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## Disparate Impact Under the Age Discrimination in Employment Act of 1967

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## Disparate Impact Under the Age Discrimination in Employment Act of 1967

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Michael Evan Gold<sup>‡</sup>

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## I.

## INTRODUCTION

Employment practices that are not intended to disadvantage older workers can nonetheless have an adverse effect on them vis-à-vis younger workers.<sup>1</sup> Accordingly, the issue arises whether the Age Discrimination in Employment Act of 1967 (“Age Act”) allows disparate impact as a method of proving discrimination.<sup>2</sup> The Supreme Court has not ruled on the issue,<sup>3</sup> and the federal courts of appeals<sup>4</sup> and the commentators are divided.<sup>5</sup> This

1. The terms “older worker” and “older workers” are used in this article to include all workers who are protected by the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 603 (codified as amended at 29 U.S.C. §§ 621-634 (1994)).

2. *Id.*

3. The Court granted a writ of *certiorari* on the issue, heard oral arguments, then dismissed the writ as improvidently granted. *Adams v. Florida Power Corp.*, 534 U.S. 1054 (2001), *cert. dismissed*, 535 U.S. 228 (2002). Previously, the Court had indicated that it had not decided the issue. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (“We have never decided whether a disparate impact theory of liability is available under the ADEA. . . and we do not do so here.”).

4. See *Criley v. Delta Air Lines*, 119 F.3d 102 (2d Cir. 1997) (disparate impact is allowed). See also *Frank v. United Air Lines*, 216 F.3d 845 (9th Cir. 2000) (same); *EEOC v. McDonnell Douglas Co.*, 191 F.3d 948 (8th Cir. 1999) (same). *But cf.* *Adams v. Florida Power Corp.*, 255 F.3d 1322 (11th Cir. 2001) (disparate impact is not allowed), *cert. granted*, 534 U.S. 1054 (2001), *and cert. dismissed*, 535 U.S. 228 (2002); *Mullin v. Raytheon*, 164 F.3d 696 (1st Cir. 1999) (same); *Blackwell v. Cole Taylor Bank*, 152 F.3d 666 (7th Cir. 1998) (same); *Ellis v. United Airlines*, 73 F.3d 999 (10th Cir. 1996) (same).

5. Alfred W. Blumrosen, *Interpreting The ADEA: Intent or Impact*, in AGE DISCRIMINATION IN EMPLOYMENT ACT, A COMPLIANCE AND LITIGATION MANUAL FOR LAWYERS AND PERSONNEL PRACTITIONERS 68 (Monte B. Lake ed., 1982); Jennifer J. Clemons & Richard A. Bayles, *ADEA Disparate Impact in the Sixth Circuit*, 27 OHIO N.U. L. REV. 1 (2000); Howard Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception*, 66 B.U. L. REV. 155 (1986); Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and The Civil Rights Act of 1991: Three Acts And a Dog That Didn't Bark*, 39 WAYNE L. REV. 1093 (1993); Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis For Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071 (1998); 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 (1997); Douglas C. Herbert & Lani Schweiker Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. TEX. L. REV. 625 (1996); Judith J. Johnson, *Semantic Cover For Age Discrimination: Twilight of the ADEA*, 42 WAYNE L. REV. 1 (1995); Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229 (1990); Michael D. Moberly, *Reconsidering the Discriminatory Motive Requirement in ADEA Disparate Treatment Cases*, 24 N.M. L. REV. 89 (1994); Mack A. Player, *Title VII Impact Analysis Applied To The Age Discrimination in Employment Act: Is a Transplant Appropriate?*, 14 U. TOL. L. REV. 1261 (1983); Mack A. Player, *Wards Cove Packing or Not Wards Cove Packing? That is Not the Question: Some Thoughts on Impact Analysis Under the Age Discrimination in Employment Act*, 31 U. RICH. L. REV.

article is composed primarily of new evidence and arguments on the issue.

Disparate impact evolved under Title VII of the Civil Rights Act of 1964 ("Title VII").<sup>6</sup> A plaintiff proves disparate impact by establishing that (1) a particular employment practice has an adverse effect on workers of the plaintiff's race or sex,<sup>7</sup> regardless of the intent of the employer;<sup>8</sup> that is, the practice disadvantages disproportionately more workers of the plaintiff's group than workers of another race or sex (the comparators), and (2) the practice is not related to job performance or a business necessity.<sup>9</sup> In *Griggs v. Duke Power Company*, for example, the employer required workers seeking promotion to pass a written test.<sup>10</sup> The test had an adverse effect on African-American workers because they passed at a significantly lower rate than did European-American workers. The test was not job related; a passing score on the test did not predict success on the job.

In contrast, the plaintiff in a disparate *treatment* case proves discrimination by establishing that (1) the employer treated a worker less favorably, regarding the terms, conditions, or privileges of employment, than a worker of another race or sex was or would have been treated, and (2) the worker's race or sex was at least part of the employer's reason for the act. Proof of intent is indispensable in a disparate treatment case. For

819 (1997); Marc Rosenblum, *The Prerogative To Downsize - A Commentary on Blumrosen, et al.*, 2 EMPL. RTS. & EMPL. POL'Y J. 417 (1998); Jonas Saunders, *Age Discrimination: Disparate Impact Under the ADEA After Hazen Paper Co. v. Biggins: Arguments in Favor*, 73 U. DET. MERCY L. REV. 591 (1996); Donald R. Stacy, *A Case Against Extending the Adverse Impact Doctrine to ADEA*, 10 EMPLOYEE REL. L.J. 437 (1984); Roberta Sue Alexander, Comment, *The Future of Disparate Impact Analysis for Age Discrimination in a Post-Hazen Paper World*, 25 U. DAYTON L. REV. 75 (1999); Miles F. Archer, Note, *Mullin v. Raytheon Company: The Threatened Vitality of Disparate Impact Under the ADEA*, 52 ME. L. REV. 149 (2000); Brett Ira Johnson, Comment, *Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing the ADEA From Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. 303 (2000); Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267 (1995); Michael C. Sloan, Comment, *Disparate Impact in the Age Discrimination in Employment Act: Will The Supreme Court Permit It?*, 1995 WIS. L. REV. 507 (1995); Brendan Sweeney, Comment, *"Downsizing" The Age Discrimination in Employment Act: The Availability of Disparate Impact Liability*, 41 VILL. L. REV. 1527 (1996). The author thanks Stephanie Hutchinson for her help with these articles.

6. Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000a-2000h-6 (2000)).

7. The term "race or sex" is used in this article to refer to all the bases on which discrimination is prohibited by Title VII, namely, race, color, religion, sex, and national origin. Civil Rights Act of 1964 (Title VII) §703, 42 U.S.C. § 2000e-2 (2000).

8. Unless the context indicates otherwise, the term "employer" is used in this article to refer to include all parties who must obey the laws against employment discrimination.

9. See BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW chs. 4-7 (Paul W. Cane, Jr. ed., 3d ed. 1996) (discussing disparate impact) [hereinafter "LINDEMANN & GROSSMAN, 3d ed."].

10. 401 U.S. 424 (1971). The *Griggs* case involved employee testing and high school diploma requirements that were not "directed or intended to measure the ability to learn to perform a particular job or category of jobs." *Id.* at 428.

example, the employer in *Phillips v. Martin Marietta Corporation* was guilty of disparate treatment for hiring men, but not women, who had young children.<sup>11</sup> The employer intentionally denied employment opportunities to women, in part, because of their sex.

For the purposes of this article, the crucial feature of disparate impact is the lack of intent.<sup>12</sup> The plaintiffs in *Griggs* prevailed without proving that the employer intended to disadvantage them because of race. The lack of scienter gives rise to a puzzle. Title VII prohibits disadvantaging a worker *because of* race or sex. Causation is clear in a disparate treatment case: the employer knowingly uses race or sex as a basis of decision; to say the same thing, race or sex is a fact in the employer's reason for action. The puzzle is this: in what sense is race or sex a cause of the employer's action in a disparate impact case? In *Griggs*, for example, the employer refused to promote the plaintiffs because they failed the written test. In what sense was race the cause of this refusal? The solution to the puzzle lies in the fact that the test was not job related. A job related test accurately selects qualified workers. A test that is not job related selects at random with respect to qualifications. In *Griggs* scores on the test were not related to success on the job. But the test did not select altogether at random.<sup>13</sup> For some reason, the test selected a significantly greater proportion of European-Americans than of African-Americans (which is to say, the test had an adverse effect on African-Americans).<sup>14</sup> This is all the test did. It gave each black a lesser chance to succeed than each white. Thus, *the test selected on the basis of race*. By using the test to decide whom to promote, the employer — albeit unknowingly — made decisions based on race. In this way, the employer disadvantaged the plaintiffs because of their race. Thus is proved the element of causation in a disparate impact case.

Arguments for and against recognizing disparate impact under the Age Act follow. For convenience of exposition, the opposing arguments will be voiced by advocates named PRO and CON. Part II is a brief legislative history of the act. Part III contains PRO'S and CON'S arguments on Justice Powell's theorem that disparate treatment and disparate impact are not separate claims, but different methods of proving the same claim. Part IV contains the PROS and CONS regarding the meaning of section 4(a)(2) of the Age Act, and Part V, regarding the meaning of section 4(f)(1) (the RFOA

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11. 400 U.S. 542 (1971).

12. Intent is all that distinguishes disparate treatment from disparate impact. See Michael Evan Gold, *Towards a Unified Theory of the Law of Employment Discrimination*, 22 BERKELEY J. EMP. & LAB. L. 175 (2001) [hereinafter "Gold, *Towards a Unified Theory*"].

13. If the test had truly selected at random, the success rates of African-Americans and European-Americans would have been equal. The test would have had no adverse effect, and would have been legal.

14. The reason why the test had an adverse effect was not established in *Griggs* and need not be in disparate impact cases.

clause). Part VI is the author's evaluation of the competing arguments, and Part VII states the author's arguments on the purpose of the act.

## II.

### A BRIEF LEGISLATIVE HISTORY OF THE AGE ACT

Beginning in 1951, representatives and senators introduced many bills to prohibit age discrimination. Prior to 1964, none of these efforts was successful. In 1964, some legislators sought to add age as a protected class to Title VII.<sup>15</sup> Because age differed from race or sex and Congress had insufficient information about the differences, age was not included in that statute. Instead, section 715 directed that the Secretary of Labor

shall make a full and complete study of the factors which might tend to result in discrimination because of age and . . . make a report to Congress . . . containing the results of such study and shall include in such report such recommendations for legislation to prevent arbitrary discrimination in employment because of age. . . .<sup>16</sup>

The Secretary of Labor was Willard Wirtz<sup>17</sup> and his report dated June 1965, is a major element of the legislative history of the Age Act.<sup>18</sup>

The Secretary's Report was divided into three sections. The initial section, entitled "Introduction," identified four types of discrimination that plagued older workers. The first type of discrimination led to "non-employment resulting from feelings about people entirely unrelated to their ability to do the job."<sup>19</sup> As the Report later clarified, this type of discrimination was "based on the kind of dislike or intolerance that sometimes exists in the case of race, color, religion, or national origin, and which is based on considerations entirely unrelated to ability to perform a job."<sup>20</sup>

15. Senator Smathers offered an amendment that would have added age to Title VII, but the amendment was defeated "due to the parliamentary situation." *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Comm. on Labor and Public Welfare*, 90th Cong. 29 (1967) [hereinafter "*Senate Hearings*"] (statement of Sen. Smathers). See also 113 CONG. REC. 31254 (1967) (statement of Sen. Javits).

16. Civil Rights Act of 1964 (Title VII), sec. 715 (codified as amended at 42 U.S.C. § 2000e-14 (2002)).

17. U.S. Department of Labor, Wirtz Labor Library, available at <http://www.dol.gov/oasam/library/bib/wirtzbib.htm> (last visited Feb. 23, 2004).

18. The Older American Worker: Age Discrimination in Employment (1965) (report of the Secretary of Labor to the Congress under section 715 of the Civil Rights Act of 1964). The report was presented in two, separately bound parts. The first part of the report, comprising 25 pages of readable text and graphs, will be cited and referred to hereinafter as the "Secretary's Report" or the "Report." The second part of the report, composed of statistics and summaries of technical studies, will be cited hereinafter as "Secretary's Research Materials."

19. Secretary's Report, *supra* note 18, at 2.

20. *Id.* at 5.



The next type of discrimination resulted in non-employment 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.*”<sup>21</sup> The Report added, “[I]t is this [type of discrimination] which Congress refers to, in Section 715 of the Civil Rights Act [of 1964], as ‘arbitrary discrimination.’”<sup>22</sup>

“A third type of discrimination — which should perhaps be called something else entirely — involves decisions not to employ a person for a particular job because of his age *when there is in fact a relationship between his age and his ability to perform the job.*”<sup>23</sup> The Report opined that this type of discrimination “does not exist so far as, for example, racial or religious discrimination are concerned.”<sup>24</sup>

The fourth type of discrimination occurred

when an employer turns an older man or woman away, not because of concern about the individual’s ability to perform the work, but because of programs and practices actually designed to *protect* the employment of older workers while they remain in the work force, and to provide support when they leave it or are ill. Seniority and promotion-from-within systems, and pension and insurance programs, are a mark of civilization. They vastly enhance the dignity, the security, the quality of the later years of life in the United States. At the same time, ironically, they sometimes have tended to push still further down the age at which employers begin asking whether or not a prospective employee is too old to be taken on.<sup>25</sup>

The next section of the Secretary’s Report, entitled “Findings,” found “clear evidence of the Nation’s waste today of a wealth of human resources that could be contributed by hundreds of thousands of older workers, and of the needless denial to these workers of opportunity for that useful activity which constitutes much of life’s meaning.”<sup>26</sup> The Report proceeded to discuss each of the four types of discrimination previously identified.

The Secretary’s Report found “no significant evidence” of the first type of discrimination, which was based on dislike or intolerance.<sup>27</sup> In contrast, the Report found “substantial evidence of arbitrary practice in the second category of discrimination — discrimination based on unsupported general assumptions about the effect of age on ability — in hiring practices that take the form of specific age limits applied to older workers as a

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21. *Id.* at 2 (emphasis in original).

22. *Id.*

23. *Id.* (emphasis in original).

24. *Id.* The Report was partially mistaken in this regard. In the third type of “discrimination,” age is a bona fide occupational qualification for a job. Under Title VII, religion may also be a BFOQ, but race cannot be.

25. *Id.* (emphasis in original).

26. *Id.* at 5

27. *Id.* at 2, 5.

group.”<sup>28</sup> Whether discrimination of the third type occurred, in which age was in fact related to job performance, or of the fourth type, in which “institutional arrangements . . . operate indirectly to restrict the employment of older workers,” depended on the circumstances of individual cases.<sup>29</sup>

The second section ended with the consequences of age discrimination for the economy and for individual workers. Beginning with the economy, the Report observed:

[A] million man-years of productive time are unused each year because of unemployment of workers over 45. . . . A substantial portion of the unemployment insurance payments of \$1 billion a year to workers 45 and over can be attributed to unemployment resulting in one way or another from the fact of the employee’s age. . . . Only a hypothetical calculation can be made of the potential contributions of those who have retired involuntarily. Such a calculation would easily yield several billion dollars a year. . . .<sup>30</sup>

Turning to individual workers, the Report noted:

The unemployment rate of male workers 45 and over last year was one-fifth greater than the rate in the 35-44 year group. Older workers (45 and over) experienced more long-term unemployment than younger groups . . . . On the average this unemployment lasted . . . about 75 percent longer than the average duration of unemployment for workers under 45. The proportion of the very long-term unemployed (over 27 weeks) made up of men 45 and over has been rising in the face of a generally improved employment situation. . . . This development is often accompanied by . . . deterioration of skill and motivation, with consequent reduced acceptability to employers. . . . The consequences of discrimination on individuals affected go far beyond those attributable to arbitrary refusal to employ on the basis of age. They show up in widespread uncertainty concerning the role of vigorous older persons in our society, and in personal frustrations and anxieties.<sup>31</sup>

The last section of the Secretary’s Report, entitled “Conclusions and Recommendations,” contained four recommendations. The first recommendation was a federal statute to prohibit

the persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability. . . . The possibility of new *nonstatutory* means of dealing with such arbitrary discrimination has been explored. That area is barren.<sup>32</sup>

The second recommendation was a series of steps “to adjust those

28. *Id.* at 5.

29. *Id.*

30. *Id.* at 18.

31. *Id.* at 18-19.

32. *Id.* at 21 (emphasis in original).

present employment practices which quite unintentionally lead to age limits in hiring. This will require special arrangements to overcome employer reluctance [sic] to hire qualified workers under present pension and seniority arrangements."<sup>33</sup> Such arrangements included vesting and portability provisions in private pension plans, new forms of private annuities for older workers who were not covered by pension plans, a review of workers' compensation and disability insurance systems, and aid to unions and employers in developing procedures for hiring of older workers while protecting the seniority rights of workers already employed. None of these steps would be required by law.<sup>34</sup>

The third and fourth recommendations, which were increasing jobs for older workers and augmenting their educational opportunities,<sup>35</sup> are not relevant to the issue of whether the Age Act prohibits disparate impact.

Congress did not act on the Secretary's Report in 1965. In 1966 the Senate considered a bill, already passed by the House of Representatives, to raise the minimum wage.<sup>36</sup> Senator Javits moved an amendment that would have outlawed age discrimination by employers and unions,<sup>37</sup> and the Senate agreed to the amendment.<sup>38</sup> The conference committee deleted the amendment, but added section 606 to Public Law 89-601, which directed the Secretary of Labor to submit specific legislative proposals for banning age discrimination in employment.

The Secretary complied on January 25, 1967,<sup>39</sup> and on February 3rd Senator Yarborough introduced S. 830,<sup>40</sup> which reflected the Secretary's proposals.<sup>41</sup> On the same date Representative Perkins introduced H.R. 3651, a twin to S. 830.<sup>42</sup> Section 2 of the bills contained the findings of Congress and the purpose of the proposed act. The findings summarized the central findings of the Secretary's Report:

SEC. 2.

(a) The Congress hereby finds and declares that —

- (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their effort to retain employment, and especially to regain employment when displaced from jobs;
- (2) the setting of arbitrary age limits regardless of potential for job

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33. *Id.* at 22.

34. *Id.*

35. *Id.* at 23-25.

36. H.R. 13712, 89th Cong. (1966). See S. REP. NO. 89-1487, at 1 (1966).

37. 112 CONG. REC. 20819 (1966) (discussing amendment no. 764).

38. *Id.* at 20825.

39. 113 CONG. REC. 1480, 1484 (1967).

40. *Id.* at 2464; S. 830, 90th Cong. (1967).

41. See *id.* at 2199, 7076 (statement of Sen. Javits).

42. See H.R. 3651, 90th Cong. (1967).

performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems are grave. . . .<sup>43</sup>

Likewise, the purpose of the proposed act reflected the recommendations of the Secretary's Report:

(b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.<sup>44</sup>

In line with the Secretary's recommendations to enlighten the public about the abilities and problems of older workers, and to encourage employers and unions voluntarily to adjust practices that, though intended to protect older workers, actually led to age limits in hiring — practices such as seniority systems, promotion from within, and pension and insurance plans — the bills provided:

#### SEC. 3.

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this Act, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures:

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment. . . .<sup>45</sup>

Section 4 of the bills reflected the Secretary's recommendation for a statutory ban on age discrimination in employment:

#### SEC. 4.

(a) It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or

43. H.R. 3651 and S. 830 at 1-2.

44. *Id.* at 2.

45. *Id.* at 2-3.

otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.<sup>46</sup>

The Secretary's Report had recognized that some age "discrimination" occurred because of a genuine relationship between a worker's age and ability to perform the job. Accordingly, section 4(f) of the bills provided:

(f) It shall not be unlawful for an employer . . .

(1) to take any action otherwise prohibited under . . . this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age. . . .<sup>47</sup>

The Subcommittee on Labor of the Senate Committee on Labor and Public Welfare held hearings on S. 788 and 830<sup>48</sup> and, with some amendments, reported S. 830 favorably to the full Committee on Labor and Public Welfare.<sup>49</sup> The full committee approved an amendment in the nature of a substitute and reported it favorably to the Senate.<sup>50</sup> The passages of S. 830 quoted above were not changed. The Senate passed S. 830, as amended, on November 6, 1967 and sent it to the House.<sup>51</sup>

The General Subcommittee on Labor of the House Committee on Education and Labor held hearings on H.R. 3651, 3768, and 4221.<sup>52</sup> With some amendments, the subcommittee reported favorably on H.R. 4221<sup>53</sup> to the full Committee on Education and Labor.<sup>54</sup> The full committee approved some additional amendments and reported a clean bill, H.R. 13054, to the House.<sup>55</sup> This bill contained word for word the provisions of S. 830 that are quoted above. The House passed H.R. 13054 on December 4, 1967.<sup>56</sup>

46. *Id.* at 3-4.

47. *Id.* at 5-6.

48. *Senate Hearings, supra* note 15. S. 788 was essentially Senator Javits' 1966 amendment to the Fair Labor Standards Act.

49. S. REP. NO. 90-723, at 3 (1967).

50. *Id.*

51. 113 CONG. REC. 31257 (1967).

52. *Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the General Subcommittee on Labor of the Committee on Education and Labor, 90th Cong.* (1967) [hereinafter "*House Hearings*"].

53. Except for having been introduced by Representative Dent, who was the chair of the subcommittee, H.R. 4221 was identical to the Secretary's bill, H.R. 3651.

54. H.R. REP. NO. 90-805, at 3 (1967).

55. *Id.*

56. 113 CONG. REC. 34753 (1967).

Immediately thereafter, the House struck the contents of S. 830, substituted therefore the contents of H.R. 13054, passed S. 830 (as thus revised), and sent it back to the Senate.<sup>57</sup>

On December 5, 1967, the Senate amended the House's version of S. 830 (i.e., H.R. 13054), passed the bill, and returned it to the House.<sup>58</sup> The Senate amendments did not affect the passages from S. 830 quoted above. The following day, the House accepted the Senate's amendment and sent the bill to the President,<sup>59</sup> who approved it on December 15, 1967.<sup>60</sup> Thus, sections 2(a) and (b), 3(a), and 4(a) and (f) of the Age Discrimination in Employment Act of 1967 contain, and bear the same numeration, as the sections of S. 830 quoted above.

### III.

#### JUSTICE POWELL'S THEOREM

##### *A. PRO: Justice Powell's Theorem Is True*

*Justice Powell's theorem postulated that disparate treatment and disparate impact were not separate claims, but separate legal theories or methods of proving the claim of discrimination.*

Disparate treatment and disparate impact are normally thought of as distinct rights or claims under Title VII. In 1982, however, Justice Powell proposed the theorem that they were separate methods of proving the same claim. He proposed this theorem in *Connecticut v. Teal*, in which the employer used a two-step process to decide which workers to promote to supervisor.<sup>61</sup> The plaintiffs claimed (and the employer conceded) that the first step in the process, a written test, had an adverse effect on the plaintiffs' group and was not job related. The employer defended on the ground that the second step of the process compensated for the first. In the second step, proportionally more members of the plaintiffs' group than of the comparators' were promoted, and the selection process, taken as a whole, had no adverse effect on the plaintiffs. The majority of the Court held that the plaintiffs could attack the first step in the process, regardless of the final result. Justice Powell dissented, arguing that the plaintiffs should be permitted to attack only the final result. In the process, he advanced the theorem that disparate treatment and disparate impact were not separate

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57. *Id.* at 34755.

58. *Id.* at 35053-57.

59. *Id.* at 35133-34.

60. *Id.* at 37125.

61. 457 U.S. 440 (1982).

claims; rather, they were *separate methods of proof that shared the same aim*, namely, proving that employment discrimination has occurred. He wrote:

[W]hile disparate-treatment cases focus on the way in which an individual has been treated, disparate-impact cases are concerned with the protected group. . . . The Court, disregarding the distinction drawn by our cases, repeatedly asserts that Title VII was designed to protect individual, not group, rights. It emphasizes that some individual blacks were eliminated by the disparate impact of the preliminary test. But this argument confuses the *aim* of Title VII with the **legal theories** through which its aims were intended to be vindicated. It is true that the aim of Title VII is to protect individuals, not groups. But in advancing this commendable objective, Title VII jurisprudence has recognized two distinct **methods of proof**. In one set of cases — those involving direct proof of discriminatory intent — the plaintiff seeks to establish direct, intentional discrimination against him. . . . In disparate-impact cases, by contrast, the plaintiff seeks to carry his burden of proof by way of *inference* — by showing that an employer’s selection process results in the rejection of a disproportionate number of members of a protected group to which he belongs. From such a showing a fair inference then may be drawn that the rejected applicant, as a member of that disproportionately excluded group, was himself a victim of that process’ “built-in headwinds.”<sup>62</sup>

Justice Powell’s theorem was plausible on its face. Disparate treatment and disparate impact were not mentioned in the statute, but were developed as legal theories or methods of proof by lawyers and judges in much the same way that common law principles of evidence evolved. Plausibility,

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62. *Id.* at 458-459 (1982) (Powell, J., dissenting) (citation omitted) (italics in original) (boldface added). Justice Powell’s theorem may have been prompted by a suggestion in the Brief *Amici Curiae*, Equal Employment Advisory Council, Robert E. Williams et al. at 9, *Connecticut v. Teal*, 457 U.S. 440 (1982) (No. 80-2147) (“In implementing the nondiscrimination requirements of Title VII, this Court has adopted two methods of proof of discrimination — disparate treatment and disparate impact.”). The author thanks Ms. Alyssa Razook for bringing this passage to his attention.

A few years later, Justice O’Connor repeated the same theorem about the nature of disparate treatment and disparate impact. In *Watson v. Fort Worth Bank & Trust* she wrote:

Several of our decisions have dealt with the **evidentiary standards** that apply when an individual alleges that an employer has treated that particular person less favorably than others because of the plaintiff’s race, color, religion, sex, or national origin. In such “disparate treatment” cases . . . the plaintiff is required to prove that the defendant had a discriminatory intent or motive. . . . In *Griggs v. Duke Power Co.*, this Court held that a plaintiff need not necessarily prove intentional discrimination in order to establish that an employer has violated § 703. . . . The factual issues and the character of the evidence are inevitably somewhat different when the plaintiff is exempted from the need to prove intentional discrimination. The evidence in these “disparate impact” cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities. The distinguishing features of the factual issues that typically dominate disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used. . . .

