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Age Discrimination and Disparate Impact: A New Look at an Age-Old Problem

Kenneth R. Davis

ARTICLES

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A NEW LOOK AT AN AGE-OLD PROBLEM*

Kenneth R. Davis†

I. INTRODUCTION

America is aging. As the generation of baby boomers approaches its fifties and sixties, it occupies every venue in the American workforce from the assembly line to the corporate boardroom. Baby boomers hold government posts from postal clerk to the presidency. They are teachers and administrators, stockbrokers and real estate salespersons. They work in steel mills and textile factories, run retail shops, and manage sprawling business enterprises. Today, about 51% of the labor force is over forty.[1] The Bureau of Labor Statistics projects that this number will rise to 53% by 2012.[2]

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† Associate Professor, Fordham University Graduate School of Business Administration. B.A., SUNY at Binghamton, 1969; M.A., California State University at Long Beach, 1971; J.D., University of Toledo, 1977. My thanks to Jeffrey Franco for his research assistance. I wish also to express my appreciation to my wife, Jean Davis, the goddess of law librarians.

[1] Bureau of Labor Statistics, Total Labor Force, *at* ftp://ftp.bls.gov/pub/special.requests/ep/labor.force/clfa0212.txt (last visited Nov. 16, 2004).

[2] *Id.*

Older workers have long endured unfair stereotypes of waning competence.[3] Misguided employers deny jobs to such workers under the false assumption that graying hair and a sixtieth birthday signal a decline in productivity.[4] To combat these stereotypes, Congress passed the Age Discrimination in Employment Act (ADEA).[5] Enacted in 1967, the ADEA forbids discrimination against workers over the age of forty.[6]

Disparate impact theory makes facially neutral employment practices unlawful if they have a disproportionately adverse impact on a protected class.[7] This theory outlaws unintentional discrimination unless the employer shows that business necessity justifies the challenged employment practice.[8] To show business necessity, the employer ordinarily links the challenged employment practice to job performance.[9] For example, requiring prison guards to have a minimum height of 5 feet 2 inches and a minimum weight of 120 pounds would have a disproportionate impact on women. Such requirements would be legally permissible only if the prison authority could show that they are performance related.[10]

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[3] Congress has found that:

> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs; (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons; (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave.

29 U.S.C. §§ 621(a)(1)–(3) (2000).

[4] DEPARTMENT OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965) *reprinted in* EEOC, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 8 (1981) [hereinafter LABOR REPORT] (finding that "[t]he competence and work performance of older workers are, by any general measures, at least equal to those of younger workers.").

[5] Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–624 (2000)).

[6] *Id.*

[7] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (establishing disparate impact liability in racial discrimination cases brought under Title VII).

[8] *Id.*

[9] *Id.*

[10] This issue was presented in *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Adopted by Alabama statute, these requirements had a disproportionate impact on women, and the Alabama Department of Corrections failed to justify these requirements by showing that they enhanced job performance. *Id.* at 331.

Applicable to all federally protected classes under Title VII and the Americans with Disabilities Act (ADA),[11] disparate impact law prohibits discrimination because of race, sex, religion, national origin,[12] and disability.[13] Because of a unique provision in the ADEA,[14] the federal courts, over the past four decades, have split over whether disparate impact theory applies to age discrimination.[15] The Supreme Court recently granted certiorari in *Smith v. City of Jackson*[16] to resolve this conflict.[17] Because so many millions now populate the class of workers forty and older, the answer to this issue will carry enormous economic and social consequences.[18]

Part II of this Article discusses disparate impact theory, first recognized in *Griggs v. Duke Power Co.*[19] The discussion of *Griggs* will focus on the elements of a disparate impact claim, the business necessity defense, and the policy underpinnings of

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[11] Americans with Disabilities Act of 1989, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended 42 U.S.C. §§12101–12213 (2000)).

[12] Section 105 of the Civil Rights Act of 1991 provides:

> An unlawful employment practice based on disparate impact is established under this title only if 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.

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

[13] The Americans with Disabilities Act (ADA) codifies disparate impact law as defined in *Griggs*, and applies disparate impact protection to the disabled. The ADA provides that an employer engages in an unlawful discriminatory practice by:

> [U]tilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability, [and] using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

42 U.S.C. §§ 12112(b)(3)(A), (b)(6) (2000).

[14] *See infra* Part IV.A.2.

[15] *See infra* note 68 and accompanying text (citing cases that have expressed positions on the issue).

[16] Smith v. City of Jackson, 351 F.3d 183 (5th Cir. 2003), *cert. granted*, 72 U.S.L.W. 3539 (U.S. Mar. 29, 2004) (No. 03-1160).

[17] The Supreme Court granted certiorari in *Adams v. Florida Power Corp.*, 534 U.S. 1054 (2001), to decide whether disparate impact analysis applies to age discrimination cases, but the court subsequently dismissed the writ of certiorari as improvidently granted, 535 U.S. 228 (2002).

[18] Appellants stressed in their petition for a writ of certiorari that "[a]lmost seventy million employees age forty and over – nearly half of the civilian labor force – are protected by the ADEA. Because the Act covers so many employees, the question presented is of great importance to the national economy." Smith v. City of Jackson, No. 03-1160, 2004 WL 304286, at *9 (Feb. 11, 2004) (citations omitted).

[19] 401 U.S. 424 (1971).

the decision. After presenting post-*Griggs* approaches to defining business necessity, this Part will end with an explanation of the "less discriminatory alternative" test.

Part III examines the majority and dissenting opinions of *Smith v. City of Jackson*,[20] the Fifth Circuit case now pending before the U.S. Supreme Court. In *Smith,* the Court will determine whether disparate impact theory applies to age discrimination.[21] An examination of the Fifth Circuit's opinion and the dissenting opinion offer a springboard for understanding the arguments on both sides of the issue.

Part IV analyzes the legal arguments both for and against the application of disparate impact theory to the ADEA. This Part focuses on the text of the ADEA, emphasizing the "reasonable factors other than age" (RFOA) defense. Having criticized alternative interpretations of that provision, Part IV determines that the RFOA defense applies to cases of disparate treatment rather than disparate impact. After analyzing the legislative history of the ADEA, this Part dissects the language of *Hazen Paper Co. v. Biggins*,[22] looking for clues of how the Supreme Court will likely rule in *Smith.* This Part then discusses Congress' failure to amend the ADEA to include disparate impact claims, and concludes that none of the numerous legal arguments indicates a clear resolution to the issue.

Part V explores policy issues arising out of the extension of disparate impact coverage to the class of workers over forty. First, this Part argues that extending disparate impact theory to age cases would not promote the theory's purposes. This Part then identifies African-Americans as a preferred protected class, and shows the effects that providing workers over forty with disparate impact coverage would have on African-Americans. Workers over forty comprise a majority of the workforce and they hold a significant number of high-paying, managerial jobs. African-Americans are underrepresented among this class of workers. Therefore, an unintended consequence of providing older workers with disparate impact coverage would be to freeze African-Americans out of jobs that employers have historically denied them. The Article concludes

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[20] 351 F.3d 183 (5th Cir. 2003).

[21] Jackson Lewis, *Employment-Related Supreme Court Decisions: The Year in Review and What's Ahead* (Oct. 5, 2004), *at* http://www.jacksonlewis.com/legal updates/article.cfm?aid=640 (last visited Jan. 15, 2004).

[22] 507 U.S. 604 (1993).

that, as a matter of policy, disparate impact protection should not be extended to workers covered by the ADEA.

II. THE ORIGINS AND CONTOURS OF DISPARATE IMPACT LAW

To determine whether the theory of disparate impact should apply to age discrimination, one must understand the origins and contours of disparate impact law. In *Griggs v. Duke Power Co.*, the Supreme Court established disparate impact as a basis for recovery under Title VII.[23]

A. Griggs v. Duke Power Co.

1. The Facts and Procedural Background

Duke Power Company organized its Dan River plant into five operating departments, including the relatively low paying Labor and Coal Handling departments to the more lucrative "inside" departments including, Operations, Maintenance and Laboratory and Test.[24] The controversy in the case arose from screening practices that Duke instituted for entry-level hires and transfers to inside positions. First, Duke initiated a policy requiring a high school diploma for initial assignment to any department except Labor.[25] Second, Duke established the requirement that incumbent workers attain certain minimum scores on two professionally prepared aptitude tests before qualifying for transfer.[26] These screening requirements disqualified a disproportionately high number of African-Americans from hire and for promotion.[27] Black employees at the Dan River plant commenced a class action against Duke.[28] The facts counseled both for and against liability. On the one hand, Duke's failure to link the screening

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[23] 401 U.S. 424 (1971).

[24] *Id.* at 427.

[25] *Id.* According to the 1960 census, 34% of white males nationwide earned high school diplomas, whereas only 12% of black males earned such diplomas. *Id.* at 430.

[26] *Id.* at 427–28. Duke required incumbent employees seeking transfer to inside positions to take the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test. *Id.* at 428. To pass and to be eligible for transfer, an employee had to score approximately at the national median for high school graduates. *Id.* Thus, the standard adopted by Duke would have eliminated approximately one-half of all high school graduates from consideration for transfer. *Id.* at 428 n.3.

[27] *See id.* at 429.

[28] *See Griggs*, 404 U.S. at 426.

requirements to job performance supported the employees' claims.[29] However, the absence of evidence of discriminatory intent bolstered Duke's position that it had not violated Title VII.[30] The Fourth Circuit agreed with Duke, holding that discriminatory intent is a necessary element of a Title VII violation.[31]

2. The Reasoning of the Supreme Court

The Supreme Court reversed, ruling that the absence of discriminatory intent does not necessarily insulate a defendant from liability under Title VII.[32] Although noting that Title VII does not guarantee jobs to victims of prior discrimination or to racial minorities, the Court stressed that Title VII does promise equality of employment opportunity.[33] To achieve this objective, Title VII seeks to remove barriers that "freeze" black workers into the status quo created by a history of employment discrimination.[34] The Court observed that blacks do not on average receive the same high-quality education as whites.[35] Thus, Duke's diploma and test requirements, even if not intentional instruments of discrimination, perpetuated a pattern of minority exclusion from the workplace.[36]

The Court held that employment practices discriminatory in operation violate Title VII.[37] Though Title VII certainly condemns discriminatory motives, it also prohibits the discriminatory consequences of employment practices, even if the consequences are unintentional.[38] A facially neutral employment practice that has a disproportionately adverse impact on minorities is a prima facie violation of Title VII.[39] If, however, the employer can justify the employment practice as a

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[29] *See id.* at 429 n.5.

[30] *See id.* at 429.

[31] *See id.* at 428.

[32] *See id.* at 431, 432. The Court commended Duke for having undertaken a program to contribute two-thirds of the cost of tuition for those undereducated employees who sought a high school education. *See id.* at 432. Laudable motives, however, did not shelter Duke from liability because liability was predicated upon the consequences of Duke's practices. *See id.*

[33] *Griggs*, 404 U.S. at 429–31.

[34] *Id.* at 430.

[35] *Id.* at 430.

[36] *See id.* at 430–31.

[37] *See id.* at 431.

[38] *Griggs*, 404 U.S. at 432.

[39] *Id.*

business necessity, the challenged practice is permissible.[40] The Court defined "business necessity" as job-performance relatedness.[41] To meet this test, the job "requirement must have a manifest relationship to the employment in question."[42] In holding against Duke, the Court pointed out that Duke had offered no evidence linking the diploma or testing requirements to job performance.[43] Equally damning to Duke's job-relatedness defense, employees hired or transferred before Duke implemented these requirements performed satisfactorily.[44] Accordingly, Duke had failed to prove that the tests and diploma requirement bore a "demonstrable relationship to successful [job] performance."[45]

B. Disparate Impact Law After Griggs

Two questions arise from *Griggs*' adoption of the business necessity defense. The first asks how "necessary" a business necessity must be, and the second asks what proof a defendant must present to establish the defense. Since *Griggs*, the Supreme Court has been inconsistent in answering both questions. In *Dothard v. Rawlinson*,[46] women challenged statutory height and weight requirements for prison guards in the Alabama penal system on the ground that these requirements disproportionately affected women.[47] The Board of

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[40] *See id.* at 431. In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 660 (1989), the Supreme Court shifted the burden of proving business necessity to the plaintiff. In the 1991 Civil Rights Act, a disgruntled Congress promptly shifted this burden of proof back to the defendant. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

[41] *Griggs*, 401 U.S. at 431. Such a justification often requires complex statistical proof. While age and sex discrimination cases involve dichotomous classes, age discrimination cases involve a class distributed along a continuum. Douglas C. Herbert & Lani S. Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Model in Age Discrimination Cases*, 37 S. TEX. L. REV. 625, 655–56 (1996). The complexity of the statistical evidence in age cases will therefore expand to daunting proportions unsuitable for lay jurors. *See id.*

[42] *Griggs*, 401 U.S. at 432.

[43] *Id.* at 431.

[44] *Id.* at 431–32. Duke also argued that § 703(h) permitted its use of the Wonderlic and Bennett Mechanical Comprehension Tests. *Id.* at 433. That subsection authorizes the use of "any professionally developed ability test" that is not "designed, intended, or *used* to discriminate because of race. . . ." *Id.* (emphasis added) (quoting Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964)). After reviewing the legislative history of the subsection, the Court concluded that an employer may not *use* a professionally developed test to discriminate, a prohibition which requires a connection between the test and job performance. *Id.* at 433–36.

[45] *Id.* at 431.

[46] 433 U.S. 321 (1977).

[47] *Id.* at 328–29.

Corrections asserted a business necessity defense, arguing that the requirements correlated with strength, a critical attribute for prison guards.[48] The Court rejected this argument because the Board of Corrections presented "no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance."[49] Thus, *Dothard* seemed to favor stringent standards for both the question of how to define business necessity and the question of what evidence a plaintiff must present to prove the defense. First, it expressed a near literal definition of business necessity; that is, the requirement must be "essential," not merely conducive, to performing the job. Second, *Dothard* seemed to require statistical rather than anecdotal evidence.

Only two years after *Dothard,* the Supreme Court articulated a more flexible definition of business necessity and a more lax evidentiary standard. In *New York Transit Auth. v. Beazer,*[50] the Transit Authority adopted a policy of excluding participants in methadone programs from all jobs, even those that were not safety-related.[51] The Court, without statistical verification, approved the policy, which disproportionately excluded blacks, satisfied that the policy had a "manifest relationship to the employment in question."[52] Insofar as non-safety related jobs were concerned, this policy appeared to have been one of preference rather than necessity.

A more balanced approach to business necessity appears in *Wards Cove Packing Co. v. Atonio,*[53] in which the Court stated, "A mere insubstantial justification in this regard will not suffice . . . . At the same time, though, there is no

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[48] *Id.* at 331.

[49] *Id.*

[50] 440 U.S. 568 (1979).

[51] *Id.* at 568.

[52] *Id.* at 587 n.31 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

[53] 490 U.S. 642 (1989). In *Wards Cove*, minority workers, primarily Filipinos, alleged disparate impact claims against two salmon canneries for their hiring and promotion practices. *Id.* at 647–48. The plaintiffs argued that the canneries excluded them from skilled positions, which went primarily to white workers. *Id.* To establish a prima facie disparate impact case, the plaintiffs relied on statistics showing the high percentage of non-white workers in unskilled jobs and the high percentage of white workers in skilled jobs. *Id.* at 650. The Court ruled that this statistical showing failed to establish a prima facie case because it did not take into account the pool of qualified applicants or the pool of qualified workers in the labor force. *Id.* at 651. *See supra* note 40 and accompanying text (discussing congressional reaction to that part of the *Wards Cove* decision shifting the burden of persuasion to disprove business necessity to the plaintiff).

requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business . . . ."[54]

Congress had the opportunity to clarify the standard in the Civil Rights Act of 1991. The Act, however, equivocates by providing that the defendant has an affirmative defense to a claim of disparate impact if he can "demonstrate that the challenged practice is job related for the position *and* consistent with business necessity."[55] By separating job relatedness and business necessity into two requirements, Congress has confused the standard.

Case law added another dimension to disparate impact analysis. Even if the employer meets the business necessity defense, the challenged practice is nevertheless unlawful if the plaintiff proves that a less discriminatory alternative employment practice satisfies the employer's legitimate business needs, and the employer refuses to adopt the practice.[56] The Supreme Court created the less discriminatory alternative test in *Albemarle Paper Co. v. Moody*,[57] holding that a plaintiff in a disparate impact case will prevail if he can "show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"[58] The Civil Rights Act of 1991 codified this doctrine.[59]

The legal principles governing disparate impact analysis, along with the doctrine's policy justifications, provide the background to decide whether disparate impact theory should apply in age discrimination cases. The remainder of this article will tackle this issue.

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[54] *Wards Cove*, 490 U.S. at 659.

[55] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000) (emphasis added).

[56] *See, e.g.*, Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 998 (1988) (reaffirming the principle that the plaintiff may prevail by proving a less discriminatory alternative meeting the employer's legitimate interests, and explaining that "the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice").

