ARTICLES

THE CONTINUING VALIDITY OF DISPARATE IMPACT ANALYSIS FOR FEDERAL-SECTOR AGE DISCRIMINATION CLAIMS

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B. The Legislative History of Section 4 of the ADEA
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INTRODUCTION

Recently, there has been a steady flow of commentary on the propriety of disparate impact analysis for age discrimination claims brought against private-sector employers and state and local governmental entities pursuant to the Age Discrimination in Employment Act of 1967 (“ADEA”). However, none of that commentary addresses whether disparate impact analysis is appropriate in ADEA cases against federal-sector employers, such as federal governmental agencies. This Article is intended to fill that void.

Section 15 of the ADEA prohibits age discrimination in federal-sector employment. Section 4 of the ADEA, which has been the sole focus of the above-mentioned disparate impact commentary, also outlaws age-based employment discrimination, but applies only to private-sector and state government employers, labor organizations and employment agencies. The principal thesis of this Article is that the unique statutory language of section 15, combined with its legislative history and parallel to corresponding provisions of Title VII of

the Civil Rights Act of 1964 ("Title VII"), mandate the continuing application of disparate impact analysis in ADEA cases against the federal government.

Part I of this Article briefly discusses the difference between disparate treatment analysis, which requires a showing of specific discriminatory intent, and disparate impact analysis, which does not. Although these theories of liability contain different elements of proof, at bottom, they represent nothing more than different analytical routes to the same legal conclusion—discrimination.

Part I further notes that prior to the Supreme Court's 1993 decision in *Hazen Paper Co. v. Biggins,* courts uniformly had applied disparate impact analysis in ADEA cases. Based on dicta in that case and Congress' failure to codify disparate impact analysis into the ADEA in 1991, several courts now question or categorically prohibit the application of this method of proof in age discrimination cases. All of these decisions, however, interpret and apply section 4 of the ADEA, not section 15.

Part II notes that, unlike section 4 of the ADEA, section 15 does not contain any exceptions to age-based employment decisions. Part II then argues that because of the Supreme Court's holding in *Lehman v. Nakshian,* and the "integration" language contained in section 15(f) of the ADEA, section 4's exceptions cannot be read into section 15.

Part II next explains that Congress patterned section 15 of the ADEA directly after section 717 of Title VII, which bars federal-sector employment discrimination based on race, sex, color, national origin, or religion. Part II continues by arguing that because the statutory language of these two provisions is identical in all relevant respects, and because courts have repeatedly applied disparate impact analysis in discrimination claims against the federal government under section 717, it follows that this analysis applies in the ADEA context as well. Part II further argues that this conclusion is buttressed by court decisions that have uniformly applied a disparate impact analysis under section 15 and by the legislative history of section 15, which shows that Congress intended to prohibit ostensibly age-neutral employment practices that have a significant adverse impact.

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on older federal workers.

Part II briefly addresses the government's potential assertion of a sovereign immunity defense to ADEA claims based on disparate impact. This Part argues that as disparate impact and disparate treatment are simply two different analytical routes to the same legal conclusion, the government's waiver of sovereign immunity for age-discrimination liability should encompass claims premised upon disparate impact.

Part III examines the legislative history of section 4, concluding that, as with federal-sector employment, Congress intended to target facially-neutral, but nonetheless age-discriminatory, employment practices of private employers. Accordingly, section 4 of the ADEA provides further support for the use of disparate impact analysis in federal-sector ADEA claims.

I. AN OVERVIEW OF BURdens OF PROOF IN EMPLOYMENT DISCRIMINATION CASES

Over the past thirty-five years, Congress has outlawed employment discrimination on the basis of an individual's membership in any one of several protected classes, including race, sex, color, national origin, religion, disability, citizenshship status, and age. During that time, the federal courts have established two methods for proving employment discrimination under these statutes: "disparate treatment" and "disparate impact."
Under a disparate treatment method of proof, "[p]roof of discriminatory motive is critical." Proof of discriminatory motive is not critical under the disparate impact approach,\textsuperscript{7} where the required proof "involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."\textsuperscript{18} Regardless of whether a discrimination claim is analyzed under a disparate treatment or disparate impact method of proof, the core legal issue in a discrimination case is always the same: whether an individual was a victim of discrimination. Significantly, the Supreme Court has held that a disparate impact theory of discrimination is functionally equivalent to a disparate treatment theory\textsuperscript{19} and that "[e]ither theory may be applied to a particular set of facts."\textsuperscript{20}

\textbf{A. Disparate Treatment}

An employment policy that explicitly denies an employment benefit because of a person's age, sex or race is the most obvious, and typically the most unjustifiable, form of disparate treatment.\textsuperscript{21} Since, however, as there will rarely be an eyewitness account of the employer's state of mind, let alone a published, facially-discriminatory employment policy,\textsuperscript{22} the Supreme Court has developed a three-step
procedure for proving intentional discrimination wholly through circumstantial evidence.23 Although the Supreme Court fashioned this three-step analysis in the context of race discrimination cases brought under Title VII, the lower courts have uniformly applied it to age discrimination claims under the ADEA,24 with the Supreme Court's implicit approval.25

23. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973) (stating that in a Title VII discrimination action, plaintiff bears the initial burden of establishing a prima facie case, then the defendant has the burden to articulate a non-discriminatory reason for its action, and finally, the plaintiff must prove the pretextual nature of defendant's reason); see also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993) (maintaining that trier of fact's rejection of an employer's stated reasons for its actions does not result in a judgment for the plaintiff as a matter of law, but rather the burden of persuasion remains with the plaintiff to prove intentional discrimination); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (articulating three-part process for proving discrimination). Essentially, the first step of this indirect mode of proof, the prima facie case, requires a plaintiff to prove that she was qualified for, but denied, employment or other job benefits in favor of an employee outside of her protected class. See McDonnell Douglas, 450 U.S. at 802 & n.13. In the second step, the employer's burden of production, the employer proffers admissible evidence of, but need not prove, a non-discriminatory reason for its actions. See Burdine, 450 U.S. at 254. In the third step, the establishment of a pretextual motive, the plaintiff must prove that the employer's articulated reason is a lie or "pretext" that conceals a discriminatory motive. See Hicks, 509 U.S. at 507-08. The plaintiff bears the burden of proof at all steps of this analysis. See id. at 507. This three-step test is referred to as the McDonnell Douglas test in this Article.


Sometimes, disparate treatment cases fall within a fuzzy area between facially-discriminatory policies and wholly-circumstantial cases of intentional discrimination. To facilitate a showing of discriminatory intent, the Supreme Court has held in the context of alleged gender discrimination that once a plaintiff shows that her gender "played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving ... that it would have made the same decision even if it had not taken the plaintiff's gender into account." This is the so-called "mixed-motives" analysis. In such cases, where there is substantial evidence that a decision-maker relied on discriminatory considerations, the burden of proof shifts to the employer, unlike under the three-step, indirect mode of proof. Although the mixed-motives analysis was spawned in the Title VII context, it applies to ADEA cases as well.


27. To trigger such an analysis, a plaintiff may submit "direct" evidence of discriminatory intent ("I won't hire you because you're a woman," or "I'm firing you because you're not a Christian"). See, e.g., Venters v. City of Delphi, 123 F.3d 956, 972 (7th Cir. 1997) (ruling against summary judgment for an employer in a Title VII religious discrimination case where plaintiff had direct evidence of discrimination because her boss threatened job loss if she did not play by "God's rules"). Alternatively, a plaintiff may submit evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude. Racist or sexist comments uttered by a supervisor in connection with an employee's discharge might be one example. See Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992) (discussing sufficiency of proof needed to entitle plaintiff to a burden-shifting instruction); Fields v. New York State Office of Mental Retardation & Developmental Disabilities, 115 F.3d 116, 124 (2d Cir. 1997) (holding that stray remarks made by people who are not part of decision-making process fail to meet Ostrowski standard); see also Thomas v. National Football League Players Ass'n, 131 F.3d 198, 204 (D.C. Cir. 1997) (noting "direct" evidence merely means showing unlawful consideration and does not go to nature of evidence offered); Venters, 123 F.3d at 972-73 (reiterating that direct evidence of discrimination involves a person with employment decision-making power who states an "illegal employment criterion"); Fuller v. Phipps, 67 F.3d 1137, 1143 (4th Cir. 1995) (noting that plaintiff failed to make out a mixed-motives case where there was no direct evidence of discrimination).

28. The Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (codified as amended in scattered sections of 42 U.S.C.), partially overruled Price Waterhouse as it applies to Title VII cases. Now when a protected characteristic constitutes a "motivating factor" in an adverse employment action, the employer is automatically liable under Title VII, regardless of whether the employer would have made the same decision, absent the impermissible motive. See 42 U.S.C. § 2000e-2(m) (1994). The employer, however, can severely curtail the remedies available to the plaintiff by proving by a preponderance of the evidence that it "would have taken the same action in the absence of the impermissible motivating factor." See id. § 2000e-5(g)(2)(B).

29. See, e.g., Nitschke v. McDonnell Douglas Corp., 68 F.3d 249, 253 (8th Cir. 1995) (assuming that mixed-motives analysis is allowed under ADEA); Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1216 (5th Cir. 1995) (same); EEOC v. Ethan Allen, Inc., 44 F.3d 116, 119 (2d Cir. 1994) (stating that ADEA cases may be brought under Title VII using pretext or mixed-motives analysis); Considine v. Newspaper Agency Corp., 43 F.3d 1349, 1366 (10th Cir. 1994) (assuming that mixed-motives analysis is allowed under ADEA); Armbruster v. Unisys Corp., 92 F.3d 768, 771 n.3 (3d Cir. 1994) (permitting argument that mixed-motives analysis is allowed under
Because "harassment" based on a protected characteristic is a form of disparate treatment in the terms or conditions of employment, the elements of proof in a harassment case represent yet another of proving intentional employment discrimination. Several courts have applied the harassment mode of proof to the age discrimination context.

B. Disparate Impact

Although evolving since its inception in 1971, the law of disparate impact, unlike disparate treatment analysis, has not ventured off in numerous different directions. In *Griggs v. Duke Power Co.*, the Supreme Court held that in the Title VII context "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." Under such a standard, a company's requirement that employees possess a high school education and pass a written intelligence test

ADEA but declining to rule so because the issue was not fully briefed). At least one district court has held that the new mixed-motives provisions of Title VII do not apply to ADEA claims because the statutory language literally applies only to claims of race, sex, color, national origin, or religious discrimination. See *Siwik v. Marshall Field & Co.*, 945 F. Supp. 1158, 1162 (N.D. Ill. 1996) (finding the Civil Rights Act of 1991 only applies to statutorily defined classes and not to the ADEA because the ADEA has not been amended as Title VII has; therefore, *Price Waterhouse* controls). This holding is consistent with those courts that have refused to apply the new mixed-motives provisions to Title VII retaliation claims. See *Tanca v. Nordberg*, 98 F.3d 680, 684 (1st Cir. 1996) (concluding that plain meaning of Title VII does not allow for application of section 107 of the Civil Rights Act of 1991 to retaliation claims brought under section 2000e-3), cert. denied, 117 S. Ct. 1253 (1997); accord *Woodson v. Scott Paper Co.*, 109 F.3d 913, 935 (3d Cir.) (concluding that section 107 does not apply to retaliation cases because it amended only 42 U.S.C. § 2000e-2, not 42 U.S.C. § 2000e-3, which deals with retaliation), cert. denied, 118 S. Ct. 299 (1997).

30. See *Merit* Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986) (finding a claim of "hostile environment" to be valid sex discrimination claim under Title VII); Daniels v. Essex Group, Inc., 937 F.2d 1214, 1272-73 (7th Cir. 1991) (finding a racially hostile work environment claim valid under Title VII). 31. See *Merit*, 477 U.S. at 67 (holding that for hostile environment sexual harassment to be actionable "it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment" and also discussing with approval lower court cases finding a cause of action for hostile work environment claims based on race and national origin (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982))). Courts have applied a hostile work environment theory of discrimination to claims against federal employers. See, e.g., *Hathaway v. Runyon*, 132 F.3d 1214 (8th Cir. 1998) (examining sexual harassment claims against the U.S. Postal Service).

32. See *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 884 (6th Cir. 1996) (extending hostile work environment theory of discrimination to ADEA); see also *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1249 n.7 (11th Cir. 1997) (assuming, without deciding, that hostile work environment theory applies to ADEA; affirming judgment for plaintiff on jury verdict). But see *Burns v. AAF-McQuay, Inc.*, 980 F. Supp. 175, 180 (W.D. Va. 1997) (holding that Fourth Circuit would not recognize claims for age harassment).


34. *Id.* at 432.
will violate Title VII if such requirements adversely affect a markedly disproportionate number of minorities, unless the requirements satisfy the "business necessity" principle and are shown to be related to job performance.

In the seventeen years following the Griggs decision, the Supreme Court elaborated upon the order and allocation of proof under disparate impact analysis. The Court noted that, to begin the analysis, the complaining party must make out a prima facie case of discrimination. For example, in a failure-to-hire or failure-to-promote case, the complaining party must show that "the facially neutral standards in question select applicants in a significantly discriminatory pattern.

The Court reiterated that after the plaintiff shows adverse impact, the employer bears the burden of proving the business necessity and job-relatedness of its ostensibly-neutral employment practices. According to Griggs, this showing requires that the business practices in question be a demonstrably reasonable measure of job performance

35. See id. at 429.

36. See id. at 431. Until very recently, the lower courts uniformly applied, or assumed the applicability of, disparate impact analysis to age discrimination claims under the ADEA. See, e.g., Fisher v. Transco Services-Milwaukee Inc., 979 F.2d 1239, 1244-45 (7th Cir. 1992) (permitting plaintiffs to rely on disparate impact analysis to prove age discrimination); Maresco v. Evans Chemetics, 964 F.2d 106, 115 (2d Cir. 1992) (applying disparate impact doctrine); MacPherson v. University of Montevallo, 922 F.2d 766, 770 (11th Cir. 1991) (utilizing disparate impact analysis); Abbott v. Federal Forge, Inc., 912 F.2d 867, 872 (6th Cir. 1990) (applying disparate impact analysis); Rose v. Wells Fargo & Co., 902 F.2d 1417, 1421 (9th Cir. 1990) (same); MacNamara v. Korean Airlines, 863 F.2d 1135, 1148 (3d Cir. 1988) (assuming the existence of, but not imposing, disparate impact liability); Arnold v. United States Postal Serv., 863 F.2d 994, 998 (D.C. Cir. 1988) (assuming the existence of the disparate impact theory); Holt v. Gamewell Corp., 797 F.2d 36, 37 (1st Cir. 1986) (applying disparate impact analysis); Akins v. South Cent. Bell Tel. Co., 744 F.2d 1133, 1136 (5th Cir. 1984) (assuming the existence of the disparate impact theory); Monroe v. United Airlines, 736 F.2d 394, 404 n.3 (7th Cir. 1984) (endorsing trial court's use of disparate impact analysis); Leftwich v. Harris-Stowe State College, 702 F.2d 686, 690 (8th Cir. 1983) (applying a disparate impact theory).

37. See Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (explaining a prima facie case of discrimination requires a plaintiff to show that facially neutral hiring criteria have a "significantly discriminatory pattern" in practice).

38. Id.; see also Albemarle Paper Co. v. Moody, 422 U.S. 405, 409 (1975) (holding that complaining party must initially show selection "in a racial pattern significantly different from that of the pool of applicants") (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

39. See Connecticut v. Teal, 457 U.S. 440, 446-47 (1982) (noting that the employer must demonstrate job-relatedness); Dothard, 433 U.S. at 329 (requiring the employer to prove job-relatedness of challenged requirements); Albemarle Paper, 422 U.S. at 408, 425 (reaffirming Griggs, where the Court unanimously held that employer has burden of proving job-relatedness and noting that one question before the Court was "[w]hat must an employer show to establish that pre-employment tests racially discriminatory in effect, though not in intent, are sufficiently 'job-related' to survive challenge under Title VII"); Griggs, 401 U.S. at 432 ("Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.").
and satisfy a genuine business need.\textsuperscript{40} Consistent with this requirement, in \textit{Albemarle Paper Co. v. Moody},\textsuperscript{41} the Court endorsed the interpretive guidelines of the Equal Employment Opportunity Commission ("EEOC"), which require that selection practices having a significant adverse impact be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."\textsuperscript{42}

Finally, the Court announced that even if the employer satisfies its burden of proof, the complaining party may still prevail by showing that the employer used its selection devices as a "pretext for discrimination."\textsuperscript{43} Specifically, the complaining party can show that the employer had other tests or selection devices available that would not have such an undesirable effect on the protected group of employees and that would also serve the employer's legitimate interest in "efficient and trustworthy workmanship."\textsuperscript{44}

The Court's definition of disparate impact analysis began to unravel in 1988, when a plurality of the Supreme Court modified the complaining party's prima facie burden by requiring the plaintiff to isolate and identify the specific employment practices which allegedly lead to any observed statistical disparities.\textsuperscript{45} That same plurality held that the plaintiff retained the ultimate burden of proving that discrimination against a protected group was caused by a specific employment practice.\textsuperscript{46} The Court transformed, and reduced, the employer's responsive burden from one of proving the necessity of its employment practices to one of merely producing evidence that its practices are legitimate.\textsuperscript{47}

This trend continued in \textit{Wards Cove Packing Co. v. Atonio},\textsuperscript{48} where the Court held that at the initial step of disparate impact analysis in a race discrimination case, the complaining party is required to dem-

\textsuperscript{40} See \textit{Griggs}, 401 U.S. at 432, 436 (noting that Congress does not require the less qualified to be hired over the more qualified because of a minority status, but rather that any measurement used to determine a person's qualifications must "measure the person for the job and not the person in the abstract").

