro story.

Supreme Court's decision in *Hazen Paper Co. v. Biggins*,[26] it was applied chaotically and inconsistently.

Parts III and IV recount the origin of Bizarro statutory stare decisis and explain what makes it "Bizarro." In particular, Part III describes the two elements essential to the creation of Bizarro statutory stare decisis: the consistency presumption[27] and statutory stare decisis.[28] This part also introduces the various theoretical justifications for statutory stare decisis.

Part IV.A discusses the Court's opinion in *Smith*, focusing primarily on the resurrection of the *Wards Cove* interpretation of the evidentiary burdens in a disparate impact case. Part IV.B explains why *Smith*'s Bizarro statutory stare decisis fails to meet the various justifications that support a strong presumption of statutory stare decisis.

Part V highlights the problems likely to result if Bizarro statutory stare decisis is allowed to take root. The confusion regarding the mixed-motives theory of discrimination and the overridden interpretation of Title VII in *Price Waterhouse v. Hopkins*[29] exemplifies a context in which Bizarro statutory stare decisis could again play a decisive and destructive role in ADEA interpretation.[30]

Finally, Part VI provides an alternative to Bizarro statutory stare decisis in contexts like *Smith*. I argue that the Court should interpret the statutory language as it would in the first instance.[31] In advocating this approach, I do not argue that the Court must adopt the amended statute's approach; however, it should be cautious not to revive an overridden interpretation without specific textual, purposive, or historical indications that such an interpretation is more appropriate in the subsequent statutory context (in this case, the ADEA) than it was in the original statute (in this case, Title VII). Part VI concludes with an explanation of how this approach might have played out in *Smith*.

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26. 507 U.S. 604 (1993).

27. The consistency presumption parallels the duplicating ray in the Bizarro story. While the comic book context allows one to suspend disbelief and accept the existence of the duplicating ray despite its questionable science, the consistency presumption requires a bit of explication. Part III.A provides the metaphorical "specs" for the consistency presumption duplicating ray.

28. In the allegory to the Bizarro story, statutory stare decisis represents Superman. It is the original "super" power (*see infra* note 116 and accompanying text) from which the imperfect, Bizarro power is derived.

29. 490 U.S. 228 (1989).

30. This part parallels the destruction Bizarro caused when he was allowed to roam the city on his own.

31. In other words, I argue that the Court should approach the interpretation as it generally would in any other interpretation of first impression.

II.
THE HISTORY OF DISPARATE IMPACT: THE BIZARRO BACKSTORY

The evolution of the disparate impact theory sets the stage for the explanation of why the Supreme Court's creation of Bizarro statutory stare decisis in *Smith* was unwarranted and doctrinally dangerous. This Part will discuss the genesis of Title VII disparate impact theory in the Supreme Court and its development through the *Wards Cove* decision. Then, it will describe the congressional reaction to *Wards Cove* in the 1991 Act. This Part will conclude by describing the federal courts' application of disparate impact theory under the ADEA before *Smith*.

A. Disparate Impact Theory Under Title VII

When it enacted Title VII, Congress did not likely anticipate the specific form and role of disparate impact theory under the statute. Nevertheless, disparate impact theory garnered the federal courts' attention, and those courts put the doctrine to use soon after Title VII's enactment.

1. Griggs v. Duke Power Co. *and its Early Progeny: Recognizing and Refining Disparate Impact*

Although disparate treatment claims are more common—and perhaps because disparate treatment is "the most easily understood type of discrimination"[32]—one of the Supreme Court's first forays[33] into Title VII interpretation was a disparate impact claim. In *Griggs*,[34] a group of African-American employees challenged their employer's practice of requiring a high school diploma and passing scores on standardized tests as conditions for hire or transfer to certain departments.[35] While the employer had a history of rejecting black job applicants and segregating its

32. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). The ease by which disparate treatment may be understood is belied by the continuing attention commentators and courts devote to the difficult questions raised by disparate treatment theory. *See, e.g.*, Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 916-925 (2005) (describing the "motive-intent question" and trait discrimination as seriously complicated issues that disparate treatment theory raises).

33. Technically, *Griggs* was the second Title VII case to reach the Supreme Court. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam), preceded *Griggs* by approximately three months. The two cases were argued before the Court within a week of each other. *Phillips*, which involved a claim by a woman who was denied an employment opportunity because she had preschool-aged children even though fathers of preschool-aged children were not similarly denied the opportunity, was a short *per curiam* opinion. *Id.* at 543. The Supreme Court's opinion vacating and remanding the case stated, "The Court of Appeals therefore erred in reading . . . section [703(a)] as permitting one hiring policy for women and another for men—each having pre-school-age children." *Id.* at 544. *Phillips* is considered the foundation for the theory of "sex-plus" or "gender-plus" discrimination. *See* Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 722 (2001) ("*Phillips* established what is now referred to as the sex-plus doctrine.").

34. 401 U.S. 424 (1971).

35. *Id.* at 427-28.

departments, it abandoned those practices before Title VII's effective date in 1965.[36] Nevertheless, the graduation and standardized test requirements perpetuated the segregated status quo. Black employees remained segregated into the lowest paying department.[37] Notably, neither the high school graduation requirement nor the standardized test requirement was shown to—or intended to—identify workers with particular abilities to perform the jobs for which they were used as screening devices.[38] Instead, the purpose of the requirements was to maintain "the overall quality of the workforce."[39] Yet workers who had neither graduated from high school nor passed the standardized tests could satisfactorily perform the jobs.[40]

Because the diploma and standardized testing requirements screened out a "markedly disproportionate" number of black employees,[41] the Court addressed whether the requirements violated Title VII. The Court interpreted Section 703(a)(2) of Title VII[42] as authorizing such disparate impact claims, even when an employer did not intentionally discriminate.[43] The Court focused on the consequences of the employment practices, instead of the motivation for them,[44] and accepted the lower court's finding that the employer had not intentionally discriminated against the black employees when it implemented the requirements. Nevertheless, the Court determined that discriminatory intent was not required when a non-job-related policy or practice had discriminatory effects.[45] The Court's reasoning is evident in the following passage: "[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[46] This passage is the origin of the "business necessity" defense, which became central to

36. *Id.* at 427.

37. *Id.*

38. *Id.* at 431.

39. *Id.*

40. *Id.* at 431-32.

41. *Id.* at 429.

42. 42 U.S.C. § 2000e-2(a)(2) (2000) ("It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

43. *Griggs*, 401 U.S. at 430.

44. *Id.* at 432.

45. *Id.* ("We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.").

46. *Id.* at 431.

evaluating whether a neutral policy with discriminatory results is prohibited under Title VII.[47]

Over the next fifteen years a body of case law developed, adding nuance to the disparate impact theory announced in *Griggs*.[48] The basic structure and allocation of burdens in a disparate impact claim, however, remained generally consistent.[49] The plaintiff had to prove a prima facie case by producing statistical evidence of the disparate impact caused by an otherwise neutral employment practice. The burden then shifted to the employer to prove the necessity of the challenged practice. In the late 1980s, however, that all changed.

2. Watson v. Fort Worth Bank & Trust: *Foreshadowing* Wards Cove's *Retrenchment*

Nearly eighteen years after the Supreme Court's decision in *Griggs*, the Court issued a fractured opinion in *Watson v. Fort Worth Bank & Trust*,[50] which recognized that subjective or discretionary employee selection practices could provide grounds for a disparate impact claim.[51] Justice O'Connor's plurality opinion notably would have reallocated the burden shifting scheme in disparate impact cases. Thus, *Watson* foreshadowed the retrenchment of *Wards Cove* and set the stage for the 1991 Act's disparate impact amendment.

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47. *Id.*

48. Disparate impact claims heard by the Supreme Court in this period included *Connecticut v. Teal*, 457 U.S. 440 (1982) (finding a disparate impact claim actionable if some policy, practice, or procedure results in adverse impact, even if ultimate "bottom line" employment numbers show no imbalance); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (extending disparate impact claims to height and weight restrictions that had an adverse impact on the basis of gender, and requiring close correlation between the standard and job performance); *Washington v. Davis*, 426 U.S. 229 (1976) (holding that the Constitution's Equal Protection Clause does not include a Title VII disparate impact claim, but rather requires proof of discriminatory intent); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (requiring validation of tests to show job relatedness).

49. *But see* Earl M. Maltz, *The Legacy of* Griggs v. Duke Power Co.: *A Case Study in the Impact of a Modernist Statutory Precedent*, 1994 UTAH L. REV. 1353, 1370-71 (arguing that the business necessity and job related requirements were inconsistently applied in the courts during this time).

50. 487 U.S. 977 (1988). Justice O'Connor penned an opinion that was part-majority and part-plurality. The eight members of the Court who participated in the consideration and decision of the case agreed as to the judgment and agreed that disparate impact claims pursuant to Title VII could be based on subjective or discretionary employee selection practices; however, four of the justices refused to join what Justice Stevens called the plurality's "'fresh' interpretation of [the Court's] prior cases applying disparate-impact analysis to objective employment criteria." *Id.* at 1011 (Stevens, J., concurring).

51. Prior to *Watson*, the Supreme Court had only endorsed and applied the disparate impact model to objective criteria, such as educational requirements, standardized tests, and height and weight requirements. *See, e.g., Teal*, 457 U.S. at 443 (written test); New York City Transit Auth. v. Beazer, 440 U.S. 568, 570 (1979) (prohibition against methadone users); *Dothard*, 433 U.S. at 323-24 (height and weight requirements); *Davis*, 426 U.S. at 234-35 (test of verbal skills); *Albemarle*, 422 U.S. at 410-11 (written aptitude test); *Griggs*, 401 U.S. at 425-26 (high school diploma and standardized testing requirements).

Clara Watson, an African-American woman, worked as a bank teller for Fort Worth Bank & Trust.[52] Watson applied for at least four separate open positions at Fort Worth, each of which would have been a promotion,[53] and was turned down for each in favor of white candidates.[54] Fort Worth had no formal, objective criteria or procedures for evaluating candidates for the positions. Rather, Fort Worth relied on the subjective judgment of supervisors who were familiar with the applicants and with the positions in question.[55]

Watson filed suit against Fort Worth alleging race discrimination on behalf of a class of "blacks who applied to or were employed by [Fort Worth] on or after October 21, 1979 or who may submit employment applications to [Fort Worth] in the future."[56] The lower court held that Watson's case was inappropriate for disparate impact analysis due to the subjective nature of the hiring and promotion process.[57] Justice O'Connor described the Court's task in *Watson* as "determin[ing] whether the reasons that support the use of disparate impact analysis apply to subjective employment practices, and whether such analysis can be applied in this new context under workable evidentiary standards."[58] She identified two issues for the Court to resolve: (1) whether disparate impact analysis applies to subjective practices at all; and, (2) if it does, the proper allocation of the evidentiary burdens of production and persuasion in such cases.[59]

The justices agreed that disparate impact analysis could be applied to subjective selection practices.[60] They recognized that *Griggs* and its progeny too easily could be subverted and effectively nullified if a strict line were drawn between subjective and objective criteria, with disparate

52. *Watson*, 487 U.S. at 982.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 983.

57. Though the lower courts largely focused on the issue of class certification, *id.* at 983-84, the ultimately important issue was whether Watson's claim allowed for a disparate impact analysis given that the promotion process gave nearly unfettered discretion to supervisors. The United States Court of Appeals for the Fifth Circuit held that "'a Title VII challenge to an allegedly discretionary promotion system is properly analyzed under the disparate treatment model rather than the disparate impact model.'" *Id.* at 984 (quoting Watson v. Fort Worth Bank & Trust, 798 F.2d 791, 797 (5th Cir. 1986)). The Fifth Circuit's holding created a split among the circuit courts regarding the application of disparate impact analysis to discretionary or subjective hiring or promotion procedures. *Id.* (citing contrary holdings in Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (en banc); Griffin v. Carlin, 755 F.2d 1516, 1522-25 (11th Cir. 1985)). The Supreme Court granted certiorari to resolve that question. *Watson*, 487 U.S. at 985.

58. *Watson*, 487 U.S. at 989.

59. *Id.* ("[W]e must determine whether the reasons that support the use of disparate impact analysis apply to subjective employment practices, and whether such analysis can be applied in this new context under workable evidentiary standards.")

60. *Id.* at 989-990. *See also id.* at 1000 (Blackmun, J., concurring).

impact only applying to the latter.[61] Moreover, the justices saw no inherent difference between a disparate impact resulting from an objective criterion and one resulting from a subjective process. In both cases, a facially neutral practice that was not intentionally discriminatory produced discriminatory results.[62]

The justices' unanimity ceased as Justice O'Connor proceeded to allocate the evidentiary burdens of the disparate impact claim. The plurality believed that *Griggs*' burden-shifting scheme would force employers to resort to quotas if it applied to subjective practices. *Griggs* was traditionally understood to require employers to justify challenged practices by proving business necessity and job relatedness.[63] In the context of a claim based on objective tests, the employer could carry its burden by conducting validation studies on the tests. The O'Connor plurality was concerned that employers could not likewise "validate" subjective criteria or processes.[64] Without the benefit of validation studies to carry their burden under the business necessity defense, employers would adopt quotas to avoid workforce imbalances, thereby escaping the threat of disparate impact claims.[65]

To alleviate an employer's burden of justifying subjective hiring or promotion practices, and to avoid a perceived Hobson's choice between disparate impact liability and instituting quotas, the *Watson* plurality revisited the evidentiary standards of a disparate impact case. In particular, the plurality stated that bare statistical disparities in the workforce would be insufficient to support a prima facie case of disparate impact.[66] Rather, the plaintiff had to identify the *particular* employment practice that caused the

61. *Id.* at 989. For instance, Justice O'Connor noted that, regardless of where the line between subjective and objective procedures was drawn, procedures involving a mix of the two would by necessity fall on the subjective side of the line. Therefore, if disparate impact analysis were only applied to objective criteria, an employer could insulate its reliance on written tests, diploma requirements, or height and weight restrictions by making them formally non-determinative (though practically determinative) and adding a subjective interview step to the process. *Id.* at 989-90. *But see generally* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006) (arguing that the expansion of disparate impact theory to practices other than objective criteria, primarily testing and seniority cases, was a mistake in that it frustrated the development of an expansive concept of intent under disparate treatment theory).

62. *Watson*, 487 U.S. at 990.

63. Once a statistically and legally significant disparate impact was shown, *Griggs* and its progeny shifted the burden to the employer to justify the challenged practice. *See id.* at 991 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 426 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)). *See also supra* Part I.A.1.

64. *Watson*, 487 U.S. at 991-92.

65. *Id.* at 992. *But see* Eric Schnapper, *Statutory Misinterpretations: A Legal Autopsy*, 68 NOTRE DAME L. REV. 1095, 1130-33 (1993) (describing this concern about quota avoidance as a "vampire argument," in which an objection to legislation that was rejected when Congress enacted it is revived as courts insist the objection must be accounted for in the interpretation of the legislation).

