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What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act

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Imagine you are a business owner in the 1990s. In these difficult economic times you may need to “readjust” your company’s workforce in order to keep your business profitable. An effective strategy might be to replace your most expensive employees—those with the highest salaries, largest fringe benefit expenses or highest pension benefit costs—with employees who will cost less to do the same jobs. However, you recognize that such a decision is likely to effect your older workers more than your younger employees, because older workers are likely to have the higher salaries associated with greater experience and seniority, and because these salaries, combined with health and lifestyle differences, make them more expensive to employ. You may not have any motivation to harm older workers; in fact, you may even have a proud track record of complying with all state and federal employment laws and have no intention of discriminating against older workers. But with a changing economy...
and a difficult and competitive business environment, your business needs to have the best, most cost-efficient workforce possible.

Now imagine that instead of being a business owner, you are an employee over the age of forty. You are probably acutely aware of the many stereotypes that exist about older workers. Older people are often perceived as "not very physically active, not very good at getting things done, not very useful members of their community, not very open-minded and adaptable." You may have seen or heard that employers tend to avoid hiring or promoting older workers because of false perceptions that older workers are slower, less creative and less energetic than younger workers; that they are untrainable, less productive, and less adaptable workers; that they are likely to miss more work and to be depressed. Employers may even be "more critical of their older workers' performance, more skeptical of their ability to keep pace with technological developments and more concerned with the cost of their insurance and retirement benefits." In essence, as an "older" worker, you may feel that employers will look at your chronological age and not your abilities—just as many employers once looked at skin color or gender rather than capability—and you may watch as younger people are preferred while older people are often excluded.

Supra note 2, at C4.

5. For the purposes of this Comment, the age of forty will be considered the point at which a person is "older" because the Age Discrimination in Employment Act has set "40 years of age" as the minimum qualifying age for statutory protection. Age Discrimination in Employment Act § 12, 29 U.S.C. § 631(a) (Supp. V 1993).


8. See Michelle Hiskey, Fired Older Workers Winning Court Cases Over Firms' Age Bias, Atlanta Const., Nov. 27, 1989, at A1.


10. Marla Ziegler, Note, Disparate Impact Analysis and the Age Discrimination in Employment Act, 68 Minn. L. Rev. 1038, 1062-65 (1984). Despite the fact that the percentage of older Americans within the total population continues to increase, their role in the workforce and the portion of overall economic benefits that they receive continues to decline. Id.

It is frequently argued that much of corporate America does not show the same sensitivity to age that it does to race and gender. Often, business executives brag about having young staffs or management teams. This is clearly illustrated in the following account:

Lawyers for John Sheahan, a longtime CBS News Television correspondent dismissed at age 53 in a round of layoffs at the network, in his [age discrimination] suit presented evidence from a meeting of CBS news interns and
employee with a high salary, pension, and healthcare costs who is affected by an employer's re-adjustment of its workforce, you may very likely feel you have been unfairly victimized due to these stereotypes.

In either situation, whether you are the employer or employee, you may contact a lawyer or government Equal Employment Opportunity Commission official to find out if it is legal for an employer to make employment decisions on the basis of the salaries, pension status, or other age-related costs of employees. The issue that the employer and employee are both raising is a fundamental question in employment discrimination law: whether disparate impact theory—which allows a complainant to challenge a facially neutral employment policy or practice by showing that the policy or practice impacts more harshly on a protected class of individuals than on others—is a valid theory of recovery under the Age Discrimination in Employment Act (ADEA). This issue has never been decided by the United States Supreme Court, has been the subject of much conflict within the federal court system, and has been argued forcefully on both sides by academics and scholars. Despite a network executives. At the session, a young journalism student wondered aloud, "Where are all the old people at CBS?"

"We put them in radio," responded a CBS News Vice President, a comment that sent the entire room into laughter... None of the jurors laughed, however, and before Sheahan's case went to the jury, CBS settled for an undisclosed sum. Mike Donning, Fired Older Workers Sue on Bias, and Win, CHI. TRIB., May 29, 1994, § 1, at 1, 10.

11. Lawyers who represent employers in employment discrimination cases must wish that their clients would ask them about the legality of an employment decision before the employer carries out the decision. This would enable the lawyer to advise the employer about what types of employment decisions are legal and what types of actions are prohibited, so that problems and lawsuits could be avoided.

12. International Bhd. of Teamsters v. United States, 431 U.S. 324, 349 (1977). Disparate impact doctrine was originally created by the United States Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), a Title VII employment discrimination case, in an effort to ensure that the spirit of the Civil Rights Act of 1964 was followed. The Griggs doctrine allows employees who are discriminated against on the basis of their race to recover against their employers even when they cannot prove that their employer possessed a discriminatory intent. For a complete discussion of the Griggs decision and the creation of disparate impact theory, see infra notes 69-77 and accompanying text.


14. Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1706 (1993) ("[W]e have never decided whether a disparate impact theory of liability is available under the ADEA.... "). See infra note 120 and accompanying text for a further discussion of the Supreme Court's failure to directly address the applicability of disparate impact theory to the ADEA.

15. See infra notes 121-24 and accompanying text.

16. See infra note 125 and accompanying text.
debate that has been ongoing for more than a decade, "there [is still] no clear dividing line between when the company's right [to make an employment decision] for economic reasons intrudes on the worker's right not to be discriminated against because of age." 

This question of whether disparate impact should apply to the ADEA remains unresolved.

At the same time, this issue seems destined to become only more pervasive in employment discrimination claims. As the "graying" of the "Baby Boom" generation combines with corporate America's continuing emphasis on reducing payrolls and shrinking workforces, it seems inevitable that employment decisions will be made that will adversely impact older Americans. This trend makes the issue of whether disparate impact liability should be available under the ADEA very timely and important to the area of employment law and the emerging field of elder law.

This Comment argues that disparate impact theory developed for Title VII litigation should not be applied to the ADEA because of important differences between the statutory language, legislative

17. Louise Witt, Middle-Age Squeeze: More Workers Are Going to Court with the Charge that Age Cost Them Professionally, DETROIT FREE PRESS, Jan. 31, 1994, at 8F, 9F ("From one federal district or appellate court to another, decisions have been wildly erratic. It's never been completely and satisfactorily solved.").
19. "Age [discrimination] charges are growing at a faster rate than race, sex or national origin [discrimination] cases." Kenneth J. Cooper, Out of a Job: A Matter of Age, DETROIT FREE PRESS, June 21, 1987, at 1F (quoting Paul Brenner, Equal Employment Opportunity Commission (EEOC) staff attorney). This trend can be seen in the number of charges of age discrimination filed with the EEOC since 1980. In fiscal year 1980, there were 11,076 ADEA charges filed, accounting for 18.6% of all EEOC charges filed. In fiscal year 1986, the number of ADEA charges filed had risen to 17,443, which made up 25.3% of all EEOC charges. By fiscal year 1992, the number of ADEA charges filed amounted to 19,253, or 27.4% of all EEOC charges. 1 HOWARD C. EGLIT, AGE DISCRIMINATION § 2.01, at 2-6 (2d ed. 1994).

While this is occurring, the number of people protected by the ADEA continues to grow. The ADEA covered only 56 million people between the ages of 40 and 65 in 1980 versus an estimated 90 million, or 37% of the population, who were over the age of 40 in 1987. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1994, at 14 (114th ed. 1994). As the baby boom generation ages and the average life expectancy increases, the number of people covered by the ADEA will only continue to grow. See 1 EGLIT, supra, § 1.04 at 1-1 to 1-16. By 2004, more than half of the workforce will be in the protected age group. Doming, supra note 10, § 1, at 1; see also Ronald E. Roel, Older Workers Face Age-Old Problem: Despite Labor Shortage, Many Still Feel Impact of Stereotypes, NEWSDAY, Mar. 6, 1989, available in WESTLAW, NWSDAY database, at WL2 (discussing the impact of an aging population and the increasing life expectancy on the labor market).
history, and policies of the ADEA and Title VII. The Comment offers a comprehensive review of how this issue developed and why it still remains unclear, leaving employers, their employees, and all older Americans without proper guidance in this area. This Comment concludes that the issue should be resolved against the use of disparate impact theory in ADEA litigation.

Part I of this Comment provides an overview of the ADEA, including a review of the ADEA's goals and the statutory defenses available to employers under the statute. Part II examines disparate impact theory, including the development and extension of disparate impact doctrine over the last twenty years. After reviewing the theory of disparate impact and the ADEA itself, Part III then describes why the decision to apply or not to apply disparate impact theory to the ADEA is of such importance. With the critical nature of this decision properly in focus, Part IV then offers a combined analysis of disparate impact theory and the ADEA, and illustrates why the theory should not be applied to the ADEA. This Part includes a review of the ADEA's language, its statutory history, and the policy goals that supported the statute's enactment, and shows the inherent conflict between disparate impact theory and the ADEA. Finally, Part V offers an assessment of the drastic effect disparate impact theory would have on the ADEA and the areas of age discrimination and employment litigation, and concludes that any attempt to address the adverse effects an employment decision may have on older workers should be carried out by Congress, and not the judiciary.

I. OVERVIEW OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

A. Purposes of the ADEA

The Age Discrimination in Employment Act of 1967 was enacted by Congress with a three-part purpose: "To promote employment of older persons based on their ability rather than age;
to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." Under the ADEA, it is prohibited 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." Specifically, the ADEA attempts to protect Americans age forty and older from age discrimination in the workplace. The central theme of the ADEA is "to shift [the] focus away from chronological age and age-related barriers," thereby generally prohibiting employers from "using age as a factor in employment decisions or from classifying employees in ways that would adversely affect employment opportunities because of age.

It is critical to an understanding of the ADEA to review the congressional statement of findings and purpose in ADEA section two. This section notes the negative effects of arbitrary age discrimination, and recognizes that such discrimination is occurring with increased frequency and greater harm to older persons. But, despite the appearance that the ADEA provides broad protection for older workers against employment discrimination, the findings in

27. Id. § 623(a)(1).
28. See id. § 631(a). The pertinent language of § 631(a) states: "The prohibitions of this chapter . . . shall be limited to individuals who are at least 40 years of age." Id. The original version of the statute only protected workers between the ages of 40 and 65, but the ADEA was subsequently amended, first increasing the upper age limit to 70, Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189, 189-90 (1978) (current version at 29 U.S.C. § 631(a) (Supp. V 1993)), and then removing the upper age limit entirely, Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, § 2(c)(1), 100 Stat. 3342, 3342 (1986) (current version at 29 U.S.C. § 631(a) (Supp. V 1993)).
29. Kaminshine, supra note 3, at 235.
30. Ziegler, supra note 10, at 1038 (footnote omitted).
32. See id. § 621(a)(1) ("[O]lder workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs . . . ."); id. § 621(a)(2) ("[T]he 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 . . . ."); id. § 621(a)(3) ("[T]he incidence of unemployment . . . is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave . . . .").
33. See id. § 621(a)(2) ("[T]he 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 . . . .").
section two underscore that Congress' goal in enacting the ADEA was not to prohibit all consideration of age and age-related criteria; rather, the ADEA outlaws only arbitrary discrimination.\textsuperscript{34} For example, several parts of the statute legitimize the consideration of age in some contexts.\textsuperscript{35} Moreover, the ADEA did not aspire to end the practice of arbitrary age discrimination merely by the prohibitions found in the statute.\textsuperscript{36} The purpose of the legislation was to "promote the employment of older workers based on their ability . . . through an education and information program to assist employers and employees in meeting employment problems which are real and dispelling those which are illusory . . . ."\textsuperscript{37} Finally, along with its prohibitions, the ADEA was also directed "to help employers and workers find ways of meeting problems arising from the impact of age on employment."\textsuperscript{38}

\textsuperscript{34} The concept of arbitrariness is referred to no less than three times in the ADEA's statement of findings and purposes. See ADEA § 2(a)(2), 29 U.S.C. § 621(a)(2) (1988) ("[T]he setting of arbitrary age limits . . . has become a common practice, and . . . may work to the disadvantage of older persons . . . ."); ADEA § 2(a)(4), 29 U.S.C. § 621(a)(4) (1988) ("[T]he existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce . . . ."); ADEA § 2(b), 29 U.S.C. § 621(b) (1988) ("It is therefore the purpose of this chapter to . . . prohibit arbitrary age discrimination in employment . . . .").

\textsuperscript{35} For a discussion of the ADEA's statutory defenses, see infra notes 39-52 and accompanying text.

\textsuperscript{36} President Johnson, in his Special Message to Congress recommending passage of the ADEA, recognized the limits on the ability of any statute to eradicate completely the effects of age discrimination in employment: "Employment opportunities for older workers cannot be increased solely by measures eliminating discrimination." President's Special Message to Congress Proposing Programs for Older Americans, PUB. PAPERS 32, 37 (Jan. 23, 1967). There is a distinct difference between decisions made "on the basis of age" and "arbitrary age discrimination." Decisions made on the basis of age means that the employer considers the age of an employee (or employees) when it makes employment decisions because the characteristic of age is actually relevant to the choice being made, and thus needs to be taken into account by the decision-maker. In contrast, arbitrary age discrimination means that age is considered despite its total irrelevance to the choice being made, and therefore, it should not be a factor in the decision-maker's calculus. The ADEA is concerned with arbitrary age discrimination, as typified by President Johnson's own message to Congress recommending enactment of the ADEA, "a law prohibiting arbitrary and unjust discrimination in employment because of a person's age." Id.; see also Kaminshine, supra note 3, at 236 (discussing the congressional intent to prohibit only arbitrary age discrimination, as evidenced by the statutory exception for justified differentiation).


\textsuperscript{38} 29 U.S.C. § 621(b) (1988).
B. Statutory Defenses under the ADEA

In creating the ADEA, Congress did not prohibit every use of age as a factor in making employment policies and decisions. The ADEA provides for several statutory defenses, which either permit age discrimination in employment under certain conditions, or allow the employer to prove that the employment decision was based on factors other than age.39

1. Bona Fide Occupational Qualification (BFOQ)

An employer does not violate the ADEA by using age as a factor to make an employment decision if age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business."40 The BFOQ defense allows discrimination on the basis of age to occur if the employer can justify the discrimination.41 The BFOQ defense applies when the employer adopts a uniform policy of age limitations that are appropriately linked to job qualifications.42 For example, the refusal to hire any person over a specific age for a particular job that requires great physical stamina, such as an airline pilot, may be in the interest of public safety and therefore be justified as a BFOQ exception to the ADEA.43

39. In addition to the four statutory defenses discussed infra at notes 40-52 and accompanying text, an employer may also avoid liability under the ADEA: (1) by affirmatively proving that it acted in good faith reliance on a written administrative regulation, order, ruling, approval, or interpretation, or an administrative practice or enforcement policy, 29 U.S.C. § 259 (1988); id. § 626(e) (Supp. V 1993); (2) if the suit alleging a violation of the ADEA fails to comply with the required statute of limitations, 29 U.S.C. § 626(d)-(e) (1988 & Supp. V 1993); or (3) if the employer who allegedly violates the ADEA is a foreign person not controlled by an American employer, 29 U.S.C. § 623(h)(2) (1988).
41. Id. at 155. This defense allows a business to require that employees be able to execute certain tasks, usually physical tasks, that are directly relevant to the employee's job. Some jobs include within their descriptions certain tasks that not all persons may be able to accomplish, but are central to the job's completion. The employer is not required to hire an applicant or maintain in its employment an employee who cannot carry out a task necessary to the job. Id. at 155-56.
42. Id. at 155. This defense allows a business to require that employees be able to execute certain tasks, usually physical tasks, that are directly relevant to the employee's job. Some jobs include within their descriptions certain tasks that not all persons may be able to accomplish, but are central to the job's completion. The employer is not required to hire an applicant or maintain in its employment an employee who cannot carry out a task necessary to the job. Id. at 155-56.
43. The Federal Aviation Agency rules that prohibit airline pilots from working as pilots when they reach the age of 60 have been upheld against numerous challenges. See, e.g., Gathercole v. Global Assocs., 727 F.2d 1485, 1488 (9th Cir. 1984), cert. denied, 469 U.S. 1087 (1984) (upholding as valid BFOQ federal regulation prohibiting persons aged 60 or older from piloting a commercially operated aircraft).
2. Bona Fide Seniority Systems and Employee Benefit Plans

An employer does not violate the ADEA by observing the terms of a bona fide seniority system or the terms of a qualified benefit plan, so long as neither was intended to evade the purposes of the ADEA. This defense allows employers to differentiate between employees based on their years of service and to spend different amounts on employee benefits without violating the ADEA. Similar to the BFOQ defense, this defense allows discrimination on the basis of age to occur but provides a justification for such discrimination.