487 U.S. 977, 985-987 (1988) (citations omitted) (boldface added). All eight justices who participated in the decision joined in this part of the *Watson* opinion.

however, would not justify using the theorem to resolve issues or decide cases; for these purposes, proof is necessary. But like Pythagoras and Fermat, Justice Powell left to others the task of proving the truth of his theorem.

The proof is stated in full in the following text, but a summary of it may be helpful at the outset. A student of Title VII has argued that disparate treatment and disparate impact are indistinguishable except for intent.<sup>63</sup> This argument was correct in most regards, and it is incorporated into the following proof; but the argument was mistaken in one regard: it treated disparate treatment and disparate impact as proving separate claims. In fact, they are different theories for proving the same claim. That claim is discrimination. The difference between disparate treatment and disparate impact *as theories* is the way in which they prove causation. Both theories must establish that race or sex was a cause of the plaintiff's injury. Disparate treatment establishes causation with proof of intent. Disparate impact establishes causation with proof that an employment practice (commonly, a selection criterion like a written test) has an adverse effect on the plaintiffs' class and is not job related. Because the practice has an adverse effect, it disadvantages the plaintiffs' group. Because the practice is not job related, it does not serve any legitimate interest of the business. Therefore, the practice does only one thing: it selects on the basis of race or sex. This analysis establishes that Justice Powell's theorem was true: that disparate impact and disparate treatment were different methods of proving causation in Title VII cases prior to the Civil Rights Act of 1991.<sup>64</sup> Justice Powell's theorem also applies to the Age Act, which was not amended in any relevant way in 1991.

### 1. *Disparate Impact*

*In disparate impact, causation was proved by the facts that an employment practice had an adverse effect on a protected class and that the practice was not job related. Because the practice was not job related, it did not select qualified workers. Because the practice also had an adverse effect, it selected on the basis of race or sex.*

Disparate impact as a legal theory or method of proving discrimination was developed under Title VII, and Justice Powell's theorem applied to Title VII. For these reasons, the following proof of the theorem will draw upon Title VII cases. The proof will focus on the period before the 1991 amendments. After these amendments, the theorem was no longer true of

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63. Gold, *Towards a Unified Theory*, *supra* note 12.

64. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).



Title VII; that is, the amendments made disparate treatment and disparate impact into genuinely separate claims under that statute. The 1991 amendments, however, did not change the Age Act in any relevant way, and therefore Justice Powell's theorem remains true of this statute.

The proof in a disparate impact action under Title VII pertained to how an employer treated many workers; therefore, statistical evidence was always used in disparate impact cases. Although any employment practice could be analyzed under disparate impact, this method of proving discrimination was applied most frequently to selection criteria.<sup>65</sup> *Dothard v. Rawlinson* provides a good example.<sup>66</sup> The Board of Corrections of the State of Alabama was hiring correctional counselors. In the first stage of the hiring process, applicants were eliminated if they did not stand a minimum of 5 feet 2 inches tall and weigh a minimum of 120 pounds. These minima had an adverse effect on women because only 59 percent of them, as compared to 99 percent of men, were tall and heavy enough. The employer failed to prove that the minima were job related; that is, the minima did not distinguish between workers who were qualified to be correctional counselors and workers who were not qualified.

The first step in proving disparate impact was conventional evidence that the employer was covered by the act. In *Dothard*, the employer was the Board of Corrections, a state agency; Title VII covered states and their political subdivisions.

The second step was conventional evidence that an employment opportunity was available. The Board of Corrections was hiring correctional counselors.

Ideally, the third step in disparate impact was for the plaintiffs to identify the "qualified labor pool." This term named the group of workers who were willing and able to perform a job. Then the plaintiffs calculated the percentages of their group and of the comparators in the pool. Practically, however, it was far easier to describe the qualified labor pool than to designate it, and plaintiffs normally resorted to a proxy. A fair proxy had two characteristics: it was reasonably similar to the qualified labor pool, and the representations of the plaintiffs' group and of the comparators in the proxy could be readily calculated. In *Dothard*, the proxy was the national population.<sup>67</sup>

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65. An example of disparate impact applied to another employment practice is *Bazemore v. Friday*, 478 U.S. 385 (1986) (multiple regression analysis used regarding a claim of discrimination in compensation).

66. 433 U.S. 321 (1977).

67. Not every person in the nation was willing and able to perform the job of correctional counselor in Alabama, but the defendant offered no evidence to rebut the following reasoning: The height and weight characteristics of adults (HWCA) in the nation were similar to the HWCA in Alabama. The HWCA in Alabama were similar to the HWCA in the labor force in Alabama. The HWCA in the labor

When a court in a disparate impact action accepted the plaintiffs' proxy as fair (of course, the employer had an opportunity to challenge it), the proxy thereafter stood for the qualified labor pool. Accordingly, workers in the proxy were presumed to be willing and able to perform the job.

The fourth step in the disparate impact method of proof was a showing that the employer afforded the plaintiffs a lesser chance than the comparators to benefit from the employment opportunity. This showing was made with evidence that the employer used a selection criterion that favored the comparators over the plaintiffs.<sup>68</sup> It was commonly said that the selection criterion had an "adverse effect" on the plaintiffs, or that a disparity existed between the plaintiffs' and the comparators' rates of success on the criterion. In *Dothard*, the selection criteria were the height and weight minima, and a disparity existed because men's rate of success was 99 percent and women's rate was only 59 percent.

Because the adverse effect was established by statistics, the question necessarily arose, was the disparity in success rates statistically significant, or was it merely a random variation that should be ignored? A test of statistical significance had to be applied. If the disparity was statistically significant, then it proved that the employer had afforded a lesser chance of success to the plaintiffs than to the comparators. In *Dothard*, did proportionally fewer women than men satisfy the height and weight minima, or was the disparity so small that it was meaningless? Given the size of the proxy and the degree of the disparity, it was obviously significant.

The final issue was causation. The disparate impact method of proof established but-for causation. To prove but-for causation, it must be demonstrated that race or sex was a necessary cause of the disparity. At first blush, such proof may seem impossible: for the cause of the disparity was the selection criterion, and the criterion, both on its face and in its administration, was neutral with respect to race or sex. But the criterion was not neutral in its results. It was not job related. It did not select qualified workers. Thus, it selected randomly with respect to qualifications. Fully random selection would have been lawful; it would not have disadvantaged a protected class.<sup>69</sup> But a selection criterion might be random with respect to qualifications, yet not random with respect to race

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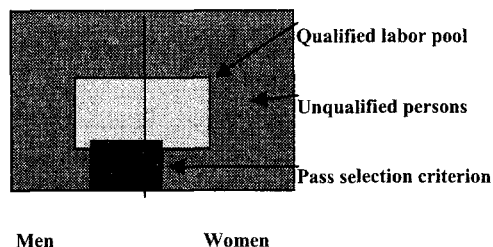
force in Alabama were similar to the HWCA in the qualified labor pool for the job of correctional counselor. *Id.* at 331.

68. Satisfying a selection criterion is an opportunity protected by Title VII. *Connecticut v. Teal*, 457 U.S. 440 (1982) (holding plaintiffs proved disparate impact with evidence that their rate of success on a scored test was lower than the comparators').

69. For example, if an employer hired only Virgos, selection would have been random with respect to qualifications, but would not have disadvantaged blacks vis-à-vis whites or women vis-à-vis men.

or sex. A criterion that was not job related, but yielded a significant disparity, was not random with respect to race or sex. *Such a criterion selected on the basis of race or sex.* Indeed, it did nothing else but favor comparators over plaintiffs. It gave each comparator a better chance of being selected than each plaintiff, as the following diagram illustrates.

**NONJOB-RELATED SELECTION CRITERION WITH AN ADVERSE  
EFFECT**



Thus, race or sex was a but-for cause of the plaintiffs' disadvantage whenever the employer used a selection criterion that had an adverse effect on the plaintiffs' group (that is, created a disparity) and was not job related. In *Dothard*, the height and weight minima were not job related. Consequently, they selected at random with respect to qualifications. But they did not select at random with respect to sex. Because 99 percent of men but only 59 percent of women satisfied minima, they favored men over women. Each *qualified* man had almost twice the chance of satisfying the minima as each *qualified* woman had. Hence, sex was a but-for cause of the plaintiffs' disadvantage.<sup>70</sup>

It is apparent, therefore, that an employer's use of a selection criterion that had an adverse effect and was not job related was "in operation . . . functionally equivalent to intentional discrimination,"<sup>71</sup> that is, equivalent to explicit use of race or sex as a selection criterion.<sup>72</sup> In *Dothard*, the defendant's use of the height and weight minima had the same effect as if the defendant had said, "I will allow 99 percent of qualified men, but only 59 percent of qualified women, to advance in the hiring process."

70. Women tend to be smaller than men. This fact caused women to be less successful than men on the defendant's selection criteria. Women's lack of success on the selection criteria was the defendant's reason for not hiring them.

71. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988).

72. Every member of the plaintiffs' group had a lesser chance of success than every comparator. However, not every plaintiff was rejected, and not every comparator was selected. Therefore, the selection criterion had an adverse effect and was not job related, did not select exclusively on the basis of race or sex; but race or sex was one of the bases on which it selected.

Although the absence of job relatedness was crucial to the plaintiffs' proof of causation in a disparate impact case, the existence of job relatedness was an affirmative defense during most of the time prior to 1991.<sup>73</sup> Accordingly, at the close of the plaintiffs' evidence, the employer had the burden of proving that the selection criterion predicted success on the job (was job related). Proof that a selection criterion was job related undermined the plaintiffs' evidence of their qualifications. The reason was that a job-related selection criterion identified qualified workers. If a job-related selection criterion happened to produce a disparity, the disparity was legitimate: proportionally more comparators than plaintiffs were in fact qualified. Thus, proof of job relatedness refuted the evidence that qualified plaintiffs were denied an employment opportunity.<sup>74</sup>

CON argues that disparate impact may not be used to prove discrimination under the Age Act because, unlike Title VII, the Age Act demands that age be the sole cause of the employer's act; and sole causation is consistent only with disparate treatment.<sup>75</sup> The short answer to this argument is that sections 4(a)(1) and (2) prohibit discrimination "because of such individual's age," not "solely because." In addition, neither the Senate Report nor the House Report mentioned sole causation, though both reports used the phrases "because of age" or "based on age" several times.<sup>76</sup> Although some senators and representatives may have expressed the idea of sole causation, others spoke in the broader terms that are used in the statute.<sup>77</sup> Even more significantly, some of the very Congress members

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73. Between 1971 and 1989 it was generally thought that job relatedness was an affirmative defense, with the result that the burdens of production and persuasion on job relatedness fell on the employer. BARBARA SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1160 (1st ed. 1976); BARBARA SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1328 (2d ed. 1983) [hereinafter "SCHLEI & GROSSMAN, 2d ed.]; BARBARA SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW, FIVE-YEAR CUMULATIVE SUPPLEMENT TO SCHLEI AND GROSSMAN* 496 (2d ed. 1989). In *Wards Cove Packing Company v. Atonio*, 490 U.S. 642, 659-660 (1989), the Supreme Court held that the burden of production belonged to the employer, but the burden of persuasion rested on the plaintiffs. The 1991 amendments moved the burden of persuasion back to the employer. Civil Rights Act of 1991 § 105(a), 42 U.S.C. § 2000e-2 (2000).

74. For example, suppose plaintiffs allege sex discrimination in hiring for a job. The proxy is the pool of applicants, which includes 100 men and 100 women. The employer requires applicants to pass a written test. The test appears to have an adverse effect because 70 of the men and only 30 of the women pass. This disparity being statistically significant, it seems that the test unfairly favors men over women. But suppose the employer proves the test is job related. It distinguishes qualified from unqualified applicants. Therefore, whereas the plaintiffs' evidence *assumes* that the men and women who take the test are equally qualified, the employer's evidence *proves* that 70 of the men but only 30 of the women are in fact qualified.

75. See *infra* notes 112-113 and accompanying text.

76. S. REP. NO. 90-723, *supra* note 49, at 3-4 (summarizing the major provisions of the bill), 8-9 (section-by-section analysis); H.R. REP. NO. 90-805, *supra* note 54, at 3-4 (summarizing the major provisions of the bill), 8-9 (section-by-section analysis).

77. 113 CONG. REC. 34742 (1967) (statement of Rep. Burke) ("In the last several years, significant legislation to bar employment discrimination on the basis of race, religion, color, and sex has been

who spoke of sole causation also spoke in the broader statutory terms.<sup>78</sup> Most likely, when legislators said “sole cause,” they were thinking of explicit age limits and were not specifying a test of causation.

The text of the Age Act and the committee reports indicate that Congress intended the traditional but-for test of causation. This test allows discrimination to be proved by disparate impact, as *Griggs*, *Dothard*, and other cases under Title VII before the 1991 amendments demonstrated. When plaintiffs proved disparate impact, they established that the employer afforded them a lesser chance than comparators to benefit from an opportunity in which plaintiffs were interested and for which they were qualified. Thus, if the plaintiffs in *Dothard* had been the same sex as the comparators — that is, but for the plaintiffs’ sex — then they would have been afforded a greater chance to receive the opportunity.

The table below summarizes how the facts of *Dothard* proved the components of the disparate impact method of proof.

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enacted. It is only just that we do the same against discrimination on the basis of age.”). See also *id.* at 34746 (statement of Rep. Daniels) (“a provision is included which would make it unlawful for an employer, employment agency, or labor organization to discriminate against a worker on the basis of age”), 34750 (statement of Rep. Hechler) (“there are many older workers who have held jobs in the mines who are now being discriminated against because of age”), 34750 (statement of Rep. Pepper) (“It will prohibit . . . any employer, employment agency, or labor union employing more than 50 people from discriminating against any employee on account of age. After 1968 it will prohibit any employer, employing more than 25 employees from discriminating on account of age.”), 34751 (statement of Rep. Dwyer) (“Of the multitude of ways in which man discriminates against his fellow man, one of the most difficult to oppose effectively – and to overcome personally – is discrimination in employment because of age.”).

78. 113 CONG. REC. 35056 (1967) (statement of Sen. Yarborough) (“As a member of the full Committee on Aging of the Senate, I, too, have participated in those hearings, and we have learned much, on that Committee, of the problems of tens of millions of Americans who are barred arbitrarily from employment on account of age . . .”). See also *id.* at 31252 (statement of Sen. Yarborough) (“The bill is intended to ban discrimination in employment because of age . . .”), 31253 (statement of Sen. Yarborough) (“our national policy as declared by this bill will be to stop invidious distinctions in employment because of age”), 31254 (statement of Sen. Javits) (“I have a very special interest in this particular piece of legislation for I have been introducing bills to outlaw discrimination in employment on the grounds of age ever since I was a Member of the House of Representatives in 1951.”), 31255 (statement of Sen. Yarborough) (“It was not the intent of the sponsors of this legislation . . . to permit discrimination in employment on account of age, whether discrimination might be attempted between a man 38 and one 52 years of age, or between one 42 and one 52 years of age [sic].”), 34740 (statement of Rep. Perkins) (“H.R. 13054 . . . makes it unlawful for an employer to refuse to hire such a person because of his age or to discharge him . . . because of his age . . . [or] for an employment agency or a labor union . . . to discriminate against him because of his age.”), 34747 (statement of Rep. Dent) (“there was no parallel legal prohibition of discrimination because of age . . . Section 4 of the bill [makes it] unlawful for an employer . . . to fail or refuse to hire, or to discharge or discriminate against any individual . . . because of age.”).

Components of Disparate Impact	<i>Dothard v. Rawlinson</i>
1. Conventional evidence of coverage.	1. The Board of Corrections was a state agency, and states were covered.
2. Conventional evidence of an employment opportunity.	2. The employer was hiring correctional counselors.
3. A fair proxy for the qualified labor pool.	3. The national population was a fair proxy for the qualified labor pool for the job of correctional counselor.
4. The employer awarded the opportunity according to a selection criterion that favored the comparators over the plaintiffs in the proxy. The disparity in success rates was statistically significant.	4. The height and weight minima were satisfied by 99% of men but only 59% of women. This disparity was statistically significant.
5. The selection criterion did not identify qualified workers. Because the criterion also had an adverse effect, race or sex was in fact the chain of events that culminated in the employer's reason for action.	5. The height and weight minima were not job related.

## 2. *Disparate Treatment*

*In disparate treatment, causation was proved by the fact that the employer knowingly used race or sex as a basis of selection.*

It has just been shown that causation in disparate *impact* actions was established with proof that an employment practice had an adverse effect on the plaintiffs' group and served no legitimate interest of the business. In disparate *treatment* actions, causation was proved with evidence that race or sex was a fact in the employer's reason for action, in other words, that the employer intentionally disadvantaged the plaintiff because of race or sex. Because proof of causation was the only distinction between disparate treatment and disparate impact, the most profitable way to categorize disparate treatment cases is according to how they proved intent. Two major categories existed: cases that used only conventional evidence such as testimony and documents ("conventional disparate treatment"), and cases that used both conventional and statistical evidence ("statistical disparate treatment"). The proof in conventional disparate treatment pertained to how an employer treated one or a small number of persons; in statistical

disparate treatment, to how an employer treated many persons.

a. *Conventional Disparate Treatment*

In conventional disparate treatment, the dominant paradigm was the formula provided by the Supreme Court in *McDonnell Douglas v. Green*:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of race discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.<sup>79</sup>

The plaintiff in *McDonnell Douglas* satisfied the formula. He was an African-American who had been laid off from a job due to lack of business. He applied for recall when business improved, but the employer rejected him.<sup>80</sup>

The *McDonnell Douglas* formula called for conventional evidence that the employer was covered by the act, that the plaintiff was qualified for the job, and that the employer denied the job to the plaintiff. The employer's seeking of applicants with the plaintiff's qualifications proved that a job was available. The application proved the plaintiff's willingness to accept the job. When the plaintiff's race or sex was added to these facts, the formula permitted the inference that race or sex was a cause of the employer's act. Justice Rehnquist later explained the basis of this inference:

A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on consideration of impermissible factors. . . . [W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.<sup>81</sup>

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79. 411 U.S. 792, 802 (1973) (citation omitted). The formula omitted evidence that the employer was covered by the act, but we will assume the formula included such evidence.

80. The case was remanded to give the employer an opportunity to rebut the plaintiff's evidence, and the employer did. *Green v. McDonnell Douglas Corp.*, 390 F. Supp. 501 (E.D. Mo. 1975), *aff'd*, 528 F.2d 1102 (8th Cir. 1976). However, we are focusing on the components of disparate treatment and how the *McDonnell Douglas* formula proved them. For this purpose, the plaintiff prevailed, and the subsequent history of the case can be ignored.

81. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (emphasis in original).

b. *Statistical Disparate Treatment*

In statistical disparate treatment cases, perhaps the most common focus was hiring. The statistical evidence showed that the employer hired proportionally fewer qualified members of the plaintiff's group than comparators, and the conventional evidence showed that race or sex influenced the hiring. *Hazelwood School District v. United States* provides a good example.<sup>82</sup>

Conventional evidence proved that the employer was covered by the act and offered an employment opportunity. In *Hazelwood*, the employer was a school district and it was hiring teachers.

Statistical evidence functioned in the same way in statistical disparate treatment actions as in disparate impact actions. The plaintiffs identified a fair proxy for the qualified labor pool, and thereby proved they were willing and able to do the job. In *Hazelwood*, the plaintiff proposed as a proxy the teachers in the county in which the school district was located; 84.6 percent of them were white and 15.4 percent were black. When a court accepted the plaintiffs' proxy as fair, the proxy thereafter stood for the qualified labor pool, and whatever was proved about the proxy was presumed to be true of the qualified labor pool. In *Hazelwood*, the plaintiff's proxy indicated that 15.4 percent of persons willing and able to take teaching jobs in the school district were black.<sup>83</sup>

The next step in statistical disparate treatment was a showing that the employer denied employment opportunities to the plaintiffs. Plaintiffs made this showing with evidence of a disparity between their representation in the proxy and their representation among beneficiaries of the opportunity in question. In *Hazelwood*, the district had hired 405 new teachers. Being 15.4 percent of the proxy, blacks would have received approximately  $(.154 \times 405 =) 62$  jobs if race had played no role in hiring; but only 15 or  $(15 \div 405 =) 3.7$  percent of the new teachers were black. Thus, the plaintiff proved a disparity between the expected outcome in a non-discriminatory process (62 black teachers) and the actual outcome in this case (15 black teachers). Applying a standard technique, the Court noted that the disparity was statistically significant.<sup>84</sup> This meant that the disparity was highly unlikely to have occurred by chance in a process not influenced by race. It

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82. 433 U.S. 299 (1977).

83. The defendant challenged this proxy by pointing out that the major city in the county had an affirmative action program that attracted a large share of the black teachers in the county. Accordingly, the defendant argued that the plaintiff's proxy was inappropriate because it included the city; the defendant proposed as a proxy the teachers in the county excluding the city. Approximately 94 percent of the teachers in this proxy were white and 6 percent black. The Supreme Court remanded the case to the district court for a finding as to the appropriate proxy. *Id.* at 310-12. In the text we will use the plaintiff's proxy.

84. *See id.* at 310 n.17 (citing *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977)).



followed that the employer denied jobs to approximately (62 - 15 =) 47 black teachers.

Then the issue became causation. Why did the disparity occur? Statistical evidence can suggest the reason for an act, but cannot prove a reason.<sup>85</sup> Only conventional evidence can prove a reason. Therefore, the last step in statistical proof of disparate treatment was for the plaintiff to present conventional evidence of causation. In *Hazelwood*, the plaintiff proved that the defendant had openly refused to hire black teachers in the past, recruited only at predominantly white colleges, and left hiring decisions to the unsupervised discretion of principals, who used subjective criteria. In addition, the plaintiff proved, using the *McDonnell Douglas* formula, that the defendant had discriminated against 16 individuals. This evidence proved that race was a cause of the employer's act.

The principal defense to disparate treatment was the bona fide occupational qualification (BFOQ). Title VII allowed an employer to limit an employment opportunity to members of a particular religion, sex, or national origin if the characteristic was "reasonably necessary to the normal operation of that particular business or enterprise."<sup>86</sup> For present purposes, the important aspect of this defense is that a BFOQ destroyed the element of qualifications in the prima facie case (as did the defense of job relatedness in disparate impact).<sup>87</sup> If a characteristic like sex or religion was genuinely a BFOQ for a job, then anyone lacking the characteristic was not qualified for the job. For example, men are not qualified for the job of modeling women's bathing suits.<sup>88</sup> Being qualified for the job was a component of disparate treatment.

It was shown above that proof of job relatedness in a disparate impact action rebutted the plaintiffs' proof of qualifications for the job. Here it has been shown that proof of a BFOQ also rebutted the plaintiff's proof of qualifications.

The table below summarizes how the facts of *McDonnell Douglas* and *Hazelwood* proved the components of disparate treatment.

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85. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977) ("Statistics showing racial or ethnic imbalance are probative . . . because such imbalance is often a telltale sign of purposeful discrimination. . .").

86. Civil Rights Act of 1964 (Title VII) §703(e), 42 U.S.C. § 2000e-2 (2000).

87. See *supra* note 74 and accompanying text.

88. Equal Employment Opportunity Commission, Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a)(2) (2003). See also LINDEMANN & GROSSMAN, 3d ed., *supra* note 9, at 393-396.

<b>Components of Disparate Treatment</b>	<b><i>McDonnell Douglas</i> Formula</b>	<b><i>Hazelwood v. United States</i></b>
1. Conventional evidence of coverage.	1. The employer had 15 or more employees.	1. The employer was a public school district, and public employers were covered.
2. Conventional evidence of an employment opportunity.	2. The employer sought applicants.	2. The employer hired 405 teachers.
3. Conventional Conventional evidence of interest and qualifications. Statistical A fair proxy for the qualified labor pool.	3. The plaintiff formerly held the job and applied for recall.	3. Teachers in the county were a fair proxy for the qualified labor pool.
4. Conventional Conventional evidence that the employer denied the opportunity to the plaintiff. Statistical A statistically significant disparity between the plaintiffs and the comparators to whom the employer awarded the opportunity.	4. The plaintiff's application was rejected.	4. The employer hired 47 fewer blacks than would have been expected in a non-discriminatory process.
5. Race or sex was a cause of the employer's act in that the employer intentionally denied the plaintiff an employment opportunity because of race or sex.	5. The plaintiff was an African-American, was qualified, and applied for a job that was available. The legitimate reasons for rejecting the plaintiff having been ruled out, race or sex was a cause of the employer's refusal to rehire the plaintiff.	5. The employer had openly refused to hire black teachers in the past, recruited only at predominantly white colleges, and left hiring decisions to the discretion of principals who used subjective criteria. Sixteen qualified blacks applied and were rejected. Thus race or sex was a cause of the employer's hiring decisions.

### 3. *Overlap of Disparate Treatment and Disparate Impact*

*Disparate treatment and disparate impact overlapped almost entirely; they differed only in the methods used to establish that race or sex was a cause of the employer's act. Relief under Title VII before 1991 was the same, whether the plaintiff used disparate treatment or disparate impact; this is further evidence that disparate treatment and disparate impact were methods of proof, not claims.*

If disparate treatment and disparate impact were different methods of proving the same claim, as Justice Powell's theorem held, it would not be surprising if they overlapped substantially. And overlap they did in all regards except for the way of proving causation.

Disparate impact and both forms of disparate treatment used conventional evidence to show that the employer was covered by the act and offered an employment opportunity.

Conventional disparate treatment used conventional evidence to establish the plaintiff's interest in the opportunity and qualifications for it. Statistical disparate treatment and disparate impact established these facts via a fair proxy for the qualified labor pool.