66. *Watson*, 487 U.S. at 994.

adverse impact,[67] which is easier when only objective criteria are involved.[68]

Second, the plurality argued that the plaintiff should retain the burden of proving discrimination at all times. Disregarding contrary language in prior cases,[69] the *Watson* plurality stated that once an employer has produced "evidence that its employment practices are based on legitimate business reasons,"[70] the plaintiff has the burden of proving that the employer could have used other selection devices or practices that would not have produced the undesired adverse impact.[71]

The concurring justices criticized the plurality's construction of the evidentiary burdens.[72] Justice Blackmun, joined by Justices Brennan and Marshall, argued that the plurality's construction departed from precedent and undermined Congress's desire to prohibit both intentional discrimination and practices that unintentionally produce discriminatory effects.[73] In particular, Justice Blackmun argued that a plaintiff should only be required to present statistics to prove the prohibited discriminatory impact. After that, the employer should bear the burden of justifying the practice that caused the disparate impact, regardless of whether the practice was objective or subjective.[74]

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67. The plurality noted that the statistical evidence of adverse impact must be reliable, significant, and appropriately suited to show a causal connection between the challenged practice and the ultimate exclusion of members of a protected group. *Id.* at 994-96. The plurality declined, however, to set any particular threshold shortfall requirement, instead claiming that a case-by-case approach was preferable. *Id.* at 995 n.3.

68. *Id.* at 994.

69. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (requiring employer to "prove[] that the challenged requirements are 'job related'"); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.").

70. As Justice Blackmun explained in his concurrence, this formulation seems to reflect the *McDonnell Douglas* formulation of the shifting burdens in a disparate treatment case rather than a disparate impact claim (see *infra* note 270) and indicates that the employer has only the burden of producing evidence indicative of job relatedness rather than a burden of proving that the challenged practice is necessary. *Watson*, 487 U.S. at 1001-02 (Blackmun, J., concurring).

71. *Id.* at 998.

72. Justice Stevens objected to the discussion wholesale, arguing it was unnecessary to address the evidentiary standards, as the Court had answered the question presented regarding the applicability of disparate impact to subjective criteria in the affirmative. He saw no benefit to discussing evidentiary burdens in the abstract. *Id.* at 1011 (Stevens, J., concurring).

73. *Id.* at 1002.

74. *Id.* The disagreement between the plurality and the concurring justices also revolved around the type of evidence that could justify a challenged subjective practice and ease with which that evidence could be shown. The plurality argued that validation of subjective criteria was nearly impossible and suggested that showing a connection between the criteria and the employment would be relatively easy. *Id.* at 998-99. The concurrence argued that validation was not impossible and that evidence other than formal "validation studies," such as expert testimony and historically documented success, could be presented to support subjective criteria. *Id.* at 1006-07 (Blackmun, J., concurring). Furthermore, the concurring justices opposed the plurality with their argument that justifying subjective or discretionary criteria would often be more challenging. *Id.* at 1008-09.

As there was no majority opinion regarding the question of evidentiary burdens, *Watson* required clarification. The plurality's re-allocation of the burden of proof to the plaintiff to identify a specific practice that produced a statistically-significant disparate impact set the stage for the majority's retrenchment in *Wards Cove*.

3. Wards Cove Packing Co. v. Atonio: *Limiting Disparate Impact*

The wait for clarification was short. The Court heard *Wards Cove* the next term.[75] A class of workers at a salmon cannery in Alaska claimed that their employers ("the canneries") discriminated against them on the basis of race.[76] The workers raised both disparate treatment and disparate impact claims.[77] They alleged that the canneries' hiring and promotion practices[78] limited employment opportunities for non-white workers and produced a racially segregated workplace.[79] The disparate treatment claims were rejected in the lower courts, but the disparate impact claims raised several issues that *Watson* had left unresolved.[80] The Supreme Court granted certiorari to determine the appropriate evidentiary standards for disparate impact analysis.[81]

This time a bare majority ostensibly adopted the approach taken by Justice O'Connor's plurality in *Watson*. The Court first required the plaintiff to identify a specific employment practice that caused a disparate impact on a protected category.[82] By creating this specific causation requirement, the Court sought to spare employers from "being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.'"[83]

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75. 490 U.S. 642 (1989).

76. *Id.* at 647-48.

77. *Id.*

78. Specifically, the employees challenged the canneries' hiring and promotion practices: "nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, [and] a practice of not promoting from within." *Id.* at 647.

79. The canneries were located in remote areas of Alaska. *Id.* at 646. The workforce was divided into unskilled "cannery jobs" and primarily skilled "noncannery jobs," which were uniformly higher paying than the cannery jobs. *Id.* at 647. Local and Filipino (non-white) workers dominated the cannery jobs, while the noncannery skilled positions were primarily filled by white Washingtonians and Oregonians who were hired in the offseason at the canneries' mainland offices. *Id.*

80. Though beyond the scope of this Article, the Court also clarified what sort of statistical comparison would be sufficient to make out a prima facie case of disparate impact. *Id.* at 650 (noting that the plaintiffs' evidence of a significant imbalance in the racial makeup of the two classes of workers was insufficient to support a prima facie case without reference to the expected balance based on the qualified relevant labor force).

81. *Id.* at 649-50.

82. *Id.* at 657 ("As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack.").

83. *Id.* (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988)).

Second, the Court adopted the approach of Justice O'Connor's *Watson* plurality, allocating the burden of persuasion to the plaintiff at all times.[84] The Court required the employer to respond to the prima facie case by producing evidence of its business justification for the challenged practice; however, the employer was not required to show that the practice was "essential" or "indispensable."[85] This construction is noteworthy for two reasons. First, prior precedent indicated that the burden of proof (both production and persuasion) shifted to the employer upon the employee's prima facie showing of disparate impact.[86] Second, the Court further lowered the burden of production for employers, changing the description of that burden from "business *necessity*"[87] to "business *justification*."[88]

Finally, if the employer produced evidence of a business justification, the employee could still prevail by showing that an equally effective alternative practice could serve the employer's legitimate employment goals while reducing the adverse impact on the protected class.[89] But, not just any alternative would do. The employer must have known of the plaintiff's suggested alternative, yet rejected it nonetheless.[90] Furthermore, the Court determined that issues such as cost and other burdens were relevant when determining whether the alternative practice was in fact equally effective.[91]

4. *The Civil Rights Act of 1991: Overriding* Wards Cove

Congress quickly responded to *Wards Cove*'s restrictive interpretation of the disparate impact claim. As part of the 1991 Act, Congress amended Title VII by adding Section 703(k).[92] The amendment was a purposeful

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84. *Id.* at 659.

85. *Id.*

86. *Id.* at 660 ("We acknowledge that some of our earlier decisions can be read as suggesting otherwise. But to the extent that those cases speak of an employer's 'burden of proof' with respect to a legitimate business justification defense, they should have been understood to mean an employer's production—but not persuasion—burden." (internal citations omitted)).

87. *See, e.g., Griggs*, 401 U.S. at 431 ("The touchstone is *business necessity*." (emphasis added)).

88. *Wards Cove*, 490 U.S. at 659 (emphasis added). Interestingly, the Court used *Griggs*'s "touchstone" phrase, but substituted *justification* for *necessity*. Then, it specifically held that the justification must be substantial, but need not be "essential" or "indispensable." *Id.* The Court's verbal formula for business justification was that the "challenged practice [must] serve[], in a significant way, the legitimate employment goals of the employer." *Id.* That was a much less exacting standard than the business necessity formulation previously endorsed by the Court and applied by the lower courts. Though, in fairness, there was substantial variation in applying the standard among the lower courts prior to *Wards Cove*. *See infra* note 95.

89. *Wards Cove*, 490 U.S. at 660-61.

90. Thus, the employer's rejection "belie[s] a claim . . . that [the] incumbent practices are being employed for nondiscriminatory reasons." *Id.* at 661.

91. *Id.*

92. 42 U.S.C. § 2000e-2(k) (2000). In relevant part, section 703(k) reads:

(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if --

repudiation of the *Wards Cove* construction of disparate impact.[93] Rather than requiring the plaintiff to isolate a specific practice to challenge, the amendment allows the plaintiff to claim disparate impact based on the employer's decision-making process as a whole.[94] The amendment also readopts the "job related" and "business necessity" standards in lieu of the more lenient "business justification" and "legitimate interests" standards set forth in *Wards Cove*.[95] Finally, the 1991 Act clearly places the burden of proving business necessity on the employer,[96] overriding the element of the *Wards Cove* holding that saddled the employer with only the burden of production.[97]

Notably, the 1991 Act did not amend or even refer to the ADEA with regard to disparate impact claims.

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice."

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

Id.

93. Section 105 of the 1991 Act, which includes the amendment quoted *supra* at note 92, makes an interpretive memorandum the exclusive legislative history for that amendment. The memorandum proclaims that the terms "business necessity" and "job related" in the 1991 Act "reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, a 1971 case and other Supreme Court decisions prior to the Wards versus Atonio case." 137 Cong. Rec. S15237 (daily ed. Oct. 25, 1991) (Statement of Sen. Hatch).

94. 42 U.S.C. § 2000e-2(k)(1)(B)(i).

95. *Id.* § 2000e-2(k)(1)(A)(i). Some commentators have suggested, though, that the adoption of the standard of job relatedness and business necessity only incorporated pre-*Wards Cove* doctrinal confusion. *See, e.g.*, Maltz, *supra* note 49, at 1370-71 ("Ultimately, Congress chose not to resolve the apparent conflicts in the case law. Legislators instead adopted compromise language . . . . At the same time, the legislative history on this issue explicitly states that the Civil Rights Act simply reinstates the law as it existed prior to 1989."); Linda Lye, Comment, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 335 (1998) ("In essence, the 1991 Act codified the confusion which formerly prevailed.").

96. 42 U.S.C. § 2000e-2(k)(1)(A)(i), (k)(1)(B)(ii).

97. *See supra* notes 84-86 and accompanying text.

B. *Disparate Impact Theory Under the ADEA (Pre-*Smith*)*

The history of disparate impact analysis under the ADEA leading up to the Supreme Court's *Smith* opinion unfolds in two stages. Prior to 1993, the lower courts generally assumed that disparate impact analysis could be employed under the ADEA, as it had been under Title VII.[98] In 1993, however, the Supreme Court's decision in *Hazen Paper Co. v. Biggins*[99] challenged that assumption. The ensuing dozen years leading up to *Smith* saw relative chaos in the lower courts regarding the application of disparate impact theory under the ADEA, and the circuit courts splintered.[100]

1. *Before* Hazen Paper Co. v. Biggins*: General Recognition*

Lower courts uniformly assumed that *Griggs* and its progeny applied with equal force to the ADEA because Title VII and the ADEA shared the same relevant text.[101] Similarly, the EEOC's interpretive guidelines endorsed the application of disparate impact theory under the ADEA and incorporated the business necessity defense.[102] The Supreme Court's 1993 opinion in *Hazen Paper* upset this uniformity.

In *Hazen Paper*, Biggins claimed that his employer violated the ADEA when it terminated him in an attempt to keep his pension fund from vesting.[103] Though the Supreme Court recognized that the decision to terminate Biggins was correlated with his age, the decision was more specifically motivated by Biggins's years of service rather than by his age.[104] The Court therefore held that Biggins's disparate treatment claim failed because the employment decision was based on a factor other than age.[105]

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98. *See* Smith v. City of Jackson, 544 U.S. 228, 236-37 (2005) ("Indeed, for over two decades after our decision in *Griggs*, the Courts of Appeal uniformly interpreted the ADEA as authorizing recovery on a 'disparate-impact' theory in appropriate cases.").

99. 507 U.S. 604 (1993).

100. *See Smith*, 544 U.S. at 237 n.9 (listing authorities). *See also* Dennison Keller, Note, *Older, Wiser and More Dispensable: ADEA Options Available Under* Smith v. Jackson*: Desperate Times Call for Disparate Impact*, 33 N. KY. L. REV. 259, 268 (2006) (collecting cases illustrating the split).

101. *See* 42 U.S.C. § 2000e-2(a)(2) (2000) ("It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."). *See also infra* note 113 and accompanying text. This was ultimately the position taken by the Court in *Smith*. *See Smith*, 544 U.S. at 234.

102. *See Smith*, 544 U.S. at 239.

103. 507 U.S. at 606-07.

104. *Id.* at 611-612.

105. *Id.* at 613.

2. *After* Hazen Paper*: Circuit Split*

While the Court in *Hazen Paper* mentioned in dicta that the decision did not resolve whether disparate impact claims based on criteria correlated with age could be successful under the ADEA,[106] a number of lower courts interpreted *Hazen Paper* as repudiating disparate impact theory under the ADEA. A split developed in the circuit courts. The Second, Eighth, and Ninth Circuits found that the ADEA allowed disparate impact claims, while the First, Fifth, Seventh, Tenth, and Eleventh did not.[107]

In 2002, the Supreme Court granted certiorari in *Adams v. Florida Power* to resolve the split, but subsequently dismissed the writ as improvidently granted.[108] Two years later, the Court again granted certiorari, heard the argument in *Smith*, and finally laid to rest the confusion wrought by *Hazen Paper*.[109]

III.
THE INTERPLAY OF TWO PRESUMPTIONS: THE DUPLICATING RAY AND THE ORIGINAL "SUPER" POWER

This Part will provide a more thorough explanation of the two presumptions at play in *Smith*. First, it discusses the presumption that text lifted from one statute and duplicated in another ought to be interpreted consistently. Second, it discusses the presumption of enhanced statutory stare decisis.

A. The Consistency Presumption: Duplicating Prior Interpretations

When the legislature borrows language from one statute to draft a subsequent statute, courts generally agree that the statutes should be construed consistently. Thus, an interpretation of one statute is usually treated as binding on the other when both involve the same language. This is a specific application of the *in pari materia* canon of statutory construction.[110] For purposes of this Article, I call it the "consistency presumption."

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106. *Id.* Justice Kennedy's concurrence, however, explicitly stated that the ADEA might not allow such disparate impact claims. *Id.* at 618 (Kennedy, J., concurring).

107. *See Smith*, 544 U.S. at 237 n.9.

108. *See* Adams v. Florida Power Corp., 535 U.S. 228 (2002).

109. *See infra* Part IV.A.

110. *See* BLACK'S LAW DICTIONARY 791 (6th ed. 1990) ("[S]tatutes which relate to the same subject matter should be read, construed and applied together so that the legislature's intention can be gathered from the whole of the enactments . . . ."). *See also* Caren Spencer, Comment, *When a Boss Isn't an Employer: Limitations of Title VII Coverage*, 25 BERKELEY J. EMP. & LAB. L. 441, 466 (2004) ("Analysis of Title VII, the ADA, and ADEA is very closely integrated, as Title VII and ADEA use the same definitions in most instances and many of those terms are explicitly incorporated into the ADA. As the statutes have similar goals and structures, using the canon of *in pari materia*, they should be interpreted similarly, unless the legislative history or purpose suggests material differences.").

