
5-1-2005

Discriminating among Discrimination: The Appropriateness of Treating Reverse Age Discrimination Differently from Reverse Race Discrimination

Andrea B. Short

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Andrea B. Short, *Discriminating among Discrimination: The Appropriateness of Treating Reverse Age Discrimination Differently from Reverse Race Discrimination*, 83 N.C. L. REV. 1065 (2005).

Available at: <http://scholarship.law.unc.edu/nclr/vol83/iss4/8>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Discriminating Among Discrimination: The Appropriateness of Treating Reverse Age Discrimination Differently from Reverse Race Discrimination

“Old age equalizes—we are aware that what is happening to us has happened to untold numbers from the beginning of time.”¹

Aging is a universal process to which there is no real desirable alternative. However, American culture today seems more obsessed with youth and looking young than perhaps ever before.² Reality television shows like *Extreme Makeover*,³ *The Swan*,⁴ and *I Want a Famous Face*⁵ allow viewers to watch people going under the knife for multiple plastic surgeries, emerging as often-unrecognizable, younger-looking, leaner, and more flawless versions of themselves.⁶ Pharmaceutical companies hawk drugs like Viagra that promise to restore men's youthful sexual vigor.⁷ And across the country, people attend parties where the main refreshment is an injection of botulism toxin, or Botox, into the face to temporarily smooth wrinkles and lines.⁸ Undeniably, youth and looking young are in style.

Youth has also traditionally been considered an asset in the employment context. Aging Americans have historically faced

1. ERIC HOFFER, REFLECTIONS ON THE HUMAN CONDITION 92 (1973).

2. See, e.g., Marco R. della Cava, *Appearances Can Be Deceiving*, USA TODAY, Sept. 9, 2003, at 1D (noting that plastic surgeries and use of “non-surgical indulgences” like Botox are on the rise, partially in response to and partially feeding the trend of reality television shows in which participants receive plastic surgery and outspoken celebrities laud the results of their own plastic surgeries).

3. *Extreme Makeover* chronicles the Extreme Team, a group of surgeons, dentists, and stylists who make over participants through a litany of surgical procedures. See ABC.com, *The Show*, at <http://www.abc.go.com/primetime/extrememakeover/show.html> (last visited Jan. 13, 2005) (on file with the North Carolina Law Review).

4. *The Swan* focuses on transforming women who consider themselves “ugly ducklings” through surgical procedures, physical training, and emotional therapy. See Fox.com, *The Swan*, at <http://www.fox.com/swan/home.htm> (last visited Jan. 13, 2005) (on file with the North Carolina Law Review). At the end of the season, the show's participants are part of a pageant whose winner is named “The Swan.” *Id.*

5. *I Want a Famous Face* documents the “journey[s]” of people who choose reconstructive surgery to look more like their celebrity idols. See MTV.com, *I Want a Famous Face*, at http://www.mtv.com/onair/i_want_a_famous_face (last visited Feb. 3, 2005) (on file with the North Carolina Law Review).

6. See Booth Moore, *America, the Beautified*, L.A. TIMES, July 11, 2004, at E1.

7. See Dr. Jim Taylor, *A Second Coming of Age*, AM. DEMOGRAPHICS, June 2004, at 36.

8. See Caitlin Cleary, *Wine? Brie? Botox?*, SEATTLE TIMES, Nov. 22, 2002, at E1.

challenges in the workplace, especially when competing with younger workers.⁹ Having difficulty finding a job when competing with younger applicants occurs because younger workers are less expensive to employ, and employers may believe younger workers will be abler, more effective workers.¹⁰ Seeking to ease these and other problems faced by older workers, Congress in 1967 passed the Age Discrimination in Employment Act ("the ADEA").¹¹ The ADEA was designed to help remedy discrimination against older workers based on unfounded assumptions about older workers' abilities to continue to successfully perform their jobs.¹² The ADEA, which protects only workers ages forty and older,¹³ provides that "[i]t shall be unlawful for an employer . . . to fail or 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."¹⁴

In *General Dynamics Land Systems, Inc. v. Cline*,¹⁵ the older workers received the benefit for a change. A group of employees, ages forty to forty-nine,¹⁶ sued their employer after a new collective bargaining agreement eliminated the employer's retiree health insurance benefits program for workers then under age fifty.¹⁷ Thus, older workers ages fifty and older retained their benefits at the expense of workers ages forty to forty-nine, who were protected by the ADEA.¹⁸ When the case reached the Supreme Court, the

9. See *Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 90th Cong. 151 (1967) (Sup. Docs. No. Y4.Ed 8/1:Ag 3/2) [hereinafter *House Hearings*] (statement of Rep. Eilberg).

10. See *id.* at 45 (statement of Norman Sprague, Director, Employment and Retirement Program, National Council on the Aging).

11. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. §§ 621-634 (2000)).

12. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621(b) (2000).

13. See *id.* § 631(a).

14. *Id.* § 623(a).

15. 540 U.S. 581 (2004).

16. See *id.* at 584.

17. *Id.* at 584-85.

18. See 29 U.S.C. § 631(a) (protecting workers ages forty and older). Because the employees ages forty to forty-nine were discriminated against in favor of *older* workers, the District Court called this claim one of "reverse age discrimination" and, like all district and circuit courts before it, held that no relief was available for such a claim under the ADEA. See *Cline v. Gen. Dynamics Land Sys., Inc.*, 98 F. Supp. 2d 846, 848 (N.D. Ohio 2000), *rev'd*, 296 F.3d 466 (6th Cir. 2002), *rev'd*, 540 U.S. 581 (2004). A divided Sixth Circuit panel reversed, justifying its decision on the plain language of the ADEA. *Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466, 469 (6th Cir. 2002), *rev'd*, 540 U.S. 581 (2004).

majority held that the ADEA does not permit reverse age discrimination claims.¹⁹ In deciding that younger workers within the ADEA's protected class have no cause of action under the ADEA against employers who discriminate against them in favor of their older coworkers,²⁰ the six-Justice majority supported this interpretation by referring to the "natural reading of the whole" statute,²¹ the legislative history of the ADEA,²² and case precedents.²³ Meanwhile, Justice Thomas assailed the majority's result, asserting the Court's reasoning conflicted with its prior recognition of reverse discrimination claims under other nondiscrimination statutes, particularly Title VII of the Civil Rights Act of 1964 ("Title VII").²⁴

The *Cline* majority ineffectively attempted to distinguish age discrimination from racial discrimination on a purely semantic level, suggesting that the term "age" used in the ADEA is not comparable to the term "race" used in Title VII. Writing for the majority, Justice Souter concluded: "Race . . . [is a] general term[] that in every day usage require[s] modifiers to indicate any relatively narrow application. . . . But the prohibition of age discrimination is readily read more narrowly than analogous provisions dealing with race" ²⁵ However, the Court's support for this conclusion is meager. The Court simply insisted that when paired with the word "discrimination," "race" is a general term while "age" is specific and naturally refers to "old age."²⁶

19. *Cline*, 540 U.S. at 584. The Supreme Court's decision resolved a circuit split between the Sixth and Seventh Circuits. In *Cline v. General Dynamics Land Systems*, 296 F.3d 466, 469 (6th Cir. 2002), *rev'd*, 540 U.S. 581 (2004), the Sixth Circuit became the only circuit to recognize a reverse age discrimination claim under the ADEA. Meanwhile, decisions holding that the ADEA does not permit reverse age discrimination claims abounded. See *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226, 1228 (7th Cir. 1992) ("The ADEA does not provide a remedy for reverse age discrimination."); *Karlen v. City Colls. of Chi.*, 837 F.2d 314, 318 (7th Cir. 1988) ("[T]he Age Discrimination in Employment Act does not protect the young as well as the old, or even, we think, the younger *against* the older."); *Dittman v. Gen. Motors Corp.*, 941 F. Supp. 284, 287 (D. Conn. 1996) ("ADEA does not bar discrimination against the young in favor of the old."); *Parker v. Wakelin*, 882 F. Supp. 1131, 1140 (D. Me. 1995) ("The ADEA has never been construed to permit younger persons to claim discrimination against them in favor of older persons.").

