Flourishing Forties Against Flaming Fifties: Is Reverse Age Discrimination Actionable Under the Age Discrimination in Employment Act?

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FLOURISHING FORTIES AGAINST FLAMING FIFTIES: IS REVERSE AGE DISCRIMINATION ACTIONABLE UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT?[1]

I. INTRODUCTION

On February 5, 2001, twenty-eight-year-old Stacey Stillman, one of the castaways from the popular television series "Survivor," filed a lawsuit claiming that the producer rigged the show by encouraging other cast members to vote her off the island.[2] She further claimed that the producer's motivation was to ensure that the only senior citizen left on the island—crusty seventy-two-year-old Rudy Boesch—would continue to participate in the show.[3] Stillman's claim was regarded as highly unusual, and it provoked joking commentary in newspapers and on television, as well as a lawsuit directed back at Stillman. It seemed preposterous at the time that a young and attractive woman could be discriminated against in favor of an old man, and have a viable claim. Now, in 2003, this idea does not appear as bizarre. Change the scenario a little: add just twelve years to Stillman's age, presume there is no restrictive employment contract and that no charges of fraudulent interference with the show are involved—and voila! You now have a cognizable age discrimination claim under the Age Discrimination in Employment Act (ADEA),[4] at least according to the Sixth Circuit Court of Appeals.[5] Specifically, a defendant-employer may now be found liable for reverse age discrimination.

"Reverse discrimination" is the term that has been coined by the courts to refer to discrimination in favor of a minority group against a majority.[6]

1. The labels "flourishing forties" and "flaming fifties" were assigned to different generational cohorts by Gail Sheehy, the author of the acclaimed book *New Passages*. *See* GAIL SHEEHY, NEW PASSAGES: MAPPING YOUR LIFE ACROSS TIME 24 (1995).

2. *See 'Survivor' Castoff, Producers Wash into Court*, 12 NO. 11 ANDREWS SPORTS & ENT. LITIG. REP. 11 (2001).

3. Editorial, *Bits and Pieces*, WINSTON-SALEM J., Feb. 10, 2001, at 16, *available at* 2001 WL 3040737.

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

5. *See* Cline v. Gen. Dynamics Land Sys., Inc., 296 F.3d 466 (6th Cir. 2002), *cert. granted*, 123 S.Ct. 1786 (2003).

6. The term also sometimes refers to "affirmative action," but often has different meanings depending on the context in which it is used. *See generally* Philip L. Fetzer, *'Reverse*

Reverse discrimination claims brought under federal anti-discrimination laws have proliferated in the past several years.[7] Such claims have been held viable under Title VII of the Civil Rights Act of 1964 (Title VII)[8] when plaintiffs who are not members of a racial minority sued for discrimination on the basis of race.[9] Similarly, male workers have claimed the protection of Title VII when discriminated against in favor of women.[10]

Reverse discrimination has a different connotation when used in the context of age discrimination claims than it does when used in connection with race or sex discrimination. According to its terms, the ADEA makes it unlawful to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[11] The ADEA protects only employees who are forty years old and older.[12] As a result, federal case law appears well settled as far as reverse discrimination claims of workers under forty are concerned; the plain language of the statute puts them outside of ADEA protection.[13] Unlike reverse race or sex discrimination that focuses on discrimination against those who historically have been free from discrimination,[14] reverse age discrimination is discrimination based on relative youth and occurs within a protected class.[15] In

Discrimination': The Political Use of Language, 12 NAT'L BLACK L.J. 212, 216 (1993) (describing the origins and discussing various definitions of the term 'reverse discrimination').

7. *See* Timothy K. Giordano, Comment, *Different Treatment for Non-Minority Plaintiffs under Title VII: A Call for Modification of the Background Circumstances Test to Ensure That Separate Is Equal*, 49 EMORY L.J. 993, 993 (2000) (stating that the number of reverse discrimination claims has almost doubled since 1991, constituting 17.1% of the claims filed with the Equal Opportunity Commission (EEOC) in 1996).

8. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255, Title VII, § 703 (codified as amended at 42 U.S.C. § 2000e-2(a)(1) (2000)).