Courts have applied the consistency presumption when interpreting language of the ADEA that was lifted directly from Title VII.[111] This presumption was a central theme in *Smith*. First, the consistency presumption was the "duplicating ray" which, when combined with the Court's deference to *Wards Cove* out of respect for statutory stare decisis, made the decision Bizarro. Second, the Court treated *Griggs* as "precedent of compelling importance"[112] insofar as the decision interpreted statutory language that was nearly identical to the ADEA text at issue in *Smith*.[113]

B. Statutory Stare Decisis: The "Super-Strong Presumption"

According to the doctrine of statutory stare decisis, the Supreme Court will avoid revisiting statutory language that it has already interpreted.[114] As such, the Court has traditionally been exceedingly deferential to its precedents that involve interpretation of ambiguous statutory language.[115] William Eskridge has called enhanced statutory stare decisis a "super-strong presumption."[116] The underlying theory is that, unlike the constitutional interpretation context where legislative override is virtually impossible,[117] Congress can—and often will[118]—step in to override

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111. *See, e.g.*, *Smith*, 544 U.S. at 233-34 ("We have consistently applied that presumption to language in the ADEA that was derived *in haec verba* from Title VII." (internal quotes omitted)); W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 416 (1985) (using interpretations of Title VII's bona fide occupational qualification defense as authoritative interpretations of the ADEA's identically-worded defense); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("This interpretation of Title VII of the Civil Rights Act of 1964 applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA were derived *in haec verba* from Title VII." (internal citation and quotes omitted)).

112. *Smith*, 544 U.S. at 234.

113. In both cases, the language was:

> It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a)(2) (2000). Protected categories under Title VII include race, color, sex, religion or national origin. 42 U.S.C. § 2000e-2(a)(2) (2000).

114. The Court's most famous and enduring example of adhering to a statutory interpretation of increasingly lessening viability involved *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922), which granted organized baseball an exception to the Sherman Act's prohibition of contracts in restraint of trade. In two subsequent cases, the Court continued to stand by the *Federal Baseball* exemption, despite the fact that the Court had refused to provide similar exemptions for the other similar professional sports leagues. *See* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953); Flood v. Kuhn, 407 U.S. 258 (1972). The basis for this "super-strong presumption" of validity for *Federal Baseball* was that it was a statutory interpretation decision and Congress could have, but did not, override it. *See Toolson*, 346 U.S. at 357; *Flood*, 407 U.S. at 258. For a concise but complete discussion of the baseball cases, see Barrett, *supra* note 8, at 319-22.

115. *See* Barrett, *supra* note 8, at 319 (describing the Court's application of statutory stare decisis).

116. Eskridge, *Overruling*, *supra* note 2, at 1363.

117. Eskridge argues that the strength of the Supreme Court's adherence to stare decisis differs with the kind of case it is deciding. *Id.* at 1362. Statutory interpretation precedents receive the "super-strong presumption." *Id.* Constitutional precedents are afforded relatively weak precedential value. *Id.*

incorrect statutory interpretation.[119] As a result, a party who requests that the Court overrule a statutory precedent faces a more onerous burden than does a party who requests that the Court revisit constitutional or common law precedents.[120] If a change in statutory interpretation is what a party seeks, Congress would be the appropriate body to petition.

Nevertheless, the Supreme Court is not mandated to follow any of its previous decisions; stare decisis is a prudential doctrine.[121] Thus it can be, and with relative frequency is, ignored and statutory interpretation decisions are overruled by the Court,[122] provided that there is some "special justification."[123] Amanda L. Tyler, who advocates for a rule of heightened statutory stare decisis, would find such special justification when statutory precedent is "wholly out of sync with the legal fabric."[124]

Several rationales have been advanced to support the "super-strong presumption" of statutory stare decisis. The most prominent are described in the following Subparts.

1. Congressional Acquiescence

The most common argument in support of the "super-strong presumption" is the theory of congressional acquiescence, which is based on the assumption that Congress's silence or lack of action in response to the Court's interpretation is tantamount to Congress's endorsement of that interpretation. The Court has no reason to revisit or overrule its

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Federal common law precedents are more respected than constitutional decisions, but are more likely to be overruled than statutory precedents. *Id.*

118. For an extensive empirical study of the frequency with which Congress overrides Supreme Court statutory interpretation decisions, see generally Eskridge, *Overriding*, *supra* note 2. Eskridge studied the years 1967-1990. *Id.* at 335. In particular, he determined that each Congress between 1975 and 1990 overrode an average of roughly a dozen of the Court's statutory interpretation decisions. *Id.* at 335-36.

119. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 629 n.7 (1987) ("When a court says to a legislature: 'You (or your predecessor) meant *X*,' it almost invites the legislature to answer: 'We did not.'" (quoting G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31-32 (1982))). *See also* Daniel A. Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2, 13 (1988) ("[I]n general, we can expect more extensive Congressional activity when Congress strongly disapproves of the result.").

120. *See generally* Barrett, *supra* note 8.

121. *See* Farber, *supra* note 119, at 17 ("Rather than being a domain of tightly constraining rules that preclude consideration of broader public values, stare decisis is a largely prudential doctrine.").

122. Indeed, Eskridge chronicles more than 80 cases in the period between 1961 and 1986 in which the Supreme Court either explicitly or implicitly overruled its own prior statutory interpretation decisions. *See* Eskridge, *Overruling*, *supra* note 2, at 1368 and Appendixes A and B (1430-39).

123. *See* Marshall, *supra* note 8, at 179 (citing Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989), quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

124. *See* Tyler, *supra* note 8, at 1417-18. Tyler expounds on what might make a precedent "wholly out of sync," listing "where the precedent failed to apply a consistently-employed canon, cannot be squared with precedents interpreting companion statutory provisions or similarly-worded statutes, or has generated only great confusion (as opposed to clarity) in the law." *Id.*

interpretation when Congress has implicitly approved it.[125] Statutory stare decisis opinions by the Supreme Court typically contain language that reflects the acquiescence theory. Indeed, the plain language of Justice Stevens's opinion in *Smith* reveals that he relied on congressional silence as an indication of endorsement.[126]

In its simplest form the theory is as follows: We (the Court) interpreted the statute. You (the Legislature) did nothing in response. We would expect you to respond if you did not approve; therefore, you approve.[127] Professor Eskridge explains this reasoning through the metaphor of Waddlington, the principal who tells his agent to buy him "soupmeat," and Krattenmaker, the agent who buys beef in response to the command. If Waddlington says nothing to Krattenmaker to correct him or to repudiate his choice of beef soupmeat, as opposed to chicken or pork, then one might presume that Waddlington intends Krattenmaker to continue to buy beef in the future.[128]

The theory, though, is flawed because one cannot so conclusively determine the meaning of congressional inaction. Congress is a "discontinuous decisionmaker."[129] While Waddlington is the same person both when he commanded Krattenmaker to get the soupmeat and when Krattenmaker brings back the beef, often the Congress sitting at the time of the Court's potentially controversial interpretation is different from the Congress that originally enacted the statute.[130] Eskridge argues that a subsequent Congress's reaction to a Court's interpretation is not as constitutionally relevant as the intent of the enacting Congress.[131] Furthermore, Waddlington has a compelling motivation to correct Krattenmaker if beef is not what he wanted; he has to eat the beef or go

125. For an in-depth treatment of the Supreme Court's use of congressional inaction as an interpretive tool, see generally William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988) [hereinafter Eskridge, *Interpreting*].

126. Smith v. City of Jackson, 544 U.S. 228, 240 (2005).

127. Granted, this is the acquiescence theory at its most simplistic. But that simplistic logic is what often finds its way into opinions when the Court trots out statutory stare decisis as a justification for its interpretation. Still, Daniel A. Farber has offered a unique and more sophisticated public choice theory justification to support acquiescence theory, based on the supposed preference of legislators, *ex ante*, for a rule that would find significance in congressional inaction. Because legislators cannot know at the time of enactment whether subsequent judicial interpretations will be favorable or unfavorable to them—and, assuming good faith efforts by judges to interpret the statutes accurately, one would expect a roughly equal probability of favorable and unfavorable interpretations—legislators would prefer a strong statutory stare decisis rule rather than a weak one that will impose costs of uncertainty and unreliability. According to Farber, a legislator will take the bargain of allowing mistaken interpretations to stay on the books for the equally likely possibility that favorable interpretations will have staying power as well. *See* Farber, *supra*, note 119, at 11-13.

128. *See* Eskridge, *Interpreting*, *supra* note 125, at 93.

129. *Id.* at 94.

130. *Id.*

131. *Id.*

hungry. Congress, on the other hand[132] has little or no "personal" stake in the Court's interpretation. It is the public, not Congress, that must eat the beef served up by the Court's interpretation. While Congress is clearly not divorced from public opinion, certain obstacles make it unlikely that the public would successfully prod Congress to react.[133]

Acquiescence theory has been criticized as insufficient to justify the doctrine of enhanced statutory stare decisis.[134] Lawrence C. Marshall has nicely categorized the most practical objections into four "*i*'s": ignorance,[135] inertia,[136] interpretational ambiguity,[137] and irrelevance.[138] Several other commentators have raised constitutional objections to the acquiescence justification, because interpretations become quasi-legislative

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132. Eskridge also notes that Congress as a collective decisionmaker cannot be as easily assigned a single motivating intent for its action or inaction as can Waddlington, a single decisionmaker. *Id.* ("While Waddlington may sometimes 'be of two minds,' Congress is always of two minds (the House and the Senate) and each of them contains many different minds.").

133. *See, e.g., infra* notes 136-37, 219-25 and accompanying text.

134. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 672 (Scalia, J., dissenting) ("The 'complicated check on legislation[]' erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." (internal citation omitted)); Eskridge, *Interpreting*, *supra* note 125, at 95 ("Acquiescence arguments are almost never persuasive indicia of actual legislative intent.").

135. *See* Marshall, *supra* note 8, at 186-90 (arguing that Congressional ignorance is as likely to lead to inaction as is congressional contemplation and acquiescence). *See also* Eskridge, *Interpreting*, *supra* note 125, at 75 ("One strategy is to show that Congress was not aware of the judicial or administrative interpretation and, therefore, could not be charged with any form of approval by its failure to overturn it.").

136. *See* Marshall, *supra* note 8, at 190-91 (contending that Congress is afflicted (by design) with issues of organizational inertia that block or frustrate Congress's ability to pass legislation even when a majority of legislators desires it). *See also* Eskridge, *Interpreting*, *supra* note 125, at 98 ("[T]he structure of Congress makes it far more likely that something will not happen (inaction) than that it will (action)."). Eskridge provides, as an example of this truism, the story of Congress's laborious experience overriding *Grove City College v. Bell*, 465 U.S. 555 (1984), with the Civil Rights Restoration Act of 1988, Pub. L. No. 100-259, 102 Stat. 28. Though *Grove City* never enjoyed the support of committees or the full membership of either house of Congress, overriding it required persevering through four years of legislative roadblocks, including the introduction of several different versions of the bill, a filibuster, and a veto. All the while, a majority of Congress favored overriding *Grove City*. *See* Eskridge, *Interpreting*, *supra* note 125, at 99 n.181.

137. *See* Marshall, *supra* note 8, at 191-93 (serious interpretational ambiguity plagues any attempt to finding meaning in silence and inaction).

138. *See id.* at 193-96 (in other circumstances, the Court adheres to a rule that treats subsequent legislative history as irrelevant to the meaning and intent of the enacting legislature, so it is odd that this particular post-enactment history (sometimes far removed in time and purpose from the original enactment) should be favored over relatively more contemporaneous and unambiguous post-enactment history). *See also* Eskridge, *Interpreting*, *supra* note 125, at 96 ("The acquiescence . . . cases directly conflict with these propositions [that subsequent legislative statements are not useful because they do not comply with procedural structures for statutory law found in the constitution]. If subsequent legislative *statements* directly supporting a statutory interpretation are not valid evidence, how can subsequent legislative *silence*, usually just indirectly supporting a statutory interpretation, be considered any more authoritative?" (emphasis in original)).

while circumventing the constitutional legislative process of bicameralism and presentment.[139]

2. *Task Splitting*

Enhanced statutory stare decisis finds more substantial justification in what Marshall calls the "task-splitting" theory,[140] which is based on proper resource allocation between Congress and the judiciary. The task-splitting argument does not affirmatively interpret congressional silence, but simply claims that the Court risks no great harm when it rigidly adheres to its own statutory interpretations because Congress is available and empowered to act if it so desires. Thus, the Court may devote its resources to new issues instead of constantly revisiting its prior interpretations.[141] As Marshall points out, though, the task-splitting theory still suffers from problems of congressional ignorance and inertia.[142] In addition, that Congress is merely *available* to override erroneous statutory interpretations is not itself a sufficient justification to give it that job. Congress would also benefit from having its resources freed for other purposes.[143]

3. *Separation of Powers*

a. *Constitutionally Compelled*

The argument that the constitutional separation of powers doctrine *requires* Congress to override erroneous Supreme Court decisions[144] takes up where the task-splitting theory falls short by providing a structural—rather than a purely pragmatic—justification for allocating the job to Congress. Justice Hugo Black was the most ardent supporter of this position on the Supreme Court.[145] He argued that once the Court was called upon to interpret ambiguous language, its interpretation amounted to the statutory text itself, which the Court is institutionally prohibited from altering or overruling.[146] Justice Black was never able to garner majority

139. U.S. CONST. art. I, § 7. *See also* Barrett, *supra* note 8, at 338-39 (summarizing the constitutional impediments to the acquiescence rationale); Eskridge, *Interpreting*, *supra* note 125, at 96; Marshall, *supra* note 8, at 194 ("Indeed, [acquiescence] is more than silly; it is contrary to fundamental constitutional principles.").

140. Marshall, *supra* note 8, at 197-98.

141. *See id.*

142. *Id.*

143. *Id.* at 198.

144. *See* Barrett, *supra* note 8, at 325-26 (discussing and dismissing this argument).

145. *See* Eskridge, *Overruling*, *supra* note 2, at 1397-98.

146. *See* Barrett, *supra* note 8, at 340.

support for his constitutionalized statutory stare decisis approach.[147] In the end, Justice Black's approach is internally inconsistent and insufficiently supported by constitutional doctrine.[148] Specifically, Black advanced no coherent explanation for why the Court's first interpretation should be treated as statutory text, while subsequent interpretations or modifications would exceed the Court's constitutional authority.[149]

b. Norm-based

Still another justification for heightened statutory stare decisis, which is likewise grounded in separation of powers considerations, does not claim that the Constitution prohibits overruling statutory precedents. Instead, it uses the values inherent in the separation of powers doctrine to suggest that a heightened rule of statutory stare decisis is a normatively superior policy.[150] According to this approach, the countermajoritarian nature of judicial statutory interpretation suggests that the Supreme Court should avoid it whenever possible and submit to legislative supremacy in policymaking.[151] Marshall urges the Court to adopt an absolute rule of statutory stare decisis to signal clearly that Congress—and only Congress—is responsible for fixing any mistakes in judicial interpretation.[152] In the absence of an absolute statutory stare decisis rule, Congress has the incentive to "hang back," waiting to see if the Court will overturn its own erroneous interpretation.[153] However, if Congress is certain that the Court will do no such thing, it is more likely to correct the Court's misinterpretations definitively and quickly.[154]

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147. *See* Eskridge, *Overruling*, *supra* note 2, at 1398 ("This formalist 'judicial legislation' argument has never been accepted by a majority of the Court as a justification for the super-strong presumption.").

148. *See* Barrett, *supra* note 8, at 341 (explaining that Justice Black "does not identify the force that transforms an initial judicial interpretation into statutory text").

149. *See id.*; Eskridge, *Overruling*, *supra* note 2, at 1399 ("The argument's distinction between acceptable judicial lawmaking (the original interpretation) and the unacceptable judicial lawmaking (the overruling) is essentially a semantic one, with no persuasive formal justification.").