Conventional disparate treatment also used conventional evidence to prove that the employer denied the opportunity to the plaintiff. Disparate impact and statistical disparate treatment proved this fact by means of a statistically significant disparity between the success rates of the plaintiffs and the comparators in the proxy.

Both forms of disparate treatment proved that race or sex was a but-for cause of the employer's act by showing that the employer intentionally rejected the plaintiff because of race or sex. The employer's intent was proved with conventional evidence, both direct and circumstantial, such as that the employer recruited only at predominantly white colleges and that all legitimate reasons for rejecting the plaintiff were ruled out.

Disparate impact proved that race or sex was a but-for cause of the employer's act by showing that the selection criterion did not identify qualified workers, but did favor comparators over plaintiffs.

The defenses were also the same. If sex, religion, or national origin was a BFOQ for a job, then individuals who lacked the relevant characteristic were not qualified to do the work. A man was not qualified to portray Cleopatra. If a selection criterion was job related, individuals who failed to satisfy the criterion were not qualified to do the work. If a job required the ability to type at 75 words per minute, a man who scored 50 words per minute on a typing test was not qualified for the job, even if proportionally fewer men than women passed the test.

In sum, disparate treatment and disparate impact were

indistinguishable, except for the way of proving that race or sex was a cause of the employer's act. Both proved that race or sex influenced the employer's act, but disparate treatment proved that the employer knew of the role played by race or sex (it was a fact in the reason for action), whereas disparate impact proved that race or sex was a fact in the chain of events that culminated in the employer's reason for action.

*The conclusion follows that causation was an element of the claim of discrimination, but intent was not. Intent was one of two ways of proving causation.*

This conclusion is fortified by the relief that was available under Title VII. Whichever method of proof the plaintiff used — disparate treatment or disparate impact — the relief was the same: back pay and an injunction.<sup>89</sup>

#### 4. *The Claim of Discrimination*

*The elements of the claim of discrimination are stated.*

This analysis of disparate treatment and disparate impact establishes that the elements of the claim of discrimination were

1. The employer was covered by the act.
2. The employer offered an employment opportunity.
3. The plaintiff was protected by the act —
  - a. was qualified for the opportunity
  - b. was willing to accept the opportunity.
4. The employer denied the opportunity to the plaintiff.
5. Race or sex was a cause of the denial.

The table below summarizes the components of disparate treatment and disparate impact and shows how they proved the elements of the claim of discrimination.

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89. See SCHLEI & GROSSMAN, 2d ed., *supra* note 73, chs. 37-38 (discussing back pay and injunctions).

Elements of the Claim of Discrimination	Components of Disparate Treatment	Components of Disparate Impact
1. The employer was covered by the act.	1. Conventional evidence of coverage.	1. Conventional evidence of coverage.
2. The employer offered an employment opportunity.	2. Conventional evidence of an employment opportunity.	2. Conventional evidence of an employment opportunity.
3. The plaintiff was protected by the act — was qualified for and willing to accept the opportunity.	3. Conventional Conventional evidence of interest and qualifications. Statistical A fair proxy for the qualified labor pool.	3. A fair proxy for the qualified labor pool.
4. The employer denied the opportunity to the plaintiff.	4. Conventional Conventional evidence that the employer denied the opportunity to the plaintiff. Statistical A statistically significant disparity between the plaintiffs and the comparators to whom the employer awarded the opportunity.	4. A statistically significant disparity between the plaintiffs and the comparators to whom the employer awarded the opportunity.
5. Race or sex was a cause of the denial.	5. The employer intentionally denied an opportunity to the plaintiff because of race or sex.	5. The selection criterion according to which the opportunity was awarded did not identify qualified workers, but favored the comparators over the plaintiffs.

### 5. Application to the Age Act

*Justice Powell's theorem, which characterized Title VII before 1991, applies to the Age Act, which was not amended in any relevant way in 1991.*

Justice Powell's theorem is no longer true of Title VII. The overlap of disparate treatment and disparate impact remains true, but the Civil Rights Act of 1991 has created separate claims with different relief for intentional and unintentional discrimination; the former is proved by disparate

treatment, and the latter, by disparate impact. Nevertheless, the theorem continues to apply to the Age Act, which Congress did not amend in any relevant way in 1991. Disparate treatment and disparate impact remain alternative methods of proof under the Age Act.

*B. CON: Justice Powell's Theorem Is False*

*A claim is a group of facts which gives rise to relief. The facts of disparate treatment differ from the facts of disparate impact, and therefore, disparate treatment and disparate impact are separate claims.*

PRO is mistaken. Justice Powell's theorem is false. Disparate treatment and disparate impact have always been separate claims. A claim is "a *group of facts* which give rise to one or more rights of relief."<sup>90</sup> If group *A*, comprising facts 1, 2, and 3, justifies relief of some sort, and if group *B*, comprising facts 2, 3, and 4, also justifies relief, groups *A* and *B* are different claims. For example, the torts of assault and battery are similar, except that the plaintiff's apprehension of an intentional harmful or offensive contact is an element of assault only, and physical contact is an element of battery only.<sup>91</sup> Likewise, disparate treatment and disparate impact are similar, but they are distinguished by the fact of intent. Intent is an element of the former but not the latter, and therefore, they are and always have been separate claims.

IV.

PROHIBITION OF AGE DISCRIMINATION IN EMPLOYER PRACTICES: SECTION 4(a)(2)

*A. PRO: Section 4(a)(2) Includes Disparate Impact*

*Sections 703(a)(1) of Title VII and 4(a)(1) of the Age Act are aimed at intentional discrimination, i.e., disparate treatment. The bases of disparate impact are sections 703(a)(2) and 4(a)(2).*

The surest indication of the will of Congress is the text of an act. Begin with the prohibitory sections of the Age Act. Because these sections are practically identical to the corresponding sections of Title VII (except for the classes protected), and the two statutes are so often compared, below are quoted the relevant prohibitory sections of both acts.

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90. FLEMING JAMES, JR., CIVIL PROCEDURE 76 (1965) (emphasis in original) (citing CHARLES EDWARD CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 137 (2d ed. 1947) and *Elliott v. Mosgrove*, 93 P.2d 1070 (Or. 1939)).

91. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 41 (1964).

Age Act	Title VII
<p>SEC. 4. (a) It shall be unlawful for an employer —</p> <p>(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age;</p> <p>(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age.<sup>92</sup></p>	<p>SEC. 703. (a) It shall be an unlawful employment practice for an employer —</p> <p>(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or</p> <p>(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.<sup>93</sup></p>

Whether the Age Act embraces disparate impact depends on whether section 4(a)(1) or section 4(a)(2) require proof of intent.

The term “to discriminate” in sections 703(a)(1) of Title VII and (4)(a)(1) of the Age Act is so obviously aimed at intentional acts<sup>94</sup> that

92. 29 U.S.C. § 623 (2003).

93. 42 U.S.C. § 2000e-2 (2000).

94. The root meaning of the verb “to discriminate” is simply to distinguish. The verb derives from the Latin word “*discriminatus*, past part[iciple] of *discriminare* to divide, distinguish, fr[om] *discrimin-*, *discrimen* division, distinction, decision, fr[om] *discernere* to separate, distinguish between. . . .” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 648 (1981) (unabridged). The verb began to carry a negative connotation, as in “to discriminate against,” as early as 1880. See OXFORD ENGLISH DICTIONARY VOLUME III 436 (1st. ed 1897) (“*to discriminate against*: to make an adverse distinction with regard to; to distinguish unfavourably from others. 1880 MARK TWAIN (Clemens) *Tramp. Abr.* II 153, I did not propose to be discriminated against on account of my nationality.”). By 1930 “to discriminate against” had come into common usage. See WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 637 (1st. ed 1930) (unabridged) (“*discriminate, v.i. . . . 2.* To make a difference in treatment or favor (of one as compared with others); as, to *discriminate* in favor of one’s friends; to *discriminate* against a special class.”).

Mark Twain in 1880, the Oxford English Dictionary in 1897, and Webster’s New International Dictionary in 1930 must have had intentional discrimination in mind. No one suggests that the idea of unintentional discrimination existed in those days. Although we have not pinpointed when the idea of disparate impact first developed, we can assert that it was not generally understood in the 1960’s when Title VII and the Age Act were passed. See Michael Evan Gold, *Griggs’ Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 520-564 (1985) [hereinafter “Gold, *Griggs’ Folly*”].

See also WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 745 (2d ed. 1952) (unabridged) (giving exactly the same definition of “to discriminate” that appeared in the first edition); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 648 (3d

sections 703(a)(2) of Title VII and 4(a)(2) of the Age Act are more appropriate as the statutory bases for disparate impact.<sup>95</sup> The question, therefore, is whether intent is an element of section 4(a)(2).

### 1. *The Text of Section 4(a)(2)*

*An employment practice with a disparate impact "limit[s]" or "classifies]" workers so as to deny them employment opportunities.*

The first phrase of section 4(a)(2) of the Age Act names three specific acts — "to limit, segregate, or classify . . . employees." Given the long history of intentional racial segregation in this country, let us accept that "segregate" refers to an intentional act. The other two words in the phrase, however, have no such history, and they are modified so as to give them maximum reach: "to limit . . . or classify *in any way* which would deprive *or tend to deprive* any individual of employment opportunities . . ." (emphasis added). An employment practice with a disparate impact limits the advancement of qualified workers and classifies them so as to deprive them of employment opportunities.

### 2. *Precedent*

*The Supreme Court has held that section 703(a)(2) embraces disparate*

ed. 1961) (unabridged) (changing the wording but not the sense of the definition: "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit <~ in favor of your friends><habitually ~ against a certain nationality>"). Abridged versions of these works, appearing as various editions of Webster's New Collegiate Dictionary, were likely to have been used by many representatives and senators. See NEW COLLEGIATE DICTIONARY 237 (1960) (using an abbreviated version of the definition found in the first and second editions of Webster's New International Dictionary, unabridged: "to make a difference in treatment or favor (of one as compared with others)"); WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 238 (1965) (abridged) (using the same definition as the third edition of Webster's New International Dictionary, unabridged: "to make a difference in treatment or favor on a basis other than individual merit").

Dictionaries from other publishers were similar. See RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 411 (1966) (unabridged) (defining "to discriminate" similarly to the definition in Webster's Third New International, unabridged, of 1961: "to make a distinction in favor of or against a person or thing on the basis of the group, class, or category to which the person or thing belongs, rather than according to individual merit: *He discriminates against foreigners*"); WEBSTER'S NEW WORLD DICTIONARY OF THE ENGLISH LANGUAGE 418 (WORLD PUBLISHING CO., 1966) (offering substantially the same definition: "to make distinctions in treatment; show partiality (*in favor of*) or prejudice (*against*).").

That the same or very similar words were used to define "to discriminate" between 1930 and 1966 implies that the meaning of this verb was also the same: it referred to intentional discrimination.

95. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 426, n.1 (1971) (holding employer liable for violating section 703(a)(2) on the disparate impact theory); *Connecticut v. Teal*, 457 U.S. 440, 445 (1982) (same).



*impact. The Court has also said that section 4(a)(2) was copied from section 703(a)(2).*

The Supreme Court stated the obvious in *Lorillard v. Pons*: “the prohibitions of the [Age Act] were derived in *haec verba* from Title VII.”<sup>96</sup> By copying section 4(a)(2) of the Age Act from section 703(a)(2) of Title VII, Congress intended section 4(a)(2) of the Age Act to mean exactly what section 703(a)(2) of Title VII meant. The Court held in *Griggs* that section 703(a)(2) of Title VII embraced disparate impact. In *Oscar Mayer & Co. v. Evans*, the Court added that “the [Age Act] and Title VII share a common purpose, the elimination of discrimination in the workplace.”<sup>97</sup> It follows that Congress meant section 4(a)(2) of the Age Act to outlaw employment practices with a disparate impact.

### 3. Causation

*The words “because of age” require a causal connection between the denial of an employment opportunity and a worker’s age. The cause of the act of a free agent may be a fact in the agent’s reason for acting; in this case, which in the present context, is called disparate treatment, the agent is aware of the fact. The cause of an act of a free agent may also be a fact in a chain of events that culminates in the agent’s reason for acting; in this case, which in the present context, is called disparate impact, the agent need not be aware of the fact.*

The words “because of . . . age” in section 4(a)(2) of the Age Act indicate that the denial of an employment opportunity is unlawful only if the denial is caused by age. (A denial caused by personal animosity, for example, or political affiliation would not violate the statute.) There being no indication to the contrary, it is appropriate to assume that Congress had ordinary ideas of causation in mind. Two of them are presently relevant. The first idea of causation holds that a fact in a person’s reason for action is a cause of the act; the disparate treatment method of proving discrimination incorporates this idea. The second idea of causation holds that a fact in a chain of facts that culminates in a reason for action is a cause of the act; the disparate impact method of proving discrimination incorporates this idea. These ideas require explication.

Let us begin with what may be called “empirical causation.” Regarding all things empirical except humans, causation is an hypothesis. We want to explain why event *E* occurs, usually because we want to

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96. 434 U.S. 575, 584 (1978) (citation omitted).

97. 441 U.S. 750, 756 (1979).

replicate it or prevent it, or simply to understand it. We observe that event *C* regularly precedes *E*, and we conclude that *C* is the cause (or one of the causes) of *E*. We observe rain precede floods, and we conclude that rain causes floods. We observe a white billiard ball roll towards and strike a colored billiard ball, which then moves, and we conclude that the white ball caused the colored ball to move. Yet we never observe empirical causation. It is not a sensible phenomenon. Rather, causation is an hypothesis, an idea, a mental construct. We observe, and our minds supply the connections.

Empirical causation is perhaps the most successful hypothesis in history. Most people believe in it so firmly that they reject any challenge to it out of hand. Who would say that the theory of causation might be false? Who would disagree that every event has a cause?

And yet, in the realm in which we have the most constant and immediate evidence, the realm of our own behavior, all of us (except determinists) reject empirical causation. The hypothesis of causation does not explain the subjective experience of human decision making. Instead, we employ the doctrine of free will to explain this experience. Lawyers and most other persons believe that the human will does not have empirical causes. Human agents make free choices, and then are responsible for them. Indeed, in those rare circumstances in which a person is not a free agent, in which one's will is overborne — in which empirical causation genuinely exists — we hold that the person has not truly acted and is not responsible, even though the person was not physically manipulated. Our laws are not concerned with such acts. Our laws are concerned only with acts reflecting choice and emanating from free will.

Although we believe that human acts have no empirical causes, we continue to explain human acts in causal terms. The question, therefore, arises: what do we have in mind when we speak of "human causation?" What does it mean to say that free agent *A* acted "because of" cause *C*? This question is more easily addressed in another form, namely, what causes a human act? An empirical fact may not be such a cause; if it were, it would be tantamount to an empirical cause, which is inconsistent with free will. Rain does not cause an agent to carry one's umbrella. Rain may cause a flood, but a free agent who observes rain has a choice about whether to carry one's umbrella.

If an empirical fact does not cause a human act, what does? The answer is a reason. A reason may be the cause of a human act because a free agent can decide whether a given reason warrants action. Thus, it is entirely correct to say:

*(1) A carried her umbrella because she wanted to protect herself from the rain.*

Statement (1) means that *A* performed the act of carrying her umbrella,

and her reason for this act was her desire to protect herself from the rain.

We are now prepared to answer the prior question above, namely, what does it mean to say that free agent *A* acted “because of” cause *C*? Human acts are caused, not by empirical facts, but by reasons upon which a free agent decides whether or not to act. Therefore, *C* must be a reason in the agent’s mind, and to say that *A* acted “because of” *C* is to say that *C* was *A*’s reason for action.

Nevertheless, we commonly say that a human act was caused by an empirical fact. Suppose that rain was falling to the west of *A*’s home in the early morning hours. The wind was blowing from the west, and the National Weather Service predicted a 90 chance that the rain would reach *A*’s city by noon. Before leaving for work, *A* listened to the weather forecast, which said, “There is a 90 percent chance of rain today,” and she decided to carry her umbrella. It would be correct to say:

(2) *A carried her umbrella because the wind was blowing from the west.*

A statement like (2) is not meant to repudiate the doctrine of free will. Although the literal meaning of the statement is that an empirical fact caused the agent’s act, we understand the statement to mean that the fact is a proximate part of a chain of facts that culminates in a reason for action. When we say *A carried her umbrella because the wind was blowing from the west*, we mean that the westerly wind was a fact in a chain of facts that culminated in her reason for action.

The idea of causation reflected in a chain of facts is, in essence, the idea of causation in science. Consider lung cancer and smoking tobacco. In what sense does smoking cause lung cancer? Not every victim of lung cancer smokes tobacco; thus, smoking is not a necessary cause of lung cancer. Not every long-time smoker develops lung cancer; thus, smoking is not a sufficient cause of cancer. Yet the data reveal such a strong association between smoking and lung cancer that we reasonably believe that a causal connection exists between them. Our belief would turn to certainty if we understood the chain of facts in greater detail. For example, suppose DNA in humans breaks spontaneously with a certain frequency; that such damage to DNA can lead to cancer; that smoking also damages DNA; that certain enzymes repair damage to DNA; and that the production of such enzymes varies with individuals.<sup>98</sup> If these facts turn out to be true, they would explain why some non-smokers develop lung cancer — they produce too few enzymes to repair spontaneous damage to their DNA; why some long-time smokers do not develop lung cancer — they produce sufficient enzymes to repair all damage to their DNA, whether generated spontaneously or by smoking; and why smokers as a group develop lung

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98. See Nathan Seppa, *Damage Control*, SCI. NEWS, Sept. 13, 2003, at 164.

cancer more than non-smokers do — many smokers produce enough repair enzymes to cope with spontaneous damage to their DNA, but not enough to cope with the additional damage caused by smoking. In this example, smoking, which we call a cause of cancer, is an element in a chain of facts that often culminates in lung cancer.

One further dimension of causation requires discussion, namely, the agent's awareness of facts that are identified as causes. In statements like (1), the agent's reason includes an empirical fact (rain), and the agent is necessarily aware of this fact. But in statements like (2), the fact identified as a cause (the westerly wind) is not a part of the agent's reason, and the agent may or may not be aware of this fact. *A* heard the weather forecast; she did not know about the rain to the west or the westerly wind. Nonetheless, facts which are part of the chain of facts that culminates in the agent's reason for action are properly identified as causes if they are sufficiently proximate to the agent's reason. We may say that *A* carried her umbrella because of the weather forecast, of which she was aware, or because of the rain to the west or the westerly wind, of which she was unaware.

These ideas may be applied to the Age Act. Assuming that Congress believed in free will and used the ordinary ideas of causation, the words "because of . . . age" refer either to a reason for action which, as the employer knew, contained age as a fact, or to a reason for action which, albeit without the employer's knowledge, was the culmination of a chain of facts that contained age as a proximate fact.

In describing disparate treatment cases above, it was noted that causation is satisfied because the employer intentionally uses race or sex as a basis of decision. This description corresponds to one of the ordinary ideas of causation that Congress incorporated into the Age Act, namely, a reason for action which, as the employer knows, contains age as a fact. For example, suppose an employer refuses to hire anyone over the age of 40 for a certain job. The employer's reason for action includes the worker's age. The employer knowingly uses this fact as a basis of action. This example is analogous to statement (1).

*(1') The employer denied an older worker a job because the worker was too old.*

In describing disparate impact cases above, it was noted that causation is satisfied because the employer, albeit unknowingly, uses race or sex as a basis of action. This description corresponds to the other ordinary idea of causation that Congress incorporated into the Age Act, namely, a reason for action which, without the employer's knowledge, is the culmination of a chain of facts that contains age as a proximate element (scientific causation). For example, suppose that an employer decides whom to hire according to scores on a written test that includes questions about

contemporary youth culture, and the test has a disparate impact on older workers. Not being job related, the test does not select qualified candidates; having an adverse effect as well, the test disadvantages older workers. This employer unknowingly uses age as a basis of decision, and age is a proximate fact in the chain of facts that culminates in the employer's action. The chain comprises the facts that youth culture changes rapidly, that older persons tend to be disinterested in youth culture, that the test contains questions about contemporary youth culture, that proportionally more younger workers than older workers pass the test, that the test does not predict success on the job, that the employer hires only workers who pass the test, and that the employer hires proportionally more qualified younger workers than qualified older workers. This example is analogous to statement (2).

*(2') The employer denied jobs to older workers because the test contained question about contemporary youth culture.*

This examination of the text of section 4(a)(2) of the Age Act leads to the conclusion that causation is an element of the section, that causation may be established with or without proof of intent, and, therefore, that the section bars disparate impact as well as disparate treatment. This conclusion is reinforced by the *differences* between the Age Act and Title VII.

#### 4. *Differences Between the Age Act and Title VII*

*Congress differentiated the Age Act from Title VII where age discrimination differs from race or sex discrimination. That section 4(a)(2) is not differentiated from section 703(a)(2) shows that Congress wanted the sections to carry the same meaning.*

It was noted above that Congress decided not to include age in Title VII and directed the Secretary of Labor to study the matter. The postponement was wise because the Secretary found significant differences between race or sex discrimination and age discrimination. In his Report to Congress the following year, the Secretary wrote:

The Nation has faced the fact — rejecting inherited prejudice or contrary conviction — that people's ability and usefulness is [sic] unrelated to the facts of their race. . . . Having accepted this truth, the easy thing to do would be simply to extend the conclusions derived from it to the problem of discrimination in employment based on aging, and be done with the matter. This would be easy — and wrong.<sup>99</sup>

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99. Secretary's Report, *supra* note 18, at 1.

It would have been wrong because unique issues pertained to age discrimination.<sup>100</sup>

One issue unique to age was fringe benefits, such as pensions and life insurance. For this purpose, an employer could treat whites and people of color the same, but an employer could not treat a newly hired worker aged 27 the same as a newly hired worker aged 47.<sup>101</sup> Under most plans, the latter was a more costly employee.<sup>102</sup> Congress dealt with fringe benefits in section 4(f)(2). It allowed an employer, "to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan . . . except that no such employee benefit plan shall excuse the failure to hire any individual."<sup>103</sup> According to two leading proponents of the Age Act, Senators Javits and Yarborough, this section meant that an employer could exclude a newly hired older worker from a pension or insurance plan or provide the older worker with reduced benefits.<sup>104</sup>

Another issue unique to age was time. Older workers might die or become disabled before getting justice if remedial procedures were too elaborate. Time was a lesser concern under Title VII, which required victims of race or sex discrimination to proceed through local agencies and the Equal Employment Opportunity Commission ("EEOC") before going to court.<sup>105</sup> As originally introduced, the Secretary of Labor's bill (S. 830 and H.R. 3651) was not sensitive to the issue of time. The first version of the bill would have placed enforcement in the hands of the Secretary. Section 7 of the bill contemplated that a victim of age discrimination would file a charge against an employer with the Secretary. The Secretary would then investigate. The bill directed that if the Secretary determined that the employer had committed an unlawful practice, then efforts be made to settle the matter "by informal methods of conference, conciliation, and persuasion."<sup>106</sup> If these methods failed, the Secretary would conduct an

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100. Legislators and witnesses before legislative committees agreed. For example, consider the following exchange between Representative Dent and Norman Sprague, director, Committee on Employment and Retirement of the National Council on the Aging:

MR. DENT. There is some demand that this legislation be put under the Equal Opportunities Office [that is, the Equal Employment Opportunity Commission]. Would you favor such a motion?

MR. SPRAGUE. No. I would not and I think the National Council on the Aging would not favor that. We feel that other forms of prejudice are distinctly different from age discrimination. We think age discrimination has with it too many other economic factors and should not be dealt with by equal-opportunities legislation.

MR. DENT. It seems to this member that this is a sound observation.

HOUSE HEARINGS, *supra* note 52, at 49.

101. Secretary's Research Materials, *supra* note 18, at 21-45.

102. *Id.* at 40-45.

103. Age Discrimination in Employment Act of 1967, § 4(f)(2), 26 U.S.C. § 623 (2003).

104. 113 CONG. REC. 31254-55 (1967) (statements of Sen. Javits and Sen. Yarborough).

105. Civil Rights Act of 1964 § 706, 42 U.S.C. § 2000e-5(f) (2000).

106. S. 830, 90th Cong., § 7 (1967).

administrative hearing. If the result of the hearing was a determination that the employer had broken the law, the Secretary could issue a cease-and-desist order. The order, however, would not be self enforcing. To secure enforcement, the Secretary would have to petition a federal court of appeals.

Senator Javits urged the Senate Committee on Labor and Public Welfare to strike this lengthy procedure,<sup>107</sup> and the committee complied. It adopted a much speedier procedure, which was enacted and which took account of the fact that time works against older workers: a victim of age discrimination could file a lawsuit sixty days after notifying the Secretary of Labor of the intent to sue.<sup>108</sup>

Where Congress saw significant differences between age discrimination and race or sex discrimination, the Age Act was differentiated from Title VII. It is fair to infer that where the two acts were not differentiated, Congress did not see significant differences between age discrimination and race or sex discrimination. Congress did not differentiate between sections 703(a)(2) of Title VII and 4(a)(2) of the Age Act; the sections are virtually identical. The conclusion is obvious: the meaning of the sections is also identical.

### *B. CON: Section 4(a)(2) Precludes Disparate Impact*

*Legislative history demonstrates that Congress did not intend disparate impact under Title VII or the Age Act.*

#### *1. Precedent*

*Griggs misread the intent of Congress.*

PRO'S reliance on *Griggs v. Duke Power Company* is misplaced. It is time to recognize that the *Griggs*' construction of section 703(a)(2) of Title VII was mistaken. Congress was largely innocent of disparate impact while

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107. The Administration's bill . . . would require the establishment of a wholly new and separate bureaucracy within the Labor Department, replete with regional directors, attorneys and investigators, as well as trial examiners. Aside from the needless duplication of functions involved, one result of the Administration's approach will surely be the same delays which plague so many of our agencies, such as the EEOC and the NLRB [National Labor Relations Board]. The EEOC, for example, is already years behind in disposing of its docket. Such delay is always unfortunate, but *it is particularly so in the case of older citizens to whom, by definition, relatively few productive years are left.* By utilizing the courts rather than a bureaucracy within the Labor Department as the forum to hear cases arising under the law, these delays may be largely avoided.

