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SMITH V. CITY OF JACKSON: SOLVING AN AGE-OLD PROBLEM?

Adam N. Bitter

To Azel Smith and other Jackson, Mississippi police officers and dispatchers, the city’s new pay plan appeared unjust. Although the pay plan announced across-the-board salary increases for all officers and dispatchers, the numbers told a different story. The raises appeared to adversely affect police personnel with more than five years of tenure. In fact, one expert concluded that the pay increases for newly hired officers younger than forty years of age were four standard deviations greater than pay increases for older officers.

After the city of Jackson adopted its new pay plan, Azel Smith and the other officers and dispatchers brought suit under the Age Discrimination in Employment Act (ADEA), claiming disparate treatment and disparate...
rate impact. In their disparate treatment claim, the plaintiffs alleged that several city employees made age-biased comments, and that the city concealed information regarding the new pay plan. In their disparate impact claim, the plaintiffs alleged that the city’s new pay plan, by focusing on years of tenure, adversely affected police personnel over forty years of age. Although the Fifth Circuit had not previously ruled on the availability of disparate impact recovery under the ADEA, the plaintiffs argued that the similarities between the ADEA and Title VII of the Civil Rights Act supported the applicability of the disparate impact model. Moreover, the plaintiffs contended that the city failed to prove that business necessity justified its salary increases, as required by Equal Employment Opportunity Commission (EEOC) regulations.

In response, the city asserted that its new pay plan sought to increase the starting salaries of police officers to the regional average. Similarly,

7. City of Jackson, 351 F.3d at 186. The Supreme Court has noted that disparate impact claims “involve 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. Proof of discriminatory motive . . . is not required under a disparate-impact theory.” Teamsters, 431 U.S. at 336 n.15. In a disparate impact claim, plaintiffs often introduce statistical evidence to demonstrate the effects of facially neutral employment practices across a group of employees. E.g., Geller v. Markham, 635 F.2d 1027, 1030 (2d Cir. 1980) (admitting statistical evidence demonstrating that, under the defendant employer’s hiring policies, a person over forty years of age had a substantially lower chance of being selected for a teaching position than a person under forty years of age); see BARBARA T. LINDEMANN & DAVID D. KADUE, AGE DISCRIMINATION IN EMPLOYMENT LAW 581 (2003); see also Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994-95 (1988) (plurality opinion) (holding, in a Title VII case, that statistical disparities must be “sufficiently substantial” to draw an inference that the employment practice causes an adverse impact).

8. See Brief of Appellants, supra note 1, at 7.


10. City of Jackson, 351 F.3d at 184.


12. See Brief of Appellants, supra note 1, at 15-16. As the plaintiffs noted, the two statutes contain nearly identical substantive provisions and share the common goal of eradicating employment discrimination. Id.; see also Laura C. Marino, Note, A Necessary Tool: The Continuing Debate Over the Viability of Disparate Impact Claims Under the Age Discrimination in Employment Act, 77 ST. JOHN’S L. REV. 649, 666 (2003) (noting the similarities in the congressional purposes and substantive provisions of Title VII and the ADEA).


15. See Smith v. City of Jackson, 544 U.S. 228, 231 (2005). In defense of its plan, the city contended that it sought to “attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability.” Id. (emphasis added).
the city disputed the plaintiffs' evidence of age-biased comments, arguing that city employees referred only to officers' tenure of service, not to their age.\textsuperscript{16} As to the plaintiffs' disparate impact claim, the city acknowledged that the pay plan affected employees differently based on their age, as the plan focused on the threshold of five years of tenure.\textsuperscript{17} Accordingly, the city asserted that it complied with the ADEA by using a reasonable factor other than age (RFOA).\textsuperscript{18} In addition, the city contended that it was not required to demonstrate business necessity because such a defense applied only to disparate impact claims, which the city asserted could not be brought under the ADEA.\textsuperscript{19}

The district court granted summary judgment for the city on each of the plaintiffs' claims.\textsuperscript{20} On appeal, the Fifth Circuit affirmed the dismissal of the disparate impact claim,\textsuperscript{21} holding that the ADEA does not authorize such recovery.\textsuperscript{22} The Fifth Circuit reasoned that an employer could not be held liable under the ADEA where it used an RFOA, regardless of the adverse effect of the employment policy or practice on older workers.\textsuperscript{23}

\begin{itemize}
  \item \textsuperscript{16} See Brief of Appellees at 10-11, Smith v. City of Jackson, 351 F.3d 183 (5th Cir. 2003) (No. 02-60850).
  \item \textsuperscript{17} See id. at 2-3. The City noted that the pay plan included three categories of employees:
    \begin{enumerate}
      \item Those officers and dispatchers with less than five years of tenure, most if not all, of whom would have been under 40 years of age;
      \item those 40 years of age or older, most, if not all, of whom would have had more than five years of tenure, and;
      \item those under 40 years of age with more than five years of tenure.
    \end{enumerate}
  \item \textsuperscript{18} See id. at 6. Under the ADEA, it is lawful for an employer to adopt an otherwise prohibited employment practice "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1) (2000) (RFOA provision). Since the passage of the ADEA, there has been considerable debate about whether the RFOA provision precludes disparate impact liability or whether it merely serves as an affirmative defense to a disparate impact claim. See infra Part I.C.4.
  \item \textsuperscript{19} See Brief of Appellees, supra note 16, at 8-9.
  \item \textsuperscript{20} Smith v. City of Jackson, 544 U.S. 228, 231 (2005). By dismissing the case at the summary judgment stage, the district court applied the then-majority view that the ADEA did not authorize disparate impact claims. See, e.g., Adams v. Fla. Power Corp., 255 F.3d 1322, 1326 (11th Cir. 2001) (affirming summary judgment in favor of the employer because "disparate impact claims may not be brought under the ADEA"); Mullin v. Raytheon Co., 164 F.3d 696, 703-04, 706 (1st Cir. 1999) (affirming the dismissal of the plaintiff's claim at the summary judgment stage, and reasoning that the ADEA does not authorize disparate impact recovery).
  \item \textsuperscript{21} See Smith v. City of Jackson, 351 F.3d 183, 195 (5th Cir. 2003). However, the Fifth Circuit ruled that the district court improperly dismissed the disparate treatment claim at the summary judgment stage. Id. at 198.
  \item \textsuperscript{22} Id. at 195.
  \item \textsuperscript{23} See id. at 189-93 (arguing that the RFOA exception provides employers with a "safe harbor" from liability under the ADEA).
\end{itemize}
On appeal, a majority of the United States Supreme Court—in a splin-
tered opinion—announced that the ADEA authorizes disparate impact
recovery. The Court, however, affirmed the dismissal of the plaintiff's
disparate impact claim, as the Court held that the city met its burden of
demonstrating the use of a reasonable, non-age factor. Justice Stevens,
writing for a plurality of the Court, contended that disparate impact re-
covery is cognizable under the ADEA, pointing to the Act's substantive
prohibitions and its similarities with Title VII. In a concurring opinion,
Justice Scalia agreed that disparate impact recovery is available under the
ADEA, but based his opinion on deference to the EEOC's interpreta-
tions of the Act. Justice O'Connor, joined by Justices Thomas and
Kennedy, concurred in the judgment only, contending that disparate im-
 pact theory is inapplicable to the ADEA because of the Act's RFOA
provision and legislative history.

Age discrimination suits number in the thousands every year and take
many different forms. For example, plaintiffs often allege that an em-
ployer's practice of hiring "recent college graduates" or persons with par-
ticular levels of experience adversely affects older applicants. Similarly,
employees may allege that an employer's reduction in force (RIF) ad-
versely affects older workers because the reduction tends to dismiss em-
ployees whose salaries have increased over long tenures. In fact, plain-

24. City of Jackson, 544 U.S. at 229, 240, 243. Chief Justice Rehnquist did not participa-
te in the City of Jackson decision. Id. at 243.
25. Id. at 243. The Court reasoned that the plaintiffs failed to identify a specific dis-
 criminary employment practice. Id. at 241. In addition, the Court held that the City
relied on RFOAs in seniority and rank. Id. at 241-42.
26. Id. at 233-38 (plurality opinion).
27. Id. at 243-44 (Scalia, J., concurring); see, e.g., EEOC v. McDonnell Douglas Corp.,
191 F.3d 948, 950 (8th Cir. 1999) (noting the EEOC's opposition to an employer's reduc-
tion in force because of its adverse effect on older employees).
29. See U.S. Equal Employment Opportunity Commission, Age Discrimination in
19, 2007) (reporting that the EEOC received 16,585 charges of age discrimination in FY
2005). Under the ADEA, an aggrieved individual must first file a complaint of age dis-
 crimination with the EEOC. 29 U.S.C. § 626(d) (2000). After filing a charge with the
EEOC, the complainant must wait at least sixty days before filing a civil suit. Id.
employer's noncompetitive career ladders for particular college graduates); see LINDEMAN N & KADUE, supra note 7, at 137. But see EEOC v. Francis W. Parker Sch., 41
F.3d 1073, 1077-78 (7th Cir. 1994) (implying that the ADEA does not allow job applicants
to assert disparate impact claims because the text prohibits only those practices that ad-
versely affect "employees").
31. See Note, The Cost of Growing Old: Business Necessity and the Age Discrimina-
tion in Employment Act, 88 YALE L.J. 565, 575-76 (1979) (remarking that employers con-
sider "overriding economic" concerns in a RIF); cf. Pippin v. Burlington Res. Oil & Gas
Co., 440 F.3d 1186, 1189 (10th Cir. 2006) (noting that the employer's RIF was based on the
company's future needs and its intent to "select the 'best performers' to retain").
tiffs also commonly assert disparate impact claims under the ADEA in response to an employer's evaluations, terminations, or promotions.

This Comment examines the nature and scope of ADEA disparate impact recovery in light of Smith v. City of Jackson. Part I of this Comment outlines the statutory basis for disparate impact recovery, focusing on the legislative history and text of the ADEA. Part I also examines the central issues within the ADEA disparate impact debate, and discusses how the Supreme Court resolved each of these issues in City of Jackson. Part II of this Comment analyzes the plurality and concurring opinions in City of Jackson and asserts that the plurality opinion misinterpreted the ADEA's text and legislative history, as well as the substantial differences between the ADEA and Title VII. Finally, Part III of this Comment proposes that Congress respond to City of Jackson by amending the ADEA to preclude disparate impact recovery.

I. AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

A. Legislative History of the ADEA

In 1964, Congress enacted Title VII of the Civil Rights Act to prohibit discrimination in employment based on race, color, sex, national origin, and religion. During the debates on Title VII, Congressman John Dowdy and Senator George Smathers introduced amendments to in-

32. See, e.g., Finch v. Hercules Inc., 865 F. Supp. 1104, 1128 (D. Del. 1994) (involving an employer allegedly giving disproportionately lower rankings to its employees over the age of fifty).

33. See, e.g., Evers v. Alliant Techsystems, Inc., 241 F.3d 948, 956 (8th Cir. 2001) (rejecting a discharged employee's disparate impact claim in part because of the employer's cost justification).


35. 42 U.S.C. § 2000e-2 (2000). Title VII makes it unlawful 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 . . . or . . . 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.

Id. § 2000e-2(a).

36. See 110 CONG. REC. 2596 (1964). Congressman Dowdy referred to discrimination affecting persons between forty and forty-five years of age, stating, "[this] is the worst kind of discrimination when a person is discriminated against at that age, particularly, that young age." Id. at 2596 (statement of Rep. Dowdy).