150. *See* Barrett, *supra* note 8, at 325-26, 340-41, 348 (advocating a heightened statutory stare decisis rule to encourage judicial restraint and to avoid the distrust that accompanies Congress's delegation of policymaking to the federal courts through statutory ambiguity); Marshall, *supra* note 8, at 200-208 (developing the case for an *absolute* rule of statutory stare decisis, aimed at creating an incentive for Congress to assume supremacy).

151. Marshall, *supra* note 8, at 208.

152. *Id.* at 211.

153. *Id.* at 213.

154. *Id.* at 211 ("There should be a marginally higher level of congressional oversight in the system in which courts apply a heightened or absolute rule of statutory stare decisis. For in that system the legislators, lobbyists, and public all know that any changes in the interpretation of statutes can come only through legislative action—not through a judicial reversal of the announced interpretation.").

In this way, Marshall's absolute rule of statutory stare decisis performs a similar function as a preference-eliciting default statutory rule as expounded by Einer Elhauge, albeit much less radically. *See* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165

4. *Reliance, Continuity, and Coherence*

In two recent influential articles, Einer Elhauge suggests a re-imagining of dynamic statutory interpretation theory[155] in which courts would estimate the enactable preferences of the current legislature (or, failing this, adopt preference-eliciting interpretations) rather than focusing solely on the original meaning or purpose of the enacting legislature. Such preferences would be revealed only through "well-defined official political action,"[156] such as committee reports or other positive legislative acts. By adopting preference-estimating default rules, Elhauge argues that judges are better suited to perform their role as "faithful interpretive agents" of the legislature.[157] He argues that when judges must estimate the legislature's enactable preferences, they are constrained from implementing their own views or estimations of the polity's preferences.[158] Elhauge proposes a more restricted role for the judiciary when compared to his dynamic theory predecessors, who urged judges to consult broad social norms and values to update statutes. Predictably, Elhauge and the other dynamic theorists put little stock in a heightened rule of statutory stare decisis.[159]

(2002) [hereinafter Elhauge, *Preference-Eliciting*] ("The justification for preference-eliciting canons thus need not rest in their correspondence to either legislative preferences or sound policy. The justification—and necessary predicate—is rather that the default result is more likely to be reconsidered (and deliberated) by the legislature because it burdens some politically powerful group with ready access to the legislative agenda.") Both are focused on disciplining the legislature to enact its true policy preferences. Both are more stick than carrot. Elhauge's stick is just much heavier and sharper.

Amy Coney Barrett, on the other hand, would not go so far as to pose an absolute rule, in part because she does not consider influencing Congress's actions to be a primary goal; she seeks instead to cabin the federal courts' exercise of the dubious policymaking powers inherent in statutory interpretation. *See* Barrett, *supra* note 8, at 348.

Both Marshall and Barrett recognize that the countermajoritarian problem of judicial creativity inherent in interpreting statutes is, at times, unavoidable. Therefore, they both seek to limit it beyond the initial, unavoidable interpretation of ambiguous language. Marshall, however, also notes that congressional passivity is a problem with statutory interpretation and seeks, with his absolute rule of statutory stare decisis, to shake Congress out of that passive role and to step up as the primary authority on statutory interpretation and legislating. *See* Marshall, *supra* note 8, at 207.

Of course, Marshall's proposal is subject to criticism from a number of perspectives. *See* William N. Eskridge, *The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases*, 88 MICH. L. REV. 2450 (1990) (offering a "Speluncean Explorers"-inspired critique of Marshall's proposal from law and economics, structuralist, and critical legal studies viewpoints).

155. *See, e.g.*, Elhauge, *Preference-Eliciting*, *supra* note 154; Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002) [hereinafter *Preference-Estimating*]. For a discussion of dynamic statutory interpretation theory, see T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

156. Elhauge, *Preference-Estimating*, *supra* note 155, at 2107.

157. *Id.* at 2032, 2039-40.

158. *Id.* at 2107.

159. Dynamic theorists as a group presumably would not support a strong statutory stare decisis rule and, thus, would wholly reject the Court's use of it in *Smith*. The goal of this Article, however, is not to advocate for any one of the various interpretative theories. Rather the Article's goal is to illustrate why the *Smith* Court's application of statutory stare decisis was not really traditional statutory stare

In response to Elhauge, Amanda L. Tyler has proposed the most recent defense of a limited judicial role and an enhanced doctrine of statutory stare decisis.[160] Her article "promotes as normatively superior the construction of an interpretive regime built on a strong rule of statutory stare decisis and consistent application of interpretive guides that advance continuity and coherence."[161] Continuity, according to Tyler, calls for incremental statutory change, and this only when there is an indication that the statutory baseline must be upset.[162] Coherence is achieved by "reconciling and harmonizing linguistic meaning among numerous interpretations over time."[163] Tyler argues that, when the legislature is the primary and preferred body to effect legislative change, the public's reliance interests (for example, deals or relationships predicated on the prevailing understanding of statutory language) are better protected because the prospective nature of legislative change avoids the retroactive application inherent in judicial decisions. Furthermore, the cost of legislative amendment ensures that such change happens less frequently and more deliberately.[164]

The continuity and coherence values dominating Tyler's approach reflect the continuity policy that Eskridge argues is the basis for all stare decisis.[165] According to Eskridge, continuity is desirable for three interrelated reasons: (1) It is the basis for the legitimacy of law, because we feel more secure in the rule of law when it does not shift with the prevailing winds; (2) it protects the reliance interests of the public; and (3) it ensures the coherence of the law.[166] Thus, to the extent that a statutory interpretation incorporates these policy goals, it should be respected and protected from tinkering.[167]

It is important to reiterate that Tyler does not advocate an absolute rule of statutory stare decisis; she makes room for judicial overruling when an interpretation has not shown the proper concern for consistency or

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decisis at all and to advocate for a recognition that Bizarro statutory stare decisis is problematic and should not be emulated.

160. Tyler builds on the ideas of David Shapiro, among others. *See, e.g.*, David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992).

161. Tyler, *supra* note 8, at 1406.

162. *See id.* ("This principle may be understood as viewing statutory change through the lens of incrementalism."). Eskridge refers to this interest as "'vertical continuity,' that is, the perseverance of an interpretation over time." Eskridge, *Interpreting*, *supra* note 125, at 70.

163. Tyler, *supra* note 8, at 1406. Eskridge refers to this interest as "'horizontal continuity,' that is, the coherence of rules and policies at any given time." Eskridge, *Interpreting*, *supra* note 125, at 70.

164. Tyler, *supra* note 8, at 1406. *Cf.* Eskridge, *Interpreting*, *supra* note 125 at 70 (arguing that congressional inaction should be treated as acquiescence to "building block interpretations" by courts, because such interpretations give[] rise to public or private reliance interests).

165. Eskridge, *Interpreting*, *supra* note 125 at 110.

166. *Id.*

167. Eskridge calls interpretations that advance these goals "building block interpretations." *Id.* at 108.

coherence, when an interpretation is inconsistent with a larger statutory scheme, or when the statute has caused confusion rather than coherence.[168]

IV.
THE *SMITH* DECISION: THE ORIGIN OF BIZARRO STATUTORY STARE DECISIS AND WHY IT IS BIZARRO

A. The Smith *Opinion*

The *Smith* Court determined that the disparate impact theory of liability is available under the ADEA.[169] While the ADEA disparate impact cause of action is significantly different from the corresponding Title VII cause of action, the Court oddly relied on its congressionally overridden interpretation of Title VII in *Wards Cove* to structure important aspects of the ADEA impact analysis.[170] This reliance on *Wards Cove* is Bizarro statutory stare decisis.

In *Smith*, a number of police officers aged forty and over filed a claim of age discrimination against the City of Jackson, Mississippi (hereinafter the City). They alleged that a pay plan the City adopted and revised between October 1998 and May 1999, which granted pay increases to all City employees, discriminated against officers over forty years old.[171] The plan and its revision were motivated by the City's desire to attract and retain qualified employees, to reward performance, and, most notably, to bring the starting salary of police officers in line with that of comparable positions in the region.[172] While the plaintiffs claimed that the pay plan was evidence of disparate treatment, the case turned on their disparate impact claim that the pay plan resulted in proportionately greater raises for junior officers than for those with greater seniority.[173] Although a few junior officers were forty or older, the vast majority of officers with greater seniority was older and, thus had proportionately lower raises.[174] This

168. *See supra* note 124 and accompanying text. Similarly, Eskridge argues that courts' frequent conclusion in applying statutory stare decisis—that legislative inaction in response to an interpretation evinces Congress's intent that the interpretation is correct—overvalues "vertical continuity" (or, in Tyler's parlance, "continuity") and undervalues "horizontal continuity" (or coherence). *See* Eskridge, *Interpreting*, *supra* note 125, at 70. Both are important, so one should not be sacrificed routinely in service of the other.

169. Smith v. City of Jackson, 544 U.S. 228, 240 (2005).

170. *Id.* ("While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination. Hence, *Wards Cove's* pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA.").

171. *Id.* at 231.

172. *Id.*

173. *Id.*

174. *Id.* at 242.

adverse effect for police officers over forty years of age formed the basis for the plaintiffs' disparate impact claim.[175]

The statistics supported the claim of adverse impact. In particular, two-thirds of officers under age forty received raises greater than 10%, while less than half of the officers over forty years old did.[176] The entire class of officers over forty years old also fared worse than the younger officers in average percentage increases.[177]

The District Court granted summary judgment to the City.[178] The Fifth Circuit affirmed that decision with regard to the disparate impact claim, determining that the ADEA did not incorporate a disparate impact theory.[179] The Supreme Court Justices unanimously affirmed summary judgment on the disparate impact claim. Five justices agreed that the ADEA incorporated a limited form of disparate impact theory,[180] while the three dissenting justices[181] concluded that the ADEA did not permit disparate impact claims. Justice Stevens's opinion (which announced the judgment of the Court and was, in all but one part, the majority opinion) relied on three complementary lines of reasoning. First, citing the consistency presumption discussed in Part III.A of this article, he focused on the similarity of the operative language in Title VII and the ADEA.[182] Second, he analyzed the relevant language of the ADEA, particularly the "reasonable factor other than age" (RFOA) provision,[183] and determined that it appeared to incorporate disparate impact.[184] Third, he concluded that the Court should defer to agency interpretations that were on point. Specifically, he noted that "the Department of Labor . . . and the EEOC . . . have consistently interpreted the ADEA to authorize relief on a disparate-impact theory."[185] Justice Scalia declined to join the plurality's interpretation of the legislative text and intent. Although he "agree[d] with all of the Court's reasoning" in that part, he did not believe it was necessary as an "independent determination of the disparate impact question," and

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 231.

179. *Id.*

180. While Justice Scalia agreed on this point, he filed a concurring opinion explaining how his reasoning differed slightly from the plurality of the other four.

181. Chief Justice Rehnquist took no part in the consideration or decision of the case.

182. *Smith*, 544 U.S. at 233-34 ("In determining whether the ADEA authorizes disparate-impact claims, we begin 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. We have consistently applied that presumption to language in the ADEA that was 'derived in haec verba from Title VII.'" (internal citations omitted)).

183. This provision is found at § 4(f)(1) of the ADEA, and is codified at 29 U.S.C. § 623(f)(1).

184. *Smith*, 544 U.S. at 238-39.

185. *Id.* at 239.

instead argued that the Court should apply *Chevron* deference to the EEOC's interpretation of the ADEA.[186]

Justice O'Connor disagreed both with the majority's reading of the statute and with Justice Scalia's deference to the EEOC. She found that the RFOA defense in the ADEA[187] (not present, of course, in the text of Title VII) made the Title VII interpretation in *Griggs* wholly inapplicable to the ADEA[188]; that the legislative history of the ADEA made clear that the policy underlying disparate impact claims was missing from the ADEA[189]; and that the Department of Labor and the EEOC were neither consistent in their interpretations of the ADEA nor were they owed the deference that Justice Scalia claimed.[190]

The opinion of the Court is important for two reasons. First, it resolved the split among the circuit courts.[191] Second, and more relevant to this Article, the opinion elucidates the burden allocation for ADEA disparate impact claims.[192] It is in this portion of the opinion that the Court's reasoning takes the Bizarro turn of relying on *Wards Cove* despite Congress's clear repudiation of the case.

An ADEA plaintiff who wants to use the disparate impact theory confronts two major hurdles. The first arises from the substantial difference between the original[193] text of Title VII and that of the ADEA, namely, the RFOA language in § 4(f)(1) of the ADEA.[194] For Justices O'Connor, Kennedy, and Thomas, this textual difference foreclosed the possibility that the ADEA includes a disparate impact claim. For the majority, the RFOA provision instead "plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'"[195] As opposed to Title VII disparate impact claims, in which the defendant is saddled with the burden of proving the "business necessity" defense to escape liability, the ADEA provides the defendant a safe harbor from

186. *Id.* at 243 (Scalia, J., concurring in part and concurring in the judgment) (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

187. 29 U.S.C. § 623(f)(1) (2000) ("It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section . . . where the differentiation is based on reasonable factors other than age.").

188. *Smith*, 544 U.S. at 251-52 (O'Connor, J. concurring in the judgment).

189. *Id.* at 253-54

190. *Id.* at 264-65.

191. *See id.* at 237 n.9. *See also supra* note 57 and accompanying text; Keller, *supra* note 100, at 268 (collecting cases illustrating the split).

192. *See Smith*, 544 U.S. at 240-41.

193. I call it "original" because it was a difference between the ADEA and Title VII from the ADEA's initial passage; the RFOA clause has always been part of the ADEA, but Title VII has never had an analogous provision. I also mean to draw a contrast between this long-standing difference between the two statutes and the more recent textual difference brought about by the 1991 Act's amendment to Title VII. *See* 42 U.S.C. § 2000e-2(k).

194. 29 U.S.C. § 623(f)(1). For the relevant statutory text of this section see *supra* note 187.

195. *Smith*, 544 U.S. at 239.

liability when the defendant utilizes some reasonable factor other than age (even when it results in an adverse impact on older workers).[196] Since what is "reasonable" need not always be "necessary" for the business's operation, employers are given a wider berth under the ADEA than they are under Title VII. The *Smith* plaintiffs' disparate impact claim failed to clear this hurdle. The Court found that the City's reliance on seniority and rank in allocating pay raises was "unquestionably reasonable given the City's goal of raising employees' salaries to match those in surrounding communities."[197]

The second hurdle that an ADEA plaintiff must overcome relates more directly to the topic of this article. The Court presumed its pre-1991 Title VII disparate impact decisions would govern ADEA disparate impact claims. In particular, the Court relied on *Wards Cove*.[198] Employing Bizarro statutory stare decisis, it imported the requirement that the plaintiff "isolate[] and identify[] the *specific* employment practices that are allegedly responsible for any observed statistical disparities."[199] The Court noted that the plaintiffs in *Smith* failed to isolate the particular practice that led to the disproportionate salary increases for younger officers.[200] In addition, the Court incorporated *Wards Cove*'s requirement that the plaintiff bear the burden of persuasion at all times and required only a burden of production from the employer in defense.[201] Justice Stevens's majority opinion implies that it was the plaintiffs' responsibility to show the unreasonableness of the rank and seniority criteria.[202] Justice O'Connor's concurring opinion makes clear her view that the burden of persuasion remains at all times with the employee, even as the case turns to the RFOA defense.[203]

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196. This is because employers might legitimately rely on a number of criteria when making employment decisions that nevertheless have some correlation with age, unlike the assumptions in Title VII regarding race and sex. *Id.* at 240.