\textsuperscript{41} 422 U.S. 405 (1975).

\textsuperscript{42} See id. at 431 (quoting 29 C.F.R. § 1607.4(c)).

\textsuperscript{43} See id. (quoting McDonnell Douglas Corp. v. Green, 411 U.S. at 792, 804-05 (1973)).

\textsuperscript{44} See id. (quoting \textit{McDonnell Douglas}, 411 U.S. at 801).


\textsuperscript{46} See id. at 997 (commenting that employers are not required to prove their tests are accurate predictors of job performance, only that the tests bear "manifest relationship" to a legitimate business goal).

\textsuperscript{47} See id. at 998 (explaining the way in which an employer can demonstrate a manifest relationship between employment requirement and employment in question).

onstrate that "each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites." 49 Thereafter, the employer bears the burden of producing evidence showing that its "challenged practice serves, in a significant way, the employment goals of the employer." 50 Instead of business necessity, the touchstone of this inquiry was now a "reasoned review of the employer's justification for his use of the challenged practice." 51

In 1991, Congress codified and overturned parts of Wards Cove, as it applied to Title VII cases, by enacting the Civil Rights Act of 1991 ("CRA"). 52 Like Wards Cove, the CRA requires a Title VII plaintiff to demonstrate that the employer "uses a particular employment practice that causes a disparate impact." 53 Congress, however, mollified this creation of Wards Cove by allowing the employer's decision-making process to be analyzed as one employment practice when that process is not capable of separation for analysis. 54 Congress also returned the burden of proving "job-relatedness" and "business necessity" to the employer. 55 Although Congress abstained from defining this burden, the Interpretive Memorandum accompanying the CRA provides that the "terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in [Griggs] and in other Supreme Court decisions prior to [Wards Cove]." 56 Congress remained silent on the continuing relevance of Wards Cove outside of Title VII and on the propriety of using disparate impact analysis in ADEA cases at all.

C. Re-Thinking Disparate Impact Analysis Under the ADEA: Hazen Paper Co. v. Biggins

Despite the congressional silence in the CRA, courts continued to apply disparate impact analysis to ADEA cases 57 until the Supreme

49. Id. at 657.
50. Id. at 659.
51. Id.
57. See, e.g., Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239, 1245 n.4 (7th Cir. 1992) (noting the CRA's codification of disparate impact analysis for Title VII cases, but still permitting plaintiffs to sue for disparate impact under ADEA); Maresco v. Evans Chemetics, 964 F.2d 106, 115 (2d Cir. 1992) (noting that the disparate impact doctrine was applicable to ADEA cases but finding that theory did not "provide[] any significant analytical contribution in
Court's 1993 decision in *Hazen Paper Co. v. Biggins*.

Although a disparate treatment case under the ADEA, the opinion in *Hazen Paper* contained dicta about the purpose of the ADEA, causing some courts to reconsider the use of disparate impact analysis.

Other than a damages issue not relevant to this discussion, the question before the Court in *Hazen Paper* was whether an employer's interference with the vesting of an employee's pension benefits violated the ADEA.

The Court answered this question in the negative on the facts before it, observing that Hazen Paper's pension plan had only a ten-year vesting period, and therefore, under that plan, "an employee's age [was] analytically distinct from his years of service. . . . [so that] a decision based on years of service [was not] necessarily age-based.

The company could take account of the plaintiff's years of service while ignoring his age.

In dicta, the Court also observed that "[d]isparate treatment captures the essence of what Congress sought to prohibit in the ADEA," and that it "is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." For the Court, when the employer's decision is "wholly motivated by factors other than age [such as pension status], the problem of inaccurate and stigmatizing stereotypes disappears.

Several courts have relied on this dicta to preclude ADEA claims premised on a disparate impact theory. These courts have taken what the Supreme Court characterized as the "essence" of the ADEA's prohibitions, intentional discrimination, and molded it into the exclusive prohibition of the ADEA. Consistent with such an ap-

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59. See id. at 610-11 (stating in dicta that ADEA's purpose is to prevent employers reliance on inaccurate and stigmatizing stereotypes and that when an employer's decision is motivated by factors other than age these stereotypes disappear. Additionally, Justices Rehnquist, Kennedy and Thomas wrote separately to note that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." Id. at 618 (concurring opinion).
60. See id. at 608.
61. Id. at 611.
62. Id. (implying that an employer can factor in years of service while disregarding age).
63. Id. at 610.
64. Id.
65. Id. at 611.
66. See, e.g., Ellis v. United Airlines, Inc., 73 F.3d 999, 1008-09 (10th Cir.) (inferring that Supreme Court in *Hazen Paper* suggested that the ADEA does not encompass disparate impact claims), cert. denied, 517 U.S. 1245 (1996); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076-77 (7th Cir. 1994) (reasoning that claims based on disparate impact should not be brought under ADEA).
67. See Ellis, 73 F.3d at 1008-09 (indicating that *Hazen Paper* Court in dicta stated that
proach, these courts have reasoned that when an employer discriminates unintentionally through a neutral policy or practice, it has not acted upon an age stereotype, and therefore, a disparate impact theory is not cognizable under the ADEA. Some of these courts have buttressed this conclusion with the fact that Congress had the opportunity to, but refrained from, explicitly codifying disparate impact analysis into the CRA in 1991.

Part III of this Article addresses the merits of these decisions, which involved claims under section 4 of the ADEA. Moreover, as Part II discusses these decisions have limited application to disparate impact challenges brought by federal employees, since the federal-sector provision of the ADEA, section 15, is entirely distinct from the language and history of section 4.

II. FEDERAL-SECTOR ADEA CLAIMS PREMISED ON DISPARATE IMPACT ANALYSIS

A. The Distinctiveness of the Federal-Sector Provisions of the ADEA

Section 15(a) of the ADEA provides that all personnel actions affecting most federal employees who are at least forty years of age "shall be made free from any discrimination based on age." This succinct prohibition is worded very differently from the prohibitions contained in section 4, which apply only to private-sector and state government employers, labor organizations, and employment agencies.

ADEA prohibits only intentional discrimination).

68. See Ellis, 73 F.3d at 1008-09 (ruling that it is improper to use disparate impact analysis if employer's decisions are motivated by factors other than age); see also DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732-33 (3d Cir. 1995) (stating in dicta that no disparate impact claims exist under ADEA); Francis W. Parker Sch., 41 F.3d at 1076-77 (stating that employment decisions based on criterion that merely tends to affect elderly workers are not prohibited and should not fall under disparate impact theory).

69. See, e.g., Ellis, 73 F.3d at 1008 (noting that Congress' addition of disparate impact language into Title VII through the CRA, while refraining from such parallel provision in ADEA, signaled Congress' intent not to allow for a disparate impact cause of action under ADEA).


71. See 29 U.S.C. §§ 623(a)-(c), 630(b)-(d) (defining unlawful age discrimination practices by private sector and state government employers, labor organizations and employment agencies). Among other things, section 4 makes it unlawful for an employer:

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

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with [the ADEA].
Moreover, section 4 contains several exceptions to age discrimination that do not appear in section 15. For instance, section 4(f) provides that a private employer does not commit age discrimination when (1) it relies on age as "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" (the "BFOQ" exception), (2) it differentiates "based on reasonable factors other than age" (the "RFOA" exception), (3) the employee is working in a foreign workplace and compliance with the ADEA would violate foreign law (the "foreign workplace" exception), (4) it observes the terms of a bona fide seniority system or a bona fide employee benefit plan that is not intended to evade the purposes of the ADEA, or (5) it discharges or otherwise disciplines an individual for good cause. Although section 15 ostensibly makes the BFOQ exception a defense to age discrimination in federal employment, a federal employer can invoke that defense only if the EEOC first establishes "a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position." To date, the EEOC has established no such exemptions. Accordingly, the ADEA essentially provides no exception to age discrimination by the federal government, in sharp contrast to the private sector.

It is beyond cavil that section 4's exceptions cannot be read into section 15, as ADEA section 15(f) explicitly requires that the two sections be construed separately. Consistent with the statutory text, the Supreme Court has held that section 15 is "self-contained and unaffected by other sections, including those governing procedures ap-

73. See 29 U.S.C. § 623(f) (1).
74. See id.
75. See id.
76. See id. § 623(f) (2).
77. See id. § 623(f) (3).
78. See id. § 633a(b).
79. See 29 C.F.R. § 1614.201 (b) (1997).
80. Other provisions of federal law may impose a mandatory retirement age for certain federal employees. See, e.g., 22 U.S.C. § 4052 (1994) (requiring that Foreign Service workers generally must retire at age 65). Such a requirement has been held not to violate the ADEA. See, e.g., Strawberry v. Albright, 111 F.3d 943, 947 (D.C. Cir. 1997) (ruling that mandatory retirement provisions do not violate the ADEA), cert. denied, 118 S.Ct. 1164 (1998); cf. Johnson v. Mayor of Baltimore, 472 U.S. 353, 370 (1985) (holding that court could not validate a city's mandatory retirement age for fire fighters by relying on a federal civil service statute that provided for mandatory retirement for federal fire fighters at age 55).
81. See 29 U.S.C. § 633a(f) (indicating that the provisions of 29 U.S.C. §§ 631(b) and 633a are the only sections of the ADEA that could possibly affect federal personnel actions). Section 631(b) is irrelevant here because it merely limits the prohibitions contained in section 633a (section 15) to individuals who are at least 40 years of age. See id. § 631(b).
plicable in actions against private employers. Thus, to be consistent with the legislative history of the ADEA Amendments of 1978, which added section 15(f), section 15 must be construed on its own terms, without reference to the various exceptions and unique statutory language contained in the private-sector provisions of the ADEA.

B. The Crucial Link Between Section 15 of the ADEA and Section 717 of Title VII of the Civil Rights Act

In Lehman v. Nakshian, the Supreme Court held in no uncertain terms that Congress patterned section 15 directly after the federal-sector, anti-discrimination provision contained in section 717 of Title VII. The Court further noted that Senator Bentsen, the principal sponsor of the bill that ultimately became section 15, "acknowledged that [the measures used to protect Federal employees [from age discrimination] would be substantially similar to those incorporated] in recently enacted amendments to Title VII." It is no surprise, therefore, that other than the protected classes specified in the two statutes, the prohibitory language contained in section 717 of Title VII and section 15 of the ADEA is worded identically. Accordingly, a court's construction of section 15 should be consistent with its construction of section 717.


84. See H.R. REP. NO. 95-415, at 11 (1977) (noting that restrictions and limitations in other parts of the ADEA, such as paragraph (f) of section 4, do not apply to the section 15).

85. See Lehman, 453 U.S. at 163-64 ("[Sections] 15(a) and (b) are patterned after §§ 717(a) and (b) of the Civil Rights Act of 1964, which extend the protection of Title VII to federal employees." (citation omitted); id. at 167 n.15 ("Sections 15(a) and (b) of the ADEA, as offered by Senator Bentsen and as finally enacted, are patterned directly after §§ 717(a) and (b) of the Civil Rights Act of 1964, which extend Title VII protections to federal employees." (citation omitted); id. at 166-67 ("Congress deliberately prescribed a distinct statutory scheme applicable only to the federal sector [section 15], and one based... on Title VII.").

86. Id. at 167 n.15 (quoting 118 CONG. REC. 24,397 (1972) (statement of Sen. Bentsen)).

87. Compare 42 U.S.C. § 2000e-16(a) [Title VII] (1994 & Supp. I 1995) ("All personnel actions affecting employees or applicants for employment... shall be made free from any discrimination based on race, color, religion, sex, or national origin."); with 29 U.S.C. § 633a [section 15] (1994 & Supp. I 1995) ("All personnel actions affecting employees or applicants for employment who are at least 40 years of age... shall be made free from any discrimination based on age.").

88. See, e.g., Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) ("Since the ADEA and
Courts repeatedly have utilized disparate impact analysis in Title VII cases against the federal government, and several explicitly have held that the 1972 amendments to Title VII which created section 717 necessitate the application of *Griggs* to federal employment. These decisions are buttressed by the legislative history of the Title VII amendments which shows that Congress intended disparate impact analysis to apply in cases against the federal government. As Title VII share a common purpose, the elimination of discrimination in the workplace, since the language of section 14(b) [of the ADEA] is almost *in haec verba* with § 706(c) [of Title VII], and since the legislative history of 14(b) indicates that its source was § 706(c), we may properly conclude that Congress intended that the construction of § 14(b) should follow that of § 706(c). Despite the identical wording of the two statutes, one district court has declined to look to section 717 of Title VII to imply a retaliation claim for federal employees under section 15 of the ADEA. See *Koslow v. Hundt*, 919 F. Supp. 18, 20 (D.D.C. 1995) (deciding not to look at Title VII provision with regard to retaliation claims under section 15 because, unlike section 15, Title VII does not include an exclusivity provision). It does not follow, however, that judicial constructions of section 15 generally should not follow constructions of section 717 of Title VII. The decision in *Koslow* was premised on the unique facts that (1)section 15 does not explicitly bar retaliation, unlike section 4(d), which explicitly bars retaliation by private employers, and (2)section 15(f) precludes a court from borrowing other provisions of the ADEA when interpreting section 15. See id. at 20-21. In contrast to the ADEA's prohibition against retaliation, no section of the ADEA explicitly addresses the availability of disparate impact analysis, so there is no possibility of impermissible borrowing in contravention of section 15(f). Therefore, to determine whether section 15 encompasses disparate impact analysis, courts necessarily must refer to the relevant legislative history regarding the meaning of the phrase "discrimination based on age." This history shows not only that Congress was targeting facially-neutral, age-discriminatory employment practices, see infra Part II.D, but also that, in the words of the Supreme Court, section 15 was "patterned directly after" section 717 of Title VII. See *Lehman*, 453 U.S. at 167 n.15.

Furthermore, the merits of the *Koslow* decision are questionable because federal-sector employees seem to be protected from retaliation for exercising their rights under the ADEA. See 5 U.S.C. § 2302(1)(B) (1994) (prohibiting age discrimination in executive agencies and in the Government Printing Office); id. § 2302(b)(9)(A)-(B) (prohibiting reprisal against federal employees for their exercising "any appeal, complaint, or grievance right granted by any law, rule, or regulation" or for their "testifying for or otherwise lawfully assisting any individual in the exercise" of such a right).

90. See Washington v. Davis, 426 U.S. 229, 249-52 & n.15 (1976) (applying *Griggs* to the federal government and noting that the federal government had argued it was subject to disparate impact analysis); Cooperstch v. Roudebush, 517 F.2d 818, 821 n.7 (D.C. Cir. 1975) (stating, in a sex-discrimination disparate impact case against the Veterans Administration, that "[a]lthough *Griggs* dealt with the practices of a private employer, in light of the 1972 amendments to Title VII of the Civil Rights Act, extending the provisions of that Act to government employees, see 42 U.S.C. § 2000e-16, job qualifications for federal positions must also be measured under the *Griggs* standard"); see also Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 586 n.7 (1983) (plurality opinion) (noting in disparate impact class action against a local government entity that the "District Court correctly relied on *Griggs*... and its progeny, as the framework for its Title VII disparate impact analysis"); United States v. Virginia, 620 F.2d 1018, 1023 (4th Cir. 1980) ("Title VII applies the *Griggs* impact standard to both public and private employees."); Scott v. City of Anniston, 597 F.2d 897, 898 (5th Cir. 1979) ("[F]ailure to prove intentional discrimination is not essential to recovery in a Title VII action even when the employer is a governmental agency."); Matthews v. Runyon, 860 F. Supp. 1347, 1354-59 (E.D. Wis. 1994) (applying disparate impact analysis to race discrimination claim against the U.S. Postal Service); Thompson v. Boyle, 499 F. Supp. 1147, 1160-65 (D.D.C. 1979) (applying *Griggs* standard to practices of Government Printing Office), aff'd in relevant part sub nom. Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982).