20. *Cline*, 540 U.S. at 584.

21. *Id.* at 586.

22. See *id.* at 586–92 (discussing the legislative history of the ADEA).

23. See *id.* at 592–94 (reviewing case precedents).

24. See *id.* at 602 (Thomas, J., dissenting). Title VII prohibits employment discrimination based on a number of factors, including race and sex, but not age. See 42 U.S.C. § 2000e-2 (2000).

25. *Cline*, 540 U.S. at 597–98. The Court made the same suggestion with regard to distinction between the terms "sex" and "age." *Id.*

26. *Id.* at 596.

In spite of the Court's unsatisfying semantic analysis, the Court reached the correct conclusion in deciding to treat age discrimination differently from race discrimination.²⁷ Thus, while the majority's responses to Justice Thomas's charge that the Court was disregarding precedent are not wholly satisfying,²⁸ the Supreme Court rightly declined to treat age discrimination and race discrimination similarly in *Cline*.²⁹ Congress has treated age and race discrimination differently in its legislation, broadly protecting people from race discrimination in Title VII while treating age discrimination separately, and in a more limited way, in the ADEA.³⁰ In doing so, Congress has recognized that the two characteristics—age and race—are substantively different in important ways that justify different treatment and different levels of protection from discrimination.³¹

27. See Elena Minkin, Comment, *Flourishing Forties Against Flaming Fifties: Is Reverse Age Discrimination Actionable Under the Age Discrimination in Employment Act?*, 48 ST. LOUIS U. L.J. 225, 266–72 (2003) (arguing before *Cline* was decided that both Congress's and the Supreme Court's different treatment of race discrimination and age discrimination justifies allowing reverse discrimination claims for race but not for age).

28. See *Cline*, 540 U.S. at 597–98.

29. In doing so, the Supreme Court also decided to treat age discrimination differently from sex discrimination. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (holding that Title VII sex discrimination protections are available to men in a same-sex sexual harassment claim). Sex discrimination is more analogous to race discrimination than age discrimination. Some of the same rationales for extending protections beyond the group for whose benefit the legislation was first enacted apply as well to sex as to race. First of all, like race and unlike age, sex is an immutable characteristic, one with which a person is born and for which a person has no individual responsibility. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (“[S]ince sex, like race . . . is an immutable characteristic determined solely by birth, the imposition of special disabilities upon members of a particular sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility.”). Furthermore, like racial minorities, women have historically suffered from “pervasive, although at times more subtle” discrimination in education, employment, and politics. *Id.* However, sex is also like age in that there are sometimes legitimate reasons to discriminate based on gender because of biological differences between women and men. See *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (“Supposed ‘inherent differences’ are no longer accepted as a ground for race . . . classifications. Physical differences between men and women, however, are enduring: ‘The two sexes are not fungible’” (internal citations omitted)).

30. Compare 42 U.S.C. §§ 2000e–2000e-17 (2000) (treating race and sex discrimination), with 29 U.S.C. §§ 621–634 (2000) (treating age discrimination). Title VII was enacted in 1964, and the ADEA was enacted three years later in 1967. See Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253 (1964) (codified at 42 U.S.C. §§ 2000e–2000e-17 (2000)); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. §§ 621–634 (2000)). See generally Minkin, *supra* note 27, at 266–72 (discussing Congress's purposes in enacting Title VII and the ADEA).

31. See, e.g., *House Hearings*, *supra* note 9, at 449 (statement of Rep. Burke) (“Racial . . . discrimination results in nonemployment because of feelings about a person entirely

The Supreme Court has also interpreted laws involving age discrimination differently from those involving race discrimination, always treating race discrimination with more exacting scrutiny and allowing broader disparate impact claims under Title VII than under the ADEA.³² With *Cline* as a guide, this Recent Development examines the real differences between age discrimination and race discrimination and the reasons the differences justify different treatment of age discrimination and race discrimination in the context of so-called "reverse discrimination."³³

While some aspects of the *Cline* majority's reasoning are beyond the scope of this Recent Development,³⁴ the discussion of the

unrelated to his ability to do a job. This is hardly a problem for the older job seeker.").

32. See *infra* notes 82–144 and accompanying text (discussing the Supreme Court's different treatment of age discrimination and race discrimination).

33. Used here and throughout this Recent Development, the term "reverse discrimination" means discrimination against a person or group that does not have the characteristic for which the antidiscrimination plan was originally put in place (e.g., a white person claiming discrimination based on her race). Cf. David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657, 662 (2000) (advocating limiting the extent to which white plaintiffs could claim discrimination based on race at least in the context of affirmative action programs and leaving such matters to Congress and the political process). Schwartz, then, might prefer to treat race and age discrimination similarly, at least insofar as treating them similarly means not allowing reverse discrimination claims in any case. See *id.*

34. In deciding that reverse age discrimination claims are not possible under the ADEA, the majority chose not to defer to the interpretation of the Equal Employment Opportunity Commission ("EEOC"), the agency charged by Congress with interpreting the ADEA. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 599–600 (2004). The EEOC's interpretation provided that "if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor." 29 C.F.R. § 1625.2(a) (2003). The majority in *Cline* determined that Congress's intent in the ADEA was unambiguous that the statute's protections were only extended to older workers who might be discriminated against in favor of younger workers. *Cline*, 540 U.S. at 600. But see *id.* at 605–06 (Thomas, J., dissenting) (determining that Congress's intent in the ADEA was unambiguous that the statute's protections attach whenever a worker over forty is discriminated against based on age). Neither the majority nor the dissent purported to decide whether the EEOC's interpretation in this case was entitled to "Chevron deference," the standard of review applied to an agency's interpretation of a statute that agency administers. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Under *Chevron*, if Congress's intent is unambiguous, the court and agency must give effect to that intent. *Id.* But if the court determines that Congress has not directly spoken to the precise question at issue (e.g., if the statute is silent or ambiguous on the matter before the court), the court, rather than construing the statute on its own, defers to the agency's interpretation so long as that interpretation is reasonable. *Id.* at 843. For a discussion of the EEOC's interpretation of the ADEA and *Chevron*, see Tara-Ann Topputo, Comment, *Finding a Hole in the ADEA: Allowing a Cause of Action for Age Discrimination Among Employees Within the Age-Protected Class*, 29 DAYTON L. REV. 169, 179–80 & n.83 (2003). In *Cline*, Justice Scalia's short

ADEA's history and purpose is pertinent and instructive. The ADEA's history and purpose evince Congress's realization that race and age are very different characteristics. Congress chose not to include age discrimination among the forbidden forms of discrimination under Title VII.³⁵ Congress realized that discrimination based on race is invidious and that there is never a legitimate reason to discriminate based on race because race is totally unrelated to one's ability to work or to learn.³⁶ However, in the context of age discrimination, unlike with race, "there [are] legitimate reasons as well as invidious ones for making employment decisions" based on age.³⁷ For example, as employees age, "higher pension and benefit costs" burden employers, making them cautious about hiring older workers.³⁸ Furthermore, some employers hiring for jobs requiring a high degree of physical alertness or strength may need, in the interest of safety, to make generalizations based on age.³⁹ Instead

dissent included his assessment that the ADEA is ambiguous on the issue of whether reverse age discrimination claims are available and that the Court should therefore follow the EEOC's reasonable construction. *Cline*, 540 U.S. at 601 (Scalia, J., dissenting). Based on the majority's and Justice Thomas's equally fervent arguments that the statute clearly supports their opposing viewpoints, perhaps Scalia is correct. At least the Court should have addressed the possible ambiguity and the reasonableness of the EEOC's construction in turn. Although beyond the scope of this Recent Development, perhaps the fact neither the majority nor Justice Thomas entertained the possibility of ambiguity in the language of the ADEA indicates some ambivalence toward *Chevron*. This uneasiness with *Chevron* deference appears in the Court's greater willingness to resolve statutory meaning at *Chevron* step one to avoid any need to discuss an agency interpretation's reasonableness. See, e.g., Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532, 536 (2000) ("Increasingly, the Supreme Court has chosen to resolve interpretive questions at Step One of the Chevron analysis. It frequently has done so by using a textualist approach to statutory interpretation that finds in the statute itself an answer to the interpretive question posed.").