[57] 422 U.S. 405 (1975).

[58] *Id.* at 425.

[59] 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2000).

III. DISPARATE IMPACT AS A POTENTIAL THEORY OF RECOVERY UNDER THE ADEA

After years of uncertainty and division among the circuit courts, the Supreme Court will decide, in *Smith v. City of Jackson*,[60] whether disparate impact analysis applies to the ADEA.

A. Smith v. City of Jackson

Chief Judge King, writing for a majority of the Fifth Circuit, presented a thorough analysis of the arguments against the applicability of disparate impact theory to the ADEA. Judge Stewart, in a dissenting opinion, offered a point-by-point critique of the majority's arguments.[61]

1. Facts and Procedural Background

The City of Jackson police department instituted a performance pay plan, which granted proportionately higher raises to officers and dispatchers with five or fewer years of tenure than those with more than five years of tenure.[62] This plan resulted in higher raises for officers and dispatchers under forty compared to the raises received by their coworkers over forty.[63] Thirty police officers and dispatchers, all over the age of forty, brought an ADEA suit against the City of Jackson and the Jackson police department alleging that the performance payment plan evidenced both disparate treatment, that is, intentional discrimination,[64] and disparate

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[60] Smith v. City of Jackson, 351 F.3d 183 (5th Cir. 2003), *cert. granted*, 72 U.S.L.W. 3614 (U.S. Mar. 29, 2004) (No. 03-1160).

[61] *Id.* at 198–203 (Stewart, J., dissenting).

[62] *Id.* at 185.

[63] *Id.* Four standard deviations separated the raises the workers under forty received from the raises the workers over forty received. *Id.* at 186.

[64] Intentional discrimination is classified into individual and systemic disparate treatment. Individual disparate treatment cases are analyzed under two alternative approaches. The first of these is the three-step, burden-shifting approach of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). This method affords the plaintiff the opportunity to prove discrimination inferentially by proving that the defendant's alleged justification for the challenged action was a pretext for discrimination. The first step of this regime requires the plaintiff to prove a prima facie case by a preponderance of evidence. In a refusal-to-hire case, for example, the plaintiff must prove: (i) he is a member of a protected class, (ii) he was qualified for and applied for the job in question, (iii) he was rejected, and (iv) the employer continued to seek applicants with qualifications similar to the plaintiff. *Id.* at 802. At step two, the defendant must merely articulate a nondiscriminatory reason for the adverse employment action, *id.*,

impact.[65] The district court granted the defendants summary judgment on both the disparate treatment and disparate impact claims.[66]

The threshold issue in the case was whether disparate impact theory is even cognizable under the ADEA. On appeal, the Fifth Circuit held that disparate impact theory does not apply to age discrimination.

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and at step three the plaintiff must prove, by a preponderance of the evidence, that the defendant's articulated step-two reason is a pretext for discrimination. *Id.* at 804. In *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) and *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 146–47 (2000), the Court, though claiming to be reaffirming *McDonnell Douglas*, modified it by holding that plaintiff's disproof of the step-two reason permits but does not compel judgment for the plaintiff. *See* Kenneth R. Davis, *The Stumbling Three-Step, Burdening-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 761 (1995) (criticizing the *McDonnell Douglas* approach and calling for its abandonment). *But see* Tristan K. Green, *Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CAL. L. REV. 983, 1011 (1999) (advocating *McDonnell Douglas* as the universal framework to resolve individual disparate treatment cases). The second approach to individual disparate treatment is prescribed in § 703(m) of Title VII. This approach requires the plaintiff to prove that discrimination was a "motivating factor for any employment practice." 42 U.S.C. § 2000e-2(m) (2000). If, however, the defendant proves that it "would have taken the same action in the absence of the impermissible factor" plaintiff's remedies are limited to declaratory relief, some forms of injunctive relief, and attorneys' fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B) (2000). Because of confusion among the circuit courts as to whether the motivating factor test applied only in direct evidence cases, the Supreme Court decided *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99–101 (2003), holding that the motivating factor test of § 703(m) applies in any individual, disparate treatment case, whether based on circumstantial or direct evidence. Before *Costa*, most of the circuit courts had held that circumstantial evidence cases were within the exclusive domain of the *McDonnell Douglas* approach. *Costa* has therefore cast doubt on the continued vitality of *McDonnell Douglas*. *See* Kenneth R. Davis, *Price-Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. L. REV. 859, 888–90 (2004) (arguing that after *Costa*, the *McDonnell Douglas* approach serves no useful purpose). There are two separate types of systemic disparate treatment cases. The first challenges a systemic pattern and practice of intentional discrimination. *See, e.g.*, Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 312–13 (1977) (remanding case to district court to determine the appropriate statistical comparisons needed to assess allegations that Hazelwood was engaged in intentional discrimination by using subjective hiring criteria to deny teaching jobs to qualified black applicants). The other type of systematic disparate treatment case, unlike *Hazelwood*, attacks a formal discriminatory policy that the employer argues is a bona fide occupational qualification (BFOQ). *See, e.g.*, Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187, 206–07 (1991) (holding that a fetal protection policy precluding some women from certain factory jobs was not a BFOQ and therefore violated Title VII).

[65] *Smith*, 351 F.3d at 184–85.

[66] *Id.* at 185. The circuit court vacated the grant of summary judgment dismissing the disparate treatment claims and remanded the case for further proceedings. *Id.* at 198. The court held that the district court had decided the summary judgment motion prematurely because discovery motions were pending. *Id.*

2. The Reasoning of the Fifth Circuit

The court pointed out that, although disparate impact is recognized as a theory of recovery under Title VII, the application of disparate impact theory to the ADEA is unsettled.[67] Highlighting this uncertainty by surveying circuit court decisions,[68] the Fifth Circuit quoted the U.S. Supreme

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[67] *Id.* at 186 n.1.

[68] *Id.* at 187. The predominant position among the circuit and district courts disallows such claims as a matter of law. Adams v. Fla. Power Corp., 255 F.3d 1322, 1326 (11th Cir. 2001) (expressly following the reasoning of the First Circuit in *Mullin* and the Tenth Circuit in *Ellis)*; Mullin v. Raytheon Co., 164 F.3d 696, 701–04 (1st Cir. 1999), *cert. denied*, 528 U.S. 811 (1999) (concluding that the ADEA does not permit disparate impact claims, based on an analysis of *Hazen Paper*, the text of the ADEA including the RFOA defense, the legislative history, the absence of the effects of past discrimination on older workers, and Congress' failure to insert an express disparate impact provision in the ADEA when it did so in Title VII); Ellis v. United Airlines, Inc., 73 F.3d 999, 1007–09 (10th Cir. 1996) (holding that ADEA plaintiffs may not bring disparate impact claims, and discussing essentially the same reasons as examined in *Mullin)*; EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076–78 (7th Cir. 1994) (ruling that the ADEA does not allow disparate impact claims because of *Hazen Paper*, the RFOA defense, and the ADEA's failure to protect "applicants for employment" compared to Title VII's inclusion of such language); Stone v. First Union Corp., 203 F.R.D. 532, 547 n.18 (S.D. Fla. 2001) (holding without analysis that disparate impact claims may not be brought under the ADEA); Fobian v. Storage Tech. Corp., 959 F. Supp. 742, 746–47 (E.D. Va. 1997) (relying principally on *Hazen Paper* to hold that the ADEA does not cover disparate impact claims); Hyman v. First Union Corp., 980 F. Supp. 38, 42 (D.D.C. 1997) (noting *Griggs'* failure to cite a statutory basis for its holding, and therefore rejecting the argument that the similarity of language between Title VII and the ADEA supports the proposition that the ADEA incorporates disparate impact claims); Hiatt v. Union Pac. R.R. Co., 859 F. Supp. 1416, 1435–36 (D. Wyo. 1994) (holding disparate impact theory unavailable under the ADEA because, unlike racial minorities, older workers have not suffered a history of discrimination and because age sometimes does correlate with job performance). Some circuit court decisions question whether disparate impact analysis in age discrimination cases survives *Hazen Paper. See, e.g.*, Allen v. Entergy Corp., 193 F.3d 1010, 1015 & n.5 (8th Cir. 1999) (affirming jury verdict against plaintiffs bringing age-based disparate impact claims, but questioning the efficacy of disparate-impact age-discrimination claims after *Hazen Paper)*; Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union, 53 F.3d 135, 139–40 & n.5 (6th Cir. 1995) (doubting whether the ADEA permits disparate impact claims in light of *Hazen Paper's* emphasis on the congressional intent to prevent inaccurate and damaging stereotypes from injuring older workers, but nevertheless adhering to previous case law of the circuit stating that such claims "may be possible"); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732–35 (3d Cir. 1995) (granting summary judgment to a defendant on an age-based disparate impact claim, and stating that "it is difficult to see how disparate impact analysis can survive the analysis [of *Hazen Paper*]."). A minority of federal circuit courts has held that the ADEA permits disparate impact claims. *See, e.g.*, Meacham v. Knolls Atomic Power Lab., 381 F.3d 56, 69–71 (2d Cir. 2004) (rejecting the argument that *Hazen Paper* disallows age-based disparate impact claims); Coleman v. Quaker Oats Co., 232 F.3d 1271, 1291 (9th Cir. 2000) (holding that "[w]hen challenging an adverse employment action under the ADEA, an employee may proceed under two theories of liability: disparate treatment or disparate impact."); Frank v. United Airlines, Inc., 216 F.3d 845, 856 (9th Cir. 2000) (disagreeing that *Hazen Paper* precludes age-based claims of disparate impact, and reaffirming "that a disparate impact claim is cognizable in an ADEA case."); Smith v.

Court, which declared in *Hazen Paper v. Biggins*:[69] "[W]e have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here."[70]

Since disparate impact theory applies under Title VII, the court began its analysis by comparing the language of the ADEA to the language of Title VII.[71] Title VII prohibits discrimination "because of an individual's race, color, religion, sex, or national origin."[72] Derived *in haec verba* from Title VII,

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Xerox Corp., 196 F.3d 358, 364 (2d Cir. 1999) (analyzing age-based disparate impact claim, and affirming summary judgment for the defendant based on the plaintiffs' inadequate statistical support); Smith v. City of Des Moines, 99 F.3d 1466, 1470 (8th Cir. 1996) (recognizing disparate impact claims under the ADEA post-*Hazen Paper*). In *Kroger v. Reno*, 98 F.3d 631, 639 (D.C. Cir. 1996), the D.C. Circuit Court assumed without deciding that disparate impact analysis applies to age discrimination claims.

[69] 507 U.S. 604 (1993). In *Markham v. Geller*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) (Rehnquist, C.J., dissenting), an age discrimination case raising a disparate impact claim, Chief Justice Rehnquist challenged the applicability of disparate impact analysis to the ADEA as well as the reasoning of the Second Circuit. The Chief Justice stated in an opinion dissenting from the refusal to grant a writ of certiorari:

> This Court has never held that proof of discriminatory impact can establish a violation of the ADEA . . . . Congress revealed this intention in 29 U.S.C. § 623(f)(1) which provides that it shall not be unlawful for an employer to take any action otherwise prohibited "where the differentiation is based on reasonable factors other than age." Because the differential based on experience in petitioners' sixth-step policy has nothing to do with age, I would grant the petition for a writ of certiorari and give plenary consideration to the decision of the Court of Appeals.

Id. at 948–49 (internal citations omitted).

[70] Smith v. City of Jackson, 351 F.3d 183, 187 (5th Cir. 2003) (citing *Hazen Paper*, 507 U.S. at 610) (internal citation omitted)). Justice O'Connor, writing for the *Hazen Paper* Court, made statements that some commentators cite to show the Supreme Court's likely refusal to recognize disparate impact claims under the ADEA. She stated, "Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA." *Hazen Paper*, 507 U.S. at 610. She also remarked, "[w]hen the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears." *Id.* at 611. *See, e.g.*, Miles F. Archer, Mullin v. Raytheon Company: *The Threatened Vitality of Disparate Impact Under the ADEA*, 52 ME. L. REV. 150, 161–62 (2000) (suggesting that *Hazen Paper* casts doubt on the viability of disparate impact claims under the ADEA). These statements, however, may not indicate the Court's predilections on this issue. *See infra* notes 195–200 and accompanying text (finding alternative interpretations of Justice O'Connor's remarks).

[71] *Hazen Paper*, 351 F.3d at 188.

[72] 42 U.S.C. § 2000e-2(a)(1)–(2) (2000). The prohibitory subsections of Title VII provide that it is illegal for an employer:

> (1) 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; or (2) 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 such individual's race, color, religion, sex, or national origin.

the analogous language of the ADEA similarly forbids discrimination "because of [an] individual's age."[73] This congruence of language had led some courts to hold disparate impact theory available under the ADEA.[74] The Fifth Circuit, however, considered another ADEA section that arguably distinguishes the protective range of the ADEA from the protective range of Title VII. Unlike Title VII, § 623(f)(1) of the ADEA provides employers with a defense if the adverse employment action "is based on reasonable factors other than age."[75] Disparate impact theory prohibits discrimination based on facially neutral factors – that is, factors other than the protected trait.[76] Thus, the Fifth Circuit reasoned that by eliminating liability based on "reasonable factors other than age," the ADEA precludes disparate impact liability.[77] To strengthen this conclusion, the court compared the "reasonable factors other than age" (RFOA) defense to a similar provision in the Equal Pay Act.[78] The Equal Pay Act forbids discrimination in pay based on sex except under certain circumstances.[79] One exception permits a pay "differential based on any other factor other than sex."[80] In *County of Washington v. Gunther*,[81] the Supreme Court stated, in dicta,

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Id.

[73] *Smith*, 351 F.2d at 188. *See also* 29 U.S.C. § 623(a)(1)–(2) (2000). The prohibitory subsections of the ADEA make it illegal for an employer:

> (1) to fail or to refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees 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 . . .
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> . .

29 U.S.C. § 623(a)(1)–(2). The Fifth Circuit observed that the only other difference between the language of Title VII and the language of the ADEA, aside from the basis for protection, is that Title VII extends protection to "applicants" whereas the ADEA does not. *Smith*, 351 F.3d at 188.

[74] *Smith*, 351 F.3d at 188. *See, e.g.*, Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980) (noting that prohibitory provisions of the ADEA were derived *in haec verba* from those of Title VII, and relying on this fact to recognize disparate impact claims in the ADEA).

[75] 29 U.S.C. § 623(f)(1) (2000).

[76] *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645–46 (1989) (noting that under disparate impact theory "a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate").

[77] *Smith*, 351 F.3d at 190.

[78] *Id.* at 191.

[79] 29 U.S.C. § 206(d)(1) (2000).

[80] *Smith*, 351 F.3d at 191 (citing 29 U.S.C. § 206(d)(1)).

[81] 452 U.S. 161 (1981).

that this exception forecloses disparate impact protection under the Equal Pay Act.[82] Though analogizing the RFOA defense to the similar provision of the Equal Pay Act, the Fifth Circuit conceded that the two provisions differ: the ADEA permits "reasonable" factors, in contrast to the Equal Pay Act, which permits "any" factor.[83] Nevertheless, the court found no meaningful distinction between the two provisions, concluding that the RFOA provision, like the analogous Equal Pay Act provision, disallows disparate impact claims.[84]

Relying on legislative history, the majority stressed policy differences between Title VII and the ADEA to demonstrate why disparate impact theory should not apply to age discrimination.[85] To make its point, the court analyzed a 1965 report ("Labor Report") submitted by Willard Wirtz, the Secretary of Labor, to Congress.[86] The Labor Report contrasted the purposes of Title VII with the proposed purposes of the pending legislation destined to become the ADEA.[87] Age discrimination, the Labor Report noted, arises from misconceptions about the capabilities of older workers.[88] It does not, however, spring from dislike or intolerance.[89] This form of prejudice is not as pernicious as racial bigotry, which stems from animosity toward racial minorities, particularly African-Americans.[90] The Labor Report cited a second difference between race and age: everyone, regardless of socioeconomic or educational background, ultimately enters the group of people over forty.[91] One's race, in contrast, is immutable.[92] In addition,

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[82] *Id.* at 169–71. In *Gunther*, the Supreme Court held that the so-called Bennett Amendment, which transplanted defenses from the Equal Pay Act into Title VII, did not restrict Title VII's prohibition of sex-based discrimination to claims of equal pay for equal work as defined in the Equal Pay Act. *Id.* at 168. In reaching this conclusion, the Court distinguished Title VII from the Equal Pay Act, noting that Title VII prohibits "'practices that are fair in form, but discriminatory in operation.'" *Id.* at 170 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)). By contrast, "[t]he fourth affirmative defense of the Equal Pay Act [the "other factors other than age" defense] . . . was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination." *Id.* at 170.

[83] *Smith*, 351 F.3d at 190-93.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 193, 203 n.8.

[87] *Id.* at 194.

[88] *See Smith*, 351 F.3d at 193.