91. See S. REP. No. 92-415, at 14-15 (1971) ("[T]he Committee expects the Civil Service
discussed in Part II.D, below, Congress expressed the same intent for ADEA section 15, which like section 717 of Title VII, was enacted well after the Supreme Court's decision in *Griggs*. Therefore, to be consistent, disparate impact analysis should be utilized under section 717's sister provision, ADEA's section 15.91

C. The Consistent Application of Disparate Impact Analysis in ADEA Lawsuits Against the Federal Government

Although reported cases are few in number, the lower courts have applied disparate impact analysis in age discrimination cases against the federal government.92 Only one of those courts, however, has rigorously examined why disparate impact analysis is appropriate under section 15.

In *Lumpkin v. Brown*,93 six contract specialists with the Veterans Affairs Department sued the Secretary of Veterans Affairs under a disparate impact theory of age discrimination, challenging various selection criteria the Secretary had used for promotions.94 The Secretary moved to dismiss based upon the Seventh Circuit's decision in *EEOC Commission to undertake a thorough re-examination of its entire testing and qualification program to ensure that the standards enunciated in the *Griggs* case are fully met."); H.R. REP. NO. 92-238, at 24 (1971) (observing that Civil Service selection and promotion requirements are "replete with artificial selection and promotion requirements that place a premium on 'paper' credentials which frequently prove of questionable value as a means of predicting actual job performance").

91. Cf. Alexander v. Choate, 469 U.S. 287, 294 n.11 (1985) (citations omitted) ("Thus, when Congress in 1973 adopted virtually the same language for [section] 504 [of the Rehabilitation Act of 1973] that had been used in Title VI [of the Civil Rights Act of 1964], Congress was well aware . . . that similar language in Title VI consistently had been interpreted to reach disparate-impact discrimination. In refusing expressly to limit section 504 to intentional discrimination, Congress could be thought to have approved a disparate-impact standard for section 504."); see also Lorillard v. Pons, 434 U.S. 575, 581 (1978) ("[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.")

92. See Lujan v. Walters, 813 F.2d 1051, 1057 (10th Cir. 1987) (applying ADEA disparate impact analysis against federal government); Palmer v. United States, 794 F.2d 534, 536-39 (9th Cir. 1986) (stating that disparate impact analysis applies to ADEA claims, but affirming summary judgment for the employer); Lumpkin v. Brown, 898 F. Supp. 1263, 1270-71 (N.D. Ill. 1995) (holding that disparate impact doctrine applies to ADEA claims against the federal government); Klein v. Secretary of Transp., 807 F. Supp. 1517, 1522 (E.D. Wash. 1992) (contrasting disparate treatment recovery under ADEA with disparate impact theory and choosing latter as appropriate to facts of case).


94. See id. at 1267-69 (alleging that noncompetitive promotions of recent college graduates for "contract specialist" positions violated section 633a's prohibition against age discrimination).
v. Francis W. Parker School, a decision which foreclosed the use of a disparate impact theory under ADEA's section 4.

In its reasoning, the Lumpkin court began by stating that while several circuits have recognized a disparate impact theory vis-à-vis private employers, they have not been without criticism from other courts and commentators. The court then observed that critics of disparate impact, including the district court's own circuit, base their criticisms on (1) the "reasonable factors other than age" exception contained in section 4(f)(1) of the ADEA, (2) the fact that section 4(f) does not, on its face, refer to "applicants for employment" (unlike Title VII's private-sector prohibition on discrimination), and (3) dicta from Hazen Paper, a disparate treatment case under section 4.

The district court, however, found a crucial "twist" in the case before it: the plaintiffs were seeking relief under section 15, not section 4. Citing the Supreme Court's decision in Lehman, the court concluded that section 15 is wholly distinct from section 4, and therefore none of the reasons precluding disparate impact analysis applied. Specifically, the court observed that (1) section 15 contains no "reasonable factor other than age" exception, (2) section 15 explicitly applies to "applicants for employment," and (3) because Hazen Paper was a disparate treatment case brought under section 4, it cannot be viewed as having considered the very different situation of disparate impact under section 15. As section 15 was enacted three years after Griggs was decided, the court held that the Seventh Circuit would still utilize disparate impact analysis under section 15, notwithstanding its contrary view concerning section 4.

The Lumpkin court's analysis is sound, as far as it goes. To buttress its holding, however, the court also could have noted section 15's

95. 41 F.3d 1073 (7th Cir. 1994).
96. See id. at 1077 (affirming summary judgment on ADEA claim premised on disparate impact theory because "decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited") (citation omitted).
97. See Lumpkin, 898 F. Supp. at 1270-71 (noting criticism against importing disparate impact analysis into the ADEA).
98. See id. at 1270-71. The merits of the arguments against the use of disparate impact analysis for section 4 claims are addressed below in Part III.
99. See id. at 1271 (asserting that section 15 "contains no textual counterpart" to section 4 and "by its terms it is the exclusive prohibition against age discrimination within the federal government").
100. See id. (quoting Lehman which stated that section 15 is both "self-contained" and "unaffected by other sections, including those governing procedures applicable in actions against private employers").
101. See id. (concluding that for these three reasons "[w]e are thus left largely without compass from our Court of Appeals on the issue of disparate impact as to federal employees")
102. See id. (suggesting that since section 15 was enacted after Griggs, it incorporated the disparate impact theory).
parallel with section 717 of Title VII and, as discussed below, section 15's legislative history.

D. The Legislative History of Section 15 of the ADEA

The origins of section 15 of the ADEA can be traced as far back as March 9, 1972, when Senator Bentsen introduced Senate Bill 3318 before the 92nd Congress. Senate Bill 3318 was created to subject federal, state, and local governments to the provisions of the ADEA. In support of the bill, Senator Bentsen noted that as a result of recent government reductions in force ("RIF") orders issued by federal agencies, older employees were "transferred repeatedly, denied their right to 'bump' employees with less experience, or subject to veiled hints that their usefulness [was] at an end." On May 4, 1972, Senator Bentsen and three senate co-sponsors submitted a new version of Senate Bill 3318 as an amendment to Senate Bill 1861, which became the Fair Labor Standards Amendments ("FLSA") of 1972. Similar to the present section 15, the amended version of Senate Bill 3318 mandated that "[a]ll personnel actions affecting employees or applicants for employment... in executive agencies... shall be made free from any discrimination based on age." The bill died, however, when the 1972 FLSA bill failed to pass in the House for unrelated reasons.

On January 31, 1973, citing a special study completed by the Senate Select Committee on Aging, entitled Cancelled Careers, Senator Bentsen reintroduced his bill as Senate Bill 635. In support of this latest bill, the Senator observed that Cancelled Careers documented "repeated instances of subtle and direct discrimination against Federal workers." His observation was correct.

The preface to Cancelled Careers, authored by Senator Frank Church, Chairman of the Special Committee on Aging, and Senators Jennings Randolph and Walter F. Mondale, proclaimed that "if man-
agement in Government is allowed to take arbitrary actions which, in effect, cause ‘cancelled careers,’ it may pose a serious threat to well-trained and conscientious employees and to the entire civil service system.” The Senators then endorsed the report’s specific findings prepared by Elizabeth Heidbreder, of the National Council on the Aging’s Institute of Industrial Gerontology. According to them, Heidbreder’s findings provided “disturbing evidence” that substantiated the impression that the federal government’s RIF programs were resulting in “dire consequences” for older workers and were likely to be counterproductive.

These “dire consequences” stemmed, in part, from ostensibly age-neutral RIF practices such as (1) cutting jobs at higher salary grade levels and (2) strict limitations on competitive bumping areas. In particular, Heidbreder found that “[t]hose in the higher grade slots are particularly attractive targets [for RIF’s] because the elimination of their jobs would help reduce agency grade levels as directed by the Office of Management and Budget.” Heidbreder also found that agencies arbitrarily and artificially determined competitive areas and job assignments where senior employees could “bump” or “retreat” to during a RIF, resulting in an adverse impact on older federal workers.

She cited numerous examples of agencies artificially reducing areas of competition to extremely small units in which there are no alternate positions available to employees with the highest retention categories, namely, those with the most seniority.

112. See id. (presenting Heidbreder’s studies that were specifically conducted to bolster findings of report).
113. See id. at IV (noting early retirees have increased financial burdens relating to home and family but age may bar retiree from obtaining second career to supplement annuity).
114. Id. at 8; see also id. at 1 (finding that “[e]arly retirement and layoff of middle-aged Federal employees [were] being caused by management directives to cut jobs and grades”).
115. See id. at 1 (“[C]ompetitive areas may be so narrowly defined that in effect employees have no one against whom they can compete and their rights to jobs held by employees with lower retention ratings evaporate.”); id. at 10 (“While employees with considerable Federal service have job protection in that if their jobs are abolished they are supposed to be able to ‘bump’ other employees in similar jobs with less seniority or ‘retreat’ to a lesser graded position, there are always ways for overzealous supervisors to circumvent rules or harass subordinates. One way is to strictly limit the competitive bumping area with the result that there is no one to bump.”).
116. See id. at 22-24 & app. 5 at 43 (finding that NASA had established 1381 competitive levels for 1830 aerospace scientists at Goddard Space Flight Center, effectively eliminating veterans’ preference and seniority as factors in retention, and also citing a report which had documented the “booby trap” in a new job classification and evaluation system being developed by the Civil Service System with regard to the competitive levels used in RIF’s).
Thus, intentional discrimination, such as age limitations on training programs and agencies' desire to have a younger work force, was not the only major impetus for Senator Bentsen's bill barring age discrimination in federal employment. The bill also relied on significant evidence that certain ostensibly-neutral polices, such as targeting higher grade levels and hyper-definition of competitive areas, were "arbitrary actions" that amounted to subtle discrimination having "dire consequences" for older federal workers. These are the same types of concerns that the Supreme Court has held motivated the enactment of Title VII and necessitated the application of disparate impact analysis under that statute.

In the second session of the 93d Congress, Senator Bentsen's new bill barring age discrimination in federal employment was folded into Senate Bill 2747, the Fair Labor Standard Amendments of 1974. Senator Church invoked the Cancelled Careers report as a justification for passing the bill. In passing Senate Bill 2747, the Senate enacted section 15 of the ADEA which, for the first time, required all federal government personnel actions to be "free from any discrimination based on age." As discussed above, the legislative history strongly suggests that this broad statutory prohibition is intended to encompass age-based barriers to employment caused by both disparate treatment and disparate impact

117. See id. at III-IV.
118. See Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1970) (noting that "Congress directed the thrust of [Title VII] to the consequences of employment practices, not simply the motivation" and observing that adverse impact analysis is necessary to eliminate "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate") (second emphasis added).
120. See 120 CONG. REC. 4706 (1974).
121. See id. at 4707.
122. See 120 CONG. REC. 8769 (1974).
124. Although section 15 finally afforded older federal employees a remedy for unintentional employment discrimination, the federal government has had a policy against facially-neutral, non-job-related barriers to the employment of older persons since the early 1960's. In 1963, President Kennedy issued a memorandum for the heads of executive departments and agencies which stated, among other things,

[I]t is the policy of the Federal Government as an employer to evaluate each job applicant on the basis of ability, not age. . . . Personnel actions should be based, in accordance with merit principles, solely on the ability of candidates to meet qualification re-
E. Confronting a Claim of Sovereign Immunity

Governmental immunity, otherwise known as sovereign immunity, is an ancient common law principle that protects governments at all levels from liability for legal actions. Although a government may consent to be sued, any waiver of the federal government's immunity must be unequivocally expressed in statutory text, will not be implied, and will be strictly construed, in terms of scope, in favor of the sovereign.

Several Supreme Court Justices have noted that the concept of discrimination is "susceptible of varying interpretations." Faced with a disparate impact ADEA claim, a federal government defendant might argue such ambiguity shows that Congress has not unequivocally waived sovereign immunity for disparate impact liability, and therefore, that Congress must codify disparate impact analysis into ADEA section 15 before it can apply to the federal government.

Such an argument would prove too much. If the term "discriminate" is ambiguous for purposes of sovereign immunity law, then it is ambiguous as to all interpretations of the term, including the interpretation that it denotes intentional discrimination. This conclusion would directly conflict with the Supreme Court's repeated pronouncements that Congress has waived the government's immunity from claims of age-based employment discrimination.

quirements and physical standards of the position to be filled.

Moreover, the federal government itself has argued that it has adhered to a policy of job-related employment standards since the 19th century. See Washington v. Davis, 426 U.S. 229, 249 n.15 (1976) (reciting government's argument to lower court: "In Griggs, the Supreme Court set a job-relationship standard for the private sector employers which has been a standard for federal employment since the passage of the Civil Service Act in 1883.").

126. See id.
128. See id. (citing Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990)).
129. See id. (citing United States v. Williams, 514 U.S. 527, 551 (1995)); see also Lehman v. Nakshian, 453 U.S. 156, 168-69 (1980) (holding that federal employees suing under section 15 of the ADEA are not entitled to a jury trial on their claims because Congress did not affirmatively and unambiguously grant that right by statute).
131. See, e.g., Nordic Village, 503 U.S. at 37 (holding that the existence of multiple plausible readings of a statute establishes that "a reading imposing monetary liability on the Government is not "unambiguous" for purposes of waiving sovereign immunity.
132. See Lehman, 458 U.S. at 160 (restating the Court's recognition that Congress has waived
Inevitably, any argument over sovereign immunity really is a debate over the proper way to construe the statutory term "discrimination." If Title VII jurisprudence is instructive, then the Supreme Court already has settled this debate by holding that discrimination based on disparate impact and discrimination based on disparate treatment constitute the identical legal animal. As the Court explained:

The distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used. . . . Rather, the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination. 135

Accordingly, disparate treatment and disparate impact arguably represent just two different analytical routes to (or theories of proof for) the same legal conclusion—the presence or absence of employment discrimination. 134 If so, sovereign immunity law should not require the sovereign's explicit consent to the particular theory of liability a discrimination plaintiff might choose to invoke. In fact, the federal government itself recently argued this very point in Reynolds v. Alabama Department of Transportation. 135

In Reynolds, the defendant state agencies asserted sovereign immunity from the plaintiffs' disparate impact race discrimination claim brought pursuant to Title VII. 136 The state defendants argued that

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134. See id. at 990 (referring to "disparate impact analysis"); see also Hazen Paper Co. v. Biggins, 507 U.S. 604, 618 (1993) (Kennedy, J.,Thomas, J., and Rehnquist, C.J., concurring) (referring to "disparate impact analysis"); see also Furnco Constr. Corp. v. Waters, 438 U.S. 567, 583 (1978) (Marshall, J., concurring) ("Where the Title VII claim is that a facially neutral employment practice actually falls more harshly on one racial group, thus having a disparate impact on that group, our cases establish a different way of proving the claim.") (emphasis added).
136. Id. at 1094 (claiming that it would violate the Eleventh Amendment to impose disparate impact liability on states). In Seminole Tribe v. Florida, 517 U.S. 44 (1996), the Supreme Court articulated a two-part test for determining whether federal law violates a state entity's sovereign immunity under the Eleventh Amendment. Id. at 55-56. First, "Congress' intent to abrogate the States' immunity from suit must be obvious from a clear legislative statement and must be expressed in unequivocal statutory language." Id. (internal quotations omitted). Second, the federal law at issue must have been passed "pursuant to a valid exercise of power." Id. at 55. The test for the federal government's sovereign immunity only requires satisfaction of the first part of the Seminole Tribe test. See Lane v. Pena, 518 U.S. 187, 192 (1996) (holding that a waiver of the federal government's sovereign immunity must "appear clearly in . . . statutory text" and must be unequivocally expressed therein).
the 1972 amendments to Title VII, which for the first time authorized suits against the states, "did not provide a sufficiently 'unequivocal expression' of [congressional] intent to impose liability on the States for disparate-impact discrimination, because this disparate-impact liability was a 'judicially-created theory' that was neither the product of Congressional decision-making nor explicitly mentioned in the 1972 amendments."\(^\text{137}\) While the agencies conceded that the Supreme Court had held in *Fitzpatrick v. Bitzer*\(^\text{138}\) that the 1972 amendments validly abrogated the states' sovereign immunity against Title VII suits, they nevertheless contended that the amendments did not contain "a sufficiently clear statement of [Congress'] intent to abrogate the States' immunity specifically as to claims grounded on a disparate-impact theory of discrimination."\(^\text{139}\)

The district court rejected the sovereign immunity defense, instead relying upon the arguments advanced by the Justice Department on behalf of the United States. The court held:

*As the United States correctly observes*, the defendants have failed in their attempt to establish that the 'unequivocal expression' requirement demands more than a clear expression by Congress of its intent to abrogate the States' immunity as to a statute as a whole, that is, also compels Congress to indicate explicitly that its abrogation is meant to encompass claims against States brought pursuant to all potential theories of liability available under the statute.\(^\text{140}\)

Indeed, the court's opinion echoed the very words contained in the Justice Department's brief. There, the United States argued:

Defendants can cite no authority for the assertion that it is insufficient that Congress clearly state its intent to abrogate the States' immunity from claims under a statute as a whole, but rather must separately and specifically state its intent to abrogate with respect to every theory of liability arising under the statute. In fact, that is simply not the law.\(^\text{141}\)

The *Reynolds* court further held that, "assum[ing] for the sake of argument that Congress must unequivocally state its intent to abrogate as to specific liability theories, there is ample support for a conclusion that such a requirement would be satisfied...."\(^\text{142}\) The

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140. *Id.* at 1097 (emphasis added).
court's reasoning was two-fold. First, in the Fitzpatrick decision, where the Supreme Court held that Congress had waived the state's sovereign immunity under Title VII, the Court made no reference to a specific theory or theories of liability, but rather, to "general-applicability provision[s] pertaining to the definition of terms employed in the statute or the scope of the right to sue under Title VII." Second, the theory of disparate impact liability "was not judicially created in 1971 [through Griggs] but rather was a product of statutory construction of what the law is, and was at the time of passage, and, most importantly, prior to the extension of Title VII to the States with 1972 amendments." These reasons apply equally as well to ADEA's section 15. First, when the Supreme Court announced that Congress had waived the federal government's sovereign immunity for ADEA claims, it made no reference to theories of liability, but rather to section 15's general prohibition against age discrimination in federal employment and to section 15(c), which authorizes civil actions in federal district court. Second, disparate impact analysis under the ADEA is not a judicial creation, but an explanation of what section 15 is and was at the time of its passage based on its legislative history and its interconnection with the statutory language applying Title VII to the federal government. Thus, ADEA disparate impact liability does not run afoul of the government's sovereign immunity under the rationale of the Reynolds court.