37. See id. at 9911-13. Senator Smathers echoed the sentiments of Congressman Dowdy, asserting that "[w]hen we find that more and more people are not able to make a
clude age as a protected status. However, Congress rejected the amendments for lack of sufficient evidence of age discrimination in employment. As a result, Congress ordered Secretary of Labor W. Willard Wirtz to research and report to Congress on the causes and effects of age discrimination in employment.

When submitted one year later, the Secretary's Report (Wirtz Report) became a driving force behind the enactment of federal legislation prohibiting employment discrimination on account of age. Secretary Wirtz reported that, in contrast to other forms of discrimination, employers did not demonstrate animus or intolerance of older workers. However, the Secretary discovered "substantial evidence of arbitrary ... discrimination based on unsupported general assumptions about the effect of age on ability." Moreover, the Secretary commented that certain "institutional arrangements," such as promotion-from-within programs and pension plans, adversely affected older workers partly because of an livelihood because of age, that is an actual and real kind of discrimination." Id. at 9912 (statement of Sen. Smathers).

38. Id. at 2596, 9911.

39. See 113 CONG. REC. 31,254 (1967) (statement of Sen. Javits) (pointing to "the lack of any concrete information and statistics to show the full magnitude of the problem"). In addition, the opposition to the age amendments focused on the difficulty in defining age discrimination. See, e.g., 110 CONG. REC. 2596 (1964) (statement of Rep. Celler) (arguing that Congress would be "entering into a thicket of difficulties" if it adopted Congressman Dowdy's amendment because it was unclear at what age persons began experiencing discrimination).


43. WIRTZ REPORT, supra note 41, at 5-6 (comparing the causes of age discrimination and other forms of discrimination).

employer's interest in cost savings.\textsuperscript{45} In his recommendations to Congress, the Secretary declared his support for federal legislation to curb arbitrary age discrimination.\textsuperscript{46} In response to the institutional arrangements where no arbitrary discrimination existed, however, the Secretary did not advocate for federal legislation; instead, Secretary Wirtz encouraged employers to adopt new measures, including pension and seniority arrangements.\textsuperscript{47}

After the Wirtz Report was issued, Congress began debating a proposed bill prohibiting age discrimination in employment.\textsuperscript{48} In accord with Secretary Wirtz's findings, Congress recognized that misguided stereotypes regarding age and ability fueled discrimination against older workers.\textsuperscript{49} In addition, proponents of the legislation asserted that the ADEA would become part of a comprehensive scheme to curb employment discrimination.\textsuperscript{50} Finally, supporters contended that the legislation provided

\begin{itemize}
  \item \textsuperscript{45} WIRTZ REPORT, supra note 41, at 15-16. On the promotion-from-within policies, Secretary Wirtz noted that such policies, "accepted as desirable by management and worker alike, very often restrict hiring from outside the firm to lower wage entry levels, traditionally regarded as more suitable for younger workers." \textit{Id.} at 15. On the issue of pension plans, the Secretary commented, "[i]t is not clear to what extent these restraints arise directly from cost factors." \textit{Id.} at 16.
  \item \textsuperscript{46} See \textit{id.} at 22 (advocating for federal legislation that "declares, clearly and unequivocally, and implements so far as is practicable, a national policy with respect to hiring on the basis of ability rather than age"). In his message to Congress supporting age discrimination legislation, President Johnson reiterated the Wirtz Report's findings on "arbitrary" age discrimination:
    
    Hundreds of thousands, not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination. . . .
    
    \ldots
    
    In economic terms, this is a serious—and senseless—loss to a nation on the move.
    
    But the greater loss is the cruel sacrifice in happiness and well-being which joblessness imposes on these citizens and their families.

Special Message to the Congress Proposing Programs for Older Americans, 1 PUB. PAPERS 32, 37 (Jan. 23, 1967).
  \item \textsuperscript{47} WIRTZ REPORT, supra note 41, at 22.
  \item \textsuperscript{48} See LINDEMANN & KADUE, supra note 7, at 7. The Secretary's proposed age discrimination legislation was a hybrid provision, borrowing its substantive prohibitions from Title VII and its remedial provisions from the Fair Labor Standards Act. \textit{Id.} at 7 n.24.
  \item \textsuperscript{49} See, e.g., 113 CONG. REC. 34,746 (1967) (statement of Rep. Olsen) (stating that erroneous generalizations about older workers "have hardened into restrictive policies and practices in the hiring of new employees"); \textit{id.} at 34,745 (statement of Rep. Eilberg) (remarking that employers' stereotyped thinking resulted in discriminatory practices against older workers); \textit{id.} at 31,254 (statement of Sen. Javits) (asserting that much of the problem with age discrimination in employment originated from sheer ignorance).
  \item \textsuperscript{50} See \textit{id.} at 34,744 (statement of Rep. Pucinski) (identifying Title VII's prohibition of employment discrimination and commenting that "it is now time to legislate against one of the cruelest forms of discrimination"); \textit{id.} at 34,742 (statement of Rep. Burke) (referring to Congress' enactment of Title VII and noting that justice required a similar response to age discrimination).
\end{itemize}
employers with flexibility in situations where age was closely related to their business.\footnote{51}

\textbf{B. Text and Purpose of the ADEA}

In 1967, Congress enacted the Age Discrimination in Employment Act, finding that it was "common practice" for employers to implement arbitrary age limits.\footnote{52} Furthermore, Congress emphasized that age discrimination in employment adversely affected interstate commerce.\footnote{53} As enacted, the ADEA contains three explicit purposes: "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."\footnote{54} Under the ADEA, it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age."\footnote{55} In addition, the ADEA prohibits any employment practice that "limit[s], segregat[e]s, or classif[i]es . . . employees in any way which would . . . otherwise adversely affect his status as an employee, because of such individual's age."\footnote{56} After several amendments, the protections afforded by the ADEA currently extend to all employees over forty years of age.\footnote{57}

\footnote{51. See \textit{Age Discrimination in Employment: Hearings Before the General Subcomm. on Labor of the S. Comm. on Labor and Public Welfare}, 90th Cong. 39 (1967) (statement of W. Willard Wirtz, Secretary of Labor) (asserting that under the proposed ADEA, the employer defenses were "obviously broad"); 113 \textit{CONG. REC.} 34,746 (1967) (statement of Rep. Daniels) (asserting that the ADEA considered the interests of employers). \textit{But see id.} at 34,743 (statement of Rep. Mink) (criticizing the bona fide occupational qualification (BFOQ) defense because employers could continue to advance erroneous stereotypes concerning age and ability).}

\footnote{52. 29 U.S.C. § 621(a)(2) (2000).}

\footnote{53. \textit{Id.} § 621(a)(4).}

\footnote{54. \textit{Id.} § 621(b). Courts have held that the ADEA's purposes and legislative findings mirror the Wirtz Report. \textit{See, e.g.,} Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 589 (2004). Similarly, in discussing the purposes of the ADEA and Title VII, the Supreme Court has noted: "Congress designed the remedial measures in these statutes to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination." \textit{McKennon v. Nashville Banner Publ'g Co.}, 513 U.S. 352, 358 (1995).}

\footnote{55. 29 U.S.C. § 623(a)(1).}

\footnote{56. \textit{Id.} § 623(a)(2). The ADEA similarly regulates employment agencies, \textit{id.} § 623(b), and labor organizations, \textit{id.} § 623(c).}

The ADEA contains several exceptions for employers. First, an employer can adopt an otherwise prohibited employment practice "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." In addition, an employer is immune from ADEA liability where it uses an RFOA. As the EEOC recognizes, however, these exceptions are difficult to define and are often determined on a case-by-case basis.

C. Judicial Interpretations of Disparate Impact Recovery under the ADEA

Courts have uniformly upheld a plaintiff's right to assert a disparate treatment claim under the ADEA. In addition, the Supreme Court has


59. Id. § 623(f)(1). In Western Air Lines, Inc. v. Criswell, the Supreme Court set forth a two-part analysis for the BFOQ defense. W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 413-14, 422-23 (1985). First, the employer must demonstrate that the challenged employment practice is "reasonably necessary to the normal operation of the particular business." Id. at 413 (citation omitted). Second, the employer must demonstrate that it is forced to use age as a factor in its employment practice, by showing either: "a substantial basis for believing that all or nearly all employees above an age lack the qualifications required for the position"; or that it would be "highly impractical" for the employer to individually test employees for the particular qualifications. Id. at 422-23.

In raising the ADEA's upper age limit in 1978, the Senate remarked on the BFOQ defense: "[T]here may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs ..." S. REP No. 95-493, at 10-11 (1977), reprinted in 1978 U.S.C.C.A.N. 504, 513-14.

60. 29 U.S.C. § 623(f)(1). In EEOC v. Wyoming, the Supreme Court noted that Congress drafted the RFOA provision "to insure that employers were permitted to use neutral criteria not directly dependent on age." EEOC v. Wyoming, 460 U.S. 226, 232-33 (1983).

61. See 29 C.F.R. § 1625.6-7 (2006). With respect to the RFOA provision, EEOC regulations caution that "[n]o precise and unequivocal determination can be made as to [its] scope." Id. § 1625.7(b). The regulations make a similar finding as to the BFOQ defense. Id. § 1625.6(a). These exceptions have influenced the ADEA disparate impact debate because Title VII contains a BFOQ defense but not an RFOA provision. See MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 517 (1988).

62. See LINDEMANN & KADUE, supra note 7, at 352-53. In cases involving ADEA disparate treatment claims, the courts have consistently adopted the three-part burden shifting analysis used in Title VII cases. See, e.g., Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1047 (6th Cir. 1998); Woodman v. Haemonetics Corp., 51 F.3d 1087, 1091-92 (1st Cir. 1995). Under this three-part analysis:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination.

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.

...
long held that Title VII authorizes disparate impact recovery. However, courts and commentators have long disagreed about the availability of disparate impact recovery under the ADEA.

1. Similarities Between Title VII and the ADEA

One of the central arguments in the disparate impact debate focuses on the similarities between the substantive prohibitions of Title VII and the ADEA. The Supreme Court first considered the similarities between the two statutes in *Lorillard v. Pons*. In *Lorillard*, the plaintiff filed suit against her former employer, alleging that her termination violated the ADEA. The central issue in the case was whether the ADEA provided a right to a jury trial in a private civil suit for lost wages. The Court held in the affirmative, reasoning that the ADEA's remedial and procedural provisions mirror the Fair Labor Standards Act (FLSA), which provides the right to trial by jury in similar suits. Although the Court ultimately

... [Then, the employee] must... be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 804 (1973).

63. See Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). In *Griggs*, the Supreme Court held that Title VII's goal of equal opportunity meant more than merely eradicating intentional discrimination, and included removing institutional arrangements that adversely affected persons based on race. *Id.* The Court reasoned that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.; see also* Dothard v. Rawlinson, 433 U.S. 321, 331 (1977) (allowing for disparate impact recovery in gender-based discrimination claims under Title VII).


67. *Id.* at 576.
68. *Id.*
69. *Id.* at 585.
looked to the FLSA for guidance, the Court noted that the ADEA’s substantive prohibitions “were derived in haec verba from Title VII.”

Courts have often used Lorillard’s reasoning in support of applying the disparate impact model to the ADEA. In *Geller v. Markham*, for example, a 55-year-old teacher alleged that her former employer’s hiring policies, which focused on recruiting teachers at lower salary levels, disproportionately affected older workers. The Second Circuit applied the Lorillard Court’s finding regarding the similarities between Title VII and the ADEA, and held that the ADEA authorizes disparate impact recovery. The court reasoned that “[a]lthough the ADEA did not adopt Title VII’s procedural rules entirely, the rule permitting a case to be established by a showing of discriminatory impact or treatment cannot reasonably be viewed as merely procedural.”