[89] *Id.*

[90] *Id.* (citing LABOR REPORT, *supra* note 4, at 352).

[91] *Id.* (citing LABOR REPORT, *supra* note 4, at 352).

[92] *Id.*

the court emphasized that *Griggs* established disparate impact protection in race discrimination cases, at least in part, to eradicate the present effects of past discrimination that have excluded African-Americans from employment opportunities.[93] In contrast to racial discrimination, age discrimination does not burden individuals during their entire lives with bigoted attitudes that their parents and grandparents endured. Rather, age discrimination affects the very workers who once benefited from positive attitudes directed toward workers in their twenties and thirties.[94]

The court also stressed the Labor Report's recommendation that the law prohibit only "arbitrary" discrimination against older workers.[95] Because the Labor Report characterized "arbitrary discrimination" as arising from stereotypes about older workers, the court reasoned that the Labor Report used "arbitrary" as a synonym for "intentional."[96] On the other hand, the Labor Report proposed that systemic disadvantages incidentally affecting older workers – presumably incidents of disparate impact – be remedied with educational programs and institutional restructuring rather than statutory proscriptions.[97]

This analysis led the court to conclude that the ADEA should not be coextensive with the broad remedial scope of Title VII, which protects racial minorities from the unintentional, discriminatory affects of facially neutral employment practices.[98]

3. The Dissenting Opinion

Judge Stewart disagreed with the majority's conclusion denying the applicability of disparate impact theory to the ADEA.[99] Similar to the majority, he began by enlisting support

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[93] *Smith*, 351 F.3d at 194–95.

[94] *Id.* at 195.

[95] *Id.* at 194 (characterizing the Labor Report as recommending legislative action to address "arbitrary" discrimination rather than systemic disadvantages incidentally afflicting older workers (citing Mullin v. Raytheon Co., 164 F.3d 696, 703 (1st Cir. 1999)). The court noted that Congress confirmed these findings through extensive factfinding of its own (citing EEOC v. Wyoming, 460 U.S. 226, 230–31 (1983)).

[96] *Id.* at 194 n.13.

[97] *Mullin*, 164 F.3d at 703.

[98] *Smith*, 351 F.3d at 195.

[99] *Id.* at 198–99 (Stewart, J., dissenting). Judge Stewart agreed with the majority's disposition vacating the dismissal of the disparate treatment claims. *Id.*

from circuit courts that had recognized disparate impact coverage for victims of age discrimination.[100] He supported his view by arguing that Title VII and the ADEA are statutes *in pari materia*, a canon of construction calling for like interpretation of statutes governing similar relationships.[101] The aptness of this doctrine arose from three circumstances: both Title VII and the ADEA regulate the employment relationship, the ADEA grew out of congressional debates on Title VII, and the language of the prohibitory sections of Title VII and the ADEA is nearly identical.[102]

Concentrating on the RFOA provision, Judge Stewart argued that it codified the business necessity defense established in *Griggs*.[103] Although his explanation was sketchy, he suggested that the word "reasonable" in the RFOA provision does not permit an employer to escape liability by relying on *any* factor other than age.[104] Rather, the safe harbor applies only to "reasonable" factors other than age. A reasonable factor, Judge Stewart suggested, is a factor supported by a business necessity.[105] Thus, Judge Stewart concluded that the RFOA defense incorporates disparate impact protection into the ADEA, even providing for the business necessity defense,

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[100] *Id.* at 200. He cited authority from the Second and Eighth Circuits. *Id.*

[101] *Id.* at 201.

[102] *Id.* at 201.

[103] *Smith*, 351 F.3d at 200.

[104] *Id.* at 200 (Stewart, J., dissenting). The EEOC supports Judge Stewart's position. It issued an interpretive guideline, adopting disparate impact coverage under the ADEA. The interpretive guideline provides:

> When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity.

29 C.F.R. § 1625.7(d) (2004). The *Smith* majority accorded little deference to this guideline, based on its belief that the EEOC, in "the absence of significant analysis," issued the guideline in the wake of *Griggs*. 351 F.3d at 189 n.5. The court alluded to subsequent developments, casting doubt on the persuasiveness of the guideline – presumably the *Hazen Paper* decision and perhaps the numerous circuit court decisions spelling out arguments contrary to the position taken by the EEOC. *Id.* The majority's reasons for according little weight to the interpretive guideline find support in *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257–58 (1991) (superseded by statute as stated in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994)) (instructing in dicta that the persuasive force of an EEOC interpretive guideline depends on (i) whether the EEOC promulgated the guideline contemporaneously with enactment of the statute, (ii) whether the EEOC was rigorous in its reasoning, and (iii) whether the guideline has support in the statute's language). Judge Stewart did not rely on the interpretive guideline, nor did he attempt to rebut the majority's dismissive view toward it. *Smith*, 351 F.3d at 198–203 (Stewart, J., dissenting).

[105] *Smith*, 351 F.3d at 200 (Stewart. J., dissenting).

though not in language identical to that used in *Griggs*.[106] Judge Stewart punctuated this point by attacking the majority's comparison between the RFOA defense and the language of the Equal Pay Act.[107] As the majority conceded, while the Equal Pay Act permits "any" factor other than sex to stand as a legal justification for a wage differential, the RFOA exception of the ADEA permits only "reasonable" factors other than age to serve as a defense to an age discrimination claim.[108]

Turning to legislative history, Judge Stewart found the majority's analysis of the Labor Report irrelevant because the ADEA, enacted in 1967, predated the advent of disparate impact theory in *Griggs* by four years.[109] Thus, Congress could not have contemplated the preclusion of a legal theory that had not yet come into existence.[110] Moreover, he interpreted the Labor Report to urge the elimination of age-related stereotypes in the workplace, a goal which the implementation of disparate impact theory would help achieve.[111]

Judge Stewart assailed the majority's argument that Title VII's broad remedial policy, which has no counterpart in the ADEA, renders disparate impact protection inappropriate for the victims of age discrimination. Although he read *Griggs*, as did the *Smith* majority, to seek the eradication of the effects

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[106] *Id.*

[107] *Id.*

[108] *Id.* at 200–01.

[109] *Id.* at 201.

[110] *Smith*, 351 F.3d at 201. Judge Stewart's argument is curious inasmuch as he interpreted the RFOA exception to provide for disparate impact protection. If, as Judge Stewart contends, Congress had no inkling of the disparate impact theory, Congress could not have intended the RFOA exception to create liability based on that theory.

[111] *Id.* at 203 (Stewart, J., dissenting). Judge Stewart discerned congressional intent to allow age-based disparate impact claims from passage of the Older Workers Benefit Protection Act. *Id.* This statute safeguards older workers from predatory actions of employers seeking to extract releases of claims in exchange for severance packages. 29 U.S.C. §§ 623, 626(f)(1)(E)–(G), 630(f) (2000). Judge Stewart reasoned that the statutory requirement of providing such employees with statistics comparing the age of terminated workers with retained workers shows the congressional intent to recognize disparate impact claims in age cases. *Smith*, 351 F.3d at 203 (Stewart, J., dissenting); *see* 29 U.S.C. § 626(f)(1)(H)(ii) (2000); *see also* Roberta S. Alexander, Comment, *The Future of Disparate Impact Analysis for Age Discrimination in a Post-*Hazen Paper *World*, 25 U. DAYTON L. REV. 75, 99–100 (1999) (arguing that the only conceivable reason for this statutory provision is to aid older workers in determining whether they have valid disparate impact claims). As Chief Judge White explained in *Smith*, this argument is unpersuasive because the statistics could be used to help establish a disparate treatment claim rather than a disparate impact claim. 351 F.3d at 193 n.12 (citing Teamsters v. United States, 431 U.S. 324, 339 (1977) (accepting statistical data as determinative in a pattern and practice disparate treatment case)).

of past discrimination, he also interpreted *Griggs* to seek elimination of the consequences of discrimination, even absent invidious animus or historical injustice.[112] The goal of eliminating the consequences of unintentional discrimination applies to age as much as it does to race. Also, he stressed that disparate impact is an essential tool for uncovering the subtle discriminatory acts of cagey employers who, although inclined to discriminate, wish to avoid a date at the courthouse.[113] Subtle discriminatory practices might escape redress by disparate treatment analysis, which requires the plaintiff to prove elusive discriminatory intent. Such practices are more readily extirpated from the workplace by the use of disparate impact theory. Finally, he observed that disparate impact theory applies to gender, national origin, and religious discrimination.[114] Victims of these forms of discrimination do not confront the same level of animus endured by victims of racial discrimination. Nor do they suffer from the generational legacy of past discrimination. Thus, he argued that disparate impact protection reaches more broadly than the majority recognized.[115]

The opinions of Chief Judge King and Judge Stewart in *Smith* illustrate the salient legal arguments. Part IV analyzes these arguments in greater depth, and determines that they are inconclusive. The lack of a decisive legal argument points the inquiry to policy considerations that this article will examine in Part V.

IV. ANALYSIS OF THE LEGAL ARGUMENTS

The legal analysis begins with a comparison of the prohibitory section of the ADEA and the provision after which it was modeled: the prohibitory section of Title VII.[116] The similarity between these provisions favors those who would engraft disparate impact liability into the ADEA. The analysis then turns to a series of counterarguments, none of which is convincing. First, this article examines the provision that has

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[112] *Smith*, 351 F.3d at 202–03 (Stewart, J., dissenting).

[113] *See id.* at 202. *See also* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468 (2001) (arguing that subtle discrimination, perpetuated by organizational structures, causes more harm than blatant forms of discrimination).

[114] *Smith*, 351 F.3d at 202–03 (Stewart, J., dissenting).

[115] *Id.* at 203.

[116] *See infra* Part IV.A.1.

captured the attention of both the judiciary and scholars: the RFOA defense.[117] Many have concluded that this defense resolves the question. Unfortunately, the answer depends on who is doing the talking. This article concludes that the RFOA defense does not resolve the issue because it addresses disparate treatment rather than disparate impact claims. Another argument arises from the Labor Report, which provides some support for opponents of age-based disparate impact claims, but the Labor Report is susceptible to conflicting interpretations.[118] This Part then focuses on passages from *Hazen Paper*.[119] Though some try to extract hidden innuendo from Justice O'Connor's discussion, their efforts are unsuccessful because the implications of Justice O'Connor's remarks are ambiguous. This Part concludes with an examination of the argument that congressional inaction suggests the intent not to incorporate disparate impact protection into the ADEA.[120] This final argument, though appealing, is not wholly persuasive.

A. *Textual Arguments*

1. The Prohibitory Provisions

Similarities between the texts of the ADEA and Title VII support the position that the ADEA, like Title VII, provides a claim for disparate impact. Like the prohibitory provision of Title VII, which forbids employers to discriminate "because of" race, national origin, sex, and religion, the analogous provision of the ADEA forbids employment discrimination "because of" age. In *Lorillard v. Pons*,[121] the Supreme Court noted, "[t]here are important similarities between [Title VII and the ADEA] . . . both in their aims – the elimination of discrimination from the workplace – and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title

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[117] *See infra* Part IV.A.2.

[118] *See infra* Part IV.B.

[119] *See infra* Part IV.C.

[120] *See infra* Part IV.D.

[121] 434 U.S. 575 (1978). *See also* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755–56 (1979) (construing § 14(b) of the ADEA, a procedural provision governing the timing for the filing of federal discrimination claims, similarly to § 706(c) of Title VII because the acts share a common purpose and because the ADEA section was modeled after the Title VII section).

VII."[122] Though *Lorillard* did not hold that the ADEA covers disparate impact claims, some have inferred that if the prohibitory language of Title VII forbids disparate impact discrimination, the same conclusion must flow from the essentially identical language of the ADEA. Following this reasoning, the Second Circuit, in *Geller v. Markham*,[123] recognized age-based disparate impact claims.[124]

Two counterarguments deserve comment. First, the *Griggs* Court did not cite a particular provision of Title VII to support the recognition of disparate impact claims.[125] Finding this gap in the Court's explanation significant, Judge Lamberth in *Hyman v. First Union Corp.*,[126] commented that "reliance on a simple comparison of the language of the two statutes appears to be misplaced."[127] Judge Lamberth's point, however, is not convincing. Though not citing a particular provision of Title VII, the Court did rely expressly on the statute. The Court noted:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute . . . . Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[128]

In *Connecticut v. Teal*,[129] the Court expressly anchored disparate impact theory to § 703(a)(2) of Title VII.[130] Comparing the language of this provision to the language of § 623(a)(2), the analogous provision in the ADEA, is therefore quite relevant.

Second, there is a textual difference between the two statutes. Title VII expressly prohibits discrimination against "applicants for employment,"[131] whereas the ADEA does not. Some judges and commentators observe that disparate impact

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[122] *Lorillard*, 434 U.S. at 584.

[123] 635 F.2d 1027 (2d Cir. 1980).

[124] *Id.* at 1032. *Hazen Paper*, decided thirteen years after *Geller*, arguably undermined the cogency of the Second Circuit's reliance on *Lorillard* because the Supreme Court emphasized that it had never ruled on whether the ADEA permits disparate impact claims. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

[125] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[126] 980 F. Supp. 38 (D.C. Cir. 1997).

[127] *Id.* at 42.

[128] *Griggs*, 401 U.S. at 429–30.

[129] 457 U.S. 440 (1982).

[130] *Id.* at 445–46.

[131] 42 U.S.C. § 2000e-2(a)(2) (2000).

violations most frequently affect applicants rather than incumbent employees.[132] These judges and commentators reason that, because the ADEA does not expressly forbid discrimination against "applicants for employment," the ADEA does not provide disparate impact protection.[133] This argument fails, however, because disparate impact applies to all phases of the employment relationship from hiring to discharge. In *Griggs,* the seminal disparate impact case, for example, the Court upheld the claim of incumbent black employees stymied from advancement by a high school diploma requirement and aptitude testing requirements that had no demonstrated correlation with job performance.[134] Moreover, despite the ADEA's omission of express language protecting applicants, the courts have applied the statute uniformly to discriminatory hiring practices.[135]

2. The RFOA Defense

Section 623(f)(1) of the ADEA exempts from liability employers who take action otherwise prohibited by the Act "where the differentiation is based on reasonable factors other than age." Thus, § 623(f)(1) permits "reasonable factors other than age" as a basis for differentiation – or discrimination. Opponents of disparate impact protection under the ADEA rely most heavily on this section for support. They argue that §

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[132] *E.g.*, EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077 (7th Cir. 1994) (observing that "[t]he 'mirror' provision in the ADEA omits from its coverage 'applicants for employment,'" and concluding that this omission is "noteworthy" given the essentially identical language of the prohibitory sections of Title VII and the ADEA); Pamela S. Krop, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 843 (1982) (stating that it would be "anomalous for Congress to authorize disparate impact in section 4(a)(2) and yet exclude the group of plaintiffs most likely to benefit from such a claim").

[133] *See supra* notes 73, 132 and accompanying text.

[134] 401 U.S. 424, 431 (1971). *See also, e.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 999–1000 (1988) (applying disparate impact analysis to subjective promotion criteria).

[135] *E.g.*, Ellis v. United Airlines, Inc., 73 F.3d 999, 1006–10 (10th Cir. 1996) (entertaining disparate treatment claims of applicants for flight attendant positions, and affirming the district court's grant of summary judgment for United because the plaintiffs failed to prove that United Airlines' maximum weight standards were a pretext for age discrimination); *Francis W. Parker Sch.*, 41 F.3d at 1078 (entertaining disparate treatment claim brought by EEOC on behalf of teacher denied a position, and affirming the district court's grant of summary judgment for the school because the plaintiff failed to prove that the challenged salary system was a subterfuge for age discrimination); Smallwood v. United Air Lines, Inc., 661 F.2d 303, 309 (4th Cir. 1981) (holding United Airlines' hiring requirement that pilots be at least thirty-five years old is not a bona fide occupational qualification).

623(f)(1) can mean only one thing: an employment practice that unintentionally has a discriminatory impact on workers over forty is permissible. By putting this gloss on the section, one negates disparate impact protection under the ADEA because disparate impact theory forbids exactly what this section, so interpreted, allows. Absent business necessity, disparate impact theory would prohibit employment practices that differentiate between workers over forty compared to other workers, whereas § 623(f)(1) would allow all such differentiations. As Chief Judge King noted in *Smith,* the Equal Pay Act contains a provision similar to § 623(f)(1).[136] The Equal Pay Act provision permits an employer to use "any other factor other than sex," as a basis for a wage differential.[137] In *Washington v. Gunther* the Supreme Court interpreted the "any other factor other than sex" provision to preclude disparate impact claims under the Equal Pay Act.[138]

Proponents of disparate impact protection under the ADEA expose the fallacy of this argument. Unlike the Equal Pay Act, § 623(f)(1) does not permit "any" factor other than age. Rather it permits only "reasonable" factors other than age. By limiting the scope of permissible factors to those that are "reasonable," the subsection implies that unreasonable factors are impermissible. A reasonable factor, argue the proponents, is one justified by business necessity, proven most often by linking the practice to job performance.[139] Thus, proponents read the subsection to reflect the holding of *Griggs.* An employment practice, though not motivated by discriminatory intent, which nevertheless disproportionately affects workers over forty, is illegal unless the employer links the practice to business necessity or job performance.[140]

The proponents' argument, however, also suffers from an interpretive flaw. Section 623(f)(1) permits employers to rely on "reasonable" factors other than age. The subsection

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[136] Smith v. City of Jackson, 351 F.3d 183, 191–92 (5th Cir. 2003) (citing County of Washington v. Gunther, 452 U.S. 161, 169–71 (1981) (analyzing the "other factors other than age" provision of the Equal Pay Act)).