3. Reasonable Factor Other Than Age ("RFOTA")

Employers may also defend an age discrimination claim on the rationale that the differentiation complained of was based not on age, but rather on a reasonable factor other than age. This defense denies that age played a role in the employment decision—instead the employer claims that it used other valid factors in making the employment decision. The defense is essentially that the employer did not need to rely on age in a discriminatory manner, because it had other valid reasons for making the same decision, and therefore it cannot be shown to have discriminated on the basis of age. The

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44. The Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (as amended by Pub. L. No. 101-521, 104 Stat. 2287 (1990)), replaced the original ADEA language regarding bona fide seniority systems and certain qualified employee benefit plans. The original language of the statute stated that it was not unlawful for an employer "to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter." ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2) (1988) (current version at 29 U.S.C. § 623(f)(2)(A)-(B) (Supp. V 1993). Both the original language and the amended version of this exception to the ADEA reflect Congress' awareness of a unique problem of age discrimination: pension and insurance programs rely largely on actuarial age factors. Mandating equal coverage for all workers would be very expensive for employers, and might lead employers to view older workers as even more unattractive employees—a result opposite to the goals of the ADEA. This exception saves employers the cost of paying for equal benefits despite actuarially required costs, while not affecting the employability of older workers. Kaminshine, supra note 3, at 249-50.


46. Kaminshine, supra note 3, at 249-50.

47. WAKE FOREST UNIVERSITY SCHOOL OF LAW, supra note 41, at 154.


49. For a more complete discussion of the effect the RFOTA defense has on the applicability of disparate impact theory to the ADEA, see infra notes 159-82 and accompanying text.
RFOTA defense attempts to show that there was no causal relationship between age and any adverse impact on the defendant's employee(s).

4. Good Cause

An employer may discharge or discipline an employee for good cause, and may show that the employment policy or termination decision was not motivated by age discrimination by pointing to valid reasons for the decision. Like the RFOTA defense, the use of the good cause defense requires the employer to demonstrate the lack of a causal link between age and any adverse impact on the employee(s).

The ADEA's statutory defenses provide for some latitude in employment decisions where age may be a factor in the decisions. As shown, the BFOQ and the bona fide seniority systems and employee benefit plans defenses actually allow employers to use age in a manner that may have a discriminatory effect on older Americans, while the RFOTA and good cause defenses provide the opportunity for the employer to show that the employment decision was based on factors other than age. These statutory defenses are consistent with the ADEA's goal of prohibiting only arbitrary age discrimination in employment.

II. DISPARATE IMPACT THEORY

A. Definition of Disparate Impact Theory

The theory of disparate impact applies to situations in which a specific, facially neutral employment policy or practice is challenged as having a disproportionate impact on a class of workers protected by statute, where that impact cannot be justified by a legitimate business consideration. The issue is not whether an employer...
intended to discriminate against its employees and applicants, or whether there existed any motivation to discriminate—motive or intent is not a concern under disparate impact theory.\(^5\) The focus is solely on the actual effect that the employer's practice or policy had on the members of the protected class. Disparate impact claims assess the effects, rather than the intent, of "practices, procedures, or tests that are neutral on their face."\(^5\)

The essence of a disparate impact claim is that a policy or practice affects members of the protected category and the rest of the employer's workforce differently, and that such difference does not result by chance.\(^6\) Generally, disparate impact is proved by showing that a neutral employment policy or practice creates a significant statistical disparity between workers within the protected class and those outside the class.\(^5\) For example, ideally,\(^5\) if older persons comprise ten percent of the qualified labor force (however "qualified labor force" may be defined in the specific circumstances), one would expect the employer's workforce to include about ten percent older persons.\(^5\) The use of statistics enables courts to discover any difference in employment levels between members of the protected class and those outside the class.\(^6\)

In contrast to disparate impact, disparate treatment theory focuses on whether an employer impermissibly differentiates among employees or applicants based on a characteristic of a protected class.\(^6\) In a disparate treatment claim, an employee is attempting to show that the employment policy or practice in question caused the plaintiff employee to be treated less favorably than others, and to

\(^{54}\) "Proof of discriminatory motive ... is not required under a disparate-impact theory." *International Bhd. of Teamsters*, 431 U.S. at 336 n.15. For a more detailed explanation of disparate treatment theory, see *infra* notes 61-65 and accompanying text.

\(^{55}\) "Proof of discriminatory motive ... is not required under a disparate-impact theory." *International Bhd. of Teamsters*, 431 U.S. at 336 n.15.


\(^{57}\) Ziegler, *supra* note 10, at 1070.

\(^{58}\) Disparate impact analysis involves different issues and evidence than disparate treatment—the former uses statistical theory not to infer the motive of an employer but rather to describe the result of a policy. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252 n.5 (1981).

\(^{59}\) That is, absent a decision based on business necessity or a "reasonable factor other than age" (RFOTA). *See supra* notes 48-50 and accompanying text.

\(^{60}\) "[A] group of employees should reflect the composition of its appropriate benchmark, at least in terms of the protected category." Ziegler, *supra* note 10, at 1069.

\(^{61}\) *Id.*
show that the employer had a discriminatory motive.62 A disparate

treatment plaintiff may either show the employer’s discriminatory

motive by direct evidence, or may establish a prima facie case by

following the four-step burden of proof standard established in

McDonnell Douglas Corp. v. Green.63 In essence, McDonnell

Douglas requires the plaintiff to show a much more stringent set of

circumstances than would be required by a disparate impact plaintiff
to establish a prima facie case of disparate treatment. Under

McDonnell Douglas a plaintiff must establish: (1) her own membership

in the protected class; (2) that she applied and was qualified for

a job for which the employer was seeking applicants; (3) that she was

rejected despite her qualification; and (4) that after being rejected, the

position remained open and the employer continued to seek ap-

plicants with the plaintiff’s qualifications.64 Once the plaintiff makes

this showing, the burden shifts to the employer to show non-
discriminatory reasons for the different treatment.65

The basic concept of disparate impact theory has been criticized

because of the difficulties of its application and its reliance on

statistics.66 In the age discrimination setting the problem is even

62. Id.


64. See id. at 802.

65. Id. “[E]very court of appeals has embraced the prima facie case formulation
devised in McDonnell Douglas as being applicable to ADEA based claims.” 1 EGLIT, supra note 19, § 7.03, at 7-17 to 7-18. However, the fourth element is often modified in cases of age discrimination, especially in discharge or replacement cases. Some courts require the plaintiff to prove that an applicant hired was outside the protected group. See, e.g., Olsen v. Southern Pac. Transp. Co., 480 F. Supp. 773, 779 (N.D. Cal. 1979), aff'd, 654 F.2d 733 (9th Cir. 1981) (requiring age discrimination plaintiff to prove that applicant hired was younger than 40). Courts disagree over the showing required for a plaintiff alleging she was illegally replaced: Some require a showing that the replacement worker is under age forty, Price v. Maryland Casualty Co., 561 F.2d 609, 612 (5th Cir. 1977); some that the replacement is “substantially” younger, Douglas v. Anderson, 656 F.2d 528, 533 (9th Cir. 1981) or “sufficiently” younger, Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1506 (5th Cir. 1988); and some courts allow recovery even if the replacement is older than the plaintiff, Smith v. World Book-Childcraft, Int'l, Inc., 502 F. Supp. 96, 100-02 (N.D. Ill. 1980). When, however, the employee's claim involves a reduction in force so that the fired employee is not replaced, all circuit courts have agreed that the fourth factor must be modified. Wayne N. Outten, Unique Questions in the Age Discrimination Case: From the Plaintiff's Perspective, in EMPLOYMENT DISCRIMINATION LITIGATION 1993, at 161, 173-74 (PLI Litig. & Admin. Practice Course Handbook Series No. H-464, 1993).

more complex. Many neutral factors, such as the normal predominance of younger workers entering the workforce in combination with older ones leaving, tend to skew the statistics, making age based disparate impact cases rarer than those based on other protected classes. Furthermore, "courts tend to apply a disparate treatment analysis [to age discrimination cases], even where a neutral policy or rule is being challenged"—the type of discrimination cases in which disparate impact theory is normally utilized when the discrimination is covered under Title VII.

B. Development and Rationale of Disparate Impact Theory

In order to consider whether disparate impact theory should be an applicable theory of recovery under the ADEA, a review of the historical development of and rationale that supports the theory is necessary. Disparate impact theory was first established in *Griggs v. Duke Power Co.*, a case alleging racial discrimination in employment under Title VII of the Civil Rights Act of 1964. In *Griggs*, the employer had blatantly discriminated on the basis of race in hiring and assigning employees prior to the effective date of Title VII. On the date Title VII became effective, the employer established a requirement that employees successfully pass two different aptitude tests and possess a high school diploma before they could be eligible for any but the lowest paying jobs, to which African-Americans had previously been restricted. These requirements, though facially neutral, had the effect of making a disproportionate number of African-Americans ineligible for jobs with the employer.

The Supreme Court held that these requirements violated Title VII because Congress' intent in enacting civil rights legislation included the "consequences of employment practices, not simply the

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72. *Id.* at 427-29.
Therefore, the Court struck down the employment practice, concluding that the requirements would perpetuate the history of past discrimination against African-Americans and thus freeze the existing discriminatory composition of the defendant employer’s workforce. The Griggs Court held that Congress “placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.” Disparate impact analysis encompasses this wider view of employment discrimination that requires no showing of scienter. As the Griggs Court wrote, “good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds.’ ” This was a great leap forward by the Court in attempting to ensure that the goals of the Civil Rights Act of 1964 were given effect in substance, not just in form.

The Supreme Court extended disparate impact theory in Connecticut v. Teal. In Teal, the employer required its employees to pass a written test as a first step in obtaining permanent status as supervisors. A much larger percentage of white candidates than African-American candidates passed the test (seventy-nine percent to fifty-four percent), and the plaintiff claimed that this test violated Title VII due to its disparate impact on African-Americans. However, the employer promoted 22.9% of the identified African-American candidates and only 13.5% of the identified white candidates, and argued therefore that at the “bottom line” the policy (the test) did not adversely affect African-American candidates. The Teal Court rejected the notion that this “bottom-line” showing could insulate an employer against liability for one element of a system when it was shown that the element in question had a disparate impact on members of a protected class. The Court held that Congress intended Title VII to achieve equality in employment opportunities for each individual, not just equity in the overall

73. Id. at 432.
74. Id. at 430.
75. Id. at 432.
76. Ziegler, supra note 10, at 1042.
77. Griggs, 401 U.S. at 432.
79. Id. at 443.
80. Id. at 444.
81. Id.
82. Id. at 454.
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number of minorities actually hired or promoted. Therefore, a plaintiff could recover by showing that a specific provision in the employment policy resulted in an adverse effect, even if in the end the adverse impact was watered down by other aspects of the policy.

In Watson v. Fort Worth Bank & Trust, the Supreme Court further extended the applicability of disparate impact theory. An African-American employee filed a race discrimination claim under Title VII after she had applied for promotion four times, only to see the job given to a white employee each time. The employee claimed that the employer's subjective promotion criteria permitted racial bias to infect employment decisions. The Watson Court held that disparate impact theory applies not only to objective criteria (such as the scored standardized test in Teal) but also to subjective decision making in matters such as hiring and promotion. Writing for the Court, Justice O'Connor stated that to hold otherwise would nullify the protections of Griggs because it would allow employers simply to add subjective factors to their objective standards to escape a disparate impact challenge. Watson followed Teal in demonstrating the Court's interest in ensuring that the Civil Rights Act's goal of protecting individuals from discrimination would be put into practice.

However, in Wards Cove Packing Co. v. Atonio, the Court reversed this trend by creating an evidentiary standard applicable to disparate impact cases that seemed to be a significant departure from Griggs. In Wards Cove, Filipino and Native-American cannery employees charged that their employer's hiring and promotion policies violated Title VII by forcing segregation by national origin and race in the workforce. The Court of Appeals had held that once a

83. Id. at 453.
85. Id. at 982.
86. Id. at 984.
87. Id. at 990-91.
88. Id. at 990; see also Barbara A. Lee, Subjective Employment Practices and Disparate Impact: Unresolved Issues, 15 EMPLOYEE REL. L. J. 403, 409-11 (1989/90) (concluding that Watson extended disparate impact analysis to all subjective employment factors).
90. WAKE FOREST UNIVERSITY SCHOOL OF LAW, supra note 41, at 36.
91. Wards Cove, 490 U.S. at 647-48. The cannery workers claimed that practices such as nepotism, rehiring preferences, separate hiring channels for cannery and non-cannery jobs, and the refusal to promote from within caused a segregated workforce of predominantly white non-cannery workers and overwhelmingly minority cannery workers. Furthermore, at the two Alaskan salmon canneries at issue, the housing and eating facilities for cannery and non-cannery workers were segregated. Id.
plaintiff succeeded in proving a prima facie case of discrimination, it was up to the defendant to respond and attempt to rebut the plaintiff's proof. The Supreme Court disagreed, holding that in a Title VII employment discrimination case involving disparate impact the ultimate burden of persuasion remains with the plaintiff. Thus, in these discrimination cases, even after the plaintiff establishes a prima facie case of discrimination, the employer has only the burden of producing evidence, not the burden of persuasion. Moreover, after Wards Cove, the plaintiff must identify the particular practices that create the alleged disparate impact, and must show that the practices have the requisite causation—a "significantly disparate" impact on employment opportunities. The employer may still rebut the showing of disparate impact by producing evidence that the practices serve legitimate employment goals in a significant, though not indispensable, way. Clearly this was a step away from the Court's decisions in Teal, Watson, and even Griggs itself.