35. See 42 U.S.C. § 2000e-2 (2000) (prohibiting employment discrimination because of an individual's "race, color, religion, sex, or national origin").

36. See *House Hearings*, *supra* note 9, at 449 (statement of Rep. Burke) ("Racial . . . discrimination results in nonemployment because of feelings about a person entirely unrelated to his ability to do a job. This is hardly a problem for the older job seeker."); U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 2 (1965) [hereinafter WIRTZ REPORT]. But see *infra* notes 133-44 and accompanying text (noting that the Supreme Court has held that a form of racial discrimination, namely voluntary race-conscious affirmative action plans, are not prohibited where employers are attempting to remedy past discrimination by opening traditionally segregated jobs to racial minorities).

37. *Cline*, 540 U.S. at 587.

38. *Id.* at 589.

39. See, e.g., *Maki v. Comm'r of Educ.*, 568 F. Supp. 252, 256 (N.D.N.Y. 1983) (holding that because of "the safety risks involved in operating a school bus" and the difficulty of making a case-by-case determination of the physical hardness of school bus drivers over age sixty-five, mandatory retirement at that age is appropriate and not a violation of the ADEA).

of including age among Title VII's protections, Congress called on then Secretary of Labor W. Willard Wirtz to study the issues relating to age discrimination.⁴⁰ The Secretary of Labor's report ("the Wirtz Report") confirmed that age discrimination was a problem that called for a legislative remedy.⁴¹ But the Wirtz Report made clear that age discrimination was different in kind from racial discrimination in large part due to the existence of legitimate reasons to make age distinctions in the employment context.⁴²

The Wirtz Report identified three general categories of discrimination.⁴³ The first category involved discrimination based on feelings totally unrelated to a person's ability to perform a job.⁴⁴ Though common in the race context, the Wirtz Report found that there was no discrimination against older workers based on feelings totally unrelated to their abilities.⁴⁵ An example of this type of discrimination would be an employer deciding not to hire or promote an African-American worker simply because the employer felt antagonism or animosity towards African Americans generally, without any regard to stereotypes about qualifications or ability.⁴⁶

The second category, "arbitrary" discrimination, was a common problem for older workers.⁴⁷ The Wirtz Report found that older workers were discriminated against "because of assumptions about the effect of age on their ability to do their jobs when there is in fact no basis for these assumptions."⁴⁸ This arbitrary discrimination most commonly took the form of age ceilings for hiring.⁴⁹ For example, a company policy would provide that the company would not hire new workers over age forty-five (based on an arbitrary decision that workers older than forty-five either could not do the work or that they were not worth training) without any regard to individual qualifications of applicants.⁵⁰

Finally, the third category involved instances where there was a legitimate relationship between a worker's age and abilities in the

40. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 703, 78 Stat. 241, 255 (1964) (codified at 42 U.S.C. § 2000e-14 (2000)).

41. WIRTZ REPORT, *supra* note 36, at 3.

42. *Id.* at 2.

43. *Id.*

44. *Id.*

45. *Id.*

46. See Minkin, *supra* note 27, at 231.

47. WIRTZ REPORT, *supra* note 36, at 2.

48. *Id.* (emphasis omitted).

49. *Id.* at 6.

50. See *id.* at 6-8 (reporting survey data on age limitations in hiring and employers' purported reasoning for those age limitations).

employment context.⁵¹ This kind of discrimination was unique to the age context since aging may actually affect workers' physical abilities.⁵² Furthermore, older workers also face the difficulty of employers turning them away, not because of concern about the worker's ability, but rather because seniority, promotion-from-within, and pension and insurance programs place financial burdens on employers that generally increase commensurate with the age of the workers for whom these programs are provided.⁵³ This third type of discrimination, and the impact that increased costs associated with the hiring of older workers have on hiring decisions, was included in the Wirtz Report not because this type of discrimination required a legislative remedy, as arbitrary discrimination did, but to point out that, unlike race, there is sometimes a relationship between a person's age and his ability to perform the job.⁵⁴ Thus, some discrimination based on age in employment is necessarily permissible in stark contrast to the race context.⁵⁵

Congress also rightly recognized that age and race are substantively different characteristics. The cadre of older citizens is "one minority group in which we all seek . . . eventual membership."⁵⁶ At some point, everyone—people of both sexes and people of all races, religions, and sexual and political orientations—will

51. *Id.* at 2.

52. *Id.*

53. *Id.*

54. *See id.*

55. *See, e.g.*, 29 U.S.C. § 623(f)(1) (2000) (providing an exception from the requirements of the ADEA where "age is a bona fide occupational qualification"). No such exception exists in Title VII for race discrimination. While not an exception per se, Title VII has been held not to forbid voluntary affirmative action plans. *See* 42 U.S.C. § 2000e-2(j) (2000); *United Steelworkers v. Weber*, 443 U.S. 193, 204–06 (1979). There is, however, a bona fide occupational qualification ("BFOQ") exception for sex discrimination in Title VII. *See* 42 U.S.C. § 2000e-2(e). Thus, in this instance sex discrimination looks less like race discrimination and more like age discrimination in that there are sometimes legitimate and permissible reasons to discriminate based on sex in employment. *See, e.g.*, *Dothard v. Rawlinson*, 433 U.S. 321, 333, 335–37 (1977) (applying the BFOQ exception of Title VII for sex discrimination). In *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Supreme Court held that an employer could refuse to hire female guards for certain areas of all-male maximum-security prisons. *Id.* at 335–36. The Court reasoned that gender was related to the guard's ability to perform the job of maintaining prison security. *Id.* The Court recognized, however, that the BFOQ exception in Title VII "was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." *Id.* at 334. In another case in which the Court refused to apply the BFOQ exception to a sex discrimination claim, it noted that the ADEA's BFOQ exception has been applied just as narrowly as Title VII's. *See Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991).

56. WIRTZ REPORT, *supra* note 36, at 3.

presumably join the group protected by the ADEA.⁵⁷ All will therefore be in danger of experiencing firsthand some form of arbitrary age discrimination.⁵⁸ The same is not true of race; people are born with racial characteristics that cannot be changed.⁵⁹ As such, race is an immutable characteristic.⁶⁰ A white person cannot know what it is like to be African-American, and vice versa.⁶¹ In contrast, everyone will age no matter what their physical characteristics are.⁶² Most people have family members among the aged, making us naturally more sympathetic to their plight.⁶³ Thus, it is more necessary to vigilantly protect people from race discrimination, because abuse "is more likely to occur against a group with which the abuser has neither immediate nor potential affiliation."⁶⁴ Of the three types of discrimination revealed in the Wirtz Report, discrimination based on feelings totally unrelated to one's ability to do her job is most prevalent in the race context but is virtually nonexistent for age.⁶⁵ Thus, the two characteristics, age and race, have major substantive differences that justify different levels of protection from associated forms of discrimination.

Recognizing these substantive differences and informed of the Wirtz Report's findings with respect to the three different types of

57. See Minkin, *supra* note 27, at 269.

58. *Id.*

59. *Id.*

60. See *id.*

61. See *id.* For example, a white person will likely never experience firsthand the kind of arbitrary and systematic racial discrimination that racial minorities experience from day to day, whether racial profiling on the roads or at airports, or in the employment context. See, e.g., David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999) (interviewing middle class African Americans about their experiences and perceptions with traffic stops and noting that even famous, wealthy African Americans like Will Smith, Al Joyner, and Johnnie Cochran have been subjected to pretextual traffic stops).