[137] *Smith*, 351 F.3d at 192. *See also* 29 U.S.C. §206(d)(1) (2000).

[138] *Gunther*, 452 U.S. at 169–71.

[139] *See, e.g.*, Jonas Saunders, Note, *Age Discrimination: Disparate Impact Under the ADEA After* Hazen Paper Co. v. Biggins: *Arguments in Favor*, 73 U. DET. MERCY L. REV. 591, 605 (1996) (arguing that facially neutral employment practices are unreasonable under the RFOA defense if they are not "job related or based upon a business necessity").

[140] *See supra* notes 40-55 and accompanying text.

prohibits only unreasonable or arbitrary factors. A reasonable factor – one that is not arbitrary – is not equivalent to a business necessity as that term is defined in *Griggs* and subsequent Supreme Court cases. *Western Air Lines, Inc. v. Criswell*[141] is instructive on this point. The *Criswell* Court interpreted the scope of the bona fide occupational qualification (BFOQ) defense in a disparate treatment, age discrimination case. The BFOQ defense permits age discrimination "where age is a bona fide occupational qualification *reasonably necessary* for the normal operation of the particular business."[142] The issue in *Criswell* was whether Western's mandatory retirement policy for flight engineers at age sixty was a BFOQ.[143] The trial court instructed the jury that the "BFOQ defense is available only if it is reasonably necessary to the normal operation or essence of defendant's business."[144] Western objected to the jury instruction, arguing that the district court should have instructed the jury to defer to "Western's selection of job qualifications for the position of [flight engineer] that are *reasonable* in light of the safety risks."[145] The Supreme Court upheld the trial courts rejection of Western's proposed instruction because "reasonable necessity" is a more stringent standard than "reasonableness."[146] The Court even observed that using the "rational basis in fact" standard – which is the functional equivalent of using the reasonableness test – would be tantamount to instructing the jury to return a verdict for Western.[147]

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[141] 472 U.S. 400 (2000).

[142] 29 U.S.C. § 623(f)(1) (2000).

[143] 472 U.S. at 405–06.

[144] *Id.* at 407. The judge followed the instruction given in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). A *Usery* instruction permits the employer to establish a BFOQ defense in two ways. First, the employer may show that it has a factual basis to believe that all or substantially all of those persons over a certain age cannot perform the job responsibilities safely and efficiently. *Criswell*, 472 U.S. at 414 (citing *Usery*, 531 F.3d at 235 (quoting Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969))). Alternatively, the employer may prove that it is highly impractical to assess capabilities of older workers on an individual basis, and that some members of the discriminated-against class possess a trait precluding safe and efficient performance. *Id.* at 414–15.

[145] *Criswell*, 472 U.S. at 419 (emphasis added) (quoting Brief for Petitioner at 30, *Criswell* (No. 83-1545)).

[146] *Id.*

[147] *Id.* at 421. Western argued to the Supreme Court that it merely had to show a rational basis to prove that it was highly impractical to assess the capabilities of older workers individually. The Court rejected Western's argument because applying the rational basis test would have assured a verdict for Western. Requiring only a

The same semantic analysis applies to the RFOA defense. If one assumes that the ADEA includes disparate impact claims, the "reasonable factors other than age" defense permits practices that are reasonable even if they not justified by "business necessity."[148] A reasonable factor, as noted, is not arbitrary or irrational. Rather, it makes sense on its face. The height and weight requirements in *Dothard v. Rawlinson*[149] might have been reasonable in light of the duties of prison guards, but the prison authority did not demonstrate with admissible evidence that these requirements were business necessities within the meaning of *Griggs*. To prove business necessity, an employer must often present evidence of expert validation studies, grounded in statistical analysis.[150] In *Albemarle Paper v. Moody,*[151] for example, Albemarle engaged an industrial psychologist to validate the relationship between job performance and its testing program used for hiring and promotion.[152] The Supreme Court scrutinized the statistical methodology of the validation study and ultimately rejected it.[153]

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rational basis falls short of the statutory requirement of proving that the selection criteria were "reasonably necessary." *Id.*

[148] *See* Mack A. Player, Wards Cove Packing *or Not* Wards Cove Packing? *That is Not the Question: Some Thoughts on Impact Analysis Under the Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819, 840–41 (1997) (arguing that a "reasonable" factor, within the meaning of the RFOA defense, meets the test of business rationality, a standard less onerous than business necessity).

[149] 433 U.S. 321, 324 & n.2 (1977).

[150] *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 429 (1975) (discussed *infra* notes 151-53 and accompanying text); Geller v. Markham, 635 F.2d 1027, 1032–33 (2d Cir. 1980) (approving of an expert statistical analysis demonstrating a correlation between age and defendant's hiring program). *But see* New York Transit Auth. v. Beazer, 440 U.S. 568, 587 & n.31 (1979) (approving Transit Authority's rule excluding participants in Methadone program from employment although no statistical evidence linked Methadone treatment to inadequate performance, even for jobs not involving safety concerns).

[151] 422 U.S. 405 (1975).

[152] *Id.* at 429.

[153] *Id.* at 429–36. The Court catalogued many deficiencies of the validation study. Overall, the Court was skeptical of the study because plant officials conducted it without oversight only four months before the case went to trial. *Id.* at 434. The Court also criticized the statistical methodology. The study correlated test scores with blind, subjective performance evaluations of supervisors. *Id.* at 432. The supervisors were asked to "determine which [employees] they felt irrespective of the job that they were actually doing, but in their respective jobs, did a better job than the person they were rating against. . . ." *Id.* at 433. The Court, though granting that such subjective comparisons are an acceptable validation method, questioned the vagueness of the standards on which the subjective evaluations were made. *Id.* The study focused on performance at jobs near the top of various lines of job progression. The Court also challenged this aspect of the study because performance ratings at relatively high-level jobs may not indicate performance ratings at lower-level jobs. *Id.* at 434. Finally, the

As *Criswell* states, proving reasonableness is a far easier undertaking. A facially reasonable explanation meets this test without resort to standard deviations or regression analysis. Thus, if the proponents are right and § 623(a)(2) creates disparate impact liability, disparate impact protection under the ADEA is a fragile veneer pierced by any reasonable explanation. One might ask why Congress would create a claim so easily defeated. The answer is that § 623(f)(1) does not refer to disparate impact at all. When Congress enacted the ADEA in 1967, *Griggs*, which created disparate impact theory, would not be decided for another four years. Early civil rights legislation was aimed at eliminating intentional discrimination. It is doubtful that in 1967 Congress even conceived of prohibiting facially neutral employment practices with disproportionate effects on protected classes. Disparate impact was beyond the congressional horizon.

Only one logical explanation for the RFOA defense remains. The RFOA defense applies to intentional discrimination, that is, disparate treatment. Dean Player disagrees with this interpretation because he sees it as circular. He argues that "[i]f section 4(a) [the prohibitory section of the ADEA] does not extend beyond age motivation, there would be no need to have the 4(f)(1) [RFOA] defense because age motivated decisions could not possibly be for reasons 'other than age.'"[154] In other words, Congress would not create a pointless statutory rule providing that it is acceptable for an employer to make decisions based on obviously permissible criteria, that is, reasonable factors other than age. Dean Player concludes that the ADEA must therefore prohibit disparate impact violations.[155]

Although enticing, Dean Player's reading of the statute misses the purpose of the RFOA defense. By permitting employers to make adverse employment decisions based on "reasonable factors other than age," the ADEA countenanced an employer's reliance on factors that correlate with age, such as high wages, or spiraling benefit costs. The RFOA defense

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Court objected to the study because it tested the performance of experienced, white workers, rather than inexperienced, black applicants. *Id.* at 435.

[154] Player, *supra* note 148, at 832.

[155] *See id.* at 832–33. Dean Player invokes the rule of statutory construction that prefers an interpretation avoiding redundancy and surplusage over other interpretations. *Id.* at 833.

means that refusing to hire or firing an older worker to cut costs provides no evidence of discriminatory intent.

There is substantial support for this interpretation. First, support comes from the placement of the RFOA defense in the ADEA. The BFOQ defense exempts employers from liability for intentional discrimination when age is a bona fide occupational qualification. This defense appears in § 623(f)(1), the same subsection where the RFOA defense appears. The two defenses are separated merely by the disjunctive "or." It is logical that Congress meant the RFOA defense, like its neighbor the BFOQ defense, to apply to intentional discrimination. If Congress had intended the RFOA defense to apply to a different kind of discrimination – disparate impact – it would have made its purpose intelligible.

It is understandable why Congress included the RFOA defense in the ADEA. Discrimination against older workers differs from discrimination against all other protected classes. Once can hardly contrive a sensible argument that the cost of employing a qualified black worker exceeds the cost of employing a qualified white worker. It similarly makes no sense to contend that employing a qualified woman costs an employer more than employing a qualified man. Employing older workers, however, often entails escalating costs. The most obvious is a wage differential. Age correlates with years of service. Years of service correlate with relatively high wages. Thus, older workers tend on average to earn more than younger ones. If Congress had not crafted the RFOA defense, older workers fired as a result of cost-trimming measures would argue that firing the top salaried employees (who tend to be over forty) constitutes proof of intentional age discrimination.

This argument is not merely a hypothetical possibility. In *Metz v. Transit Mix, Inc.*,[156] the plaintiff argued that replacing him with a younger, lower-salaried worker constituted intentional discrimination in violation of the ADEA.[157] The employer asserted an RFOA defense based on cost-justification,[158] but the Seventh Circuit rejected the

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[156] 828 F.2d 1202 (7th Cir. 1987).

[157] *See id.* at 1203–04.

[158] *Id.* at 1206.

defense,[159] and sustained the employee's disparate treatment claim.[160]

The issue whether an employer violates the ADEA by relying on factors that correlate with age was so significant that the Supreme Court addressed it. In *Hazen Paper Co. v. Biggins,*[161] the plaintiff proved that he was fired because his pension was about to vest.[162] Because pension vesting correlates with age, he contended that his discharge was proof of intentional age discrimination. The Supreme Court disagreed, holding that age and pension vesting, though correlated, are analytically distinct.[163] An older worker, for example, may be newly hired, whereas a worker in his thirties and therefore not in the protected class, may have accrued the ten years of service needed for a pension to vest under Hazen Paper's plan.[164] The Court emphasized that Hazen Paper's misconduct violated ERISA.[165] It also recognized that using pension vesting as a proxy for age, that is, "Let's get rid of our workers over fifty by firing everyone whose pension is about to vest," would violate the ADEA because it would prove intentional age discrimination.[166] Simply firing a worker, who happens to be in the protected class, to prevent his pension from vesting, however, does not violate the ADEA.[167]

Hazen Paper did not raise the RFOA defense, and therefore the Court did not rely on the defense or even refer to

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[159] *Id.*

[160] *Id.* at 1208–11. *See also* Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 728 (E.D.N.Y. 1978) (rejecting a cost-justification defense in a disparate treatment case, and noting "[w]here economic savings and expectation of longer future service are directly related to an employee's age, it is a violation of the ADEA to discharge the employee for those reasons"), *aff'd in part and rev'd in part without opinion,* 608 F.2d 1369 (2d Cir. 1979).

[161] 507 U.S. 604 (1993).

[162] *Id.* at 607.

[163] *Id.* at 611.

[164] *Id.*

[165] *Id.* at 612. The Court pointed out that firing a black worker over age forty because the worker is black does not violate the ADEA, though such conduct violates Title VII. *Id.* Thus, as a matter of strategy, if a worker in two protected classes believes his employer has discriminated against him, the worker must consider suing under both theories since proof of discrimination under one theory will not advance his case under a second theory. Proof of discrimination based on a classification not alleged in the complaint or presented to the EEOC may furnish the employer with a defense.

[166] *Hazen Paper,* 507 U.S. at 612–13. The Court also reserved decision on cases where a pension vests when an employee reaches a certain age, rather than when he completes a specified number of years of service. *Id.* at 613.

[167] *Id.* at 613.

it.[168] The reason for this omission may have been that interference with the vesting of a pension, rather than being a reasonable factor, is an illegal and therefore unreasonable one. Thus, the RFOA defense, which envisions legitimate business-related factors and not illegal motives, did not apply. The outcome of the case, however, comports with the spirit of the RFOA defense by rendering factors other than age irrelevant to the issue of discriminatory intent.

The wisdom of *Hazen Paper* is open to question because the Court excluded the pension-related evidence from consideration although Biggins had presented other evidence of discriminatory intent at trial. Given the independent evidence of discriminatory intent, one might argue that the pension-related evidence circumstantially supported the case.[169] The same argument applies to the RFOA defense. The RFOA defense may mean that evidence of reasonable factors other than age cannot by itself support a case of disparate treatment age discrimination, but the defense may be read to allow such evidence when the plaintiff presents other proof of discriminatory intent. In other words, one may construe the RFOA defense to mean that to prove discriminatory intent the plaintiff may not rely on reasonable factors other than age as the *sole* motivation for the adverse action, though such factors might be considered as contributing to the adverse employment action. Regardless of which of these two variations one adopts, *Hazen Paper* protects business from economic hardship.

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[168] *See* Respondents' Brief at 33–39, Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) (No. 91-1600), *available at* 1992 WL 511975 at *33–39 (Sept. 4, 1992) (containing no reference to the RFOA defense).

[169] Biggins offered proof of discriminatory intent in addition to the evidence that Hazen Paper fired him to prevent his pension from vesting. Though hardly overwhelming, that evidence consisted in part of his employer's insistence that he sign an onerous confidentiality agreement, which no other employees were required to sign. Furthermore, Hazen Paper presented Biggins' younger replacement with a less onerous agreement. *Hazen Paper*, 507 U.S. at 613. In remanding the case to the First Circuit, the Supreme Court instructed the circuit court to consider whether the evidence of discriminatory intent, excluding evidence related to the pension, was sufficient to support an ADEA violation. *Id.* at 614. Thus, the Supreme Court held, not merely that the pension-related evidence standing alone could not support a violation, but it also held that such evidence could not be considered in conjunction with other evidence of discriminatory intent. *See* Respondents' Brief at 33–39, Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) (No. 91-1600) (arguing that firing Biggins to prevent his pension from vesting was, in conjunction with other proof offered at trial, evidence of intentional age discrimination). *See also* Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 573 (1996) (criticizing *Hazen Paper* for discounting evidence that Biggins was fired to prevent his pension from vesting even as circumstantial proof of discrimination).

Employers need not fear lawsuits because they made rational, cost-saving business decisions, even if those decisions incidentally disadvantaged older workers.

Hazen Paper does not resolve whether disparate impact theory applies to workers over forty. One may infer nevertheless that *if* the ADEA's prohibitory section, like its counterpart in Title VII, allows for disparate impact claims, a reasonable cost-cutting measure that correlates with age is not actionable, even if the defendant cannot prove that the measure rises to the level of a business necessity. Still, the more basic question – whether the ADEA even includes disparate impact protection – stands unanswered. An analysis of the legislative history of the ADEA presents another approach to resolving the issue.

B. The Legislative History

Congress, in § 715 of the 1964 Civil Rights Act, directed Willard Wirtz, the Secretary of Labor, to study the problem of age discrimination and to report his findings.[170] Secretary Wirtz submitted the Labor Report to Congress, and subsequently, complying with another congressional directive, submitted a draft bill destined to become the ADEA.[171] Congress confirmed the findings of the Labor Report,[172] which is the principle source of the ADEA's legislative history.[173] The Labor Report has therefore generated a wealth of commentary. Some judges and scholars point to the Labor Report as proof that Congress did not intend to incorporate disparate impact protection into the

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[170] Section 715 directed the Secretary of Labor to transmit to Congress a "study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination." *See* Letter of Transmittal from W. Willard Wirtz, Secretary of Labor, to Hon. John W. McCormack, Speaker of the House of Representatives, and Hon. Hubert H. Humphrey, President of the Senate (June 30, 1965), in LABOR REPORT, *supra* note 4. *See also* EEOC v. Wyoming, 460 U.S. 226, 229–30 (1983) (reviewing the legislative history of the ADEA).

[171] *See* EEOC v. Wyoming, 460 U.S. at 230.

[172] *Id.* at 230–31.