On the other side of the disparate impact debate, some courts have reasoned that the ADEA and Title VII should not be interpreted in the same manner in every situation, given the fundamental differences between the two statutes. In *Mullin v. Raytheon Co.*, for example, the First Circuit held that the disparate impact model was not available under the ADEA; in its decision, the court focused on three significant differences between Title VII and the ADEA. First, in contrast to Title VII, the ADEA contains an RFOA provision, which, as the court recognized, provides a layer of protection for employers against age discrimination suits. Second, the Wirtz Report explicitly stated that arbitrary assumptions, not invidious prejudice, engendered employers’ discriminatory

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70. Id. at 584; *see also* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755-56 (1979) (looking to Title VII provisions to determine whether an aggrieved employee must exhaust state administrative remedies before filing an ADEA claim).

71. *See, e.g.*, Leftwich v. Harris-Stowe State Coll., 702 F.2d 686, 690-91 (8th Cir. 1983) (applying Title VII case law to the admission of statistical evidence in an ADEA disparate impact claim); Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980).

72. 635 F.2d 1027 (2d Cir. 1980).

73. Id. at 1029-30.

74. Id. at 1032.

75. Id.

76. *See, e.g.*, Adams v. Fla. Power Corp., 255 F.3d 1322, 1325-26 (11th Cir. 2001) (pointing to the differences in the text and legislative histories of Title VII and the ADEA); Mullin v. Raytheon Co., 164 F.3d 696, 701-04 (1st Cir. 1999).

77. 164 F.3d 696 (1st Cir. 1999).

78. Id. at 701-04.

79. Id. at 701-02. Some commentators argue that courts should preclude disparate impact recovery under the ADEA, similar to the Equal Pay Act (EPA), because both acts contain exceptions allowing an employer to consider “other” factors. *See* Manning, *supra* note 64, at 781-82. The EPA’s exception, however, allows employers to institute a pay differential based “on any other factor other than sex.” 29 U.S.C. § 206(d)(1) (2000) (emphasis added); *see also* County of Wash. v. Gunther, 452 U.S. 161, 169-70 (1981) (contrasting the structure of the EPA with Title VII, and noting that Congress drafted the EPA’s “any other factor” exception to restrict plaintiffs to disparate treatment claims).
policies toward older workers. Finally, the court noted that in the 1991 amendments to the Civil Rights Act, Congress widened the scope of Title VII disparate impact liability and enlarged the burdens facing an employer in a Title VII suit, without similarly amending the ADEA.

In *City of Jackson*, the Justices’ opinions varied considerably regarding the similarities between Title VII and the ADEA. A plurality of the Court held that the similarities between Title VII and the ADEA support the applicability of the disparate impact model to the ADEA. Justice Stevens’ plurality opinion reasoned, in part, that both statutes prohibit actions that “otherwise adversely affect” an employee’s status. Justice Stevens argued that this clause explicitly focuses on the effects of an employment practice, rather than its motivation. In addition, the plurality noted that the language of the Wirtz Report mirrored the congressional purposes of Title VII. These purposes had formed the basis for the Supreme Court’s decision in *Griggs v. Duke Power Co.*, which authorized disparate impact recovery under Title VII. Similarly, a majority of the Justices recognized Congress’ failure to amend the ADEA on the issue of disparate impact liability in 1991, but contended that the pre-1991 interpretation of Title VII disparate impact liability could still apply to the

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80. *Mullin*, 164 F.3d at 702-03.
81. *Id.* at 703. In 1991, Congress amended Title VII in response to *Wards Cove Packing Co. v. Atonio*, in which the Supreme Court had narrowed the scope of Title VII disparate impact liability. *See Smith v. City of Jackson*, 544 U.S. 228, 240 (2005); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656-60 (1989). In *Wards Cove Packing*, the Court held that an employee must identify a specific employment practice alleged to be discriminatory. *Wards Cove Packing*, 490 U.S. at 657. Furthermore, the Court ruled that after the Title VII plaintiff proves a prima facie case of disparate impact, only the burden of production shifts to the employer; thus, the burden of persuasion would remain at all times with the plaintiff. *Id.* at 659-60. Finally, the *Wards Cove Packing* Court rejected the business necessity defense and ruled that the employer need only demonstrate that the employment practice fulfilled, in any significant way, its legitimate business goals. *Id.* at 659-61. In response, the Civil Rights Act of 1991 altered the Title VII disparate impact framework by placing the burden on the employer to defend a challenged employment practice by demonstrating the practice is “job related for the position in question and consistent with business necessity.” 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).
82. *Mullin*, 164 F.3d at 703. *But see Saunders*, *supra* note 64, at 609 (noting that “Congress has amended the ADEA but has not expressly prohibited” disparate impact recovery).
83. *Compare City of Jackson*, 544 U.S. at 233 (noting the “identical language” of Title VII and the ADEA), with *id.* at 248 (O’Connor, J., concurring) (referring to the “significant differences” between the two statutes).
84. *See id.* at 233 (plurality opinion) (arguing that “it is appropriate to presume that Congress intended [the] text to have the same meaning in both statutes”).
85. *Id.* at 235.
86. *Id.* at 236.
87. *Id.* at 235 n.5.
89. *Id.*
ADEA because Congress had never explicitly precluded ADEA disparate impact recovery. Therefore, under the Court's view of an ADEA disparate impact claim, a plaintiff must first point to a specific employment practice that adversely affects older workers; if the employer demonstrates the use of a non-age factor, the plaintiff then carries the burden of proving that the employer's justification is unreasonable.

In concurrence, Justice O'Connor identified "significant textual differences" between the ADEA and Title VII. For example, similar to the First Circuit's opinion in Mullin, Justice O'Connor noted that the ADEA contains an RFOA clause and seeks to remedy institutional arrangements through noncoercive measures. In addition, Justice O'Connor disagreed with the plurality's interpretation of the ADEA's "adversely affect" clause. Justice O'Connor contended that the clause must be read in conjunction with the requirement that age actually motivate an employer's decision. Accordingly, Justice O'Connor interpreted the ADEA's prohibition to read that "[a]n employer may not, because of an individual's age, limit, segregate, or classify his employees in a way that harms that individual."

2. Differences Between Age Discrimination and Other Forms of Discrimination

A second part of the ADEA disparate impact debate involves a policy question: given the mutability of age and the limited history of age discrimination, is age a fundamentally different protected class than race or sex? Courts have generally found that the two classes are entirely dif-

90. City of Jackson, 544 U.S. at 240-41. On this issue, the plurality was joined by Justice Scalia. See id. at 243 (Scalia, J., concurring).
91. See id. at 241-43 (majority opinion); see also Meacham v. Knolls Atomic Power Lab., 461 F.3d 134, 143-44 (2d Cir. 2006) (applying the burden-shifting analysis of City of Jackson, and holding that the plaintiff employees had not discharged their burden of proving that the employer considered unreasonable factors in its RIF).
92. City of Jackson, 544 U.S. at 261 (O'Connor, J., concurring).
93. Id. In addition, Justice O'Connor rejected the application of Title VII disparate impact liability to the ADEA because the Court's decision in Griggs occurred four years after the ADEA's passage. Id. at 260. Accordingly, Justice O'Connor argued that "there is no reason to suppose that Congress in 1967 could have foreseen the interpretation of Title VII that was to come." Id.
94. Id. at 250.
95. Id.
96. Id.
97. See LINDEMANN & KADUE, supra note 7, at 77 ("Barring unforeseen circumstances, every individual will become a member of the class protected by the ADEA."); see also WIRTZ REPORT, supra note 41, at 6 (asserting that the aging process affects all persons who live long enough).
98. See Mack A. Player, Wards Cove Packing or Not Wards Cove Packing? That is Not the Question: Some Thoughts on Impact Analysis Under the Age Discrimination in
ferent. For example, in *Massachusetts Board of Retirement v. Murgia*, the Supreme Court held that rational basis, rather than strict scrutiny, is the proper standard of review for age classifications. In reaching its decision, the Court reasoned that older persons "have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."102

Similarly, in *Goldstein v. Manhattan Industries, Inc.*, the Eleventh Circuit discussed the mutability of age in the context of an ADEA disparate treatment claim. There, a sixty-year-old sales representative argued that he was terminated from his position because of intentional age discrimination. Although the court ultimately affirmed the jury's verdict in favor of the plaintiff, the court refused to automatically apply the burden-shifting approach of Title VII disparate treatment claims. The court reasoned that age discrimination is fundamentally different than race or gender discrimination, in light of the mutability of age.105

On the other side of the debate, some courts and commentators argue that the ADEA and Title VII are part of an overall scheme to curb employment discrimination, and thus should be interpreted similarly. In

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101. Id. at 311-12.

102. Id. at 313; see also Hamilton v. Caterpillar Inc., 966 F.2d 1226, 1227 (7th Cir. 1992) (disputing as "implausible" the argument that age discrimination is akin to race or sex discrimination).

103. 758 F.2d 1435 (11th Cir. 1985).

104. Id. at 1442.

105. Id. at 1437-40.

106. Id. at 1446.

107. Id. at 1442-43.

108. Id. at 1442; see also Player, supra note 98, at 829 (recognizing that the mutability of age is likely the strongest argument for opponents of ADEA disparate impact recovery).

109. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979); Saunders, supra note 64, at 606-07 (arguing that Congress demonstrated the same concerns in passing Title VII and the ADEA).
McKennon v. Nashville Banner Publishing Co., a discharged employee filed suit against her former employer, alleging that her cost-based termination violated the ADEA. The employer argued it should not have to provide any remedy for the unlawful termination because it learned, after the discharge, that the employee had committed wrongdoing during her employment. The Supreme Court ruled that evidence of employee wrongdoing acquired after an employee's age-based termination does not preclude the employee from recovery under the ADEA. The Court reasoned that the ADEA was "part of a wider statutory scheme to protect employees in the workplace nationwide."

One court rejected the majority view concerning the mutability of age and held that age is an immutable characteristic. In Stevenson v. Superior Court, a discharged hospital employee alleged, inter alia, that her termination violated the Fair Employment and Housing Act, California's equivalent to the ADEA. Concluding that the plaintiff proved the elements of a tortious wrongful discharge claim, the California Supreme Court focused, in part, on the state's strong public policy against employment discrimination. In reaching its decision, the court reasoned that being over a certain age "is as permanent and immutable as race or sex." Accordingly, the court found that age discrimination should not be treated differently than other forms of discrimination.