Largely in response to the Wards Cove decision, Congress enacted the 1991 Civil Rights Act [1991 CRA]. One of the main goals of the 1991 CRA was to overrule the Wards Cove decision by specifically allowing the establishment of an unlawful employment practice by use of disparate impact theory. Under the 1991 CRA,
once a showing of disparate impact is made, the burdens of production and persuasion shift to the employer to show that "the challenged practice is job related . . . and consistent with business necessity."\textsuperscript{99} Even if the employer successfully makes the required showing of business necessity, the plaintiff may nonetheless win by showing that there are alternative practices having no disparate impact but still serving the employer's legitimate interests.\textsuperscript{100} This congressional action not only attempts to restore employment discrimination law to its pre-\textit{Wards Cove} status, but it also clearly manifests Congress' approval of disparate impact theory as it applies to Title VII's protected classes.\textsuperscript{101}

The extent to which the provisions of the Civil Rights Act of 1991 will be applied to the ADEA is uncertain. The construction of the ADEA has normally followed that of Title VII,\textsuperscript{102} and the prior practice of some courts suggests that disparate impact analysis codified in the 1991 CRA will be applied to the ADEA.\textsuperscript{103} Some courts that had occasion to consider ADEA cases during the period between the issuance of the \textit{Wards Cove} decision and Congress' action to counteract that decision did apply \textit{Wards Cove} to ADEA disparate impact cases.\textsuperscript{104} While enacting the 1991 CRA, Congress did amend the ADEA in one respect,\textsuperscript{105} however it did not


\textsuperscript{100} WAKE FOREST UNIVERSITY SCHOOL OF LAW, supra note 41, at 38.

\textsuperscript{101} Since disparate impact theory is a judicial creation, see supra notes 69-77 and accompanying text, the 1991 CRA was a clear signal by Congress that while the Supreme Court may have grafted disparate impact theory onto Title VII, Congress approved this decision and supported the availability of the theory to employees in discrimination suits. For further discussion of this implication, see \textit{infra} notes 236-37 and accompanying text.

\textsuperscript{102} See infra notes 130-38 and accompanying text.

\textsuperscript{103} Outten, supra note 65, at 188 (citing Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980), where the court applied the \textit{Griggs} test to an ADEA claim).

\textsuperscript{104} See MacPherson v. University of Montevallo, 922 F.2d 766, 771-73 (11th Cir. 1991); Davidson v. Board of Governors of State Colleges & Univs., 920 F.2d 441, 444 (7th Cir. 1990); Abbott v. Federal Forge, Inc., 912 F.2d 867, 873-75 (6th Cir. 1990); Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364, 1369-72 (2d Cir. 1989), cert. denied, 494 U.S. 1026 (1990). This would seem to require those same courts now to apply the 1991 CRA to ADEA disparate impact cases, since this legislation was a direct attempt to overrule the \textit{Wards Cove} decision. See, e.g., Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239, 1245 n.4 (7th Cir. 1992) ("The treatment of disparate impact claims under Title VII, and arguably the treatment of such claims arising under the ADEA, has been altered by the recent enactment of the Civil Rights Act of 1991 . . . .")

\textsuperscript{105} See infra note 239.
specifically amend the ADEA to allow recovery via disparate impact theory, as it did with Title VII. Therefore, a strong argument can be made that the Wards Cove decision is still controlling for cases brought under the ADEA.

III. WHY DISPARATE IMPACT THEORY IS POTENTIALLY SO IMPORTANT

If disparate impact theory is made an available form of recovery under the ADEA, the field of age discrimination litigation would be dramatically altered. Under the traditional disparate treatment theory available under the ADEA, an employee must offer evidence of an employer's discriminatory treatment of that employee—namely proof of the employer's motive or intent to treat that older worker more harshly than younger workers. In contrast, under a disparate impact theory, the employee need not show that the employment decision was based on an employer's motive to discriminate. Motive, often the hardest factor to prove because it is subjective, existing only within the actor's mind and not readily proven by direct evidence, becomes inconsequential.

If disparate impact is available, to establish a prima facie case of disparate impact under the ADEA a plaintiff would be required to: (1) identify the particular employment practice or decision criterion being challenged; (2) show disparate impact on the basis of age; and (3) show that the practice in question has caused employment decisions (such as the exclusion of applicants for jobs or promotions)

106. See infra notes 236-37 and accompanying text.
107. For a detailed analysis of whether the 1991 CRA or the Wards Cove decision should control cases brought under the ADEA, see Howard C. 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) (concluding that because Congress did not amend the ADEA with the 1991 CRA, Wards Cove is still controlling for ADEA cases). See also infra note 240 (discussing the applicability of the 1991 CRA to ADEA cases and citing cases addressing this issue).
108. WAKE FOREST UNIVERSITY SCHOOL OF LAW, supra note 41, at 39; see also International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) (noting that in a disparate treatment claim, an employee is attempting to show that the employment policy or practice in question caused the plaintiff employee to be treated less favorably than others, and to show that the employer had a discriminatory motive).
109. See supra notes 54-60 and accompanying text.
made on the basis of the plaintiff's age. The evidence must show a statistical disparity between the protected group's representation in the employer's workforce as against the qualified pool which is sufficiently substantial to raise an inference of causation.

Once a plaintiff shows that the application of a particular employment practice (or group of practices) disparately impacts the members of the protected class, the burden of producing evidence shifts to the employer to try to overcome this showing. This may be attempted in a number of ways. Often the employer will challenge the statistics the plaintiff claims show the adverse impact. The employer may claim that there is an insufficient sample size, that the impact is not sufficiently disparate despite the statistics presented, or that the statistics alone do not have sufficient probative value without also reviewing the policy or practice in question in relation to the job, the working community and any specific circumstances of the case that make this employment setting different from others. However, even if the employer can make such a showing to overcome the employee's prima facie case of age discrimination, the employee has the opportunity to try to show either that the employer's reason is a pretext for discrimination, or that there exists an alternative employment practice that does not have a disparate impact, which also serves the employer's legitimate interests.

Instead of (or in addition to) attacking the statistics proffered by the plaintiff, the employer may attempt to demonstrate that the challenged practice falls within a statutory exception to the ADEA. If disparate impact theory is applicable to the ADEA, then merely showing that the employer's policy or action has a disparate

111. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). The question of whether Wards Cove is still controlling for cases brought under the ADEA is discussed supra at notes 102-07 and accompanying text.
112. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994-95 (1988) (opinion of O'Connor, J.). There is no formula for establishing a significant disparity, and the difficulty in doing so often causes disparate impact cases to fail. But compared to offering evidence of an employer's motive or intent to discriminate, which is often beyond the means of an employee to prove, the availability of disparate impact doctrine offers another avenue for seeking recovery. See id. at 989-91.
113. Wards Cove, 490 U.S. at 659-60.
115. Id.
116. Id. at 660-61; see also Caron v. Scott Paper Co., 834 F. Supp. 33, 38-39 (D. Me. 1993) (stating that a plaintiff may attempt to show that "other tests or selection methods having less discriminatory effects would serve the employer's legitimate interest in competent performance of the job").
117. See supra notes 39-52 and accompanying text.
impact on members of the protected class (employees over age forty) would establish a prima facie case of age discrimination, which the employer must rebut. This is a relatively low threshold for such a dramatic burden shift, thus highlighting why the application of disparate impact to the ADEA is potentially so important: With a reduced burden of proof on the plaintiff, not only are claims more likely to be successful on the merits, but claims also have an even greater chance to survive an employer's motion for summary judgment. This would raise the stakes dramatically for employers and alter the strategy and risk calculus used by both parties in employment discrimination suits brought under the ADEA. The United States Supreme Court has yet to decide whether disparate impact theory is a valid theory of recovery under the ADEA. 

The United States Supreme Court has yet to decide whether disparate impact theory is a valid theory of recovery under the ADEA. Disparate impact theory was developed and is usually pursued only in Title VII litigation. Of the many United States Federal District Courts and Circuit Courts of Appeals that have encountered cases presenting this precise issue, some have accepted the theory as valid under the ADEA; some have reserved making

118. See infra notes 313-16 and accompanying text.
119. See infra notes 305-17 and accompanying text.
120. See Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1706 (1993). The Hazen decision was limited to disparate treatment theory because the plaintiff, suing under the ADEA, did not include a disparate impact claim. Id. Justice Kennedy, in a concurring opinion joined by Chief Justice Rehnquist and Justice Thomas, stated that he was joining the Court's opinion in Hazen on the understanding that the Court was not addressing the issue of the applicability of disparate impact theory in ADEA cases. Id. at 1710 (Kennedy, J., concurring). Justice Kennedy underscored that the majority's opinion should not be read to imply that disparate impact will succeed in ADEA cases, and that there were serious questions about the propriety of extending the doctrine from Title VII to ADEA cases. Id. (Kennedy, J., concurring).

More than a decade before Hazen, then-Justice Rehnquist stated, "This Court has never held that proof of discriminatory impact can establish a violation of the ADEA." Markham v. Geller, 451 U.S. 945, 948 (1981) (Rehnquist, J. dissenting), denying cert. to Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980).

121. See, e.g., First Circuit: Holt v. Gamewell Corp., 797 F.2d 36, 37 (1st Cir. 1986) (assuming, without analysis, that the ADEA, like Title VII, allows a claim of discrimination under disparate impact analysis); Second Circuit: Maresco v. Evans Chemetics, 964 F.2d 106, 115 (2d Cir. 1992) ("The disparate impact doctrine, developed under Title VII, is also applicable to cases under the ADEA."); Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980) (accepting the application of disparate impact theory to ADEA cases), cert. denied, 451 U.S. 945 (1981); Third Circuit: MacNamara v. Korean Airlines, 863 F.2d 1135, 1148 (3d Cir. 1988), cert. denied, 493 U.S. 944 (1989) (accepting the application of disparate impact theory to the ADEA without analysis); Sixth Circuit: Wooden v. Board of Educ., 931 F.2d 376, 379 (6th Cir. 1991) (assuming theory is applicable to the ADEA); Abbot v. Federal Forge, Inc., 912 F.2d 867, 872 (6th Cir. 1990) (accepting applicability without analysis, based on acceptance by two other courts); Seventh Circuit: Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1163 (7th Cir. 1992)
a decision on the issue, hoping that the Supreme Court will weigh in with its opinion; and some have concluded that the theory should not apply to the ADEA. Moreover, those courts that have accepted the theory “have either assumed that the disparate impact doctrine applies under the ADEA, or have concluded that it applies without any formal analysis of the issue.” Furthermore, the issue

(Stating that the weight of authority is that disparate impact is a viable doctrine under the ADEA); Eighth Circuit: Leftwich v. Harris-Stowe State College, 702 F.2d 686, 690 (8th Cir. 1983) (assuming theory is applicable to the ADEA); Ninth Circuit: EEOC v. Local 350, Plumbers & Pipefitters, 998 F.2d 641, 648 n.2 (9th Cir. 1992) (assuming disparate impact theory is applicable to the ADEA); Cotton v. City of Alameda, 812 F.2d 1245, 1247 (9th Cir. 1987) (same); EEOC v. Borden's, Inc., 722 F.2d 1390, 1394-95 (9th Cir. 1984) (adopting disparate impact theory due to similarities between the ADEA and Title VII); Eleventh Circuit: MacPherson v. University of Montevallo, 922 F.2d 766, 770-71 (11th Cir. 1991) (assuming applicability of the theory to the ADEA and detailing requirements necessary to establish a disparate impact claim under the ADEA).

122. The Circuit for the District of Columbia, the Fifth and the Tenth Circuits have explicitly reserved this issue for future resolution. See Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1428 (10th Cir. 1993) (reserving a decision on applicability of the theory to the ADEA “until such time as the issue is properly presented and argued before this court”); Arnold v. United States Postal Serv., 863 F.2d 994, 998 (D.C. Cir. 1988) (refusing to decide whether disparate impact theory is applicable to an ADEA case because practice at issue does not have a disparate impact on employees over forty), cert. denied, 493 U.S. 846 (1989); Akins v. South Cent. Bell Tel. Co., 744 F.2d 1133 (5th Cir. 1984) (viewing the issue of disparate impact analysis as an open one, but refusing to resolve it). The Seventh Circuit Court of Appeals purported to reserve the issue as well, Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239, 1244 n.3 (7th Cir. 1992), but this reservation is in stark contrast to the same court's apparent acceptance of disparate impact theory under the ADEA in Metz v. Transit Mix, Inc., 882 F.2d 1202, 1206-11 (7th Cir. 1987) (holding that the firing of higher-paid, more senior employees to save salary costs violates ADEA because allowing such economic discrimination would undermine the policies of the ADEA) and their recent apparent reversal of Metz in EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077 (7th Cir. 1994) (holding that basing a hiring decision on salary costs which are based on seniority, a factor with a high correlation with age, does not violate the ADEA).

123. See, e.g., EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077 (7th Cir. 1994) ("[D]ecisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited [by the ADEA]."); Hiatt v. Union Pac. R.R., 859 F. Supp. 1416, 1433-36 (D. Wyo. 1994) (concluding that disparate impact theory is not applicable to the ADEA, after noting that the Tenth Circuit has only assumed the applicability of disparate impact theory without deciding the issue); Martinic v. Urban Redevelopment Auth., 844 F. Supp. 1073, 1076-78 (W.D. Pa. 1994) (concluding that Supreme Court's Hazen decision overrides the Third Circuit's previous suggestion that disparate impact is applicable to the ADEA).

has lead to much academic debate, with various legal scholars and practitioners reaching different conclusions. For both the employee entitled to the ADEA's protection and the employer making employment decisions (not to mention their respective attorneys and the judges trying to resolve such lawsuits), these differing views have created quite a dilemma. However, a thorough analysis of both sides of the debate leads to the conclusion that disparate impact theory should not apply to the ADEA.

IV. DISPARATE IMPACT SHOULD NOT APPLY TO THE ADEA BECAUSE OF THE DIFFERENCES BETWEEN THE ADEA AND TITLE VII

Disparate impact theory was developed with a focus on employment discrimination affecting members of Title VII's protected classes of race, gender, national origin, and religion; and it has been a strong device for combating such discrimination. Age, however, is a characteristic unique from Title VII's classes, and thus the ADEA has its own language, history, and goals distinct from Title VII. To attempt to construe the ADEA to incorporate disparate impact theory would be to ignore the critical differences in the language and purposes of the ADEA and Title VII; it would require one to ignore the legislative and administrative histories of the ADEA; it would fail to recognize the differences between age and other

125. Compare Blumrosen, supra note 66, at 108 (questioning whether theory should apply to age due to the differences between age and Title VII categories); Mack A. Player, Proof of Disparate Treatment Under the ADEA: Variations on a Title VII Theme, 17 GA. L. REV. 621, 624-25 (1983) (doubting theory's applicability); Donald R. Stacy, A Case Against Extending the Adverse Impact Doctrine to the ADEA, 10 EMPLOYEE REL. L.J. 437 (1984) (asserting that the theory should not be available); Peter H. Harris, Note, Age Discrimination, Wages and Economics: What Judicial Standard?, 13 HARV. J.L. & PUB. POL'Y 715, 729-30 (1990) (positing that the theory is probably unavailable because of its contradictions with statutory language and exceptions of the ADEA); and Krop, supra note 66, at 838 (arguing that disparate impact theory should not be available under the ADEA) with Howard Eglit, The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception, 66 B.U. L. REV. 155, 216-17 (1986) (expressing a more positive view as to the theory's applicability); Kaminshine, supra note 3, at 279-87 (purporting to offer "a more balanced approach" and thereby accept the theory under the ADEA); and Ziegler, supra note 10, at 1040 (asserting that the theory should be available under the ADEA).