62. See Minkin, *supra* note 27, at 269.

63. See *id.* It must be noted that in recent years Americans increasingly have family members of different races due, in part, to adoption and interracial marriage. See, e.g., Tamar Lewin, *New Families Redraw Racial Boundaries*, N.Y. TIMES, Oct. 27, 1998, at A1 (discussing multiracial families created through adoption and discussing one boy's early understanding of race: "[B]oys were white like him . . . and girls, like his African-American sister . . . had dark skin"); David E. Rosenbaum, *Legal License: Race, Sex and Forbidden Unions*, N.Y. TIMES, Dec. 14, 2003, at D4 (noting the increased social acceptance of interracial marriages following the enactment of the ADEA in 1967: "In 1968, the year after the Supreme Court legalized interracial marriages, a Gallup Poll found that people, by more than 3 to 1, still disapproved of marriages between whites and blacks. The last Gallup Poll on the topic, in 1997, showed that two-thirds of adults approved of them").

64. Minkin, *supra* note 27, at 269.

65. WIRTZ REPORT, *supra* note 36, at 2.

discrimination, Congress crafted protections from discrimination based on age and race separately and differently. Rather than originally including age as a protected class within Title VII, or even later amending Title VII to include the aged among its protected classes, Congress enacted the ADEA as an independent statutory regime.⁶⁶ Additionally, the ADEA's protected class is much more limited than those of Title VII.⁶⁷ The Wirtz Report concluded that the arbitrary age discrimination that Congress should seek to remedy begins to affect workers at age forty-five.⁶⁸ But after testimony before the Senate Committee on Education and Labor showed that age discrimination in employment becomes evident at age forty, Congress chose that age as the lower limit for the ADEA's protections.⁶⁹ Thus, unlike in the race context, Congress chose not to protect everyone from age discrimination equally.⁷⁰ The ADEA's protections explicitly extend only to individuals age forty and older, whereas Title VII protects everyone.⁷¹

While the substantive provisions of both statutes utilize the same language,⁷² Congress put in place exceptions in the ADEA that have no counterpart or analog in Title VII.⁷³ With the Wirtz Report's conclusions regarding legitimate discrimination on the basis of age in mind, Congress recognized that sometimes age can permissibly play a role in employment decisions.⁷⁴ These exceptions to employer

66. Minkin, *supra* note 27, at 267.

67. *Id.*

68. WIRTZ REPORT, *supra* note 36, at 6–7.

69. See 113 CONG. REC. 31,252–53 (1967) (statement of Sen. Yarborough).

70. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 591 (2004). Title VII protects everyone from employment discrimination based on race or gender. See 42 U.S.C. § 2000e-2 (2000).

71. The ADEA provides that its protections “shall be limited to individuals who are at least 40 years of age.” 29 U.S.C. § 631(a) (2000).

72. The ADEA's main substantive provision provides, in relevant part, that it is unlawful for an employer “to fail or refuse to hire or to discharge any individual . . . because of such individual's age.” 29 U.S.C. § 623(a)(1) (2000). Title VII provides, in relevant part, that it is unlawful for an employer “to fail or refuse to hire or to discharge any individual . . . because of such individual's race” 42 U.S.C. § 2000e-2(a)(1)–(2) (2000).

73. See *Smith v. City of Jackson*, 125 S. Ct. 1536, 1540–41 & n.3 (2005) (noting that there is no “bona fide occupational qualification” exception under Title VII that allows for discrimination based on race).

74. See *W. Air Lines v. Criswell*, 472 U.S. 400, 411–12 (1985) (“Congress recognized that classifications based on age . . . may sometimes serve as a necessary proxy for neutral employment qualifications essential to the employer's business.”); S. REP. NO. 90-723, at 9 (1967) (Sup. Docs. No. Y1.1/5:90-723) (addressing the ADEA's exception allowing age distinctions “where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business”).

liability are set out in § 623(f) of the ADEA.⁷⁵ For example, employers may make decisions based on “reasonable factors other than age,”⁷⁶ and they may also consider age when it is a “bona fide occupational qualification.”⁷⁷ Employers may also utilize voluntary early retirement plans that benefit older workers but not younger ones (even those over forty).⁷⁸ Thus, built into the ADEA is the idea

75. See 29 U.S.C. § 623(f).

76. See *id.* § 623(f)(1). It is unclear why the employer in *Cline* did not make its decision based on a reasonable factor other than age, like years of service, and grant the retirement health benefits to, say, all employees with thirty or more years of service. The burden would have then been on the plaintiff to prove that years of service was a mere “proxy” for age and that a correlation of which the employer should have been aware existed between the proxy and age. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 613 (1993). *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), requires a plaintiff to prove a discriminatory intent on the part of the employer by showing that the employer knew or should have known that the proxy factor was very closely correlated to age. See *id.* at 612. However, even if the employer in *Cline* had used years of service in designing its benefit plan, the plaintiffs could possibly have established that years of service was a proxy for age. For example, the plaintiffs might have proven that the employer “suppose[d] a correlation between” years of service and age, and acted “on the assumption” that employees who have fewer years of service “are likely to be” younger. See *id.* at 612–13. The Court would then be faced with the same issue that ultimately was decided in *Cline* where the workers discriminated against were the younger members of the protected class and the older members of the class received a benefit. See generally Toni J. Query, Note, *A Rose by Any Other Name No Longer Smells as Sweet: Disparate Treatment Discrimination and the Age Proxy Doctrine After Hazen Paper Co. v. Biggins*, 81 CORNELL L. REV. 530 (1996) (discussing age proxies in greater detail). If the plaintiffs could not show that years of service were a proxy for age, however, the employer’s decision in *Cline*, if based on years of service, would be lawful under the ADEA. See *id.* at 552–55 (discussing the difficulty of establishing that a non-age factor is an age proxy after *Hazen Paper*).

77. See § 623(f)(1). The BFOQ exception has been construed as “extremely narrow.” See *Criswell*, 472 U.S. at 412. Some courts have upheld maximum hiring age limits for law enforcement officers as BFOQs, and others have struck these age limits down. Compare *Reed v. Reno*, 146 F.3d 392, 394 (6th Cir. 1988) (“It is well-established that the maximum entry age for law enforcement officers is a valid exception to the ADEA.”), with *McMahon v. Barclay*, 510 F. Supp. 1114, 1116–17 (S.D.N.Y. 1981) (holding that a statute forbidding hiring of police officers over age twenty-nine could not be defended as a BFOQ).

78. See § 623(f)(2)(A), (B)(ii). In *Karlen v. City Colleges of Chicago*, 837 F.2d 314 (7th Cir. 1988), Judge Posner suggested in dicta that if reverse age discrimination claims were allowed under the ADEA, early retirement plans would have to be available to everyone forty or older, an absurd result that could result in the extinction of the popular early retirement plan. See *id.* at 318. Because of the exceptions in the ADEA, however, some commentators have proposed that Posner and others may have overstated the risk to early retirement plans. For discussion of these statutory exceptions and suggestion that the exceptions should assuage fears that allowing reverse age discrimination claims under the ADEA would result in a slew of challenges to seniority systems and early retirement plans, see Michael E. Franke, Comment, *Age Discrimination Under the Age Discrimination in Employment Act: A Two-Way Street Blocked in One Direction*, 42 BRANDEIS L.J. 673, 677–79, 688 (2004), and Amanda Zaremba, Comment, *The ADEA*

that employers may make legitimate age-based distinctions that "favor the aged over the young."⁷⁹ No analogous exceptions are built into Title VII, precisely because Congress intended Title VII to protect all people from discrimination based on race in employment.⁸⁰ On the other hand, the ADEA was promulgated principally to prohibit arbitrary age discrimination based on stereotypes about older workers' abilities and not distinctions related to other, legitimate factors such as pension status.⁸¹

In addition to Congress's different treatment of age and race discrimination, the Supreme Court has consistently treated the two types of discrimination differently. In equal protection cases, the Supreme Court considers race a suspect classification and requires

and Reverse Age Discrimination: The Realities and Implications of Cline v. General Dynamics Land Systems, Inc., 72 U. CIN. L. REV. 389, 411-12 (2003). However, neither article addresses the notion that the very authorization of minimum age requirements for eligibility for certain early retirement plans under ADEA evinces Congress's intention not to protect younger workers within the protected class from discrimination in favor of their older peers. See § 623(1)(1)(a) (allowing employers to set a minimum age as a condition of eligibility for retirement benefits).