In City of Jackson, the Court's various opinions differed in their comparison of age discrimination and other forms of discrimination. Justice Stevens, writing for the plurality, contended that Congress must have considered the ADEA and Title VII classes to be "sufficiently similar" because the statutes contain identical language and were passed within

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111. Id. at 354.
112. See id. at 354-55.
113. See id. at 358 (noting that precluding the plaintiff from recovery would contradict the ADEA's purpose of deterring discriminatory employment practices and compensating the private litigants).
114. Id. at 357; see also Oscar Mayer, 441 U.S. at 756 (concluding that "the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace").
117. CAL. GOV'T CODE §§ 12900-12996 (West 2005); Stevenson, 941 P.2d at 1158-59.
118. See Stevenson, 941 P.2d at 1158-59.
119. Id. at 1167.
120. Id. at 1165; see also Kaminshine, supra note 44, at 307 (asserting that gender, race, and age are equally immutable characteristics).
121. See Stevenson, 941 P.2d at 1165-66.
122. Compare Smith v. City of Jackson, 544 U.S. 228, 236-37 n.7 (2005) (plurality opinion) (noting that the identical language in Title VII and the ADEA shows Congress' intent to treat the classes similarly), with id. at 253 (O'Connor, J., concurring) (referring to "qualitative[]" differences between age discrimination and other forms of discrimination).
three years of each other.\textsuperscript{123} A majority of the Justices, however, conceded that ADEA disparate impact liability should be narrower than Title VII partly because age, unlike Title VII's protected classes, is often relevant to one's ability to engage in particular types of work.\textsuperscript{124} In concurrence, Justice O'Connor contended that age discrimination is fundamentally different from other forms of discrimination.\textsuperscript{125} Justice O'Connor referred to the Wirtz Report's finding that erroneous assumptions, not intolerance, fueled discrimination against older workers.\textsuperscript{126} Furthermore, Justice O'Connor submitted that, in certain instances, there is a connection between age and ability, in sharp contrast to the protected classifications under Title VII.\textsuperscript{127}

3. Effect of Hazen Paper Co. v. Biggins

Prior to City of Jackson, the Supreme Court's seminal opinion in Hazen Paper Co. v. Biggins\textsuperscript{128} significantly influenced the ADEA disparate impact debate.\textsuperscript{129} In Hazen Paper, Walter Biggins filed a disparate treatment claim under the ADEA, alleging that his employer terminated him because of his age.\textsuperscript{130} The First Circuit affirmed the jury's finding of liability, ruling that the employer fired Biggins because his pension benefits would have vested a few weeks later.\textsuperscript{131} The Supreme Court vacated the judgment on the ADEA claim,\textsuperscript{132} finding that the plaintiff's age did not motivate his termination.\textsuperscript{133} The Court asserted that the drafters of

\textsuperscript{123} Id. at 233, 236 n.7 (plurality opinion).
\textsuperscript{124} Id. at 240-41 (majority opinion).
\textsuperscript{125} Id. at 253-55 (O'Connor, J., concurring).
\textsuperscript{126} Id. at 254-55.
\textsuperscript{127} Id. at 255. Moreover, Justice O'Connor argued that because many employment benefits increase with the employee's rise in seniority, an employer should not be held liable solely because its cost-cutting measures have an adverse effect on older workers. Id. at 259.
\textsuperscript{128} 507 U.S. 604 (1993).
\textsuperscript{129} See Herbert & Shelton, supra note 65, at 634 (positing that "[t]he era of unreflective transfer of the disparate impact doctrine from Title VII to the ADEA effectively ended" with Hazen Paper); cf. Laurie A. McCann, Age Discrimination: Recent Trends, in EMPLOYMENT DISCRIMINATION LITIGATION 71, 71 (David L. Leitner ed., 1999) (criticizing the impact of Hazen Paper because the circuit courts relied on dictum from Justice O'Connor's majority opinion).
\textsuperscript{130} Hazen Paper, 507 U.S. at 606.
\textsuperscript{131} Id. at 607. The First Circuit argued that the jury could have found that Biggins' age motivated the termination because his pension benefits would not have been so close to vesting if not for his age. Id.
\textsuperscript{132} Id. at 617. Although there was no ADEA violation, the Court held that the plaintiff's termination violated the Employee Retirement Income Security Act (ERISA). Id. at 612.
\textsuperscript{133} Id. at 609. In rejecting disparate treatment liability, the Court reasoned that the employer did not terminate Biggins because of an inaccurate assumption about older
the ADEA sought to prohibit employment discrimination based on erroneous or stereotypical assumptions about older workers; however, where an employer relies on a non-age factor, these assumptions do not exist. In dictum, the Court noted that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." Justice Kennedy's concurrence, joined by Chief Justice Rehnquist and Justice Thomas, echoed the majority's concerns regarding the availability of disparate impact recovery under the ADEA. The concurring opinion asserted that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA.

_Hazen Paper_ had a resounding effect on the judicial interpretations of ADEA disparate impact recovery. In _Gantt v. Wilson Sporting Goods Co._, a discharged employee filed suit under the ADEA alleging that her former employer's leave of absence policy adversely affected older workers. The court affirmed the district court's dismissal of the plaintiff's ADEA disparate impact claim, rejecting an earlier Sixth Circuit opinion in which the court appeared to favor disparate impact recovery under the ADEA. The _Gantt_ court reasoned that the ADEA disparate impact model was now in "considerable doubt" in light of _Hazen Paper_. Similarly, several other circuits rejected disparate impact recovery under the ADEA after _Hazen Paper_.

_workers._ Id. at 611-12. Rather, the termination was an accurate determination that the employee's pension benefits were close to vesting. Id. at 612.

134. _Id._ at 610-11. The Court reasoned that the most common form of age discrimination occurs when "an older employee [is] fired because the employer believes that productivity and competence decline with old age." _Id._ at 610.

135. _Id._ at 610; _see also_ W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 422 (1985) (recognizing that the ADEA requires employers to evaluate its older employees based on merit, rather than age).

136. _Hazen Paper_, 507 U.S. at 618 (Kennedy, J., concurring).

137. _Id._

138. _See_ Holmes, _supra_ note 42, at 311 (referring to the post-_Hazen Paper_ circuit split on ADEA disparate impact recovery); _Player_, _supra_ note 98, at 825 (arguing that several courts "ignored the Court's reservation" and used the _Hazen Paper_ language to overrule their own precedent, which had favored ADEA disparate impact recovery).

139. 143 F.3d 1042 (6th Cir. 1998).

140. _Id._ at 1044-45.

141. _See id._ at 1048.

142. _Id._ (quoting Lyon v. Ohio Education & Professional Staff Union, 53 F.3d 135, 139 n.5 (6th Cir. 1995)).

143. _See_, e.g., Adams v. Fla. Power Corp., 255 F.3d 1322, 1326 (11th Cir. 2001) ( reasoning that although _Hazen Paper_ did not explicitly preclude ADEA disparate impact liability, its language suggests such a result); O'Regan v. Arbitration Forums, Inc., 246 F.3d 975, 986 (7th Cir. 2001) (holding that the ADEA does not authorize disparate impact recovery); Mullin v. Raytheon Co., 164 F.3d 696, 700 (1st Cir. 1999) (asserting that "tectonic plates shifted" after _Hazen Paper_); Ellis v. United Airlines, Inc., 73 F.3d 999, 1007-10 (10th Cir. 1996) (rejecting ADEA disparate impact recovery in part because of _Hazen Paper_'s dictum and the subsequent circuit split); DiBiasi v. SmithKline Beecham Corp., 48 F.3d...
In contrast, the Eighth Circuit in Smith v. City of Des Moines\textsuperscript{144} remained consistent with its prior rulings, and held that the ADEA authorizes disparate impact recovery.\textsuperscript{145} In City of Des Moines, a discharged fire captain alleged that his former employer’s testing standards disproportionately affected older employees.\textsuperscript{146} In moving for summary judgment, the city argued, in part, that the ADEA did not authorize disparate impact claims.\textsuperscript{147} Dismissing the city’s argument, the court reasoned that Hazen Paper did not provide a “‘clear indication’” to overrule Eighth Circuit precedent.\textsuperscript{148} Likewise, other courts held that Hazen Paper’s dictum did not provide a sufficient basis for overruling their precedent.\textsuperscript{149}

In City of Jackson, the majority announced that its decision in Hazen Paper did not affect the interpretation of ADEA disparate impact recovery.\textsuperscript{150} Following the City of Des Moines reasoning, the Court recognized that Hazen Paper was merely a disparate treatment case.\textsuperscript{151} Furthermore, the Court relied upon its explicit statement in Hazen Paper that it would not determine whether the ADEA authorized disparate impact recovery.\textsuperscript{152} In concurrence, Justice O’Connor interpreted Hazen Paper in a slightly different fashion, arguing that the Court had “never read the [ADEA] to impose liability upon an employer without proof of discriminatory intent.”\textsuperscript{153} Thus, Justice O’Connor argued that the majority ignored Hazen Paper’s guidance by authorizing disparate impact recovery under the ADEA.\textsuperscript{154}

\begin{thebibliography}{99}
\bibitem{719} 719, 732 (3d Cir. 1995) (noting that the Court’s comments in Hazen Paper “cast[] considerable doubt” on ADEA disparate impact recovery).
\bibitem{144} 99 F.3d 1466 (8th Cir. 1996).
\bibitem{145} Id. at 1470.
\bibitem{146} Id. at 1467-68.
\bibitem{147} Id. at 1469.
\bibitem{148} Id. at 1470 (quoting FDIC v. Bowles Livestock Comm’n Co., 937 F.2d 1350, 1354 (8th Cir. 1991)). Although ruling that the ADEA authorizes disparate impact recovery, the City of Des Moines court affirmed the grant of summary judgment to the defendant employer because the employer met its burden of proving that its employment policy satisfied business necessity. Id. at 1470-71; see also infra Part I.C.5. (outlining the business necessity defense to disparate impact claims).
\bibitem{149} See, e.g., Frank v. United Airlines, Inc., 216 F.3d 845, 856-57 (9th Cir. 2000) (reversing the district court’s holding that Hazen Paper precluded ADEA disparate impact recovery); Dist. Council 37, AFSCME v. N.Y. City Dep’t of Parks & Recreation, 113 F.3d 347, 351 (2d Cir. 1997) (allowing the plaintiff to pursue a disparate impact claim because Hazen Paper did not explicitly reject such recovery).
\bibitem{151} See id. at 237.
\bibitem{152} See id. at 238.
\bibitem{153} Id. at 248 (O’Connor, J., concurring).
\bibitem{154} Id. at 247-48.
\end{thebibliography}
4. The Purpose of the ADEA's RFOA Provision

Another element of the disparate impact debate is whether the ADEA's RFOA provision serves as a defense for employers or a "safe harbor" precluding disparate impact claims entirely. In support of the safe harbor argument, many courts and commentators point to Judge Easterbrook's dissent in Metz v. Transit Mix, Inc. In Metz, a fifty-four-year-old company manager brought suit against his former employer, alleging that his termination was an act of intentional age discrimination. Applying the disparate treatment model of recovery, the court rejected the employer's cost savings justification, and the court noted that where age and salary are closely correlated, "it would undermine the goals of the ADEA to recognize cost-cutting as a nondiscriminatory justification for an employment decision." In dissent, Judge Easterbrook analyzed the case from the disparate impact model of proof because the plaintiff failed to demonstrate the requisite elements of intent and causation. Judge Easterbrook rejected the majority's holding that an employer's cost justification failed to constitute a legitimate, nondiscriminatory reason for an employee's discharge. Moreover, Judge Easterbrook argued that the RFOA provision implies strongly that the employer may use a ground of decision that is not age, even if it varies with age. . . . Surely [the provision] does not mean simply that "only age discrimination is age discrimination." "The prohibition and the exception appear identical. The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorizes disparate impact."