126. See infra notes 130-89 and accompanying text.

127. See infra notes 190-247 and accompanying text.
protected characteristics, and it would be contrary to the policy that supports the theory's use under Title VII.

A. Comparison of the Statutory Language of ADEA and Title VII

Disparate impact theory that developed under Title VII should not be applied to the ADEA because there are numerous significant differences between the substantive provisions of Title VII and the ADEA. While there are many similarities between Title VII and the ADEA, when one actually compares the two statutes the distinctions between the language of the ADEA and Title VII demonstrate that while disparate impact theory fits within the language of Title VII, it conflicts with and is negated by the language of the ADEA.

1. The Fallacy of the Statutes' Similarities

Those who argue in favor of extending disparate impact theory to the ADEA are forced to place a heavy emphasis on the general similarities between the statutory language of the ADEA and the language of Title VII. Admittedly, at first glance this is an appealing argument. Because the ADEA was modeled after Title VII of the Civil Rights Act of 1964, both statutes' provisions are largely identical in wording and purpose. The Supreme Court, in Lorillard, Division of Loew's Theaters, Inc. v. Pons, recognized that there are important similarities in the aims and substantive prohibitions of Title VII and the ADEA. In Oscar Mayer & Co.

128. See infra notes 248-301 and accompanying text.

129. See infra notes 302-04 and accompanying text.

130. See Ziegler, supra note 10, at 1040.


132. Ziegler, supra note 10, at 1039. Compare, e.g., 29 U.S.C. § 623(a) (1988) ("It shall be unlawful for an employer—(1) to fail 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 . . . .") with 42 U.S.C. § 2000e-2(a) (1988) ("It shall be unlawful for an employer (1) to fail 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 race, color, religion, sex or national origin . . . ."). As one commentator specifically points out, when comparing the statutes, they are similar enough that "age" can easily be substituted for Title VII's protected categories. Kaminshine, supra note 3, at 230.


134. Id. at 584. Most of the ADEA's substantive provisions were "lifted verbatim from Title VII," Kaminshine, supra note 3, at 230, or "derived in haec verba from Title VII," Lorillard, Div. of Loew's Theaters, Inc., 434 U.S. at 584.
v. Evans, the Supreme Court also accepted the parallel nature of the two acts as "clear and convincing evidence" that Congress intended parallel procedural provisions of Title VII and the ADEA to be similarly construed. The Oscar Mayer Court held that "the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace," and many lower federal courts have followed the Supreme Court's lead in applying many of the standards developed under Title VII to ADEA cases.

However, the fact that Title VII and the ADEA are "statutory relatives, ... does not make them twins. There are indeed important distinctions between the two statutes which have precluded the development of completely parallel bodies of case law." The problem with relying on the similarities between the ADEA and Title VII is illustrated by an analysis of Geller v. Markham, the first major decision to apply disparate impact theory to an ADEA case. Geller relies on Lorillard and Oscar Mayer as precedent, despite the fact that "neither case [truly] supports the proposition that disparate impact doctrine applies to ADEA cases." In fact, the Lorillard decision directly contradicts the attempt to apply disparate impact to the ADEA. The holding in Lorillard—that there is a right to jury trial under the ADEA—is antithetical to the notion that the ADEA and Title VII should always be treated similarly, because

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136. Id. at 758.
137. Id. at 756.
138. See Kaminshine, supra note 3, at 230; Krop, supra note 66, at 837. For a recent affirmation of this principle, see Csicsery v. Bowsher, 862 F. Supp. 547, 568 (D. D.C. 1994) (recognizing the validity of the use of Title VII analyses and ideas for ADEA cases).
139. Eglit, supra note 107, at 1101 n.36. As the Sixth Circuit Court of Appeals said in considering whether to apply Title VII judicial precedent to the ADEA, "[t]hat the [ADEA] is embodied in a separate act and has its own unique history at least counsels the examiner to consider the particular problems sought to be reached by the statute." Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975); see also Washington v. Davis, 426 U.S. 229, 255 (1976) (Stevens, J., concurring) ("[I]t is inappropriate simply to transplant [Title VII] standards in their entirety into a different statutory scheme having a different history.").
140. 635 F.2d 1027 (2d Cir. 1980).
141. Id. at 1032. For a general discussion of Oscar Mayer, see supra notes 135-38 and accompanying text.
142. Krop, supra note 66, at 841.
until Title VII was amended in 1991, jury trials were unavailable under Title VII. Similarly, although *Oscar Mayer* did hold that parallel provisions of the ADEA and Title VII should be similarly construed, because disparate impact doctrine was judicially created in *Griggs*, not from the language of Title VII, *Oscar Mayer*’s holding does not offer “much support for extending the disparate impact doctrine” to the ADEA, regardless of the similarities between the language of the ADEA and Title VII. It is ineffectual to argue that because the Supreme Court developed the theory in a Title VII case, and because there are many similarities between Title VII and the ADEA, such a theory is appropriate under ADEA. Such an argument assumes the two statutes to be more similar than they in fact are.

2. The Language of ADEA Section 4(a)(2)

The impropriety of applying disparate impact theory to the ADEA becomes even clearer when the actual language of the ADEA is closely examined. For example, ADEA section 4(a)(2) provides that it shall be an unlawful employment practice for an employer “to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment oppor-

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144. One of the amendments made by Congress to Title VII in the 1991 Civil Rights Act, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 29 U.S.C. § 626(e) (Supp. V 1993) and scattered sections of 42 U.S.C.), was to provide Title VII litigants the option to have a jury trial of their claim. *Id.* § 1977A(c), 105 Stat. at 1073 (codified at 42 U.S.C. § 1981a(c) (Supp. V 1993)). Even prior to the 1991 CRA, the ADEA included this option, see *Lorillard*, 434 U.S. at 585, but Title VII did not.


146. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) (“[S]ince the language of [ADEA] §14(b) is almost *in haec verba* with § 706 [of Title VII] . . . we may properly conclude that Congress intended that the construction of § 14(b) should follow that of § 706.”).

147. *See supra* notes 69-77 and accompanying text.


149. Yet this appears to be what the *Geller* court did. *Geller v. Markham*, 635 F.2d 1027, 1034 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981). This type of argument is reminiscent of the classic argument frequently made—but rarely seriously—in college football, regarding who should be considered the national champion. The argument tends to go something like this: “If A beat B, B beat C, C beat D, and D beat E, then A should be the national champion over B, C, D, or E.”

150. *See Stacy*, *supra* note 125, at 438 (stating that race and age discrimination “represent different kinds of societal problems, and not all devices appropriate to combating the former are appropriate to combating the latter”); *see also infra* notes 190-301 and accompanying text (discussing the policy justifications behind disparate impact theory under Title VII and the different policy that supports the ADEA).
tunities or otherwise adversely affect his status as an employee, because of such individual's age."151 This section could be read to authorize disparate impact claims under the ADEA if "adversely affect" implies that an employment practice can constitute illegal discrimination even if it is not specifically directed at age.152 However, a different and more grammatically correct interpretation of this section shows that the opposite conclusion should be reached. Section 4(a)(2) should properly be read to "prohibit limiting, segregating or classifying employees because of age," which authorizes only disparate treatment claims.153 Reading the section this way is the grammatically correct reading154 and is also supported by comparison to section 4(a)(1), which uses similar terms but applies to disparate treatment only.155 Furthermore, section 4(a)(2) addresses only actions which affect employees, whereas under a disparate impact theory, unsuccessful applicants are the most common claimants, and it seems unlikely that Congress would have meant to authorize disparate impact in section 4(a)(2) while excluding the group of plaintiffs most likely to benefit from the theory.156 Since ADEA section 4(a)(2), unlike its "mirror" section in Title VII,157 does not provide a basis for applying disparate impact theory, those

152. Ziegler, supra note 10, at 1051. The very language of the exception could be interpreted to "forbid[] any policy having a more harmful effect on older people than on their co-workers." Id.
154. The phrase "because of age" should be read to modify "limit, segregate, or classify." Id. Thus, the section "prohibits classifying employees because of their age, so as to adversely affect their employment status." Id. Such an "interpretation authorizes only claims of disparate treatment." Id. The phrase "because of age" would have to modify the verb "affect" to imply disparate impact claims. Id.
155. Id. ADEA § 4(a)(1) 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 . . . ." 29 U.S.C. § 623(a)(1) (1988) (emphasis added). "Because of age" implies treatment directly due to the characteristic of age, which is the hallmark of disparate treatment theory. See also infra notes 159-65 and accompanying text (discussing RFOTA defense under the ADEA).
156. Krop, supra note 66, at 843. Subsection (2) of Title VII, the basis for the Griggs decision, proscribes any actions by employers which "limit, segregate, or classify [their] employees or applicants for employment in any way which would . . . adversely affect his status as an employee" on the basis of his membership in a protected class. 42 U.S.C. § 2000e-2(a)(2) (1988) (emphasis added). ADEA's "mirror" provision omits "applicants for employment." ADEA § 4(a)(2), 29 U.S.C. § 623(a)(2) (1988). In light of ADEA's near verbatim adoption of Title VII language, the exclusion of job applicants from subsection (2) of the ADEA is noteworthy. See Krop, supra note 66, at 843-44.
seeking to extend the theory to the ADEA search the statutory language for any statutory basis. But this search is fruitless because there are no other statutory provisions of the ADEA that provide the basis for applying disparate impact, such as the Griggs Court found under Title VII.158

3. Statutory Defense: RFOTA

Not only does the ADEA lack any statutory foothold for implying disparate impact theory, the specific statutory defenses included in the ADEA show convincingly that disparate impact theory was not intended to be a method of recovery under the ADEA. The defense most obviously inconsistent with disparate impact theory is the RFOTA defense, ADEA section 4(f)(1),159 which allows an employer to defend an age discrimination claim on the ground that it was a differentiation based on a "reasonable factor other than age."160 This defense "is not limited to a specific type of employer conduct"161—it "allow[s] employers to base employment decisions on reasonable factors that may accompany aging, so long as the decisions are not motivated by age bias."162 The RFOTA defense

160. Id. In contrast, Title VII has no equivalent to RFOTA. See Michael D. Moberly, Reconsidering the Discriminatory Motive Requirement in ADEA Disparate Treatment Cases, 24 N.M. L. Rev. 89, 96 (1994) ("There is no comparable provision [to the ADEA's RFOTA defense] in Title VII . . . .").
161. Stacy, supra note 125, at 451.
162. Krop, supra note 66, at 845. The ADEA was designed to prevent arbitrary age discrimination (disparate treatment, not disparate impact), and therefore the factor used to differentiate among employees should be considered "reasonable" so long as it is not arbitrary. See id.

The Equal Employment Opportunities Commission (EEOC), the body charged with enforcing the ADEA, see infra note 299, has taken the position that disparate impact applies under the ADEA, and has issued guidelines which forbid the use of cost—a facially neutral policy that adversely affects older workers—as an RFOTA defense. 29 C.F.R. § 1625.7(d)-(f) (1994). Under the EEOC guidelines an employer cannot refuse to hire older workers because they cost more than younger workers. Id. § 1625.7(f).

However, "[t]he EEOC guideline is [merely] an interpretation of the Act; it is not a regulation. Accordingly, it does not have the force of law." See Eglit, supra note 107, at 1183 n.303. "[T]he level of deference afforded [an EEOC regulation] 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.' " Id. (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991) (quoting General Elec. Co. v. Gilbert, 429 U.S. 125, 142 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)))). Furthermore, where EEOC regulations conflict with the statute they purport to interpret, as they do here, they have been set aside as having no
means that "decisions which are made for reasons independent of age but which happen to correlate with age are not actionable under the ADEA." The basis of a disparate impact claim of age discrimination is that a decision or policy, neutral on its face, has an adverse effect on older workers—that the decision's negative effect correlates with age. The existence of the RFOTA defense therefore conflicts with an attempt to make a disparate impact showing of age discrimination, and underscores the inappropriateness of applying the theory to the ADEA.

Courts that have accepted disparate impact theory in ADEA cases seem conveniently to ignore the RFOTA defense. For example, in Geller v. Markham, the Second Circuit Court of Appeals applied disparate impact to an ADEA claim. The Geller court held that an employee could recover upon successfully showing that a cost-cutting plan to hire teachers based on lesser seniority, and therefore lesser salary requirements, had a disparate impact upon members of the employee's protected class, in this case teachers over forty years of age. The Second Circuit found unavailing the effect. See Mohasco Corp. v. Silver, 447 U.S. 807, 825 (1980) ("[EEOC's] 'interpretation' of the statute cannot supersede the language chosen by Congress."); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973) ("Courts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong.'" (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969)).

163. EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077 (7th Cir. 1994); accord Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1126 (7th Cir. 1993) ("[T]he correlation [between compensation and age] is not perfect ... [and therefore plaintiff] could not prove age discrimination even if he was fired simply because [his employer] desired to reduce its salary costs by discharging him."); Metz v. Transit Mix, Inc., 828 F.2d 1202, 1212 (7th Cir. 1987) (Easterbrook, J., dissenting) ("Wage discrimination is age discrimination only when wage depends directly on age, so that the use of one is a pretext for the other; high covariance is not sufficient . . . .").


165. See Harris, supra note 125, at 730 ("Neutral practices are almost always reasonable practices and are exempted from coverage [of disparate impact violations]."). Professor Eglit frames this same argument succinctly: The existence of the RFOTA exception "debunks the applicability of disparate impact analysis to the ADEA. . . . [The RFOTA] provision explicitly approves the use of reasonable factors other than age, and this approbation extends . . . to age-neutral factors, even if they have a disparate impact on age-defined groups." 1 EGLIT, supra note 19, § 5.19, at 5-79 n.357.

166. See Harris, supra note 125, at 734 ("Both the Geller and Leftwich courts [in applying disparate impact theory to ADEA cases] showed absolute disregard for the RFOTA defense."); infra notes 167-76 and accompanying text.


168. Id. at 1032-34.

169. Id.
school district's defense that the policy was a necessary cost cutting measure. The *Geller* court held that:

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 ADEA] 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.

Similarly, in *Leftwich v. Harris-Stowe State College*, the Eighth Circuit Court of Appeals used the same logic employed in *Geller* to adopt disparate impact as a viable theory for recovery in ADEA cases. The *Leftwich* Court held that a policy by the employer of preferring non-tenured faculty had a disparate impact on older employees. Furthermore, the monetary savings the policy achieved was not an adequate defense, and the plaintiff was allowed to show that less discriminatory means were available to achieve the employer's legitimate objectives. But notably, neither the Second nor the Eighth Circuit courts even made mention of the RFOTA defense. Any court that analyzed the RFOTA defense in the context of facts similar to those in *Geller* or *Leftwich* would have trouble reaching the same conclusion.