[173] *See id.* (discussing the influence of the Labor Report on Congress); Alfred W. Blumrosen, *Interpreting the ADEA: Intent or Impact*, *in* AGE DISCRIMINATION IN EMPLOYMENT ACT: A COMPLIANCE AND LITIGATION MANUAL FOR LAWYERS AND PERSONNEL PRACTITIONERS 68, 83 (Monte B. Lake ed., 1982) (referring to the Labor Report as the document responsible for "shaping the thinking in Congress" that culminated in the enactment of the ADEA).

ADEA.[174] Others find the Labor Report ambiguous or even an indication that the ADEA permits disparate impact claims.[175]

A careful analysis must recognize that Secretary Wirtz submitted the Labor Report to Congress in 1965, six years before *Griggs,* the landmark Supreme Court decision that created disparate impact theory and applied it to racial discrimination.[176] This chronology does not imply that Secretary Wirtz could not have contemplated the theory of disparate impact. He may have pioneered the theory. It does suggest, however, that ambiguities should not lead to the uncritical conclusion that he meant to take a position on the issue when other interpretations are equally plausible.

Based on a thorough analysis of the ADEA's legislative history, which centers on the Labor Report, Professor Blumrosen argues that Congress did not intend the ADEA to permit claims of disparate impact.[177] He underscores two separate problems that the Labor Report identifies. First, under the heading "Arbitrary Discrimination: Specific Age Limits," the Labor Report states, "[t]he most obvious kind of age discrimination in employment takes the form of employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications."[178] Professor Blumrosen concludes that the Labor Report equates "arbitrary discrimination" with specific age limits,[179] and he points out that the Labor Report calls for federal legislation outlawing "arbitrary discrimination."[180]

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[174] *See, e.g.*, Smith v. City of Jackson, 351 F.3d 183 (5th Cir. 2003) (underscoring the policy differences of Title VII and the ADEA as revealed in the Labor Report); Mullin v. Raytheon Co., 164 F.3d 696, 703 (1st Cir. 1999) (concluding that "the Report's findings suggest that the theory [of disparate impact] has no utility in age discrimination cases"); Blumrosen, *supra* note 173, at 79 (arguing that the Labor Report proposed making only intentional discrimination illegal, not unintentional institutional arrangements that have a disproportionate adverse effect on older workers).

[175] *Smith*, 351 F.3d at 203 (Stewart, J., dissenting) (interpreting the Labor Report to embrace disparate impact liability because an express purpose of the Labor Report was to address discrimination not based on animus); Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 290–98 (1990) (criticizing Blumrosen's analysis and concluding that the Labor Report is ambiguous and even may reasonably be interpreted to recommend the adoption of disparate impact liability).

[176] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[177] Blumrosen, *supra* note 173, at 73.

[178] LABOR REPORT, *supra* note 4, at 6. *See* Blumrosen, *supra* note 173, at 76.

[179] Blumrosen, *supra* note 173, at 76.

[180] *Id.* at 77; LABOR REPORT, *supra* note 4, at 21–22.

The Labor Report's next section raises a separate concern affecting older workers: "It is equally important to recognize the force of certain circumstances which unquestionably affect older workers more strongly as a group than they do younger workers."[181] One such circumstance is "institutional arrangements" such as seniority systems under collective bargaining agreements, pension and health insurance costs, and the practice of promotion from within.[182] However, the Labor Report recommends non-statutory measures to address institutional arrangements that diminish the employment prospects of older workers. These measures include restructuring benefit plans,[183] and improving educational opportunities.[184] Professor Blumrosen argues, "[t]hese separate and distinct recommendations reinforce the conclusion that the statutory prohibition on age discrimination was intended to prohibit only specific age limits for hiring or termination."[185] He characterizes "institutional practice(s)" that have an "'adverse effect' on older workers" as having a disparate impact on older workers, and he notes that the Labor Report does not propose making such practices illegal.[186]

Professor Blumrosen's analysis may be right, but it just as easily may be wrong. A second, brisk walk through the Labor Report raises questions about the persuasiveness of Professor Blumrosen's interpretation. After enumerating three variations of intentional discrimination, the Labor Report discusses a fourth type of discrimination: rejecting older workers because of institutional arrangements, including seniority systems, promotion-from-within, and pension and insurance programs. As shown above, Professor Blumrosen characterizes this form of discrimination as disparate impact, but the Report contradicts this characterization by noting that the costs of these programs "push still further down the age at which employers begin asking whether or not a prospective employee is too old to be taken on." So defined, his practice is a form of conscious discrimination, not disparate impact.

A passage in the Findings section of the Labor Report also contradicts Professor Blumrosen's view. Secretary Wirtz,

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[181] LABOR REPORT, *supra* note 4, at 11.
[182] *Id.* at 15–17.
[183] *Id.* at 22.
[184] *Id.* at 24–25.
[185] Blumrosen, *supra* note 173, at 79.
[186] *Id.* at 79.

while discussing the fourth type of discrimination (discrimination arising from institutional arrangements), notes that "institutional arrangements which operate indirectly to restrict the employment of older workers" may cause "arbitrary discrimination." Use of the word "arbitrary," according to Professor Blumrosen, indicates intentional discrimination, not disparate impact. Yet Professor Blumrosen argues that the Labor Report treats "institutional arrangements" as examples of disparate impact or unintentional discrimination. Either in its use of the word "arbitrary" or in its treatment of "institutional arrangements," the Labor Report does not square with Professor Blumrosen's analysis.

In the Conclusions and Recommendations section, the Labor Report proposes that "to adjust those present employment practices which quite unintentionally lead to age limits in hiring," employers should adjust pension and seniority arrangements.[187] The phrase "unintentionally lead to age limits in hiring" suggests disparate impact. As Professor Blumrosen points out, rather than recommending civil liability to confront these problems, the Labor Report proposes restructuring.[188] Thus, the Labor Report seems to reject disparate impact liability. The next sentence of the Labor Report, however, clashes with this interpretation by suggesting that new pension and seniority arrangements are needed to overcome employer *reluctance* to hire qualified older workers.[189] Employer reluctance suggests the intent to discriminate, which is an element of disparate treatment, not disparate impact. The Labor Report's apparent conflict in using the words "unintentional" and "reluctance" may be explained by recognizing that employers do not adopt pension plans to discriminate against older workers, but a consequence may nevertheless be employer reluctance to hire older workers because of increased costs.[190] This explanation contradicts Professor Blumrosen's position.

The Labor Report notes that inadequate education bars some older workers from desirable jobs.[191] This sounds like disparate impact. To address this problem, the Labor Report

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[187] LABOR REPORT, *supra* note 4, at 22.

[188] Blumrosen, *supra* note 173, at 78–79.

[189] LABOR REPORT, *supra* note 4, at 22.

[190] *Id.* at 16.

[191] LABOR REPORT, *supra* note 4, at 11–12.

recommends more training and education, not lawsuits.[192] Professor Blumrosen concludes that the Labor Report therefore rejects disparate impact under the ADEA.[193] The Labor Report, however, was merely pointing out that employers sometimes reject older workers because they are unqualified educationally.[194] More education is the obvious remedy. The Labor Report would have made no sense if it had proposed civil lawsuits to address the legitimate rejection of older undereducated workers. In other words, the Labor Report merely recognizes that rejecting an older worker for justifiable business reasons should not be actionable. It does not follow that the Labor Report intends to foreclose disparate impact claims, which arise when an employer's *illegitimate* educational requirements result unintentionally in the rejection of older workers.

Some of these ambiguities might be read to exclude disparate impact liability from the ADEA. Congress, however, did not prepare the Labor Report – the Department of Labor did. Although Congress endorsed the Labor Report, it surely did not intend to adopt every nuance of ambiguous language, even if a phrase or two might be interpreted to suggest the emergence and simultaneous rejection of a novel and unnamed doctrine.

C. *The Implications of* Hazen Paper

Justice O'Connor, writing for the *Hazen Paper* Court, made several statements that some courts and commentators cite to show the Supreme Court's likely refusal to recognize disparate impact claims under the ADEA.[195] First, she stated,

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[192] *Id.* at 24–25.

[193] Blumrosen, *supra* note 173, at 79.

[194] LABOR REPORT, *supra* note 4, at 12.

[195] *See, e.g.*, Allen v. Entergy Corp., 193 F.3d 1010, 1015 n.5 (8th Cir. 1999) (concluding that *Hazen Paper* suggested that the ADEA does not permit disparate impact actions); Mullin v. Raytheon Co., 164 F.3d 696, 701 (1st Cir. 1999) (asserting that the "inescapable implication of her [Justice O'Connor's] statements [in *Hazen Paper*] is that the imposition of disparate impact liability would not address the evils Congress was attempting to purge when it enacted the ADEA"); Archer, *supra* note 70, at 161–62 (suggesting that *Hazen Paper* casts doubt on the viability of disparate impact claims under the ADEA); Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267, 313 (1995) (stating that "even while the Court recognized that the plaintiff had not raised a disparate impact claim, the Court's language shows tremendous skepticism about including a disparate impact theory under the ADEA").

"Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA."[196] This statement might be read to exclude disparate impact. A more sensible interpretation, however, is that Justice O'Connor was simply acknowledging that the essence of civil rights law is to eradicate intentional discrimination arising from unfair stereotypes. A secondary but nevertheless critical goal of civil rights law, recognized in *Griggs,* is to eliminate the less flagrant form of discrimination: unintentional, disparate impact violations.

Later in *Hazen Paper*, Justice O'Connor remarked, "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes."[197] She continued, "When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears."[198] Since disparate impact would prohibit the employer from relying on "factors other than age," some infer that Justice O'Connor was suggesting the inappropriateness of that theory. Although tenable, this inference does not necessarily reflect what Justice O'Connor meant. Interpreting these comments to preclude disparate impact claims overlooks their context, which explicitly referred to disparate treatment liability. Justice O'Connor was probably noting that disparate treatment confronts the problem of stereotyping, and the problem of stereotyping disappears when an employment decision is based wholly on factors other than age. Facially neutral factors causing a disproportionate impact on older workers present a separate problem, which Justice O'Connor was not addressing. Designed to address this separate problem, disparate impact seeks to rid the workplace of the consequences of discrimination, even absent stigmatizing attitudes. One can therefore reconcile Justice O'Connor's statements with the position that the ADEA recognizes claims for disparate impact. Particularly in light of Justice O'Connor's express admonition that the Court was not addressing the viability of disparate impact under the ADEA, attempts to

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[196] Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

[197] *Id.*

[198] *Id.* at 611.

glean hidden meanings from *Hazen Paper* are like grabbing at fog.[199]

Three justices in *Hazen Paper*, however, did express reservations about incorporating disparate impact claims into the ADEA. Justice Kennedy, in a concurring opinion joined by Chief Justice Rehnquist and Justice Thomas, stated, "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."[200] Although the concurring opinion might lead to speculation that the Court will ultimately reject disparate impact analysis under the ADEA, this prediction amounts to sheer guesswork because six judges declined to join in the concurring opinion.

D. Congressional Inaction

The 1991 Civil Rights Act provides another counterargument to the position that the ADEA forbids disparate impact employment practices.[201] That Act codified case law that had made disparate impact unlawful under Title VII.[202] Although Congress simultaneously amended the ADEA in the Civil Rights Act of 1991, it did not establish a claim for disparate impact as an ADEA violation.[203] Some take Congress' failure to provide for such a claim as evidence of congressional intent to exclude such claims from the ADEA.[204] Others point out that only congressional action reveals its intent; nothing

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[199] *Id.* at 610.

[200] *Id.* at 618 (Kennedy, J., concurring).

[201] *See infra* note 204 and accompanying text (citing judicial and scholarly support for this argument). *See generally* 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 (1993) (providing an in-depth analysis of the implications of congressional inaction and tying the analysis to whether changes in the Civil Rights Act of 1991 affect the ADEA).

[202] The 1991 Civil Rights Act provides:

> An unlawful employment practice based on disparate impact is established only if—(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. . . .

42 U.S.C. § 2000e-2(k)(1)(a)(i).

[203] *See* 42 U.S.C. § 616 (amending the notice and limitations periods prescribed in 29 U.S.C. § 626(e)).

[204] *See* Ellis v. United Airlines, 73 F.3d 999, 1008 (10th Cir. 1996) (inferring from Congress' failure to amend the ADEA to include claims for disparate impact that Congress intended not to preclude such claims).

can be deduced from what Congress does not do.[205] Attributing motives to what Congress does not do is too speculative to be useful.[206]

Both sides of the debate can muster support. In *Johnson v. Transportation Agency,*[207] the Supreme Court explained, "The fact that inaction may not always provide crystalline revelation, however, should not obscure the fact that it may be probative to varying degrees. *Weber* [which construed Title VII to permit affirmative action], for instance, was a widely publicized decision that addressed a prominent issue of public debate. Legislative inattention thus is not a plausible explanation for congressional inaction."[208] Like reasoning might be applied to Congress' failure to insert disparate impact protection into the ADEA. Congress showed that it was aware of the importance of recognizing disparate impact theory when it added disparate impact protection to Title VII. It similarly demonstrated that it was mindful of the ADEA by amending it in other ways. Therefore, its failure to include disparate impact protection in the ADEA was a conscious decision.

Justice Scalia, however, mocked the majority's view in *Johnson*, gibing that "vindication by congressional inaction is a canard."[209] He is not alone in this view. In *Schneidewind v. ANR*

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[205] Brett Ira Johnson, Note, *Six of One, Half-Dozen of Another:* Mullin v. Raytheon *as a Representative of Federal Circuit Courts Erroneously Distinguishing the ADEA from Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. 303, 332 (2000).

[206] In Helvering v. Hallock, 309 U.S. 106, 119–20 (1940), the Court stated:

> It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities. Congress may not have had its attention directed to an undesirable decision; and there is no indication that as to the St. Louis Trust cases it had, even by any bill that found its way into a committee pigeon-hole. Congress may not have had its attention so directed for any number of reasons that may have moved the Treasury to stay its hand. . . . Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.

Id.

[207] 480 U.S. 616 (1987).

[208] *Id.* at 629 n.7. *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975) (inferring that Congress intended to allow parties who did not file charges with the EEOC to be eligible to collect backpay, because Senate approved of circuit court rulings unanimously allowing such recovery, and because the amendment to Title VII that Congress ultimately passed did not have such a limitation although the House bill was to the contrary).

[209] *Johnson*, 480 U.S. at 672 (Scalia, J., dissenting).

Pipeline Co.,[210] the Supreme Court refused to infer legislative intent from Congress' failure to enact proposed legislation that would have given the Federal Energy Regulatory Commission explicit authority to regulate the issuance of securities of natural gas companies.[211] The Court instructed that it is "generally ... reluctant to draw inferences from Congress' failure to act."[212]

Despite some reluctance, the Court has shown the willingness to infer congressional intent from inaction when appropriate. The unique circumstances of both amending Title VII, a statute highly analogous to the ADEA, while amending the ADEA in different ways, would seem to suggest the reasonableness of inferring from congressional inaction that Congress was at least hesitant to add disparate impact coverage to the ADEA. Challenging this viewpoint, Brett Ira Johnson speculates that Congress, though intending to include disparate impact coverage in the ADEA, may not have done so expressly because it was preoccupied with overruling *Wards Cove Packing Co. v. Atonio*,[213] which shifted the burden of proving business necessity to the plaintiff in a Title VII disparate impact case.[214] The Court, therefore, inadvertently overlooked the ADEA while focusing on Title VII.[215] This point is dubious, however, because the same issue of affixing the burden of proof on the defendant would have applied to ADEA disparate impact claims, if such claims existed. Thus, the *Wards Cove* issue, rather than diverting attention from the ADEA, would have alerted lawmakers to amend it. Johnson, however, makes a more intriguing point. Before *Hazen Paper* was decided in 1993, federal courts had uniformly applied disparate impact analysis to the ADEA.[216] The Civil Rights Act

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[210] 485 U.S. 293 (1988).

[211] *Id.* at 306.

[212] *Id.*

[213] 490 U.S. 642 (1989).

[214] Johnson, *supra* note 205, at 333. *See Wards Cove Packing Co.*, 490 U.S. at 658 ("In this phase, the employer carries the burden of producing evidence of business justification for his employment practice. The burden of persuasion, however, remains with the disparate impact plaintiff.").

[215] Johnson, *supra* note 205, at 333.

[216] Houghton v. Sipco, Inc., 38 F.3d 953, 959 (8th Cir. 1994) (ordering a new trial because the district court improperly instructed the jury on a burden of proof then applicable to a disparate impact claim); Wooden v. Bd. of Educ. of Jefferson County, 931 F.2d 376, 379–80 (6th Cir. 1991) (affirming grant of summary judgment because the plaintiff failed to support his charge that the board's policy of limiting credit for higher salaries at fourteen years had a disparate impact on any individual and that the

of 1991 can be construed as tacit approval for the status quo at that time. Johnson argues that Congress' silence therefore indicates congressional approval of age-based disparate impact claims.[217] This argument has a doctrinal basis. The argument posits an example of what Professor Eskridge has called the "acquiescence rule," which attributes congressional approval of judicial decisions that Congress, through inaction, lets stand.[218]

The legal arguments discussed in this Part of the article provide substantial support for both sides. Though both sides score points, neither emerges the clear winner. This debate, however, need not end in a standoff. As shown below, there are policy arguments that weigh heavily against incorporating disparate impact protection into the ADEA.