155. See Herbert & Shelton, supra note 65, at 639 (commenting that most opposition to ADEA disparate impact recovery focuses on the RFOA provision); see also 1 HOWARD C. EGLIT, AGE DISCRIMINATION § 5.14 (2d ed. 2005) (recognizing that some circuits have interpreted the RFOA as an affirmative defense).
156. See, e.g., Hazen Paper Co. v. Biggins, 507 U.S. 604, 618 (1993) (Kennedy, J., concurring) (citing Judge Easterbrook as the author of one of the "substantial arguments" in opposition to ADEA disparate impact recovery); Furr v. Seagate Tech., Inc., 82 F.3d 980, 987 (10th Cir. 1996) (rejecting the plaintiff's adverse impact claim under the ADEA because the statute explicitly allows an employer to use an RFOA); Peter H. Harris, Note, Age Discrimination, Wages, and Economics: What Judicial Standard?, 13 HARV. J.L. & PUB. POL'Y 715, 730 (1990) (commenting that the RFOA exception rejects most, if not all, disparate impact claims).
157. 828 F.2d 1202, 1211 (7th Cir. 1987) (Easterbrook, J., dissenting).
158. Id. at 1203 (majority opinion).
159. Id. at 1207.
160. Id. at 1214-16 (Easterbrook, J., dissenting).
161. Id. at 1212.
162. Id. at 1220 (quoting Douglas Laycock, Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues, 49 LAW & CONTEMP. PROBS. 53, 55 (1986)).
In the Fifth Circuit's decision in *City of Jackson*, the court adopted a similar "safe harbor" reasoning in its interpretation of the RFOA provision.\(^{163}\) Moreover, the court argued that post-*Hazen Paper* case law supported interpreting the provision as intending to prohibit only intentional age discrimination.\(^{164}\) 

On the other side of the debate, some courts and commentators argue that the RFOA provision provides employers with a defense to a disparate impact charge under the ADEA, rather than a safe harbor from liability.\(^{165}\) For example, in *Hiatt v. Union Pacific Railroad*,\(^{166}\) former railroad employees alleged that their employer's mandatory promotions adversely affected older workers.\(^{167}\) The United States District Court for the District of Wyoming granted the defendant's motion for summary judgment, finding that Title VII disparate impact theory could not be automatically applied to the ADEA context.\(^{168}\) The court reasoned, in large part, that the statutes had different substantive provisions and purposes.\(^{169}\) In dictum, however, the *Hiatt* court rejected the employer's argument that the RFOA clause served as an independent bar to disparate impact recovery under the ADEA.\(^{170}\) The court asserted that the clause could coexist with the disparate impact model by codifying the business necessity defense and thus allowing employers to consider reasonable, non-age factors.\(^{171}\)

\(^{163}\) See Smith v. City of Jackson, 351 F.3d 183, 189-91 (5th Cir. 2003), aff'd, 544 U.S. 228 (2005).

\(^{164}\) *Id.* at 190; see, e.g., Mullin v. Raytheon Co., 164 F.3d 696, 701-02 (1st Cir. 1999) (echoing Judge Easterbrook's *Metz* dissent by noting that "if the [RFOA] exception ... is not understood to preclude disparate impact liability, it becomes nothing more than a bromide to the effect that 'only age discrimination is age discrimination'").

\(^{165}\) See, e.g., Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 122 (1985) (referring, in dictum, to the RFOA provision as an affirmative defense); *Hiatt v. Union Pac. R.R.*, 859 F. Supp. 1416, 1434 (D. Wyo. 1994), aff'd, 65 F.3d 838 (10th Cir. 1995); Player, *supra* note 98, at 832 (submitting that the RFOA provision is a defense because its text and structure presumes that an employer has committed an "otherwise prohibited" act). Even in those jurisdictions that recognized the RFOA provision as a defense prior to *City of Jackson*, there was a debate as to the allocation of the burdens of production and persuasion. 1 EGLIT, *supra* note 155, § 5.15 (recognizing the circuit split on whether the RFOA clause is an affirmative defense requiring the employer to bear the burdens of production and persuasion on its justification for its employment practice); see also Smith v. City of Des Moines, 99 F.3d 1466, 1470-71 (8th Cir. 1996) (placing the burden of persuasion on the employer to prove that its physical fitness test was related to the position, but noting that it was unclear whether this burden allocation survived the Civil Rights Act of 1991).

\(^{166}\) 859 F. Supp. 1416 (D. Wyo. 1994), aff'd, 65 F.3d 838 (10th Cir. 1995).

\(^{167}\) *Id.* at 1420.

\(^{168}\) *Id.* at 1434.

\(^{169}\) *Id.* at 1434-37.

\(^{170}\) *Id.* at 1434.

\(^{171}\) *Id.*; see also EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1080 (7th Cir. 1994) (Cudahy, J., dissenting) (submitting that the RFOA exception codifies the business necessity defense); Caron v. Scott Paper Co., 834 F. Supp. 33, 37 n.4 (D. Me. 1993) (arguing that
In *City of Jackson*, the plurality opinion disagreed with the Fifth Circuit's categorical rejection of ADEA disparate impact liability. Instead, the plurality argued that the RFOA provision serves its central role in disparate impact claims. The plurality opinion reasoned that under disparate treatment theory, if an employer uses a non-age factor, there would likely be no violation of the ADEA, regardless of the existence of an RFOA provision. In contrast, under disparate impact theory, the RFOA provision precludes liability only if "the adverse impact was attributable to a nonage factor that was 'reasonable.'" The plurality further noted that Congress could have excluded disparate impact recovery entirely by dropping the modifier "reasonable" and instead adopting a broader exception, such as the Equal Pay Act (EPA)'s "any other factor" exception.

In her concurrence, Justice O'Connor argued that the plurality's expansive reading of the ADEA misinterpreted the purpose and effect of the RFOA provision. After submitting that the ADEA prohibitions extend only to intentional discrimination, Justice O'Connor asserted that the RFOA clause allows an employer to rebut a plaintiff's prima facie case of intentional age discrimination. Moreover, Justice O'Connor observed that the RFOA provision serves a separate function when the employer had multiple motives for its action. Justice O'Connor recognized that in these cases, the provision would validate an employment practice based on a reasonable, non-age factor, even if age played a "substantial part" in the practice.

Congress included the RFOA exception as a defense so that the ADEA would apply only to unreasonable policies, abrogated by Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999).

172. See *Smith v. City of Jackson*, 544 U.S. 228, 238-40 (2005) (plurality opinion) (rejecting the safe harbor argument, and asserting that the ADEA's legislative history and text support disparate impact liability notwithstanding the RFOA provision).

173. *Id.* at 239.


175. *Id.* at 239 (emphasis added).

176. *Id.* at 239 n.11.

177. *Id.* at 251-53 (O'Connor, J., concurring).

178. *Id.* at 249-51.

179. *Id.* at 252. Justice O'Connor compared the RFOA provision to the "legitimate, nondiscriminatory reason" defense provided in Title VII. *Id.; see also Krieg v. Paul Revere Life Ins. Co.*, 718 F.2d 998, 999 (11th Cir. 1983) (per curiam) (viewing the RFOA provision as a means to rebut plaintiff's prima facie case of intentional age discrimination); *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 590-92 (5th Cir. 1978) (submitting that some of the factors that may be used by the defendant to rebut the plaintiff's case serve to deny plaintiff's prima facie case of disparate treatment).


5. Employer's Defense Under the ADEA

In those jurisdictions that authorized disparate impact recovery prior to City of Jackson, nearly all courts found that the ADEA, similarly to Title VII, required the employer to prove that its particular employment practice satisfied a business necessity defense.\(^{182}\) Under this approach, the employer must demonstrate that its policy "is job related for the position in question and consistent with business necessity."\(^{183}\) Moreover, even after the employer meets its burden of demonstrating job relatedness, the plaintiff can still prevail by proving that other employment practices would have served the employer's legitimate business interests without the same discriminatory effect.\(^{184}\)

In Leftwich v. Harris-Stowe State College,\(^ {185}\) for example, a college professor alleged that his employer's policy of setting aside a specific number of faculty slots for untenured faculty adversely affected older workers.\(^ {186}\) After the plaintiff established his prima facie case of disparate impact, the court required the college to justify its policy based on business necessity.\(^ {187}\) The Eighth Circuit rejected the college's cost-savings\(^ {188}\) and "inno-

\(^{182}\) See LINDEMANN & KADUE, supra note 7, at 682; see also Steger v. Gen. Elec. Co., 318 F.3d 1066, 1076 (11th Cir. 2003) (requiring the employer to demonstrate business necessity); Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1164-65 (7th Cir. 1992) (rejecting plaintiff's prima facie case of age discrimination because market forces necessitated the employer's limitations on vacation rights). Prior to City of Jackson, Lindemann and Kadue noted that only one court—the United States District Court for the Central District of California—adopted the RFOA standard instead of the business necessity defense. LINDEMANN & KADUE, supra note 7, at 682 & n.71. In EEOC v. Newport Mesa Unified School District, the court rejected the EEOC's claim that the RFOA provision incorporated the business necessity defense. EEOC v. Newport Mesa Unified Sch. Dist., 893 F. Supp. 927, 932 (C.D. Cal. 1995). Instead, the court held that the RFOA provision demonstrates Congress' intent to provide "more leeway" to employers in considering age. Id.

Notwithstanding Newport Mesa, EEOC regulations continue to support the business necessity defense under the ADEA. See 29 C.F.R. § 1625.7(d) (2006). But see Player, supra note 98, at 841 (rejecting the application of the business necessity defense to the ADEA and arguing that the RFOA provision requires business "rationality," rather than necessity).


\(^{184}\) See Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (Title VII case); Smith v. City of Des Moines, 99 F.3d 1466, 1473 (8th Cir. 1996) (applying the Title VII disparate impact analysis to an ADEA claim); Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980) (same).

\(^{185}\) 702 F.2d 686 (8th Cir. 1983).

\(^{186}\) Id. at 689-90.

\(^{187}\) Id. at 691; see also Steger, 318 F.3d at 1076 (finding that economic necessity and other objective factors justified the plaintiff's layoff).

\(^{188}\) Leftwich, 702 F.2d at 691. But see James v. N.Y. Racing Ass'n, 233 F.3d 149, 153 (2d Cir. 2000) (finding that an employer's concern with the high costs of employing older workers did not violate the ADEA); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125-26 (7th Cir. 1994) (rejecting the plaintiff's ADEA claim in light of the employer's cost justification). EEOC regulations provide that, with a limited exception, an employer can-
vation" justifications, noting in part that the burden of proving business necessity is a "heavy one." The court ruled that an employer must show that its policy has a clear relationship to the position and that there is a "compelling need" for the policy.

In City of Jackson, the Supreme Court adopted a different rationale and held that the ADEA requires only the use of an RFOA, rather than the higher standard of business necessity. The Court noted that the scope of ADEA disparate impact liability is narrower than Title VII because of two substantive differences between the statutes. First, the Court argued that the ADEA's RFOA provision limited disparate impact liability by allowing an employer to consider reasonable, non-age factors in adopting employment practices. Second, the Court observed that Congress widened the scope of Title VII disparate impact liability in 1991 without similarly amending the ADEA. In sum, the Court announced:

Congress' decision to limit the . . . ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment. . . . Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group.

not base an older employee's termination on a cost-savings interest. 29 C.F.R. § 1625.7(f) (2006) ("A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans . . . .")

In contrast, courts have consistently rejected an employer's cost-savings defense in Title VII cases. See, e.g., L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-17 (1978) (rejecting employer's cost defense to a sex discrimination claim, as "neither Congress nor the courts have recognized such a defense under Title VII"); EEOC v. Ind. Bell Tel. Co., 256 F.3d 516, 523-24 (7th Cir. 2001) (rejecting, in a Title VII claim, an employer's asserted interest in cost savings).

189. Leftwich, 702 F.2d at 692.
190. Id.
191. Id. (emphasis omitted).
192. Smith v. City of Jackson, 544 U.S. 228, 240-41, 243 (2005). Justice Scalia joined this part of Justice Stevens' opinion, thus giving the Court a majority on its ruling regarding the RFOA defense. See id. at 243 (Scalia, J., concurring); see also ANDREW J. RUZICHO & LOUIS A. JACOBS, LITIGATING AGE DISCRIMINATION CASES § 2:8, at 64 (Supp. 2006) ("ADEA precedent imposing a business necessity defense on employers is no longer viable.").
193. City of Jackson, 544 U.S. at 240; see infra notes 193-96 and accompanying text. In concurrence, Justice O'Connor conceded that, if disparate impact claims are allowed under the ADEA, they should be strictly limited by the RFOA provision. City of Jackson, 544 U.S. at 267 (O'Connor, J., concurring). Under Justice O'Connor's view, if an employer produces evidence demonstrating it used an RFOA, the plaintiff "bears the burden of disproving this assertion." Id.
194. City of Jackson, 544 U.S. at 240-41.
195. Id. at 240; see supra notes 81-82 and accompanying text.
196. City of Jackson, 544 U.S. at 240-41.
Accordingly, the Court found that ADEA disparate impact liability could be analyzed under the pre-1991 standard applicable to Title VII disparate impact claims. After announcing the RFOA defense, the Court analyzed whether the city met its burden of demonstrating the use of reasonable, non-age factors. The Court accepted the city's reliance on seniority and rank because of the city's asserted purpose to increase employees' salaries to the regional average. Furthermore, under the reasonableness test, the Court did not consider whether there were alternative ways for the employer to achieve its goals without causing a disparate impact on older workers. As the Court noted, the analysis under an ADEA disparate impact claim, in contrast to Title VII, examines only whether the particular non-age factor used by the employer is reasonable.