9. John P. Furfaro & Maury B. Josephson, *Reverse Age Discrimination*, 210 N.Y. L.J. 3, 3 (1993). *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

10. *See, e.g.*, Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012 (D.C. Cir. 1981) (Title VII lawsuit brought by a male railroad employee alleging that he was denied a promotion to become a locomotive fireman because of preferences given to black and female employees).

11. 29 U.S.C. § 623(a)(1) (2000). It is also unlawful under the ADEA provisions to "limit, segregate, or classify" employees in a manner that would deprive the employee of "employment opportunities or otherwise adversely affect his status as an employee" and "reduce the wage rate of any employee in order to comply with [the ADEA]." *Id.* §§ 623(a)(2)–623(a)(3).

12. *Id.* § 631(a) (stating in pertinent part that "[t]he prohibitions in this chapter shall be limited to individuals who are at least 40 years of age").

13. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996).

14. *See* Fetzer, *supra* note 6, at 216.

15. Jeffrey Paul Fuhrman, Comment, *Can Discrimination Law Affect the Imposition of a Minimum Age Requirement for Employment in the National Basketball Association*?, 3 U. PA. J. LAB. & EMP. L. 585, 600 (2001).

other words, within the ambit of the ADEA, reverse discrimination refers to discrimination against the "younger-old" in favor of the "older-old."

While age discrimination claims have been on the rise in the past several years,[16] litigation based on claims of reverse discrimination has been rare under the ADEA.[17] Until recently, the few federal courts that addressed the issue of reverse age discrimination under the ADEA refused to extend the protection of the statute to workers older than forty who alleged discrimination based on their relative youth.[18] The legal landscape changed, however, in June 2002 with the Sixth Circuit's decision in *Cline v. General Dynamics Land Systems, Inc.*,[19] which found that the ADEA protects workers in their forties from being treated less favorably than older workers.

This Note will discuss the issue of reverse age discrimination within the protected class in light of the *Cline* decision and will address the circuit split created by *Cline*. Although the term reverse age discrimination has sometimes been applied to discrimination against workers under forty,[20] this Note will address only the type of discrimination that affects workers older than forty who are within the class protected by the ADEA. Part II of the Note will briefly discuss the language, purpose, and history of the ADEA. Part III will profile the cases in the current circuit split. Part IV will offer a critical assessment of recognizing a cause of action for reverse discrimination under the ADEA and will argue that the text of the ADEA, its goals, and its legislative history require that a cause of action based on reverse age discrimination should not be recognized. Part V will examine whether it is reasonable to recognize reverse discrimination under Title VII while denying it under the ADEA and will conclude that the courts' treatment of reverse discrimination under Title VII is inapposite for the purposes of the ADEA. Support for this idea will be gleaned from the marked differences between age,

16. *See* U.S. Equal Employment Opportunity Commission, *Charge Statistics: FY 1992 Through FY 2001*, *at* http://www.eeoc.gov/stats/charges.html (last modified Feb. 6, 2003) (illustrating that ADEA charge filings increased from 18.3% of all discrimination charges filed with the EEOC in 1999 to 21.5% of charges filed in 2001).

17. *See* Furfaro & Josephson, *supra* note 9, at 3.

18. *See, e.g.*, Stone v. Travelers Corp., 58 F.3d 434 (9th Cir. 1995); Hamilton v. Caterpillar, Inc., 966 F.2d 1226 (7th Cir. 1992); Greer v. Pension Benefit Guar. Corp., No. 00 CIV 1272 SAS, 2001 WL 137330 (S.D.N.Y. Feb. 15, 2001); Dittman v. Gen. Motors Corp., 941 F. Supp. 284, 287 (D. Conn. 1996), *aff'd*, 116 F.3d 465 (2d Cir. 1997); Parker v. Wakelin, 882 F. Supp. 1131 (D. Me. 1995).

19. 296 F.3d at 466.

20. Reverse age discrimination for people younger than forty remains a hot topic for debate and has been addressed by several commentators. *See, e.g.*, Fuhrman, *supra* note 15, at 602 (advocating the extension of the ADEA protection to people younger than forty); Bryan B. Woodruff, Note, *Unprotected Until Forty: The Limited Scope of the Age Discrimination in Employment Act of 1967*, 73 IND. L.J. 1295, 1295 (1998) (arguing that Congress should prohibit all age discrimination regardless of the employee's age).

sex, and race as protected categories and will be illustrated by Supreme Court decisions. Public policy considerations that stem from the possibility of allowing a cause of action for reverse age discrimination will be examined in Part VI. The Note will conclude that the circuit split should be resolved against the availability of the cause of action for employees older than forty claiming reverse age discrimination.