Moreover, requiring Congress to codify a mode of proving the legal harm of discrimination into the United States Code before it can be applied against the federal government might preclude application of some of the most fundamental procedural rules in employment discrimination law to federal discrimination claims, such as the three-step approach for proving disparate treatment with circumstantial evidence, mixed-motives analysis, and hostile work environment analysis. Such a requirement would also preclude Title VII disparate impact claims against the federal government because the federal employment provision of Title VII does not expressly impose disparate impact liability. This result, however, would plainly con-

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143. Id. at 1097-98 (referring back to analysis in Fitzpatrick).
144. Id. at 1098 (emphasis in original) (citing Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 107 (1993) (Scalia, J., concurring)).
146. See supra Part II.D.
147. See supra Part II.B.
148. See supra Part I.A.
149. Indeed, when Congress passed the Civil Rights Act of 1991, it codified disparate impact language only into the non-federal employment provisions of Title VII. See infra Part III.G.
conflict with Supreme Court precedent, and the federal government's own litigation position, that disparate impact analysis does apply to a federal government employer sued under Title VII.\textsuperscript{150} A far less disruptive result would be to treat disparate impact analysis just like other methods of proof in discrimination law, that is, not as discrete "claims," but as different ways to prove the same legal harm—employment discrimination.\textsuperscript{151}

III. DISPARATE IMPACT ANALYSIS UNDER SECTION 4 OF THE ADEA

As argued in Part II, the statutory language of ADEA section 15, its distinctiveness from section 4, its direct parallel with section 717 of Title VII, the uniformity of court decisions applying disparate impact analysis under both section 717 and section 15, and the legislative history of section 15, all support the conclusion that disparate impact analysis applies in ADEA claims against the federal government. The purported impropriety of disparate impact analysis under ADEA section 4 should not alter this conclusion.\textsuperscript{152} Nevertheless, assuming that judicial interpretations of section 4 are relevant to this discussion, this Part argues that some form of disparate impact is appropriate under section 4, notwithstanding some recent court of appeals decisions to the contrary.

The First, Second, Fifth, Sixth, Eighth, Ninth and District of Co-

\textsuperscript{150} See Washington v. Davis, 426 U.S. 229, 248 (1976) (refusing to permit a rule whereby discrimination claims brought against the government under the Fifth Amendment can be premised on disparate impact analysis, because, in the Court's view, "extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription") (emphasis added); id. at 249 n.15 (noting that federal government had taken position that it was bound by standards announced in Griggs).

\textsuperscript{151} To further illustrate this point, an analogy could be drawn to the government's waiver of immunity through the Federal Tort Claims Act ("FTCA"). The FTCA waives the government's immunity for "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1) (1994). State law governs how a negligence claim is proved against the federal government. See id. § 1346(b). Depending upon applicable state law, negligence can be proven in several different ways. A plaintiff might take the typical route and attempt to prove: (1) a legal duty of the defendant to protect others against unreasonable risks; (2) defendant's breach of that duty; (3) that the plaintiff's injury was actually and legally caused by the defendant's breach of duty; and (4) that as a result the plaintiff incurred damages. See PROSSER & KEETON, supra note 125, § 30, at 164-65. Alternatively, using the doctrine of \textit{res ipsa loquitur}, he may try to prove that (1) the injury-causing event was of a kind which ordinarily does not occur in the absence of someone's negligence; (2) the event was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the event was not due to any voluntary action or contribution on the part of the plaintiff. See id. § 39, at 244. Despite the different elements of proof for a \textit{res ipsa loquitur} theory of negligence, the federal government still may be held liable under this type of analysis. See id. § 131, at 1054. By analogy, the government's waiver of immunity for claims of age discrimination, as with claims of negligence under the FTCA, should not be contingent upon the specific method of proof.

\textsuperscript{152} See supra Part IIA (discussing distinctiveness of section 15 and arguing that section 15 stands independently from section 4).
lumbia Circuits all continue to apply or assume *arguendo* the applicability of disparate impact analysis under section 4. The Seventh and Tenth Circuits, however, have explicitly held that disparate impact analysis cannot be invoked under ADEA section 4, and the Third Circuit in dicta has expressed doubt about its availability. As argued below, these three circuits fail to address several significant pieces of legislative history and misconstrue others that strongly suggest Congress intended to prohibit certain age-discriminatory practices of private employers that are not necessarily based on age stereotypes. Furthermore, these courts proffer other dubious reasons to preclude disparate impact analysis under section 4, such as dicta from the Supreme Court’s *Hazen Paper* decision, an unpersuasive comparison between the Equal Pay Act’s “other factors other than sex” exception and the ADEA’s exception for differentiation based on “reasonable factors other than age,” a flawed interpretation of section 4’s prohibition against discrimination “because of such individual’s age,” and Congress’s failure to add disparate impact language to the ADEA when it passed the CRA. This Part concludes by arguing that although ADEA disparate impact claims may pose unique practical problems in certain factual settings, such problems can be accommodated, and, in any event, do not justify the wholesale denial of a remedy for age discrimination.

**A. Defining “Arbitrary” Age Discrimination**

Section 2 of the ADEA, the congressional statement of findings

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153. *See* Bramble v. American Postal Workers Union, 135 F.3d 21, 26 (1st Cir. 1998) (reiterating that no definitive interpretation of the applicability of disparate impact analysis exists); Lewis v. Aerospace Community Credit Union, 114 F.3d 745, 750 (8th Cir. 1997) (recognizing the viability of disparate impact claims under the ADEA); District Council 37 v. New York City Dep’t of Parks & Recreation, 113 F.3d 347, 351-54 (2d Cir. 1997) (maintaining applicability of such claims under ADEA); Koger v. Reno, 98 F.3d 631, 639 (D.C. Cir. 1996) (assuming, without deciding, that disparate impact analysis is available); Mangold v. California Pub. Util. Comm’n, 67 F.3d 1470, 1473-74 (9th Cir. 1995) (indicating instances where the theory should not apply); Lyon v. Ohio Educ. Ass’n & Prof’l Staff Union, 53 F.3d 135, 139-40 n.5 (6th Cir. 1995) (casting some doubt on viability of theory, but still applying it); EEOC v. General Dynamics Corp., 999 F.2d 113, 116-17 (5th Cir. 1993) (maintaining applicability of such claims under ADEA).

154. *See* Ellis v. United Airlines, Inc., 73 F.3d 999, 1009 (10th Cir.) (rejecting plaintiff’s reliance on disparate impact theory), *cert. denied*, 517 U.S. 1245 (1996); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076-78 (7th Cir. 1994) (same).


156. *See* Francis W. Parker Sch., 41 F.3d at 1073, 1076-77 (discussing the disparate treatment claim in *Hazen Paper*).

157. *See* Ellis, 73 F.3d at 1008 (comparing Equal Pay Act and ADEA language).

158. *See* DiBiase, 48 F.3d at 724-25.

159. *See* Ellis, 73 F.3d at 1008 (stating that Congress did not intend for ADEA to provide for disparate impact analysis).
and purpose, professes a congressional intent to prohibit "arbitrary" age discrimination in employment. In the course of rejecting disparate impact liability under section 4 of the ADEA, the Tenth Circuit reached the questionable conclusion that "arbitrary" discrimination means intentional discrimination only.

As noted in Part II.D above and by Professor Steven J. Kaminshine, one of the major reasons the Supreme Court fashioned disparate impact analysis was its view that Congress had intended to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate . . . ." In prohibiting arbitrary discrimination, section 2 of the ADEA is therefore consistent with Griggs. Section 2 clearly manifests a congressional intent that employers judge older workers on their true abilities, not by arbitrary standards. In addition, as discussed in Part III.B, below, the principal impetus behind the 1967 Act, a report prepared at the behest of Congress by the Secretary of Labor in 1965, explicitly includes ostensibly-neutral, age-discriminatory practices within the definition of "arbitrary" age discrimination. Accordingly, the term "arbitrary" discrimination can encompass more than intentional discrimination.

In any event, the actual prohibitions contained in section 4 do not contain the word "arbitrary." Instead, except for minor variations, section 4's prohibitory language mirrors that of section 703(a) (2) of

161. See Ellis, 73 F.3d at 1008 (citing Hazen Paper in concluding that ADEA prohibits only intentional discrimination and positing that to prevail, plaintiff must establish the pretextual nature of defendant's proffered reasons for not hiring).
164. See, e.g., 29 U.S.C. § 621(b) (1994) ("It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age . . . ."); 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] ("An unmeasured but significant proportion of the age limitations presently in effect are arbitrary in the sense that they have been established without any determination of their actual relevance to job requirements, and are defended on grounds apparently different from their actual explanation.").
165. See SECRETARY'S REPORT, supra note 164.
166. A prepared statement submitted to the Senate Subcommittee on Labor by the American Association of Railroads ("AAR") during the hearings on the ADEA noted the significance of the omission of the word "arbitrary" from the prohibitory provisions of the ADEA. See Age Discrimination in Employment, 1967: Hearings on S. 830 & S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare, 90th Cong. 320 (1967) [hereinafter Senate Hearings]. The AAR pointed out that this omission was "a departure from the concept of eliminating only 'arbitrary' discrimination which is the concept set forth throughout" the Secretary of Labor's 1965 report, and therefore the AAR requested that the Senate bills barring age discrimination be amended to prohibit only "arbitrary" discrimination. See id.
Title VII, which undoubtedly encompasses disparate impact liability. Consequently, the specific, prohibitory language contained in section 4 should trump any contrary inference that may arise from language in the findings and purpose section of the statute.

B. The Legislative History of Section 4 of the ADEA

As noted above, the Tenth Circuit has held that Congress did not contemplate disparate impact analysis in ADEA cases against private employers. That court purports to rely on the principal piece of

167. Section 703(a)(2) of Title VII reads:

It shall be an unlawful employment practice for an employer... to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(2) (1994).

Section 4(a)(2) of the ADEA reads: "It shall be unlawful for an employer... 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 such individual's age..." 29 U.S.C. § 623(a)(2). This language is identical to that contained in Title VII, except for the omission of "applicants for employment." It could be argued that, at a minimum, this omission precludes disparate impact analysis for claims attacking application or hiring procedures. See EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077 (7th Cir. 1994). But see id. at 1080 n.3 (arguing that there is authority holding that § 623(a)(2) protects applicants from disparate impact, as does ADEA § 623(a)(1)). Alternatively, it could be argued that any explicit reference to applicants is unnecessary, because the statute protects the employment opportunities of any "individual"—a general term that encompasses prospective, current and former employees, as well as individuals who have no employment relationship with the alleged discriminator. Cf. Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1341-42 (D.C. Cir. 1973) (noting that "nowhere are there words of limitation that restrict references in [Title VII] to "any individual" as comprehending only an employee of an employer" and holding that relief may be available "against respondents who are neither actual nor potential direct employers of particular complainants, but who control access to such employment and who deny such access by reference to invidious criteria") (footnote omitted). This argument is consistent with Department of Labor regulations from 1968 interpreting the ADEA to prohibit practices that tend to adversely affect older applicants. See infra notes 195-97 and accompanying text (discussing regulations related to physical fitness and educational standards).

168. See Griggs, 401 U.S. at 426 n.1 (noting that the Court had granted review to determine whether section 703(a)(2) encompasses disparate impact liability); see also Connecticut v. Teal, 457 U.S. 576, 588-89 (1982) (noting that Griggs had interpreted section 703(a)(2) to prohibit disparate impact); Nashville Gas Co. v. Satty, 494 U.S. 136, 141 (1989) (same).

169. See, e.g., Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 176 (1989) ("In order to determine the type of age discrimination that Congress sought to eliminate as arbitrary, we must look for guidance to the substantive prohibitions of the Act itself, for these provide the best evidence of the nature of the evils Congress sought to eradicate."). see'd in part by statute, 29 U.S.C. § 623(f)(2) (1994); Bissette v. Colonial Mortgage Corp., 477 F.2d 1245, 1246 n.2 (D.C. Cir. 1973) (rejecting plaintiff's statutory interpretation of 15 U.S.C. § 1601 based on the purported legislative goals of the statute because the "general section setting forth legislative goals neither constitutes an operative section of the statute nor prevails over the specific provisions"); Samuels v. District of Columbia, 650 F. Supp. 482, 484 (D.D.C. 1986) (holding that "the preamble of the [Housing and Urban Rural Recovery Act of 1983] is merely a general statement of policy which does not mitigate and certainly does not override the specific requirements laid out in the body of the statute") (footnote omitted) (citing Bissette, 477 F.2d at 1245-47).

ADEA legislative history, a 1965 report on age discrimination in employment, entitled *The Older American Worker: Age Discrimination in Employment* ("Secretary's Report"). Congress commissioned the report from then-Secretary of Labor W. Willard Wirtz pursuant to Section 715 of Title VII of the Civil Rights Act of 1964. According to the Tenth Circuit, the Secretary's Report differentiates between "'arbitrary discrimination' based on age (intentional discrimination based on age stereotypes) and problems resulting from factors that 'affect older workers more strongly, as a group, than they do younger employees' (disparate impact'). The Secretary's Report, however, made no such distinction.

The report discusses numerous personnel programs and practices that disproportionately affect older workers, although not developed for this purpose, labeling them "institutional arrangements that indirectly restrict the employment of older workers." It then explicitly states that "individual circumstances may... lead to arbitrary discrimination in the... category... involving institutional arrangements which operate indirectly to restrict the employment of older workers." Thus, the Tenth Circuit clearly misconstrued the Secretary's definition of "arbitrary" discrimination. The indirect, institutional forces may constitute "arbitrary" age discrimination, depending upon the "individual circumstances" of the case.

The Tenth Circuit compounded its mistake by reasoning that the Secretary's Report supposedly recommended only "programmatic measures" to address such age-neutral institutional forces, and therefore the ADEA's statutory prohibitions fail to address them. Both the Secretary's Report and the language of the ADEA undermine the court's reasoning.