II. EXAMINING SMITH V. CITY OF JACKSON: HOW THE SUPREME COURT IGNORED THE LEGISLATIVE HISTORY AND TEXT OF THE ADEA

A. The City of Jackson Plurality Opinion Ignored the Legislative Intent and Plain Meaning of the ADEA

The ADEA's legislative history firmly rejects the City of Jackson plurality's contention that Congress intended the ADEA to authorize disparate impact liability. First, the Wirtz Report drew a clear distinction

197. *Id.* at 240; *supra* note 91 and accompanying text; see also Sarah Benjes, Comment, Smith v. City of Jackson: A Pretext of Victory for Employees, 83 DENV. U. L. REV. 231, 250-51 (2005) (noting that the Wards Cove Packing allocation of the burdens of proof and persuasion now apply to the ADEA).

198. *City of Jackson,* 544 U.S. at 241-42.

199. *Id.* at 242.

200. *Id.* at 243.

201. See *id.* Since City of Jackson, courts have commented on the employer's defense to an ADEA charge. See, e.g., Meacham v. Knolls Atomic Power Lab., 461 F.3d 134, 143 (2d Cir. 2006) (finding that the employer had put forth a legitimate business justification for its RIF, as it sought to "reduce its workforce while still retaining employees with skills critical to the performance of [the company's] functions" (quotation omitted)); Pippin v. Burlington Res. Oil & Gas Co., 440 F.3d 1186, 1201 (10th Cir. 2006) (finding that even if the plaintiff had proven a prima facie case of disparate impact, the employer still would have been entitled to summary judgment because its RIF relied on reasonable, non-age factors—"prior job performance and skill set"); Durante v. Qualcomm, Inc., 144 F. App'x 603, 607 (9th Cir. 2005) (affirming the dismissal of the plaintiff's disparate impact claim because the employer considered reasonable, diverse business factors in the company's RIF).

202. See Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine,* 34 STAN. L. REV. 837, 853 n.75 (1982) (arguing that the ADEA's legislative history is "replete" with references to Congress' intent to prohibit only arbitrary age discrimination); Manning, *supra* note 64, at 786-87 (contending that the ADEA's legislative history demonstrates Congress' intent to prohibit only disparate treatment); cf. Brendan Sweeney, "Downsizing" the Age Discrimination in Employment Act: The Availability of Disparate
between arbitrary age discrimination and neutral practices with an adverse impact. While recommending the implementation of federal legislation to eliminate arbitrary—or intentional—acts of age discrimination, Secretary Wirtz explicitly pushed for informal responses to remedy the problem of institutional arrangements causing an adverse impact on older workers. During the legislative debates on the ADEA, supporters of the ADEA furthered this pivotal distinction by consistently asserting their intent to prohibit employment discrimination based on erroneous assumptions regarding older workers. In response to the institutional arrangements, Congress followed Secretary Wirtz's recommendations and rejected making such programs illegal. However, the City of Jackson plurality erred in according no weight to this explicit distinction in the ADEA's legislative history. Contrary to unambiguous legislative intent, the plurality focused on the effects of an employer's action rather than the motivation.

Similarly, the City of Jackson plurality opinion misinterpreted the plain meaning of the ADEA's text. By focusing on the ADEA's prohibition

Impact Liability, 41 VILL. L. REV. 1527, 1542 (1996) (asserting that the ADEA's legislative history does not offer a clear answer on whether Congress intended to authorize disparate impact liability).

203. See WIRTZ REPORT, supra note 41, at 21-22 ( Outlining the Secretary's recommendations for eliminating arbitrary age discrimination and responding to institutional arrangements); see also Blumrosen, supra note 44, at 74 (recognizing the Wirtz Report's obvious distinction between arbitrary discrimination and adverse impact). But see Michael C. Sloan, Comment, Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?, 1995 Wis. L. REV. 507, 518-19 (1995) (disputing Blumrosen's conclusion because the Wirtz Report's findings mirror the congressional purposes recognized in Griggs).

204. See WIRTZ REPORT, supra note 41, at 22 (“It will be necessary to modify some existing arrangements, to encourage new kinds of employer and union actions, and to explore additional steps to be taken by the Federal Government.”). In particular, Secretary Wirtz noted the importance of providing training and counseling to older workers and employers. Id. at 23.

205. See, e.g., 113 CONG. REC. 34,744 (1967) (statement of Rep. Pucinski) (noting that the proposed ADEA would limit the use of arbitrary employment practices and procedures); id. at 31,253 (statement of Sen. Yarborough) (recognizing the dual goals of the ADEA to curb invidious age classifications and “educate” employers about older workers' abilities).

206. See Blumrosen, supra note 44, at 79 (analyzing the ADEA's legislative history and determining that the drafters did not intend to prohibit group-based impacts).

207. See id. at 74 (concluding that the ADEA's legislative history demonstrates a clear distinction between intentional discrimination and policies with an adverse impact). See generally Smith v. City of Jackson, 544 U.S. 228, 233-40 (2005).

208. See Blumrosen, supra note 44, at 91-93 (concluding that Congress intended the ADEA to prohibit only those employment practices motivated solely by age). See generally City of Jackson, 544 U.S. at 236.

of employment practices that “adversely affect” older workers, the plurality disregarded the Act’s subsequent clause: the particular employment practice must be adopted “because of such individual’s age.” Because the latter clause is set off by a comma, its most logical meaning is that an employer violates the ADEA only if age motivates the employer’s decision and the practice adversely affects older employees. Of further significance, the “adversely affect” clause only pertains to employees, not applicants. Because applicants are the most common group of plaintiffs to assert disparate impact claims, it is unlikely that Congress would extend this form of recovery to the ADEA without applying it to the most likely beneficiaries.

B. Lorillard and the ADEA’s Text Reject the Plurality’s Reasoning on the Similarities Between Title VII and the ADEA

In City of Jackson, the plurality pointed to Lorillard’s holding regarding the identical substantive prohibitions in Title VII and the ADEA. However, there are several problems with applying Lorillard to the

the results or effects of an action when stating that something happened ‘because of’ that particular action”); Herbert & Shelton, supra note 65, at 633-37 (examining whether the ADEA’s text is logically inconsistent with disparate impact theory).

210. See Pontz, supra note 65, at 291-92, 292 n.154 (contending that the ADEA’s text prohibits only those employment practices motivated by age). But see Kaminshine, supra note 44, at 299 & n.347 (arguing that the ADEA’s “adversely affect” clause unambiguously supports the availability of disparate impact recovery).

211. See Krop, supra note 202, at 843 & n.27 (arguing that the “because of . . . age” clause modifies the prohibited conduct and thus requires the two provisions to be interpreted together); Sweeney, supra note 202, at 1543; see also DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 733-34 (3d Cir. 1995) (relying explicitly upon Krop’s analysis to reject the application of disparate impact recovery under the ADEA). But see Marla Ziegler, Note, Disparate Impact Analysis and the Age Discrimination in Employment Act, 68 MINN. L. REV. 1038, 1051-52 (1984) (contending that plaintiffs should be able to recover based on disparate impact under the ADEA because the text explicitly prohibits employment practices that “adversely affect” older workers).

212. See Krop, supra note 202, at 843. Compare 29 U.S.C. § 623(a)(1) (2000) (prohibiting employment practices in regard to employees and applicants), with id. § 623(a)(2) (applying prohibitions only to employees). In contrast, Title VII’s parallel provision pertains to applicants for employment. See 42 U.S.C. § 2000e-2(a)(2) (2000); Pontz, supra note 65, at 292 n.156 (arguing that the omission of job applicants from one of the ADEA’s substantive prohibitions is significant because Title VII’s provision applies to job applicants); supra note 35.

213. See Krop, supra note 202, at 843 (noting that job applicants most commonly assert disparate impact claims, and thus questioning whether Congress would allow for disparate impact recovery but exclude applicants).

ADEA disparate impact debate. First, the *Lorillard* holding does not support the assertion that Title VII and the ADEA should always be interpreted *in haec verba* because the *Lorillard* Court itself looked to the Fair Labor Standards Act for guidance in reaching its opinion. Second, the *Lorillard* Court compared substantive provisions of Title VII and the ADEA. In sharp contrast, there is no textual basis for Title VII's disparate impact model—the Court, not Congress, created the doctrine in its subsequent opinion in *Griggs*. Third, Congress could not have intended to apply the disparate impact model to the ADEA because Congress enacted the ADEA four years before *Griggs* was decided.

In reaching its opinion in *City of Jackson*, the plurality also overlooked a key textual difference between Title VII and the ADEA: the ADEA's RFOA provision. Despite acknowledging this provision, the plurality maintained that it could still apply Title VII disparate impact analysis to the ADEA because the statutes had similar language and were enacted within three years of each other. As a result of rejecting the impor-

215. See Herbert & Shelton, supra note 65, at 633-34 (contending that *Lorillard* counsels against an automatic application of Title VII principles to the ADEA); Krop, supra note 202, at 841 (criticizing the application of *Lorillard* to ADEA disparate impact recovery). But see Jan W. Henkel, *The Age Discrimination in Employment Act: Disparate Impact Analysis and the Availability of Liquidated Damages After Hazen Paper Co. v. Biggins*, 47 SYRACUSE L. REV. 1183, 1197 (1997) (arguing that courts will likely continue to apply *Lorillard* to authorize ADEA disparate impact recovery because Congress has not rejected its consistent application by lower courts).

216. See Krop, supra note 202, at 841 (asserting that the Court's holding in *Lorillard*—a plaintiff has a right to a jury trial under the ADEA—was contrary to Title VII, which at the time did not allow for a jury trial); Pontz, supra note 65, at 290 (contending that *Lorillard* contradicts an automatic application of Title VII rules to the ADEA context).

217. See Krop, supra note 202, at 842.

218. See Manning, supra note 64, at 772 & n.45 (noting that Title VII disparate impact liability was "judicially determined").

219. See Allen et al., supra note 209, at 80; Saunders, supra note 64, at 606-07 (acknowledging that Congress could not have foreseen the holding in *Griggs* when it debated the ADEA, but asserting that the principles underlying *Griggs* mirror the ADEA's purposes).

220. See Holmes, supra note 42, at 306 (acknowledging the strong similarities between Title VII and the ADEA but arguing that the latter's RFOA provision demonstrates that the Title VII disparate impact model of proof is inapplicable to the ADEA context); Pontz, supra note 65, at 293 (referring to the RFOA provision as "[t]he defense most obviously inconsistent with disparate impact theory"). But see Marino, supra note 12, at 667 (contending that the RFOA provision should be interpreted as a codification of the business necessity defense).

221. Smith v. City of Jackson, 544 U.S. 228, 238-40 (2005) (plurality opinion) (holding that the RFOA provision limits, but does not preclude, ADEA disparate impact liability).