197. *Id.* at 242.

198. *Id.* at 240.

199. *Wards Cove*, 490 U.S. at 656 (emphasis added) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)).

200. *Smith*, 544 U.S. at 241 ("[The plaintiffs] have not identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers.").

201. *Wards Cove*, 490 U.S. at 659-60.

202. *Smith*, 544 U.S. at 242. This is odd given the fairly plain textual implication that the RFOA is an affirmative defense. *See* 29 U.S.C. 623(f)(1) (2000) ("It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section . . . where the differentiation is based on reasonable factors other than age. . . ."). *See also* Meacham v. Knolls Atomic Power Lab., 461 F.3d 134, 149-51 (2d Cir. 2006) (Pooler, J., dissenting) (arguing that the RFOA should be treated as an affirmative defense based on the plain language of the statute and two canons of statutory construction); Transcript of Oral Argument at 3-6, *Smith*, 544 U.S. 228 (No. 03-1160) (Justices Stevens, Breyer, and Ginsburg each assume or suggest that the RFOA is an affirmative defense), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-1160.pdf.

203. *Smith*, 544 U.S. 267 ("[O]nce the employer has produced evidence that its action was based on a reasonable nonage factor, the plaintiff bears the burden of disproving this assertion.").

This is particularly striking because Justice Stevens's opinion employs the reasoning of statutory stare decisis in applying *Wards Cove* to the ADEA, relying on the fact that the 1991 Act did not change the language of the ADEA that was identical to the Title VII language at issue in *Wards Cove*.[204] As discussed in Part III.B.1, interpreting congressional silence as a sign of implicit acceptance is prototypical statutory stare decisis reasoning.[205] However, Congress was far from silent and the *Smith* decision was far from the prototypical application of the doctrine of statutory stare decisis. The following Section describes why *Smith*'s invocation of the doctrine distorts and mutates it, creating Bizarro statutory stare decisis.

B. The Bizarro Nature of Smith's Reasoning (or Lack Thereof)

Having described the theories that may be employed with varying levels of persuasiveness to justify the application of heightened statutory stare decisis, this Subpart evaluates whether any of these theories supports the *Smith* Court's invocation of the doctrine. At the outset it is important to recall that *Smith* was not a run-of-the-mill case for the application of statutory stare decisis. Statutory stare decisis is typically applied where the Court has previously interpreted the statutory language at issue and where Congress has offered no official response to that interpretation. Both of those ordinary conditions were absent in *Smith*. The statutory language at issue had been interpreted, but in the context of Title VII, not the ADEA.[206] More importantly, Congress had been anything but silent in response to that interpretation. In the very Title VII context with which *Wards Cove* dealt, and with specific reference to overriding *Wards Cove*,[207] Congress amended Title VII to repudiate the crabbed *Wards Cove* interpretation of the burdens and defenses in a Title VII disparate impact claim. These unique circumstances surrounding the *Smith* case portend the origin of the "imperfect duplicate," or the Bizarro nature of the statutory stare decisis ultimately brought to life in *Smith*.

I move now to show why, in the context of these procedural and substantive quirks, a number of the justifications for strong statutory stare

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204. *Id.* at 240.

205. *See supra* Part III.B.1 and *infra* Part IV.B.1.

206. While the Court was absolutely correct that the identical language in Title VII and the ADEA have been traditionally interpreted consistently, it is telling that the language at issue in *Smith* and to which *Wards Cove* was applied was not altogether the same as Title VII. *See generally Smith*, 544 U.S. at 233-34. Notably, the RFOA provision, 29 U.S.C. § 623(f)(1) (2000), was a significant textual difference between the ADEA and Title VII even before the 1991 Act's amendments to Title VII. The Court should have recognized that the "limit, segregate, or classify" language of § 4(a)(2), 29 U.S.C. § 623(a)(2) (2000), which is identical to Title VII's pre-1991 language in § 703(a)(2), gained its meaning, in part, by reference to the textually different § 4(f)(1) RFOA language. *See Smith*, 544 U.S at 238-42. Rather than reading §§ 4(a)(2) and 4(f)(1) together to determine if the RFOA defense might mitigate some of the concerns that animated *Wards Cove*, the Court simply applied *Wards Cove*'s reasoning.

207. *See supra* note 93.

decisis are inapplicable to *Smith*. Though Justice Stevens seemed to rely on the acquiescence theory,[208] the following Sections will discuss whether this or any other justification discussed in Part III.B supports the application of statutory stare decisis to the *Wards Cove* interpretation of Title VII in the ADEA context.

1. Congressional Acquiescence

Justice Stevens suggested that Congress had been inactive in response to *Wards Cove*'s application to the ADEA.[209] That is true enough. Whereas the 1991 Act amended Title VII regarding the disparate impact theory,[210] it did not amend the ADEA's comparable § 4(a)(2).[211] But the 1991 Act must be considered a definitive congressional statement, as it specifically referred to, disapproved of, and overrode *Wards Cove*'s primary holding.[212] It is difficult to know what to infer from Congress's "silence" regarding the

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208. *See Smith*, 544 U.S. at 240.

209. *See id.*

210. *See supra* note 92.

211. 29 U.S.C. § 623(a)(2).

212. Professor Howard Eglit calls an argument similar to this "too simplistic to be satisfactory." *See* Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog that Didn't Bark*, 39 WAYNE L. REV. 1093, 1174-75 (1993). Though the argument is simple, it is not simplistic; in fact, it is quite powerful. It strains credulity to suggest that Congress should have to comprehensively overhaul the federal code each time it overrides a statutory interpretation. To the extent that the Court's interpretation of statutory language and Congress's override of that interpretation is a conversation between coequal branches of government, the Court is unreasonable to ignore the clear message of Congress that the prior interpretation of the same or similar language was simply wrong.

Professor Eglit also reads much into the 1991 Act's response to Martin v. Wilks, 490 U.S. 755, 761 (1989) (allowing a post-order challenge to a consent degree under Title VII, even though the challenger had adequate notice that its interests were implicated at the time of the entry of the decree). He argues that Congress's response to *Martin*, in which it crafted an amendment applying to all federal equal employment opportunity statutes, shows that Congress did amend the ADEA when it was specifically concerned with an interpretation's affect on the ADEA. *See* Eglit, *supra*, at 1118-19. In contrast, he argues, the lack of amendment to the ADEA in response to *Wards Cove* is significant. The comparison, however, is inapt. *Martin* was not a case involving the interpretation of a specific section of Title VII. It involved "a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Martin*, 490 U.S. at 762 (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)) (internal citations omitted). Such a general principle, by its nature, had application in many contexts. And, because *Martin* did not involve the direct interpretation of statutory language but rather dealt with a general principle of the administration of courts' decision-making powers, simply overriding the holding in *Martin* by amending Title VII would not indicate anything more than that the general principle should not apply to Title VII. Therefore, when Congress acted to "undo" the damage done by *Martin*, it could not simply amend Title VII as a signal that the Court's reasoning was incorrect. It had to send the message that the procedural rule was inapplicable in all civil rights laws. In such a case, it makes sense to expect Congress to define all the contexts in which that procedural rule does not apply. By contrast, when the Court misinterprets the language of a specific statute, as it did to Title VII in *Wards Cove*, it should be enough to send the message that the interpretation was wrong by "undoing" that particular interpretation. At the very least, it should be a signal to the Court that the interpretation was disfavored and should not be lightly reapplied elsewhere.

ADEA[213] in light of this conspicuous and active repudiation of the Court's logic and construction of the disparate impact cause of action in *Wards Cove*.[214]

To expand Professor Eskridge's Waddlington and Krattenmaker metaphor[215] to match the situation in *Smith*, let us assume once more that Waddlington asked Krattenmaker to fetch him some "soupmeat" for his dinner. When Krattenmaker returned with beef, Waddlington rebuffed Krattenmaker by saying, "I didn't want beef. I wanted chicken." If Waddlington also tasked Krattenmaker to fetch "soupmeat" for the next day's lunch, we would think Krattenmaker foolish simply to assume that Waddlington had intended him to bring back beef for lunch, even though Waddlington's earlier rebuff did not specifically address his desires regarding lunch. Given Waddlington's rejection of beef for one meal, we would expect Krattenmaker to seek some sort of clarification regarding the next day's lunch. Moreover, without a specific instruction from Waddlington to buy beef or some other indication that beef would be particularly appropriate for lunch (for example, people of Waddlington's religion or ethnicity routinely use beef for lunch soupmeat even when they do not for other meals), it would seem reasonable for Krattenmaker to avoid buying Waddlington any beef at all. In the same vein, Krattenmaker could not be certain that Waddlington desires chicken for lunch simply because that was his desire for the previous night's dinner. Krattenmaker's only rational option would be to engage in some sort of inquiry to ascertain Waddlington's desires for lunch. Nevertheless, in *Smith*, the Court played the role of foolish Krattenmaker, assuming that the *Wards Cove* "beef" was still Congress's "soupmeat" of choice for the ADEA's "lunch," even though it was resoundingly rejected for Title VII's "dinner."

The foregoing metaphor illustrates the weakness of the *Smith* Court's reliance on acquiescence theory in the *Smith* case. The other critiques of acquiescence theory reveal additional problems with the revival of *Wards Cove*.

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213. *See* Marshall, *supra* note 8, at 191-93.

214. Indeed Eskridge notes that a sometimes successful argument that overcomes the acquiescence theory is "that Congress, even though it has not formally overruled the . . . judicial interpretation, has acted as though the interpretation were not the settled one." Eskridge, *Interpreting*, *supra* note 125, at 76. This argument grows in strength in the context of *Smith*. Congress has not just "acted" as though *Wards Cove* were not a settled interpretation, it actively overrode it. Thus, the opinion relied on an overestimation of the power of the consistency presumption to overcome this objection, which is odd given the Court's care not to overstate the consistency presumption with regard to the main question (i.e., the application of *Griggs* to the ADEA). Not just relying on the consistency presumption to apply *Griggs*, the Court also sought support from the EEOC interpretations and other textual cues. *See* Smith v. City of Jackson, 544 U.S. 228, 240 (2005).

215. *See supra* notes 128-33 and accompanying text.

a. Marshall's Four "i's"

Marshall's four "*i*'s[216]—ignorance, inertia, interpretational ambiguity, and irrelevance—are fairly devastating critiques of the acquiescence theory. Congress was certainly not *ignorant* of *Wards Cove*; to the contrary, it explicitly repudiated the part of that decision interpreting § 703(a)(2)[217] of Title VII in the 1991 Act.[218] On the other hand, Congress was ignorant of the fact that the Court would employ this Bizarro form of statutory stare decisis to apply *Wards Cove* to the ADEA. Thus, it may not have been motivated to try to amend the ADEA.

While the second critique, *inertia*, is much stronger, it may be a misnomer in this instance. Congressional inertia refers to the organizational difficulties (structural, political, and constitutional) constraining any attempt to legislate.[219] Overriding a statutory interpretation is costly[220] and ordinarily involves overcoming barriers to developing sufficient interest, urgency, and will; assembling a coalition of interested legislators and stakeholders; and undertaking the "painstaking deliberation over whether the decision undermines [Congress's] policies and whether alternative approaches are desirable."[221] To be sure, Congress mustered the will and energy to overcome the inertia problem and amend Title VII in the 1991 Act. A critic then may rhetorically ask why, once the "ball was rolling," Congress did not also amend the ADEA's identical language and why such inaction should not be treated as particularly instructive. But, this criticism misapprehends the costs associated with the inertia problem. Legislating is a delicate balance and putting together too broad an agenda or tackling more than necessary can be lethal to a legislative undertaking. Congress accomplished its main goal of responding to *Wards Cove*: It directly and clearly repudiated the holding in the very context and for the very language that the Court interpreted. That action says something about Congress's disapproval of *Wards Cove*. To expect Congress to venture outside the statute at issue in *Wards Cove* and amend every statute that incorporates a disparate impact claim asks too much.[222]

Professor Eskridge's research regarding the ability of interest groups to effect legislative change is also relevant here. His study indicates that Congress is more likely to override a judicial interpretation that treads upon

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216. *See supra* notes 135-38 and accompanying text.

217. 42 U.S.C. § 2000e-2(a)(2) (2000).

218. *See supra* note 93.

219. *See* Marshall, *supra* note 8, at 190-91.

220. *See* Eskridge, *Overriding*, *supra* note 2, at 335-339.

221. *Id.* at 359.

222. Harkening back to the Waddlington/Krattenmaker metaphor, no one would expect that Waddlington should have to instruct Krattenmaker not to buy beef for each individual meal or risk that Krattenmaker might bring back beef at some random future meal.

the interests of an influential and organized group.[223] Groups that are scattered or are not particularly well-liked typically fail to grab Congress's attention.[224] Whereas older workers are neither diffuse nor unpopular, they may not have realized any immediate vested interest in seeing the ADEA amended in response to a Title VII interpretation that was so clearly repudiated by Congress.[225]

The third "i," *interpretional ambiguity*, refers to the fact that Congress may not act or may remain silent in response to a statutory interpretation for a number of reasons,[226] approval being only one of them (and perhaps an unlikely one, especially in this instance). Indeed, commentators have suggested several other reasons for Congress's failure to address the ADEA in light of *Wards Cove*, including (1) that Congress saw no reason to amend the ADEA in response to a Title VII decision;[227] (2) that Congress did not consider how the ADEA might be affected by an interpretation of Title VII and a resulting non-parallel amendment;[228] or (3) that Congress did in fact expect that the 1991 Act's amendments to Title VII would apply to similar statutes like the ADEA, even if those other statutes were not amended.[229]

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223. Eskridge, *Overriding*, *supra* note 2, at 360.

224. *Id.*

225. But see Harold S. Lewis, Jr., Walking the Walk of Plain Text: The Supreme Court's Markedly More Solicitous Treatment of Title VII Following The Civil Rights Act of 1991, 49 ST. LOUIS U. L.J. 1081, 1088 ("In one respect, it is true, the 1991 Amendments shored up Title VII only weakly. In addressing the Court's 1989 decision in Wards Cove Packing Co., Inc. v. Atonio, Congress restored the Title VII disproportionate adverse impact proof mode . . . far more tepidly and ambiguously than [in other sections]."). Still, the intent of Congress was clear: to undo what Wards Cove had done.

> [I]n the interpretive memorandum (which it purported to tell the courts was their sole legitimate guide to any legislative history related to Wards Cove), that the job relatedness and business necessity defenses an employer must use to justify the disproportionate adverse effects of a neutral practice mean what the Supreme Court had said such defenses meant in its decisions before Wards Cove.

See id. at 1088-89. So, Congress sought to wipe *Wards Cove* from our collective memories. The *Smith* Court ensured that did not happen.

226. *See supra* notes 127-29 and accompanying text.