The Secretary's Report provides several examples of institutional ar-

171. See id. (relying on the Secretary's Report).
172. 42 U.S.C. § 2000e-14 (1994) Title VII required the Secretary of Labor to "make a full and complete study of factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected." See 42 U.S.C. § 2000e-14 (1994). The report was to include "such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable." Id. Secretary Wirtz submitted the report in June 1965, along with a set of research materials supporting the report. See 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, RESEARCH MATERIALS (1965) [hereinafter RESEARCH MATERIALS].
173. See Ellis, 73 F.3d at 1008 (highlighting the difference the SECRETARY'S REPORT purportedly draws between age discrimination and employment issues faced by older workers).
174. See SECRETARY'S REPORT, supra note 164, at 15.
175. Id. at 5.
176. See Ellis, 73 F.3d at 1008 (noting report's recommendation that programmatic measures be used to improve opportunities for older workers).
rangements that operate against older workers: (1) "arbitrary" rules and generalized hiring policies that "ignore individual differences" and "deprive companies of talent and qualified workers of opportunity;" (2) promotion-from-within policies that greatly benefit currently employed workers, but tend to restrict outside hiring to lower wage entry levels; (3) seniority systems which protect older workers in their jobs, but may result in layoffs of older workers if their seniority units for layoff purposes are narrowly-defined; (4) workers' compensation laws, liberally construed by courts to enable recovery for non-job-related disabilities, that create employer reluctance to hire older workers; and (5) private pension, health, and insurance plans that provide security to the older worker, but which may make it more costly to employ older workers at a benefit level comparable to younger workers. The report notes that these arrangements generally involve programs and practices designed to protect the employment of older workers and provide support for them when they retire or become ill, and proffers recommendations for "adjust[ing]" arrangements (3), (4), and (5) through programmatic measures. Significantly, he suggested no programmatic measures for coping with non-protective, arbitrary rules that lead to age discrimination.

Congress concurred with the Secretary's findings by noting in legislation that "certain otherwise desirable practices may work to the disadvantage of older persons." Contrary to the Tenth Circuit's analysis, however, Congress did not rely, and through subsequent amendments, has not relied, solely on "programmatic measures" to remedy age discrimination caused by institutional arrangements. Instead, all of these institutional arrangements are dealt with in the prohibitory portions of the ADEA.

Arbitrary employment rules and promotion-from-within policies are addressed by ADEA section 4(f)(1), which permits a non-federal employer to differentiate between employees "based on reasonable factors other than age," also known as the RFOA exception. The RFOA exception permits ostensibly-neutral employment rules and practices that operate to the disadvantage of older workers, as long as they are based on "reasonable" decision-making factors. The Secretary's Report suggests that "arbitrary" rules and practices are not reasonable, because they "deprive[] companies of talent and qualified

177. See SECRETARY'S REPORT, supra note 164, at 15-17.
178. Id. at 2, 22 (discussing the need for policy initiatives in the areas of pensions, worker's compensation, disability insurance, and seniority rights).
180. See id. 623(a)-(c).
181. See id. § 623(f)(1).
workers of opportunity.  

Seniority systems fall within the scope of ADEA section 4(f)(2)(A), which provides that observance of a bona fide seniority system not intended to evade the purposes of the ADEA and that does not require or permit involuntary early retirement does not violate the ADEA.  

Section 4(f)(2)(A) embodies the understanding that seniority systems can operate to the disadvantage of older workers, but limits employer liability to cases of intentional discrimination. This limitation is perfectly consistent with Title VII, under which plaintiffs challenging a seniority system as discriminatory also are limited to a disparate treatment theory of recovery.  

It is unclear why Secretary Wirtz viewed the fourth arrangement (discrimination based on perceived worker's compensation costs) to be an age-neutral "institutional arrangement." This type of discrimination appears to be functionally equivalent to a policy of not hiring people over a certain age (which Secretary Wirtz stated was not age-neutral), because the employer would be acting upon a generalized assumption about older workers, instead of considering the specific circumstances and qualifications of the individual. In any event, recent Supreme Court precedent strongly suggests that intentionally failing to hire an older worker because of a stereotyped belief that increased age correlates with higher workers' compensation costs is illegal under the ADEA.  

Employee benefit plans are addressed by ADEA section 4(f)(2)(B), which permits an employer to utilize a bona fide employee benefit plan.  

182. See SECRETARY'S REPORT, supra note 164, at 15.  
184. See Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 171 (1989) (holding that plaintiffs must demonstrate discriminatory intent under pre-1990 language of section 4(f)(2)(A) making it lawful to observe the terms of an employee benefit plan as long as plan is not designed to evade the purposes of ADEA), superseded by statute on other grounds, 29 U.S.C. § 623(f)(2) (1994); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1078 (7th Cir. 1994) (refusing to apply disparate impact analysis to claim brought under section 4 where employer's seniority system would have required employer to pay plaintiff more money than amount allocated to available position); EEOC v. Newport Mesa Unif. Sch. Dist., 893 F. Supp. 927, 933 (C.D. Cal. 1995) (citations omitted) ("Even if a seniority system has a disparate effect on a protected class, the system can be attacked only by showing it was created with a discriminatory intent.").  
185. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 346 n.28 (1977) (noting that an employer would commit intentional age discrimination if it "suppose[s] a correlation" between two factors like advanced age and pension eligibility and acts accordingly by discriminating against pension-eligible employees).
plan as long as (1) the plan does not "excuse the failure to hire any individual" or "require or permit involuntary retirement... because of the age of such individual" and (2) "for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker..." This provision addresses employers' legitimate financial concern with the increased pension and insurance costs that may be associated with the employment of older workers. Although employers cannot refuse to employ older workers on these grounds, they need not incur any greater expense for an older worker than they would for a younger worker. Unlike section 4(f)'s seniority exception, the pension plan exception is an objective, equal cost benefit rule, and therefore does not excuse unintentional non-compliance with the ADEA.

As the above discussion illustrates, the statutory scheme actually enacted by Congress belies any argument that Congress intended to remedy the effects of age-neutral "institutional arrangements" only through "programmatic measures." To varying degrees, all of these arrangements are regulated by the ADEA's prohibitions.

Additionally, although Secretary Wirtz recommended that Congress merely "adjust" those institutional arrangements generally designed to protect the older worker, he forwarded no such recommendation for those age-neutral employment practices not designed to protect the older worker. In fact, he suggested at least one example of an age-neutral employment practice that should be prohibited: non-job-related educational requirements.

188. 29 U.S.C. § 623(f) (2) (B) (i)-(ii).
189. See supra text accompanying note 188 (quoting the ADEA on lawful practices for employee benefit plans).
190. See 29 U.S.C. § 623(f) (2) (B) (providing the conditions under which the establishment of an employee pension benefit plan is unlawful because of age discrimination).
191. See SECRETARY'S REPORT, supra note 164, at 3 ("Any formal employment standard which requires, for example, a high school diploma will obviously work against the employment of many older workers—unfairly if, despite his limited schooling, an older worker's years of experience have given him the relevant equivalent of a high school education.").
The interpretive regulations that the Department of Labor issued under Secretary Wirtz's leadership on June 21, 1968, only nine days after the ADEA became effective, further support the conclusion that he intended the ADEA to prohibit certain ostensibly age-neutral, but non-job-related, employment practices. With his first report to Congress pursuant to section 13 of the ADEA,\textsuperscript{192} Secretary Wirtz submitted a copy of these regulations,\textsuperscript{193} which provided that age-neutral physical fitness standards must be "reasonably necessary for the specific work to be performed," that "a differentiation based on a physical examination, but not one based on age," is "reasonable" only for jobs which "necessitate" stringent physical requirements, and that age-neutral evaluation factors such as quantity or quality of production or educational level must have "a valid relationship to job requirements."\textsuperscript{194}

These 1968 regulations were entirely consistent with Secretary Wirtz's findings three years earlier that physical requirements (i.e., strength, speed, dexterity, quantity of work) were employers' most frequently mentioned consideration for restrictions on the hiring of older workers,\textsuperscript{195} but that many of these requirements had "no studied basis."\textsuperscript{196} With regard to pre-employment physical examinations, the regulations reflected the Secretary's finding that employers' "[e]stablished health criteria may or may not differentiate among the varying physical demands of different jobs."\textsuperscript{197}

The regulations also echoed the Secretary's prior criticism of unfair educational requirements\textsuperscript{198} that "penalize" the older worker,\textsuperscript{199}
his finding that written tests with "little direct relationship to the jobs" tended to preclude the employment of otherwise-qualified older applicants, his testimony in hearings before the Senate Subcommittee on Labor, Senator Yarborough's suggestion during the ADEA debates that employment tests must measure job requirements in order to fall under the RFOA exception, and several state age discrimination laws cited in the legislative history, which required that employees be selected on the basis of the "relevant" and/or "reasonably necessary" educational, experience, and physical requirements for the job.

In addition, in 1968, the Wage and Hour Division of the Department of Labor dispensed advisory opinions stating that facially-neutral job requirements and employment practices, such as testing, must be validated and job-related. Subsequently, on January 9, 2002.

200. See id. at 14.

201. During an exchange with Senator Yarborough, the floor manager of the Senate bill barring age discrimination, Secretary Wirtz concurred with the Senator's statement that the purpose of the legislation was "to get away from arbitrary age distinctions and go to judgment of individuals on their merits." See Senate Hearings, supra note 166, at 51. Secretary Wirtz then added: "I am wondering whether we should strike any reference to age at all in any connection and look at employment only in terms of whether the individual does have or does not have the capacity to do whatever job it is that that individual is seeking." Id. at 51-52.

202. See 113 CONG. REc. 31,253 (1967) (statement of Sen. Yarborough). Senator Yarborough offered the following example:

If a test shows that a man cannot do certain things, he might fail to pass the test at 35; he might fail to pass the test at 55. Some men slow up sooner than others. If the job requires a certain speed and the differentiation is based on factors other than age, the law would not apply. Id. (emphasis added).

203. See Senate Hearings, supra note 166, at 153, 156, 249 (discussing Oregon's and New York's age discrimination laws and administrative guidance); 113 CONG. REc. 31,253 (1967) (statement of Sen. Yarborough) (referring to New York as a leading state in enacting laws against age discrimination).

The legislative history also contains two studies performed for the California legislature on age discrimination. See Age Discrimination in Employment: Hearings on H.R. 3651, 3768, & 4221 Before the Subcomm. on Labor of the House Comm. on Educ. and Labor, 90th Cong. 161-396 (1967). One study found that rigid physical and educational requirements "in excess of actual job requirements may be a kind of 'hidden discrimination.'" Id. at 169. The study recommended that "arbitrary requirements on recency of education ... be eliminated from the hiring requirements of public agencies, and that instead appropriate examinations or qualifications appraisals be utilized to determine whether an applicant meets job standards for currency of professional or occupational preparation." Id. at 170. The study further recommended the establishment of job specifications that measure an individual's capacities and qualifications against the duties required for a particular job. See id.; see also id. at 192, 287, 295, 352 (discussing further that facially-neutral job requirements that disadvantage older workers are a form of hidden discrimination.) Senator Yarborough expressed particular interest in these studies. See Senate Hearings, supra note 166.

204. See Clarence T. Lindquist, Administrator, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, ADEA Opinion Letter (Aug. 1968) (rendering opinion on requirement that railroad switchmen and car men be in excellent physical condition and have 20/20 vision). This advisory opinion noted that if "uncorrected 20/20 vision is a requirement reasonably necessary to perform such duties or is in the interest of safety the [RFOA] exception must apply." Id. In a second opinion letter, the Labor Department stated: "the use of a vali-
1969, the Labor Department supplemented its interpretive regulations that prohibited facially-neutral, non-job-related employment practices.\textsuperscript{205} Consistent with these regulations, the EEOC's present-day interpretive regulations of the ADEA preclude such practices.\textsuperscript{206} It is significant that Congress has not seen fit to interfere with these interpretations in their thirty-year history.\textsuperscript{207} Such early statutory interpretations by the enforcing agency are "entitled to great deference."\textsuperscript{208} Indeed, the Supreme Court has relied on the same body of regulations as persuasive authority in interpreting the ADEA.\textsuperscript{209} Considering that the most significant piece of legislative history for section 4 appears to be a document generated by Secretary Wirtz,\textsuperscript{210} what

dated employee test is not, of itself, a violation of the act when such a test is (1) specifically related to the requirements of the job, (2) fair and reasonable, (3) administered in good faith and without discrimination on the basis of age, and (4) properly evaluated." Ben. P. Robertson, Deputy Administrator, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, ADEA Opinion Letter (Oct. 9, 1968).

205. See 29 C.F.R. § 860.104(a) (1969) (adding provision stating that an employer with a policy of hiring only persons receiving old age Social Security insurance benefits might discriminate against younger employees who also fell within the ADEA's protected age group); see also id. § 860.104(b) ("The use of a validated employee test is not, of itself, a violation of the Act when such test is specifically related to the requirements of the job [and] is fair and reasonable . . . .").

206. Cf. 29 C.F.R. § 1625.7(d) (1997). This Part of the regulations provides that employment practices that have an adverse impact on individuals 40 and over and that are defended as being based on reasonable factors other than age "can only be justified as a business necessity." Id. Moreover, if an employment test has an adverse impact, it must be validated in accordance with the Uniform Guidelines on Employee Selection Procedures. See 29 C.F.R. § 1607 (1997). The Uniform Guidelines are an elaborate set of regulations, mandating that selection procedures with an adverse impact on the protected class be validated and designed to ensure that the purported "reasonable factor" is significantly related to job performance. Seeid.

207. See Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592-93 (1983) (White, J.) (plurality opinion) (noting that early regulations under Title VI precluding disparate impact discrimination in federally-funded programs were valid, in part because the Title had "been consistently administered in this manner for almost two decades without interference by Congress").

208. See Griggs v. Duke Power Co., 401 U.S. 424, 439-44 (1971) (discussing and adopting EEOC's Title VII requirement that tests be job-related); see also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (discussing and adopting EEOC's regulations prohibiting sexual harassment as a form of sex discrimination); Guardians Ass'n, 463 U.S. at 592 (stating that regulations interpreting Title VI of the Civil Rights Act of 1964 to preclude disparate impact discrimination "were early interpretations of the statute by the agencies charged with its enforcement, and we should not reject them absent clear inconsistency with the face or structure of the statute, or with the unmistakable mandate of the legislative history"). The fact that the ADEA regulations are interpretive rather than legislative rules should not undermine the high degree of judicial deference owed to them. See Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 517 n.13 (1981) ("Because an agency empowered to enact legislative rules may choose to issue non-legislative statements, we review this Treasury Regulation under the scrutiny applicable to interpretive rules, with due deference to consistent agency practice."); see also Interport Inc. v. Magaw, 135 F.3d 826, 829 (D.C. Cir. 1998) ("We defer to an agency's reasonable interpretation of the laws and regulations it administers none the less because that interpretation appears in an interpretive rather than a legislative rule.") (citation omitted).


210. See supra notes 171-72 and accompanying text.
could be more telling about the Secretary's understanding of the ADEA's prohibitions than the interpretive guidelines generated under his purview and submitted by him to Congress in 1968? Given that the Supreme Court did not adopt disparate impact analysis until 1971, Secretary Wirtz proved to be quite prescient.

In sum, there is substantial evidence in the ADEA's legislative history to support the application of disparate impact analysis to private employers, perhaps more than exists in the pre-Griggs legislative history for Title VII. Courts like the Tenth Circuit simply have overlooked or misinterpreted this evidence.

C. The Hazen Paper Decision

As noted above, several courts invoke the Supreme Court's decision in Hazen Paper to preclude, or at least seriously question, the availability of disparate impact analysis in non-federal ADEA cases. In Hazen Paper, the Supreme Court stated in dicta that (1) disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA," and (2) Congress enacted the ADEA out of a concern that "older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes," and therefore, "[w]hen the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears." Lower courts interpreting this language conclude that the ADEA is not implicated in a pure disparate impact case because the employer was not motivated by age stereotypes, but by age-neutral, though age-correlated, factors.

There are several points to keep in mind about Hazen Paper which militate against the per se preclusion of disparate impact analysis in ADEA cases. The most important, and most obvious, is that Hazen Paper was a disparate treatment case; the Supreme Court explicitly declined to rule on the viability of disparate impact analysis under

211. See, e.g., Zubar v. Allen, 396 U.S. 168, 192 (1969) (stating that a departmental interpretation of a statute carries the most weight when specifically interpreted by administrators who participated in its drafting).

212. See Kaminshine, supra note 162, at 291 ("[O]ne searches in vain in the legislative history to Title VII to find any specific attention to, or awareness of, the concept of disparate impact liability.") (footnote omitted).


215. See id.

216. Id. at 611.

217. See DiBiase, 48 F.3d at 733.
Instead, the Court focused on the type of evidence sufficient to prove discriminatory intent in a case under section 4 of the ADEA; in particular, when an employer is "wholly motivated by factors other than age." The Court’s holding merely reemphasized the obvious point that a disparate treatment theory, whether advanced under the ADEA or Title VII, necessarily will fail if the factor actually motivating the employer is not the protected characteristic. It does not follow, however, that when the employer’s motivation is irrelevant, as in a disparate impact challenge, that it automatically escapes liability.