V. POLICY ARGUMENTS

The ADEA protects older workers from disparate treatment discrimination. Any victim of intentional discrimination may seek legal and equitable relief, including back pay, front pay, reinstatement and judgments compelling promotion, as well as attorneys' fees.[219] In cases where the

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policy was unsound); Holt v. Gamewell Corp., 797 F.2d 36, 38 (1st Cir. 1986) (affirming grant of summary judgment for the defendant because the plaintiff failed to prove that discharging employees based on salary level disproportionately affected older workers); Heward v. Western Elec., 35 Fair Empl. Prac. Cas. (BNA) 807, 811 (10th Cir. 1984) (stating that a plaintiff may allege a disparate impact claim under the ADEA and concluding that Heward alleged no such claim); EEOC v. Borden's, Inc., 724 F.2d 1390, 1393 (9th Cir. 1984) (affirming grant of summary judgment in favor of employees' disparate impact claims based on severance policy); Allison v. Western Union Tel. Co., 680 F.2d 1318, 1322 (11th Cir. 1982) (upholding the trial court's denial of plaintiffs' motion for a directed verdict in disparate impact case brought under the ADEA); Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980) (upholding jury verdict in favor of plaintiff who alleged that a school's policy not to hire teachers with more than a certain level of experience constituted a disparate impact violation under the ADEA).

[217] Johnson, *supra* note 205, at 331–33.

[218] William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 71 (1988). Professor Eskridge classifies congressional inaction into three categories:

> [T]he "acquiescence cases," in which the Court concludes that Congress's failure to overturn a judicial or administrative interpretation is evidence that Congress has acquiesced in that interpretation of the statute; the "reenactment cases," where the acquiescence argument is buttressed by reenactment of the interpreted statute without material change; and the "rejected proposal cases," in which the Court infers from the rejection of a bill or amendment by Congress, or by a chamber or committee of Congress, that an interpretation similar to the rejected proposal is excluded from the statute.

Id. at 70–71.

[219] 29 U.S.C. § 216(b) (2000); 29 U.S.C. §§ 626(b), (c)(1) (2000).

employer knew of the discriminatory practice or recklessly permitted it to occur, the employer will have to pay liquidated damages.[220] The question is whether, as a matter of policy, these workers should receive additional protection afforded by disparate impact theory.

A. *Failing to Meet the Purposes of Disparate Impact Theory*

The purposes of disparate impact protection are twofold: (1) to eliminate unjustified employment practices that cause discrimination unintentionally,[221] and (2) to ferret out subtle and subconscious acts of discrimination where intent is difficult to prove.[222] These two purposes will be discussed below separately, and the author will argue that neither purpose supports extending disparate impact protections to older workers.

1. Eliminating Unintentional Discrimination

Disparate impact theory protects workers from unintentional discrimination. The Supreme Court in *Griggs* stated that "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 job capability."[223] But older workers do not fit the profile of a minority group impeded by "built-in headwinds." Such workers are not a minority at all. Their ranks have swelled to record numbers, comprising a growing majority of the labor force. In 2003, approximately 51% of the national labor force is over forty.[224] This percentage will increase to 53 by 2012. (See Table 1.) In January 2004, the total labor force in the United States will be comprised of nearly 151 million workers. (See Table 2.) Of this total approximately 78 million workers will be over forty. By 2012 there will be about 86 million workers over forty in a labor force of 162 million workers. (See Tables 1 and 2.) Furthermore, older workers have not encountered systemic

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[220] 29 U.S.C. § 216(b) (2000); 29 U.S.C. § 626(b) (2000). *See also Hazen Paper*, 507 U.S. at 617. *See* note 290 and accompanying text (discussing liquidated damages).

[221] *See infra* Part V.A.1.

[222] *See infra* Part V.A.2.

[223] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[224] Bureau of Labor Statistics, Total Labor Force, *available at* ftp://ftp.bls.gov/pub/special.requests/ep/labor.force/clfa0212.txt (last visited Nov. 16, 2004).

underemployment. Even in Secretary Wirtz' 1965 Labor Report on the problems of age discrimination, he acknowledged, "Older workers are in general valued and often prized employees. Almost 97 percent of male workers 45 and over were employed in 1964. Persons over 45 make up almost 40 percent of the U.S. labor force, but only 27 percent of total unemployment . . . ."[225]

Table 1: Projections of Labor Force Over 40[226]
(In thousands)

Year	Total 40+ in Labor Force	% 40+ Making Up Labor Force
2005	77,784	51.6
2006	79,211	51.9
2007	80,441	52.1
2008	81,585	52.2
2009	82,713	52.4
2010	83,978	52.7
2011	85,159	52.9
2012	85,995	53.0

Table 2: Breakdown of Projections of Labor Force Over 40[227]
(In thousands)

Year	Total in Labor Force	40-44	45-54	55-64	65+
2005	150,739	19,073	34,862	19,063	4,785
2006	152,657	18,772	35,591	19,925	4,924
2007	154,481	18,411	36,184	20,736	5,110
2008	156,238	18,063	36,666	21,511	5,346
2009	157,869	17,793	37,067	22,281	5,571
2010	159,428	17,764	37,262	23,172	5,780
2011	160,942	17,897	37,234	24,006	6,022
2012	162,269	17,943	37,026	24,616	6,410

The sheer magnitude of the projected number of workers over age forty cautions that disparate impact theory

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[225] LABOR REPORT, *supra* note 4, at 5.

[226] Bureau of Labor Statistics, Total Labor Force, *available at* ftp://ftp.bls.gov/pub/special.requests/ep/labor.force/clfa0212.txt (last visited Nov. 16, 2004).

[227] *Id.*

should not be incorporated into the ADEA. More important, older workers enjoy positions at the highest rungs of the labor force. They fill the majority of mid-level and upper level management positions. Twenty-five-year-olds do not run Fortune 500 corporations. Other protected classes – African-Americans, women, and the disabled – need disparate impact protection because they have been systemically excluded from desirable jobs. National policy seeks to bolster the representation of these protected classes at all rungs of the employment ladder. Disparate impact theory provides one means to hasten the achievement of this goal. Intentional discrimination, which sometimes targets older workers, must be excised from the workplace, but that is as far as the legal protection should go.

Though arising in a different context, *Sutton v. United Air Lines, Inc.*[228] supports the conclusion that disparate impact protection ought not be extended to the populous class of workers over forty. In *Sutton,* the Supreme Court held that the ADA does not cover those with correctable conditions such as visual impairments correctable with eyeglasses.[229] In reaching this conclusion, the Court relied on legislative history that showed congressional intent to include approximately 43 million disabled individuals within the protected class.[230] The number of disabled people with uncorrectable conditions approximated this number, but the number of people with correctable conditions totaled about 160 million.[231] Congress did not mean to create a protected class of disabled people that would have exceeded half the nation's population. The reason for congressional exclusion of those with correctable conditions was not simply the immensity of numbers. Individuals with correctable conditions are not powerless victims of employment discrimination. As Justice Ginsburg explained, "the inclusion of correctable disabilities within the ADA's domain would extend the Act's coverage to far more than 43 million people. [Such people] can be found in every social and economic class; they do not cluster among the politically powerless, nor do they coalesce as historical victims of discrimination."[232]

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[228] 527 U.S. 471 (1999).

[229] *Id.* at 488–89.

[230] *Id.* at 484.

[231] *Id.* at 486–87.

[232] *Id.* at 494 (Ginsburg, J., concurring).

Justice Ginsburg's reasoning counsels against extending disparate impact protection to workers over forty. Like people with correctable medical conditions, individuals over forty do not comprise a powerless, victimized class. To the contrary, they comprise the majority of the workforce, and fill the ranks of middle and upper management. The Supreme Court in *Sutton* categorically denied both disparate treatment and disparate impact coverage to people with correctable conditions. No one argues that workers over forty should be denied the protection of disparate treatment theory. Sound policy considerations, however, clash with extending disparate impact protection to such workers.

2. Rooting Out Subconscious Discrimination

The Supreme Court has identified another purpose that disparate impact theory serves. In *Watson v. Fort Worth Bank & Trust*,[233] the Court observed that disparate impact analysis ferrets out subconsciously motivated discriminatory actions too subtle for disparate treatment analysis to detect.[234] Clara Watson, a teller at the bank's drive-in facility, sought several promotions all of which, based on the subjective judgment of branch supervisors, went to white coworkers.[235] The Supreme Court heard the case to decide if subjective criteria may provide a basis for disparate impact liability.[236] Ruling that subjective or discretionary practices, in contrast to objective measures such as professionally designed tests, are amenable to disparate impact analysis, [237] the Court recognized that disparate treatment law could not adequately address "the

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[233] 487 U.S. 977 (1988).

[234] *Id.* at 990–91. Judge Cudahy has highlighted this point. He stated, "The *Griggs* disparate impact method recognizes that not all discrimination is apparent and overt. It is sometimes subtle and hidden. It is at times hidden even from the decisionmaker herself, reflecting perhaps subconscious predilections and stereotypes." EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1080 (7th Cir. 1994) (Cudahy, J., dissenting). *See also In re* Employment Discrimination Litigation Against the State of Alabama, 198 F.3d 1305, 1321 (11th Cir. 1999) (noting that "a genuine finding of disparate impact can be highly probative of the employer's motive since a racial 'imbalance is often a telltale sign of purposeful discrimination'") (quoting Teamsters v. United States, 431 U.S. 324, 339–40 n.20 (1977)).

[235] *Watson*, 487 U.S. at 982.

[236] *Id.* at 983–85. The district court held that subjective criteria may never provide a basis for disparate impact liability, *id.* at 984, but the Fifth Circuit reversed the holding of the district court. *Id.* The Supreme Court noted that the circuits were split on the issue. *Id.*

[237] *Id.* at 991.

problem of subconscious stereotypes and prejudices."[238] For example, a bank official told Watson, "the teller position [she sought] was a big responsibility with 'a lot of money . . . for blacks to have to count.'"[239] Such remarks, the Court observed, may not establish a disparate treatment violation, but they do exhibit "a lingering form of the problem that Title VII was enacted to combat."[240]

Superficially, the rationale of *Watson* may support the application of disparate impact analysis to age discrimination cases: if the ADEA, like Title VII, seeks to eradicate even subtle, subconscious manifestations of discrimination, disparate impact will assist in that enterprise.[241] On the other hand, a hasty application of the *Watson* rationale to age discrimination may be misguided. Smoking out hidden discriminatory racial motives is a legitimate function of disparate impact theory. Racism has haunted this nation since the seventeenth century, and its eradication calls for strict measures. Age discrimination, however, does not carry the history, animosity, pervasiveness, or lingering effects of race discrimination. Unlike African-Americans, women, and the disabled, all of whom have been excluded from a broad spectrum of job opportunities, older workers enjoy high rates of employment and often have desirable jobs. If a plaintiff cannot prove discriminatory intent, lowering the bar by applying disparate impact analysis will sometimes throw employers lacking even subconscious intent into liability. Necessary in race discrimination cases and appropriate in sex and disability cases, this safety net approach is inadvisable under the ADEA. An employer should not be held liable for a business decision that one suspects *might* have been tainted by stereotypical attitudes toward older workers. Disparate treatment law has

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[238] *Id.* at 990.

[239] *Id.* (citing App. Br. at 7).

[240] *Watson*, 487 U.S. at 990. Fort Worth Bank argued that if subjective decisionmaking falls within disparate impact analysis, employers would institute illegal quotas to prevent innocent statistical deviations in employment figures that might invite disparate impact lawsuits and result in liability. *Id.* at 992. The Court attempted to assuage this concern by suggesting that courts should defer, within reasonable limits, to the subjective decisionmaking of employers, though the Court did not define the boundaries of such deference. *Id.* at 999.

[241] Citing *Watson*, the appellants in *Smith* argued to the Fifth Circuit that disparate impact protection is necessary to protect older workers from subconscious stereotypes, which are tantamount to intentional discrimination. Brief of Appellants at 11, Smith v. City of Jackson, 351 F.3d 183 (5th Cir. 2003) (No. 02-60850) (filed Dec. 20, 2002).

established standards for proving discriminatory intent. If a plaintiff in an age discrimination case cannot meet those standards, the law should not resurrect his claim by enforcing a less rigorous standard of liability.

B. Frustrating the Interests of African-Americans

The overarching policy of civil rights law is to promote the equality of African-Americans. Title VII promotes this policy by guaranteeing African-Americans equality of opportunity in the workplace. Allowing disparate impact claims under the ADEA would undermine this policy.

1. Race as a Preferred Protected Class

There is a hierarchy among the classes protected by civil rights law. African-Americans stand at the apex of the hierarchy because of the tenacious historical record of racism. Aging workers endure the stigma of declining productivity,[242] and the disabled are burdened with "stereotypic assumptions not truly indicative of [their] ability..."[243] Women, too, contend with demeaning stereotypes of femininity and the proper role of females.[244] Racial prejudice, however, is more pernicious than other stereotyping because it feeds on myths of inferiority; it diminishes a person by telling him that no matter what he does he can never be quite right.[245] The psychological toll is as

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[242] *See* 29 U.S.C. § 621(a)(2) (2000); Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) (recognizing that "[i]t is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with age"); EEOC v. Wyoming, 460 U.S. 226, 231 (1983) (summarizing the findings of the Secretary of Labor that "stereotypes unsupported by objective fact" accounted for most age discrimination in business and that empirical data suggest that older workers are at least as productive as their younger counterparts).

[243] 42 U.S.C. § 12101(a)(7) (2000).

[244] *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (finding comments of partners at an accounting firm that a female applicant who was denied partnership was too "macho" and 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, to be evidence of impermissible stereotyping, *id.* 251).

[245] *See* Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2140–41 (1989).

> Into this breach of the division-within-ourselves falls the helplessness of our fragile humanity. Unfortunately, the degree to which it is somewhat easier in the short run to climb out of the pit by denying the mountain labelled "colored" than it is to tackle the sheer and risky cliff that is our scorned mortality, is the degree to which blacks internalize the mountain labelled colored. It is the degree to which blacks remain divided along all sorts of categories of blackness, including class, turning the speech of helplessness

harmful as the job interview inexplicably gone sour. But there are more measurable harms like lack of educational opportunities that keep good jobs out of reach. Bias against African-Americans intrudes on their employment prospects in nearly every quarter of the marketplace. The best jobs are the ones that prove most elusive. Age stereotyping does not crop up with the same persistence, nor does it evoke the feelings of disdain that drive some employers to keep their payrolls white.[246]

Civil rights law recognizes that African-Americans occupy a special position among protected classes.[247] As the Supreme Court declared in *Newman v. Piggie Park Enterprises,*[248] eradication of racial discrimination is "a policy that Congress considered of the highest priority."[249] By abolishing slavery,[250] guaranteeing a person equal protection of the laws,[251] and forbidding the denial of the right to vote on account of race,[252] the post-Civil War amendments sought to assure basic rights for the newly freed slaves.[253]

> upon ourselves like a fire hose. We should *do* something with ourselves, say the mothers to the daughters and the sons to the fathers, we should do something. So we rub ointments on our skin and pull at our hair and wrap our bodies in silk and gold. We remake and redo and we sing and we pray that the ugliness will be hidden and that our beauty will shine through like light and be accepted.

Id. at 2140–41.

[246] *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976).

[247] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) (declaring that "it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise"); Edwards v. Jewish Hosp. of St. Louis, 855 F.2d 1345, 1352 (8th Cir. 1988) (emphasizing the "national policy of blotting out all vestiges of racial discrimination, especially in employment, as evidenced by both § 1981 and Title VII"). *See generally* Kenneth R. Davis, *Undo Hardship: An Argument for Affirmative Action as a Mandatory Remedy in Systemic Racial Discrimination Cases*, 107 DICK. L. REV. 503, 551 (hereinafter "*Undo Hardship*") (discussing the elevated status of African-Americans as a protected class).

[248] 390 U.S. 400 (1968).

[249] *Id.* at 402.

[250] U.S. CONST. amend. XIII.

[251] U.S. CONST. amend. XIV.

[252] U.S. CONST. amend. XV.

[253] Congress reinforced minority rights by enacting the nineteenth century civil rights acts, including § 1981, which guarantee black Americans contract rights in private transactions. Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (2000). *See also* § 1983, which provides:

Equal protection jurisprudence acknowledges the heightened status of African-Americans. In *McLauglin v. Florida,*[254] the Supreme Court struck down a Florida statute outlawing cohabitation between blacks and whites.[255] While recognizing that the Fourteenth Amendment generally requires that a legal classification meet the test of rationality, the Court held that a classification based on race "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States."[256] Thus, racial classifications are "constitutionally suspect"[257] and "subject to the 'most rigid scrutiny.'"[258]

Rather than strict scrutiny analysis, classifications based on age need be supported only by a rational basis.[259] In *Massachusetts Board of Retirement v. Murgia,*[260] the Court upheld a Massachusetts statute requiring the retirement of police officers at age fifty because the statute met the rational basis test.[261] In so holding, the Court observed:

> While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a history of 'purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.[262]

Even Secretary Wirtz' Labor Report, which was intended to highlight the problems of age discrimination, recognized that race discrimination is more malignant. The Labor Report states: "Employment discrimination because of

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> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (2000).