*Senate Hearings, supra* note 15, at 24 (statement of Sen. Javits).

108. S. REP. NO. 90-723, *supra* note 49, at 5. Age Discrimination in Employment Act of 1967, §§ 7(c)-7(d), 29 U.S.C. § 626(d) (2003).

Title VII was being debated, and, further, in the few instances in which practices that have an adverse effect were considered (nepotism in admission to labor unions, seniority systems, and professionally developed written tests), Congress decided that they were beyond the reach of the statute.<sup>109</sup> The error of *Griggs* should not be repeated under the Age Act.

## 2. *The Text of Section 4(a)(2)*

*PRO'S argument based on the text of section 4(a)(2) is anachronistic.*

PRO'S argument about the meaning of the words "limit" and "classify" in section 4(a)(2) interprets those words with today's dictionary in mind, not the dictionary of 1967.<sup>110</sup> The following sections of this article demonstrate that the proponents of the Age Act meant to prohibit only intentional discrimination.

## 3. *The Legislative History of Section 4(a)(2)*

*The legislative history of section 4(a)(2) reveals that Congress did not mean to outlaw disparate impact in 1967.*

### a. *Sole Cause as the Test of Causation*

*Congress intended sole causation to be the test of causation under the Age Act.*

PRO argues that disparate impact establishes but-for causation.<sup>111</sup> Sole

109. Gold, *Griggs' Folly*, *supra* note 94, at 530-549. An additional piece of evidence is an amendment offered in the House of Representatives that would have made it unlawful to prefer one employee over another "for reasons which may have the indirect effect of causing discrimination because of race. . ." 110 CONG. REC. 2593 (1964) (amendment offered by Rep. Cahill). Representative Griffin explained why he could not support the amendment:

The amendment . . . refers to other practices which "may" have the "indirect effect" of discriminating on the basis of race, color, and so forth. I should like to say for the record and for the purpose of establishing legislative history, that if a union, or an employer, for that matter, engage in a practice which is a subterfuge amounting to discrimination on the basis of race, color, or creed in some indirect fashion then a court would probably find that such a practice would fall within the scope of this bill. However, so far as the gentleman's amendment is concerned, there are factors such as seniority, length of employment, and other factors which could affect union membership, union rights, and so forth, and have nothing to do with color, race, or creed. . . . I hesitate to support the amendment for the reasons I have indicated.

*Id.* at 2594. The amendment was defeated. *Id.* at 2595.

110. See *supra* Part IV(A)(1).

111. See *supra* notes 69-70 and accompanying text.



causation, however, is the appropriate test under the Age Act. Senator Yarborough, the floor manager of S. 830, and Senator Javits, the leading proponent of a bill against age discrimination, each indicated their belief that sole causation would be the test of causation under the Age Act. Senator Yarborough stated, "In simple terms, this bill prohibits discrimination in hiring and firing workers solely because they are over 40 and under 65."<sup>112</sup> Senator Javits stated:

[I]f two individuals ages 52 and 42 apply for the same job, and the employer selected the man aged 42 solely – and I emphasize that word "solely" – because he is younger than the man 52, then he will have violated the act. . . . The question here is: Was the individual discriminated against solely because of his age?<sup>113</sup>

In the House of Representatives, similar statements were made by Representative Perkins,<sup>114</sup> who was the chair of the House Committee on Education and Labor;<sup>115</sup> by Representative Dent,<sup>116</sup> who was chair of the General Subcommittee on Labor of the House Committee on Education and Labor;<sup>117</sup> and by Representatives Pucinski,<sup>118</sup> Hawkins,<sup>119</sup> Olsen,<sup>120</sup> Matsunaga,<sup>121</sup> and Randall.<sup>122</sup>

Sole causation plainly refers to an action based on a single, illegal reason, such as an explicit age limit (which is clearly disparate treatment).

112. 113 CONG. REC. 31252 (1967).

113. *Id.* at 31255.

114. "A person at age 40 or 45 . . . often finds that his age is a great handicap in finding a job . . . . Despite the fact that these men are educable, retrainable, and desirous of gainful employment, they have been denied employment opportunities merely because they have reached or passed age 40." *Id.* at 34740.

115. CCH CONGRESSIONAL INDEX, 90TH CONGRESS 6007 (1967-68).

116. The bill . . . provides relief only when a qualified person who is ready, willing, and able to work is unfairly denied or deprived of a job solely on the basis of age. . . . The bill recognizes two distinct types of unfair discrimination based on age: First, the discrimination which is the result of misunderstanding of the relationship of age to usefulness; and second, the discrimination which is the result of a deliberate disregard of a worker's value solely because of age.

113 CONG. REC. 34747 (1967).

117. CCH CONGRESSIONAL INDEX, 90TH CONGRESS 6008 (1967-68).

118. "But these programs will not help if the older worker with a newly learned skill and high expectations runs into arbitrary discrimination based solely on his chronological age." 113 CONG. REC. 34744 (1967).

119. "[T]he time has now come for a concerted effort to eliminate job discrimination based solely on age. H.R. 13054 would make a major contribution to that effort . . ." *Id.*

120. "Very often, the older worker is excluded from consideration for positions for which he is eminently qualified solely because of his age." *Id.* at 34746.

121. "Title VII . . . does not encompass the important area of age, and it is vital that Federal legislation now be enacted to correct the widespread discriminatory employment practices found in this area. Twenty-four States . . . have already passed legislation making it unlawful to discriminate merely on the basis of age . . ." *Id.* at 34742.

122. "It seems irrational for society on the one hand to do everything possible to extend the life span of a man, and on the other hand throw him out to a sort of scrap heap as unusable, solely because of his chronological age." *Id.* at 34750.

PRO may be correct that disparate impact establishes but-for causation, but disparate impact does not establish sole causation and, therefore, should not be permitted under the Age Act.

b. *The Absence of Debate*

*As it discussed the Age Act, Congress did not consider any of the issues pertinent to disparate impact.*

The legislative history of section 4(a)(2) of the Age Act reveals that Congress knew no more about disparate impact in 1967 than in 1964. Issues obviously central to disparate impact were never mentioned in committee hearings,<sup>123</sup> in committee reports,<sup>124</sup> or in discussions on the floor of Congress.<sup>125</sup> No representative or senator asked questions that would have been obvious to anyone who understood disparate impact. For example, how much of a disparity would be necessary to constitute an adverse effect? How strongly must a selection criterion be correlated with success on the job in order to be job related? How costly would it be to prove that a test is job related, and could a small employer afford the cost? Would it be fair to award damages against an employer who used a test in good faith, not knowing it had an adverse effect and was not job related? In addition, no witness or legislator described an employment practice with a disparate impact and said the act would or should outlaw the practice. Nor was disparate impact understood outside of Congress at this time.<sup>126</sup>

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123. *Senate Hearings, supra* note 15; *House Hearings, supra* note 52.

124. S. REP. NO. 90-723, *supra* note 49; H.R. REP. NO. 90-805, *supra* note 54.

125. The word "discussions" is used instead of the word "debates" because no one opposed the bill on the floor of Congress. The House and Senate discussions are recorded at 113 CONG. REC. 31248-57, 34738-55, 35053-57, 35153 (1967).

126. For example, Senator Yarborough ordered printed, as Appendix A to the testimony of Anthony Obadal, Secretary of the Advisory Panel on Older Workers of the U.S. Chamber of Commerce, a document entitled "Summary of State Laws Prohibiting Discrimination in Employment Because of Age," printed by the Department of Labor as Fact Sheet 6-B, dated August, 1966. *Senate Hearings, supra* note 15, at 115. The Senator also ordered printed, as Appendix B to Mr. Obadal's testimony, another document entitled "Age Discrimination Prohibited Under State Laws," printed by the Department of Labor as Fact Sheet 6-C, dated February, 1966. *Id.* at 119. Neither document mentioned practices with an adverse effect.

Judge J. Edward Conway, Commissioner of the New York State Commission on Human Rights, testified before the Senate Subcommittee on Labor and brought with him a document entitled "The Older Worker: Rulings Interpretive of the Age Provisions of the Law Against Discrimination." *Id.* at 233, 245. The document comments on pre-employment tests, an area rife with practices that have a disparate impact: "Pre-employment physical examinations relating to minimum physical standards for employment are lawful, provided the minimum physical standards are reasonably necessary for the work to be performed and are uniformly applied to all applicants for the particular job category." *Id.* at 249. Thus, the New York commission was approaching the theory of disparate impact. Physical examinations had to be job related. However, the commission had not yet articulated the other element of disparate impact, namely, that the practice in question has an adverse effect on a protected class (New

c. *The Secretary's Report*

*The Report of the Secretary of Labor referred to practices that "unintentionally affect the employment of the older worker, though they were not developed for this purpose." The Report was referring, not to disparate impact, but to practices that motivated employers to establish age limits in hiring older workers, i.e., disparate treatment.*

Although disparate impact lacked a name and a theory in 1967, some practices that unintentionally disadvantaged older workers were known. All of them, however, led to age limits — that is, to disparate treatment, not to disparate impact.

A few such practices were discussed in the Secretary's Report. A subsection of the section Findings was entitled "Institutional Arrangements that Indirectly Restrict the Employment of Older Workers," and it began with a passage that today might be read as an apt description of practices that have a disparate impact on older workers: "A broad range of personnel programs and practices affect the employment of the older worker, although they were not developed for this purpose. Instituted to bring efficiency, equity, order, and improved fringe benefits, they operate with some force against older workers not within their compass."<sup>127</sup> At the time it was written, however, this passage referred only to disparate treatment. The passage described practices that unintentionally motivated employers to adopt age limits in hiring, or that, coupled with age limits, disadvantaged older workers. An earlier passage in the report makes clear that this reading is correct. After describing three kinds of discrimination that affect older workers, the Introduction stated:

There is finally, so far as age is concerned, that kind of "discrimination" which results when an employer turns an older man or woman away, not because of concern about the individual's ability to perform the work, but because of programs and practices actually designed to *protect* the employment of older workers while they remain in the work force, and to provide support when they leave it or are ill. Seniority and promotion-from-within systems, and pension and insurance programs, are a mark of civilization. They vastly enhance the dignity, the security, the quality of the later years of life in the United States. **At the same time, ironically, they sometimes have tended to push still further down the age at which employers begin asking whether or not a prospective employee is too old to be taken on.**<sup>128</sup>

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York apparently required that all physical examinations be job related; under disparate impact theory, a practice need not be job related unless it has an adverse effect). New York was only one step shy of recognizing disparate impact, but shy nonetheless.

127. *Secretary's Report*, *supra* note 18, at 15.

128. *Id.* at 2 (italics in original) (boldface added).

The Secretary also wrote, “The explanations given by employers for **the adoption of age limits** include . . . a policy of promotion-from-within and accompanying restriction of hiring to younger ages and entry jobs.”<sup>129</sup> Thus promotion from within, coupled with disparate treatment, cost older workers jobs; the firm hired only at the entry level, and those jobs were reserved for younger workers.<sup>130</sup>

Would promotion from within have had an adverse effect on older workers even if they had been eligible for entry-level jobs?<sup>131</sup> The Report did not consider this question. The Secretary’s only concern was that promotion from within, *coupled with* age limits for entry-level jobs, made it difficult for unemployed older workers to find jobs.

Although seniority often benefited older workers, one aspect of it could be harmful, namely, the breadth of the seniority unit. A worker who was laid off had recall rights only within one’s seniority unit. When the unit was narrowly drawn, an older worker often found oneself laid off from one’s unit while the employer brought new hires into other units.<sup>132</sup>

Did narrow seniority units have an adverse effect on older workers? The Secretary knew both that narrow units disadvantaged some older workers, and that seniority aided many others by protecting them from lay offs, giving them preferences in promotion, entitling them to higher wages, and so forth. If the Secretary had been aware of disparate impact, his report would have weighed these opposing effects.

The practices that led to perhaps the most detrimental effects on older workers were fringe benefits such as pensions and medical insurance. Because of such programs, older workers were (or were thought to be) more costly to employ; and, therefore, employers had an incentive to hire younger workers.<sup>133</sup> Once again, it was not disparate impact that concerned the Secretary. His concern was that these practices motivated employers to impose age limits.

This interpretation is reinforced by the Secretary’s proposals for change. The third section of his Report, “Conclusions and

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129. *Id.* at 8 (boldface added).

130. The adverse effect of promotion from within on older workers had been known for many years. KERRY SEGRAVE, *AGE DISCRIMINATION BY EMPLOYERS* (2001) [hereinafter “SEGRAVE, *AGE DISCRIMINATION BY EMPLOYERS*”] 33, 45, 57, 65, 94, 97, 105, 121 (noting various sources from 1929, 1931, 1937, 1949, 1952, 1961 and 1965 asserting that firms held out promotion-from-within as a reason for not hiring older workers).

131. On the one hand, older workers outside the firm still would not have been considered for higher-level jobs for which the outsiders’ skill and experience qualified them, as those jobs would have been reserved for workers inside the firm. On the other hand, older workers inside the firm would not have had to compete for promotion against workers outside the firm. The result of these opposing effects is uncertain.

132. Secretary’s Report, *supra* note 18, at 15.

133. *Id.* at 16.

Recommendations,” contained proposals for remedial action that confirm the judgment that the Report addressed only disparate treatment.

The first subsection of “Conclusions and Recommendations” was entitled “Arbitrary Discrimination: Specific Age Limits,” and its topic sentence stated: “The most obvious kind of age discrimination in employment takes the form of employer policies of not hiring people over a certain age, without consideration of a particular applicant’s individual qualifications.”<sup>134</sup> As the remedy for this evil, which today we would call disparate treatment, the Secretary proposed a federal statute banning age limits.<sup>135</sup>

The second subsection of “Conclusions and Recommendations” was entitled “Action to Adjust Institutional Arrangements Which Work to the Disadvantage of Older Workers.”<sup>136</sup> This title might be interpreted today to apply to practices that have a disparate impact on older workers, but two facts demonstrate that this interpretation would be incorrect for 1965. First, this subsection addressed the practices mentioned earlier in the Secretary’s Report (pension plans, promotion from within, and seniority); as has been demonstrated, those practices were understood to lead to age limits in hiring, which are disparate treatment. Second, the initial sentence under this title read, “To eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which *quite unintentionally lead to age limits in hiring.*”<sup>137</sup> Age limits in hiring are disparate treatment. If the remedy addressed only disparate treatment, the problem could not have been disparate impact.

Even if this analysis is mistaken and this passage of the Secretary’s Report did address practices with a disparate impact, the proposed remedy was not to outlaw the practices, but to encourage further study, development of new ideas, and voluntary change.<sup>138</sup> “Methods should be developed for assisting private parties in collective bargaining to work out procedures which would open opportunities for hiring unemployed workers with long industrial service, while protecting seniority rights of workers who are already employed.”<sup>139</sup> Such methods might ameliorate the effects of hiring from within and narrow seniority units. Extra cost for older workers in pension plans could be reduced by amending benefit formulae, or could be eliminated by excluding new employees beyond a certain age from coverage. Hiring older workers could be encouraged by adopting

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134. *Id.* at 6.

135. *Id.* at 21-22.

136. *Id.* at 22.

137. *Id.* (emphasis added).

138. *Id.*

139. *Id.*

benefit formulae based on highest earnings during the last years of service, or by enabling workers to carry earned pension credits to new companies.<sup>140</sup> Thus, if the Secretary understood disparate impact, he did not propose to outlaw it.

*d. Congressional Action*

*Congress prescribed the remedy of research and education for practices that "unintentionally affect the employment of the older worker."*

Congress dealt specifically with some of the practices identified by the Secretary as unintentionally affecting the employment of older workers. The way Congress dealt with these practices demonstrates that Congress understood the unintentional effects to be explicit age limits in hiring, which are disparate treatment; Congress did not understand the practices in terms of disparate impact.

Senator Yarborough gave an example of a practice with an unintentional effect on older workers. He was discussing section 4(f)(2), which provided that it shall not be unlawful for an employer "to observe the terms of . . . any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purpose of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual."<sup>141</sup> Perhaps because the meaning of this section was not evident on its surface, Senator Yarborough gave his colleagues an example. Suppose a company retires workers at age 65 (as the Age Act originally allowed). The company's labor contract provides for a pension plan. To be eligible for a pension, a worker must accrue at least twenty years of service. During these twenty years, the company contributes sufficient money to the plan to fund the worker's benefits. The company refuses to hire older workers because they cannot work long enough to be eligible for pensions. Section 4(f)(2), said Senator Yarborough, would require this company to hire older workers, but would allow it to exclude them from the pension program.<sup>142</sup>

Note that the unintended effect on older workers was not that they were denied pensions. Rather, the unintended effect was that the pension plan led the employer to impose age limits in hiring. If Congress had understood disparate impact, the statute would have addressed two evils: both the age limits (which were disparate treatment) and the denial of pensions (which might be understood as a disparate impact). But Congress

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140. *Id.* at 16-17, 22.

141. Age Discrimination in Employment Act of 1967, § 4(f)(2), 26 U.S.C. § 623 (2003).

142. 113 CONG. REC. 31255 (1967) (statement of Sen. Yarborough).

understood only disparate treatment. The act outlawed the age limits, but permitted the denial of pensions.

Representative Dent clearly understood the difference between what the Secretary had called “overt acts of discrimination” and “practices which quite unintentionally lead to age limits in hiring;” and like the Secretary, Representative Dent understood that the remedy for the latter was education:

The bill recognizes two distinct types of unfair discrimination based on age: First, the discrimination which is the result of misunderstanding of the relationship of age to usefulness; and second, the discrimination which is the result of a deliberate disregard of a worker’s value solely because of age. The results of the two types of discrimination are the same, but the remedies called for are different.

The obvious remedy for discrimination born of misunderstanding is the use of education, information, and research – as provided for in section 3.

The second type of unfair discrimination is more pernicious. To eliminate this more serious discrimination, H.R. 13054 provides prohibitions against specific practices of arbitrary discrimination.<sup>143</sup>

It is evident that Representative Dent understood a significant aspect of disparate impact, namely, that it produces the same results as disparate treatment does. Nevertheless, he stated plainly that the remedy in the bill for such practices was education.

Congress agreed with Representative Dent. For the practices identified by the Secretary as unintentionally disadvantaging older workers, Congress prescribed exactly what the Secretary had recommended:

SEC. 3.

(a) . . . In order to achieve the purposes of this Act, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures —

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons. . .<sup>144</sup>

Some practices with a disparate impact, such as seniority, Congress protected. Other practices with a disparate impact, such as promotion from within, Congress ordered the Secretary of Labor to study. No senator or representative named a practice with a disparate impact and said the Age Act would outlaw the practice. The conclusion is inescapable: Congress did not intend the Age Act to outlaw disparate impact.

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143. 113 CONG. REC. 34747 (1967) (statement of Rep. Dent).

144. Age Discrimination in Employment Act of 1967, 29 U.S.C.A. §§ 621-634 (2003).

#### 4. *The Origin of Section 4(a)(2)*

##### a. *Bills Introduced Before Title VII Was Enacted*

###### (1) *Race Bills*

*The origin of section 4(a)(2) is a bill against race discrimination introduced in 1947 by Senator Ives. In this bill, and in race bills for the next fifteen years, the clause "limit, segregate, or classify..." was applied only to intentional discrimination by labor unions.*

The true origin of sections 4(a)(2) of the Age Act and 703(a)(2) of Title VII is older by a factor of five than the Supreme Court realized in *Griggs*. As PRO correctly acknowledged, the crucial clause in these sections is, "limit, segregate, or classify."<sup>145</sup> The earliest use of this clause was in a bill against race discrimination introduced in the Senate in 1947 by Irving Ives of New York.<sup>146</sup> Section 5(a) of Senator Ives's bill would have made it illegal for an *employer* "to discriminate against any individual. . . ." The next section of the bill read:

###### SEC. 5

(b) It shall be an unlawful employment practice for any *labor organization* to discriminate against any individual or to *limit, segregate, or classify its membership* in any way which would deprive or tend to deprive such individual of employment opportunities, or would limit his employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, or would affect adversely his wages, hours, or employment conditions, because of such individual's race, religion, color, national origin, or ancestry.<sup>147</sup>

The words "its membership" make clear beyond peradventure that the clause "limit, segregate, or classify" contemplated the relationship of labor union to member.

For fifteen years in race discrimination bills, this clause was applied only to labor unions; not until 1962 did a bill apply the clause to employers as well as unions.<sup>148</sup> This bill was H.R. 10144, introduced by

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145. The full clause, for which "limit, segregate, or classify" serves as an abbreviation, reads: "It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's" race, sex, or age.

146. S. 984, 80th Cong. (1947) (introduced by Sen. Ives).

147. *Id.* (emphasis added).

148. Gold, *Griggs' Folly*, *supra* note 94, at 572-78.



Representative Roosevelt.<sup>149</sup> It would have outlawed discrimination based not only on race, but also on age. The bill was the first to apply “limit, segregate, or classify” to employers as well as unions. The bill was not enacted, and Representative Roosevelt reintroduced it the following year as H.R. 405.<sup>150</sup> Without the provisions on age discrimination and with other changes that are not relevant here, H.R. 405 became Title VII of the Civil Rights Act of 1964.<sup>151</sup>

A student of Title VII has studied this history of the clause “limit, segregate, or classify” in Title VII. The evidence compelled the conclusion that the clause was aimed, not at disparate impact, but at intentional discrimination as practiced by labor unions.<sup>152</sup>

## (2) *The National Act Against Age Discrimination in Employment*

*Senator Javits copied the clause “limit, segregate, or classify” into his bills against age discrimination, which were introduced from 1947 through 1965, and during all of those years the clause referred to discrimination by unions.*

Bills in Congress against age discrimination ran parallel to bills against race discrimination. The leader of the effort to enact a bill against age discrimination was Jacob Javits of New York. As a member of the House of Representatives, he introduced the first such bill in 1951;<sup>153</sup> two other representatives introduced identical bills.<sup>154</sup> Entitled the “National Act Against Age Discrimination in Employment,” the bill prohibited age discrimination by employers and by labor unions in these terms:

### SEC. 5

- (a) It shall be an unlawful employment practice for an *employer* —
- (1) to refuse to hire, to discharge, or otherwise to discriminate against any individual with respect to his terms, conditions, or privileges of employment, otherwise lawful, because of such individual’s age;
- (b) It shall be an unlawful employment practice for any *labor organization* to discriminate against any individual or to *limit, segregate, or classify its membership* in any way which would deprive

149. 87th Cong. (1962).

150. 88th Cong. (1963).

151. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 433-7 (1965).

152. Gold, *Griggs’ Folly*, *supra* note 94, at 568-578.

153. H.R. 4731, 82d Cong. (1951).

154. H.R. 4733, 82d Cong. (1951) (introduced by Rep. Fulton); H.R. 4734, 82d Cong. (1951) (introduced by Rep. Morano).

or tend to deprive such individual of otherwise lawful employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as such an employee or as such an applicant for employment, or would affect adversely his wages, hours, or employment conditions, because of such individual's age.<sup>155</sup>

It is evident that Representative Javits borrowed section 5 of his bill almost word for word from section 5 of the bill of his fellow New Yorker, Senator Ives. (Indeed, Representative Javits copied nearly every section of his bill from Senator Ives's bill.)<sup>156</sup> As in Senator Ives' bill, the words "its membership" in the clause "limit, segregate, or classify" in Representative Javits' bill make clear that the clause applied to the behavior of unions. Thus, it is beyond doubt that the clause carried the same meaning in both bills: it applied to intentional discrimination by labor unions against their members.

The Eighty-second Congress paid little attention to the National Act Against Age Discrimination in Employment, so Representative Javits introduced it again in 1953,<sup>157</sup> as did two other representatives;<sup>158</sup> but the Eighty-third Congress also neglected the bill. Because Mr. Javits was

155. H.R. 4731, 82d Cong. (1951) (emphasis added).

156. Except for the classes protected, the sections of Representative Javits' bill listed in the following table are identical to the corresponding sections of Senator Ives' bill.

<b>Rep. Javits' Bill, H.R. 4731</b>	<b>Sen. Ives' Bill, S. 984</b>
Section 1	Section 1
Section 2(a)	Section 2(a)
Section 2(c)	Section 2(b)
Section 2(d)	Section 2(d)
Section 3	Section 3
Section 4	Section 4
Section 5	Section 5
Section 6(a)	Section 6(d)
Section 6(b)	Section 6(f)
Section 6(c)	Section 6(g)
Section 7	Section 7
Section 8 (misnumbered as Section 9)	Section 8
Section 9	Section 9
Section 10	Section 10
Section 11	Section 11
Section 12	Section 12
Section 13	Section 13
Section 14	Section 14
Section 15	Section 15

157. H.R. 1585, 83d Cong. (1953).

158. H.R. 1579, 83d Cong. (1953) (introduced by Rep. Fulton); H.R. 1593, 83d Cong. (1953) (introduced by Rep. Morano).

elected Attorney General of New York in 1954 and, consequently, did not serve in the Eighty-fourth Congress, Representative Fulton carried the colors in 1955.<sup>159</sup> When Mr. Javits returned to Congress as a senator in the Eighty-fifth Congress, he introduced the National Act in 1957,<sup>160</sup> and so did seven representatives.<sup>161</sup> Senator Javits tried again in 1959<sup>162</sup> along with nine representatives,<sup>163</sup> and in 1961<sup>164</sup> with five representatives.<sup>165</sup> The National Act was not introduced in the Eighty-eighth Congress, which may have been preoccupied with the bill that became the Civil Rights Act of 1964.<sup>166</sup> Senator Javits introduced the National Act for the last time in 1965.<sup>167</sup>

Although the National Act never became law, the bill is important for our purposes because the text of section 5 stayed exactly the same over the years. The only reasonable conclusion is that its meaning was also the same in the minds of a significant number of members of Congress. Like the identical clause in the bills against race discrimination, the clause “limit, segregate, or classify” in the National Act had nothing to do with disparate impact; rather, the clause was meant to outlaw intentional age discrimination as practiced by unions against their members.