Although no longer good substantive law with respect to Title VII, the Supreme Court’s pregnancy discrimination jurisprudence is instructive on this point. In General Electric Co. v. Gilbert, the Court held that General Electric’s disability plan, which paid weekly benefits to employees who became totally disabled as a result of a non-occupational sickness or accident, did not discriminate because of sex, even though the plan excluded disabilities arising from pregnancy. The Court based its decision primarily on its earlier decision in Geduldig v. Aiello, which held that a very similar disability program established under California law did not violate the Equal Protection Clause of the Fourteenth Amendment.

The Geduldig Court acknowledged that only women can become pregnant, but nevertheless held that the California disability program did “not exclude anyone from benefit eligibility because of gender but merely remove[d] one physical condition—pregnancy—from the list of compensable disabilities.” Indeed, it was “clear” to the Court that the program did not discriminate unlawfully because it merely divided potential recipients into two groups, “pregnant women and

218. See Hazen Paper, 507 U.S. at 610 (stating that the Court has never decided whether a disparate impact theory of liability is available under the ADEA and will not do so in this case).
219. See id. at 611.
220. Compare id. at 610 (“In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer’s decision.”), with Price Waterhouse v. Hopkins, 490 U.S. 228, 244 (1989) (plurality opinion) (“[W]hile an employer may not take gender into account in making an employment decision (except in those very narrow circumstances in which gender is a BFOQ), it is free to decide against a woman for other reasons.”).
222. See Gilbert, 429 U.S. at 145-46.
224. See Gilbert, 429 U.S. at 132-140 (discussing relevance of Geduldig).
225. Geduldig, 417 U.S. at 496 n.20; accord Nashville Gas Co. v. Satty, 434 U.S. 136, 140 (1977) (noting that a policy denying accumulated seniority to employees returning to work following a disability caused by childbirth “appears to be neutral in its treatment of male and female employees” under the policy).
nonpregnant persons. The Court explained that "while the first group is exclusively female, the second includes members of both sexes."

Based on Geduldig, the Gilbert Court held that the pregnancy exclusion in General Electric's policy was not tantamount to intentional sex discrimination under Title VII, unless the pregnancy exclusion was "a mere 'pretex[t] designed to effect an invidious discrimination against the members of one sex or the other." The Court further held that the pregnancy exclusion still could constitute unlawful disparate impact discrimination, but that the plaintiffs had not made the requisite showing of a gender-based effect.

The reasoning in Gilbert embodies two principles relevant to the instant discussion. First, intentional discrimination does not necessarily lie merely because there is a high (or even perfect) correlation between membership in the complainant's protected class (i.e., being female) and the employer's ostensibly class-neutral decision-making criterion (pregnancy status as a disqualifier for disability benefits), particularly when the subset of employees who are not adversely affected by that criterion (non-pregnant persons) consists of members of the complainant's protected class (non-pregnant females). To prove intentional discrimination in such a case, there must be evidence that the employer relied on the correlation between class membership and the neutral decision making criterion as a pretext for discrimination. The second Gilbert principle is that, even assum-

226. See Geduldig, 417 U.S. at 496-97 n.20.
227. Id.
229. See id. at 137 ("[O]ur cases recognize that a prima facie violation of Title VII can be established in some circumstances upon proof that the effect of an otherwise facially neutral plan or classification is to discriminate against members of one class or another."). Cf. Saty, 434 U.S. at 150-53 (holding that a policy that denied accumulated seniority to employees returning to work following a disability caused by childbirth was not unlawful intentional discrimination, but might be unlawful under disparate impact analysis).
230 Congress invalidated this principle as applied to the correlation between pregnancy and gender in 1978 when it amended Title VII to provide that the "terms 'because of sex, and 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (1994)). Despite this statutory reversal of the result in Gilbert and its progeny (but not the result in Geduldig, which was brought under the Fourteenth Amendment), the analytical approach Gilbert utilized arguably is still instructive for other types of discrimination claims.

For example, blacks are far more likely to be afflicted with sickle-cell anemia than non-blacks. If an employer has a policy of rejecting all applicants with sickle-cell anemia such a policy would not necessarily evidence intentional race discrimination, but it could support a claim of discrimination based on disparate impact. See EEOC Decision No. 81-8, 27 F.E.P. Cases. (BNA) 1781 (Nov. 18, 1980) (finding reasonable cause to believe that the employer had engaged in disparate impact race discrimination where employer failed to hire a black applicant because she suffered from sickle-cell anemia, even though non-blacks with sickle-cell anemia
ing the absence of pretext evidence, the correlation nevertheless may evidence disparate impact discrimination.

The Court's *Hazen Paper* decision is entirely consistent with these two principles. There, the Court acknowledged the "typical[]" correlation between advanced age and pension-vesting status based on years of service. 231 Yet, the Court held that it is not per se age discrimination to fire an employee solely because his pension is close to vesting. 232 An employee under age forty may have worked for the company his entire career and be close to a vested pension, while an older worker may have been newly hired and be a long way from vesting. 233 Therefore, under Hazen Paper's pension plan, which required only ten years of service for pension-vesting, age and years of service were "analytically distinct." 234

This reasoning reflects the first *Gilbert* principle. Recall that in *Gilbert*, the Court found the denial of pregnancy-related disability benefits not to be intentionally discriminatory because the denial of benefits was independent of gender; that is, despite the obvious correlation between femaleness and pregnancy-capability (and hence, the greater potential need of female employees for pregnancy-related disability benefits), the Court reasoned that the employer had differentiated only between pregnant women and non-pregnant persons, not between men and women. 235

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231. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993) ("On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with a particular employer.").

232. See id.

233. See id.

234. See id.; see also *RESEARCH MATERIALS, supra* note 172, at 56 ("Since one grows older in the process of attaining years of service, the correlation between age and length of service is obviously high. . . . [But] [l]ength of service (seniority status) and age are synonymous only on the average . . . ").

235. See *Gilbert*, 429 U.S. at 186-88 (stating that the "package" of benefits for male and female employees "covers exactly the same categories of risk").
Similarly, in *Hazen Paper*, the Court found the denial of pension benefits not to be intentionally discriminatory because the alleged denial of benefits was independent of age.\footnote{236}{See *Hazen Paper*, 507 U.S. at 611-12.} Despite the high correlation between advanced age and pension-vesting based on years of service, the evidence of pension discrimination at most showed that the employer had differentiated between those employees who had the requisite number of service years to be considered close to vesting and those who did not.\footnote{237}{See id. at 612.} While the former group may have consisted primarily of older workers, the second (according to the Court’s speculation) consisted of both younger and older workers.\footnote{238}{See id. at 611.} Accordingly, the Court held that to sustain a claim of intentional age discrimination premised on alleged pension discrimination there must be evidence that the pension discrimination, was in fact, a pretext for age discrimination.\footnote{239}{See id. at 612-13 (holding that intentional age discrimination still may be proved through evidence that the employer “suppos[ed] a correlation” between age and pension status and acted accordingly).} This is precisely the type of evidence that the first *Gilbert* principle would require.

If the parallel between *Gilbert* and *Hazen Paper* is to be complete, then application of the second *Gilbert* principle would permit an ADEA plaintiff to rely on the correlation between advanced age and pension status as evidence of disparate impact discrimination. Thus, just because an age-based correlation does not necessarily prove intentional age discrimination (per *Hazen Paper*), the *Gilbert* decision suggests that such evidence still could form the foundation of a disparate impact claim.

The *Hazen Paper* Court’s observation that disparate treatment “captures the essence” of the ADEA prohibitions\footnote{240}{See *Hazen Paper*, 507 U.S. at 610 (explaining that the protected trait must influence the employer’s decision for liability to exist).} does not necessarily undermine this argument. Until 1967, facially age-discriminatory employment policies were legal (except in twenty states) and represented the “most obvious kind of age discrimination.”\footnote{241}{See SECRETARY’S REPORT, supra note 164, at 6.} Three out of every five employers covered by Labor Secretary Wirtz’s study had “in effect age limitations on new hires which they appl[ied] without consideration of an applicant’s other qualifications.”\footnote{242}{Id.} But just as such policies were the primary impetus of the ADEA, so too were facially-race-discriminatory employment practices the primary impetus be-
hind the passage of Title VII in 1964.\textsuperscript{243} Obviously, disparate treatment does not define the limit of Title VII’s reach, even though it may “capture the essence” of Title VII’s prohibitions. Arguably, the same is true for the ADEA.

Additionally, it may be unwise to draw an inference against ADEA disparate impact liability from the “captures the essence” statement, given the Court’s minimal, almost “off-the-cuff” characterization of the ADEA’s legislative history. As the Court admonished in another employment discrimination case, “it [is] generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code.”\textsuperscript{244}

Equally important for purposes of this Article is the fact that the Court did not interpret section 15 of the ADEA, nor did it examine its legislative history. Although disparate treatment may capture the essence of what Congress sought to prohibit in section 4 of the ADEA,\textsuperscript{245} it does not appear to capture the essence of the unique concerns that motivated Congress’ addition of section 15 in 1974.\textsuperscript{246}

Even assuming that the Court’s characterization of the congressional intent behind the ADEA is unassailable, the Court has emphasized that congressional intent does not necessarily limit the use of remedial theories that are otherwise consistent with the statutory scheme. For example, Justice Scalia recently noted in a Title VII case that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”\textsuperscript{247} Because the Court has previously held that disparate treatment and disparate impact are “functionally equivalent”\textsuperscript{248} (i.e. “reasonably comparable evils”), there is not necessarily a statutory impediment to extending disparate impact liability to ADEA cases, notwithstanding what Congress purportedly had in mind in 1967, four years before the Supreme Court first endorsed disparate impact analysis.

Nor is disparate impact analysis necessarily precluded by the \textit{Hazen Paper} Court’s observation that the problem of inaccurate and stigmatizing stereotypes disappears when the employer’s decision is wholly

\textsuperscript{243} Kaminshine, \textit{supra} note 162, at 291 & n.303.
\textsuperscript{244} St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993).
\textsuperscript{245} \textit{See Hazen Paper}, 507 U.S. at 610.
\textsuperscript{246} \textit{See supra} Part I.I.D.
\textsuperscript{247} Oncale v. Sundowner Offshore Servs., 118 S. Ct. 998, 1002 (1998) (holding that same-sex sexual harassment is prohibited by Title VII, even though “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII”).
motivated by factors other than age. The Court previously has concluded under Title VII that disparate impact analysis helps police "the problem of subconscious stereotypes and prejudices." Thus, even assuming that age discrimination does not exist when the employer is "wholly motivated by factors other than age," proving the elements of disparate impact arguably is equivalent to proving that the employer was, at least in part, subconsciously motivated by age. It is unclear, however, whether the logic of this argument would permit a disparate impact challenge against any age-neutral decision-making factor that tends to have an adverse impact on older workers (i.e., an entirely subjective promotion system).

It may be empirically unfounded, however, to assume that age bias necessarily lies at the heart of every disparate impact case, no matter what the challenged decision-making factor may be. It is conceivable that at least sometimes an age-based disparate impact claim can stem from the coincidental interplay of circumstances, not conscious or subconscious bias. In such cases, the use of disparate impact analysis must be justified solely by the age-exclusionary effect of the unjustifiable employment criteria, not the motivation behind them.

The remaining question is whether there is a statutory justification for disparate impact analysis (or something akin to disparate impact) that is not premised on an intent-based model. This question is addressed in the following section of this Article.

D. The RFOA Exception

Section 4(f) (1) of the ADEA provides that it is not age discrimination for an employer, employment agency, or labor organization "to take any action otherwise prohibited ... where the differentiation is based on reasonable factors other than age"—the "RFOA" exception. As discussed below, several courts have pointed to the

249. *Hazen Paper*, 507 U.S. at 611 (1993) (stating that even if the motivating factor is correlated with age, the problem of stigmatizing stereotypes disappears).

250. *Watson*, 487 U.S. 977 at 990 (holding that disparate impact analysis can be applied to subjective or discretionary employment practices); *see also EEOC v. Francis W. Parker Sch.*, 41 F.3d 1079, 1080 (7th Cir. 1994) (Cudahy, J., dissenting) (noting that disparate impact analysis targets discrimination that is "at times hidden even from the decision maker herself, reflecting perhaps subconscious predilections and stereotypes").


252. *See Kaminshine*, supra note 162, at 314-15 (criticizing the "intent model" of disparate impact that views this theory of proof as an alternative means of proving discriminatory intent; arguing that *Griggs* requires a focus on the "consequences of employment practices, not the motivation").

RFOA exception as additional evidence that disparate impact claims are not cognizable under section 4 of the ADEA by drawing a parallel between the ADEA's RFOA exception and the Equal Pay Act, which permits employers to pay unequal wages to men and women if the pay differential is "based on any factor other than sex."  

In County of Washington v. Gunther, the Supreme Court indicated that the EPA's "any factor other than sex" exception immunizes employers from sex-based wage discrimination claims that are not motivated by discriminatory animus. The Court remarked that this exception "was designed differently" than Title VII's prohibitions, which, by virtue of Griggs, encompass disparate impact liability. The Gunther court noted that (in contrast to Title VII) "Equal Pay Act litigation... has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex,'" and that courts may not substitute their judgment for that of employer. Accordingly, under the EPA's "other factors other than sex" defense, the employer will prevail as long as its motivation, even if misguided or mistaken, was not subjectively motivated by a discriminatory purpose. The Seventh and Tenth Circuits have extended this logic to the RFOA exception, reasoning that disparate treatment is the sole avenue of relief under the ADEA.

There are several problems with analogizing the Equal Pay Act to the ADEA. First, there is a significant linguistic difference between the RFOA exception and the "other factors other than sex" exception. Whereas the Equal Pay Act condones unequal wages based on any factors other than sex, the ADEA condones employer reliance only on reasonable factors other than age. The word "reasonable" implies that the fact finder is required to analyze the objective validity

supra Part IIA (discussing several exceptions to age discrimination that appear in section 4 but not in section 15).

254. See infra note 256-62 and accompanying text.
257. See id. at 170.
258. See id.
259. Id.
261. See id. at 170 (finding employers may defend discrimination action if pay differentials are rationalized on a good faith use of "other factors other than sex").
262. See Ellis v. United Airlines, Inc., 73 F.3d 999, 1008 (10th Cir.), cert. denied, 517 U.S. 1245 (1996); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077 (7th Cir. 1994).
of the employer's decision-making, an analysis that the Supreme Court in Gunther said is improper under the Equal Pay Act wherein the analysis focuses solely on whether the employer acted out of discriminatory animus.

Second, the Equal Pay Act's "other factors other than sex" exception is fairly well established as an affirmative defense. This affirmative defense places the burden of proof, not just production, on the employer. The Tenth Circuit, however, has held that the RFOA exception is not an affirmative defense. Thus, the Tenth Circuit's attempt to draw a parallel between the ADEA and the Equal Pay Act would create an inconsistency with its prior holding.

If the Equal Pay Act analogy is to have any force, then the RFOA exception would have to be construed as an affirmative defense to intentional age discrimination. This application of the RFOA exception, however, would present a new problem. Suppose a fifty year-old brought suit against his employer under a disparate treatment theory claiming age as the reason for his termination. The employer might respond that the employee had been terminated for failing to meet his production quota. As production quota would constitute a "reasonable factor other than age" for the termination and the employer would bear the burden of proving deficient performance. But substitute the ADEA plaintiff with a woman claiming sex discrimination under Title VII, and the burden of proof remains on her at all

265. See Kaminshine, supra note 162, at 302-04 (discussing this linguistic distinction); see also supra notes 191-210 and accompanying text (discussing early agency regulations interpreting the RFOA exception to require objective validation of certain job requirements). In its employment discrimination jurisprudence, the Supreme Court has repeatedly held that the word "reasonable" entails an objective analysis into the alleged discriminatory conduct. For example, in Griggs, the Court stated that, to make an objective determination of business necessity under the disparate impact analysis, the question is whether the employer's selection mechanisms are "demonstrably a reasonable measure of job performance." Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (emphasis added). Also, to prove hostile work environment sexual harassment, a plaintiff must prove, among other things, conduct that is "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive." Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) (emphasis added).

266. See County of Washington v. Gunther, 452 U.S. 161, 170 (1981); supra notes 256-61 and accompanying text (discussing the Gunther decision).

267. See Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974) (noting with approval uniform holdings by lower courts that the Equal Pay Act's "other factors other than sex" exception is an affirmative defense); see also Gunther, 452 U.S. at 168-70, 175 (referring to Equal Pay Act's "other factors other than sex" exception as an affirmative defense).