222. Id. at 233-34 (noting the similarities in substantive prohibitions and arguing that *Griggs* served as compelling precedent). But see Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 WAYNE L. REV. 1093, 1101 n.36 (1993) (commenting that although the ADEA and Title VII are "statutory relatives . . . [that] does not make them twins").
tance of the RFOA provision, the plurality ignored the provision’s obvious similarity with the EPA’s “any other factor” exception. Given the similarity between these exceptions, it is arguable that the RFOA provision, similar to the EPA’s exception, precludes disparate impact liability. Although the EPA and ADEA are analogous in only one provision, as compared to the similarities between Title VII and the ADEA, the importance of the RFOA provision, which serves as a statutorily authorized layer of protection for employers, advises against an automatic application of Title VII principles to the ADEA.

In addition, the plurality mischaracterized a fundamental historical difference between the two statutes: Congress amended the scope of Title VII disparate impact liability in 1991 without similarly amending the ADEA. Although the Court interpreted this amendment to limit ADEA disparate impact liability, there are several problems with this construction. First, when Congress amended Title VII in 1991, it obviously knew that courts consistently interpreted the ADEA and Title VII in haec verba, and therefore, Congress arguably drafted the amendment to pertain only to Title VII. Second, Congress made several amendments to the ADEA’s procedural provisions yet did not amend the Act

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223. See Herbert & Shelton, supra note 65, at 639-40 (noting that the EPA’s exception provides additional support for opponents of ADEA disparate impact recovery).

224. See Krop, supra note 202, at 845-47 (asserting that the EPA’s exception could be applied to the ADEA context in light of one of the ADEA’s central purposes to prohibit arbitrary age discrimination); Manning, supra note 64, at 787-88 (remarking that proponents of ADEA disparate impact recovery concede that the EPA-ADEA analogy is a strong one). But see Marino, supra note 12, at 667-68 (arguing that the ADEA’s defense is narrower than the EPA’s because the ADEA’s exception contains the term “reasonable”).

225. See Manning, supra note 64, at 781 (identifying the RFOA provision as one of the fundamental distinctions between Title VII and the ADEA); Pontz, supra note 65, at 293-94 (concluding that the RFOA provision “underscores the inappropriateness of applying [disparate impact] theory to the ADEA”).

226. See Allen et al., supra note 209, at 80-81 (submitting that Congress’ failure to amend the ADEA in 1991 is one of the strongest arguments against applying Title VII disparate impact analysis to the ADEA).

227. Smith v. City of Jackson, 544 U.S. 228, 240 (2005). The Court noted that because the 1991 amendment involved only Title VII, the pre-1991 interpretation of Title VII disparate impact liability could still be applied to the ADEA’s identical language. Id.

228. See Allen et al., supra note 209, at 90 (concluding, prior to City of Jackson, that the Court should reject ADEA disparate impact claims in part because Congress did not amend the ADEA in 1991); Holmes, supra note 42, at 306.

229. See Pontz, supra note 65, at 304 (noting that when Congress amended Title VII in 1991, it knew that courts were repeatedly applying Title VII to the ADEA context). Pontz further notes that “[t]o argue that Congress was not aware of the ADEA as it drafted the 1991 [Civil Rights Act] is to ignore the fact that Congress amended the ADEA by that very same 1991 Civil Rights Act.” Id. at 306. As Pontz recognizes, “Congress amended the ADEA to provide the same statute of limitations and ‘right to sue’ notification procedure under the ADEA as under Title VII.” Id. at 306 n.247.
to allow for disparate impact recovery. On the other hand, some commentators have argued that Congress failed to explicitly provide for ADEA disparate impact recovery in 1991 because it intended for the courts to continue to resolve the issue. Regardless of Congress' intent in failing to amend ADEA disparate impact liability, however, the 1991 amendment clearly undermines the City of Jackson plurality's contention that the two statutes contain identical language.

C. Justice O'Connor Properly Recognized the Differences Between Age Discrimination and Other Forms of Discrimination

The ADEA's legislative history strongly supports Justice O'Connor's view on the fundamental differences between age discrimination and other forms of discrimination. For example, the Wirtz Report's findings explicitly rejected any commonality between age and Title VII's protected classes. Instead, the Secretary concluded that age discrimination is fundamentally different than other forms of discrimination because it lacks the invidiousness of race and gender discrimination. Similarly, during the congressional debates on the ADEA, supporters of the proposed legislation consistently remarked that unfounded assumptions about age and ability fueled employers' discrimination against older workers.

230. Id. at 304 n.239 (noting that Congress amended the ADEA's statute of limitations for filing private lawsuits).

231. See Eglit, supra note 222, at 1184 (contending that Congress demonstrated their approval of pro-disparate impact interpretations of the ADEA because Congress never explicitly rejected any of the holdings); Brett Ira Johnson, Note, Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Eroneously Distinguishing the ADEA from Title VII Regarding Disparate Impact Liability, 36 IDAHO L. REV. 303, 332-33 (2000) (arguing that Congress' failure to amend the ADEA is not instructive, particularly because Congress did not reject prior judicial interpretations allowing for ADEA disparate impact recovery).

232. See supra Part III.C.

233. See Herbert & Shelton, supra note 65, at 644 (asserting that the Wirtz Report made a clear distinction between age and race discrimination); Note, The Age Discrimination in Employment Act of 1967, 90 HARV. L. REV. 380, 383 (1976) (submitting that the congressional debates on the ADEA echoed Secretary Wirtz's findings on the differences between age and race discrimination) [hereinafter Harvard Note].

234. WIRTZ REPORT, supra note 41, at 5-6.

235. See id. at 6 (remarking that age discrimination "differs greatly from... discrimination on the basis of race, color, religion, or national origin, which is basically unrelated to ability to perform work").

236. See, e.g., 113 CONG. REC. 31,254 (1967) (statement of Sen. Javits) (remarking that ignorance was the main cause of age discrimination in employment); id. at 31,256 (statement of Sen. Young) (commenting that age discrimination stemmed from outdated concepts regarding age and ability); id. at 34,742 (statement of Rep. Burke) (arguing that age discrimination differed from the "insidious discrimination based on race or creed prejudices and bigotry").
In addition, the differences between age discrimination and other forms of discrimination must be examined in light of the purposes behind disparate impact theory. The disparate impact model rests, in part, on the theory that because race and ability are inherently unrelated to each other, Title VII should protect employees from even the most subtle and subconscious acts of discrimination. In contrast, one’s age is often related to one’s ability to perform in a particular job. As a result, an employment practice may be entirely reasonable because of its focus on job-related factors notwithstanding its adverse effect on older workers. In addition, disparate impact theory seeks to redress the cumulative effects of past discrimination. However, there is not an extensive history of discrimination against older persons, and thus the disparate impact model cannot be automatically applied to the ADEA.

237. See Kenneth R. Davis, Age Discrimination and Disparate Impact: A New Look at an Age-Old Problem, 70 BROOK. L. REV. 361, 375-76 (2004-2005) (examining the rationale in Griggs and comparing the effects of race discrimination with age discrimination); Rhonda M. Reaves, One of These Things is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases, 38 U. RICH. L. REV. 839, 866-67, 875 (2004) (analyzing the applicability of the disparate impact model to the ADEA context given the differences between age and race discrimination).

238. See Davis, supra note 237, at 400-04; see also Pontz, supra note 65, at 302 (asserting that the Court’s decision in Griggs rests on the principle that there is no connection between race and work performance).

239. Herbert & Shelton, supra note 65, at 648; Pontz, supra note 65, at 302.


241. See Krop, supra note 202, at 850.

242. Harris, supra note 156, at 732; Pontz, supra note 65, at 306-09. Pontz further notes that older workers have not encountered the life-long bias seen in other forms of discrimination. Pontz, supra note 65, at 307-08. Instead, victims of age discrimination “may have benefitted [sic] when they were younger from such discrimination against other older workers.” Id. at 308. Summarizing the comparisons between the protected classes of the ADEA and Title VII, one commentator has noted:

Age discrimination does not apply to a discrete and insular minority, but to individuals who may have had a full range of opportunities and advantages earlier in life. It does not limit the employment opportunities available to a fixed class of people and their descendants. . . . A remedial perspective therefore confronts no persistent effects of age discrimination that need to be remedied.

Only an economic perspective can supply a justification for the ADEA.

D. The ADEA's Text and Legislative History Demonstrate that the RFOA Provision Serves to Preclude Disparate Impact Liability

Analyzing the text of the ADEA, Justice O'Connor's safe harbor interpretation of the RFOA provision represents its most logical construction. This interpretation is most consistent with one of the ADEA's central purposes: eliminating arbitrary age discrimination. Under the safe harbor theory, an employer is not subject to ADEA liability unless it intentionally discriminates on the basis of age. However, applying the reasoning of the City of Jackson plurality, an employer could be held liable based solely on the effects of a facially neutral employment practice. As a result, the plurality's interpretation significantly limits the scope of the RFOA provision because it would no longer automatically provide immunity to an employer basing its decisions on an employee's work performance. Although some courts and commentators have rejected the safe harbor theory by arguing that the term "reasonable" could be interpreted to codify the business necessity defense, it is more likely—given the legislative history of the ADEA—that Congress intended to prevent an employer from asserting an unreasonable justification that is merely a pretext for intentional discrimination. In fact, the attempted analogy between reasonable factors and business necessity is implausible because many practices may be reasonable to an employer's business but would not constitute a necessity.

In addition, the ADEA's legislative history demonstrates that the drafters intended to provide considerable leeway to an employer in decisions concerning older workers. For example, Secretary Wirtz recom-

243. See Herbert & Shelton, supra note 65, at 639 (contending that the RFOA provision is "logically inconsistent" with disparate impact recovery).
244. Krop, supra note 202, at 846-47 (examining the RFOA provision in light of the ADEA's stated purposes).
245. Pontz, supra note 65, at 293-94.
246. See Smith v. City of Jackson, 544 U.S. 228, 236 n.6 (2005) (plurality opinion) ("[A]n employer who classifies his employees without respect to age may still be liable... if such classification adversely affects the employee because of that employee's age . . . .").
247. See Pontz, supra note 65, at 293-94 (asserting that the RFOA provision conflicts with disparate impact theory because the theory allows employers to be held liable for decisions based on factors independent of age).
248. See, e.g., Kaminshine, supra note 44, at 302 (contending that the RFOA provision can be construed to incorporate disparate impact theory and the business necessity defense); supra note 171 and accompanying text (noting that several courts have found a correlation between "reasonable factors" and "business necessity").
250. Harris, supra note 156, at 730 n.70; Herbert & Shelton, supra note 65, at 641 (arguing that the analogy between the RFOA provision and "business necessity" stretches the definition of "reasonable").
251. See Harvard Note, supra note 233, at 400 (asserting that Congress intended to allow employers to take age into account in certain circumstances); see also supra note 51 and accompanying text.
mended noncoercive measures in response to institutional arrangements, recognizing that employers often adopt such programs to achieve "efficiency, equity, order, and improved fringe benefits." Thus, Secretary Wirtz's recommendations demonstrate that the drafters of the ADEA did not intend to subject an employer to liability in cases where its legitimate business practices adversely affected older workers. Second, while debating the proposed ADEA, Congress explicitly noted that the legislation would not create difficulty for employers. In fact, Congress drafted the RFOA provision so as to provide an employer with flexibility in making decisions based on the merit of its employees. Thus, the legislative history demonstrates that Congress intended to allow employers to use reasonable, non-age factors regardless of any subsequent disparate impact on older workers.

III. A CONGRESSIONAL RESPONSE TO CITY OF JACKSON

Given the Supreme Court's erroneous interpretation of the availability of disparate impact recovery under the ADEA, this Comment proposes that Congress amend the ADEA to specifically preclude disparate impact recovery. An ADEA amendment would restore the ADEA's original purposes, define the purpose of the RFOA provision, and recognize the historical differences between the ADEA and Title VII and their protected classes.