### (3) *Bills to Amend Other Statutes*

*Between 1958 and the enactment of Title VII, bills were introduced to bar age discrimination via amendments to the National Labor Relations Act and*

159. H.R. 5370, 84th Cong. (1955).

160. S. 1073, 85th Cong. (1957).

161. H.R. 5740, 85th Cong. (1957) (introduced by Rep. Dorn); H.R. 6951, 85th Cong. (1957) (introduced by Rep. Osmer); H.R. 8982, 85th Cong. (1957) (introduced by Rep. O'Hara); H.R. 8991, 85th Cong. (1957) (introduced by Rep. Widnall); H.R. 9486, 85th Cong. (1957) (introduced by Rep. Fulton); H.R. 10206, 85th Cong. (1958) (introduced by Rep. Madden); H.R. 12214, 85th Cong. (1958) (introduced by Rep. Bennett).

162. S. 738, 86th Cong. (1959).

163. H.R. 1180, 86th Cong. (1959) (introduced by Rep. Van Zandt); H.R. 2508, 86th Cong. (1959) (introduced by Rep. Widnall); H.R. 3271, 86th Cong. (1959) (introduced by Rep. Bennett); H.R. 3649, 86th Cong. (1959) (introduced by Rep. Halpern); H.R. 4382, 86th Cong. (1959) (introduced by Rep. McFall); H.R. 6006, 86th Cong. (1959) (introduced by Rep. Fulton); H.R. 6042, 86th Cong. (1959) (introduced by Rep. Dorn); H.R. 6129, 86th Cong. (1959) (introduced by Rep. Hosmer); H.R. 7285, 86th Cong. (1959) (introduced by Rep. Kowalski).

164. S. 350, 87th Cong. (1961).

165. H.R. 591, 87th Cong. (1961) (introduced by Rep. Van Zandt); H.R. 3445, 87th Cong. (1961) (introduced by Rep. Hosmer); H.R. 4421, 87th Cong. (1961) (introduced by Rep. Fulton); H.R. 6760, 87th Cong. (1961) (introduced by Rep. McFall); H.R. 6838, 87th Cong. (1961) (introduced by Rep. Hagen).

166. Senator Javits claimed to “have been introducing bills to outlaw discrimination in employment on grounds of age ever since I was a Member of the House of Representatives in 1951,” 113 CONG. REC. 31254 (1967), but the indices to 109 and 110 Congressional Record contain no record that he introduced such a bill during the 88th Congress.

167. S. 1752, 89th Cong. (1965).

*the Fair Labor Standards Act; bills were also introduced to bar age discrimination by federal contractors. In these bills, the clause "limit, segregate, or classify" was applied only to intentional discrimination by unions.*

This conclusion is fortified by three other lines of bills against age discrimination in employment. Begin with bills introduced before Title VII was enacted, that is, before Congress applied "limit, segregate, or classify" to employers as well as unions. (Bills introduced between Title VII and the Age Act will be discussed in the next section of this article.) The consistency of words, over time and across bills, is strong evidence that the sponsors intended the clause "limit, segregate, or classify" to describe and outlaw the ways in which labor unions practiced intentional discrimination.

A number of bills would have made age discrimination an unfair labor practice. Identical bills to this end were introduced by three representatives in 1960,<sup>168</sup> by two representatives in 1961,<sup>169</sup> by one representative in 1963,<sup>170</sup> and by another representative in 1964.<sup>171</sup> All of these bills proposed adding two sections to the National Labor Relations Act.<sup>172</sup> Section 8(a)(6) would have applied to employers — and *never* used the clause "limit, segregate, or classify."<sup>173</sup> Section 8(b)(8) would have applied to unions — and *always* used "limit, segregate, or classify."<sup>174</sup> In addition, a bill in the Senate in 1961 would have applied only to employers and did not use "limit, segregate, or classify."<sup>175</sup> Purpose was an element of discrimination under the Labor Act.<sup>176</sup> Thus, it is evident that the sponsors of these bills understood the clause to apply only to intentional age discrimination by labor unions.

Bills in 1958<sup>177</sup> and 1963<sup>178</sup> would have prohibited age discrimination with an amendment to the Fair Labor Standards Act.<sup>179</sup> These bills applied only to employers and did not use "limit, segregate, or classify."

168. H.R. 11671, 86th Cong. (1960) (introduced by Rep. Dingell); H.R. 12348, 86th Cong. (1960) (introduced by Rep. Wolff); H.R. 12880, 86th Cong. (1960) (introduced by Rep. Pucinski).

169. H.R. 1072, 87th Cong. (1961) (introduced by Rep. Pucinski); H.R. 2413, 87th Cong. (1961) (introduced by Rep. Dingell).

170. H.R. 3810, 88th Cong. (1963) (introduced by Rep. Dingell).

171. H.R. 11102, 88th Cong. (1964) (introduced by Rep. Royball).

172. 29 U.S.C. §§ 151-169 (2003).

173. *See infra* text following note 250.

174. *Id.*

175. S. 60, 87th Cong. (1961) (introduced by Sen. Smathers).

176. CHARLES J. MORRIS, *THE DEVELOPING LABOR LAW* 115 (1st ed. 1977). The illicit purpose was encouraging or discouraging membership in a labor organization.

177. H.R. 6793, 85th Cong. (1957) (introduced by Rep. Dellay).

178. H.R. 4935, 88th Cong. (1963) (introduced by Rep. Denton).

179. 29 U.S.C. §§ 201-219 (2003).

A line of bills would have outlawed age discrimination by firms that do business with the federal government. The first such bills were introduced in 1958 by thirteen representatives.<sup>180</sup> Similar bills were introduced in the Eighty-sixth Congress by a senator<sup>181</sup> and eleven representatives;<sup>182</sup> in the Eighty-seventh Congress by two representatives;<sup>183</sup> and in the Eighty-eighth Congress by one representative.<sup>184</sup> All of these bills were identical; they applied only to employers and did not use “limit, segregate, or classify.”

Six other bills pertaining to government contractors would have prohibited them from dealing with unions that discriminated on the basis of age.<sup>185</sup> These bills would not have prohibited unions from discriminating, did not define discriminatory practices by unions, and did not use “limit, segregate, or classify.”<sup>186</sup>

### *b. Bills Introduced After Title VII Was Enacted*

Now consider bills against age discrimination that were introduced after Title VII was enacted. The authors of these bills were surely aware of the text of Title VII, in particular, the meaning of section 703(a)(2). Their

180. H.R. 10455, 85th Cong. (1958) (introduced by Rep. Porter); H.R. 10502, 85th Cong. (1958) (introduced by Rep. Ruess); H.R. 10594, 85th Cong. (1958) (introduced by Rep. Barnett); H.R. 10806, 85th Cong. (1958) (introduced by Rep. O'Hara); H.R. 10866, 85th Cong. (1958) (introduced by Rep. Moore); H.R. 10979, 85th Cong. (1958) (introduced by Rep. Zablocki); H.R. 11053, 85th Cong. (1958) (introduced by Rep. Price); H.R. 11112, 85th Cong. (1958) (introduced by Rep. Bray); H.R. 11114, 85th Cong. (1958) (introduced by Rep. Collier); H.R. 11420, 85th Cong. (1958) (introduced by Rep. Gray); H.R. 11542, 85th Cong. (1958) (introduced by Rep. Baring); H.R. 11637, 85th Cong. (1958) (introduced by Rep. Santangelo); H.R. 12940, 85th Cong. (1958) (introduced by Rep. Wheaton).

181. S. 1172, 86th Cong. (1959) (introduced by Sen. Newberger).

182. H.R. 25, 86th Cong. (1959) (introduced by Rep. Baring); H.R. 236, 86th Cong. (1959) (introduced by Rep. Price); H.R. 1113, 86th Cong. (1959) (introduced by Rep. Collier); H.R. 1206, 86th Cong. (1959) (introduced by Rep. Zablocki); H.R. 2209, 86th Cong. (1959) (introduced by Rep. O'Hara); H.R. 3202, 86th Cong. (1959) (introduced by Rep. Santangelo); H.R. 4906, 86th Cong. (1959) (introduced by Rep. Bennett); H.R. 6908, 86th Cong. (1959) (introduced by Rep. Moore); H.R. 7098, 86th Cong. (1959) (introduced by Rep. Porter); H.R. 7734, 86th Cong. (1959) (introduced by Rep. Ruess); H.R. 10115, 86th Cong. (1960) (introduced by Rep. Murphy).

183. H.R. 599, 87th Cong. (1961) (introduced by Rep. Zablocki); H.R. 1146, 87th Cong. (1961) (introduced by Rep. Collier).

184. H.R. 1169, 88th Cong. (1963) (introduced by Rep. Zablocki).

185. S. 3433, 85th Cong. (1958) (introduced by Sen. Javits); S. 351, 87th Cong. (1961) (introduced by Sen. Javits); H.R. 3650, 86th Cong. (1959) (introduced by Rep. Halpern); H.R. 6044, 86th Cong. (1959) (introduced by Rep. Dorn); H.R. 12106, 86th Cong. (1960) (introduced by Rep. Donohue); H.R. 2480, 87th Cong. (1961) (introduced by Rep. Halpern).

186. A unique bill by Senator McNamara, S. 3726, 86th Cong. (1960), would have given the President the power to adopt rules against age discrimination by federal contractors.

There is an exception that proves the rule. Of all the bills in the four lines of bills mentioned in the text, exactly one bill falls outside the pattern. H.R. 4896, 88th Cong. (1963) (introduced by Rep. Pelly), pertained to government contractors. Section 110(b) of this bill applied the clause “limit, segregate, or classify” to employers. However, this bill was introduced after Rep. Roosevelt's bills, H.R. 10144 in 1962 and H.R. 405 in 1963, had applied the clause to employers.

use of the clause "limit, segregate, or classify," exactly as that clause had been used before the enactment of Title VII, confirms our understanding that the clause was aimed at intentional discrimination as practiced by labor unions against their members.

(1) *Bills to Amend Existing Statutes*

*Between the enactment of Title VII and the enactment of the Age Act, further bills were introduced to bar age discrimination via amendments to the National Labor Relations Act and the Fair Labor Standards Act. All of these bills applied the clause "limit, segregate, or classify" only to labor unions. Bills were also introduced to add age as a protected class to Title VII. In these bills, "limit, segregate, or classify" meant what it meant when Title VII was enacted, namely, disparate treatment.*

Consider, first, the bills that would have outlawed age discrimination by employers and unions under existing statutes. In 1965, three representatives proposed making it an unfair labor practice for an employer or a union to discriminate on the basis of age.<sup>187</sup> So did another representative in 1966<sup>188</sup> and four representatives in 1967.<sup>189</sup> These bills used "limit, segregate, or classify" only in relation to unions. A senator offered a bill that would have applied only to employers in 1965,<sup>190</sup> as did a representative in 1965 and 1967.<sup>191</sup> These bills did not use "limit, segregate, or classify."

Bills by two representatives in 1965<sup>192</sup> and in 1967<sup>193</sup> would have outlawed age discrimination only by employers under the Fair Labor Standards Act. These bills did not use "limit, segregate, or classify."

Other proposed amendments to the Fair Labor Standards Act would have applied to both unions and employers. Senator Javits' amendment, which the Senate adopted in 1966 but the House did not, would have outlawed age discrimination by employers and unions.<sup>194</sup> The amendment

187. H.R. 665, 89th Cong. (1965) (introduced by Rep. Pucinski); H.R. 9754, 89th Cong. (1965) (introduced by Rep. Randall); H.R. 10813, 89th Cong. (1965) (introduced by Rep. Dwyer).

188. H.R. 12164, 89th Cong. (1966) (introduced by Rep. Hathaway).

189. H.R. 529, 90th Cong. (1967) (introduced by Rep. Dwyer); H.R. 2893, 90th Cong. (1967) (introduced by Rep. Hathaway); H.R. 4993, 90th Cong. (1967) (introduced by Rep. Cleveland); H.R. 6908, 90th Cong. (1967) (introduced by Rep. Cramer).

190. S. 1416, 89th Cong. (1965) (introduced by Sen. Smathers).

191. H.R. 6640, 89th Cong. (1965) (introduced by Rep. Cramer); H.R. 6908, 90th Cong. (1967) (introduced by Rep. Cramer).

192. H.R. 2803, 89th Cong. (1965) (introduced by Rep. Denton); H.R. 10812, 89th Cong. (1965) (introduced by Rep. Dwyer).

193. H.R. 531, 90th Cong. (1967) (introduced by Rep. Dwyer); H.R. 4994, 90th Cong. (1967) (introduced by Rep. Cleveland).

194. 112 CONG. REC. 20819 (1966) (discussing amendment no. 764).

used “limit, segregate, or classify” only in regard to unions.

The following year, Senator Javits introduced his amendment in the form of a bill,<sup>195</sup> and three representatives introduced identical bills.<sup>196</sup> All of these bills used “limit, segregate, or classify” only with respect to unions.

No bills in 1965-1967 proposed outlawing age discrimination by federal contractors, probably because in 1964 President Lyndon Johnson had issued Executive Order 11141, which made it the policy of the executive branch that contractors and subcontractors may not discriminate on the basis of age.<sup>197</sup> Unions are not mentioned in the order and “limit, segregate, or classify” is not used.

Between 1965 and 1967, a senator<sup>198</sup> and fifteen representatives introduced bills to add age as a protected class to Title VII.<sup>199</sup> Had any of these bills been enacted, section 703(a)(2) would have included age as an illegal basis of discrimination. As shown above, Congress at this time understood section 703(a)(2) to apply to intentional discrimination.<sup>200</sup> The bills to add age to Title VII were unsuccessful, but revealing nonetheless. They reveal that when the Age Act was passed in 1967, each of the sponsors of these bills must have understood section 4(a)(2) of the Age Act, which tracked the text of section 703(a)(2) of Title VII, to mean the same as section 703(a)(2): both outlawed only intentional discrimination.

## (2) *Bills to Enact a New Statute*

*Bills tracking Title VII intended the clause “limit, segregate, or classify” to mean what it meant in Title VII.*

Turn, finally, to bills that proposed a new statute. Aside from Senator

195. S. 788, 90th Cong. (1967) (introduced by Sen. Javits).

196. H.R. 5481, 90th Cong. (1967) (introduced by Rep. Reid); H.R. 6389, 90th Cong. (1967) (introduced by Rep. Reid); H.R. 6280, 90th Cong. (1967) (introduced by Rep. Morse); H.R. 8218, 90th Cong. (1967) (introduced by Rep. Riegle).

197. 29 Fed. Reg. 2477 (Feb. 12, 1964), 3 C.F.R. § 179 (1964-1965).

198. S. 2674, 89th Cong. (1965) (introduced by Sen. Talmadge).

199. H.R. 9338, 89th Cong. (1965) (introduced by Rep. Pucinski); H.R. 11682, 89th Cong. (1965) (introduced by Rep. Burke); H.R. 11793, 89th Cong. (1965) (introduced by Rep. Mize); H.R. 11829, 89th Cong. (1965) (introduced by Rep. Mueller); H.R. 11898, 89th Cong. (1966) (introduced by Rep. Horton); H.R. 11915, 89th Cong. (1966) (introduced by Rep. Price); H.R. 11919, 89th Cong. (1966) (introduced by Rep. Roncalio); H.R. 11975, 89th Cong. (1966) (introduced by Rep. Race); H.R. 11989, 89th Cong. (1966) (introduced by Rep. Dole); H.R. 12266, 89th Cong. (1966) (introduced by Rep. Olson); H.R. 12376, 89th Cong. (1966) (introduced by Rep. Teague); H.R. 12430, 89th Cong. (1966) (introduced by Rep. Saylor); H.R. 12432, 89th Cong. (1966) (introduced by Rep. Schisler); H.R. 13050, 89th Cong. (1966) (introduced by Rep. Gubser); H.R. 13355, 89th Cong. (1966) (introduced by Rep. Schmidhauser); H.R. 328, 90th Cong. (1967) (introduced by Rep. Burke); H.R. 1094, 90th Cong. (1967) (introduced by Rep. Price).

200. See *supra* note 109 and accompanying text.

Javits's National Act,<sup>201</sup> these bills were introduced in 1967 by a senator<sup>202</sup> and ten representatives.<sup>203</sup> Except for the classes protected, all of them followed word for word the corresponding text of Title VII.

This evidence shows that, in the period between 1964 and 1967, Congress understood the clause "limit, segregate, or classify" to mean what it had meant in the period between 1947 and 1964. No evidence indicates that the meaning of the clause changed in any way in the mind of Congress.

In sum (not counting Representative Roosevelt and his bills in 1962 and 1963) sixty-six senators and representatives introduced 121 bills against age discrimination over a span of sixteen years, and in each bill save one, "limit, segregate, or classify" was applied only to labor unions. The conclusion is inescapable: the Ninetieth Congress intended the clause to outlaw intentional discrimination as practiced by labor unions. Not a shred of evidence as much as hints that Congress intended the clause to outlaw disparate impact.

## V.

### DEFENSES TO AGE DISCRIMINATION: SECTION 4(f)(1)

#### *A. PRO: Section 4(f)(1) Includes Disparate Impact*

*The text of the RFOA clause, its legislative history and origin, as well as the practices protected by section 4(f)(2), combine to demonstrate that Congress intended the Age Act to bar disparate impact discrimination.*

#### 1. *The Text of Section 4(f)(1)*

*The BFOQ clause is the defense to disparate treatment, and the RFOA clause is the defense to disparate impact; but a "reasonable factor[]" other than age" need not be strictly job related.*

The Age Act states exceptions to the general rule against age discrimination. Section 4(f)(1) reads:

201. S. 1752, 89th Cong. (1965).

202. S. 830, 89th Cong. (1965) (introduced by Sen. Yarborough).

203. H.R. 3651, 89th Cong. (1967) (introduced by Rep. Perkins); H.R. 3768, 89th Cong. (1967) (introduced by Rep. Holland); H.R. 4221, 89th Cong. (1967) (introduced by Rep. Dent); H.R. 8125, 89th Cong. (1967) (introduced by Rep. Matsunaga); H.R. 8535, 89th Cong. (1967) (introduced by Rep. Kelly); H.R. 8937, 89th Cong. (1967) (introduced by Rep. Ford); H.R. 9586, 89th Cong. (1967) (introduced by Rep. Eilberg); H.R. 10355, 89th Cong. (1967) (introduced by Rep. Rosenthal); H.R. 11301, 89th Cong. (1967) (introduced by Rep. Donohue); H.R. 12512, 89th Cong. (1967) (introduced by Rep. Pucinski); H.R. 13054, 89th Cong. (1967) (introduced by Rep. Dent). Bills lacking enforcement provisions are omitted.



(f) It shall not be unlawful for an employer, employment agency, or labor organization —

(1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

This section is straightforward. It contains two clauses. The first is the “BFOQ clause,” which applies when age is explicitly the basis of decision. An employer may refuse to hire an older worker who is above a specified age when being younger is a bona fide occupational qualification. An octogenarian need not be hired to portray an adolescent. Age is a fact in the employer’s reason for action; the employer is consciously excluding older workers. Thus, the BFOQ clause is the defense to disparate treatment.

The second clause is the “RFOA clause,” which applies when age is not explicitly the basis of decision. An employer may refuse to hire an older worker based on a factor other than age, provided the factor is reasonable. A fitness center may require its trainers to be svelte, though older workers may tend to be plumper than younger workers. Age is a fact in a chain of events that culminates in the employer’s reason for action.<sup>204</sup> Accordingly, the RFOA clause is the defense to disparate impact. Congress would not have written the defense to disparate impact into the act unless it included the prima facie case as well. Thus, the text of the RFOA clause demonstrates that Congress intended the Age Act to include disparate impact.<sup>205</sup>

CON argues that the RFOA clause does not state the defense to disparate impact, but instead completely protects an employer who reasonably bases a decision on any factor other than age.<sup>206</sup> At the risk of pedantry, it must be pointed out that the word “reasonable” in the RFOA clause modifies the word “factors.” Whether a factor is reasonable is an objective question. CON argues that “reasonable” is really an adverb modifying the word “based.” This argument is erroneous because it reads the RFOA clause as

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204. The employer’s reason for deciding to hire a younger worker instead of an older worker is that the younger worker is more trim. Many such decisions cumulate into the result that the employer hires proportionally fewer older workers than younger workers. The chain of events is that, as people age, they get less exercise and their metabolism slows, but their appetite does not diminish proportionally; therefore, they tend to gain weight as they age. Carol Krucoff, *Exercise Looks to be the Best Way to Halt Middle-Age Spread; Aging: Between 40 and 60, Most People Put on Extra Pounds that Can’t be Taken Off by Dieting Alone*, L.A. TIMES, Jan. 10, 2000, at S6.

205. The argument here, that the BFOQ clause in the Age Act is the defense to disparate treatment and the RFOA clause is the defense to disparate impact, may seem inconsistent with Justice Powell’s theorem. The inconsistency, however, is only facial. The theorem holds that disparate treatment and disparate impact were identical in all ways except for their methods of proving causation. The BFOQ and RFOA clauses pertain, not to causation, but to the plaintiffs’ qualifications. Disparate treatment and disparate impact were identical with regard to qualifications, just as the BFOQ and the RFOA clauses were substantively identical.

206. See *infra* Part V(B)(1).

though it says, “the differentiation is reasonably based on factors other than age.” This misreading shifts the focus to the employer’s state of mind: did the employer have a reasonable belief that the factor was not age? But the clause does not say this. The RFOA clause says the factor itself must be reasonable.

What does it mean to say that a factor is reasonable? It cannot mean irrational. It cannot include a practice that serves no legitimate business goal and has an adverse effect on older workers. The purpose here is not to explore the scope of the defense to disparate impact under the Age Act, yet it is appropriate to note that Congress may have used the word “reasonable” to signal that the employer’s burden should be somewhat less stringent under the Age Act than proving job relatedness under Title VII. For example, it is often said that cost is not a defense to discrimination, but it should be permissible for an employer to replace a highly paid worker with a lower-paid worker (or at least to offer the job to the highly paid worker at the lower rate). Such a practice would often have an adverse effect on older workers, but it is eminently reasonable.

## 2. *The Legislative History of Section 4(f)(1)*

*The Secretary’s Report demonstrates that the Secretary intended the RFOA clause to express the defense of job relatedness. Senator Yarborough agreed, giving an example of a reasonable factor other than age on the floor of Congress. The example was a job-related test.*

The legislative history of section 4(f)(1) is clear and dispositive. The Secretary’s Report and proposed bill, together with the discussion of the BFOQ and RFOA clauses on the floor of the Senate, confirm the plain meaning of the text: Congress intended the act to outlaw disparate impact.

The RFOA clause was contained in S. 830 and H.R. 3651, which were the proposal of the Secretary of Labor.<sup>207</sup> The clause responded to the Secretary’s observation that some age “discrimination” occurred because of a genuine relationship between a worker’s age and ability to perform a job.<sup>208</sup> It follows that the Secretary intended the clause to apply only when age is genuinely related to ability to perform a job. This perfectly captures the idea of job relatedness, which is the defense to disparate impact. A reasonable factor other than age must be job related.

The Senate shared the Secretary’s intent. Although the committee reports of the House of Representatives and the Senate did not explain the

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207. See *supra* note 47 and accompanying text.

208. Secretary’s Report, *supra* note 18, at 2.

BFOQ or RFOA clauses or give examples, Senator Yarborough did.<sup>209</sup> Speaking on the floor he said:

The bill provides for four exceptions from the enforcement provisions:

First. Where age is a bona fide occupational qualification reasonably necessary to the particular business. The example is often given — although I do not know at what age this limit would apply — of a jet pilot who flies a plane at many hundreds of miles an hour. Second. Where differentiation is based on reasonable factors other than age. For example, if a test shows that a man cannot do certain things. He might fail to pass the test at 35; he might fail to pass the test at 55. Some men slow up sooner than others. If the job requires a certain speed and the differentiation is based upon factors other than age, the law would not apply.<sup>210</sup>

It is evident that Congress meant the BFOQ clause to apply when age is explicitly the basis for decision: an airline may retire a pilot who reaches a certain age. This understanding confirms what the text states. Forcing a pilot to retire at a certain age is *prima facie* disparate treatment, and the BFOQ clause is the defense.

It is equally evident that Congress meant the RFOA clause to apply when age is not explicitly the basis for decision, as is true in disparate impact cases. Senator Yarborough's example captures the essence of the business necessity defense:

- An employer gives a test to a worker.
- The test is job related (“the job requires a certain speed”).
- The worker fails the test (“a man cannot do certain things”).
- The employer has not violated the Age Act (“the law would not apply”).<sup>211</sup>

This understanding also confirms our reading of the text of the RFOA clause. A test that favors younger workers over older workers is *prima facie* disparate impact, but the test is a “reasonable factor[] other than age” because the test is job related.

CON notes below that Senator Yarborough's example omits an element

209. S. REP. NO. 90-723, *supra* note 49, at 9. H.R. REP. NO. 90-805, *supra* note 54, at 9.

210. 113 CONG. REC. 31252-53 (1967) (statement of Sen. Yarborough).

211. Senator Yarborough's belief was firm that the Age Act would require tests to be job related. In a subsequent colloquy, Senator Javits asked Senator Yarborough how the bill would deal with discrimination between two persons each of whom is in the protected class; for example, an employer favors a man aged 42 over a man aged 52 because of age. Senator Yarborough replied:

If two men applied for employment under the terms of this law, and one was 42 and one was 52, naturally, the personnel officer or employer would have a choice to make. . . . [H]e could not turn either one down on the basis of the age factor, he would have to go into the capabilities, experience of the two men, or he might have to give them a test . . . to see if they could do the work.

*Id.* at 31255. The Senator did not say that the personnel officer could give the applicants any test at all. He said the personnel officer would have “to give them a test . . . to see if they could do the work.” A test that determines whether an applicant can do the work is a job related test.

of disparate impact, namely, that the test had an adverse effect on older workers. This omission, argues CON, shows that the Senator did not have disparate impact in mind. CON'S error is ignoring that Senator Yarborough was focusing on the disparate impact defense, not the prima facie case. One cannot say everything in every sentence. Also, Senator Yarborough suggested adverse effect when he stated that some men slow up sooner than others. This statement implies a natural progression. Provided he lives long enough, any man will eventually fail a test that measures speed of work. Therefore, more older men than younger men will fail the test. But, as the Senator said, some older men will be able to pass the test, and they are entitled to a fair chance. Only a job related test can provide this chance.