268 See Corning Glass Works, 417 U.S. at 191 & n.11 (finding that the majority of federal courts place the burden of proof for an affirmative defense under the Equal Pay Act on the employer).

269. See Schwager v. Sun Oil Co., 591 F.2d 58, 61 (10th Cir. 1979) (noting that after a plaintiff makes a prima facie case, only burden of producing evidence shifts to the employer).
times, because Title VII contains no RFOA exception.\textsuperscript{270}

Could Congress have intended to provide age discrimination plaintiffs more procedural protection than Title VII plaintiffs? There is some evidence to support that inference. Prior to the CRA, ADEA plaintiffs suing under section 4 had the right to a jury trial\textsuperscript{271} and liquidated damages,\textsuperscript{272} whereas Title VII plaintiffs did not.\textsuperscript{273} In addition, ADEA plaintiffs could bring lawsuits sixty days after filing a charge with the EEOC,\textsuperscript{274} whereas Title VII plaintiffs might have to wait as long as 180 days before they could bring suit.\textsuperscript{275} Furthermore, under Title VII, back pay was a matter of equitable discretion, whereas liability for back pay was mandatory under the ADEA.\textsuperscript{276} Finally, in 1990, Congress enacted the Older Workers Benefit Protection Act ("OWBPA"),\textsuperscript{277} which strictly defined the circumstances under which an individual’s waiver of his age discrimination claim is considered “knowing and voluntary” and put the burden of proving voluntariness on the party asserting the validity of the waiver, usually the employer.\textsuperscript{278} Title VII contains no comparable protection for employees covered under that statute. Significantly, in the course of enacting the OWBPA, Congress noted that it had “decided in 1967 that where procedural protections are involved, the ADEA should treat older workers differently from workers protected under Title VII.”\textsuperscript{279}

Still, putting age-discrimination plaintiffs in such a favorable position “would create an odd jurisprudence.”\textsuperscript{280} As previously discussed, courts have uniformly applied the \textit{McDonnell Douglas}/\textit{Burdine} three-step analysis for proving intentional discrimination in ADEA cases (with the Supreme Court’s implicit approval),\textsuperscript{281} and there is no indi-

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\item[270.] See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (noting that in a Title VII case "the ultimate burden of persuading the trier of fact that defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff").
\item[271.] See 29 U.S.C. § 625(c) (2) (1994).
\item[272.] See id. § 626(b).
\item[273.] As a result of the CRA, Title VII plaintiffs suing under a disparate treatment theory now have the right to compensatory and punitive damages and a jury trial. See 42 U.S.C. § 1981a(a)-(c) (1994).
\item[274.] See 29 U.S.C. § 625(d).
\item[276.] See Lorillard v. Pons, 434 U.S. 575, 584 (1978) (contrasting remedial provisions of ADEA and Title VII).
\item[278.] See 29 U.S.C. § 626(f) (delineating what constitutes waiver and what party bears burden of proving validity of such waiver).
\item[280.] See Kaminsky, supra note 162, at 305 (emphasis added).
\item[281.] See supra note 23 (discussing Supreme Court’s approval in \textit{Hazen Paper} of the three-step analysis developed in \textit{McDonnell Douglas} to prove intentional discrimination in ADEA
\end{enumerate}
\end{footnotesize}
cation that the Seventh and Tenth Circuits are prepared to abandon this analysis in favor of a burden-shifting, affirmative defense analysis. Thus, to avoid the upheaval of well-established disparate treatment jurisprudence, the RFOA exception probably cannot be construed as an affirmative defense to intentional discrimination, and the Equal Pay Act analogy must therefore fail.

A procedural problem still persists, however, if the RFOA exception is construed to be any kind of defense to disparate treatment. A well-established principle of disparate treatment law, under both Title VII and the ADEA, is that liability for intentional discrimination cannot rest on the fact that the employer acted unreasonably. Rather, even if the employer is misguided or mistaken in his or her reasoning, the employer has not intentionally discriminated if he or she honestly believed the reason was legitimate at the time he or she subjected the plaintiff to an adverse employment action. Indeed, the Supreme Court has held that an employer can act for any reason under the ADEA (unreasonable or even illegal), as long as its "decision is wholly motivated by factors other than age."
Application of the RFOA exception to ADEA disparate treatment cases would fly in the face of this well-settled rule. An employer facing a claim of intentional discrimination would not be able to defend its business decision solely on the ground that it had been subjectively motivated by the non-age factor. Instead, it would have to proffer evidence showing that its decision was objectively "reasonable," something that the Supreme Court has held it is not required to do.\textsuperscript{287}

Thus, unless the word "reasonable" is to be read out of the RFOA exception,\textsuperscript{288} the exception must be applied in cases where subjective motivation is irrelevant. This application of the RFOA exception would be consistent with the fact that the use of the word "reasonable" imposes an objective standard, similar to "job-relatedness" and "business necessity" in Title VII disparate impact cases.

The question then becomes: What is the employer's burden when an age-neutral factor is challenged as objectively unreasonable under the ADEA? On the one hand, the RFOA exception could be read consistently with the \textit{Griggs} "business necessity" standard, which requires the employer to prove that the challenged practices are "demonstrably a reasonable measure of job performance."\textsuperscript{289} Treating the RFOA exception as an affirmative defense to charges of disparate impact would be consistent with the ADEA's legislative history and the EEOC's interpretive regulations, as well as with the RFOA exception's placement between the BFOQ exception and the foreign workplace exception in section 4(f) (1).\textsuperscript{290}

\textsuperscript{287} See supra note 286 and accompanying text.

\textsuperscript{288} See United States v. Nordic Village, Inc., 503 U.S. 30, 36 (1992) (noting the "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect") (citations omitted).

\textsuperscript{289} See \textit{Griggs} v. Duke Power Co., 401 U.S. 424, 431, 436 (1971) (emphasis added) (noting that various testing procedures are useful but they must bear a reasonable relationship to job's qualifications).

\textsuperscript{290} Professor Eglit offers several arguments in support of treating the RFOA exception as an affirmative defense. First, he posits that the Equal Pay Act's ("EPA") "other factors other than sex" affirmative defense is analogous to the ADEA's RFOA exception, because the EPA is part of the Fair Labor Standards Act ("FLSA") and the Supreme Court has held that Congress intended to fully incorporate into the ADEA the remedies and procedures of the FLSA. See 1 \textit{HOWARD C. EGLIT, AGEDISCRIMINATION} § 5.17, at 5-68 to 5-69 (2d ed. 1994) (citing Lorillard v. Pons, 434 U.S. 575, 580-82 (1978)). Although this argument has superficial appeal, as discussed above, a true analogy would require excising the word "reasonable" from the RFOA exception.

Second, Professor Eglit relies on interpretations of the RFOA exception by the Department of Labor and the EEOC, which treat the RFOA exception as an affirmative defense. See id. § 5.18, at 5-70; see, e.g., Age Discrimination in Employment Act, 29 C.F.R. § 1625.7(d) (1997) (requiring an employer to bear burden of proving that RFOA exists factually). See also supra notes 192-212 and accompanying text (outlining legislative history of the ADEA).
Alternatively, *Wards Cove* may provide the appropriate analytical standards. As discussed in Part I, Congress statutorily overturned *Wards Cove* through the CRA, but did not do so explicitly with respect to the ADEA. Therefore, *Wards Cove* may still play a persuasive role in ADEA cases.\(^{291}\)

In *Wards Cove*, the Supreme Court held that the employer bears the burden of producing evidence, not proving, that its challenged practice serves its "legitimate employment goals . . . in a significant way,"\(^{292}\) and that the touchstone of this inquiry is a "reasoned view of the employer's justification for his use of the challenged practice."\(^{293}\) If *Wards Cove* applies, the employer would only have to produce evidence that reliance on its non-age factor is reasonable.\(^{294}\)

Then again, *Wards Cove* may have little persuasive value to the extent that the CRA is viewed more generally as a congressional statement that the Supreme Court simply "got it wrong" when it revised long-standing disparate impact doctrine in *Wards Cove*.\(^{295}\) Even though the CRA's disparate impact amendments technically apply only to non-federal Title VII claims, the persuasive reach of these amendments arguably extends beyond Title VII, to other statutory schemes.\(^{296}\) For example, even though the disparate impact amendments of the CRA, on their face, apply only to claims under section

...
703 of Title VII, at least one court has assumed that the amendments govern employment discrimination cases brought by federal employees under section 717.297 More importantly, several district court decisions have looked to the disparate impact amendments to Title VII when addressing ADEA disparate impact claims.298 Perhaps a compromise is in order. One district court has placed the burden of proving the RFOA exception on the employer (consistent with Griggs), but required a lesser showing than business necessity (consistent with Wards Cove).299 Regardless of whether Wards Cove, Griggs, a combination of the two, or some other analytical paradigm300 applies to cases defended under the RFOA exception, the fact remains that in order to avoid reading the RFOA exception out of the ADEA, some form of objective analysis distinct from disparate treatment must be recognized.

E. The Language of Section 4 of the ADEA

Section 4 of the ADEA makes it unlawful to discriminate against an individual "because of such individual's age."301 As further support for its refusal to recognize disparate impact analysis, the Tenth Circuit asserts that "[t]he most obvious reading of the clause, 'because of such individual's age,' is that it prohibits an employer from inten-

298. See Bramble v. American Postal Workers Union, 963 F. Supp. 90, 100-01 (D.R.I. 1997) (noting different burden standards imposed on employers by disparate impact amendments to Title VII), aff'd, 155 F.3d 21 (1st Cir. 1998); see also Houghton v. Sipco, Inc., 38 F.3d 953, 958-59 (8th Cir. 1994) (implying that the CRA amendments to disparate impact doctrine would apply to ADEA claims filed after the effective date of the CRA); Maidenbaum v. Bally's Park Place, Inc., 870 F. Supp. 1254, 1259 (D.N.J. 1994) (analyzing ADEA disparate impact claims in light of CRA amendments), aff'd, 67 F.3d 291 (3d Cir. 1995); Graffam v. Scott Paper Co., 870 F. Supp. 389, 394 (D. Me. 1994) (noting applicability of CRA amendments to disparate impact cases filed after the CRA effective date), aff'd, 60 F.3d 809 (1st Cir. 1995).
299. See EEOC v. Newport Mesa Unif. Sch. Dist., 893 F. Supp. 927, 932 (C.D. Cal. 1995) (observing that "Congress intended employers to have more leeway in considering factors that disparately affect older workers under the ADEA than factors that disparately affect classes protected under Title VII").
300. Professor Eglit draws a distinction between RFOA cases and disparate impact cases under the ADEA. He argues that Wards Cove, placing only a burden of production on the employer, applies to ADEA cases brought under a disparate impact theory. See 1 EGLIT, supra note 290, § 5.19, at 5-78 to 5-79. He argues further that when an employment policy affects older workers, but does not rise to the level of statistical disparity required by disparate impact law, the RFOA exception could still play a role as an affirmative defense. See id. at 5-79. In this latter type of case, Professor Eglit suggests that, due to the inferior statistical showing of adverse impact, the employer should bear the burden of proving that its decision was "substantially reasonable," and not bear the burden of proving business necessity. See id. at 5-80. This analytical scheme seems counter-intuitive, however, because it increases the burden on the employer from merely producing evidence to proving, as the plaintiff's statistical evidence becomes weaker.
tionally treating someone differently based on his or her age.  

The Tenth Circuit’s “obvious reading,” however, is both unsupported and in direct conflict with the Supreme Court’s construction of the identical operative words contained in Title VII, which likewise prohibits discrimination “because of” a protected characteristic. The Supreme Court has repeatedly found the phrase “because of” to permit disparate impact analysis, reasoning that the phrase codifies the requirement of a causal connection between the protected trait and the challenged employment practice. This causal connection is required in every discrimination case, no matter what the method of proof.

F. Purported “Practical Problems” With Disparate Impact Analysis Under the ADEA

The Tenth Circuit has also speculated that permitting disparate impact age discrimination claims would create several practical problems. Specifically, the court has expressed concern that “the line defining the class that is disparately impacted by a challenged policy is an imprecise one, which could be manipulated to either strengthen or weaken the impact of a policy on some age group.”

302. See Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir.) (asserting that interpretation of the clause “because of such individual’s age” as covering incidental and unintentional discrimination is far fetched), cert. denied, 517 U.S. 1245 (1996). This semantic argument would have little persuasive value as far as federal-sector ADEA claims are concerned because section 15 does not prohibit discrimination “because of such individual’s age,” but rather “all [discriminatory] personnel action... based on age.” 29 U.S.C. § 633a (1994 & Supp. I 1995) (emphasis added).

303. See Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660 (1989) (“The persuasion burden [under disparate impact analysis] must remain with the plaintiff, for it is he who must prove that it was ‘because of such individual’s race, color, [etc.]:’ that he was denied a desired employment opportunity.”) (emphasis added) (quoting 42 U.S.C. § 2000e-2(a)), rev’d in part by statute on other grounds, 42 U.S.C. § 2000e-2(k) (1994); Price Waterhouse v. Hopkins, 490 U.S. 228, 241-42 (1989) (plurality opinion) (interpreting words “because of” contained in Title VII’s prohibition against sex discrimination to encompass “indirect stumbling block[s] to employment opportunities,” such as in disparate impact cases challenging facially-neutral tests or qualifications); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990-92 (1988) (plurality opinion) (holding that “an employer’s undisciplined system of subjective decision making has precisely the same effects as a system pervaded by impermissible intentional discrimination,” because “[i]n both circumstances, the employer’s practices may be said to adversely affect [an individual’s] status as an employee, because of such individual’s [protected class]” (quoting 42 U.S.C. § 2000e-2(a)(2)) (emphasis added).

304. For example, the Watson Court noted that under disparate impact analysis that once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. Watson, 487 U.S. at 994 (emphasis added).

305. See Ellis, 73 F.3d at 1009.

306. Id.
Imprecision, however, should not be a reason to utterly preclude a remedy for age discrimination.

For example, in *O'Connor v. Consolidated Coin Caterers, Corp.*, a unanimous Supreme Court held that an ADEA plaintiff suing for wrongful termination under a disparate treatment theory need not submit evidence of replacement by someone outside of the protected class to establish his prima facie case. Instead, the Court held that it was sufficient to show that one's replacement was "substantially younger." Thus, rather than permitting use of a precise, bright-line test, the Supreme Court requires a court to make the far more imprecise determination of whether the replacement is "substantially younger."

Still, the Tenth Circuit's point has some force. Unlike race or sex discrimination cases, where it is typically clear who the appropriate comparison groups are (i.e., blacks versus non-blacks, or women versus men), the continuous nature of age makes the definition of the comparison groups more difficult. Thus, it is possible, for age groupings to be manipulated to produce a desired statistical result.

Courts, however, are not powerless to deter such manipulation. They can either establish bright-line rules for defining appropriate subgroups or assess the reasonableness of any particular subgrouping on a case-by-case basis. The latter approach would be consistent with the Supreme Court's belief that statistical disparities need not be

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308. See id. at 312-13.
309. See id. (noting that whether the individual who replaces the plaintiff is "outside the protected class" is not a reliable criterion).
310. See id.
311. As two commentators have queried,

Can an individual establish disparate impact by showing that a selection mechanism caused an adverse impact on those of his or her age or older? On those of his or her age and some fixed number of years (say, 5 or 10 years) older? On those of his and her age alone?

312. See id. (noting that "[i]n the absence of constraints on the types of groupings available," manipulation of such age groupings in order to obtain certain statistical results is possible).
313. Paetzold and Willborn set forth one way of assessing the reasonableness of a subgrouping:

An estimated probability of termination (corresponding to a specific selection mechanism or decision-making procedure) could be obtained for any age in the protected class... [T]he [termination] rate for the group at issue could be compared with the [termination] rate for the unprotected group to determine if there was a statistically significant difference in the two rates. The continuous nature of the age variable need not be a statistical problem under disparate impact analysis.