79. See Neil H. Abramson, *Early Retirement Incentives Under the ADEA*, 11 INDUS. REL. L.J. 323, 351 n.157 (1989) ("Insofar as seniority systems by their very design favor older employees over younger ones, Congress in the [ADEA] has expressed at least tacit approval of employment institutions that favor the aged over the young."). The majority in *Cline* also listed a litany of federal statutes for which "unwelcome discord" would be introduced were the ADEA interpreted to provide a cause of action for younger workers discriminated against in favor of their older peers. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 597 n.9 (2004) (noting several Tax Code and Employee Retirement Income Security Act ("ERISA") provisions that allow for special benefits for older workers based on the attainment of a certain age, including 26 U.S.C. § 401(a)(28)(B) (2004), which requires "an employer to allow certain employees who reach age 55 to diversify their stock ownership plans in part").

80. See Abramson, *supra* note 79, at 351 n.157.

81. See *id.* at 351. Arbitrary discrimination based upon age involves employers' erroneous beliefs that "productivity and competence decline with old age." See *Hazen Paper*, 507 U.S. at 610 (holding that there is no violation of the ADEA in firing an employee whose pension is to vest soon because pension status and age are "analytically distinct," even though the status of being close to vesting would not occur without advanced years). Thus, if that particular forbidden stereotype is not the basis for an employer's decision to discriminate against older workers, there is no ADEA violation. See *id.* at 612 (noting that there may be some other violation, such as an ERISA violation, if the employer discriminates on the basis of some other prohibited stereotype or factor). When an employer gives a benefit to an older worker at the expense of a younger worker, even one within the ADEA's protected class, the stereotype that productivity declines with age is not playing into the decision. In *Cline*, the employer instituted a discriminatory program where an employee's age determined whether or not the employee received certain benefits. *Cline*, 540 U.S. at 584. But since older workers within the ADEA's protected class received the benefit, the employer's decision could not have been based on the impermissible stereotype of the older, faltering worker.

courts to strictly scrutinize laws making distinctions based on race.⁸² Among other reasons justifying strict scrutiny, the Court has focused on the fact that race is an immutable trait⁸³ and also that racial minorities are among the “discrete and insular minorities” without effective access to the political process.⁸⁴ On the other hand, the Supreme Court has rejected arguments that age should be a suspect classification entitled to greater judicial scrutiny.⁸⁵ A person’s age is naturally always changing and thus is not immutable, even if a person cannot voluntarily change his or her age like one can his political party affiliation or domicile.⁸⁶ Furthermore, older people are not “discrete and insular minorities” who are shut out of the political process and are thus in need of greater judicial protection.⁸⁷ In applying only rational basis review to uphold a state law requiring mandatory retirement of police officers at age fifty, the Supreme

82. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“We have held that all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny.’ This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.” (internal citations omitted)); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the most rigid scrutiny.”); *Strauder v. West Virginia*, 100 U.S. 303, 306–07 (1880) (holding that a West Virginia statute prohibiting African Americans from serving on juries violated the equal protection clause of the Fourteenth Amendment). In equal protection cases, discrimination based on sex is also subject to heightened scrutiny. But where race classifications receive strict scrutiny, gender classifications only receive intermediate scrutiny. See *United States v. Virginia*, 518 U.S. 515, 524 (1996); *Craig v. Boren*, 429 U.S. 190, 197 (1976). *Cline* and the other nondiscrimination cases discussed in this Recent Development are not equal protection cases, but the Court’s treatment of the classifications is instructive. See Minkin, *supra* note 27, at 270–72. The Court’s equal protection jurisprudence provides a developed analysis and justifications for why certain groups require protection and what levels of protection are available for different groups.

83. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360–62 (1978) (Brennan, J., concurring in judgment in part and dissenting in part).

84. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

85. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) (“[A]ge is not a suspect classification under the Equal Protection Clause.”).

86. See Minkin, *supra* note 27, at 269–70.

87. See *Kimel*, 528 U.S. at 83. The Court specifically compared race and gender with age and determined that the latter characteristic is very different from both race and gender:

Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as “so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.” Older persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a “history of purposeful unequal treatment.” Old age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it.

Id. (citations omitted).

Court stated:

[Aged] persons, unlike, say, those who have been discriminated against on the basis of race . . . 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. . . . [Old age] marks a stage that each of us will reach if we live out our normal span.⁸⁸

Courts thus afford legislatures great deference when reviewing laws that make distinctions based on age by applying only rational basis review.⁸⁹ The different levels of scrutiny accorded race and age in equal protection cases further indicates the substantive differences between race and age that justify the Court's holding in *Cline*.

Also, in cases interpreting the nondiscrimination laws of Title VII and the ADEA, the Court has differed in the scope of claims it has allowed. Two types of claims are allowed under both Title VII and the ADEA: disparate treatment⁹⁰ and disparate impact.⁹¹ Under

88. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976). On the other hand, in providing protection for workers ages forty and older, Congress could arguably have created a statutory "protected class" under the ADEA. *See Zaremba, supra* note 78, at 405–06. This "protected class" of workers ages forty and over could be analogous to the protected traits of race or gender. Accordingly, courts would have to give a higher level of scrutiny to distinctions based on age within that protected class whether the distinction favored older members of the protected class or only younger ones, since distinctions based on race and gender always receive heightened scrutiny regardless of who is benefited by the distinction. Even though age classifications merit only rational basis review in equal protection cases, perhaps in the employment context Congress's creation of a protected class should signal to the courts that more exacting scrutiny should be applied to causes of action for age discrimination under the ADEA, no matter which way the discrimination runs. *See id.* at 405–07. But not all protected classes receive the same type, or level, of protection by the courts. *See Minkin, supra* note 27, at 271. Here, the forty-and-over protected class was created in the ADEA, a statute enacted to remedy a specific type of arbitrary discrimination and containing broad exceptions not available under Title VII, the separate statute creating race and gender protected classes in the employment context. *See supra* notes 66–81 and accompanying text.

89. *See Minkin, supra* note 27, at 271–72.

90. *See* 29 U.S.C. § 623(a) (2000); 42 U.S.C. § 2000e-2 (2000); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993).

91. *See Smith v. City of Jackson*, 125 S. Ct. 1536, 1540 (2005) ("[T]he ADEA does authorize recovery in 'disparate-impact' cases comparable to *Griggs*"); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–31 (1971) ("Title VII proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."). Until the recent decision in *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005), it was not settled whether an ADEA plaintiff would be allowed to make out a claim based on disparate impact. *See id.* at 1542–44 (opinion of Stevens, J.). Prior to *Smith*, four circuits had refused to recognize a disparate impact theory under the ADEA. *See Smith v. City of Jackson*, 351 F.3d 183, 187 (5th Cir. 2003), *aff'd*, 125 S. Ct. 1536 (2005); *Adams v. Fla. Power Corp.*, 255 F.3d 1322, 1326 (11th Cir. 2001); *Mullin v. Raytheon Co.*, 164 F.3d 696,

a disparate treatment theory, a plaintiff must prove discriminatory intent on the part of the employer.⁹² The protected trait, whether race or age, must actually motivate the employer's decision.⁹³ But under a disparate impact theory, a plaintiff need only "show that a facially neutral employment practice falls more harshly on the protected group than other employees."⁹⁴ Because it is often difficult to prove an employer's discriminatory intent, a plaintiff whose only available theory is disparate treatment has a more difficult case.⁹⁵

703-04 (1st Cir. 1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 (10th Cir. 1996). Furthermore, two circuits had expressed doubt as to the availability of disparate impact claims under the ADEA. See *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir. 1995) (opinion of Greenberg, J.) ("[I]n the wake of *Hazen*, it is doubtful that traditional disparate impact theory is a viable theory of liability under the ADEA."); *Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union*, 53 F.3d 135, 139 n.5 (6th Cir. 1995) ("There is considerable doubt as to whether a claim of age discrimination may exist under a disparate impact theory . . ."). However, the Second, Eighth, and Ninth Circuits continued to recognize disparate impact claims. See *Smith v. Xerox Corp.*, 196 F.3d 358, 367 (2d Cir. 1999); *Lewis v. Aerospace Cmty. Credit Union*, 114 F.3d 745, 750 (8th Cir. 1997); *Palmer v. United States*, 794 F.2d 534, 536-37 (9th Cir. 1986). Unlike Title VII, the ADEA does not expressly provide for disparate impact claims. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000); *Hazen Paper*, 507 U.S. at 609-10.