### 3. *The Origins of Section 4(f)(1)*

*The Secretary of Labor and Congress derived the RFOA clause, not from exception iv of the Equal Pay Act, but from unsuccessful equal-pay bills in 1963. Exception iv serves the narrow purpose of the Equal Pay Act, whereas the RFOA clause serves the broad purpose of the Age Act.*

The RFOA clause provides a defense "where the differentiation is based on reasonable factors other than age." Exception iv to the Equal Pay Act provides a defense for "a differential based on any other factor other than sex."<sup>212</sup> CON argues that the similarity of these texts implies that the RFOA clause was derived from exception iv of the Equal Pay Act, and, therefore, the two provisions should be interpreted similarly. If this conclusion were true, the RFOA clause might preclude disparate impact. The argument would be based on a Title VII case, *County of Washington v. Gunther*,<sup>213</sup> in which the Supreme Court suggested that exception iv, which was incorporated into Title VII by the Bennett Amendment, may preclude a disparate impact claim for sex discrimination in compensation.<sup>214</sup>

Two objections destroy CON'S argument. The first objection is obvious: the RFOA clause contains the word "reasonable," whereas exception iv does not. As suggested above, the word "reasonable" may make the defense to disparate impact under the Age Act somewhat broader than the defense to disparate impact under Title VII.<sup>215</sup>

The second objection is that the RFOA clause was not in fact derived from exception iv to the Equal Pay Act. The clause was derived from an equal-pay bill that was never enacted.

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212. Pub. L. No. 88-38, 77 Stat. 56 (1963).

213. 452 U.S. 161, 170-71 (1981).

214. Civil Rights Act of 1964 (Title VII) § 703(h), 42 U.S.C. § 2000e-2(h) (2000).

215. See *supra* text following note 205.

The roots of the Equal Pay Act are surprisingly deep, and the first effort in Congress at establishing the principle of equal pay for equal work came surprisingly close to success. In 1945, Senators Pepper and Morse introduced an equal pay bill in the first session of the 79th Congress,<sup>216</sup> and the Committee on Education and Labor recommended that the bill pass.<sup>217</sup> As amended by the committee, section 2 read in relevant part:

SEC. 2. It shall be an unfair wage practice for any employer engaged in commerce or in transactions or operations affecting commerce —

(a) to discriminate in any way in the payment of wages as between the sexes; or

(b) to pay wages to any female employee at a rate less than the rate at which he pays or has paid to male employees for work of comparable quality or quantity, except where such payment is made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex. . .

Representative Woodhouse introduced a similar bill in the second session of that Congress,<sup>218</sup> and this bill was also reported favorably; but neither bill passed.<sup>219</sup>

Note that these bills did not contain a general exception. Neither bill provided a defense for “any other factor other than sex” or for “reasonable factors other than sex.”

Equal pay bills were introduced for nearly two decades in the eight succeeding Congresses.<sup>220</sup> None of these bills contained a general

216. S. 1178, 79th Cong. (1945).

217. S. REP. No. 79-1576, at 1, 79th Cong. (1946).

218. H.R. 5221, 79th Cong. (1946).

219. H.R. REP. NO. 79-2687, at 1 (1946).

220. S. 1556, 80th Cong. (1947) (introduced by Sen. Pepper and Sen. Morse); H.R. 4273, 80th Cong. (1947) (introduced by Rep. Douglas); H.R. 4408, 80th Cong. (1947) (introduced by Rep. Smith); S. 706, 81st Cong. (1949) (introduced by Sen. Pepper and Sen. Morse); H.R. 797, 81st Cong. (1949) (introduced by Rep. Douglas); H.R. 1584, 81st Cong. (1949) (introduced by Rep. Woodhouse); H.R. 2438, 81st Cong. (1949) (introduced by Rep. Douglas); S. 1374, 82d Cong. (1951) (introduced by Sen. Murray and Sen. Morse); H.R. 3550, 82d Cong. (1951) (introduced by Rep. Kelly); H.R. 4101, 82d Cong. (1951) (introduced by Rep. Kelly); H.R. 4138, 82d Cong. (1951) (introduced by Rep. Rodino); H.R. 4144, 82d Cong. (1951) (introduced by Rep. Anfuso); H.R. 4206, 82d Cong. (1951) (introduced by Rep. Addonizio); H.R. 4299, 82d Cong. (1951) (introduced by Rep. Fine); H.R. 4303, 82d Cong. (1951) (introduced by Rep. Howell); H.R. 4319, 82d Cong. (1951) (introduced by Rep. Multer); H.R. 4320, 82d Cong. (1951) (introduced by Rep. Kennedy); H.R. 4367, 82d Cong. (1951) (introduced by Rep. Doyle); H.R. 4370, 82d Cong. (1951) (introduced by Rep. Holifield); H.R. 4374, 82d Cong. (1951) (introduced by Rep. Heller); H.R. 4451, 82d Cong. (1951) (introduced by Rep. Dempsey); H.R. 7470, 82d Cong. (1952) (introduced by Rep. Kelly); S. 176, 83d Cong. (1953) (introduced by Sen. Murray and Sen. Morse); H.R. 306, 83d Cong. (1953) (introduced by Rep. Kelly); H.R. 362, 83d Cong. (1953) (introduced by Rep. Addonizio); H.R. 1014, 83d Cong. (1953) (introduced by Rep. Fine); H.R. 1017, 83d Cong. (1953) (introduced by Rep. Fine); H.R. 1260, 83d Cong. (1953) (introduced by Rep. Heller); H.R. 1266, 83d Cong. (1953) (introduced by Rep. Multer); H.R. 1387, 83d Cong. (1953) (introduced by Rep. Howell); H.R. 7172, 83d Cong. (1954) (introduced by Rep. Bolton); H.R. 7597, 83d Cong. (1954) (introduced by Rep. Buchanan); H.R. 7675, 83d Cong. (1954) (introduced by Rep. Sullivan); S. 2708,

exception.

A general exception was first proposed in 1963, the year that equal pay legislation finally succeeded.<sup>221</sup> Indeed, two versions of the exception were

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84th Cong. (1955) (introduced by Sen. Douglas); H.R. 59, 84th Cong. (1955) (introduced by Rep. Addonizio); H.R. 281, 84th Cong. (1955) (introduced by Rep. Kelly); H.R. 680, 84th Cong. (1955) (introduced by Rep. Multer); H.R. 3228, 84th Cong. (1955) (introduced by Rep. Kelly); H.R. 3767, 84th Cong. (1955) (introduced by Rep. Fine); H.R. 6503, 84th Cong. (1955) (introduced by Rep. Green); H.R. 7759, 84th Cong. (1955) (introduced by Rep. Griffiths); S. 3352, 84th Cong. (1956) (introduced by Sen. Ives, Sen. Allott, Sen. Bender, Sen. Payne, Sen. Purtell and Sen. Bush); H.R. 9830, 84th Cong. (1956) (introduced by Rep. Kearns); H.R. 9837, 84th Cong. (1956) (introduced by Rep. Bolton); H.R. 10070, 84th Cong. (1956) (introduced by Rep. Hayworth); H.R. 10536, 84th Cong. (1956) (introduced by Rep. Rhodes); H.R. 11684, 84th Cong. (1956) (introduced by Rep. Roosevelt); H.R. 11793, 84th Cong. (1956) (introduced by Rep. Thompson); S. 1807, 85th Cong. (1957) (introduced by Sen. Kennedy, Sen. Morse, Sen. Murray, and Sen. McNamara); H.R. 394, 85th Cong. (1957) (introduced by Rep. Rodino); H.R. 651, 85th Cong. (1957) (introduced by Rep. Green); H.R. 715, 85th Cong. (1957) (introduced by Rep. Kelly); H.R. 840, 85th Cong. (1957) (introduced by Rep. Multer); H.R. 4825, 85th Cong. (1957) (introduced by Rep. Roosevelt); H.R. 6307, 85th Cong. (1957) (introduced by Rep. Dwyer); H.R. 6318, 85th Cong. (1957) (introduced by Rep. Harden); H.R. 6584, 85th Cong. (1957) (introduced by Rep. Griffiths); H.R. 6797, 85th Cong. (1957) (introduced by Rep. Roosevelt); H.R. 8274, 85th Cong. (1957) (introduced by Rep. Granahan); S. 1345, 86th Cong. (1959) (introduced by Sen. Cooper, Sen. Case, Sen. Javits, and Sen. Prouty); H.R. 313, 86th Cong. (1959) (introduced by Rep. Addonizio); H.R. 365, 86th Cong. (1959) (introduced by Rep. Green); H.R. 780, 86th Cong. (1959) (introduced by Rep. Griffiths); H.R. 822, 86th Cong. (1959) (introduced by Rep. Kelly); H.R. 855, 86th Cong. (1959) (introduced by Rep. Multer); H.R. 3866, 86th Cong. (1959) (introduced by Rep. Kearns); H.R. 3867, 86th Cong. (1959) (introduced by Rep. Church); H.R. 3868, 86th Cong. (1959) (introduced by Rep. Rogers); H.R. 3869, 86th Cong. (1959) (introduced by Rep. Weis); H.R. 3885, 86th Cong. (1959) (introduced by Rep. Bolton); H.R. 3886, 86th Cong. (1959) (introduced by Rep. Dwyer); H.R. 3887, 86th Cong. (1959) (introduced by Rep. May); H.R. 3888, 86th Cong. (1959) (introduced by Rep. St. George); H.R. 4361, 86th Cong. (1959) (introduced by Rep. Flynn); S. 3926, 86th Cong. (1960) (introduced by Sen. Morse); S. 2494, 87th Cong. (1961) (introduced by Sen. McNamara and Sen. Morse); H.R. 165, 87th Cong. (1961) (introduced by Rep. Weis); H.R. 217, 87th Cong. (1961) (introduced by Rep. Griffiths); H.R. 236, 87th Cong. (1961) (introduced by Rep. Kelly); H.R. 364, 87th Cong. (1961) (introduced by Rep. Green); H.R. 571, 87th Cong. (1961) (introduced by Rep. Sullivan); H.R. 766, 87th Cong. (1961) (introduced by Rep. McDonough); H.R. 834, 87th Cong. (1961) (introduced by Rep. Multer); H.R. 2376, 87th Cong. (1961) (introduced by Rep. Addonizio); H.R. 3796, 87th Cong. (1961) (introduced by Rep. Rivers); H.R. 8898, 87th Cong. (1961) (introduced by Rep. Green); H.R. 10575, 87th Cong. (1962) (introduced by Rep. Dwyer); H.R. 11517, 87th Cong. (1962) (introduced by Rep. Zelenko); H.R. 11634, 87th Cong. (1962) (introduced by Rep. Zelenko); H.R. 11677, 87th Cong. (1962) (introduced by Rep. Zelenko); H.R. 12062, 87th Cong. (1962) (introduced by Rep. Fulton); H.R. 12155, 87th Cong. (1962) (introduced by Rep. Ashbrook); H.R. 12159, 87th Cong. (1962) (introduced by Rep. Goodell); H.R. 12161, 87th Cong. (1962) (introduced by Rep. Kearns); H.R. 12165, 87th Cong. (1962) (introduced by Rep. Hiestand); H.R. 12228, 87th Cong. (1962) (introduced by Rep. Halpern).

221. Most of the equal pay bills in 1963 continued to lack a general exception. S. 882, 88th Cong. (1963) (introduced by Sen. Case); S. 910, 88th Cong. (1963) (introduced by Sen. McNamara); H.R. 298, 88th Cong. (1963) (introduced by Rep. Bow); H.R. 409, 88th Cong. (1963) (introduced by Rep. Roosevelt); H.R. 644, 88th Cong. (1963) (Rep. Multer); H.R. 896, 88th Cong. (1963) (introduced by Rep. Kelly); H.R. 1075, 88th Cong. (1963) (introduced by Rep. Griffiths); H.R. 1151, 88th Cong. (1963) (introduced by Rep. Sullivan); H.R. 1624, 88th Cong. (1963) (introduced by Rep. Halpern); H.R. 1936, 88th Cong. (1963) (introduced by Rep. Martin); H.R. 3861, 88th Cong. (1963) (introduced by Rep. Green); H.R. 4022, 88th Cong. (1963) (introduced by Rep. Dwyer); H.R. 4033, 88th Cong. (1963) (introduced by Rep. Holland); H.R. 4269, 88th Cong. (1963) (introduced by Rep. Thompson); H.R. 4892, 88th Cong. (1963) (introduced by Rep. Montoya); H.R. 5063, 88th Cong. (1963) (introduced by Rep. Sickles); H.R. 5672, 88th Cong. (1963) (introduced by Rep. Rivers).

proposed. The first version was in H.R. 5110, introduced by Representative Goodell.<sup>222</sup> This bill would have authorized “reasonable differentiation based on a factor or factors other than sex” (the “reasonable-factor defense”). Soon thereafter, Representative Goodell introduced H.R. 5605, which also contained the reasonable-factor defense.<sup>223</sup> Then, Senators McNamara, Morse, and Randolph introduced S. 1409, which, instead of the reasonable-factor defense, contained an exception for “any other factor other than sex” (the “any-other-factor defense”).<sup>224</sup> The latter defense proved more acceptable and was incorporated into a handful of House bills and into the statute.<sup>225</sup>

The difference between the reasonable-factor defense and the any-other-factor defense is significant. The liability clause of the Equal Pay Act provides that an employer must afford a man and a woman the same rate of pay for jobs that require equal skill, effort, and responsibility, and are performed under similar working conditions.<sup>226</sup> If Congress had adopted the reasonable-factor defense, then the trier of fact would have enjoyed some degree of discretion in deciding whether a difference between a man’s job and a woman’s job sufficed to differentiate them. For example, a jury might have decided that higher pay for a man on the swing shift than for a woman doing equal work on the day shift was not a “reasonable differentiation.” In contrast, the any-other-factor defense permits little if any discretion, and Congress adopted the any-other-factor defense for exactly this reason. Thus, Congress intended that a differential could be based on “shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability.”<sup>227</sup> If men and women performed identical work on an assembly line, except that the men sometimes picked up heavy boxes, the men could be paid more.<sup>228</sup> If female workers were more costly than male workers, the women could be paid less,<sup>229</sup> for

222. 88th Cong. (1963).

223. 88th Cong. (1963).

224. S. 1409, 88th Cong. § 3(d)(1) (1963).

225. H.R. 5970, 88th Cong. (1963) (introduced by Rep. Thompson); H.R. 5971, 88th Cong. (1963) (introduced by Rep. O’Hara); H.R. 5972, 88th Cong. (1963) (introduced by Rep. Sickles); H.R. 6021, 88th Cong. (1963) (introduced by Rep. McDowell); H.R. 6060, 88th Cong. (1963) (introduced by Rep. Green).

226. 29 U.S.C. § 206(d)(1) (2002).

227. H.R. REP. NO. 88-309, at 3, 88th Cong. (1963); 109 CONG. REC. 9195-96 (1963) (statements of Rep. Frelinghuysen and Rep. Thompson).

228. 109 CONG. REC. 9196 (1963) (statement of Rep. Frelinghuysen). *Cf. Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970) (picking up heavy boxes did not justify pay differential).

229. *See* S. REP. NO. 88-176 at 4 (1963); 109 CONG. REC. 9200 (1963) (statement of Rep. Dwyer). An amendment to the bill expressly to allow a differential based on the extra cost of employing women was defeated because it was redundant. 109 CONG. REC. at 9217 (statements of Rep. Goodell and Rep. Pucinski).

example, if state law required longer rest breaks for women, women's pay could be adjusted accordingly.<sup>230</sup> A differential could be based on red circling.<sup>231</sup> A differential might even be based on status as head of a household, provided it was available to both sexes.<sup>232</sup>

Willard Wirtz was the Secretary of Labor from 1962 to 1969.<sup>233</sup> It is reasonable to infer that he was familiar with the reasonable-factor defense in Representative Goodell's bills and with the any-other-factor defense that was incorporated into the Equal Pay Act. In addition, the Secretary drafted S. 830 and H.R. 3651, which became the Age Act and contained the RFOA clause. As for Congress, three-fourths of the senators and representatives in the Ninetieth Congress who were eligible to vote on the Age Act — including the leading advocates of the Age Act, namely, Senators Yarborough and Javits and Representatives Perkins and Dent — had been members of the Eighty-eighth Congress, which had passed the Equal Pay Act.<sup>234</sup> Several of them had introduced equal pay bills.<sup>235</sup> Thus, when the Secretary incorporated the reasonable-factor defense into the RFOA clause, and when representatives and senators voted for it, they knew the origin of this defense, and they knew how it differed from the any-other-factor defense.

Secretary Wirtz and Congress had good reason to choose the reasonable-factor defense for the Age Act. The any-other-factor defense serves the narrow purpose of the Equal Pay Act; eliminating sex discrimination in compensation is achieved as long as a pay differential between a man and a woman is genuinely based on *anything* other than sex, even if the basis of the differential is irrational. But the purpose of the Age Act is broad. Congress sought "to promote employment of older persons based on their ability rather than age."<sup>236</sup> Only differentiation based on

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230. 109 CONG. REC. 9205-06 (1963) (statement of Rep. Griffin).

231. "This term . . . describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs." H.R. REP. NO. 88-309, *supra* note 227, at 3.

232. *See* 109 CONG. REC. 9205-06 (1963) (statement of Rep. Goodell); *but cf. id.* at 9206 (statement of Rep. Green).

233. *See supra* note 17.

234. We cannot know who voted for and against S. 830 and H.R. 13054 because, of the several votes taken on these bills, only one was by roll call, 113 CONG. REC. 34753 (1967), and the bill that was approved by this vote was subsequently amended. We can know, however, that 533 members of Congress could have voted on the bills (Representative Younger having died and Representative Powell having been excluded), and 396 of these members had served in the 88th Congress. *See* U.S. CONGRESS, BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS, 1774-1971, S. Doc. No. 92-8, at 459-64, 471-6 (1971).

235. *See supra* notes 220-221.

236. Age Discrimination in Employment Act of 1967 § 2(b), 29 U.S.C. § 621 (2003).



“reasonable factors” can serve this purpose; differentiation based on irrational factors cannot.

The presence of the word “reasonable” in the RFOA clause, but not in exception iv of the Equal Pay Act, together with origin of the RFOA clause, demonstrate that the Secretary and Congress drew the clause, not from the Equal Pay Act itself, but from bills in 1963 that proposed the reasonable-factor defense. This choice was purposeful. Employing persons based on their ability, not their age, means basing decisions on factors that contribute to the safe or efficient operation of the business, not on factors that do not predict success on the job. This is the essence of the defense to disparate impact.

#### 4. Pension Plans and Other Unintended Effects

*Section 4(f)(2) indicates that Congress meant to outlaw disparate impact discrimination, but decided that some practices with an adverse effect deserved protection.*

Section 4(f)(2) protected bona fide employee benefits plans, but prohibited their use as an excuse for refusing to hire older workers. CON argues that this section reveals that Congress outlawed only disparate treatment (refusal to hire) and not disparate impact (denial of pension benefits).<sup>237</sup> In fact, however, this section demonstrates that Congress intended the Age Act to outlaw disparate impact in general, yet also intended that some practices with an adverse impact be exempted.

Section 4(f) contained several defenses. Section 4(f)(1) stated the BFOQ and RFOA defenses. Section 4(f)(2) stated the defense of observing a bona fide seniority system or benefit plan. Section 4(f)(3) stated the defense of good cause for the discharge or discipline of a worker.

It was no coincidence that the same section of the Age Act protected both seniority systems and benefit plans. Both of these programs could have adverse effects on older workers. Congress knew that although seniority often helped older workers, sometimes it hurt them. For example, seniority could be company wide or could be limited to a specific unit. Company-wide seniority protected older workers against lay-off, or, if they were laid off, helped them when workers were recalled, because an older worker could claim a job anywhere in the company. Unit-specific seniority, however, could be detrimental to an older worker, who might be laid off from one unit while junior workers in other units were retained, or who, having been laid off, might find that junior workers (or even new hires)

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237. See *infra* notes 252-253 and accompanying text.

were brought into other units.<sup>238</sup>

Congress also knew that pension and other benefit plans could have adverse effects on older workers. Senator Yarborough gave the example of a plan with a normal retirement age of 65 and a twenty-year funding and vesting schedule.<sup>239</sup> An employer might refuse to hire anyone whose pension could not vest. As a result, an applicant aged 55 would not be hired. In order to promote the employment of older workers, section 4(f)(2) required this employer to make the decision on hiring without regard for the applicant's age. But employers who began hiring older workers would encounter a significant problem: what to do about pensions, medical insurance, and other fringe benefits? Older workers are more costly to these programs.<sup>240</sup> Taking pensions as an example, hiring a worker at age 55 and providing a pension at age 65 would allow only half the usual period in which to fund the benefits. Yet if the plan provided for a twenty-year funding and vesting schedule, and if only workers whose pensions could vest could be hired, this individual would be able to establish a prima facie case of disparate impact.

Section 4(f)(2) contained Congress's solution to the problems of seniority and fringe benefits. Section 4(f)(2) protected bona fide seniority systems and benefit plans, just as section 703(h) of Title VII protected bona fide seniority systems.<sup>241</sup> Hence, CON'S argument is mistaken. What need would there have been for section 4(f)(2) to protect seniority and benefit plans against challenge based on their adverse effects unless disparate impact were illegal under section 4(a)(2)?

### *B. CON: Section 4(f)(1) Precludes Disparate Impact*

*The text of the RFOA clause, its legislative history and its true origin combine to prove that Congress aimed the Age Act only at disparate treatment.*

#### *1. The Text of Section 4(f)(1)*

*The RFOA clause is a further defense to disparate treatment, not the defense to disparate impact. The RFOA clause is perhaps superfluous, but so are the BFOQ and good-cause clauses of the Age Act. The RFOA clause protects an employer's act based on a reasonable belief.*

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238. Secretary's Report, *supra* note 18, at 15.

239. 113 CONG. REC. 31255 (1967) (statement of Sen. Yarborough).

240. Secretary's Report, *supra* note 18, at 16.

241. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 343-55 (1977).

PRO'S argument that the RFOA clause in section 4(f)(1) states the defense to disparate impact rests on the unarticulated assumption that the section has no other application. The assumption is false. For example, Senator Jennings Randolph was speaking with Secretary of Labor Wirtz about the hiring of older workers as pilots on airlines:

SENATOR RANDOLPH. Under the FAA rules, the pilot must be retired at age 60. I am told that it costs approximately \$250,000 to \$300,000 to train pilots. . . . That period of training runs for about 3 years.

I am wondering if there is a possibility of an understanding on your part as to why the airline might hesitate to invest this sum in, well say, training a man who is 45 years of age, when the airline would realize that there was only 12 years before his date of retirement. . . . Would you discuss this problem I brought to your attention?

SECRETARY WIRTZ. Yes, sir; it would involve in the administration of the law a determination under section 4(f)(1) [the RFOA clause]. . . . I would find that question not very difficult in my present understanding of it — it is subject to change — my answer. I would think where there is that much training requirement, that that would be a legitimate factor; that you would weigh the period of the usefulness of that person against the period of the training that was required, taking full account of the cost factors and human factors. I should be surprised to find any difficulty with that case and if I am less than blunt, you will know it is only the proprieties that require my putting this in any other form. I would not think it would be a violation of this provision to deny employment on those terms.<sup>242</sup>

The Secretary did not subsequently change his answer. An employer may refuse to hire a worker above a certain age if training costs are high and the employer would have a restricted period in which to recoup those costs. The refusal to hire is *prima facie* disparate treatment, but the high training costs and restricted recoupment period are “reasonable factors other than age.” Thus the RFOA clause has meaning even if it is not the defense to disparate impact.

It may be argued that the clause is superfluous if interpreted as suggested in the preceding paragraph. If an employer discharges a worker because of a reasonable factor like misconduct or inefficiency, then the worker has not been denied an opportunity because of age, and discrimination has not occurred; and there was no need for the RFOA clause to make this point. The argument is technically correct. The employer who proves that the worker was disadvantaged due to a “reasonable factor[] other than age” has destroyed the element of causation in the plaintiff's *prima facie* case. It was not necessary for Congress to write into the statute the right of a defendant to attack the plaintiff's *prima facie* case.

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242. *Senate Hearings, supra* note 15, at 48-49.

But the argument proves too much. The BFOQ clause is equally superfluous. If age is a BFOQ for a job and the plaintiff is too old, then the plaintiff is not qualified for the job. Being qualified for the job is an element of the prima facie case, and the employer would have been free to attack it even if Congress had not inserted the BFOQ clause in the act.

Likewise, section 4(f)(3) is superfluous. "It shall not be unlawful for an employer . . . to discharge or otherwise discipline an individual for good cause." To prove that a worker was disciplined for good cause is to confound the worker's attempt to prove that the discharge occurred because of age.

The RFOA clause, the BFOQ clause, and the good-cause clause are not only superfluous, but also redundant. If an employer disciplines a worker for good cause, has not the employer acted on a reasonable factor other than age? If age is a BFOQ for a job and a person is too old to do the work, is not the basis of the decision the person's lack of ability, and is not lack of ability a reasonable factor other than age?

Congress simply disregarded the canons of statutory construction. When the point was important enough, Congress did not hesitate to state the obvious, or even to repeat itself.

A much more probable reading of the RFOA clause exists. It says a "reasonable factor[] other than age" is a defense. The clause does *not* say a "job-related factor" or a "business necessity." If an employer acts reasonably in basing a decision on a certain factor, then the decision is lawful. For example, when an employer has a reasonable belief that a test selects qualified workers, the RFOA clause protects use of that test, regardless of its disparate impact. Far from ratifying disparate impact, the RFOA clause negates disparate impact.