*Id.* at 7-24 to 7-25.
“framed in terms of any rigid mathematical formula”\textsuperscript{314} and that a case-by-case approach accurately reflects the Court’s recognition that there are an infinite variety of statistics and their usefulness depends on all of the surrounding facts and circumstances. \textsuperscript{315}

One bright-line solution would be to hold that the disparate impact theory is not available to subgroups of persons age forty and over. In other words, to make out a prima facie case of disparate impact, the plaintiffs must show a statistically significant disparity between the impact of an employment policy on employees age forty and over versus the impact on those under age forty. The Second Circuit has employed just such a rule. \textsuperscript{316}

Although this approach is elegant in its simplicity, it appears to


\textsuperscript{315} See id. at 996 n.3 (citing Teamsters v. United States, 431 U.S. 324, 340 (1977), and discussing evidentiary standards in discriminatory treatment cases). Two commentators point out that Congress explicitly recognized the disparate impact doctrine when it enacted the CRA, but took care to ensure that no jury trials would be available in Title VII and ADA cases based on allegations of disparate impact. See Douglas C. Herbert & Lani Schweiker Shelton, A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases, 37 S. Tex. L. Rev. 625, 651 (1996). The authors assert that the CRA’s legislative history “does not reveal the reasons why Congress chose not to grant jury trials in Title VII disparate impact cases, but it seems likely that it was because of the bewildering complexity of the statistical proof and expert testimony in Title VII disparate impact cases.” \textit{Id.} at 652 & n.147 (noting that there “were no committee hearings or reports” on the CRA). They conclude that the judiciary should be reluctant to create a disparate impact cause of action under the ADEA, because through the CRA, Congress “specifically chose not to entrust such complex disparate impact issues to lay juries.” \textit{Id.} at 660.

This conclusion is unfounded, because the House Judiciary Committee Report (which the commentators imply does not even exist) unambiguously explains that Congress added a jury trial right only to Title VII and ADA intentional discrimination claims for damages, 42 U.S.C. § 1981a(a)(1), (c), in order to “protect the rights of all persons under the Seventh Amendment.” H.R. Rep. No. 102-40(II), at 29 (1991). Because damages are not available for a Title VII disparate impact claim, Congress decided that a “jury trial would not be available in such cases.” \textit{Id.} Thus, there appears to be little, if any, basis for the commentators’ speculation that Congress acted out of concern for jury confusion in disparate impact cases. Rather, Congress was concerned about protecting litigants’ constitutional right to trial by jury when legal damages are sought.

In any event, the commentators fail to explain adequately why a bench trial necessarily represents a better solution for coping with the potential complexities of statistical evidence, as opposed to a jury trial under the guidance of a judge (who may or may not have a better understanding of statistics than the jurors). If the statistical issues in a particular disparate impact case truly appear too complex for a jury such that instructions alone would not suffice, the judge always could refer these issues to a competent special master for resolution. See \textit{Fed. R. Civ. P. 53(b)} (providing that reference to a special master is appropriate in jury cases “when the issues are complicated”); \textit{Fed. R. Civ. P. 53(e)(3)} (providing that the master’s finding are admissible into evidence and may be read to the jury). Moreover, if it appears to the judge that the jury unreasonably has found (or failed to find) a statistically significant adverse impact, the judge has the option of setting aside the jury verdict and either entering judgment as a matter of law or granting a new trial. See \textit{Fed. R. Civ. P. 50(a), (b)}. In no event, however, should the potential complexity of statistical proof utterly deny a remedy for employment practices that violate the ADEA.

\textsuperscript{316} See Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364, 1373 (2d Cir. 1989) (refusing to recognize subgroups of older members in the over-39 protected group for purposes of disparate impact claims).
contradict the language and history of the ADEA. Sections 4 and 15 of the ADEA both protect “individuals,” not groups, against age discrimination. 317 As the Supreme Court explained in O’Connor: “This language does not ban discrimination against employees because they are aged [forty] or older; it bans discrimination against employees because of their age, but limits the protected class to those who are [forty] or older.” 318 In other words, the ADEA does not prohibit discrimination only against those “40 or over.” 319 The critical issue is whether individuals who are at least age forty suffered age discrimination vis-à-vis any other person or persons in any other age group. 320

One district court has rejected the preceding argument solely on the ground that O’Connor was a disparate treatment case. 321 It is un-

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319. See id. Senator Yarborough made this very point just prior to the passage of the ADEA in 1967. Noting that section 4 of the bill explicitly prohibited discrimination against an individual because of his age, Senator Javitz had inquired whether the bill that became the ADEA would “forbid discrimination between two persons each of whom would be between the ages of 40 and 65.” See 113 CONG. REC. 31,255 (1967) (statement of Sen. Javitz). Senator Yarborough responded that if a 42 year-old and a 52 year-old applied for the same job, the employer “could not turn either one down on the basis of the age factor.” See id. (statement of Sen. Yarborough).

320. It might be argued, however, that age discrimination is actionable only if the victims and beneficiaries of the discrimination are “significantly” or “substantially” different in age. See O’Connor, 517 U.S. at 313 (stating that a prima facie case of intentional age discrimination “cannot be drawn from the replacement of one worker with another worker insignificantly younger”). This interpretation is likely true as a practical matter, for example, in intentional discrimination wrongful discharge cases where there is little evidence of discriminatory animus other than replacement by an insignificantly younger employee. See id. at 312 (suggesting that replacement of a 68 year-old by a 65 year-old is “thin evidence” of age discrimination). But it is not necessarily true in principle because the holding in O’Connor reads more like an evidentiary guideline than an absolute rule for all ADEA cases. See id. at 312-13 (“T[he] fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of [intentional] age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.”) (emphasis added). Thus, it is conceivable, although perhaps unlikely from an evidentiary standpoint, that an employer could favor one employee over another solely because of a one or two-year age-differential.

Assuming the plaintiff can proffer evidence of such discrimination, however, the fact that there is no substantial age difference between the alleged victim and his or her comparator should not bar the ADEA claim as a matter of law. The logic of this conclusion is consistent with Title VII race discrimination cases wherein a black employee’s replacement by another black employee does not pose an automatic bar to suit, as long as there is other circumstantial evidence of discrimination. See Edwards v. Wallace Community College, 49 F.3d 1517, 1521 (11th Cir. 1995) (reasoning that Title VII protects not simply minorities, but a minority who can show that he has been discharged, that he is a protected minority, is qualified for the job from which he was discharged, and lastly, that his position was filled by a non-minority; reasoning further that a prima facie case does not have to meet the fourth requirement as long as a minority can prove that filling of vacancy by another minority was pretextual).

clear, however, why the ADEA’s prohibitions would be broader in the disparate treatment context (i.e., the ADEA is implicated when an employer, acting on an age stereotype, replaces a fifty-six year-old with a forty year-old) than in the disparate impact context (the ADEA is not implicated when a group of fifty-six year-olds are terminated in favor of a group of forty year-olds due to an unjustifiable, albeit age-neutral, decision-making factor). As disparate impact discrimination is “functionally equivalent” to disparate treatment discrimination, plaintiffs suing under the former theory should be entitled to the same protection as plaintiffs suing under the latter.

Indeed, if subgrouping is not permitted, an employer could adopt a policy which, though facially-neutral, has a significant disparate impact on workers over age sixty, as long as a relatively equal number of employees age forty or forty-five have not been affected. Oddly the ADEA would be violated when an age-neutral policy discriminates against sixty year-olds in favor of thirty-nine year-olds, but not when it discriminates in favor of forty year-olds. Thus, a rule barring subgrouping would “permit policies and practices that clearly have an adverse impact on individuals based on their age to escape judicial scrutiny.”

The Supreme Court has not condoned subgroup discrimination in Title VII disparate impact cases. The Court has held that the “principal focus of [Title VII] is the protection of the individual employee, rather than the protection of the minority group as a whole.” Thus, individual black employees who are excluded from a

("[T]here is no reason to force an employer who has no discriminatory animus to achieve statistical parity for each ... age subgroup.").

322. See supra notes 19-20 and accompanying text (arguing that disparate impact and disparate treatment are functionally equivalent).


324. Id.; see also Finch v. Hercules Inc., 865 F. Supp. 1104, 1129 (D. Del. 1994) (stating that subgroup discrimination reflects the type of arbitrary age discrimination Congress sought to prohibit).

325. See Connecticut v. Teal, 457 U.S. 440, 455 (1982) (determining that fairness to the class as a whole does not justify unfairness to an individual class member; consequently, as the Court explained, “Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired”). Several lower courts have reached a similar conclusion in the context of “sex plus” discrimination, wherein a subclass of women (such as married women or women with children) have been permitted to sue under a disparate impact theory even though there is no adverse impact against women as a class. See Wambheim v. J.C. Penny Co., 642 F.2d 363, 365-66 (9th Cir. 1981) (applying disparate impact analysis to a claim challenging an insurance policy that granted maternity benefits only to married women); see also Tuck v. MacGraw-Hill, Inc., 421 F. Supp. 39, 43-45 (S.D.N.Y. 1976) (applying disparate impact analysis to claim that employer’s rule prohibiting employment of close relatives in same operating unit discriminated against subclass of married women).

selection process would still have a viable disparate impact claim even if the overall selection process resulted in blacks as a group faring as well as non-blacks. The same logic should apply under the ADEA which, according to the Supreme Court, "prohibits discrimination on the basis of age and not class membership."

G. The Civil Rights Act of 1991

Congress' failure to codify disparate impact analysis in the ADEA when it enacted the Civil Rights Act of 1991 does not necessarily reflect, as the Tenth Circuit asserts, a congressional rejection of age discrimination claims based on disparate impact. A far more likely explanation is that Congress chose not to legislate beyond the scope of what necessitated the disparate impact amendments in the first place. The major impetus of the CRA's disparate impact amendments was the need to overturn certain Supreme Court decisions that narrowly interpreted the disparate impact doctrine under Title VII, not the ADEA. Thus, by not codifying disparate impact analysis into other civil rights statutes, such as the ADEA or the Fair Housing Act, Congress merely exercised legislative restraint.

Congress has, in fact, exercised similar restraint in the past. For instance, in 1990, Congress enacted the Older Workers Benefits Protection Act ("OWBPA"), which amended the ADEA by expressly placing the burden on the employer, employment agency, or labor organization to prove the bona fide seniority system and the bona fide employee benefit plan exceptions. Congress failed to do the same for the exceptions contained in section 4(f)(1), including the BFOQ exception. Although both the Senate and House bills that reported out of their respective committees would have allocated the same burden for the section 4(f)(1) exceptions, this provision was de-

327. See id.
330. See generally Ellis v. United Airlines, Inc, 73 F.3d 999, 1008 (10th Cir.) (rejecting disparate impact analysis for ADEA claims because Congress "explicitly added a disparate impact cause of action to Title VII in the 1991 Civil Rights Act," but added no such parallel provision to the ADEA), cert.denied, 517 U.S. 1245 (1996).
331. See H.R. REP. NO. 102-40, at 32 (1991) ("New Subsections 701(l) through (p) and 703(k) are being added to Title VII to restore the law governing Title VII disparate impact cases... prior to the decision in Wards Cove v. Antonio, 490 U.S. 642 (1989).") (emphasis added).
334. See H.R. REP. 101-664, at 3, 46-47 (1990) (stating "bona fide occupational qualification" exception included in section 4(f)(1) is an affirmative defense which the employer bears the
leted from the final substitute Senate bill that ultimately became the OWBPA.

This deletion, however, was not due to any particular congressional view about the proper allocation of burdens under BFOQ exception, but rather legislative restraint. The impetus for the OWBPA's amendments was to overturn Public Employees Retirement Systems v. Betts,\textsuperscript{335} where the Supreme Court held that an employee challenging the validity of an employee benefit plan under the ADEA bears the burden of proving that the employer had adopted the plan as a subterfuge for intentional age discrimination.\textsuperscript{336} Because the Betts case did not involve any of the exceptions contained in section 4(f)(1), Congress deleted references to those exceptions from the final bill and left the allocation of the burden of proof for those exceptions to the courts.\textsuperscript{337} Accordingly, Congress's failure to codify the BFOQ affirmative defense in 1990 did not thereby invalidate the Supreme Court's long-standing treatment of the BFOQ exception as an affirmative defense.\textsuperscript{338}

The Supreme Court outlined another example of congressional restraint in Western Air Lines, Inc. v. Criswell,\textsuperscript{339} this time involving the appropriate method for analyzing the BFOQ defense under the ADEA. The Court noted that Congress, in considering a potential amendment to the ADEA in 1978, implicitly endorsed the two-part analysis articulated by the Fifth Circuit in 1976,\textsuperscript{340} but that Congress rejected the amendment because it "neither added to nor worked any change upon present law."\textsuperscript{341} As Congress acted out of legislative restraint, the Court lacked support for the conclusion that Congress' failure to codify this two-part test into the ADEA manifested congressional disapproval of the test. To the contrary, the Court proceeded

\textsuperscript{336} See id. at 181.
\textsuperscript{337} See 136 CONG. REC. 13,596-97 (1990) (declaring that bill's managers were "not disturbing or in any way affecting the allocation of the burden of proof for paragraph 4(f)(1) under pre-Betts law" and that because the allocation of the burden of proof under paragraph 4(f)(1) was not at issue in Betts, the drafters found no need to address it in the OWBPA).
\textsuperscript{338} See Western Airlines, Inc. v. Criswell, 472 U.S. 400, 416 & nn.23-24 (1985) (holding that in order to establish a BFOQ defense, an employer needed to show that age was a legitimate safety-related job qualification).
\textsuperscript{339} 472 U.S. 400 (1985).
\textsuperscript{340} See id. at 412-415 (discussing the Fifth Circuit's holding in Usery v. Tamiami Trial Tours, Inc., 531 F.2d 224 (1976), that, in order to establish age as a BFOQ, the employer must prove: (1) the job qualifications which the employer invokes to justify his discrimination must be reasonably necessary to the essence of his business and; (2) the age qualifications must be more than convenient or reasonable).
\textsuperscript{341} See id. at 415-16 (quoting H.R. CONF. REP. NO. 95-950, at 7 (1978)).
to reaffirm the two-part test as the law of the land.\textsuperscript{342}

There are likely many more examples of Congress refraining from taking action beyond remedying the specific concern before it. In the case of the CRA, Congress' virtual inaction on the ADEA\textsuperscript{443} likely means nothing more than that the lower courts should determine whether and when disparate impact analysis may be utilized under the ADEA.

The CRA, however, remains relevant to the instant debate. Notably, even as amended, Title VII fails to state explicitly that an employment practice resulting in unjustified disparate impact is unlawful; the CRA did not alter the prohibitory language of section 703(a) of Title VII.\textsuperscript{344} Instead, section 105(a) of the CRA added subsection(k), that merely refers to an "unlawful employment practice based on disparate impact."\textsuperscript{345} Thus, any application of the disparate impact theory under Title VII still must invoke the Supreme Court's long-standing construction of section 703(a) as prohibiting practices that are fair in form, but discriminatory in operation.\textsuperscript{346}

If an inference from the CRA is appropriate, perhaps it should be that Congress's failure to make disparate impact explicitly an unlawful employment practice evidences its belief that disparate impact analysis always has been encompassed by Title VII's prohibitory language.\textsuperscript{347} In this light, it was incorrect for the Tenth Circuit to conclude that the CRA "explicitly added a disparate impact cause of action to Title VII,"\textsuperscript{348} because that cause of action already existed. Thus, because the absence of the words "disparate impact" in Title VII prior to 1991 did not make disparate impact analysis any less legitimate under Title VII, the same should be true for the ADEA after 1991.

\textsuperscript{342} See id. at 416 (concluding that the two-part inquiry adopted by the Fifth Circuit in Usery identifies the proper considerations for resolving a BFOQ defense).

\textsuperscript{343} Although the CRA did amend the ADEA, it altered only the technical, charge-filing provisions of section 7. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 115, 105 Stat. 1071, 1079 (codified at 29 U.S.C. § 626(e) (1994)).


\textsuperscript{345} Id. § 2000e-2(k)(1)(A).

\textsuperscript{346} See 137 CONG. REC. 15,276 (1991) ("[T]he terms 'business necessity' and 'job related[ness]' are intended to reflect the concepts enunciated by the Supreme Court in Griggs... and in other Supreme Court decisions prior to Wards Cove.").


CONCLUSION

Section 15 of the ADEA governing federal-sector employment, is wholly distinct from section 4, which governs private-sector employers and state and local governmental entities. Therefore, the statutory and court-fashioned limitations on ADEA claims against private and state government employers do not apply in the context of federal-sector age discrimination claims. To be consistent with the legislative history of section 15 and with judicial constructions of Title VII’s federal-sector provision, courts should recognize disparate impact analysis in ADEA cases brought by federal employees. In addition, sovereign immunity should not be an obstacle to a section 15 claim alleging disparate impact, because disparate impact simply represents an alternative means of proving unlawful age discrimination, a claim for which the federal government has already waived its immunity.

To the extent the language and legislative history of section 4 bear on the meaning of section 15, they too show that Congress intended to prohibit certain ostensibly age-neutral policies that have a disparate impact on older workers. Congress’ failure to codify disparate impact analysis into the ADEA in 1991 should not alter this conclusion, even though the formulation of the burden of proof for section 4 disparate impact claims remains an unsettled issue.