92. See *No ADEA Liability for Employment Decisions Based on Nonpretextual Factors Closely Correlated with Age*: EEOC v. Francis W. Parker Sch., 37 B.C. L. REV. 374, 374 (1996) [hereinafter *No ADEA Liability*].

93. See *Hazen Paper*, 507 U.S. at 610 ("[A] disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in [the decision making] process and had a determinative influence on the outcome.").

94. *No ADEA Liability*, *supra* note 92, at 374.

95. David A. Strauss, Symposium: *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1644-48 (1991) (arguing that in a world of "covert discrimination," "administrative costs of enforcing a disparate treatment standard" and the "likelihood of errors" are great). Now, even though the Supreme Court has ruled that disparate impact claims are cognizable under the ADEA in *Smith*, it is unclear what showing a plaintiff would have to make under the ADEA for a successful disparate impact claim. In *Smith*, plaintiff police officers over forty years of age sued the city of Jackson, Mississippi after police officers with fewer than five years of service received proportionately larger raises than those with more experience, who also tended to be older. See *Smith*, 125 S. Ct. at 1539. In addition to a disparate treatment claim, the officers claimed that the City's plan adversely affected them because of their age. *Id.* A divided panel of the Fifth Circuit held that there was no disparate-impact claim under the ADEA. *Id.* at 1539-40. While clarifying that there is such a claim under the ADEA, the Supreme Court nonetheless held that these officers had failed to make out a disparate impact claim. *Id.* at 1545-46. Rather, the City's decision was based on "seniority and position," which the Court found to be "reasonable factor[s] other than age" ("RFOA"). *Id.* The RFOA language of the ADEA was not mentioned in the Supreme Court's opinion in *Hazen Paper*, a disparate treatment case. See 29 U.S.C. § 623(f)(1) (2004); *Hazen Paper*, 507 U.S. 604. However, the result in *Smith* is consistent with *Hazen Paper*, in which the Court held that pension status, though closely correlated with age, was not the protected trait—age—nor was it a proxy for age. See *Hazen Paper*, 507 U.S. at 611. Under a disparate impact analysis, it is likely the Court in *Hazen Paper* would have found that pension status was an RFOA. This conclusion is

The Supreme Court's holding in *Hazen Paper Co. v. Biggins*,⁹⁶ a disparate treatment case, put in doubt the availability of a disparate impact theory of liability under the ADEA.⁹⁷ In *Hazen Paper*, the plaintiff Biggins's employment was terminated a few weeks before his pension would have vested.⁹⁸ Overruling the First Circuit, the

bolstered by the fact that in *Smith*, the majority held that "seniority and rank" were "unquestionably" RFOAs under the circumstances. See *Smith*, 125 S. Ct. at 1546. Indeed, it is difficult to think of an employer decision that could not be said to be based on either pension status, seniority, or rank and thus, that would give rise to disparate impact liability under the ADEA. *Smith* therefore may provide scant support for ADEA plaintiffs making disparate impact claims; it is unclear what a successful disparate impact claim under the ADEA would look like. See *id.* at 1560 (O'Connor, J., concurring in judgment). In her concurrence in the judgment in *Smith*, Justice O'Connor, who would have refused to recognize a disparate impact claim under the ADEA, noted that the RFOA exemption "strictly circumscribed" disparate impact claims under the ADEA, because "the challenged employment practice" need only be based on a "'reasonable' nonage factor—that is, one that is rationally related to some business objective." *Id.* (O'Connor, J., concurring in judgment). It is useful to contrast the broad RFOA exemption with the affirmative defense of "business necessity" that must be proved by a Title VII defendant to defeat a prima facie claim of disparate impact. See *id.* at 1546. In the ADEA context, once an employer offers an RFOA for its action, the burden shifts to the plaintiff to "disprov[e] this assertion." See *id.* at 1560 (O'Connor, J., concurring in judgment). Under the "business necessity" test, the employer must prove there are not "other ways . . . to achieve its goals that do not result in a disparate impact on a protected class . . ." *Id.* at 1546.

96. 507 U.S. 604 (1993).

97. See *id.* at 610–11 (reasoning that an employment decision based on factors other than age is acceptable, even if the factor is correlated with age). Biggins, who was sixty-two when fired, argued—and the First Circuit accepted—that his employer fired him to keep Biggins's pension rights from vesting and that his age was inextricably intertwined with that decision. See *Biggins v. Hazen Paper Co.*, 953 F.2d 1405, 1412 (1st Cir. 1992), *rev'd*, 507 U.S. 604 (1993). If not for Biggins's advanced age, his pension would not have been so close to vesting. *Hazen Paper*, 507 U.S. at 610–11; see also Query, *supra* note 76, at 548–55 (discussing *Hazen Paper*). After *Hazen Paper*, the circuits also began to refuse to recognize disparate impact claims under the ADEA. *Smith*, 125 S. Ct. at 1543 & n.9 (opinion of Stevens, J.) ("It was only after our decision in *Hazen Paper* . . . that some [circuit] courts concluded that the ADEA did not authorize a disparate-impact theory of liability."). But see *Smith v. Xerox Corp.*, 196 F.3d 358, 367 n.6 (2d Cir. 1999) (noting, even after the Court's decision in *Hazen Paper*, that the Second Circuit analyzes ADEA claims the same way it analyzes Title VII claims, "including . . . disparate impact ADEA claims"). Prior to 1993 and the *Hazen Paper* decision, courts seemed to hold that disparate impact theory could be used by ADEA plaintiffs. See *Abbott v. Fed. Forge, Inc.*, 912 F.2d 867, 872 (6th Cir. 1990) ("Although disparate impact analysis was developed by the Supreme Court in Title VII race discrimination cases, and has been used by the Court only in that context, other courts have widely applied disparate impact analysis to age discrimination cases brought under the ADEA."); *Leftwich v. Harris-Stowe State Coll.*, 702 F.2d 686, 690 (8th Cir. 1983). The reason given was the similar language of the ADEA and Title VII, and the disparate impact theory was applied the same way as it would have been in a Title VII case. See *Abbott*, 912 F.2d at 872; *Leftwich*, 702 F.2d at 690–93.

98. *Hazen Paper*, 507 U.S. at 607.

Supreme Court held that pension status, though a factor closely correlated with age, could be used in making employment decisions.⁹⁹ According to the Court, there is “no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee’s age,” such as pension status or seniority.¹⁰⁰ This holding made it more difficult for employees claiming age discrimination to prove the discriminatory intent that is requisite for a disparate treatment claim.¹⁰¹

The Supreme Court expressly refrained from addressing the question of whether a disparate impact claim were cognizable under the ADEA in *Hazen Paper*.¹⁰² In spite of this, the holding in *Hazen Paper* impacted the availability of disparate impact claims under the ADEA, with several of the circuits refusing to recognize such claims after *Hazen Paper*.¹⁰³ The *Hazen Paper* decision included the strong language that “[w]hen the employer’s decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes” sought to be remedied by the ADEA “disappears.”¹⁰⁴ The very definition of a disparate impact claim is one in which a plaintiff seeks relief because an employer’s practice, motivated by factors other than the protected trait, “fall[s] more harshly” on the protected class.¹⁰⁵ Such practices motivated by factors other than age but falling more harshly on older workers within the ADEA’s protected class—such as the practice at issue in *Hazen Paper*—were seemingly deemed lawful under the ADEA by the *Hazen Paper* decision.¹⁰⁶ Even Justice Kennedy’s concurrence indicated that he,

99. See *id.* at 611. The Court pointed out the possibility of other bases for liability for an employer who fires an employee because his pension is close to vesting (e.g., liability under ERISA). *Id.* at 612.

100. *Id.* at 609.