## 2. *The Legislative History of the RFOA Clause*

*Secretary Wirtz did not intend the RFOA clause to be the defense to disparate impact, and Senator Yarborough's example of an employer who uses a test to select workers did not contemplate disparate impact because the Senator did not say the test had an adverse effect.*

PRO argues that the RFOA clause was Secretary's Wirtz's response to his observation that some age "discrimination" occurred because of a genuine relationship between age and ability to perform a job.<sup>243</sup> But PRO cites nothing in the Secretary's Report or in the legislative history to support this connection. In this connection, PRO asserts that the RFOA

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243. See note 208 and accompanying text.

clause captures the defense to disparate impact. Even if the text of the clause were massaged into this form, the truth would remain that Congress did not understand disparate impact in 1967 and could not have intended the RFOA clause to be the defense to a claim that did not as yet exist. PRO'S argument for disparate impact based on Senator Yarborough's remarks in the Senate<sup>244</sup> neglects a crucial fact: The Senator's example did not say that the employer's test had an adverse effect on older workers. The Senator said that the man "might fail to pass the test at 35; he might fail to pass the test at 55." The Senator did not suggest that more older than younger workers failed the test. Legislators are prolix, and what they know, they say. If Senator Yarborough had thought he was discoursing on disparate impact, he would have mentioned the adverse effect of the test. The truth is simple: neither Senator Yarborough nor any other senator understood disparate impact.

### 3. *The Origin of the RFOA Clause*

#### a. *The True Origin of the RFOA Clause*

*The origin of the RFOA clause is not the Equal Pay Act, but bills against age discrimination dating from 1958. Some bills would have barred age discrimination by federal contractors, and other bills would have made age discrimination an unfair labor practice. The reasonableness defense in all of these bills applied only to intentional discrimination.*

Contrary to PRO'S argument,<sup>245</sup> the RFOA clause did not originate in Representative Goodell's bills in 1963. The clause goes back substantially further than exception iv to the Equal Pay Act. The true origin of the clause reveals that it was aimed only at disparate treatment.

Many of the bills against age discrimination between 1958 and 1967 contained an exception that would have allowed an employer to deny an employment opportunity on the basis of age when an older worker could not reasonably perform the job safely or efficiently. These bills contemplated only disparate treatment, and it follows that the RFOA clause, which grew out of the reasonableness exception in the earlier bills, also applies only to disparate treatment.

The first bill against age discrimination to contain a reasonableness exception was introduced by Representative Porter in 1958. (Senator

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244. See *supra* text accompanying note 210.

245. See *supra* notes 222-225 and accompanying text.

Javits's National Act did not contain any exceptions.)<sup>246</sup> Representative Porter's bill pertained to government contractors. It read in relevant part:

the contractor will not impose any requirement or limitation of maximum age with respect to the hiring or employment of persons, except such requirements or limitations, in accordance with regulations prescribed by the Secretary of Labor, relating to specific jobs or types of employment as are reasonably designed to protect older workers from tasks which they could not ordinarily because of their age be expected to perform safely or efficiently.<sup>247</sup>

Thirty-three similar bills were introduced by other representatives and senators between 1958 and 1964.<sup>248</sup> All of these bills prohibited maximum age limitations, which are disparate treatment. It follows that the reasonableness exception was a defense only to intentional discrimination.

The first bill seeking to make an unfair labor practice of age discrimination was introduced by Representative Dingell in 1960,<sup>249</sup> and seventeen similar bills were introduced thereafter through 1967.<sup>250</sup> These bills would have added section 8(a)(6) to the Labor Act, making it an unfair labor practice for employers:

(6) to refuse to hire, to discharge, or otherwise to discriminate against any individual with respect to his terms, conditions, or privileges of employment, otherwise lawful, because of such individual's age, when the reasonable demands of the position do not require such an age distinction. . .

Section 8(a)(6) read like section 4(a)(1) of the Age Act and section 703(a)(1) of Title VII and, therefore, was aimed only at disparate treatment. If PRO is correct that the RFOA clause is the defense to disparate impact, what is the reasonableness exception doing in this section of the bill? Far more likely, the exception for "the reasonable demands of the position" was intended as a defense to disparate treatment.

Most of the unfair labor practice bills also would have added section 8(b)(8) to the Labor Act, making it an unfair labor practice for unions:

(8) to discriminate against any individual in connection with terms, conditions, or privileges of his employment, otherwise lawful, because of such individual's age, when the reasonable demands of the position do not require such an age distinction; or to limit, segregate, or classify its membership in any way which would deprive or tend to deprive such individual of otherwise lawful employment opportunities or otherwise adversely affect his status as

246. H.R. 10455, 85th Cong. (1958).

247. *Id.*

248. *See supra* notes 180-186 and accompanying text.

249. H.R. 11671, 86th Cong. (1960).

250. *See supra* notes 168-171, 187-189 and accompanying text.

such an employee or as such an applicant for employment, or would affect adversely his wages, hours, or employment conditions, because of such individual's age.

Notice that section 8(b)(8) had two clauses, which were separated by the semicolon.

The first clause was directed at unions' role as bargaining agents. In this role, unions would have been forbidden to negotiate "terms, conditions, or privileges" of employment that discriminated on the basis of age unless the "reasonable demands of the position . . . require[d] such distinction." *Mutatis mutandis*, this clause was a paraphrase of section 8(a)(6); thus, the reasonableness exception must have been intended to carry the same meaning in both sections. It follows that the reasonableness exception in section 8(b)(8) was a defense to disparate treatment.

The second clause of section 8(b)(8) is equally important because it *omitted a reasonableness exception*. This omission devastates the argument that the clause "limit, segregate, or classify" states disparate impact and the RFOA clause states the defense. If the argument were correct, how could we explain why the second clause of the section, which supposedly stated disparate impact, omitted the reasonableness exception, which was supposedly the defense? Surely, the exception is as necessary to disparate impact as to disparate treatment. The omission was not an oversight; the reasonableness exception qualified the first clause of the same section.

The true explanation is that, whereas the first clause of section 8(b)(8) was meant to apply to unions' external relations with employers, the second clause was meant to apply to union's internal relations with their members. A close reading of sections 8(a)(6) and 8(b)(8) allows no other explanation.

Section 8(a)(6) would have prohibited employers from intentionally denying employment opportunities to older workers, unless they could not reasonably do the work, and the first clause of section 8(b)(8) would have prohibited unions from causing employers to violate section 8(a)(6). The reasonableness exception was necessary in the first clause of section 8(b)(8) because, if older workers could not reasonably perform a job, then unions should have been free to negotiate for appropriate provisions in contracts.

The reasonableness exception was not necessary in the second clause of section 8(b)(8) because it had a different purpose, namely, to govern the internal affairs of the union. The words "limit, segregate, or classify its membership" obviously applied to the relations of unions to their members. Unions would have been prohibited from organizing themselves internally to the disadvantage of older workers if the consequence were loss of job opportunities. The reasonableness exception did not appear in the second clause of section 8(b)(8) because the exception was not needed. The "reasonable demands of the position" were irrelevant to the internal organization of unions.

As mentioned above, Representative Roosevelt's bills H.R. 10144 in 1962 and H.R. 405 in 1963 each contained a section outlawing age discrimination by employers and unions, and this section contained the reasonableness exception. It provided in relevant part:

SEC. 6.

(a) It shall be an unlawful employment practice for any employer to fail or refuse to hire any individual, or to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, otherwise lawful, because of such individual's age, when the reasonable demands of the position do not require such an age distinction. . . .

(c) It shall be an unlawful employment practice for a labor organization —

(1) to exclude from its membership or to discriminate against any individual because of his age, if the reasonable demands of the position or positions involved do not require such an age distinction.

As with the bills regarding federal contractors and unfair labor practices, the liability terms in section 6 contemplated only disparate treatment, and the reasonableness exception was similarly restricted.<sup>251</sup>

The present form of the reasonableness exception — the RFOA clause — appeared for the first time early in 1967 in the legislative proposal of the Secretary of Labor, S. 830 and H.R. 3651. The changes made to this proposal by the House of Representatives and the Senate did not affect the RFOA clause.

What was the origin of the text of the RFOA clause in the administration's proposal? The answer is obvious. The clause was the linear descendent of the reasonableness exceptions in the bills that would have prohibited age discrimination by government contractors, the bills that would have made age discrimination an unfair labor practice, and the bills introduced by Representative Roosevelt in 1962 and 1963. As a result, the RFOA clause contemplates only disparate treatment because the reasonableness exception in all of those bills applied only to intentional

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251. The reasonableness exception was relevant only to employment. In relation to employers, the exception would have allowed them to exclude older workers when the "reasonable demands of the position" required youth; in relation to unions, the exception would have allowed them, in their role as bargaining agents, to negotiate clauses in labor contracts that excluded older workers for the same reason.

The reasonableness exception did not apply to unions as organizations, that is, to the internal affairs of unions. However, the exception in section 6(c)(1) seems to apply to unions both as bargaining agents and as organizations, for it qualifies both the prohibition "to exclude from its membership" and the prohibition "to discriminate against." Even if this reading were correct, it would remain that the reasonableness defense applied only to disparate treatment; but the reading is not correct. More likely, section 6(c)(1) condensed section 8(b)(8), quoted above, that would have made an unfair labor practice of age discrimination by unions. Understood as a condensation, section 6(c)(1) meant the reasonableness exception to apply only to unions in their role as bargaining agents.



discrimination.

*b. The Reasonable-Factor Defense*

*PRO mistakenly argues that the reasonable-factor defense was derived from an unsuccessful bill calling for equal pay.*

PRO asserts that the origin of the RFOA clause was an unsuccessful equal-pay bill introduced by Representative Goodell.<sup>252</sup> This assertion rests on two arguments: one argument is at best an educated guess about what Secretary Wirtz and members of Congress must have known, and the other argument is speculation as to how Congress understood the difference between the “reasonable-factor” defense and the “any-other-factor” defense. Neither argument is supported by committee reports, statements on the floor of Congress, or testimony in committee hearings.

PRO also asserts that the RFOA clause captures the essence of the defense to disparate impact. Reading the BFOQ and RFOA clauses together makes clear what each actually does. The BFOQ clause provides a defense when age is explicitly the employer’s reason for a decision; the RFOA clause provides a defense when age is not explicitly the reason for the decision. Both of these are defenses to disparate treatment, as Senator Yarborough’s examples make clear. BFOQ: an airline may retire its pilots at age 60. ROFA: in determining who is qualified for a job, an employer may use reasonable means, even if it favors a younger worker.<sup>253</sup>

It is more likely, as just argued, that the true origin of the RFOA clause was the line of bills against age discrimination that culminated in the Age Act.

## VI.

### EVALUATION OF ARGUMENTS

PRO and CON have presented arguments for and against recognizing disparate impact under the Age Act. The question now is, which arguments are more forcible? Which better serve the purpose of the act? Here follows an evaluation of these arguments by the author and then his views on the issue.

#### *A. Arguments Based on the Text of the Act*

*The ordinary meaning of the text of the Age Act favors recognition of*

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252. See *supra* notes 222-223 and accompanying text.

253. See *supra* text following note 245.

*disparate impact.*

The text of the Age Act favors an interpretation that includes disparate impact. The words "because of . . . age" demand causation, but not intent. If each section of a statute has its own meaning, section 4(a)(2) must describe disparate impact. Where Congress found differences between age discrimination and race or sex discrimination, the Age Act was differentiated from Title VII; the practical identity of sections 4(a)(2) of the Age Act and 703(a)(2) of Title VII indicates that Congress saw no differences in regard to theories of liability. The Supreme Court's decision in *Griggs* supports this interpretation.

It may be argued that Congress put the RFOA clause in the Age Act in order to rule out disparate impact. The text of the clause, however, approximates the defense to disparate impact. In the context of an employment decision, a "reasonable factor[] other than age" can only be a practice that genuinely serves a legitimate goal of the business.

### *B. Arguments Based on Legislative History*

*The legislative history of Title VII and the Age Act militate against recognizing disparate impact.*

Senator Yarborough's remarks on the BFOQ and RFOA clauses can easily be read to embrace disparate impact, but the remarks make sense even if he had only disparate treatment in mind. That Congress was not aware of disparate impact three years earlier when Title VII was considered, that none of the troubling issues to which disparate impact gives rise were raised in 1967, that the closest the Secretary of Labor's Report came to disparate impact was to recommend further study of practices that motivated employers to impose age limits, and that Congress directed the Secretary to study ways of overcoming other "barriers" to the employment of older workers, amount to convincing proof that Congress did not have disparate impact in mind in 1967.

This conclusion demonstrates the RFOA clause was not written to preclude disparate impact. Congress could not have intended the clause to forfend a theory of which no one was aware.

### *C. Arguments Based on the Origins of Section 4(a)(2) and the RFOA Clause*

*The origins of section 4(a)(2) ("to limit, segregate, or classify") and section 4(f)(1) (the RFOA clause) suggest these sections were aimed only at disparate treatment.*

Both section 703(a)(2) of Title VII and section 4(a)(2) of the Age Act originated in bills introduced shortly after the end of the Second World War. The sections were directed at intentional discrimination by labor unions, and neither their text nor their meaning changed over time. These sections were not intended to outlaw practices with a disparate impact.

The origin of the RFOA clause in section 4(f)(1) is less certain. It has roots in early bills against age discrimination, suggesting the clause is an outgrowth of an exception in those bills that allowed employers to establish reasonable age limits. These bills, both in what they prohibited and in what they excepted, were aimed only at disparate treatment. But the RFOA clause also has roots in the Equal Pay Act, suggesting that the change in wording of the exception from “any factor” to “reasonable factors” was intended to narrow the exception to the point that it is congruent with the defense to disparate impact. There is truth in both of these arguments, though the former seems to be stronger.

#### *D. Justice Powell's Theorem*

*Justice Powell's theorem is correct. Both disparate treatment and disparate impact, as legal theories or methods of proof, should be available to prove discrimination.*

Justice Powell's theorem is convincing. Disparate treatment and disparate impact were legal theories or methods of proof under Title VII, not separate claims. Eight justices of the Supreme Court subscribed to the theorem in *Watson v. Fort Work Bank & Trust*. The only difference between disparate treatment and disparate impact is the way in which causation is proved. It follows that both disparate treatment and disparate impact should be available as methods of proof under the Age Act.

## VII.

### THE PURPOSE OF THE AGE ACT

The words of the statute and Justice Powell's theorem favor disparate impact. The legislative history of the statute and the origins of the text point the other way. The purposes of the statute are the tiebreaker.

#### *A. Employment Based on Ability*

*The main purpose of the Age Act was to promote employment decisions based on ability. Outlawing disparate impact would further this goal.*

The overriding purpose of the Age Act is to promote employment based on ability. Congress believed it was unjust to deny a job to a

qualified worker simply because of age. Section 2(b) of the act states: “[I]t is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age. . . .” The committee reports in the House of Representatives and the Senate echoed this purpose,<sup>254</sup> as did individual representatives,<sup>255</sup> senators, and the Secretary of Labor.<sup>256</sup>

In order to promote employment on the basis of ability, not age, Congress sought to identify and eliminate the cause of age discrimination. Our lawmakers believed that age discrimination differed from race or sex discrimination in that employers were not prejudiced against older persons as people. So said the Report of the Secretary of Labor,<sup>257</sup> so testified the

254. S. REP. NO. 90-723, *supra* note 49, at 1. H.R. REP. NO. 90-805, *supra* note 54, at 1.

255. 113 CONG. REC. 34740 (1967) (statement of Rep. Perkins) (“H.R. 13054, a bill to bar arbitrary discrimination in employment based on age, in fact is more than a bill to bar age discrimination. It is a bill to promote employment of middle aged and older persons based on their ability”). See also *id.* at 34742 (statement of Rep. Steiger) (“This bill will . . . insure that all our citizens have an opportunity, commensurate with their abilities, for productive employment.”), 34744 (statement of Rep. Hawkins) (“Unless we can bring about a closer relationship between employment and ability — regardless of age — our longer lifespan is of little avail. . . . The purpose of H.R. 13054 . . . is ‘to promote the employment of older workers based on their ability’”), 34746 (statement of Rep. Daniels) (“employers will learn to judge prospective employees on the basis of ability”), *id.* (statement of Rep. Olsen) (“a statement of national policy to promote the employment of older workers on the basis of their ability alone has long been overdue”), 34747 (statement of Rep. Dent) (the bill “provides relief only when a qualified person who is ready, willing, and able to work is unfairly denied or deprived of a job solely on the basis of age”), 34749 (statement of Rep. Halpern) (“This bill . . . is carefully designed to promote employment of older persons based on ability rather than age.”).

256. 113 CONG. REC. 31253 (1967) (statement of Sen. Yarborough) (“this is a bill to give every American the opportunity to be equally considered for employment and promotional opportunity”).

America was and still is the great land of opportunity, and the reason is clear: It is a land where a premium is put on ability — not rank, not privilege, and, if the system worked to perfection, not nationality, not religion, not sex, not race, and not age. But, Mr. President, we are confronted with the fact that as well as the system does work, there are still some shortcomings.

*Id.* at 31254 (statement of Sen. Javits)

SENATOR YARBOROUGH. Mr. Secretary, what we really seek to do about this legislation is to get away from arbitrary age distinctions and go to judgment of individuals on their merits.

SECRETARY WIRTZ. That is correct.

SENATOR YARBOROUGH. How much should we even think of these situations where age might have some relation to ability but not in relation to an individual’s merits?

SECRETARY WIRTZ. I am wondering whether we should strike any reference to age at all in any connection and look at employment only in terms of whether the individual does or does not have the capacity to do whatever [sic] job it is that the individual is seeking.

*Senate Hearings, supra* note 15, at 51-2.

257. Secretary’s Report, *supra* note 18, at 2 (“Employment discrimination because of race is identified, in the general understanding of it, with non-employment resulting from feelings about people entirely unrelated to their ability to do the job. There is *no* significant discrimination of this kind so far as older workers are concerned.”). The report further states:

Discrimination in employment based on race, religion, color, or national origin is accompanied by and often has its origins in prejudices that originate outside the sphere of employment. There are no such prejudices in American life which would carry over so strongly into the sphere of employment. . . . We have found no evidence of prejudice based on dislike or intolerance of the older worker.

*Id.* at 5-6. However, the Secretary’s Report also said, “This is not to say that there is no intolerant

Secretary<sup>258</sup> and other witnesses before committees of Congress,<sup>259</sup> and so believed senators<sup>260</sup> and representatives.<sup>261</sup> For example, Representative Burke said on the floor of the House:

Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. These discriminations result in nonemployment because of feelings about a person entirely unrelated to his ability to do a job. This is hardly a problem for the older job seeker.<sup>262</sup>

The author believes that Representative Burke and the others were mistaken on this score. Prejudice against older persons may not have been the dominant reason for age discrimination, but American worship of youth is not a new phenomenon, and it played — and continues to play — a large role in the work place.<sup>263</sup> Age discrimination was particularly problematic

prejudice against older persons as such. Determinations not to employ older workers can become deep-seated and even emotional in character.” *Id.* at 6.

258. *House Hearings, supra* note 52, at 13 (“this kind of discrimination is entirely different from race discrimination; the root of race discrimination is pure bigotry. That is not true here. Age discrimination, I think, develops because of oversight, lack of sense, lack of realization of the capacity of an older person.”).

259. *Id.* at 45 (statement of Norman Sprague, Director, Employment and Retirement Program, National Council on the Aging) (“The problem of age discrimination is a complex one because it is seldom a matter of blind or arbitrary prejudice which often exists for reasons of race, creed, color, national origin, or sex”), 61 (statement of Peter J. Pestillo, Labor Counsel, Chamber of Commerce of the U.S.) (“the age barriers that exist in employment due to employer attitudes stem from misconceptions about ability rather than from ill feelings toward older workers”). See also *Senate Hearings, supra* note 15, at 106 (statement of Anthony Obadal, Secretary, Advisory Panel on Older Workers, U.S. Chamber of Commerce) (using exactly the same words as Mr. Pestillo), 146 (statement of Mr. Sprague) (repeating before the Senate committee the statement he made to the House committee).

260. 113 CONG. REC. 31254 (1967) (statement of Sen. Javits) (“What we have learned, essentially, is that a great deal of the problem stems from pure ignorance: there is simply a widespread irrational belief that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs.”).

261. *House Hearings, supra* note 52, at 53 (statement of Rep. Dent) (“I would like to believe that at least in this area of discrimination it is not a matter of personal prejudice or bias, it has nothing to do with the normal type of discrimination we would be faced with in our generation.”).

262. 113 CONG. REC. 34742 (1967).

263. “The present age has been called on [sic] age where the cult of youth seems to prevail over everything else.” *Senate Hearings, supra* note 15, at 28 (statement of Sen. Javits).

[A] nation which already worships the whole idea of youth must approach any problem involving older people with conscious realization of the special obligation a majority assumed with respect to “minority group” interests. This is, to be sure, one minority group in which we all seek, sometimes desperately, eventual membership. Discrimination against older workers remains, nevertheless, a problem which must be met by a majority who are not themselves adversely affected by it and may even be its temporary beneficiaries.”)

Secretary’s Report, *supra* note 18, at 3. See also SEGRAVE, AGE DISCRIMINATION BY EMPLOYERS, *supra* note 130, at 4-5 (“David Hackett Fischer described an intense age prejudice in employment in the late 19th and early 20th century. A cult of youth, he said, developed in America during the 19th century and grew rapidly in the next one.”). Segrave continues:

When H. L. Douse looked at the issue historically in the *International Labour Review*, he remarked that the twentieth century belonged to youth. . . . “This glorification of the attributes of youth has been enhanced by contemporary authors and playwrights who almost invariably make their heroes and heroines young dynamic individuals, often bestowing upon them

for women, as Congress knew. While it considered the Age Act in 1967, Congress learned about the airlines' common practice of retiring stewardesses as young as 30 or 32 years of age.<sup>264</sup> Indeed, age

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superior qualities quite incompatible with the inexperience of youth," he said. It all led to a lowered appreciation of the attributes of older people. . . . Douse concluded that age discrimination existed mainly because of prejudice and fallacious beliefs. . . .

*Id.* at 94 (citing H. L. Douse, "Discrimination Against Older Workers," 83 INT'L LABOUR REV. 349-351, 366 (1961)).

Albert Abrams, director of the New York State Joint Legislative Committee on Problems of the Aging, pointed out:

that America's national heroes were not physicists or philosophers but 20-year-old baseball players and teen-age Hollywood stars. "Many respectable corporate fortunes are being made today by successfully conditioning the public to a dread of aging. The purveyors of face creams, liver pills, slenderizing mechanisms, and so forth hold before us the grim prospect of a wrinkled, obese, ill old age." He continued, "Youth, youth, youth! We idealize it. We crave it. We fear its loss."

SEGRAVE, AGE DISCRIMINATION BY EMPLOYERS, *supra* note 130, at 98.

See also *id.* at 12 (quoting Daniel Motley, president of a small Christian college on the topic of older workers in 1915: "yet it is more delightful to be surrounded by the young, with hopefulness, gladness, and outlook in their eyes"), 26 (quoting the director of the American Vocational Exchange on the preference of her clients for younger girls in 1927: "there is, of course, the natural human element in favor of youth"), 27 (quoting the head of a women's shelter in 1928 on the difficulty faced by middle-aged homeless women when trying to find employment: "Employers naturally prefer to have young good-looking women in their employ"), 59 (responses to a 1937 questionnaire sent to 18 large New York employment agencies asked whether employers preferred younger clerical workers; the answer was yes, and the reasons included "'the youth cult,' 'party looks,' 'Older women are not as attractive as young girls'"), 65 (citing findings from a New York State legislative committee formed in the late 1930's that among the causes of age discrimination in employment was "public demand for younger people in certain occupations"), 97 (noting that Alfred Abrahms, director of the New York State Joint Legislative Committee on Problems of the Aging, believed in 1952 that "the glorification of youth and high energy" was one of the barriers faced by older workers), 127 (noting Secretary of Labor James P. Mitchell's comment in 1954 that, underlying the reasons for age discrimination was "the national tendency to glorify the values of youth and minimize the values of maturity. This constant association of undesirability with age and desirability with youth tends to embed in our society a viewpoint that shunts the aged out of business, family, and community life").

Prejudice against older persons continues. *Id.* at 146 (noting that Newsweek's survey of labor conditions in 1974 supported the conclusion that "both subtly and blatantly society had exalted youth and shrunk from what were euphemistically called the golden years. And that pervasive attitude, declared *Newsweek*, translated itself into 'widespread job discrimination against older workers. . . . [I]t was not a conscious bias but represented 'an underlying corporate value'"), 172-73 (noting that a survey done by James Haefner of Illinois employees in 1977 led Haefner to conclude, "Employees would prefer not to work with blacks, women, older individuals. . .").

264. S. REP. NO. 90-723, *supra* note 49, at 6, 15; H.R. REP. NO. 90-805, *supra* note 54, at 6, 13-14. 113 CONG. REC. 31253 (1967) (statement of Sen. Yarborough), 32155 (statement of Sen Javits), 34741 (colloquy of Reps. Mink and Perkins), 34743 (remarks of Rep. Mink and Rep. Matsunaga), 34748 (statement of Rep. Van Deerlin), 34750 (statement of Rep. Pepper).