252. WIRTZ REPORT, supra note 41, at 15.
253. See Pontz, supra note 65, at 299-300 (noting that the drafters of the ADEA sought only to prohibit employment practices based on stereotypical assumptions about older workers).
254. 113 CONG. REC. 31,254 (1967) (statement of Sen. Javits); see also id. at 34,746 (statement of Rep. Daniels) ("[T]he bill takes into full consideration the problems and interests of employers."); cf. Judith J. Johnson, Rehabilitate the Age Discrimination in Employment Act: Resuscitate the "Reasonable Factors Other Than Age" Defense and the Disparate Impact Theory, 55 HASTINGS L.J. 1399, 1429-30 (2004) (recognizing that Congress intended the RFOA clause to provide a balanced approach for both employers and employees).
256. Pontz, supra note 65, at 301; see also Markham v. Geller, 451 U.S. 945, 948-49 (1981) (Rehnquist, J., dissenting from denial of certiorari) (arguing that the lower court erred in rejecting the employer's cost defense because the drafters of the ADEA did not intend the statute to have a "restraining influence" on employers).
257. See supra Part II.
258. But see Sweeney, supra note 202, at 1577 (recommending that Congress amend the ADEA to explicitly authorize disparate impact recovery); cf. Allen et al., supra note 209, at 91 (observing, prior to City of Jackson, that if the Court rejected ADEA disparate impact recovery, Congress could amend the ADEA to authorize such claims).
A. Draft Legislative Findings Recognizing Congress' Original Intent to Prohibit Only Intentional Age Discrimination

In response to the City of Jackson plurality's interpretation of the ADEA, this Comment's proposed amendment includes legislative findings codifying Justice O'Connor's view on the original intent behind the ADEA. The congressional findings would expressly acknowledge that the ADEA's legislative history elucidates one clear purpose: it is unlawful for an employer to adopt policies where age motivates an employer's decision. In its findings, Congress would recognize that the Wirtz Report served as the central foundation for the ADEA. The legislative findings would identify Secretary Wirtz's crucial distinction between "arbitrary" age discrimination and employer arrangements that caused an adverse impact on older workers. As a result, the amendment would settle the dispute over the meaning of arbitrary age discrimination by asserting that the drafters of the ADEA intended the legislation to target the motivation, not the effects, of an employment practice. In addition, the legislative findings would state that the plain meaning of the ADEA's "because of... age" clause adopts the Wirtz Report's recommendations and prohibits only disparate treatment. In sum, the legislative findings would assert that the City of Jackson ruling, by allowing for an employer to be held liable even if a non-age factor motivates its employment practice, undermined Congress' original intent in passing the ADEA.

259. See Smith v. City of Jackson, 544 U.S. 228, 253 (2005) (O'Connor, J., concurring) (arguing that Congress did not intend to authorize disparate impact recovery under the ADEA).

260. See Allen et al., supra note 209, at 90 (contending that Congress did not consider the availability of disparate impact recovery when it enacted the ADEA); Pontz, supra note 65, at 301 (arguing that Congress, in passing the ADEA, was preoccupied with prohibiting intentional age discrimination, rather than policies causing an adverse impact on older workers).

261. See Holmes, supra note 42, at 305 (referring to the Wirtz Report as the "foundation upon which the ADEA was constructed").

262. WIRTZ REPORT, supra note 41, at 21-22 (distinguishing between arbitrary age discrimination and institutional arrangements with adverse effect on older workers); see supra notes 44-47, 203-04 and accompanying text.

263. See supra note 44 (outlining the arguments regarding the meaning of "arbitrary" age discrimination).

264. See Blumrosen, supra note 44, at 91-93 (recognizing that Congress looked at the motivation, not the effects, of an employer's practices); Pontz, supra note 65, at 301 (arguing that Congress intended to prohibit intentional discrimination, not facially neutral employment practices with an adverse impact on older workers).

265. See Krop, supra note 202, at 842-44 (commenting on the inherent inconsistency between the ADEA's "because of... age" clause and disparate impact theory); supra notes 209-13 and accompanying text.
B. Define the Role of the RFOA Provision as a Safe Harbor From ADEA Disparate Impact Liability

In addition, this Comment's proposed ADEA amendment would reject *City of Jackson*'s interpretation of the RFOA provision as a defense to both disparate impact and disparate treatment claims.\textsuperscript{266} The amendment would expressly provide that the RFOA clause provides a safe harbor from, not a defense to, disparate impact liability.\textsuperscript{267} Therefore, a plaintiff could only survive an employer's summary judgment motion by proving a prima facie case of intentional age discrimination; the employer would then be able to rebut the plaintiff's case by producing evidence that it used a reasonable, non-age factor.\textsuperscript{268} Additionally, a congressional amendment would revive *Hazen Paper*'s interpretation of the RFOA provision to allow employers to consider any RFOA, including those factors that correlate with age.\textsuperscript{269} In sharp contrast to the *City of Jackson* plurality's broad interpretation of the ADEA,\textsuperscript{270} Congress could return the ADEA to its original purpose of prohibiting only those practices based on erroneous assumptions about older workers.\textsuperscript{271} In addition, the amendment would reflect the fact that Congress originally drafted the RFOA clause so as to provide employers considerable leeway in adopting employment practices.\textsuperscript{272} Thus, the amendment would adopt Justice O'Connor's view that the RFOA provision prevents an employer from asserting an unreasonable, non-age factor that serves merely as a pretext for intentional discrimination.\textsuperscript{273}

\textsuperscript{266} See supra Part I.C.4.

\textsuperscript{267} See Krop, supra note 202, at 844-45 (arguing that the RFOA provision shields an employer from liability as long as age bias does not motivate its employment decision or practice).


\textsuperscript{269} See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611-12 (1993) (holding that an employer should not be held liable under the ADEA where it uses a non-age factor "even if the motivating factor is correlated with age").

\textsuperscript{270} See supra note 246 and accompanying text. But see Benjes, supra note 197, at 246-50 (contending that the Court's broad interpretation of the RFOA provision in *City of Jackson* will allow employers a successful defense to most disparate impact claims under the ADEA).

\textsuperscript{271} See *WIRTZ REPORT*, supra note 41, at 2 (defining arbitrary age discrimination as the "rejection [of older workers] because of assumptions about the effect of age on their ability to do a job when there is in fact no basis for these assumptions").

\textsuperscript{272} See Johnson, supra note 254, at 1430 (recognizing that Congress intended the RFOA provision, in part, to allow employers to terminate older workers who were unable to perform their jobs); supra notes 254-55 and accompanying text.

\textsuperscript{273} See *City of Jackson*, 544 U.S. at 253 (O'Connor, J., concurring) (asserting that the RFOA provision "prevent[s] the employer from gaining the benefit of the statutory safe harbor by offering an irrational justification"); supra text accompanying note 249.
C. Acknowledge the Significant Differences Between the ADEA and Title VII

In addition, an amendment to the ADEA would recognize the fundamental differences between Title VII and the ADEA. First, an amendment would acknowledge that Congress rejected adding age as a protected status to Title VII when it debated the Civil Rights Act of 1964. More importantly, the proposed legislation would identify the central reason that Congress rejected the age amendments: in contrast to race and gender discrimination, there was insufficient evidence regarding the problem of age discrimination in employment. Therefore, the amendment would recognize that although Title VII and the ADEA share a common purpose, they have entirely separate legislative histories. Second, the proposed amendment would point to Congress’ broadening of Title VII disparate impact liability in 1991. The amendment would acknowledge that the 1991 amendments to the Civil Rights Act were even more significant, given that courts were interpreting Title VII and the ADEA in haec verba. As a result, the amendment would reject the *City of Jackson* plurality’s argument that the pre-1991 interpretation of Title VII disparate impact liability applies to the ADEA.

Finally, an amendment to the ADEA would recognize the “qualitative” differences between age and the protected classes under Title VII. First, the amendment would acknowledge that there is not an entrenched history of discrimination against older persons, as compared to race and

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274. See Pontz, supra note 65, at 304-06 (discussing Congress’ 1991 amendment expanding Title VII disparate impact liability and its impact on the ADEA disparate impact debate); *supra* Part II.B.

275. See 110 CONG. REC. 2596-99, 9911-13 (1964) (rejecting the age amendments of Congressman Dowdy and Senator Smathers).

276. See supra note 39 and accompanying text.

277. See Pontz, supra note 65, at 298 (examining the varying histories behind the ADEA and Title VII); Andrea B. Short, Comment, Discriminating Among Discrimination: The Appropriateness of Treating Reverse Age Discrimination Differently from Reverse Race Discrimination, 83 N.C. L. REV. 1065, 1070-74 (2005) (commenting on the different histories and purposes behind the ADEA and Title VII).

278. See supra note 81 (examining the effects of the 1991 amendment on the burden-shifting analysis in a Title VII disparate impact claim).

279. See Pontz, supra note 65, at 304 (rejecting the argument that Congress was not aware of the ADEA when it amended Title VII liability in 1991); supra note 229 and accompanying text.

280. See supra note 90 and accompanying text.

281. Smith v. City of Jackson, 544 U.S. 228, 253-55 (2005) (O’Connor, J., concurring); see also Davis, supra note 237, at 375-76 (comparing the effects of race discrimination with age discrimination); Reaves, supra note 237, at 866-67, 875 (examining ADEA disparate impact recovery in light of the differences between age and race discrimination); *supra* Part II.C.
gender discrimination. The legislation would recognize that the Wirtz Report found no evidence of animus or intolerance of older workers. As a result, Congress would affirm that the central purpose of disparate impact theory—eliminating the perpetuation of discrimination—is entirely inapplicable to the ADEA context. Second, the amendment would recognize that, in contrast to race or gender, one’s age may be related to his or her ability to perform a job. An amendment would assert that the cost of many employment benefits increase with an employee’s rise in seniority; thus, an employment practice reasonably based on cost savings may disproportionately affect older workers. Therefore, an ADEA amendment would ensure that an employer can consider non-age factors, such as merit and cost, regardless of the adverse effect on older workers.

IV. CONCLUSION

In the disparate impact debate, the City of Jackson plaintiffs lost the battle but won the war. Although the Supreme Court ultimately affirmed the dismissal of the plaintiffs’ disparate impact claim, the case was a considerable victory for future ADEA plaintiffs who are no longer limited to recovering under a theory of disparate treatment. To restore the original intent behind the ADEA, however, this Comment proposed that Congress respond to City of Jackson by amending the ADEA to preclude disparate impact recovery. Above all, a congressional response to the Supreme Court’s opinion would more effectively recognize that in many employment decisions, age is more than just a number.

282. See Manning, supra note 64, at 787 (recognizing that, in contrast to racial or gender-based discrimination, there is no extended history of stigma or barriers levied against older persons); supra note 242 and accompanying text.
283. See WIRTZ REPORT, supra note 41, at 5-6 (noting that an employer’s discrimination based on religion or race stems from sheer prejudice, whereas there are no such prejudices against older workers); see also supra text accompanying notes 43-44.
284. See supra notes 241-42 and accompanying text.
285. See Krop, supra note 202, at 850 (commenting on the “inherent correlation between age and ability”); supra notes 239-40 and accompanying text.
286. City of Jackson, 544 U.S. at 259 (O’Connor, J., concurring) (“Given the myriad ways in which legitimate business practices can have a disparate impact on older workers, it is hardly surprising that Congress declined to subject employers to civil liability based solely on such effects.”).
287. See Krop, supra note 202, at 845 (submitting that the ADEA allows an employer to base its decision on any reasonable factor, even one that correlates with age).