101. See Querry, *supra* note 76, at 552–55 (noting that an “employer rarely waves a red flag announcing his or her discriminatory intent”).

102. See *Hazen Paper*, 507 U.S. at 610.

103. See *supra* note 97.

104. *Hazen Paper*, 504 U.S. at 611.

105. See *id.* at 609.

106. See *id.* at 611–12. After *Hazen Paper*, the circuit courts that refused to recognize disparate impact claims under the ADEA did so because they read the decision to allow for employers to make decisions motivated by factors other than age, which is exactly what a disparate impact claim attacks. See, e.g., *Mullin v. Raytheon Corp.*, 164 F.3d 696, 700–01 (1st Cir. 1999). As the First Circuit noted:

Since disparate impact claims encompass the precise scenario that [the Court] describes—disparate impact assigns liability when employment practices are grounded in factors other than the statutorily protected characteristic (say, age), yet fall more harshly on individuals within the precluded group (say, older persons)—the inescapable implication of [the Court’s] statements is that the

Chief Justice Rehnquist, and Justice Thomas, who both joined him, would be reluctant to "carry over disparate impact analysis from Title VII to the ADEA."¹⁰⁷ Thus, lower courts' reading of *Hazen Paper* to effectively, if not explicitly, foreclose disparate impact claims for ADEA plaintiffs, was quite reasonable.¹⁰⁸

In *Smith v. City of Jackson*,¹⁰⁹ a majority of the Supreme Court clarified that while disparate impact claims are possible under the ADEA, such claims are narrower in scope than cognizable disparate impact claims under Title VII.¹¹⁰ Disparate impact claims under the ADEA cannot proceed where the practice at issue is based on "reasonable factors other than age."¹¹¹ Under the test announced by the Supreme Court in *Wards Cove Packing Company v. Atonio*,¹¹² the "employer's exposure to liability on a disparate-impact theory" was "narrowly construed."¹¹³ While *Wards Cove* no longer governs Title VII cases,¹¹⁴ its interpretation of disparate impact claims "remains applicable to the ADEA."¹¹⁵ Under *Wards Cove* and thus under the ADEA, a plaintiff employee must "isolat[e] and identify[] the *specific* employment practices that are allegedly responsible for any observed statistical disparities."¹¹⁶ Alleging simply that there is a disparate impact on employees because of some "generalized policy" is not

imposition of disparate impact liability would not address the evils that Congress was attempting to purge when it enacted the ADEA.

Id.

107. *Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring). Indeed, in *Smith*, Justices Kennedy and Thomas joined Justice O'Connor in a concurrence in the judgment in which she indicated that she would have affirmed the Fifth Circuit on the ground that the ADEA does not authorize disparate impact claims. See *Smith v. City of Jackson*, 125 S. Ct. 1536, 1549 (2005) (O'Connor, J., concurring in judgment). Chief Justice Rehnquist took no part in the decision of the case. See *id.* at 1546. If his joining Justice Kennedy's concurrence in *Hazen Paper* is any indication, the Chief Justice would have provided a fourth vote for Justice O'Connor's position.

108. But see *Smith*, 125 S. Ct. at 1543 (opinion of Stevens, J.) (asserting that nothing the Court said in *Hazen Paper* purported to "address or comment on" disparate impact claims under the ADEA).

109. 125 S. Ct. 1536 (2005).

110. *Id.* at 1544.

111. See *id.* at 1546.

112. 490 U.S. 642 (1989).

113. *Smith*, 125 S. Ct. at 1545; see *Wards Cove*, 490 U.S. at 656-67.

114. In 1991, Title VII was amended to broaden its coverage and to specifically provide for disparate-impact claims. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (1991) (codified at 42 U.S.C. § 2000e-2(K)(1)(A)-(C) (2000)). A reason for this amendment was to "modify the Court's holding in *Wards Cove* . . ." *Smith*, 125 S. Ct. at 1544-45.

115. *Smith*, 125 S. Ct. at 1545.

116. See *id.* at 1545 (quoting *Wards Cove*, 490 U.S. at 656).

sufficient.¹¹⁷ In contrast, under Title VII, if a plaintiff proves that a facially neutral employment practice burdens the protected group more than others, the burden of persuasion then shifts to the employer to prove that the practice is “job related for the position in question and consistent with business necessity.”¹¹⁸

The *Smith* majority recognized that the scope of disparate impact claims allowed under Title VII is broader than those allowed under the ADEA because, “[u]nlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in disparate impact on a protected class, the reasonableness inquiry includes no such requirement.”¹¹⁹ The majority indicated “two textual differences” between the ADEA and Title VII that support the holding that “the scope of disparate-impact liability under [the] ADEA is narrower than under Title VII.”¹²⁰ First, when Title VII was amended in 1991 to explicitly provide for disparate impact claims,¹²¹ the ADEA was not amended to the same effect.¹²² Second, the ADEA’s allowance of employment decisions based on “reasonable factors other than age”¹²³ reflects the idea that “age, unlike race . . . not uncommonly has relevance to an individual’s capacity to engage in certain types of employment.”¹²⁴ Thus the

117. *Id.* In *Smith*, the plaintiffs complained that the city’s pay plan was “relatively less generous to older workers than to younger workers.” *Id.* But their failure to show “any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers” was fatal to their claim. *See id.* However, the Court went on to make clear that even if the plaintiffs in *Smith* had identified the “relevant practice,” the city’s plan was based on RFOAs and thus it could not be liable under the ADEA on a disparate impact claim. *Id.*

118. *See* 42 U.S.C. § 2000e-2(K)(1)(A)(i) (2000) (codifying how a disparate impact claim proceeds).

119. *See Smith*, 125 S. Ct. at 1546.

120. *Id.* at 1544.

121. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–75 (1991) (codified at 42 U.S.C. § 2000e-2(K)(1)(A)–(C) (2000)).

122. *See Smith*, 125 S. Ct. at 1544–45; Nathan E. Holmes, Comment, *The Age Discrimination in Employment Act: Are Disparate Impact Claims Available?*, 69 U. CIN. L. REV. 299, 306 (2000).

123. 29 U.S.C. § 623(f)(1) (2000).

124. *See Smith*, 125 S. Ct. at 1545. Prior to *Smith*, the “reasonable factors other than age” exception had been interpreted to “preclude[] disparate impact claims.” *No ADEA Liability*, *supra* note 92, at 374–75 n.7; *see also* EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077 (1994) (citing the “reasonable factors other than age” exception as “evidence of the ADEA’s focus on eliminating decisions made based on stereotypes about age”). Justice O’Connor relied on the legislative history of both the ADEA and Title VII to argue that there is no disparate impact claim under the ADEA. *See Smith*, 125 S. Ct. at 1552–55 (O’Connor, J., concurring in judgment). At the end of her concurrence in the judgment, Justice O’Connor indicated that if disparate impact claims are allowed under the ADEA, “they are strictly circumscribed by the RFOA exception.” *Id.* at 1560

Court's differing treatment of disparate impact under Title VII and the ADEA further reflects the differences between racial discrimination and age discrimination.

In allowing a narrower scope of liability under the disparate impact theory under the ADEA than under Title VII, courts have correctly discerned Congress's differing intents in enacting the two nondiscrimination statutes.¹²⁵ Title VII serves "a broad remedial purpose," that is, to remedy past discrimination suffered by minority races, especially African Americans.¹²⁶ The ADEA, on the other hand, serves a narrower purpose: to stop the arbitrary age discrimination that results from baseless assumptions about the abilities of older workers.¹²⁷ The narrower purpose of the ADEA justifies the narrower scope of its protections decided in *Cline*, even though a reverse discrimination claim would have been allowed had the case arisen under the broader Title VII.

Although it reached the appropriate result, the majority failed to adequately respond to Justice Thomas's charge that in failing to allow claims for reverse age discrimination under the ADEA, the Supreme Court was reversing its own position on the application of nondiscrimination laws.¹²⁸ In *McDonald v. Santa Fe Trail Transportation Corp.*,¹²⁹ the Court unanimously held that Title VII protections were available to whites discriminated against in favor of racial minorities,¹³⁰ even though the "principal evil"¹³¹ to be protected against by Title VII was "invidious discrimination against racial minorities."¹³²

But while Justice Thomas criticized the Court for failing to

(O'Connor, J., concurring in judgment).