Congress decided not to protect stewardesses because "a further lowering of the age limit proscribed by the bill would lessen the primary objective; that is, the promotion of employment opportunities for older workers." S. REP. NO. 90-723, *supra* note 49, at 6; H.R. REP. NO. 90-805, *supra* note 54, at 6. But the problem was remedied, in part by Title VII's prohibition of sex discrimination (stewards were not required to retire at such a young age) and in part by the Age Act itself (women aged 40 who wished to be stewardesses are protected).

discrimination has always affected women more severely than men.<sup>265</sup>

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265. SEGRAVE, AGE DISCRIMINATION BY EMPLOYERS, *supra* note 130, at 14-15 (noting that in 1905-1911, "women suffered from the double discrimination of both gender and age, and . . . age discrimination against women began at an earlier age. . ."), 20 (a female officer with the Cooperative Action Membership Corporation observed in 1927, "much was said about middle-aged men looking for work but little about middle-aged women, whose problem was equally great, if not greater. . . [E]mployment agencies often advised middle-aged women to lie about their ages when applying for jobs"), 33 (one firm in 1929 maintained a maximum hiring age of 45 for men, 35 for women), 40 (generally acknowledged in 1934 that many employers had a maximum hiring age of 45 for men, 40 for women; article in 1936 argued that there was a maximum hiring age of 26 for waitresses, of 30 for clerks), 41 (a Works Progress Administration study of 198,157 workers in 1936 found that older male workers were unemployed for longer periods than younger male workers; "the same trend was true for female workers who were, however, younger in all groups"), 42 (three speakers at a 1930 gathering of the American Women's Association in New York agreed that "women over 40 did not get anything like the same opportunity for employment that men that age did;" placement of workers through the U.S. Employment Service in 1937 "showed a very marked falling off in rates of placement in the older age groups. Among men the decline started in the 40s; among women, in the 50s for service workers, and in the 30s for white-collar women workers"); 42-43 (Ollie Randall, assistant director of welfare in 1938 for the Association for Improving the Condition of the Poor observed, "[n]ot many years ago forty was a hazardous age for a woman to seek re-employment. Employers have lowered this standard now to an age limit of 35 years, which is considered the maximum age for re-employment today. In some classes of work, such as secretarial jobs, 28 years is the absolute top with the personnel directors"), 43 (the American Engineering Council noted in 1930 that the hiring age limit for engineers was 40, and a study in the early 1930's by a carpenter's union in New York revealed that carpenters over 45 were unemployed four times longer than younger carpenters; but opportunities for women disappeared at even younger ages, for example, jobs for librarians started to diminish at age 35, vanished at age 40, and "every change of position which they made after the age of 30 'must be to a library in which they will be willing to stay until retirement'" according to the American Library Association in 1940); 48 (according to the founder of the Executive Women's Association of New York, formed in 1940, "prejudice among employers against women over 35 was as widespread as the reluctance to hire men over 40"), 56 (a survey conducted by the Maryland Commissioner of Labor & Statistics in 1930 revealed the hiring age limit for women lower than for men), 58 (the New York State Commission on Old Age Security in 1931 "found that age first became a handicap in obtaining employment after 35 for men and after 30 for women;" "older people were not among the first to be laid off, except when they attained old age . . . 65 for males, 55 for females"), 59 (the National Conference Board conducted a survey in 1937 and concluded, "Wherever age limits had been set, the age restrictions were lower for women. Almost 75 percent of the companies with limits set the maximum hiring age for women at 45 or less, while only about 40 percent of the firms with limits fixed them that low for men;" employment agencies in 1937 reported that "the average age limit set by employers when seeking clerical workers . . . was: men 25 to 30, women 23 to 25"), 60 (according to a 1937 Massachusetts study, "Beginning at age 45 . . . the chances of reemployment in Massachusetts factories were less than one in four for men and one in 10 for women; "employers prefer to hire males under 30 and females under 25 years of age"), 72 (a study by the Joint Legislative Committee on Unemployment of New York State in 1933 concluded that in New York, the "[c]ommonest age limit set for men was 45 years. Age limits set for women were regularly lower; 'forty years or less appears to be the general rule.'"), 76 (a pamphlet released by the Public Affairs Committee in 1939 stated, "[F]rom the age of 35 onward the proportion of unemployed began to rise, at first gradually, then, after 45, more steeply. . . . Women were also affected earlier. For them the decline in employability set in at 30 instead of 35, and it increased much more rapidly."), 77 ("Roswell Phelps, director of statistics for the Massachusetts Labor Department . . . found discrimination in Massachusetts beginning at around 34 for men, 29 for women" in the late 1930's), 83-84 ("Edward Rhatigan, former New York City welfare commissioner disclosed during a speech in 1948 [that a] woman over 30 and a man over 45 were seldom hired;" Irving Barshop, supervisor of the Federation Employment Service, stated during a 1949 speech that "unemployment of women as young as 35 or men as young as 38 constituted a problem that most employers refused to face"), 85 (in a 1955 profile of the

Nevertheless, our interpretation of the Age Act must be informed by what our legislators believed, and they believed that there was little prejudice against older persons.

If prejudice was not the cause of age discrimination, what was? The cause was “assumptions about the effect of age on [older workers’] ability to do a job *when there is in fact no basis for these assumptions.*”<sup>266</sup> Once again, Representative Burke put it well:

Discrimination arises for [the older worker] because of assumptions that are made about the effects of age on performance. As a general rule, ability is ageless. A young man with ability does not lose it with age, unless his capabilities are dependent upon his physical characteristics or the speed of his reactions. In most instances a worker’s skills are honed and sharpened by experience. Studies have shown that the older worker brings qualities to a job that tend to make him a very desirable employee. He is dependable, has a lower rate of absenteeism than young coworkers, he has a high rate of job stability, and his rate of work injuries is lower than that of the younger worker.<sup>267</sup>

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problems facing older workers, U.S. News & World Report noted that “new jobs were becoming harder to get for a man after he reached the age of 45, or for a woman past 35”), 86 (the American Mercury reported in 1959 that “[s]eventy percent of Houston firms would not consider men for office employment if they had passed the age of 44; for women there the percentage was ‘discouragingly higher’”), 87 (interviews conducted by the University of California at Berkeley during 1959 revealed, “At one airline age limits were as follows: 27 for stewardesses, 35 for stewards”), 88 (“females faced an even bleaker situation than did men.” Ollie Randall noted in a speech before the Women’s City Club in New York in 1950, “[C]ommercial old age for women was 35 years. . . based on a recent study by the United States Employment Service of the diminishing number of jobs for women over 35 and for men over 45 years of age”), 89 (the International Labour Organization stated in a 1955 report that “older women were more subject to unemployment than men of the same age or younger workers of either sex. . . .” Cited as examples by the International Labour Organization were Columbus, Ohio, and Houston, Texas, where 81 percent of job vacancies for women (at state employment centers) were subject to age restrictions, as compared with 64 percent for male vacancies”), 97 (“Data on job orders filled by public employment service agencies in 1950 showed that in Columbus, Ohio, of 3,925 jobs, 81 percent had age restrictions for women, 75 percent for men”), 98 (in the early 1950’s “[i]n commercial offices the age limit was frequently 35 for women and 45 for men”), 114 (a survey conducted during the late 1940’s and sponsored by the United States National Association of Manufacturers revealed that “the downward path in employability for men began around the ages 40 to 45; for women it started five to 10 years earlier”), 115 (employment agencies reported in 1956, “The chances for being placed begin to diminish most noticeably at age 35 for both men and women, while for women alone, the age handicap is significant even at 30”), 151 (surveying the early 1990’s and noting, “As in all previous periods, age discrimination hit women harder than men. Males experienced big employment drops in their mid 50’s; it came 10 years earlier for women”).

But compare *id.* at 86 (one survey showed men encountered difficulty in being hired at age 30 as compared to age 35 for women), 101 (noting that in the late 1950’s “difficulty in obtaining employment apparently began to occur earlier for men than for women in a number of occupational fields — clerical, sales, and semiskilled”

266. Secretary’s Report, *supra* note 18, at 2 (emphasis in original). See also *id.* at 5 (“We do find substantial evidence of arbitrary practice in the second category of discrimination — discrimination based on unsupported general assumptions about the effect of age on ability. . .”).

267. 113 CONG. REC. 34742 (1967).



Other legislators also believed that age discrimination was caused by employers' false assumptions and generalizations about the effect of age on older workers.<sup>268</sup>

Congress was certainly right that employers often discriminated against older workers based on false generalizations. Stereotyped conceptions of older workers have been a blight on the American economy and society since the Nineteenth Century.<sup>269</sup> For example, employers widely believed that hiring an older worker would increase costs for pensions<sup>270</sup> and workers' compensation insurance.<sup>271</sup> There was a grain of truth in these generalizations. Older workers were a slightly greater expense to pension plans.<sup>272</sup> Older workers who were injured on the job took a little longer to recuperate than younger workers did,<sup>273</sup> and the expansion of workers' compensation coverage to conditions like heart disease and diabetes benefited primarily older workers.<sup>274</sup> But employers exaggerated the magnitude of these costs and ignored off-setting benefits. Thus, the extra cost to an employer was modest when pensions were geared to years of service, so that newly hired older workers received lower

268. *Id.* at 31254 (statement of Sen. Javits) ("a great deal of the problem stems from pure ignorance: there is simply a widespread irrational belief that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs"), 34745 (statement of Rep. Eilberg) ("discriminatory practices in hiring . . . are the result of only stereotyped thinking, thoughtlessness, and prejudice about the abilities of older workers"), 34746 (statement of Rep. Olsen) ("Unfavorable beliefs and generalizations about older persons have grown up over the years. . . . The stereotype of an inflexible person, in physical decline, capable of only low productivity, bars the employer from a fair evaluation of the applicant's actual ability and performance record.").

269. SEGRAVE, AGE DISCRIMINATION BY EMPLOYERS, *supra* note 130, *passim*.

270. *Senate Hearings*, *supra* note 15, at 34 (statement of Sen. Murphy) ("Employers gave many reasons why they do not hire older workers. In a 1959 study done in my state of California, the following reasons were given for not hiring older workers: . . . 10.1% mentioned pension and insurance costs . . ."), 161 (Sen. Yarborough: "I think one of the big problems in the hiring of the aged is the problem of the pension rights." Sen. Morse: "That is right."). See also SEGRAVE, AGE DISCRIMINATION BY EMPLOYERS, *supra* note 130, at 5 (several experts believe that a major cause of age discrimination between 1895 and 1935 was union demands for pension plans), 100 (according to a federal Labor Department study in the 1950's, "Companies without pension plans hired about 45 older workers per 100 employed, while firms with pension plans hired only about 17 per 100"), 13, 14, 29, 31, 32, 34, 36-37, 59, 64, 73, 87, 92, 94, 97, 101, 105, 115-120, 128, 129, 174 (from 1916 to 1983, employers were reluctant to hire older workers because they would soon retire and need pensions, or would be forced to retire before qualifying for pensions).

271. SEGRAVE, AGE DISCRIMINATION BY EMPLOYERS, *supra* note 130, at 29, 32, 35 (during the late 1920's, employers justified maximum hiring ages by claiming a need to keep workers' compensation rates low), 63, 65, 92-93, 114-15, 130 (employers continued to use workers' compensation insurance as a reason not to hire older workers during the 1930's, 1940's, and 1950's, and also believed that older workers were more likely to be injured on the job).

272. Secretary's Report, *supra* note 18, at 16 (explaining that age can, but does not have to, affect the cost of a pension plan); Secretary's Research Materials, *supra* note 18, at 40-45; *Senate Hearings*, *supra* note 15, at 159-61 (statements of Sen. Morse and Sen. Yarborough).

273. SEGRAVE, AGE DISCRIMINATION BY EMPLOYERS, *supra* note 130, at 65.

274. Secretary's Report, *supra* note 18, at 15.

pensions than their younger counterparts,<sup>275</sup> and, vesting of rights could actually make younger workers more expensive.<sup>276</sup> Regarding workers' compensation insurance, the dominant fact was that premiums were based, not on the age of the work force, but on the incidence of injuries — and older workers tended to have fewer injuries on the job than younger workers.<sup>277</sup>

Congress knew these facts. It believed that older workers brought substantial benefits to their companies, benefits that usually outweighed the costs. As Representative Donohue said,

the best employee is one of maturity and stability and possessed of a high sense of responsibility. This is a summarized but exact description of the economic value of our middle-aged citizens. . . . It has been further found that older workers have a 20 percent better attendance record than younger employees; that employees 45 and older had 2.5 percent fewer disabling injuries, and 25 percent fewer nondisabling injuries than younger workers; that voluntary turnover rates are less among older employees; that the older worker is very likely to possess more skills, training, and all-around knowledge than younger people.<sup>278</sup>

Representative Matsunaga agreed. He said that employers justify age discrimination with

the insupportable assumption that most of the workers over 40 have health problems which would detrimentally affect their efficiency and work attendance. Studies have shown, however, that the job performance of the older worker at many tasks does not decrease significantly with age. Even after 55, the older worker is usually able to keep up with the pace set by his younger coworkers. These studies also reflect an absence of any appreciable difference in the work attendance between the age groups.<sup>279</sup>

Representative Dent also agreed: "The evidence is that, in general, the experience that older people possess fully compensates for any loss of work capacity which might otherwise in varying degrees be occasioned by their age."<sup>280</sup> So thought Representatives Burke<sup>281</sup> and Hechler as well.<sup>282</sup> And in

275. SEGRAVE, AGE DISCRIMINATION BY EMPLOYERS, *supra* note 130, at 88, 100, 116-119, 128-29 (presenting arguments by experts in the 1940's and 1950's that pension costs were not in fact higher for older workers). See generally Secretary's Research Materials, *supra* note 18, at 40-45.

276. See generally Secretary's Research Materials, *supra* note 18, at 43-44. Yet younger workers often changed jobs before their pensions vested, giving the employer the benefit of the use of pension contributions. *Senate Hearings*, *supra* note 15, at 160 (statement of Sen. Morse).

277. See SEGRAVE, AGE DISCRIMINATION BY EMPLOYERS, *supra* note 130, at 35, 63, 65, 114-15, 118 (discussing evidence from the 1920's through the 1950's showing that age discrimination was caused in part by many employers' belief that older workers suffered more injuries on the job than younger workers and therefore increased the cost of workers' compensation insurance, whereas in fact older workers suffered fewer injuries).

278. 113 CONG. REC. 34749 (1967).

279. *Id.* at 34742.

280. *Id.* at 34747.

the other body, Senator Yarborough said:

Everyone who testified at our hearings felt that the greatest need in this area was to educate employers to the facts — facts which show that older workers are at least as productive as younger workers and that on average they stay with their employers for a longer period of time. Despite the general notion to the contrary, it is the younger workers who are the big job shifters. Older workers are usually more experienced and more stable workers. It will be the major job of the Department of Labor under this bill to educate the country to the fact that older workers are just as capable employees as younger workers.<sup>283</sup>

Generalizations and assumptions are not vices in themselves. We could not function without them. Indeed, one could hardly act if one demanded rigorous proof of every proposition antecedent to action. But generalizations and assumptions can be vicious when they are false. Congress intended the Age Act to combat false assumptions and to cause employers to rely on accurate information. Accurate information would serve the primary goal of the statute: promoting employment on the basis of ability instead of age.

The disparate impact method of proving discrimination is perfectly suited to achieving the intent of Congress. Our lawmakers believed that the dominant cause of age discrimination was “assumptions about the effect of age on [older workers’] ability to do a job *when there is in fact no basis for these assumptions*.”<sup>284</sup> Disparate impact roots out such assumptions. An employment practice that is not “based on reasonable factors other than age” is based on a false assumption, namely, that the practice serves a legitimate goal of the business. If such a practice has an adverse effect on older workers, then the practice is discriminatory and should be unlawful. For example, a selection criterion that is not job related produces false information. The criterion purports to predict success on the job, but in fact selects at random with respect to qualifications. Thus, the invalid criterion generates false information as to which workers are qualified and which are not. If the criterion has an adverse effect on older workers, this false information leads an employer to deny employment opportunities to

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281. “In most instances a worker’s skills are honed and sharpened by experience. Studies have shown that the older worker brings qualities to a job that tend to make him a very desirable employee. He is dependable, has a lower rate of absenteeism than younger coworkers, he has a high rate of job stability, and his rate of work injuries is lower than that of the younger worker.” *Id.* at 34742.

282. “Frequently, older workers make better workers because they are more experienced, more level-headed and also more stable. . .” *Id.* at 34750.

283. *Id.* at 31253 (1967). Sen. Murphy concurred. See *Senate Hearings, supra* note 15, at 35 (Sen. Murphy relies on a study by the National Association of Manufacturers of 3107 companies, indicating that older workers are considered to be superior or equal to younger workers in work performance by 93 percent of respondents, in attendance by 98 percent of respondents, in safety by 97 percent of respondents, and in work attitudes by 99 percent of respondents).

284. Secretary’s Report, *supra* note 18, at 2 (emphasis in original).

qualified older workers. This is exactly what Congress meant the Age Act to prevent.

### B. Increasing Economic Productivity

*Another purpose of the Age Act is to increase the productivity of the economy. Outlawing disparate impact promotes productivity by outlawing employment decisions that irrationally deny jobs to qualified older workers.*

Age discrimination wastes valuable human resources. Congress expected the Age Act to ameliorate this evil. Secretary of Labor Wirtz found "clear evidence of the Nation's waste of a wealth of human resources that could be contributed by hundreds of thousands of older workers. . . ."285 He estimated that "a million man-years of productive time are unused each year because of unemployment of workers over 45."<sup>286</sup> Yet, he found, in most jobs older workers are as competent as younger workers:

4. The competence and work performance of older workers are, by any general measures, at least equal to those of younger workers.

The Bureau of Business Management at the University of Illinois in a study of supervisory ratings in manufacturing establishments in 1954 found that 11 percent of the workers 60 years old and over received excellent ratings for overall performance; only 3 percent received poor ratings. On work quality, 32 percent were rated better than young workers, 60 percent the same and 8 percent poorer.

A Canadian study of sales persons in retailing showed that workers hired above the age of 40 attained higher performance ratings in a shorter period than workers hired below 30 years of age. They reached their peak performance in their fifties.

Department of Labor studies of factory production work involving physical effort indicate that a slight decrease in productivity occurs after age 45; but that decrease does not become substantial until age 60. In office or other sedentary work little, if any, decline occurs prior to age 60, and the subsequent decline is minor.<sup>287</sup>

Older workers experienced the greatest difficulty, not in retaining their jobs, but in securing new jobs after, for example, a lay-off. As early as 1911, an executive of the American Federation of Labor testified to the Employers' Liability Commission that "the man over 40 with a few gray hairs could not get a new position if he lost his job, but he could hold on if he had a place."<sup>288</sup> Fifty years later, Secretary Wirtz noticed the same

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285. *Id.* at 5.

286. *Id.* at 18.

287. *Id.* at 8-9.

288. SEGRAVE, AGE DISCRIMINATION BY EMPLOYERS, *supra* note 130, at 10. See also *id.* at 11,

phenomenon: "It is significant that employers and supervisors often rate their own older workers high on overall performance, but are at the same time reluctant to hire new employees in the same age brackets."<sup>289</sup> A survey by the Department of Labor in 1965 revealed that in 20 percent of firms no workers over age 45 had been hired, and in 50 percent of firms, only 5 percent of new hires were over age 45.<sup>290</sup>

Several legislators agreed with the Secretary. They commented that outlawing age discrimination would end the loss of a valuable resource. Representative Burke said, "[B]usiness and industry would gain skills, wisdom, and experience accumulated during long working years. . . ."<sup>291</sup> So said Representative Reid: "Many of our ablest citizens are in their senior years and they have yet to make some of their most valuable contributions to meaningful jobs and service to their country."<sup>292</sup> Other legislators concurred.<sup>293</sup>

Because older workers' greatest problem is finding new jobs, let us focus on selection criteria used in hiring. If a criterion has an adverse effect

20, 24, 99 (citing evidence from 1910 through 1957 that older workers sometimes kept their jobs beyond their employers' cut-off age for hiring new employees).

289. Secretary's Report, *supra* note 18, at 9.

290. *Id.* at 7.

291. 113 CONG. REC. 34742 (1967).

292. *Id.* at 34745.

293. *Id.* at 34744 (statement of Rep. Hawkins) ("Can we afford to continue wasting the ability and experience of 850,000 Americans over the age of 45?"), 34745 (statement of Rep. Eilberg) ("at a time when we desperately need the talents and energies of older workers . . . the harm that [age discrimination] bring[s] to the strength of this Nation is intolerable. . . . [T]he loss to society because of age prejudice borders on the irresponsible."), 34746 (statement of Rep. Daniels) ("I believe that Congress can have no greater goal than to maximize our labor resources through full employment of the skills and experience of all our people."), 34752 (statement of Rep. Dwyer) ("job discrimination hurts not only the deprived applicants but the employers and our economy and society as a whole"). See also *Senate Hearings*, *supra* note 15, at 23 (statement of Sen. Javits) ("Age discrimination in employment is a tragedy . . . from the standpoint of the nation as a whole. For it represents a great waste of one of our most precious resources — in this case the talent and experience accumulated by our older workers over many years."), 55 (Sen. Yarborough ordered printed in the record "Unused Manpower: the Nation's Loss," which was Manpower Research Bulletin No. 10 from the Department of Labor. The report identified an "employment gap" of 725,000 workers, which cost the economy 7 billion dollars in gross national product; men between ages 55 and 64 accounted for two-fifths of the gap), 31 (statement of Sen. Randolph) ("by helping older workers to help themselves, we shall make them a buoyant effect on the economy instead of a drag on it. . . ." The Senator quoted Dr. J. T. Richardson of Marshall University: "Our waste of resources because of age in this country is one of the greatest tragedies of our modern culture and civilization." Then the Senator observed, "Our Nation cannot afford this waste. With the enactment of legislation before us . . . we shall release the time, talents, energies, and enthusiasm of older workers to benefit not only themselves but the entire nation as well"), 214 (statement of Sen. Williams) ("witnesses . . . have told us that older workers are needed to give us badly needed skills at a time when heavy demands are being made on our labor force. Others have said that the economy cannot sustain losses caused by idle workers"). See also *House Hearings*, *supra* note 52, at 90 (William L. Hutton, Executive Director of the National Council of Senior Citizens, testified that *Time* magazine estimated the cost of discrimination in hiring against workers over 45 cost the economy \$4 billion per year).

on older workers, and is not job related, then qualified and still-productive older workers are denied jobs, and the economy loses, in Representative Burke's words, the workers' "skills, wisdom, and experience." Interpreting the Age Act to outlaw disparate impact will serve Congress's purpose of reducing this loss.

### C. *Decreasing Cost to the Government*

*The Age Act also sought to decrease the costs of social programs like unemployment compensation and welfare. Outlawing disparate impact will provide more jobs to qualified older workers and minimize their draw on social programs.*

Saving money on unemployment compensation and welfare transfers was another benefit that Congress intended the Age Act to achieve. President Johnson's message to Congress, "The Older American Worker," estimated that unemployment insurance payments for workers 45 and older cost three-quarters of a billion dollars annually.<sup>294</sup> The Secretary of Labor's Report to Congress stated:

A substantial portion of the unemployment insurance payments of \$1 billion a year to workers 45 and older can be attributed to unemployment resulting in one way or another from the fact of the employee's age. Some of these payments, of course, would go to workers who are between jobs even under conditions of full employment; nonetheless, a large but incalculable proportion involves long-duration unemployment that reflects the difficulty which the older worker faces in attempting to find a new job.<sup>295</sup>

Later, the Secretary confirmed the President's calculation that "over three-quarters of a billion dollars in unemployment insurance was paid out in 1964 to workers 45 and older."<sup>296</sup>

Legislators were well aware that age discrimination cost the government a great deal of money in unemployment compensation to older workers. Representative Reid pointed out that 27 percent of the unemployed were aged 45 to 65,<sup>297</sup> and Representative Perkins said that 40 percent of the long-term unemployed fell into this age group.<sup>298</sup> Senator Murphy noted that the average duration of unemployment in 1964 for males aged 45 to 64 was 20.8 weeks, whereas the average duration for all males was only 14.5 weeks.<sup>299</sup> Other legislators mentioned similar statistics.<sup>300</sup>

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294. 113 CONG. REC. 34744 (1967).

295. Secretary's Report, *supra* note 18, at 18.

296. *Senate Hearings*, *supra* note 15, at 37, 39.

297. 113 CONG. REC. 34744 (1967).

298. *Id.* at 34741.

299. *Senate Hearings*, *supra* note 15, at 33-34.

300. 110 CONG. REC. at 34744 (statement of Rep. Hawkins), 34746 (statement of Rep. Dent),

Representative Dent concluded that older workers “are probably the largest single draw on unemployment in the country.”<sup>301</sup>

Congress also anticipated that the Age Act would save on welfare costs. Senator Williams said that an older worker who cannot find a job sometimes has to resort to welfare.<sup>302</sup> Representative Dent made the same observation<sup>303</sup> and added, “we might find, if investigation were made, that the workers between perhaps 40 and 65 may make up the bulk of the so-called chronic relief recipient cases. If so, in my opinion that makes this legislation even more desirable at this time.”<sup>304</sup> In fact, such investigations had been made. Harold L. Sheppard of the Upjohn Institute for Employment Research informed the House committee, “among adult groups, even if we exclude those over the age of 65, we find that after the age of 45 the rate of poverty among heads of families is directly related to being older.”<sup>305</sup> Charles S. Manning, Executive Vice President of Towers, Perrin, Forester & Crosby, testified to the House committee that the older worker is far more likely to exhaust one’s unemployment insurance benefits and to withdraw from the labor market. In consequence,

we are required to face the prospect of a growing army of displaced workers that need to be fed, clothed and housed and yet are barred from productive membership in our labor force. Their support in the form of spiraling welfare costs, old age insurance payments and social security pensions will necessarily impose an increasingly burdensome toll on the production of our younger workers.<sup>306</sup>

Employment practices with a disparate impact take jobs away from older workers, often cause them to apply for unemployment compensation, and sometimes force them to seek public assistance for themselves and their dependents. This waste would be mitigated by recognizing disparate impact under the Age Act.

## VIII.

### CONCLUSION

To summarize, Congress intended the Age Act

- to promote the employment of older persons based on their ability rather than their age
- to maximize the productivity of the economy by making full use of

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34750 (statement of Rep. Pepper) (1967).

301. *House Hearings, supra* note 52, at 40.

302. *Senate Hearings, supra* note 15, at 215.

303. *House Hearings, supra* note 52, at 48.

304. *Id.* at 49.

305. *Id.* at 78.

306. *Id.* at 282.

the skills, wisdom, and experience of older workers,

- to minimize the cost to government of unemployment compensation and welfare, and

- to eradicate an injustice.

Outlawing disparate impact would serve these purposes. Disparate impact should be recognized as a legal theory or method of proving discrimination under the Age Act.