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170. *Id.* The *Geller* court did not expressly rule that cost is not relevant under the business necessity defense, but merely cited decisions holding that the disparate treatment cannot be justified by a claim of economic savings, *see id.* at 1034, and a regulation, 29 C.F.R. § 860.103(h) (1979) (removed at 53 Fed. Reg. 23,812 (1987)), providing that a differentiation or classification based on age cannot be justified by a general assertion of cost savings. *Krop*, *supra* note 66, at 840 n.15 (*citing Geller*, 635 F.2d at 1034).


172. 702 F.2d 686 (8th Cir. 1983).

173. *Id.* at 690-93.

174. *Id.* at 691.

175. *Id.* at 691-93. This same logic was followed by the Tenth Circuit. *See Mistretta v. Sandia Corp.*, 639 F.2d 588, 592 (10th Cir. 1980) (*holding that statistics coupled with other evidence established a prima facie case that the employer's layoff procedure had a disparate impact on older workers*).

176. For example, in its recent decision in *EEOC v. Francis W. Parker School*, the Seventh Circuit Court of Appeals faced a similar fact pattern involving a school district's decision that because teacher salaries were linked to experience, it could not afford to pay for teachers with more than five years of experience. 41 F.3d 1073, 1075 (7th Cir. 1994). The Seventh Circuit panel relied in part on the RFOTA defense to state that "[employment] decisions which are made for reasons independent of age but which happen to correlate with age are not actionable under the ADEA." *Id.* at 1077. The RFOTA defense supports the inapplicability of disparate impact to the ADEA because "a sensible
In stark contrast to the *Geller* and *Lefwich* courts, the Fifth Circuit has recognized the importance of the RFOTA defense. In *Smith v. Farah Manufacturing Co.*, the court held that “the burden of rebutting an ADEA plaintiff's prima facie case [of age discrimination] requires no more than producing evidence that the employment decision was based upon reasonable factors other than age.” This same recognition regarding the RFOTA defense was made by then-Justice Rehnquist in his dissent to the Court's denial of certiorari to *Geller*. Justice Rehnquist supported the view that Congress did not intend to enable an ADEA plaintiff to recover where an employment decision based on experience has nothing to do with age, and suggested that “Congress revealed this intention in 29 U.S.C. section 623(f)(1)” — the RFOTA defense.

The existence of the RFOTA defense within the ADEA simply undermines the entire concept of disparate impact theory and any attempt to include it as a form of recovery under the ADEA. Moreover, the reason disparate impact theory has been understood to be consistent with Title VII claims is because Title VII has no parallel to the RFOTA defense. The ADEA contains this statutory interpretation of [the RFOTA defense] is that it is further evidence of the ADEA's focus on eliminating decisions made based [only] on stereotypes about age.” *Id.*

177. 650 F.2d 64 (5th Cir. 1981).
178. *Id.* at 67. This requires merely a showing of “some reason other than age.” *Id.* Such a “reason other than age” existed in both *Geller* and *Lefwich* — both employers made their employment decisions based on the salary cost of more experienced teachers — and one can only wonder how the analysis and decision in *Farah Mfg.* was not even mentioned in the *Geller* or *Lefwich* opinions which were decided within a two year period after the Fifth Circuit's decision.

180. *Id.* at 948 (Rehnquist, J., dissenting).
181. Supporters of extending disparate impact to the ADEA argue that the RFOTA defense, unlike a similar exception in the Equal Pay Act, which permits wage discriminations when based on “any other factor other than sex,” 29 U.S.C. § 206(d)(iv) (1988), requires the other factors to be “reasonable.” See Kaminshine, *supra* note 3, at 299-302. It is argued that this language implies a disparate impact concept of business necessity by applying a test of reasonableness to factors that are not age-based in their intent. *Id.* However, the “factor other than sex” defense under the Equal Pay Act was created for a very different purpose, see Stacy, *supra* note 125, at 446-47, and the Supreme Court has held that incorporating such an argument into Title VII could have significant unintended consequences. See County of Washington v. Gunther, 452 U.S. 161, 168-71 (1981). Therefore, the argument seems equally unavailing as to the ADEA.
182. Stacy, *supra* note 125, at 446. “Title VII, the only antidiscrimination statute in which the Supreme Court has found a disparate impact construction, has no provision analogous to [the] ADEA's ‘reasonable factor other than age' [defense].” *Id.*
defense, and this difference from Title VII "pulls the rug out from under" any argument for applying disparate impact to the ADEA.

4. Other ADEA Statutory Defenses Distinct from Title VII

The RFOTA defense is not the only one of the ADEA's statutory defenses which is incompatible with disparate impact theory. The BFOQ defense, ADEA section 4(f)(1), is also inconsistent with any argument that disparate impact is applicable under the Act. The ADEA is premised on the concept that age alone is a poor predictor of individual capabilities, and that employees should be judged on their individual merits. Yet the BFOQ defense recognizes that age may at some point affect performance. The ADEA was not intended to protect employees from their own performance deterioration. In contrast, Title VII does not make this recognition because characteristics such as race or gender do not affect an employee's ability to perform the job. Similarly, under ADEA section 4(f)(2)(B), an employer will be shielded from liability for a claim of age discrimination if the employer's action follows the terms of a bona fide employee benefit plan. This defense to an age discrimination claim recognizes valid differences between older and younger workers and the costs of providing them traditional employee benefits. All of these statutory defenses created in the ADEA

184. See Kaminshine, supra note 3, at 235.
185. See supra notes 40-43 and accompanying text.
186. Broad use of the BFOQ defense could undermine the goals of the ADEA, and even age limits that are based on accurate generalizations can cause some members of the protected group who are actually capable of performing to be deemed unqualified. See Kaminshine, supra note 3, at 246-47. Therefore, the BFOQ exception is generally given a very narrow application, subject to careful review. See id. at 247-48. As part of this effort, the burden of persuasion has been placed on an employer to show that a specific age-based decision is exempted from the ADEA as an age BFOQ. See Western Air Lines v. Criswell, 472 U.S. 400, 419-21 (1985) (holding that an employer must show (1) that the age limitation is reasonably necessary to the essential aspects of the business; and (2) that there is a factual basis for the presumption that all persons outside the age limitation cannot perform the job safely or efficiently or that it is not feasible for the employer to make a case-by-case determination of ability to perform). The EEOC regulations provide for a similar test for establishing the BFOQ defense. See 29 C.F.R. § 1625.6(b) (1994). But even if it is narrowly applied, the ADEA's BFOQ defense is still incompatible with any application of disparate impact theory.
187. See infra notes 248-54 and accompanying text.
point to the same conclusion—that disparate impact theory is inconsistent with the ADEA's statutory language. The statutory language not only does not support applying disparate impact theory, but it also contradicts such an argument.

B. Legislative History

1. The Different Impetus Behind the ADEA

In addition to significant differences in statutory language, the ADEA and Title VII were adopted with separate purposes and unique histories. Prior to enactment of the ADEA, little attention or effort had been paid at the federal level to the issue of age discrimination in the workplace. This is certainly in stark contrast to the long, tumultuous, and at times violent civil rights struggle that captured the public's attention and culminated in passage of the Civil Rights Act of 1964, which included Title VII's prohibition against discrimination in the workplace. One commentator has asserted that the Civil Rights Act "was a direct response to the civil unrest of the early 1960's. Its passage . . . was a response, much akin to an apology, for acts of violence by whites in retaliation for moderate civil rights activity."

During the debates over the Civil Rights Act of 1964, attempts were made to include age in the list of groups to be considered protected classes under Title VII, the Act's employment provision. But, in contrast to Title VII's focus on discrimination based on race, discrimination based on age was not viewed as a widespread social problem. In fact, age was viewed in such a different context that attempts to include it as a protected class under

from liability than any similar provision under Title VII. This is just one more example of the differences between the statutory language of Title VII and the ADEA.

190. See supra note 139; see, e.g., Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975). ("[T]he [ADEA] is embodied in a separate act and has its own unique history [compared to Title VII]. . . .").

191. See 1 EGLIT, supra note 19, §2.02, at 2-7 n.33.


196. See Yarbrough, supra note 194, at 114.
Title VII were rejected. Congress did, however, within the Civil Rights Act, direct the Secretary of Labor to study age discrimination in employment so as to be able to make recommendations to Congress for dealing with the problem, if it existed.\textsuperscript{198}

2. Arbitrariness: A Different Focus Than Title VII

In 1965, Labor Secretary Willard Wirtz reported to Congress on his findings\textsuperscript{199} and, at Congress' further request, submitted legislative recommendations that later became the ADEA.\textsuperscript{200} The Labor Secretary's Report concluded that the main concern regarding older workers was arbitrary age discrimination based on misconceptions about the abilities of older workers.\textsuperscript{201} In the Report, age discrimination was distinguished from other forms of discrimination (e.g., race) which result from feelings about people entirely unrelated to their ability to do the job.\textsuperscript{202} The Report found that there was no significant discrimination of this kind so far as older workers were concerned.\textsuperscript{203} Furthermore, the Secretary's Report distinguished between arbitrary age discrimination, such as the use of specific age limits on hiring and termination based on stereotypes about older workers, and practices which tend to bear more strongly on older workers than on younger ones\textsuperscript{204}—a distinction which is completely

\begin{footnotesize}
\begin{enumerate}
\item[197.] An amendment to include age among Title VII's protected classes which was offered by Representative Dowdy was rejected by a 123 to 94 vote. 110 CONG. REC. 2596-99 (1964).
\item[199.] U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER, AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965) [hereinafter "SECRETARY'S REPORT"].
\item[201.] SECRETARY'S REPORT, supra note 199, at 2.
\item[202.] Id. at 2-5.
\item[203.] Id. at 2.
\item[204.] Id. at 21-25.
\end{enumerate}
\end{footnotesize}
parallel to the difference between disparate treatment and disparate impact.\textsuperscript{205} The former were prohibited under the ADEA; the latter were not, and were to be addressed by other social and employment programs.\textsuperscript{206} This distinction shows that the Report, the basis for the ADEA, did not support statutory recovery for disparate impact, but only for disparate treatment.\textsuperscript{207} This dichotomy was endorsed by Congress,\textsuperscript{208} and the ADEA was enacted to prohibit "arbitrary age discrimination in employment,"\textsuperscript{209} such as the rejection of older workers solely based on assumptions about the effect of age on their ability to do a job, discrimination which can be attacked with disparate treatment liability.

A simple example of the ADEA's focus on "arbitrariness" is offered by the First Circuit Court of Appeal's decision in \textit{Holt v. Gamewell}.\textsuperscript{210} In \textit{Holt}, an employee was discharged after his managerial position was eliminated because of its high salary.\textsuperscript{211} The court found that choosing to discharge higher paid employees was not in and of itself age discrimination.\textsuperscript{212} The \textit{Holt} court concluded that while salary may be directly related to seniority, any correlation between seniority and age depends on at what age the employee began working for the employer.\textsuperscript{213} Discharging the employee who was within the protected class of the ADEA did not violate the statute because his high salary was not the result of his age, but was due to his position and his success on the job.\textsuperscript{214} In essence, the decision was not made by using age either as an arbitrary cut-off point or as a factor which was assumed to mean that the employee was no longer capable. Age was not used to make the employment decision at all—the employee's paycheck was the determining factor.

\textsuperscript{205} See id. at 2-6. Not only does the report focus on "arbitrary" discrimination, but it recognizes that there are "certain circumstances which unquestionably affect older workers more strongly as a group than they do younger workers." Id. at 11. These circumstances include increased health concerns and health costs that arise with age, the frequent lower education levels of older workers, and possible lessening of productivity. Stacy, supra note 125, at 440-41.

\textsuperscript{206} SECRETARY'S REPORT, supra note 199, at 5-17, 21-22; see ADEA § 3(a), 29 U.S.C. § 622(a) (1988).

\textsuperscript{207} Blumrosen, supra note 66, at 79.

\textsuperscript{208} See Kaminshine, supra note 3, at 290.


\textsuperscript{210} 797 F.2d 36 (1st Cir. 1986).

\textsuperscript{211} Id. at 37.

\textsuperscript{212} Id. at 38.

\textsuperscript{213} Id.

\textsuperscript{214} Id.
"[D]isparate impact doctrine is not designed to eliminate practices based on ill-conceived stereotypes of the aged; it is designed to eliminate neutral practices that happen to have a statistically adverse effect on the aged."\(^{215}\) No reference to such an expansive protection exists in the legislative history of the ADEA. The legislative history of the ADEA shows the preoccupation of the Congress, not with practices neutral on their face which had an adverse effect because of age, but rather with specific practices which overtly restricted opportunities because of age.\(^{216}\) In contrast, Title VII was enacted to eradicate all discrimination against protected classes in employment, and as the *Griggs* Court found, disparate impact theory was needed to ensure this result.\(^{217}\) Disparate impact recovery, therefore, was not what Congress intended to establish with the ADEA.\(^{218}\) As the legislative history shows, the ADEA was meant to prohibit only arbitrary discrimination, not facially neutral "actions which tend to fall more harshly on older individuals."\(^{219}\)

3. The Judicial Foundation of Disparate Impact Theory Under Title VII

There are other specific differences in the legislative histories of Title VII and the ADEA that illuminate why disparate impact applies

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216. See Blumrosen, *supra* note 66, at 90-93.
217. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971). One commentator argues that the ADEA's legislative sponsors intended that the ADEA have the same effect as Title VII—to rid the workplace of all forms of age discrimination." Ziegler, *supra* note 10, at 1054-55. Support for this argument is offered by a statement of Senator Yarborough (D-Texas), one of the ADEA's original sponsors and one of the bill's strongest supporters, that the ADEA's purpose was to "give every American . . . the opportunity to be equally considered for employment and promotion." 113 *Cong. Rec.* 31,251-54 (1967). Since disparate impact analysis in *Griggs* refers to the idea of equal opportunity in Title VII, Senator Yarborough's emphasis on equal opportunity for older workers could lead to the implication that the *Griggs* analysis should apply to the ADEA. Ziegler, *supra* note 10, at 1054-55. However, evidence of this intention is not reflected in the language of the ADEA itself and conflicts with the ADEA's stress on ridding the workplace of "arbitrary" age discrimination. See *supra* notes 199-216 and accompanying text.
218. The fact that the ADEA's "preliminary statement of findings and purpose refers separately to arbitrary age discrimination" and specific practices which may disadvantage older workers, combined with congressional hearings and floor debates focusing on unjust age restrictions as the principle concern show that Congress "endorsed the dichotomy as described in the [Secretary's R]eport and thereby intended to prohibit only overt age discrimination, i.e., discrimination based on 'the deliberate disregard of a worker's ability solely because of age.' " Kaminson, *supra* note 3, at 290 (quoting Blumrosen, *supra* note 66, at 86).
219. See Krop, *supra* note 66, at 851 n.60.
to Title VII claims but not to ADEA cases. For instance, while the legislative history of ADEA section 4(a)(2)\(^{220}\) does not reveal the purpose of the section, it was apparently borrowed from Title VII section 703(a)(2),\(^{221}\) which, when the ADEA was passed, was not intended to authorize disparate impact.\(^{222}\) The creation and acceptance of disparate impact theory came only with *Griggs v. Duke Power Co.*\(^{223}\) four years after the passage of the ADEA, and seven years after the passage of the Civil Rights Act. Since the disparate impact test was judicially established in *Griggs* it does not have its origins in Title VII, and therefore similarities between Title VII and ADEA alone do not offer much support for extending disparate impact from Title VII classes to the class of older Americans.\(^{224}\)

Moreover, there are clear differences between the *Griggs* rationale and the ADEA’s rationale: *Griggs* rests on the theory that there is nothing inherent in race that supports a correlation between race and ability to perform a job.\(^{225}\) Unlike race, there is a much stronger argument that there is an inherent correlation between age and ability.\(^{226}\) In fact, the ADEA originally recognized this by


(a) It shall be unlawful for an employer . . .