[254] 379 U.S. 184 (1964).

[255] *Id.*

[256] *Id.* at 191.

[257] *Id.* at 192 (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

[258] *Id.* at 192 (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).

[259] *See infra* notes 260–61 and accompanying text.

[260] 427 U.S. 307 (1976).

[261] *Id.* at 314.

[262] *Id.* at 313.

race is identified, in the general understanding of it, with non-employment resulting from feelings about people entirely unrelated to their ability to do the job. There is *no* significant discrimination of this kind so far as older workers are concerned."[263]

A word of clarification is in order. Unlike this article, which uses equal protection jurisprudence to show that African-Americans are a preferred protected class, some commentators analogize equal protection jurisprudence to statutory discrimination law.[264] They believe that the special equal protection status of African-Americans supported extending disparate impact protection based on race – a result achieved by *Griggs*. Since discrimination based on age receives only rational basis analysis under the Equal Protection Clause, these commentators contend that disparate impact theory should not be incorporated into the ADEA.[265]

Professor Kaminshine has criticized this argument. He points out that, for purposes of equal protection, sex receives only intermediate scrutiny, and yet disparate impact discrimination based on sex is unlawful.[266] Adopted after the publication of Professor Kaminshine's article, the ADA also includes disparate impact analysis, [267] though disability, like age, receives only rational basis protection.[268] Thus, the

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[263] LABOR REPORT, *supra* note 4, at 2.

[264] *See, e.g.*, Pontz, *supra* note 195, at 310–11 (relying on *Murgia* to conclude that the ADEA should not allow disparate impact claims); *see generally* Barbara T. Lindemann & David D. Kadue, AGE DISCRIMINATION IN EMPLOYMENT LAW 425–26 (BNA 2003) (summarizing the Equal Protection argument).

[265] *See supra* note 264 and accompanying text.

[266] Kaminshine, *supra* note 175, at 309; *see also* Marla Ziegler, Note, *Disparate Impact and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038, 1058–59 (1984) (criticizing the argument that Equal Protection analysis should determine whether the ADEA recognizes disparate impact claims, because, unlike Equal Protection analysis, neither Title VII nor the ADEA draws any distinctions between the level of protection the protected classes should receive).

[267] 42 U.S.C. § 12112 (b)(3)–(6) (2000).

[268] In *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 466 (1985), the Supreme Court applied the rational basis test to a classification based on mental disability. Declining to apply a strict scrutiny standard, the Court noted that classifications subject to strict scrutiny analysis frequently reflect antipathy, a circumstance not as often associated with classifications based on mental retardation. *Id.* at 440. *See* Welsh v. City of Tulsa, 977 F.2d 1415, 1420 (10th Cir. 1992) (holding that Tulsa's disqualification of an applicant for a firefighter position based on the applicant's disability must meet only the test of rationality under the Equal Protection clause). *But see* Stephen L. Mikochik, *The Constitution and the Americans with Disabilities Act: Some First Impressions*, 64 TEMP. L. REV. 619, 627 (1991) (recognizing that *Cleburne* did not adopt strict scrutiny or intermediate scrutiny for classifications

application of disparate impact doctrine does not depend on equal protection analysis.[269] To explain why black workers enjoy a higher equal protection standard than older workers, Professor Kaminshine notes that people over forty have traditionally had more political power than African-Americans. The ability of people over forty to protect their rights through the political process accounts for the meager constitutional protection they receive. They speak through legislative action. Since the ADEA was an expression of their political power, it should be construed broadly.[270] This argument, however, can be turned upside down. Kyle Barrentine argues that because people over forty have political clout, they could have exerted their influence to persuade Congress to pass legislation expressly recognizing disparate impact liability in age cases. The absence of a clear congressional enactment implies that Congress did not recognize age-based disparate impact liability.[271] Professor Kaminshine also rebukes the *Murgia* Court for its "casual and somewhat inaccurate assessment of age discrimination."[272] Though recognizing the "unique history and legacy of racism," he points out that age-based stereotypes are nevertheless invidious and damaging.[273] He also argues that "old age," the stage of life most associated with unfounded stigmas, is as immutable as race.[274] Except perhaps for Captain Kirk and Mister Spock, no one can travel backward in time.

Though forceful, Professor Kaminshine's analysis does not weaken the thesis of this article. The equal protection argument presented in this article does not conflict with Professor Kaminshine's rejection of equal protection analysis as a reason to deny the availability of disparate impact claims to older workers. Rather, the equal protection argument in this article illustrates that race is a preferred protected class. It will be shown in Part V(B)(2) that disparate impact protection based on age has the unintended consequence of impairing the

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based on disabilities, but maintaining that *Cleburne* established a standard somewhat more rigorous than the rational basis test).

[269] Kaminshine, *supra* note 175, at 308–09.

[270] *Id.* at 308 (arguing that passage of the ADEA suggests congressional recognition that older workers need special protection in the workplace).

[271] Kyle C. Barrentine, Note, *Disparate Impact and the ADEA: A Means to an End or Justice?*, 27 CUMB. L. REV. 1245, 1272–73 (1997) (reporting that people over forty constitute a majority of registered voters).

[272] Kaminshine, *supra* note 175, at 308.

[273] *Id.* at 307.

[274] *Id.*

employment prospects of African-Americans. This unintended consequence cautions against extending disparate impact protection to older workers. Before proceeding to that aspect of the argument, however, this article will show that, like equal protection jurisprudence, Title VII, Presidential executive orders, and affirmative action policy all support the proposition that African-Americans are a preferred protected class.

One hundred years after passage of the civil rights amendments, the continuing denial of equal educational, housing, and employment opportunities to African-Americans[275] sparked enactment of the 1964 Civil Rights Act, including Title VII, which makes employment discrimination unlawful.[276] Though prohibiting employment discrimination based on religion, sex and national origin,[277] Title VII erected a higher level of protection to combat racial discrimination. For example, § 703(e)(1) permits discriminatory employment practices "where religion, sex, or national origin is a bona fide occupational qualification [BFOQ] necessary for the normal operation of that particular business or enterprise,"[278] but the BFOQ defense does not extend to racial discrimination. Section 623(f)(1) of the ADEA establishes a BFOQ defense to discrimination against workers over forty.[279] Thus, in *EEOC v. Tex. Health Science Ctr.*,[280] the Fifth Circuit held that denying campus guard positions to applicants over forty-five was a BFOQ because younger guards interact more effectively with students. A similar policy excluding black applicants from security guard positions at a predominantly white university would violate Title VII.[281]

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[275] *See* 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey) (stating that Congress passed Title VII "to open employment opportunities for Negroes in occupations which have been traditionally closed to them."). By enacting the 1964 Civil Rights Act Congress sought to remedy both economic and social injustice. *See* 100 CONG. REC. 7220 (1964) (remarks of Sen. Clark) ("The rate of Negro unemployment has gone up consistently as compared with white unemployment for the past 15 years. This is a social malaise and social situation which we should not tolerate."). *See also* remarks of President Kennedy on proposing to Congress the bill that under the Johnson administration would become the 1964 Civil Rights Act: "There is little value in a Negro's obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job." 109 CONG. REC. 11159 (1963).

[276] 42 U.S.C. § 2000e-1–e-17 (2000).

[277] 42 U.S.C. § 2000e-2 (2000).

[278] 42 U.S.C. § 2000e-2(e)(1) (2000).

[279] 29 U.S.C. § 623(f)(1) (2000).

[280] 710 F.2d 1091 (5th Cir. 1983).

[281] The BFOQ defense is available in sex discrimination cases. One might therefore infer from the author's BFOQ argument that women, as a protected class, are

Race-based affirmative action plans by federal and local government, and the vigor with which the government has encouraged voluntary plans in private industry shows the sensitivity of public policy to the goal of eradicating employment discrimination against African-Americans. The most striking example of the federal government's support of race-based affirmative action is President Lyndon Johnson's Executive Order 11246, which required federal contractors to implement affirmative action in recruiting.[282] The Supreme Court has also endorsed race-based affirmative action. In *United Steelworkers v. Weber,*[283] the Court upheld Kaiser Aluminum & Chemical Corporation's race-based affirmative action plan which reserved one-half of skilled-job training slots for minorities.[284] The Court dismissed arguments that the plan violated Title VII, emphasizing that the plan advanced the national policy to eradicate racial discrimination.[285] "It would be

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not entitled to as much protection as African-Americans. Nevertheless, women do receive the protection of disparate impact theory. Title VII's adoption of sex-based disparate impact protection might seem to contradict the author's position that age-based disparate impact should be permitted. There is no contradiction, however, because the author has raised the BFOQ argument to show that public policy affords African-Americans a special status. As shown below, recognizing age-based disparate impact claims will derogate this public policy by injuring the interests of African-Americans. In contrast, disparate impact lawsuits instituted by women do not seriously conflict with the interests of African-Americans. The reason for the absence of conflicting interests is that women do not occupy a disproportionately high number of top-tier jobs. To the contrary, many employers have systemically excluded women from numerous categories of desirable jobs. Thus, women need disparate impact protections more than workers over forty.

[282] Exec. Order No. 11,246, 3 C.F.R. 339 (1965). Section 202 of this order provided: "The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." 30 Fed. Reg. 12,320 (Sept. 28, 1965). The executive order was amended in 1967 to include sex and religion as a protected classes. Exec. Order No. 11,375, 3 C.F.R. 684 (1967). The Office of Federal Contract Compliance Programs within the Department of Labor issues administrative orders consistent with this executive order. One such administrative order requires written affirmative action compliance programs for federal contractors with fifty or more employees and who do at least $50,000 of annual business with the federal government. 41 C.F.R. § 60-1.40(a) (1969). *See generally* Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 612–18 (1998) (discussing Executive Order No. 11,246 and administrative actions implementing it).

[283] 443 U.S. 193 (1979).

[284] *Id.* at 197. *See generally Undo Hardship*, *supra* note 247, at 510–12, 552 (analyzing the *Weber* decision and arguing that affirmative action should be a mandatory remedy when an employer commits a systemic civil rights violation).

[285] United Steelworkers of America v. Weber, 443 U.S. 193, 209 (1979). The Court held that, to be valid under Title VII, an affirmative action plan must meet three requirements. First, a plan may seek minority employees only to fill jobs in categories

ironic indeed," the Court observed, "if a law triggered by a Nation's concern over centuries of racial injustice . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish patterns of racial segregation and hierarchy."[286] No one talks about age-based affirmative action.[287] Older workers do not need this extraordinary form of relief because they have not endured a history of injustice.

Finally, racial discrimination subjects a violator to harsher remedies than other forms of discrimination. Juries may award compensatory and punitive damages for intentional acts of discrimination based on religion, sex, or national

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traditionally closed to them. Kaiser Aluminum's plan met this element because its work force had a conspicuous lack of minority workers in craft-worker jobs. *Id.* at 197–98. Next, a plan may not unnecessarily trammel the rights of white workers, by, for example, barring them absolutely from advancement. Kaiser Aluminum's affirmative action plan met this element because whites remained eligible for the remaining half of the craft jobs. *Id.* at 208. Finally, a plan must provide for its own termination once its goals have been achieved. Kaiser Aluminum's affirmative action plan met this requirement by providing for its termination when the percentage of skilled craft workers at Kaiser Aluminum approximated the percentage of blacks in the labor market. *Id.*

[286] *Id.* at 204. *See also* H.R. REP. NO. 88-914, at 18 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393 ("No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution to other forms of discrimination.").

[287] Gender-based affirmative action is also prevalent. In *Johnson v. Transportation Agency*, 480 U.S. 616, 620–21 (1987), women were drastically underrepresented in a number of job categories, including dispatcher. To rectify this imbalance, the agency adopted an affirmative action plan, which permitted gender to be considered as one factor in job promotion decisions. Johnson, a male, and Joyce, a female, were among the twelve applicants for an open dispatcher position. *Id.* at 623. At initial interviews Johnson scored seventy-five, which was the second highest score among all applicants, whereas Joyce scored seventy-three. *Id.* at 623–24. After a second interview, a board of three supervisors recommended Johnson for the job. *Id.* at 624. Joyce complained to the affirmative action coordinator that the process favored male candidates. The coordinator conveyed Joyce's feelings to Graebner, the person responsible for making the final decision, *id.* at 624, and he awarded the job to Joyce. *Id.* at 625. Johnson commenced a suit alleging a violation of Title VII based on sex. *Id.* The agency defended by pointing to its affirmative action plan. The Supreme Court held for the agency, ruling that the agency's affirmative action plan was consistent with Title VII. First, the plan addressed a manifest imbalance in the number of women employed in certain job categories, the lopsided figures showing that of 238 skilled craft jobs women held none at all. *Id.* at 636. Second, the plan did not trammel the rights of male employees because it used flexible goals, and because Johnson did not lose his job—he merely lost the opportunity for a promotion for which he might reapply in the future. *Id.* at 638. Third, the plan was temporary, stating that it sought to "attain," not maintain, a balanced workforce. *Id.* at 640.

origin,[288] but in all such cases, statutory caps limit damage awards.[289] Similarly, statutory liquidated damages limit monetary awards for age discrimination to double what would otherwise be available.[290] The penalty for racial discrimination, however, is unbounded by statute.

2. Adverse Effects on African-Americans

The effects of past and present discrimination manifest themselves today in an unemployment rate over twice as high for blacks as for whites. (See Table 3.) After the disparity declined in the mid- to -late nineties, the gap has widened over the past several years. (See Table 3.) Since African-Americans are underrepresented in the workforce, disparate impact lawsuits brought by workers over forty will benefit white workers more than black workers. Over the years, age discrimination cases have proliferated.[291] If the law recognizes disparate impact claims for older workers, age discrimination lawsuits will proliferate even more, particularly when cases begin filling the calendars of circuits, including the second and ninth, that have refused to recognize such claims. The vast number in the protected class assures a bounty of threatened and filed cases.

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[288] 42 U.S.C. § 1981a(a)(1) (2000).

[289] 42 U.S.C. § 1981a(b)(3) (2000).

[290] *See* 29 U.S.C. § 216(b) (2000). In *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617 (1993), the Court held that a "willful" violation within the meaning of § 7(b) requires that the employer knew or showed reckless disregard for whether the discriminatory acts committed violated the ADEA.

[291] *See* Brendan Sweeney, Comment, *"Downsizing" The Age Discrimination in Employment Act: The Availability of Disparate Impact Liability*, 41 VILL. L. REV. 1527, 1527 & n.2 (1996) (citing statistics that show the burgeoning number of age discrimination cases).

Table 3: Unemployment Rates of Caucasians and African-Americans[292]

Year	White	Black
1994	5.7%	13.1%
1995	4.8	10.3
1996	4.9	10.6
1997	4.5	10.8
1998	4.0	9.4
1999	3.8	7.8
2000	3.4	8.0
2001	3.6	8.2
2002	5.1	10.0
2003	5.1	10.5
2004	4.9	10.5

Another reason that litigious activity will spike is that many of the costs of doing business correlate positively with age. For example, salaries and fringe benefits including insurance expenses increase as employees get older. Business managers often base hiring and firing decisions on how most effectively to reduce these costs. Such practices will spur older workers, most of whom are white, to exercise their rights to challenge practices that affect them disproportionately.

Disparate impact cases are easier to prove than disparate treatment cases because the elusive element of intent is not part of a disparate impact case.[293] Plaintiffs who simply make a statistical showing of disproportionate impact ordinarily defeat defendants' motions for summary judgment.[294] Such cases tend to get to juries.[295] The litigation costs and risks of unfavorable verdicts may induce employers to discard business practices that may invite an unhappy judicial

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[292] Bureau of Labor Statistics, Household Data Annual Averages, *available at* ftp://ftp.bls.gov/pub/special.requests/lf/aat3.txt (last visited Nov. 2, 2004).

[293] *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988) (noting that "[t]he factual issues and character of the evidence are inevitably somewhat different when the plaintiff is exempted from the need to prove intentional discrimination . . . ." and that "[t]he evidence in these 'disparate impact' cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities").

[294] *See id.*

[295] *See* Pontz, *supra* note 195, at 286 (arguing that "[w]ith the reduced burden of proof on the plaintiff, not only are claims more likely to be successful on the merits, but claims have an even greater chance to survive an employer's motion for summary judgment").

encounter. Such practices will lock whites into desirable jobs and lock blacks out.