125. See *Smith*, 125 S. Ct. at 1542 & n.7 (opinion of Stevens, J.) (suggesting that while Justice O'Connor's reasoning to support her conclusion that there is no disparate impact claim under ADEA is unpersuasive, "we agree that the differences between age and the classes protected in Title VII are relevant, and that Congress might well have intended to treat the two differently").

126. *Smith v. City of Jackson*, 351 F.3d 183, 193 (5th Cir. 2003), *aff'd*, 125 S. Ct. 1536 (2005) (discussing the Supreme Court's decision to allow a disparate impact claim under Title VII in *Griggs*).

127. See *Smith*, 125 S. Ct. at 1553–54 (O'Connor, J., concurring in judgment).

128. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596–97 (2004) (responding to Justice Thomas); *id.* at 608 (Thomas, J., dissenting). The majority also addressed Justice Thomas's criticism in an earlier footnote. See *id.* at 592 n.5.

129. 427 U.S. 273 (1976).

130. *Id.* at 278–80.

131. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (holding that Title VII sex discrimination protections are available to a man who was sexually harassed by other men at work).

132. *Cline*, 540 U.S. at 608 (Thomas, J., dissenting).

recognize a claim of reverse age discrimination under the ADEA, even in the race context there have been cases in which the Court has allowed reverse discrimination to continue.¹³³ While the Court has likely not had its last word on affirmative action programs,¹³⁴ case precedent indicates an acceptance of reverse discrimination in the affirmative action context.¹³⁵ In *United Steelworkers of America v. Weber*,¹³⁶ the Supreme Court held that a private employer's plan setting aside fifty percent of new trainees' slots for African-American workers was acceptable under Title VII, even though potentially more qualified white applicants were passed over.¹³⁷ The majority in *Weber* pointed to the purpose of the Civil Rights Act to remedy past discrimination against racial minorities by opening employment opportunities where racial minorities had traditionally been excluded.¹³⁸ The majority relied on a statutory provision providing, "[n]othing contained in this chapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual . . . because of the race . . . of such individual."¹³⁹ Reviewing the legislative history which included concerns that Title VII presented too much federal interference with private business,¹⁴⁰ the Court concluded that Congress intended to limit this interference by using the word "require" rather than "require to permit" in § 2000e-2(j).¹⁴¹ Thus, the provision did not preclude "all voluntary, race-conscious affirmative action."¹⁴² Even in the race context, the notion that Title VII prohibits all discrimination based on race yields to the legislative purpose in remedying past discrimination against racial minorities.¹⁴³

133. See, e.g., *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979) (holding that Title VII does not prohibit race-conscious affirmative action plans from private employers seeking to eliminate manifest racial imbalances in traditionally segregated job categories).

134. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (noting in the public college context that "race-conscious admissions policies must be limited in time").

135. *Weber*, 443 U.S. at 197.

136. 443 U.S. 193 (1979).

137. See *id.* at 197. The Court recognized that voluntary action on the part of employers to eliminate the vestiges of discrimination in the workplace was important to Title VII's effectiveness. See *id.* at 204. But see *id.* at 220 (Rehnquist, J., dissenting). Justice Rehnquist, now Chief Justice, who voted with the majority in *Cline*, wrote in his *Weber* dissent, "Title VII prohibit[s] racial discrimination in employment *simpliciter*." *Id.*

138. *Id.* at 203 (quoting 110 CONG. REC. 6,548 (1964) (statement of Sen. Humphrey)).

139. 42 U.S.C. § 2000e-2(j) (2000).

140. See *Weber*, 443 U.S. at 206-07.

141. *Id.*

142. *Id.*

143. See *id.* at 208 (discussing that factors to consider when determining whether a race-conscious affirmative action plan is permissible under Title VII include whether "[t]he purposes of the plan mirror those of the statute" and whether "the plan . . .

As *Weber* demonstrates, the Supreme Court's nondiscrimination jurisprudence in the areas of age and race is not nearly as contradictory as Justice Thomas would argue.¹⁴⁴

The Supreme Court in *Cline* properly held that there is no cognizable ADEA claim for plaintiffs who, though over age forty and protected by the ADEA, were discriminated against by their employer in favor of older workers. The majority faced criticism from Justice Thomas, arguing in dissent that the result turns on its head the Court's usual view toward nondiscrimination laws.¹⁴⁵ Justice Thomas asserted that per *McDonald*, a Title VII case involving white employees receiving less favorable treatment than an African-American colleague, such laws apply as well in "reverse" as they do when applied in cases featuring the type of discrimination for which the laws were enacted.¹⁴⁶ The majority's response, focusing on semantic differences in the perceptions of the words "age" and "race," is incomplete, but a broader inquiry shows that the majority came to the correct conclusion.

The problem with treating all nondiscrimination laws the same is that not all discrimination is the same, and the differences between age and race discrimination dwarf their similarities. While race discrimination in employment occurs when employers base decisions on feelings about race that are totally unrelated to one's ability to do the job, age discrimination generally occurs in employment when employers arbitrarily discriminate based on assumptions about how one's advancing age affects one's ability to do the work.¹⁴⁷ Further,

unnecessarily trammel[s] the interests of white employees"). *Weber*'s holding is narrower than *Cline*'s in that the Court in *Weber* upheld a specific policy while in *Cline* it foreclosed a segment of possible claims going forward. However, these decisions are both consistent with the Court's treatment of age and race in general, and it is pertinent that not even in all race cases does the Court strike down policies that discriminate, especially where the discrimination at issue is reverse discrimination. Note also that in the gender context, the Supreme Court has upheld gender classifications benefiting women if the classifications are designed to remedy past discrimination. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.4.3 (2d ed. 2002). In *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), the Supreme Court upheld a voluntary affirmative action program in which gender was considered as one factor informing an employer's decision on promotions. See *id.* at 619–21 (noting the plan provided that "in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented [the employer] is authorized to consider as one factor the sex of a qualified applicant").

144. *But see* *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 608 (2004) (Thomas, J., dissenting) (asserting that interpreting the ADEA as not allowing reverse age discrimination conflicts with allowing reverse race discrimination claims under Title VII).

145. *Id.* (Thomas, J., dissenting).

146. *Id.* (Thomas, J., dissenting).

147. See *supra* notes 47–50 and accompanying text.

Congress enacted Title VII and the ADEA separately and with different purposes.¹⁴⁸ Title VII protects everyone from race discrimination, although its primary purpose is to remedy past discrimination and lack of opportunities for racial minorities.¹⁴⁹ On the other hand, the ADEA's protections only extend to those forty and older and have a narrower purpose: to remedy arbitrary age discrimination in the form of stereotypes about older workers being unable to effectively do their jobs.¹⁵⁰ The broad exceptions found in the ADEA for which no parallel provisions exist in Title VII further evidence such a narrow purpose.¹⁵¹ Finally, the Supreme Court has consistently treated age and race differently in its decisions, considering race, but not age, a suspect classification in equal protection cases¹⁵² and allowing disparate impact claims that necessarily require less proof on the part of the plaintiff more broadly in Title VII cases than in ADEA cases.¹⁵³ For all these reasons, the Court is right to examine different types of discrimination differently even if, at first blush, its explanation for "discriminating" among the types of discrimination is unsatisfying.

ANDREA B. SHORT

148. See *supra* notes 66–81 and accompanying text.

149. See, e.g., *Cline*, 540 U.S. at 608–11 (Thomas, J., dissenting) (discussing the expansive interpretation of Title VII and arguing that the result in *Cline* is inapposite with this interpretation).

150. *Id.* at 591; *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610–11 (1993).

151. See *supra* notes 72–81 and accompanying text.

152. See *supra* notes 82–89 and accompanying text.

153. See *Smith v. City of Jackson*, 125 S. Ct. 1536, 1544–46 (2005).