(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 . . . .


\(^{222}\) An interpretive memorandum on Title VII, introduced into the Congressional Record by Senators Clark and Case, the Senate floor managers for Title VII, clearly explained that the proposed Civil Rights Act prohibited only practices in which an employer segregates or classifies employees “on the basis of” race, religion, sex, or national origin. 110 CONG. REC. 7212 (1964). This shows a congressional intent to outlaw intentional discrimination (disparate treatment) rather than treatment neutral on its face which nonetheless has a discriminatory effect (disparate impact). Therefore, if Title VII § 703(a)(2) did not intend to authorize disparate impact, the ADEA’s parallel provision, ADEA § 4(a)(2) could not have been intended to authorize disparate impact either. Krop, *supra* note 66, at 844.

\(^{223}\) 401 U.S. 424 (1971).

\(^{224}\) *See* Krop, *supra* note 66, at 842-44; *see also* supra notes 139-49 and accompanying text (discussing weakness of relying on similarities between statutory language of Title VII and the ADEA).

\(^{225}\) *See* Griggs, 401 U.S. at 430-31.

\(^{226}\) *See* Krop, *supra* note 66, at 850.
restricting the statutory limit of coverage to age 65 (and then to 70 before removing the upper age limit altogether), and by allowing age-based decisions when age is a bona fide occupational qualification. Furthermore, a present correlation between age and ability is also different because it is not a result of lifelong discrimination, but instead arises over time, often combining with a physical determination.

This review of the rationale behind the Supreme Court's creation of disparate impact theory demonstrates that the Second Circuit Court of Appeals misconstrued the ADEA in Geller v. Markham when it decided that the defendant employer's refusal to hire the plaintiff violated the ADEA under a disparate impact theory of age discrimination. In Geller v. Markham, a school district faced budget cuts, and determined it could no longer afford to pay for experience. Because experience is generally correlated with age, the cost-cutting measure had a disparate impact on older workers. While this is certainly an unfortunate consequence, these older workers had not suffered from lifelong discrimination, and this discrimination was not a product of invidious stereotypes and hatred, but simply a matter of economic decisions made during hard times. This viewpoint is expressed forcefully in then-Justice Rehnquist's dissent to the Court's denial of certiorari to Geller:

[This policy of the school board] by its express terms makes no reference to age and . . . has had a significant impact on teachers under the age of 40 as well as those over that age. The Court of Appeals' opinion manages to tie the hands of local school boards in dealing with ever-increasing costs without the sanction of the [ADEA] which Congress passed to protect older workers. . . . [T]he differential based on

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227. See supra note 28.
228. See supra notes 40-43 and accompanying text.
229. Krop, supra note 66, at 830. For a complete discussion of the importance of the Griggs decision in differentiating between age and Title VII's protected classes, see infra notes 259-63 and accompanying text.
231. Id.
232. Id. at 1030.
233. Id. at 1032-33.
234. See, e.g., EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1078 (7th Cir. 1994) ("Parker's policy of linking wages to experience is an economically defensible and reasonable means of determining salaries.").
experience in [the school board’s policy] has nothing to do with age...  

4. Recent Legislative History: 1991 Civil Rights Act

The argument against applying disparate impact theory to the ADEA is strengthened even more by the 1991 Civil Rights Act [1991 CRA],\(^{236}\) the most recent congressional action affecting employment discrimination litigation. After the *Wards Cove* decision had potentially eliminated any disparate impact analysis under Title VII, Congress showed its disagreement with the Supreme Court by enacting section 105 of the 1991 CRA to codify disparate impact analysis as a theory of recovery under Title VII.\(^{237}\) Yet while Congress was amending Title VII to incorporate disparate impact theory, Congress failed to amend the ADEA similarly despite the fact that a relationship between Title VII and the ADEA was perceived by Congress prior to the 1991 Amendments to the Civil Rights Act.\(^{238}\) Congress did not codify the theory under the ADEA even though the ADEA was amended in other respects at that time.\(^{239}\)


\(^{237}\) See supra notes 89-101 and accompanying text; see also 1 EGLIT, supra note 19, § 7.51, at 7-305 (“The [1991] CRA ... is object demonstration of Congress’ perception of *Wards Cove* as for the most part being a flawed decision.”); Eglit, supra note 107, at 1174 (“In light of Congress’ obvious intense concern about *Wards Cove* ... and given further the long kinship between the ADEA and Title VII, it just does not sit well ... to unreflectively credit Congress’ silence as amounting to nothing more than inattention or ignorance ... .”). The vetoed predecessor of the 1991 Amendments explicitly reflected this perception in its text. Senate Bill 2104, § 2(b) stated that among the purposes of the bill was to “respond to the Supreme Court’s recent decisions [including *Wards Cove*] by restoring the civil rights protections that were dramatically limited by those decisions.” Cong. Rec. S. 9966 (1990).

\(^{238}\) Eglit, supra note 107, at 1172; see also 1 EGLIT, supra note 19, § 7.51, at 7-306 (“*[While it was amending Title VII] Congress left the ADEA untouched, even though it had to have known of the regular, repeated practice of ADEA courts relying on Title VII rulings.*”).

\(^{239}\) Section 115 of the CRA modified the statutes of limitations that had previously applied to the filing of private lawsuits under § 7(e) of the ADEA by eliminating the two- or three-year statutes of limitations that formerly existed under the ADEA. 29 U.S.C. § 626(e) (Supp. V 1993). In their place Congress enacted a requirement identical to that which exists under Title VII, so that under both statutes, a civil action may be brought within 90 days of receiving notification of the EEOC’s completion of its investigation. See 29 U.S.C. § 626(e) (Supp. V 1993); 42 U.S.C. § 2000e-16(c) (1994). Therefore, Congress was not only amending the ADEA and Title VII in the same effort, but was specifically amending a part of the ADEA to match part of Title VII. This unmistakably shows Congress’ understanding of the relationship between the ADEA and Title VII. See also
This congressional inaction and the non-inclusion of the ADEA in section 105 of the 1991 CRA indicate that Congress intended disparate impact theory to be applied only to Title VII cases and not to age discrimination cases under the ADEA.\textsuperscript{240}

Congress' failure to include the ADEA in its explicit adoption of disparate impact theory in the 1991 CRA was recently heavily relied upon in \textit{Martinicic v. Urban Redevelopment Authority},\textsuperscript{241} where the district court held that "disparate impact is not a cognizable claim under the ADEA."\textsuperscript{242} After considering many of the arguments concerning the inconsistencies between the theory and the language, purpose and legislative history of the ADEA, the court held that it was "significant that Congress has not sanctioned disparate impact under the ADEA."\textsuperscript{243} After pointing out that section 105 of the Civil Rights Act amended Title VII explicitly to list the types of discrimination cases where disparate impact is proper, the \textit{Martinicic} court concluded that, "Congress’ recent decision to include disparate impact in Title VII claims based on race, color, religion, sex and

Hiatt v. Union Pac. R.R., 859 F. Supp. 1416, 1434-35 (D. Wyo. 1994) ("The [employers] bolster their argument [against the applicability of disparate impact] by noting that Congress did in fact amend certain portions of the ADEA as part of the 1991 amendments . . . [and] that Congress' failure to include the codification of the disparate impact theory was a conscious omission . . . .").

240. \textit{See} Moberly, \textit{supra} note 160, at 90 n.7. As Donald Livingston has pointed out, one can see that the amendment of § 105 was of a limited scope by comparing the change in § 105 that addressed \textit{Wards Cove} to the change in § 108 which overruled Martin v. Wilks, 409 U.S. 775 (1989), and extended to any "claim of employment discrimination under the Constitution or Federal civil rights laws." Donald R. Livingston, \textit{The Civil Rights Act of 1991 and EEOC Enforcement, in EMPLOYMENT DISCRIMINATION LITIGATION 1993, supra} note 65, at 143, 156. Because of this limited change to § 105, a number of courts have held that the 1991 CRA does not apply to cases under the ADEA. \textit{See} Thompson v. Prudential Ins. Co., 795 F. Supp. 1337, 1348-49 (D.N.J. 1992) ("Congress did . . . amend the ADEA in certain sections of the [Civil Rights Act of 1991] . . . and, therefore, the decision to limit the scope of [other sections] to Title VII is significant.").

\textit{aff'd}, 993 F.2d 226 (3d Cir. 1993); \textit{cf.} Morgan v. Servicemaster Co. Ltd. Partnership, 57 Fair Empl. Pract. Cas. (BNA) 1423, 1424 (N.D. Ill. 1992) (declining to extend the provisions of the Civil Rights Act of 1991 amending Title VII's damage provisions to ADEA cases); Guillory-Wuerz v. Brady, 785 F. Supp. 889, 891 (D. Colo. 1992) (declining to "look to the new amendments affecting Title VII for guidance in ADEA litigation"). If the 1991 CRA does not apply, \textit{Wards Cove} may still be applicable to ADEA cases. \textit{See} Livingston, \textit{supra}, at 156 (citing Rebar v. Marsh, 959 F.2d 216 (11th Cir. 1992) (stating that Congress' failure to include a venue provision in the ADEA similar to the one contained in Title VII should be corrected by Congress, not the courts)); \textit{see also} \textit{supra} notes 102-07 and accompanying text (considering the continuing applicability of \textit{Wards Cove} to the ADEA after the passage of the 1991 CRA).


242. \textit{Id.} at 1076-77.

243. \textit{Id.} at 1077.
national origin, but not to suggest disparate impact analysis for age in the ADEA, or elsewhere, was not an oversight."

While there is a school of thought that congressional silence and inaction should not be construed to imply acquiescence or agreement, it seems unrealistic to say that Congress, while amending Title VII, never recognized the possibility that such changes would have some effect on the ADEA. Congress was obviously aware of the perceived harmful effects that Wards Cove had on employment discrimination law—that is one of the reasons it enacted the 1991 CRA to amend Title VII. Yet disparate impact theory was not incorporated into the other employment discrimination act—the ADEA. To argue that Congress was not aware of the ADEA as it crafted the 1991 CRA is to ignore the fact that Congress amended the ADEA by that very same 1991 Civil Rights Act. Overlooking congressional inaction under these circumstances is improper, even for the harshest critic of Congress.

C. Differences Between Age and Title VII's Protected Classes

Finally, in addition to the differences between the statutory language and legislative histories of the ADEA and Title VII, disparate impact theory should also not be applied to the ADEA because there are clear, substantive differences between age and Title VII's protected classes of race, religion, national origin and gender. The two basic differences are: (1) while Title VII's protected classes and ability are unrelated, age and ability are at least at some point inherently linked; and (2) age discrimination is based on stereotypes, not malevolence, and has a history distinct from that found among Title VII's protected classes. There are simply too many differences between the class of persons forty and older and the classes protected by Title VII to incorporate into the former a theory created for the latter. While disparate impact may be a "necessary tool to root out the pervasive legacy of racism... it [is] unnecessary and impractical

244. Id. at 1078.
245. Those who argue against finding affirmative implications in congressional inaction suggest that it is just as possible that Congress simply never recognized the potential impact of their inaction. For a comprehensive discussion of the significance of legislative silence, see Eglit, supra note 107, at 1172-1202.
246. See Eglit, supra note 107, at 1173-75.
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for addressing the less invidious problem of discrimination based on age."

1. The Correlation Between Age and Ability to Work

First, "[u]nlike with other subject areas of discrimination where there is no correlation whatsoever between the protected class and the ability to perform, with age there is a direct correlation at some point." Simply put, unlike race, religion, gender, or national origin, "at some point in almost everyone's life, age affects the ability to work." The ADEA was intended to protect only workers who had reached an age where they were susceptible to age discrimination but whose individual abilities were not affected by their age. Both the fact that the ADEA was originally limited to workers between the ages of forty and sixty-five, and the stated purpose of the ADEA recognize that age can affect the ability to work. The ADEA even sets a goal of having employers and employees work together to resolve the "real" difficulties caused by aging.

2. Age Discrimination Has a Unique Impetus and History

Second, age discrimination itself is a different beast than the discrimination Title VII sought to eradicate. Age is not an

248. Kaminshine, supra note 3, at 287.
250. Harris, supra note 125, at 716, accord Vance v. Bradley, 440 U.S. 93, 121 (1979) ("[A]ge, unlike sex, is at some point likely to bear a relationship to ability.").
251. See Harris, supra note 125, at 716-17. One commentator makes the point that Congress recognized the relationship between age and ability and therefore "did not ban age discrimination with the unequivocal, broad-brush strokes with which it banned racial discrimination." Stacy, supra note 125, at 445.
252. See supra note 28.
253. See ADEA § 2(b), 29 U.S.C. § 621(b) (1988). "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." Id. (emphasis added).
254. See Harris, supra note 125, at 717.
255. Some argue that the discrimination faced by older Americans deserves the same effort at eradication that is embodied in Title VII. They claim that "[d]iscrimination based on age...can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group." Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 699 (1st Cir. 1983); see also Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 728 (E.D.N.Y. 1978) ("[A]ge discrimination, while often more subtle than race or sex discrimination, is equally pernicious."). aff'd in part and rev'd and remanded in part, 608 F.2d 1369 (2d Cir. 1979). But even if one agrees with these characterizations
immutable characteristic such as race, sex or national origin, since age changes over time. Older persons have faced no lifelong bias—any bias that arises does so only later in life.\textsuperscript{256} In fact, those who are victims of age discrimination as older workers may have benefitted when they were younger from such discrimination against other older workers. That age discrimination can bring benefits and is not invidious clearly differentiates it from racial discrimination, or discrimination due to Title VII’s other protected characteristics.\textsuperscript{257} Discrimination against persons due to their age is generally not based on bigotry or hatred, but rather it is due to stereotypes attached to older persons and assumptions about their abilities as employees.\textsuperscript{258} Furthermore, in addition to distinctions between the types of discrimination the different classes currently face, the history of that discrimination in our country also greatly differs.

The concept of preventing the perpetuation of past discrimination is central to the \textit{Griggs} Court’s decision to establish disparate impact theory.\textsuperscript{259} Disparate impact applies under Title VII because the individuals in its protected categories have suffered from historical

of age discrimination, this does not support the application of disparate impact to the ADEA because the ADEA is not a statutory attempt to rid the workplace of all age discrimination. The ADEA attempts to fight only arbitrary age discrimination, and by allowing age to be used in a discriminatory manner under certain circumstances, the legislation itself bares the policy decision that age discrimination will be tolerated in certain situations. This is a stark contrast to Title VII’s effort to rid the workplace of all racial, gender, or ethnic discrimination.