The RFOA defense might provide a counterweight. To discourage a precipitous rise in age discrimination lawsuits, courts might interpret the defense merely to require an employer to make a showing of reasonableness, and not a showing of business necessity, which usually entails statistical analysis.[296] In *Caron v. Scott Paper Co.*,[297] Judge Carter debunked concerns that allowing disparate impact claims in age discrimination cases would hamstring employers. He remarked, "The ADEA allows [an] employer to defend against an age discrimination claim by showing that the 'differentiation is based on reasonable factors other than age . . . .' Congress consequently carved out exemptions to limit the statute's reach to unreasonable and unnecessary policies."[298]

In *Finnegan v. Trans World Airlines, Inc.*,[299] Judge Posner recognized the problem of requiring employers to justify cost-cutting measures that affect older workers disproportionately. Faced with impending bankruptcy, TWA prospectively capped vacation time at four weeks per year.[300] The brunt of this policy fell on older workers who, because of time served with the company, had accrued more vacation time than the company's younger workers.[301] Judge Posner affirmed summary judgment for TWA, explaining, "it is impossible to reduce the costs of fringe benefits without making deeper cuts in the benefits of older workers, simply because, by virtue of being older, they have greater benefits."[302] Though recognizing that TWA would have had the opportunity to establish a business necessity defense, Judge Posner explained, "Practices so tenuously related to discrimination, so remote from the

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[296] *See* Player, *supra* note 148, at 843 (pointing out that "[e]conomic efficiency in terms of salary savings may or may not be 'reasonable,' depending one one's view of business rationality").

[297] 834 F. Supp. 33 (D. Maine 1993).

[298] *Id.* at 37 n.4.

[299] 967 F.2d 1161 (7th Cir. 1992).

[300] *Id.* at 1162. Before the company instituted the policy, employees with more than sixteen years of service were entitled to more than four weeks annual vacation, and workers with thirty years of service were entitled to seven weeks. *Id.*

[301] *Id.* The policy did not breach contractual rights because it did not nullify accrued vacation time. *Id.*

[302] *Id.* at 1164.

objectives of civil rights law, do not reach the prima facie threshold."[303]

The views of Judges Carter and Posner, while encouraging, conflict with a substantial body of authority. The EEOC, which supports extending disparate impact liability to age-based cases, has adopted a guideline that interprets the RFOA defense as the equivalent of the full-blown business necessity defense, rather than as a more permissive reasonableness defense.[304] To justify an employment practice as a business necessity, the employer would ordinarily be obligated to offer expert statistical analysis. Furthermore, cases in jurisdictions that have already accepted disparate impact liability in age cases do not inspire optimism. In *Camacho v. Sears Roebuck De Puerto Rico*,[305] Sears reduced salaries across-the-board to lower its costs. Some of Sears' older employees asserted that this decision had a disparate impact on them.[306] Expressly rejecting Judge Posner's approach, the court denied Sears' motion for summary judgment because Sears had offered only a "self-serving" affidavit to support its business justification defense.[307] Apparently, the court wanted

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[303] *Id.* at 1165. *See also* Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union, 53 F.3d 135, 139 (6th Cir. 1995) (quoting Allen v. Diebold, Inc., 33 F.3d 674, 677 (6th Cir. 1994) (noting that "[t]he ADEA was not intended to protect older workers from the often harsh economic realities of common business decisions and the hardship associated with corporate reorganizations, downsizing, plant closings and relocations")). *But see* Alexander, *supra* note 111, at 104–05 (arguing that judicial oversight of downsizing decisions affecting older workers is necessary because most instances of corporate downsizing decrease productivity). Kaminshine, *supra* note 175, at 279–85 (advocating a balancing of the interests of the employer and employee by taking into account the seriousness of the employer's need to reduce costs and the feasibility of less onerous alternatives to discharge such as salary reduction of older workers); Sweeney, *supra* note 291, at 1576–77 (recommending that the courts, using the business necessity defense, strike a balance between the rights of workers over forty and the cost justifications of employers).

[304] 29 C.F.R. § 1625.7(d) (2003). The guideline provides:

> When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity.

Id.

[305] 939 F. Supp. 113 (D. P.R. 1996).

[306] *Id.* at 115.

[307] *Id.* at 123. Judge Perez-Gimenez commented:

> If Judge Posner's view is that Sears should not be asked to justify its policy at all, then his view conflicts with (1) the language of the ADEA as it has reasonably been interpreted by the executive agency charged with its enforcement, and (2) the controlling presumption in this circuit.

Id (citation omitted).

statistical proof. The court was misguided to require Sears to hire an expert and offer a validation study to justify its attempt to cut expenses. Even if Sears had made such a showing on the motion for summary judgment, the plaintiffs, armed with their own expert's analysis, could have attacked Sears' statistical methodology and stood a good chance of creating a triable issue of fact. A trial would have followed to decide the legitimacy of a facially neutral, salary-reduction plan that inevitably had the greatest impact on older workers who earn the highest wages. A cost-savings business decision would have led to protracted and costly litigation.

In *Geller v. Markham,*[308] the first case recognizing age-based disparate impact claims, the Second Circuit went a step further, categorically rejecting cost justification as a defense to such lawsuits.[309] To control salary expenditures, the West Hartford School District adopted a "sixth-step" policy, which discouraged the recruitment of teachers with more than five years experience.[310] The school district hired Geller, a fifty-five-year-old teacher for an open position.[311] Early in the school year the school district replaced her with a younger teacher. Geller alleged a disparate impact claim against the school district, proving at trial that the school district's "sixth-step" policy led to her dismissal and replacement with a younger teacher,[312] and Geller's expert witness established that the "sixth-step" policy disqualified a disproportionately high number of teachers over forty.[313] The school district argued that the "sixth-step" policy was permissible under the ADEA because it was a cost-cutting

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[308] 635 F.2d 1027 (2d Cir. 1980). The Supreme Court denied a petition for a writ of certiorari. 451 U.S. 945 (1981). Chief Justice Rehnquist dissented from the decision denying the writ, noting that, even if disparate impact were recognized under the ADEA, the lower courts erred in refusing to recognize cost justification as a defense. He criticized a doctrine that would tie the hands of school boards trying to control expenses. *Id.* at 948 (Rehnquist, J., dissenting).

[309] *Geller*, 635 F.2d at 1034.

[310] *Id.* at 1030.

[311] *Id.* at 1030.

[312] *Id.* at 1032–33.

[313] *Id.* at 1033. The expert testified that 92.6% of teachers in Connecticut had five or more years of teaching experience, whereas only 62% of teachers under forty had that much teaching experience. *Id.* at 1032. The school board argued at trial that, although the "sixth-step" policy seemed to correlate with age, the percentage of hires of teachers over forty did not fall significantly after the school board adopted the "sixth-step" policy. *Id.* at 1033. This testimony came from a non-expert, party witness, who offered statistics that were both uncorroborated and analytically dubious. *Id.* The trial court refused to give this evidence any credence, and the Second Circuit agreed. *Id.* at 1033–34.

measure designed to limit the payroll during a time of budgetary constraints.[314] The Second Circuit relied on a Department of Labor guideline, which provides:

> A general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies.[315]

Ironically, the court misinterpreted this guideline, which simply refers to the principle established in *Los Angeles Dep't of Water & Power v. Manhart.*[316] In *Manhart,* the Court held that requiring female employees to contribute more than males to a pension fund, based on mortality tables showing greater longevity for women than men, violated Title VII.[317] In other words, gender could not be used as a proxy for cost. Similarly, the guideline forbids using age as a proxy for cost.[318] Nevertheless, based on this guideline, the Second Circuit categorically rejected cost-justification as a defense to a charge of disparate impact.[319]

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[314] *Geller,* 635 F. 2d at 1034.

[315] *Id.* In 1967, the Congress authorized the Secretary of Labor to promulgate rules and regulations to implement provisions of the ADEA. Pub. L. No. 90-202, § 9, 81 Stat. 602 (1974). This function was transferred to the EEOC in 1979. 92 Stat. 3781 (1978). The Department of Labor guideline continues as follows: "To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation – an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed." 29 C.F.R. § 860.103(h) (1979). The EEOC adopted the substance of this guideline in a guideline of its own, which provides: "A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f)(2) exception to the Act." 29 C.F.R. § 1625.7(f) (2004).

[316] 435 U.S. 702 (1978).

[317] *Id.* at 704–06.

[318] Chief Justice Rehnquist rejected the Second Circuit's interpretation of the guideline. *See* Markham v. Geller, 451 U.S. 945, 947–48 (1981) (Rehnquist, J., dissenting). He noted that a cost-saving measure that happens to correlate with age does not violate the guideline. *Id.*

[319] *Geller,* 635 F.2d at 1034. *Accord* Leftwich v. Harris-Stowe State Coll., 702 F.2d 686, 691 (8th Cir. 1983) (rejecting the possibility of cost justification as a defense in age-based disparate impact case where college laid off tenured professors to cut payroll expenses). In *EEOC v. Newport Mesa Unified School Dist.*, 893 F. Supp. 927 (C.D. Ca. 1995), Judge Taylor reached a contrary result. The school district had a policy of hiring comparatively inexperienced teachers to avoid the higher salary levels of more experienced teachers. *Id.* at 929. Judge Taylor rejected *Geller's* and *Leftwich's* interpretation of 29 C.F.R. § 860.103(h), finding instead that the guideline and its EEOC successor guideline prohibited using age as a proxy for cost. *Id.* at 931. He also applied the "reasonable factor other than age" defense rather than the business

If the Supreme Court recognizes disparate impact liability under the ADEA, circuits that have shown hostility toward such claims may react to cost-cutting measures as Judge Posner did. But even if these courts more readily accept employers' business necessity or RFOA defenses, plaintiffs still have the fallback position of demonstrating a less discriminative alternative. Such an alternative might be voluntary pay cuts. Another might be job restructuring such as the creation of part-time positions. Employers will rarely win such cases on summary judgment. The cost of litigating and the chance of losing to a sympathetic plaintiff who appeals to a jury's sentiments may discourage employers from contesting factually weak claims. Employers may find it easier to settle or to retain older workers than to defend reasonable cost-cutting policies.

Apart from harming business, engrafting disparate impact into the ADEA will result in an unintended adverse consequence on African-Americans. White workers will be entrenched in jobs throughout the marketplace. Such a practice will frustrate affirmative action. More broadly, African-Americans will be impeded from attaining a rate of employment equivalent to their white counterparts. The kinds of jobs commonly held by workers over forty aggravate the potential harm to African-Americans. The barriers to equal employment opportunity have not come crashing down. Change creeps forward over a period measured in decades. The most lucrative and prestigious jobs, including supervisory and executive positions, most stubbornly elude efforts to achieve equal employment opportunity.[320] Even today, most African-

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necessity defense because not to apply the business necessity defense would be to treat it as surplusage. *Id.* at 932. Cost savings seemed to Judge Taylor to be a reasonable factor other than age. *Id.* at 932. Finally, although he agreed in principle that a plaintiff might win a disparate impact case if the plaintiff showed a feasible less discriminatory alternative, he rejected plaintiff's argument that she would have accepted a reduced salary because such an arrangement would have violated the relevant collective bargaining agreement. *Id.* at 933–34. Judge Taylor therefore granted the school district summary judgment. *Id.* at 934.

[320] One commentator has stated:

> [T]he numbers of Blacks that have cracked the corporate glass ceiling tells a story less of corporate progress than corporate apartheid. There are still only a handful of Black CEOs at the Fortune 1000 corporations. Nearly ten out of ten senior managers are White males. Black managers make up less than ten percent of the total managerial positions for all races and are paid on average less than their White counterparts.

Dr. Earl Ofari Hutchinson, *Corporate Blind-Eye To King Holiday*, *at* http://www.afrocentricnews.com/html/ofari_corporate_king.html (last visited Nov. 2, 2004). Congress has also recognized this problem. Section 202(a)(1) of the 1991 Civil Rights

Americans aspire more realistically to construction jobs than to upper management positions in major corporations.

Table 4: Employed persons by occupation and race[321]
(In thousands)

	White		Black	
Year	**2002**	**2003**	**2002**	**2003**
Total (all civilian workers)	114,013	114,235	14,872	14,739
Management occupations	12,920	12,827	904	859
Business and financial operations occupations	4,516	4,550	461	509
Professional and related occupations	22,883	23,181	2,454	2,555

In 2003, nearly 13% of all civilian workers were black. Black workers, however, occupied only 7% of management positions. (See Table 4) (showing raw employment data by race). This comparison, understates the disparity because blacks have a higher unemployment rate than whites. Lawsuits initiated by workers over forty do not ordinarily concern menial jobs. By the time a worker has reached middle age he is probably not pumping gas or waiting on tables. Compared to black workers, white workers hold a disproportionately high number of positions in the middle and top echelons of the workforce. Disparate impact lawsuits will therefore tend to freeze African-Americans out of the most desirable and elusive job opportunities.[322] Age-based disparate impact lawsuits will retard rather than advance racial equality in the workplace.

Act states: "Congress finds that despite a dramatically growing presence in the workplace, women and minorities remain underrepresented in management and decisionmaking positions in business." Pub. L. No. 102-166, § 202(a)(1), 105 Stat. 1081 (1991).

[321] Bureau of Labor Statistics, Household Data Annual Averages, *available at* http://www.bls.gov/cps/cpsaat12.pdf (last visited Jan. 13, 2005).

[322] *See* Alfred Blumrosen, *Federal Statutory Law of Employment Discrimination*, 12 SETON HALL L. REV. 186, 192–93 (1981) (book review). Blumrosen has commented, "[T]he prime beneficiaries of the ADEA are white males in their fifties and sixties. They are also the beneficiaries of traditional discrimination against minorities and women. To give them the benefit of the *Griggs* principle will inevitably slow the process of affirmative action for minorities and women." *Id.*

VI. CONCLUSION

In *Smith v. City of Jackson,*[323] the Supreme Court will decide whether age-discrimination plaintiffs may sue for disparate impact discrimination. Proponents of providing disparate impact protection under the ADEA argue that the congruence between the prohibitory sections of Title VII and the ADEA supports their position. Opponents point out that while Congress, in the Civil Rights Act of 1991, amended Title VII to include disparate impact coverage, it declined to insert a similar amendment into the ADEA. They also rely on legislative history in the form of the Department of Labor Report submitted to Congress, but the Labor Report merely muddles the issue. A third argument of opponents – supposed indications in the language of *Hazen Paper* – relies on ambiguities. Most commentators have concentrated on the RFOA defense contained in § 623(f)(1) of the ADEA, but analysis of this provision has not proven any more helpful. Despite several tenable interpretations of this defense, the most persuasive interpretation – that the RFOA defense applies to disparate treatment rather than disparate impact – sheds little if any light. One can pick from a grab bag of arguments.

Some employers believe that a sixtieth birthday forecasts declining energy, competence, and productivity. They junk older workers like worn out pieces of machinery. This is why older workers need the protection of civil rights law – to rid the workplace of intentional discrimination bred by unfounded stereotypes. Disparate treatment law provides precisely the right instrument to achieve this goal. But not all of the remedial approaches of civil rights law are appropriate for this problem. Affirmative action, for example, though necessary to fight racial discrimination, has no place in addressing age discrimination. The same is true of disparate impact theory. It is the wrong means to protect the interests of older workers because they are amply represented even at the highest levels of employment. No one should worry that facially neutral practices are excluding older workers from prominent jobs. Some are beguiled by a flawed syllogism: Older workers comprise a protected class; disparate impact theory applies to

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[323] 351 F.3d 183 (5th Cir. 2003), *cert. granted*, 72 U.S.L.W. 3614 (U.S. Mar. 29, 2004) (No. 03-1160).

all other classes protected by civil rights law; therefore disparate impact law should protect older workers. It is a feel-good argument: Let's provide older workers with as many rights as other protected classes. But a reflexive extension of rights should not direct public policy. One should look deeper into the implications of such a decision.

African-Americans have survived a history of denial and exclusion. Of all the classes protected by civil rights law, the class of African-Americans has deservedly received the highest level of protection. It is regrettable that this policy has not translated into corporate practice. Even today, the unemployment rate of African-Americans is twice that of whites,[324] and many employers balk at placing even the most qualified black workers in positions of significant responsibility. Forty years after enactment of the 1964 Civil Rights Act, stereotypes of black laziness and ineptitude lurk in the corners of the workplace. Workers over forty comprise more than half of the labor force, but African-Americans, because of their high unemployment rate, are underrepresented in this immense and growing protected class. They are therefore not proportional beneficiaries of disparate impact lawsuits. Because blacks are underrepresented in management positions, they will not participate fully in typical age discrimination lawsuits in which lucrative, mid- and high-level management positions are at stake. If the ADEA provides disparate impact protection to older workers, an unintended but inevitable consequence will be that African-Americans will be excluded from desirable jobs that business has traditionally reserved for whites. Policymakers must reject this tradeoff. African-Americans should not have to ride a seesaw of civil rights.

[324] *See supra* note 292 and Table 3 (showing unemployment statistics for blacks and whites).