227. *See* Eglit, *supra* note 212, at 1174-75. Ultimately, although Professor Eglit argues that *Wards Cove* should apply in the ADEA context, the basis for that conclusion is weaker than it appears at first glance. He states Title VII decisions have "potent analogical force" for interpreting the ADEA. *Id.* at 1215. *See also id.* at 1183 n.303. That is a much lesser claim than that *Wards Cove must* apply to the ADEA. Of special note in this regard is the fact that the decision that warranted a much stronger claim of "potent analogical force" to the ADEA (namely, *Griggs*, which has never been questioned by Congress, but was in fact endorsed in the 1991 Act) warranted extensive discussion in *Smith* as to whether it should apply. Thus, it is quite odd that the far weaker claim of analogical force that applies to *Wards Cove* would warrant almost no discussion. *See Smith*, 544 U.S. at 240. That is especially true in light of the differences between the ADEA and Title VII, which are quite relevant to the concerns addressed in *Wards Cove*. *See infra* Part VI.

228. Eglit, *supra* note 212, at 1168-70.

229. BARBARA T. LINDEMANN & DAVID D. KADUE, AGE DISCRIMINATION IN EMPLOYMENT LAW 4, 421 (2003) (noting that a committee report from the House Judiciary Committee stated that the laws that were based on the Title VII framework and language, like the ADEA, should be interpreted consistently with Title VII's post-1991 Act amended language; however, this report was not part of the Senate Bill that was ultimately adopted as the 1991 Act).

Therefore, Congress's silence should be scoured for relevant clues to clear up the ambiguity. There are plenty of indicators that Congress sought to repudiate *Wards Cove* definitively and did not expect it to crop up again in the ADEA context. Because Congress is unlikely to override a judicial decision with which it agrees, it seems suspect that the Court would treat *Wards Cove* as though it were any other precedent in the ADEA context. To do so suggests an *i* not among Marshall's four: Supreme Court intransigence.[230]

The *irrelevance* of post-enactment legislative pronouncements, though typically sound, lacks bite in this instance. In the 1991 Act, Congress announced its clear policy decision that the interests and concerns that supposedly underlie *Wards Cove* are unworthy of credence. It is difficult to see how such a clear congressional statement against the *Wards Cove* rationale could be considered "irrelevant." In conjunction with the other *i*'s, the *irrelevance* concern raises important criticisms of Bizarro statutory stare decisis.

b. Constitutional Concerns

The Article I concerns underlying the acquiescence theory also loom large in *Smith*.[231] The 1991 Act, which embodies the will of Congress to repudiate *Wards Cove*, survived a bicameral vote, was presented to the president who signed it rather than vetoed it, and was thereby enacted into law. Yet the *Smith* Court ostensibly decided to treat *Wards Cove* as legally binding precedent for the ADEA because Congress did not specifically prohibit it. That directly implicates the concern Barrett, Marshall, and Eskridge raise[232] that the interpretation of the unelected judges is elevated over Congress's expressed will, avoiding the structure outlined in Article I of the Constitution.

Congressional "silence" and "inaction" toward the ADEA in response to *Wards Cove* is simply too flimsy a tool to resurrect *Wards Cove* after the 1991 Act so clearly put it to rest.

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230. *See* Schnapper, *supra* note 65, at 1100 ("No one but an incorrigible judicial recidivist would consider instead applying to [the 1991 Act and eight other corrective statutes where Congress overrode Court interpretations] the very defective interpretive methodology that the Congress condemned in enacting those corrective laws. The lessons to be learned from these nine statutes, and from the sixteen short-lived decisions they overturned [including *Wards Cove*], are not limited to the particular provisions misinterpreted and then amended, or to civil rights."). In fairness, this characterization of intransigence is not only a bit intemperate, but also probably excessive, because Justice Stevens, who wrote the opinion adopting the *Wards Cove* standards in *Smith*, filed a strong dissent in *Wards Cove* itself. *See Wards Cove*, 490 U.S. at 661-79 (Stevens, J., dissenting). It is doubtful he relished the opportunity to resurrect the *Wards Cove* approach. He does, however, have a pattern of strong deference to precedent.

231. *See supra* note 139 and accompanying text.

232. *Id.*

2. *Task Splitting*

The task-splitting justification seems inapt in the case of *Smith*. To the extent that a task was allocated to Congress by the Constitution, it carried that task out by overriding *Wards Cove* in the 1991 Act. The legislative history made clear that the 1991 Act's amendments were expected to set disparate impact doctrine back to its pre-*Wards Cove* setting.[233] In addition, as discussed above, the issue of inertia (or, more aptly for this situation, the institutional, structural, and political roadblocks that complicate a congressional attempt to override a statutory precedent) plagues the task-splitting justification as much as the acquiescence theory. The task that Bizarro statutory stare decisis allocates to Congress is onerous, as it requires congressional conjecture and encourages tinkering with statutes. It seems much more efficient to treat the situation in *Smith* as one involving statutory interpretation of first impression, allocating to the Court its typical work of interpreting ambiguity and allocating to Congress the job of monitoring that interpretation.

3. *Separation of Powers*

Because the Constitution-based separation of powers justification for enhanced statutory stare decisis has never gained much support beyond Justice Hugo Black's, and because it is subject to a set of fairly devastating critiques,[234] it will not be addressed here at length. It does not provide an independent justification for treating *Wards Cove* as vaunted precedent.

If the goal of statutory stare decisis is to reflect the values embodied in the separation of powers doctrine, then the application of the strong presumption of statutory stare decisis rule to *Wards Cove* in *Smith* is inappropriate. Marshall suggests that the heightened stare decisis rule invites Congress to override disfavored statutory interpretation by the Court.[235] That is exactly what happened in the 1991 Act. It is not clear, however, that the next step of requiring Congress to head off every possible application of that misinterpretation should be necessary to fulfill Marshall's goals, even under the absolute rule of statutory stare decisis that he advocates. Barrett's judicial restraint justification[236] does little more to support the application of *Wards Cove* to the ADEA. The alternative to Bizarro statutory stare decisis[237] does not undermine Barrett's preference for judicial restraint. It would require the Court to do the work of interpretation, not re-interpretation of a settled issue. The result in *Smith* would have been the Court's recognition of the differences between the

233. *See supra* note 93 and accompanying text.

234. *See supra* notes 147-49 and accompanying text.

235. *See supra* notes 152-54 and accompanying text.

236. *See supra* note 154.

237. *See infra* Part VI.

concerns in *Wards Cove* and the structure of the ADEA, especially in light of the RFOA defense.[238] This approach would have been less "activist" than the *Smith* Court's resurrection of a repudiated and overridden precedent.

4. Reliance, Continuity, and Coherence

Tyler claims that a strong doctrine of stare decisis supports reliance interests by creating a sense of continuity and coherence in the statutory legal landscape.[239] There was little reliance on the disparate impact claim under the ADEA[240] in the decade of uncertainty following *Hazen Paper* and following the dismissal of the *Adams* certiorari petition[241]; the law was too unsettled and fractured. Nor did *Wards Cove* have the characteristics of a "building block interpretation"[242] upon which public or private parties had grown to rely in ordering their affairs.[243] Moreover, Congress severely weakened *Wards Cove*'s authority by overriding the decision. The split among the circuit courts regarding the availability of disparate impact theory under the ADEA further undermined any reliance.[244] Finally, there is no evidence that Congress or any agency such as the EEOC acted in reliance on *Wards Cove*'s application to ADEA disparate impact cases when developing legislation or rules.

In terms of Tyler's conceptions of continuity and coherence, reviving an overridden interpretation does more violence to continuity and coherence than heightened statutory stare decisis does to support those goals. In fact, the circumstances surrounding *Smith* would have warranted deviation from a heightened rule of statutory stare decisis even according to Tyler's own model.[245] In particular, applying *Wards Cove* in *Smith* did not show the proper concern for consistency or coherence; such an application was inconsistent with the statutory schemes of both Title VII and the ADEA and

238. *See id.*

239. *See supra* notes 160-68 and accompanying text.

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

241. *See supra* Part II.B.2; *see also* Adams v. Florida Power Corp., 535 U.S. 228 (2002).

242. Professor Eskridge contends that reliance interests support a presumption of correctness for "building block interpretations." Building block interpretations are those that are "authoritative, well-settled interpretations upon which public and/or private parties reasonably rely to carry out their roles under the statute." Eskridge, *Interpreting*, *supra* note 125, at 108.

243. *Id.* at 111. A "building block" interpretation has three characteristics: it is "authoritative and settled" and "set[s] a firm direction for the statute's development"; it has led to reliance by parties who are subject to the statute; and it is one upon which Congress and other lawmakers have relied when crafting additional related legal rules.

244. Nevertheless, some courts that found the ADEA included disparate impact claims before *Smith* also assumed that *Wards Cove* applied.

245. *See supra* note 168 and accompanying text.

it revived *Wards Cove*, a decision that caused confusion rather than coherence.[246]

V.
THE LONG-TERM IMPACT OF BIZARRO STATUTORY STARE DECISIS: BIZARRO GOES EXPLORING

None of the justifications for heightened statutory stare decisis supports the *Smith* Court's Bizarro version. If *Smith* were an anomaly, we could simply dismiss it as a poorly reasoned but limited decision. Bizarro statutory stare decisis is not so limited, however. Now that it has been let loose, it could turn up in a number of contexts.

A. The Effects of Bizarro Statutory Stare Decisis: A Shift in the Balance of Power

Bizarro statutory stare decisis raises significant concerns, especially because it places an impracticable burden on Congress and alters the balance of lawmaking power between Congress and the Court. If the Court were to invoke Bizarro statutory stare decisis routinely, Congress would bear the burden of identifying every possible statute to which a disfavored statutory interpretation might be extended. That is an unworkable requirement,[247] especially given the environment in which the Supreme Court operates. Because the Court hears so few cases, its statutory interpretations (especially those involving theories of recovery or allocations of burden) are used as benchmarks or models in a number of other statutory contexts. Indeed, the Title VII disparate impact doctrine has been applied to several other statutes.[248] Many other statutes are bound to have parallel language and, accordingly, interconnected judicial interpretations (as discussed in Part III.A of this article). Therefore, if *Smith*'s Bizarro statutory stare decisis were to be generally accepted, Congress would be hard-pressed to repudiate definitively and override any interpretation by the Court. To do so would require Congress to canvass the entire statutory landscape for potential statutes to which the Court might extend the interpretation that meets with congressional disapproval.

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246. *Id.*

247. *Cf.* Schnapper, *supra* note 65, at 1147 ("When a new piece of legislation addresses an issue with an increased degree of specificity, it is often impracticable for Congress to review every related or analogous existing statute to insert the same language. Rather than giving such later specific legislation the effect of narrowing earlier laws, the Court should look to the more specific subsequent legislation as a guide to interpreting the earlier more general measures.").

248. *See* Eglit, *supra* note 212, at 1150 n.200 (collecting cases illustrating other contexts in which Title VII disparate impact has been used as a model or guide, including the Equal Credit Opportunity Act, Title VIII of the Civil Rights Act of 1964, and numerous state statutes).

When Congress kills an interpretation, it should be able to presume that the Court will not resurrect that interpretation without a particularly compelling indication that the interpretation is warranted under the related statute. Furthermore, Bizarro statutory stare decisis shifts the balance of power from Congress to the Court, making Congress the reactive body to the Court's policymaking. That state of affairs raises serious countermajoritarian concerns.[249]

If *Smith* were just an isolated mistake, then criticizing it might be nothing more than futile pedantry. But, *Smith* is not likely to stand alone as an anomaly of Supreme Court decision-making. Even if we limit our inquiry to the interaction between Title VII and the ADEA, the 1991 Act overrode a number of other Supreme Court interpretations by amending Title VII.[250] Congress did not typically amend the ADEA to reflect those modifications.[251] Thus, Bizarro statutory stare decisis can become a menace in other contexts, and this problem can likely reoccur in the future. The following Section provides one such example.[252]

B. An Example: Price Waterhouse and the Mixed-Motive Case

Ann Hopkins was denied partnership in Price Waterhouse, a national professional accounting firm.[253] She claimed Price Waterhouse denied her the opportunity on account of her sex.[254] Price Waterhouse argued that it was Hopkins's personality problems, and not her sex, that doomed her prospects for partnership.[255] The dispute made its way to the Supreme Court.

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249. On the countermajoritarian difficulty, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (1962).

250. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Lorance v. AT&T Techs. Inc., 490 U.S. 900 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

251. *See supra* note 212 and accompanying text.

252. An example in the opposite direction is found in EEOC v. Arab Am. Oil Co., 499 U.S. 244 (1991) ("*Aramco*"). In 1983, Congress amended the ADEA in response to several judicial opinions that concluded the ADEA could not be applied extraterritorially to protect from age discrimination American citizens working abroad for American firms. *See* 29 U.S.C. § 623(h)(1) (2000). At least some Congressmembers thought that, by so amending it to specifically authorize extraterritorial coverage, the ADEA would become coextensive with the coverage of Title VII. *Aramco*, 499 U.S. at 273 n.7 (Marshall, J., dissenting). Nevertheless, in Aramco, the Court held that Title VII did not apply to American citizens working for American companies abroad, relying for support on the fact that Title VII was not similarly amended. *See id.* at 246-47.

253. More accurately, in her first year as a partner candidate, she was "held" for reconsideration and, subsequently, never again proposed as a candidate. Price Waterhouse v. Hopkins, 490 U.S. 228, 231, 233 n.1 (1989). For an interesting first-hand account of the case and its antecedent facts, see generally ANN BRANIGAR HOPKINS, SO ORDERED: MAKING PARTNER THE HARD WAY (1996).

254. *Price Waterhouse*, 490 U.S. at 232.

255. *Id.* at 234-35.

In a fractured set of opinions with a four justice plurality,[256] two separate concurrences,[257] and a dissent by the remaining justices,[258] the Court handed Hopkins a victory. The Court ruled that a plaintiff could prevail on a claim pursuant to Title VII in a "mixed-motives" case.[259] Specifically, the Court found that, even if Price Waterhouse was motivated to deny partnership to Ann Hopkins based on her allegedly negative personality characteristics that were unrelated to her sex, it also was motivated to reject Hopkins based on her failure to comport with stereotypes of proper feminine behavior and characteristics.[260] Such reliance on sex stereotypes is prohibited by Title VII. Thus, the justices in the plurality, along with the concurring justices, agreed that the plaintiff has carried his or her burden under Title VII when a plaintiff shows that the employer's adverse employment decision was based on a protected characteristic, even if the employer also relied on other, legitimate criteria.[261] Nevertheless, the Court also allowed the employer to escape liability entirely by proving an affirmative defense[262]: that it would have made the same challenged employment decision even had it not considered the illegal criterion.[263]

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256. Justices Marshall, Blackmun, and Stevens joined the opinion authored by Justice Brennan.

257. Justice White and Justice O'Connor each wrote a concurring opinion.

258. Chief Justice Rehnquist and Justice Scalia joined the dissent, which as written by Justice Kennedy.

259. *See id.* at 246-47 (using the "mixed-motives case" label). The plurality noted that the idea of a mixed-motives case had its origin in a constitutional employment claim. *Id.* at 248-49 (citing and discussing Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977) (public school teacher sued the board of education for firing him in violation of his free speech rights under the First Amendment)). Indeed, Justice White relied primarily on this precedent in his concurrence. *Id.* at 258 (White, J., concurring in the judgment) ("In my view, to determine the proper approach to causation in this case, we need look only to the Court's opinion in [*Mt. Healthy*]." (citation omitted)).