\textsuperscript{256} Supporters of applying disparate impact to the ADEA argue that the fact that older persons are “old” only for part of their lives does not lessen the discrimination they face in these years. Ziegler, \textit{supra} note 10, at 1061. The fact that a Mexican-American has only recently arrived in this country does not reduce the prejudice that she faces once she has arrived. \textit{Id.} at 1061 n.96. Whether racially or ethnically motivated or based on age, once the discrimination begins, an individual is judged by the stereotypes attached to the class in which she is grouped, regardless of her own individual characteristics. \textit{Id.} at 1061.

But even if this is true, it entirely misses the point. Supporters argue that disparate impact theory should be grafted onto the ADEA simply because all discrimination is bad, and any method used to fight discrimination in Title VII should be universally applied. But the very differences between the characteristic of age, which leads to employment discrimination only later in life, and Title VII’s categories, to which discrimination adheres at birth, prove that what is appropriate for one statute does not automatically fit the other. As the Seventh Circuit Court of Appeals recently noted, while this may “create[,] a ‘practical difficulty,’ it is a result dictated by the statute itself.” EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1078 (7th Cir. 1994).

\textsuperscript{257} See Smith v. Farah Mfg. Co., 650 F.2d 64, 67 (5th Cir. 1981) (stating that age discrimination is qualitatively different from race or gender discrimination).

\textsuperscript{258} Yarbrough, \textit{supra} note 194, at 114.

\textsuperscript{259} Krop, \textit{supra} note 66, at 848.
discrimination and prejudicial stereotypes. Because the aged have not been subject to the type of invidious discrimination associated with race (which led to the Court's recognition of the need for disparate impact analysis in Griggs), there is less reason to require the employer to justify every employment practice that disproportionately affects older workers. Unlike in Griggs, employer decisions responding to a changing business climate that have a disparate impact on older workers are not translating past discrimination against older Americans into present disabilities. The policy considerations that inspired the Griggs Court to hold the theory implied in Title VII are not present under the ADEA. In essence, Griggs was predicated on the assumption that blacks and whites are inherently equal in ability and that, but for historical discrimination, they would be equally well situated in employment. . . . Similar assumptions cannot be made for all other protected groups. Indeed, some—such as the aged

260. See Hiatt v. Union Pac. R.R., 859 F. Supp. 1416, 1432-33 (D. Wyo. 1994). "[I]t is clear that Griggs' adoption of the disparate impact theory was grounded in the fear of allowing employers' workforces to remain stagnant and discriminatory in composition with respect to certain groups . . . [that had] been subjected to an empirically documented history of overt societal discrimination . . . ." Id.

261. Krop, supra note 66, at 852; see also Stacy, supra note 125, at 440 ("[O]lder workers have not suffered . . . [the] hostility and lack of concern occasioned by racial difference[s which was] the 'historic evil of national proportions' at which Title VII was directed.").

262. Some argue that even if age discrimination is a different type of discrimination, and even if older Americans have not faced the historical, invidious, social stereotyping faced by racial minorities and women, this is not critical to applying disparate impact analysis to the ADEA because the Supreme Court's theory of disparate impact begun with Griggs is neither tied to nor based on past discrimination. Ziegler, supra note 10, at 1056-57. They stress that "Congress directed the thrust of the [anti-discrimination statutes] to the consequences of employment practices, not simply the motivation." Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). They argue that when the Court expanded disparate impact to other Title VII protected categories, it did so without recognition of the decades of discrimination the groups had faced, but simply based on the adverse effects the employment policies in question had on members of the protected class. Ziegler, supra note 10, at 1057-59. They note that in Dothard v. Rawlinson, 433 U.S. 321 (1977), where the Supreme Court invalidated a minimum height and weight requirement for prison guards because of the requirement's disparate impact on female applicants, the Court's ruling did not include any discussion of past discrimination. Ziegler, supra note 10, at 1057-59. But the "concept of perpetuating past discrimination [was] central to the Griggs rationale," Krop, supra note 66, at 848, and even the Dothard decision, while not specifically repeating the logic used in Griggs, did note that the reasoning employed in Griggs "guide[s] our approach here." Dothard, 433 U.S. at 329.
may be protected, in part, because they are likely as
groups to be less qualified for employment than others.263

A recent example of a court using precisely this analysis to
conclude that disparate impact does not apply under the ADEA can
be found in Hiatt v. Union Pacific Railroad Co.264 In Hiatt, the
plaintiffs contended that the employer's mandatory promotion policy
violated the ADEA under a disparate impact theory because the
policy required employees to change positions, which resulted in a
loss of seniority for the promoted worker.265 The Hiatt court ruled
that "an employment practice which disproportionately falls on older
individuals, standing alone, [does] not . . . give rise to an inference or
presumption of unlawful [age] discrimination . . . [and] disparate
impact claims are not cognizable under the ADEA as a matter of
law."266 The main factors behind this decision were two-fold: First,
the court found that the concept of perpetuating past discrimination
was the central rationale behind the Griggs decision, and this concern
is "not present when the alleged disparate impact is based on age."267
Second, the court found that there was some correlation
between age and ability, and that this correlation could not be "traced
to . . . past discrimination against these [plaintiffs] who were previously
younger and possibly the beneficiaries of any age
discrimination."268 Therefore, the Hiatt court held that disparate
impact theory was not applicable to claims of age discrimination
brought under the ADEA.269

The difference between age and Title VII's protected classes is
further highlighted by the fact that age classifications are not
considered a suspect class—as race classifications are—under the

263. Elizabeth Bartholet, Application of Title VII to Jobs in High Places, 95 HARV. L.
REV. 947, 948 n.1 (1982).
265. Id. at 1423.
266. Id. at 1436.
267. Id. at 1435-36. The Hiatt court reinforced this point by holding that "it is apparent
that the underpinnings of Griggs simply have no application when the alleged
discrimination is based on age." Id. at 1436.
268. Id. at 1436.
269. Id. Even though the district court recognized that the statutory language might
offer a possible interpretation for applying the theory, it decided that it was necessary to
"look beyond the plain language of the statute" to reach a conclusion. Id. at 1434. Also,
the court refused to give much weight to Congress' failure to codify disparate impact
theory under the ADEA when it enacted the 1991 CRA. Id. at 1343-35. Nonetheless, the
court's review of Griggs was enough for it to decide that disparate impact theory should
not apply under the ADEA. Id. at 1435-36.
Equal Protection Clause of the Constitution. In *Massachusetts Board of Retirement v. Murgia*, the Supreme Court held that age-based classifications were subject only to a rational relation test. Therefore, the Court upheld a state mandatory retirement law for state troopers, reasoning:

While the treatment of the aged . . . 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. . . . [O]ld age does not define a "discrete and insular" group, in need of "extraordinary protection" [because age merely] marks a stage that each of us will reach if we live out our normal span.

The *Murgia* Court in essence recognized that not only was age discrimination different from the discrimination addressed by Title VII, but that age, unlike race or gender, "is often a relevant indicator of job performance and is not a completely inapposite stereotype with no correlation to job performance."

The most recent United States Supreme Court decision involving the ADEA, *Hazen Paper Co. v. Biggins*, also provides support for the inapplicability of disparate impact theory to the ADEA. In
*Hazen Paper*, the Court considered an ADEA claim brought by Biggins, a 62-year-old plaintiff who had been fired just days before his pension would have vested under the terms of the company pension plan which provided for vesting after ten years of working for the employer.\(^{277}\) The Court held that since the ADEA's purpose is to eradicate demeaning, stereotypical biases, when an employer fires an employee because of salary level, pension benefits, or any other factor correlated to age, it does not necessarily indicate the employer harbors forbidden views about older people.\(^{278}\) The *Hazen* Court said:

The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.

When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is.\(^{279}\)

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\(^{277}\) *Hazen Paper*, 113 S. Ct. at 1704.

\(^{278}\) *Id.* at 1706. As the Court further explained, it is possible that "an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older" violates the ADEA. *Id.* at 1707. But the Court said that the use of this type of "proxy" does not violate the ADEA just because under the statute the two factors (here age and pension status) are equivalent; the ADEA is violated only if it is shown that the employer both assumes a correlation between the two factors where none exists and acts on that assumption. *Id.* As the *Hazen* Court understood it, the question is: Did the employer use a "prohibited stereotype" in making its employment decision by thinking that "‘older employees are likely to _____’"? *Id.* In *Hazen*, the Court found that the employer did not ask itself such a question concerning Biggins. *Id.*

\(^{279}\) *Id.* at 1706.
The *Hazen* Court held that because "an employee's age is analytically distinct from his years of service . . . an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age-based.' "280 Finally, the Court said that while the ADEA "requires the employer to ignore an employee's age (absent a statutory exemption or defense) it does not specify further characteristics that an employer must also ignore."281 After *Hazen*, an ADEA plaintiff must show that the rationale behind an employer's employment decision (if one is offered) is pretextual and that the employment policy is predicated on some stereotype, conscious or unconscious. Employers will not violate the ADEA merely by interfering with an older worker's pension benefits or factors other than age, unless a clear connection is made between such an interference and discrimination based on the employee's age.282

Since *Hazen* was a disparate treatment case, and disparate impact theory was not at issue,283 some argue that the door remains open for employees within the ADEA's protection to try to use disparate impact theory to hold employers liable under the ADEA if they discriminate on the basis of pension, seniority or other "age-related" benefits.284 However, 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. The Court specifically held that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA,"285 thus implying a belief that disparate impact theory is not what the ADEA intended. Further, Justices Kennedy, Thomas, and Rehnquist signalled their willingness

280. *Id.* at 1707.
281. *Id.*
283. Plaintiff Biggins did not raise a disparate impact claim; he relied on an allegation of disparate treatment. *Hazen Paper*, 113 S. Ct. at 1706 ("[Plaintiff] claims only that he received disparate treatment.").
284. For an argument that the Court should find that disparate impact theory appropriately extends to ADEA claims resulting from termination to prevent pension benefits from vesting, see Patricia A. Mitchell, Note, *Hazen Paper Co. v. Biggins: Extending the Disparate Impact Doctrine to ADEA Claims*, 29 GONZ. L. REV. 675, 685-93 (1994).
to hold disparate impact theory expressly inapplicable to the ADEA. 286

The effects of the Hazen decision are dramatically illustrated in a recent decision by the Court of Appeals for the Seventh Circuit. In EEOC v. Francis W. Parker School, 287 a case with facts strikingly similar to those at issue in Geller v. Markham, 288 the Court of Appeals used the logic of the Hazen decision (as well as much of the opinion’s language) to hold that disparate impact theory was not applicable under the ADEA. 289 The Francis Parker School District’s policy of linking wages to experience was adjudged an economically defensible and reasonable means of determining salaries. 290 The Seventh Circuit panel held that although years of service may be correlated with age, Hazen holds that “it is incorrect to say that a decision based on years of service is necessarily age-based,” unless the plaintiff can demonstrate that the reason given was a pretext for a stereotype-based rationale. 291 The Francis Parker court used the Hazen decision as overwhelming proof that disparate impact doctrine should not be applied to the ADEA, and the Seventh Circuit’s decision might spur on the Supreme Court to address the issue directly in the near future. 292

286. See supra note 120.
287. 41 F.3d 1073 (7th Cir. 1994).
289. Francis W. Parker Sch., 41 F.3d at 1077. The Francis W. Parker Sch. decision overruled the Seventh Circuit’s earlier decision in Metz v. Transit Mix, Inc., 828 F.2d 1202, 1204 (7th Cir. 1987), in which the court applied disparate impact theory to the ADEA. This reversal was seemingly foreshadowed in the court’s previous term. See Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1993) (stating that employment decisions based on criteria which merely tend to affect workers over the age of 40 more adversely than workers under 40 are not prohibited).
290. Francis W. Parker Sch., 41 F.3d at 1078. The court held that this was “borne out by the ADEA’s ‘safe harbor’ provision which permits an employer to ‘observe the terms of a bona fide seniority system . . . which is not a subterfuge to evade the purposes of [the ADEA’s prohibitions].’ ” Id. (quoting 29 U.S.C. § 623(f)(2)) (1988), amended by 29 U.S.C. § 623(f)(2)(b) (Supp. V 1993)).
291. Id.
292. Justice Kennedy’s concurrence in Hazen signals that at least three members of the Court, Justices Kennedy and Thomas and Chief Justice Rehnquist, would hold that disparate impact should not apply under the ADEA. See Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1710 (1993) (Kennedy, J., concurring); supra note 120.
3. The Realities of the Workplace

The differences between the ADEA and Title VII are brought into even clearer focus by looking at the reality of the workplace. As the Court of Appeals for the Sixth Circuit noted,

The progression of age is a universal human process. In the very nature of the problem, it is apparent that in the usual case, absent any discriminatory intent, discharged employees will more often than not be replaced by those younger than they, for older employees are constantly moving out of the labor market, while younger ones move in. . . . [W]e do not believe that Congress intended automatic presumptions to apply whenever a worker is replaced by another of a different age.293

Furthermore, statistics, often the key to disparate impact cases, may be less probative in age cases because of this natural progression in the workplace, whereby older workers retire and younger workers replace them.294 Therefore, statistics tending to show that older workers are being replaced by younger workers, taken alone, would at best be extremely tenuous evidence of age discrimination, and any showing of a statistical disparity may receive less weight in an ADEA case than it would under Title VII.295 But since statistics are the linchpin of disparate impact claims, this inherent conflict between the

294. See Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1224 (7th Cir. 1980) (per curiam) (incorporating by reference and appending the opinion of the district court judge) (citing Laugesen, 510 F.2d at 313), cert. denied, 450 U.S. 959 (1981); see also Outen, supra note 65, at 166-67 (“Natural factors . . . such as the normal predominance of younger workers entering the workforce, and older ones leaving, tend to skew the statistics, making age disparate impact cases rarer than they are in other EEO areas.”).
295. See, e.g., Simpson v. Midland-Ross Corp., 823 F.2d 937, 944 (6th Cir. 1987) (rejecting a decreasing average employee age as probative of age discrimination); Moore v. McGraw Edison Co., 804 F.2d 1026, 1031 (8th Cir. 1986) (stating that because factors unique to age “[tend] to negate the probative value of [statistical] evidence [of age discrimination], statistics might not be reliable to indicate” an ADEA violation); Kephart, 630 F.2d at 1224 (stating that no adverse impact caused by employment decisions is legally significant unless it is great enough to offset the normal progression of older workers out of the labor force, and their replacement by younger workers); see also Sholl & Strang, supra note 68, at 338 (“It is difficult . . . to determine when the degree of any disparate impact becomes legally significant. . . . [S]ome disparity is always present, and [this disparity] simply reflects the replacement of older workers by younger workers, as older workers retire from the labor force.”); cf. Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, 1321 (E.D. Mich. 1976) (stating that age discrimination is not identical to either race or sex discrimination, so the same principles governing the use of statistics in those types of cases should not be applied across the board to an age case).
functioning of disparate impact theory and the realities of the real labor market illustrate another inherent flaw in trying to include disparate impact theory under the ADEA.