260. *Price Waterhouse*, 490 U.S. at 257-58.

261. The judges in the plurality and the two concurring judges used different wording to describe what the plaintiff must show. The plurality indicated that sex needed to play a "motivating part in an employment decision." *Price Waterhouse*, 490 U.S. at 250 (plurality opinion). Justice Brennan, writing for the plurality, elaborated by saying that the "because of" language means "that gender must be irrelevant to employment decisions." *Id.* at 240. Justice White would have required a showing that sex was a "substantial factor." *Id.* at 260 (White, J., concurring), as would have Justice O'Connor. *Id.* at 265 (O'Connor, J., concurring).

262. Justice O'Connor did not view this escape hatch as an affirmative defense as the plurality did. Instead, she believed that when a plaintiff carried her burden under the mixed-motives case, the burden of persuasion shifted to the defendant to prove that the illegal criterion was not the "but-for" cause of the employment decision. *See id.* at 263 (O'Connor, J., concurring). The dissent, likewise, ridiculed the plurality's characterization of it as an affirmative defense, calling the plurality's approach "nothing more than a label." *Id.* at 286 (dissenting opinion). See *infra* note 266 for a discussion of why this disagreement was related to a disagreement over the causal standard required to show a violation of Title VII.

263. *Id.* at 244-45 (plurality opinion). This is known as the "same decision defense." *See, e.g.*, Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas, 53 Emory L.J. 1887, 1911 (2004). A related holding of the Court was that the defendant's burden of proof under the same decision defense was to make its showing by a preponderance of the

At the root of the plurality's logic was the recognition that the "because of" language in Title VII[264] did not require a plaintiff to prove that his or her protected status was the "but for" cause of the challenged employment action.[265] Instead, the statute required a lesser causal standard.[266] The plurality explained:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.[267]

The four justices in the plurality and the two concurring justices agreed that the lower courts correctly held that Hopkins presented sufficient evidence to carry her burden under that lesser causal standard.[268] The plurality argued that once Hopkins showed that sex was a motivating part of her employer's decision, she had satisfied her burden, because "when . . . an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex and other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into

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evidence. *Price Waterhouse*, 490 U.S. at 254 (plurality opinion). The court below had required clear and convincing evidence. *Id.*

264. *See* 42 U.S.C. § 2000e-2(a)(1) (2000) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin . . . .") (emphasis added).

265. *Price Waterhouse*, 490 U.S. at 240-41 (plurality opinion).

266. There was not complete agreement about what that lesser standard should be among the justices who nevertheless agreed that the "but-for" standard was not required. Notably, Justice O'Connor distanced herself from the plurality on this point as well, arguing that the language of Title VII did, in fact, require "but-for" causation, but she was silent as to which party carried the burden of persuasion (and the attendant risk of nonpersuasion) regarding "but-for" causation. *Price Waterhouse*, 490 U.S. at 262-63 (O'Connor, J., concurring in the judgment) ("Thus, I disagree with the plurality's dictum that the words 'because of' do not mean 'but for' causation; manifestly they do."). The dissent adopted the same reading of the plurality's framework as Justice O'Connor, but disagreed that the burden shift was appropriate. *Id.* at 285-86 (dissenting opinion). *See supra* note 262 for a related discussion of the plurality's and Justice O'Connor's disagreement over whether a mixed-motives case involves an affirmative defense or a shift in the burden of persuasion.

267. *Price Waterhouse*, 490 U.S. at 250. *But see* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1172 (1995) (arguing that this standard erroneously conflates motive and intent, as well as that it is inconsistent with a cognitive understanding of discrimination, in which an employer likely cannot accurately pinpoint the reasons for its decisions, including stereotypes, which operate on an automatic and unconscious level).

268. *Price Waterhouse*, 490 U.S. at 251 (plurality opinion); *Id.* at 259 (White, J., concurring in the judgment); *id.* at 272 (O'Connor, J., concurring in the judgment). Hopkins presented evidence of sex-based comments made directly to her (e.g., that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry"), *id.* at 235, sex-based comments that were included in evaluation forms solicited from the Price Waterhouse partners, *id.*, and expert testimony of a social psychologist regarding the mechanics and presence of sex stereotyping in the evaluation process, *id.* at 235-36.

account."[269] This stands in stark contrast to the plaintiff's burden under the *McDonnell Douglas* framework,[270] which seemingly requires the plaintiff to show that the illegal motive was the employer's one, true motive.[271]

It was Justice O'Connor's concurrence, however, that lower courts and many commentators treated as *Price Waterhouse*'s operative holding, because it was the most restrictive.[272] According to Justice O'Connor, a Title VII plaintiff must first produce "direct evidence"[273] that the plaintiff's protected status was a substantial factor in the employer's challenged decision, even if other factors also motivated the decision. The burden then shifts to the employer to justify that it would have made the same decision based on those other factors and absent the illegal consideration.[274] The plurality opinion made no such explicit distinction between direct and

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269. *Id.* at 241.

270. *See* McDonnell Douglas v. Green, 411 U.S. 792 (1973). The *McDonnell Douglas* framework is often used to prove and to evaluate the evidence in cases claiming disparate treatment employment discrimination pursuant to Title VII, as well as the ADEA, and the Americans with Disabilities Act of 1990. *See, e.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44, 49-50 (2003) (analyzing an ADA claim using the *McDonnell Douglas* framework); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) (assuming, but not holding, that the *McDonnell Douglas* framework applies in ADEA cases); O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (1996) (same). *McDonnell Douglas* sets up what has been referred to as the "three-step" minuet of a disparate treatment case under Title VII. *See* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2232 n.16 (1995). First, the plaintiff must establish a prima facie case for discrimination. If the plaintiff establishes the basic elements of a prima facie case, then the defendant carries the burden of offering a legitimate, nondiscriminatory reason for its decision regarding the plaintiff. If the defendant carries its burden, the burden shifts back to the plaintiff who must show that the proffered reason is a pretext for the actual discriminatory reason. *See id.* at 2232, 2234. *McDonnell Douglas*'s burden-shifting minuet was subsequently discussed and applied in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The three-step burden shift, thus, is alternately referred to as the *McDonnell Douglas* framework, the *Burdine* framework, or *McDonnell Douglas-Burdine* framework. *See, e.g.*, Malamud, *supra*, at 2232. For the sake of clarity, I will refer to it as the *McDonnell Douglas* framework.

271. *Price Waterhouse*, 490 U.S. at 246-47.

272. *See* Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 764 n.9 (1988) ("[W]hen no single rationale commands a majority, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgmen[t] on the narrowest grounds.'" (quoting Marks v. United States, 430 U.S. 188, 193 (1977))). *But see* Benjamin C. Mizer, Note, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 MICH. L. REV. 234, 266-67 (2001) (arguing that it is odd to treat as controlling a proposition (i.e., Justice O'Connor's requirement of that a mixed-motives case can be based only on direct evidence) that was clearly not endorsed by a majority of the court).

273. Courts have had a notoriously difficult time in employment discrimination cases identifying direct evidence or defining the difference between direct and circumstantial evidence. One commentator calls the distinction "illusory." *See* Stephen W. Smith, *Title VII's National Anthem: Is there a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371, 383-87 (1997). Another questions whether true direct evidence of an employer's intent to discriminate is possible to find, because even an admission of discriminatory intent by the employer or an employer's agent requires the factfinder to infer that the decisionmaker knew his or her own mind and motives and is able to report accurately those motives. *See* Malamud, *supra* note 270, at 2321 n.290 (1995).

274. *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring in the judgment) ("In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision.").

circumstantial evidence to separate mixed-motives cases from cases under the *McDonnell Douglas* framework. Even so, Justice O'Connor failed to provide a clear distinction between the two types of evidence. She defined her notion of direct evidence in the negative (by citing a few examples of what it was not[275]) and then explained that Hopkins's evidence fit the bill.[276] Thus, the bifurcation of individual disparate treatment law between a *Price Waterhouse* mixed-motives case and a *McDonnell Douglas* pretext case was premised on whether the plaintiff presented direct or circumstantial evidence of a discriminatory motive. The lower courts struggled, unsuccessfully, for consistency under this paradigm.[277]

Price Waterhouse, like *Wards Cove*, was a case in Congress's crosshairs in the early 1990s. And, like *Wards Cove*, it was overridden in part by the 1991 Act.[278] Congress took aim at *Price Waterhouse* by allowing a plaintiff to prove a Title VII violation through the lesser "motivating factor" causation standard.[279] Furthermore, Congress converted *Price Waterhouse*'s affirmative "same decision" defense[280] from liability into a remedy limitation. Section 107 of the 1991 Act, which amended Sections 703[281] and 706[282] of Title VII, was the vehicle for this change.

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275. *Id.* at 277 (explaining that "stray remarks in the workplace," "statements by nondecisionmakers," and "statements by decisionmakers unrelated to the decisional process" are each, "standing alone," not direct evidence for purposes of shifting the burden of causation to the defendant under the mixed-motives approach).

276. *Id.*

277. *See, e.g.*, Robert A. Kearney, *The High Price of* Price Waterhouse*: Dealing with Direct Evidence of Discrimination*, 5 U. PA. J. LAB. & EMP. L. 303 (2003) (discussing the various approaches to classifying direct and circumstantial evidence that developed after *Price Waterhouse* and arguing that the distinction between mixed-motives and pretext cases results in courts undervaluing evidence of biased oral comments that are not considered "direct" evidence).

278. *See* H.R. REP. NO. 102-40, at 45-48 (1991) (reporting on a substantially similar earlier version of the Civil Rights Act of 1991 and explaining the "need to overturn *Price Waterhouse*").

279. Presumably, Congress's use of "motivating factor" and not "substantial motivating factor" was not an oversight, but was a specific choice of the plurality's—not Justice O'Connor's and Justice White's—view of the causal standard. *See supra* note 261.

280. *See supra* note 263 and accompanying text.

281. Section 703(m) now reads:

> Except as otherwise provided in this subchapter, 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.

42 U.S.C. § 2000e-2(m) (2000).

282. As amended, section 706(g)(2)(B) now reads:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title [section 703(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title [section 703(m)]; and
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A) [dealing with backpay and other victim-specific relief].

As it did in response to *Wards Cove*, Congress amended Title VII in response to *Price Waterhouse*'s restrictive interpretation of language that appears in identical form in the ADEA.[283] And, again, Congress did not amend the ADEA in the 1991 Act in response to *Price Waterhouse*. *Smith*'s Bizarro statutory stare decisis doctrine would find this fact determinative of congressional acquiescence, which would in turn justify the Court's continuing application of *Price Waterhouse* to the ADEA.[284] But that would be wholly unsatisfying.

Justice O'Connor's concurring opinion—and the direct versus circumstantial evidence issue in particular—has been widely criticized and, was in fact contradicted by a recent Supreme Court decision, *Desert Palace, Inc. v. Costa*.[285] The Court granted certiorari to that case to resolve "whether a plaintiff must present direct evidence of discrimination to obtain a mixed-motive instruction under Title VII . . . , as amended by the [1991 Act]."[286] Its answer was a resounding, unanimous, no.[287] The Court found that a plaintiff is entitled to a Section 703(m) motivating factor jury instruction[288] once the plaintiff has produced sufficient evidence to show that his or her protected status was a motivating factor for the employer's adverse employment decision, regardless of whether the evidence of unlawful motivation was direct or circumstantial.[289]

The Court based its holding on three principles. First, the text of the statute makes no mention of a direct evidence requirement.[290] Second, Section 703(m) applies if the plaintiff "demonstrates" an impermissible motive. The statute defines *demonstrates* as meeting the burdens of

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Id. § 2000e-5(g)(2)(B).

283. *Compare* 42 U.S.C. § 2000e-2(a)(1) (2000) *with* 29 U.S.C. § 623(a)(1) (2000).

284. To complicate matters, there is an argument that the RFOA provision obviates the question, because it is a safe harbor for employers in mixed-motives cases. Thus, there really is no "mixed-motives" case under the ADEA. *See, e.g.*, Smith v. City of Jackson, 544 U.S. 228, 253 (2005) (O'Connor, J., dissenting) ("[T]he RFOA provision also plays a distinct . . . role in 'mixed-motive' cases. In such cases, an adverse action taken in substantial part because of an employee's age may be 'otherwise prohibited' by § 4(a). The RFOA exemption makes clear that such conduct is nevertheless lawful so long as it is 'based on' a reasonable factor other than age." (internal citations omitted)); Transcript of Oral Argument at 51, *Smith*, 544 U.S. 228 (No. 03-1160), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-1160.pdf.

285. 539 U.S. 90 (2003).

286. *Id.* at 92.

287. *Id.* Note that even Justice O'Connor agreed that her direct evidence standard from *Price Waterhouse* was not incorporated in section 703(m); however, she did write a separate concurring opinion to reiterate her view that the *Price Waterhouse* direct evidence rule was appropriate before being supplanted by Congress. *Id.* at 102 (O'Connor, J., concurring).

288. The Court continued to use the term "mixed-motives instruction" rather than "motivating factor instruction" despite the absence of the former in the statutory language. *See id. passim.*

289. *Id.* at 101 ("In order to obtain an instruction under [section 703(m)], a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'").

290. *Id.* at 98-99 ("On its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence.").

production and persuasion.[291] The Court reasoned that it must interpret that term accurately and consistently.[292] Accuracy prohibited the Court from reading a direct evidence requirement into the definition without a clear indication from Congress that it should,[293] and the *Costa* Court found no such indication.[294] Moreover, consistency required that the use of the term "demonstrates" in Section 703(m) be given the same meaning in Section 706(g)(2)(B), the same decision defense.[295] Notably, the defendant argued that it was not required to present direct evidence to prove the same decision defense.[296] Thus, the Court refused to interpret the same term differently in the two related sections of Title VII without some clear indication from Congress that it should.[297]

Finally, the Court relied on the "conventional rule of civil litigation" that circumstantial evidence is no less adequate or convincing than direct evidence.[298] The Court drove home its position with the following statement: "The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'"[299] As a result, Justice O'Connor's evidentiary dichotomy was undone.[300]

Nevertheless, lower courts still struggle with whether *Price Waterhouse*'s formulation of the mixed-motives theory applies to the ADEA.[301] Bizarro statutory stare decisis would short-circuit any reasoned consideration of that question. Instead, Bizarro statutory stare decisis would lead the Supreme Court to determine the ADEA's text, which is identical to the Title VII text that was at issue in *Price Waterhouse*, is subject to the *Price Waterhouse* interpretation. This is an especially troubling outcome for a couple of reasons. First, *Price Waterhouse*

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291. *See* 42 U.S.C. § 2000e(m) (2000).

292. *See Costa*, 539 U.S. at 99-101.

293. *Id.* at 99.

294. *Id.*

295. *Id.* at 101.

296. *Id.*

297. *Id.*

298. *Id.* at 99-100.

299. *Id.* at 100 (quoting Rogers v. Miss. Pac. R.R., 352 U.S. 500, 508 n.17 (1957)).