4. Enforcement History and Reverse Discrimination

Two further distinctions between the ADEA and Title VII support the argument that disparate impact theory should not be applied to the ADEA. First, enforcement of the ADEA originally was assigned to the Wage and Hour Division of the Department of Labor, not to the EEOC, which enforced Title VII. The interpretation originally issued by the Wage and Hour Administrator did not support the notion that the ADEA was directed at disparate impact. Eventually, the responsibility for enforcing the ADEA was shifted to the EEOC, but this initial difference is just one more indication that while Congress' original intention in passing the ADEA may have had much in common with Title VII, the two statutes were never intended to be identical.

Second, unlike Title VII, the ADEA does not protect plaintiffs outside the protected class from reverse discrimination: employers may favor older workers over non-protected workers because Congress in the ADEA specifically sought to protect a group—older workers. These two differences between Title VII and the ADEA are further evidence that the application of disparate impact theory to the ADEA would be inappropriate.

296. Ziegler, supra note 10, at 1048 n.46.
298. See Stacy, supra note 125, at 447-48. The original interpretive regulations show concern only over assuring that practices, such as the posting of help wanted notices, 29 C.F.R. § 860.92(d) (1983) and employee testing, 29 C.F.R. § 860.104(b) (1983), are "for a permissible purpose and not for purposes proscribed by the [ADEA]." 29 C.F.R. § 860 (1983).
300. One commentator has argued that the assignment of the ADEA's enforcement to the Department of Labor was done not as an indication of any difference from Title VII, but as a realistic recognition that the EEOC may be overburdened. See Anne S. Emanuel, Comment, Class Actions Under the Age Discrimination in Employment Act: The Question Is "Why Not?", 23 EMORY L.J. 831, 838 (1974) (noting that the enforcement responsibility of the ADEA was originally different to ensure that it did not receive short shrift at the hands of an overloaded EEOC).
5. Unintended Effects of Applying Disparate Impact Theory to the ADEA

Finally, stepping back from the details and intricacies of the language and history of the ADEA and Title VII, a critical policy implication is involved when considering disparate impact theory and the ADEA. Time has shown that the main beneficiaries of the ADEA are white males in their fifties and sixties. This same group has also been the traditional beneficiary of both historic *de jure* discrimination and past and current *de facto* discrimination against women and minorities. Despite legislation and changing attitudes, discrimination against women and minorities still exists, and the effects of past discrimination continue to be difficult to completely overcome. Applying disparate impact theory to the ADEA would provide the older white male worker with one more tool to slow the progress of ensuring equal employment opportunities and equal treatment for minorities and women. Even if this is an entirely unintended result, Title VII and the ADEA were designed to complement each other. Offering a greater chance for recovery under the ADEA at the expense of continuing the oppression of minority groups is an undesirable clash. Such a conflicting effect offers one more practical reason for not applying disparate impact theory to the ADEA.

V. THE EFFECT OF APPLYING OR NOT APPLYING DISPARATE IMPACT THEORY TO THE ADEA

As illustrated in the preceding sections, disparate impact theory, as developed under Title VII, should not be applied to the ADEA because the ADEA has its own unique language, history and goals,

302. "[T]he typical plaintiff in an age-related lawsuit is a male in his early or mid-50's who has been with the company 20 years or more and has worked up through the ranks of middle management." Steven Pressman, *Older Workers Enforce Their Rights With Lawsuits*, DETROIT FREE PRESS, Mar. 17, 1989, at 1C. Theories as to why ADEA litigants seem to fit this profile focus on a number of interconnected factors including: (1) white males continue to occupy jobs that are most rewarding in terms of salary and power, and thus they have greater reason to fight the loss of such a position; and (2) since white males are often higher salaried employees, they are more likely to have the resources to fight via litigation. See 1 EGLIT, *supra* note 19, § 2.01, at 2-4.


304. *See supra* notes 129-37 and accompanying text.
and because age discrimination is distinct from other areas of employment discrimination. Furthermore, these distinctions are also supported by analyzing the current status of age discrimination litigation and the real thought processes that go through the minds of parties to a lawsuit brought under the ADEA.

The application of disparate impact to the ADEA would be a drastic step because it would suddenly open up a new avenue for recovery in those jurisdictions that currently limit an ADEA claim only to disparate treatment theory. Moreover, because being able to establish a prima facie case with statistics that show an adverse impact, and thereby shifting the burden of proof to the employer, dramatically alters the potential parties’ strategies and postures in any lawsuit, such a step would be a sea change in age discrimination litigation. The very nature of employment litigation makes the placement of the burden of proof critical to the explosion or implosion of age discrimination suits.

Initially, most employers are loathe to take age discrimination suits to trial. First, between two-thirds and three-quarters of plaintiffs who go to trial in ADEA cases win before a jury. Second, all trials are expensive and time-consuming. Third, taking a case to trial, rather than reaching a settlement, may expose the employer to huge liability. Fourth, the publicity and tension caused by a public trial may have a negative impact on the employer's


306. For example, while McDonnell Douglas Co. said it based its layoffs on performance ratings, not age, in March, 1993, the company agreed to pay $20.1 million to a group of plaintiffs in an age discrimination action to "avoid costly and time-consuming litigation." The settlement was the second largest in EEOC history. Aaron Epstein, Charges of Age Bias Rise as Companies Pare Ranks, MIAMI HERALD, May 16, 1993, at 1K.

307. "Sympathetic jurors generally award larger damages in age discrimination suits than in other types of discrimination suits. . . . [D]amage awards in age bias cases, on average, run twice the awards in race bias cases . . . ." Doming, supra note 10, § 1, at 10. One survey found that from 1988 through 1992, successful age discrimination claims brought average awards of $450,289, compared with $255,734 for sex discrimination, $176,578 for race discrimination, and $151,421 for disability discrimination. Id. (citing survey by Jury Verdict Research, Horsham, Pa.). Total damage awards in age discrimination cases tripled from 1988 to 1993, reaching a total of $96.9 million for 1993. Witt, supra note 17, at 8F.
business, the morale of other employees, and the community's view of the participants.

Moreover, litigators are rightly fearful of age discrimination suits tried before a jury. First, the suits often look like the classic case of the bully (the employer) treating the helpless "little guy" (the employee or applicant) poorly and trying to get away with it. Second, unlike cases under Title VII where jurors are asked to consider the plight of members of different protected classes subject to discrimination, almost all jurors can sympathize with the plight of the ADEA plaintiff. While not all jurors can truly understand what it is like to be a racial minority or to be of a different gender, all jurors hope to be in the plaintiff's situation one day—to be lucky enough to grow old—and therefore, they empathize with the ADEA plaintiff more easily than a victim of discrimination from any other protected class.

A decision on this issue will also dramatically affect any attempts at settlement of age discrimination suits. For example, since proof of an employer's discriminatory motive is hard to show, many disparate treatment cases are won by employers on motions for summary judgment. But under a disparate impact claim, motions for

308. See Epstein, supra note 306, at 1K (stating that despite the fact that some lawsuits alleging age bias are frivolous, since there are certainly some workers who show actual lethargy or resist change, "a fear of lawsuits often deters employers from firing unproductive older workers").

309. See Cooper, supra note 19, at 1F ("Age [discrimination in employment lawsuits] are far more likely to be successful than race or sex cases.").

310. See id. ("Juries usually view [age discrimination in employment] cases as a mismatch, 'old Uncle Charlie versus Acme Conglomerate Corp.' ").

311. Pressman, supra note 302, at 1C ("[O]lder jury members are more likely to be sympathetic to an older worker charging an employer with age discrimination. But the same logic can be easily extended to younger jurors. . . . They're going to be older people some day."); see also Cooper, supra note 19, at 1F (stating that older jurors tend to better identify and sympathize with older workers claiming age discrimination); Dorning, supra note 10, § 1, at 10 (noting that "jurors tend to be older than the general population, because older people register to vote in larger numbers and older citizens are less inclined to resist jury service when called").

312. See Dorning, supra note 10, § 1, at 10 ("We're all going to get old. We're not all going to get African-American [or] handicapped.").

313. It has been stated that "many defense counsel view the motion for summary judgment as the most important phase of the [age discrimination] case because if the case reaches a jury, the chances of the employer prevailing decrease." Thomas J. Piskorski, The Growing Judicial Acceptance of Summary Judgment in Age Discrimination Cases, 18 Employee Rel. L.J. 245, 246 (1992); see also Jeffery S. Brand, Summary Judgment Motions in Age Discrimination in Employment Actions: A Plaintiff's Perspective, in AGE DISCRIMINATION WORKSHOP 1985: STATE AND FEDERAL LITIGATION, supra note 1, at 141, 143 ("While there is language in . . . treatises to th[e] effect [that summary judgment
summary judgment are much easier for the plaintiff to survive. This difference is shown perfectly by two recent cases decided in different federal district courts. Where disparate impact was ruled a viable theory under the ADEA, the employer's summary judgment motion was defeated; where the theory was not accepted, summary judgment was granted to the employer.

If disparate impact was a valid theory for recovery, the employer would know that because a plaintiff could establish a prima facie case of age discrimination via statistics without having to prove discriminatory animus, the case is much more likely to survive a summary judgment motion and get to trial. This would alter the parties' settlement calculus and their own evaluation of the likely cost of litigation. While lawsuits are expensive and time-consuming, cases that go to trial are even more so. If disparate impact theory becomes available, the plaintiffs immediately gain bargaining strength, as well as an increased likelihood of recovering in a case where before they could not have won. Though this might make some lawsuits less contentious, it also makes a suit immediately more expensive for the employer and will drive settlements higher.

However, it also seems likely that if age discrimination claims become too easy to win, or settlements become too costly, there will

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motions are used sparingly in age discrimination cases], the reality is ... defendant's motions for summary judgment are frequently granted in age cases and ... boilerplate propositions regarding their supposed disfavor are of little use in opposing them."); Gregory, supra note 110, at 418 ("An increasing number of discrimination cases are resolved at the summary judgment stage. Whether evidence is sufficient to survive summary judgment has become the critical issue in federal discrimination practice."). For a criticism of the use of summary judgment to resolve ADEA suits, see Gale Busemeyer, Comment, Summary Judgment and the ADEA Claimant: Problems and Patterns of Proof, 21 CONN. L. REV. 99, 123-32 (1988).

314. There has been a pronounced increase in the use of summary judgment procedure in civil rights and employment discrimination litigation. See Gregory, supra note 110, at 425 ("Historically, summary judgment was a rarely used procedural device. More recently, courts have looked favorably upon the summary disposition of claims ... "); supranotes 108-19 and accompanying text (discussing the effects of disparate impact theory on burdens of proof and motions for summary judgment). See generally Samuel Issacharoff & George Loewenstein, Second Thoughts About Summary Judgment, 100 YALE L.J. 73 (1990) (discussing history and recent trends in the use of summary judgment); Ann C. McGinley, Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases, 34 B.C. L. REV. 203 (1993) (discussing recent use of summary judgment by federal district courts in employment discrimination cases).


be a subtle backlash from employers. A business seeking to survive in difficult economic times tends to find creative ways to cut costs, and it is likely that discriminatory decisions will still be made; they will just become more subtle and harder to detect. On the other hand, if claims of discrimination are too difficult to establish, employers will have a much wider range within which to make employment decisions which may impinge on the rights of older workers, and this would defeat the basic goals of the ADEA itself.

If disparate impact theory is not applied to the ADEA, it is possible that the eventual impact will be an erosion of the original congressional intent embodied in the ADEA. The practical reality is that certain characteristics, such as experience, wages based on seniority, pension status, and benefits plans, do correlate strongly with age and can be effectively used as proxies for age-based determinations. If this does not violate the ADEA, then employers will have a facially valid method for affecting limited "unintentional" age discrimination in their employment practices. This may result in a situation where age discrimination in employment is prohibited in form, but not in substance.

CONCLUSION: ESTABLISHING DISPARATE IMPACT THEORY UNDER THE ADEA WOULD REQUIRE CONGRESSIONAL ACTION

Even though strong arguments support the position that disparate impact theory should not be applied to the ADEA, there clearly remains much sympathy among commentators and courts toward aiding older employees in actions brought under the ADEA. Certainly no one would attempt to dispute the negative impacts of age discrimination, both on the workforce and on individual employees. But, the ADEA—the statute specifically created to address age discrimination in employment—is a limited legislative remedy. It is simply not broad enough to include the concept of disparate impact within its protections. A clear and final illustration of this is Martincic v. Urban Redevelopment Authority, where an employer chose to promote a younger worker over an older employee. The Martin-

317. See Ex-Official Gives EEOC Mixed Review, supra note 305, at A2 (quoting former General Counsel of the EEOC, Charles Shanor, who suggests that as plaintiffs gain more leverage for favorable settlements in employment discrimination suits, defendant employers may fight the suit harder rather than settling when the cost of settlement becomes too high).
319. Id. at 1074.
The Martincic court held that disparate impact theory must not apply under the ADEA because if it did, "[when] younger workers happen to be promoted at a higher rate than older workers, then the plaintiff's prima facie case for disparate-impact age discrimination is satisfied—even though age may not have been considered in the promotion decisions." The court reacted to the plaintiff's claim of discrimination almost incredulously: "Surely this cannot be age discrimination, at least not without Congress' imprimatur." No such congressional intent can be found in the ADEA, and if anything, the opposite intent was expressed by Congress when it amended Title VII to incorporate disparate impact theory, but did not similarly amend the ADEA. Finally, the Martincic court was troubled by the notion of a court's reviewing the employer's business decisions, absent direct evidence of age bias. It considered such a review "an undue interference in the management of a business."

If applying disparate impact theory to the ADEA ever becomes required to combat the effects of age discrimination in employment, then Congress, not the courts, should make this policy decision. Congress could amend the ADEA explicitly to provide for recovery under a disparate impact theory, or merely to include under the coverage of the ADEA a prohibition against employers using specific factors that strongly correlate with age as the basis for employment decisions. But by taking any action, Congress would be required to balance the employers' business needs with the needs of older workers, and this solution would recognize the valid arguments for extending disparate impact to the ADEA and the drastic changes that such an application would have on the business community. Such an amendment of the ADEA would reaffirm Congress' commitment to individual civil rights without losing sight of the real,
to recognize the attendant effects that policy decision would have on businesses and employment practices at all levels of the public and private sector. Therefore, any congressional action seems unlikely, because it would require squarely facing two very powerful and vocal sets of interest groups—the American Association of Retired Persons and other older citizen advocate groups and civil rights organizations on one side, and the entire business community on the other. Obviously, it would be much easier for Congress not to amend the ADEA to adopt disparate impact theory, and with the current political climate and rather crowded legislative agenda, no amendment proposal seems likely in the foreseeable future.

Absent any congressional action or amendments to the ADEA, courts should recognize that disparate impact theory is not currently applicable under the ADEA. While the goal of attempting to fight age discrimination is laudable, there is no basis in the statute, its history or its specific goals for applying the theory. While amending the ADEA might be appropriate, until such a change is enacted, disparate impact theory should not be applied to age discrimination cases brought under the ADEA.

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