300. Justice O'Connor wrote a brief concurring opinion in *Costa* to note that she agreed with the majority opinion in that the 1991 Act's amendments "codified a new evidentiary rule for mixed-motive cases arising under Title VII." *Id.* at 102 (O'Connor, J., concurring). She maintained, however, that the direct evidence requirement, which was necessary according to her *Price Waterhouse* concurrence to trigger the mixed-motives analysis, was the appropriate rule before the amendments. *Id.*

301. *Compare* Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004) (finding applicable to the ADEA the *Costa* conclusion that circumstantial evidence may be used to support a mixed-motives claim) *with* Glanzman v. Metro. Mgmt. Corp., 391 F.3d 506 n.3 (3d Cir. 2004) ("Because the Civil Rights Act of 1991 does not apply to ADEA cases . . . we continue to apply the *Price Waterhouse* test in order to resolve ADEA cases.").

produced no majority rationale or structure for the mixed-motives theory, but rather a set of fractured opinions that have long confused the lower courts. Second, if history is any guide, Justice O'Connor's *Price Waterhouse* concurrence would be treated as the operative holding.[302] Thus, the ADEA would be subject to the unworkable and (in the Title VII context) recently rejected direct-versus-circumstantial evidence dichotomy. That outcome would be even less legitimate than *Smith*'s revival of *Wards Cove*. In the next Part, I offer a superior approach for the Court to take in these situations.

VI.
AN ALTERNATIVE APPROACH: PUTTING BIZARRO TO REST

The fundamental question that the Court should have addressed in *Smith* (and that courts should consider with *Price Waterhouse*) was not whether Congress's inaction regarding the ADEA should be read as an endorsement of *Wards Cove*. Instead, the Court should have focused on the appropriate structure of a disparate impact claim, including the allocation of the burdens of proof, while bearing in mind the text, purpose, and legislative history of the ADEA.[303] This proposed approach is really just statutory interpretation in the first instance, combined with a rebuttable presumption that the overridden interpretation should not apply. Perhaps there are remarkable situations in which the overridden interpretation is the correct one for the companion statute, despite Congress's prior disapproval. To rebut the presumption that it is not correct, however, a court must find clear direction from the text, purpose, or history of the subsequently interpreted statute to revive the overridden interpretation. In other words, the Supreme Court's interpretation of Title VII in *Wards Cove* should not have been applied to the ADEA without clear indication from the text, purpose, or history of the ADEA that are even stronger evidence of the appropriateness of the *Wards Cove* interpretation than were present in Title VII. As will be discussed below, the text, purpose, and history of the ADEA do not make a strong case for applying *Wards Cove*.[304] Moreover, the presumption against applying an overridden interpretation should be even stronger in the context of the civil rights and equal employment opportunity statutes because the Supreme Court's limiting interpretations have been consistently repudiated by Congress.[305] For instance, the Court

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302. *See supra* notes 272-277 and accompanying text.

303. *Cf.* Eskridge, *Interpreting*, *supra* note 125, at 97 ("The formal question [with which the Court should concern itself in the 1989 case of *Patterson v. McLean Credit Union*] is whether the text and legislative history of section 1981 itself support *Runyon* [*v. McCrary*].").

304. *See infra* notes 310-323.

305. *See* Schnapper, *supra* note 65, at 1098 (quoting Rep. Ford, indicating that the 1991 Act would send "a powerful message that the American people reject the Supreme Court's narrow and crabbed

should have been particularly loath to resurrect *Wards Cove*, which had already met with congressional disapproval.[306]

The Court in *Smith* should have recognized that there was no strong justification for treating *Wards Cove* like binding precedent.[307] It had not induced reliance by either parties or lawmakers. Resurrecting *Wards Cove* did not significantly enhance the consistency or coherence of the law. Whether the ADEA even allowed disparate impact claims was an open question which had split the circuit courts, so *Smith* represented a watershed moment and starting point. Because there had been no consistency in the lower courts regarding disparate impact under the ADEA, a fresh interpretation of the ADEA in *Smith* would not have been inconsistent with an interest in continuity. In addition, following the amendments to Title VII by the 1991 Act, the coherence or "horizontal continuity"[308] between Title VII and the ADEA was disrupted by the application of *Wards Cove.*

Moreover, the Court should have recognized that Congress overcame the obstacles of legislative inertia to pass the 1991 Act and repudiate *Wards Cove*.[309] To expect that Congress would head off what, at the time, was a mere conjecture that *Wards Cove* would be applied to the ADEA is to ask

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interpretation of civil rights laws generally and equal employment opportunity statutes specifically.") (quoting 37 CONG. REC. H9533 (daily ed. Nov. 7, 1991)); *id.* at 1100 (referring to "judicial recidivists").

306. The interaction between the courts and Congress leading up to and following *Aramco* could have provided guidance to the Court in *Smith*. In that case, the Court had to determine whether Congress intended Title VII to apply extraterritorially to American citizens working for American companies abroad. EEOC v. Arab Am. Oil Co., 499 U.S. 244, 246 (1991) ("*Aramco*"). In interpreting Title VII not to have extraterritorial reach, the Court relied on the fact that Congress had previously amended the ADEA to clarify its extraterritorial application after several courts had interpreted it not to apply outside the United States. Congress did not likewise amend Title VII. *Id.* at 258. *See also supra* note 252 (explaining that some Congressmembers were convinced that the amendment to the ADEA was necessary to make it coextensive with Title VII). *Aramco* was not an application of Bizarro statutory stare decisis because the Court only mentioned the ADEA amendment to "buttress" its conclusion, noting that it was evidence that Congress understood how to make its intent of extraterritorial application clear. *Aramco*, 499 U.S. at 258. But that falls short of formally granting statutory stare decisis to the limiting interpretations of the ADEA that prompted Congress to amend it. So, Congress narrowly interpreted Title VII, refusing to recognize that the amendment to the ADEA was a message that Congress intended the federal equal employment opportunity statutes to have broad remedial application. In the end, Congress had to override *Aramco* in the 1991 Act to clarify its intent for Title VII to apply extraterritorially. *See* Pub. L. No. 102-166, 105 Stat. 1071, §109 (codified at 42 U.S.C. § 2000e(f) (2000)). Some give-and-take between the Court and Congress is inevitable. But, the seemingly continual cycle of crabbed and limiting interpretations of the civil rights acts by the Court followed by Congress's corrective legislation is ultimately a waste of resources. The Court should be learning its lesson and adapting its interpretive approach to these statutes accordingly. *See generally* Schnapper, *supra* note 65.

307. As argued in *supra* note 242, *Wards Cove* was not a building block interpretation of the language at issue in *Smith*. Even if there were an argument that *Wards Cove* was a building block interpretation, Congress clearly indicated its disapproval of the interpretation, a particularly compelling reason not to find any meaning in congressional inaction. *See* Eskridge, *Interpreting*, *supra* note 125, at 120.

308. *See supra* note 163 (defining "horizontal continuity").

309. *See supra* Part IV.B.1.a (discussing the inertial forces Congress was dealing with when enacting the 1991 Act).

too much of Congress. That is particularly true considering that the interest groups most concerned with the fate of the ADEA felt no immediate motivation to lobby for a similar amendment to the ADEA.

The Court should have interpreted the language of § 4(a)(2)[310]—and especially its interaction with the RFOA language in § 4(f)(1)[311]—in the first instance, as it would have in the absence of *Wards Cove*. In particular, the Court should have recognized that the RFOA provision in the ADEA not only narrowed the scope of the disparate impact doctrine as applied to the ADEA,[312] but also alleviated many of the concerns that animated the *Wards Cove* decision. Those concerns compelled the *Wards Cove* Court to require that a plaintiff disaggregate employer decision making to identify the specific practice that caused an adverse impact, and to shift the burden of proof onto the plaintiff.[313] Because the RFOA provision of the ADEA allays these concerns, it was unnecessary for the Court to apply *Wards Cove*'s Title VII interpretation to the ADEA.

For instance, the Court was concerned that the "failure to identify [a] specific practice being challenged is the sort of omission that could 'result in employers being potentially liable for the myriad of innocent causes that may lead to statistical imbalances . . . .'"[314] Perhaps that was a valid concern under Title VII when *Wards Cove* was decided; the fear was that the employer would find it exceedingly difficult both to prove business necessity as an affirmative defense and to ensure that no less restrictive alternative could have served the same interest.[315] Or, perhaps that fear was not valid.[316] Regardless, the less exacting RFOA provision makes those fears seem largely unwarranted. For instance, an employer could be expected to establish that its overall hiring process was reasonable even if portions of it were neither necessary for the business nor particularly easy to validate.[317]

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310. 29 U.S.C. § 623(a)(2) (2000).

311. *Id.* § 623(f)(1).

312. Smith v. City of Jackson, 544 U.S. 228, 240 (2005) ("[T]he scope of disparate-impact liability under ADEA is narrower than under Title VII.").

313. *See supra* notes 82-88 and accompanying text.

314. *Smith*, 544 U.S. at 241 (quoting Wards Cove v. Atonio, 490 U.S. 642, 657 (1989)) (internal quotations omitted).

315. *See supra* notes 63-67 and accompanying text.

316. Clearly Congress was not wholly moved by these concerns as they relate to Title VII. The 1991 Act amendments allowed a plaintiff to make a showing of disparate impact without pinpointing the "particular employment practice" that caused the adverse impact if the plaintiff "can demonstrate to the court that the elements of a[n employer's] decision-making process are not capable of separation for analysis." 42 U.S.C. § 2000e-2(k) (2000).

317. *See, e.g.*, Meacham v. Knolls Atomic Power Lab., 461 F.3d 134, 145 (2d Cir. 2006) (finding that employer's process of identifying employees to be laid off under an involuntary reduction in force was reasonable, in part because it was not arbitrary). *Meacham* illuminates an interesting conundrum. The process for determining the layoffs included managers' subjective evaluations of employees' "criticality" and "flexibility." *Id.* The employer's oversight of the managers' discretion under the RIF was patchy and generally shoddy. *Id.* Thus, it was possible, if not likely, that managers' biases against

Similarly, though *Wards Cove* structured the disparate impact claim so that the plaintiff-employee retained the ultimate burden of proof throughout, reference to the plain text of the ADEA would suggest a different result. The RFOA provision[318] in the ADEA appears to be an affirmative defense to the "limit, segregate, or classify" language of § 4(a)(2).[319] The bona fide occupational qualification defense,[320] which is in the same subsection as the RFOA provision, and which is written in parallel language,[321] is an affirmative defense.[322] In addition, courts have treated the RFOA as an affirmative defense in the disparate treatment context.[323] It would be perverse if the same statutory provision placed the burden on different parties based on the theory of recovery under which the parties were operating. To treat the RFOA provision as allocating the burden of proof to the employee to prove that the employer's practice is unreasonable contradicts prior interpretations of the language, ignores an important canon of construction, and—most disturbingly—elevates the policy preferences of the Court as announced in *Wards Cove* over the plain language of the ADEA.[324]

These differences between the ADEA and Title VII should have led the *Smith* Court to recognize that, in the absence of a justification for a strong stare decisis rule, the Court should not have relied on *Wards Cove* and instead should have interpreted the ADEA's language in the first instance. Had the Court done so, it would have avoided the Bizarro nature of its

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older workers crept in to that subjective step. Yet, because the process was not wholly arbitrary, it was reasonable and fulfilled the RFOA provision of the ADEA. *Id.* at 146. One is left with the impression that, under the RFOA standard, the employer is better off employing a subjective layoff process that incorporates popular management jargon like "criticality," which opens the door for biases against older workers to take root, than engaging in a wholly random process, like drawing names out of a hat. The latter is arbitrary and, thus, perhaps not reasonable, even though it is more effective at insulating employees from conscious or subtle bias.

318. 29 U.S.C. § 623(f)(1).

319. *Id.* § 623(a)(2). *See supra* note 202.

320. *Id.* § 623(f)(1) ("It shall not be unlawful for an employer . . . to take any action otherwise prohibited under [the ADEA] where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . .").

321. If the *in pari materia* canon has any force, it should be brought to bear here, where two subparts of the same statutory section include the same language. The consistency presumption that finds its origin in this canon. *See supra* note 109 and accompanying text. Nevertheless, its application between two different statutes should not trump its application within a single statute.

322. *See* Smith v. City of Jackson, 544 U.S. 228, 233 n.3 (2005).

323. *E.g.*, Criswell v. W. Airlines, Inc., 709 F.2d 544, 552 (9th Cir. 1983) ("The 'reasonable factors' defense appears alongside the BFOQ exception in the ADEA and is an affirmative defense for which the employer bears the burden of proof." (internal citation omitted)).

324. *See* Meacham v. Knolls Atomic Power Lab., 461 F.3d 134, 142 (2d. Cir. 2006) ("Any other interpretation [than that the employee bears the burden of showing the employer's justification for its practice is unreasonable] would *compromise the holding* in *Wards Cove* that the employer is not to bear the ultimate burden of persuasion with respect to the 'legitimacy' of its business justification." (emphasis added)).

invocation of statutory stare decisis and the potential problems associated with it.

Similarly, courts should not simply presume that *Price Waterhouse* controls ADEA mixed-motives cases. Instead, courts should recognize that Congress has disapproved of *Price Waterhouse* and that the Supreme Court has practically rejected Justice O'Connor's requirement that a plaintiff present direct evidence of an unlawful motive.

VII.
CONCLUSION

In *Smith* the Court aimed its judicial "duplicating ray," the consistency presumption, at the traditional doctrine of heightened statutory stare decisis and created a Bizarro brand, resuscitating an otherwise deservedly dead and gone *Wards Cove* in the process. None of the justifications for heightened statutory stare decisis supports the application of the Bizarro version. Instead, the criticisms of the doctrine typically are even stronger when applied to Bizarro statutory stare decisis. In particular, Bizarro statutory stare decisis places an unwarranted burden on Congress to identify every possible statutory setting where a decision of the Court could have analogical force and to amend those statutes to ensure the ultimate demise of the disfavored interpretation. That allocation of the workload between the Court and the Congress is both dangerous and counterintuitive. To the extent that Congress acts decisively to override the Court's interpretation of specific legislation, the Court should not feel automatically empowered to apply the repudiated interpretation in other contexts, forcing Congress to head off the Court's implementation of its own policy choices. Instead, the burden should be on the Court to engage in genuine interpretation of the statutory language. While there may be instances in which the analogical force of the prior, overridden interpretation in a new statutory setting is so strong it should supersede Congress's disapproval, *Wards Cove* as applied to the ADEA was not such an instance. Furthermore, one would expect such cases to be rare. At the very least, the Court should feel compelled to explain why the overridden interpretation is appropriate in the subsequent statutory context, despite its earlier disapproval by Congress.

As a result of the Court's use of the Bizarro version of statutory stare decisis in *Smith*, the Court has raised the specter of additional Bizarro applications in the near future. In the 1991 Act alone, Congress overrode a number of interpretations of provisions in Title VII that have analogs in the ADEA. Thus, each of these instances may result in the undoing of some of the work done by Congress in the 1991 Act, if Bizarro statutory stare decisis is applied as it was in *Smith*. The Court should instead reassume the role of interpreting statutes in the way it normally would and not rely on rejected interpretations.

The imperfect duplicate of the enhanced rule of statutory stare decisis that the Court invoked to apply *Wards Cove* in *Smith* is of little value. Bizarro statutory stare decisis upsets the balance of power and the appropriate distribution of the workload between the Court and Congress. It illegitimately excuses the Court from its duty of engaging in reasoned and well-grounded interpretation of statutory language. Thus, like Bizarro in the *Superman* comics, it should be destroyed.