II. GENERAL OVERVIEW OF THE ADEA

Before examining the viability of a cause of action for reverse age discrimination under the ADEA, it is helpful to review the language and the legislative history of the statute. What follows is a general overview of the ADEA, which focuses on the portions of the ADEA that are relevant to the discussion of reverse age discrimination.

A. The Language of the ADEA

The ADEA applies to private sector employers with twenty or more employees, labor unions, employment agencies, and the federal government.[21] The ADEA's stated goals are to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[22] Under the ADEA, an employer cannot "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[23] Section 631(a) of the ADEA provides that "any individual" means those individuals who are at least forty years of age.[24]

Congress originally designated the protected class as persons between the ages of forty and sixty-five.[25] Rather than imposing a general prohibition on

21. 29 U.S.C. §§ 630(a)–(d), 633(a) (2000). When the ADEA was first enacted, its coverage was limited to private employment. Subsequent amendments in 1974 and 1978 extended the ADEA protection to state and federal employees. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a), 88 Stat. 55; Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189.

22. 29 U.S.C. § 621(b).

23. *Id.* § 623(a)(1). The ADEA also makes it unlawful to "limit, segregate, or classify" employees in a manner that would deprive an employee of "employment opportunities or otherwise adversely affect his status as an employee" because of the individual's age. *Id.* § 623(a)(2). It is also unlawful under the ADEA to "reduce the wage rate of any employee in order to comply with this chapter." *Id.* § 623(a)(3).

24. *Id.* § 631(a).

25. *Id. See* DAVID NEUMARK, AGE DISCRIMINATION LEGISLATION IN THE UNITED STATES 3 (Nat'l Bureau of Econ. Research, Working Paper No. 8152, 2001), *available at* http://www.nber.org/papers/w8152.

age discrimination for all ages, Congress later raised the cap to age seventy[26] and eliminated the upper age limit altogether in 1986.[27] The ADEA provides four statutory defenses for noncompliance. First, it is permissible for employers to engage in age discrimination when an employee's age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business."[28] Second, the employer may take action inconsistent with the ADEA proscriptions in order to comply with a "bona fide seniority system" or a "bona fide employee benefit plan."[29] Third, the employer may make discriminatory decisions if "the differentiation is based on reasonable factors other than age."[30] Fourth, the employer may discharge or discipline for good cause.[31] In addition, the ADEA permits compulsory retirement at age sixty-five and older for employees who occupy a "bona fide executive" or a "high policymaking position" under certain circumstances.[32]

The Older Workers Benefit Protection Act ("OWBPA"), which was signed into law in 1990,[33] amended the ADEA and clarified that "'compensation, terms, conditions or privileges of employment' [under the ADEA] encompass all employee benefits, including [those] provided pursuant to a bona fide employee benefit plan."[34] The OWBPA also created a series of prerequisites for knowing and voluntary waivers of ADEA claims and imposed affirmative duties of disclosure and waiting periods.[35]

B. Legislative History of the ADEA

The ADEA was the last of three employment civil rights statutes passed during the 1960s. It was preceded by Title VII of the Civil Rights Act of

26. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3, 92 Stat. 189, 189 (codified as amended at 29 U.S.C. § 631 (2000)).

27. Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, § 2(c)(1), 100 Stat. 3342, 3342 (codified as amended at 29 U.S.C. § 631(a) (2000)).

28. 29 U.S.C. § 623(f)(1) (2000).

29. *Id.* § 623(f)(2)(A). The seniority system must not be designed to evade the "purposes" of the ADEA, thus, no seniority system may impose involuntary retirement. *Id.*

30. *Id.* § 623(f)(1).

31. *Id.* § 623(f)(3).

32. *See id.* § 631(c)(1).

33. Older Workers Benefit Protection Act, Pub. L. No. 101-433, §1, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 623, 626, 630 (2000)).

34. *See* 29 U.S.C. § 630(*l*) (2000). In addition, the Higher Education Amendments of 1998 allow institutions of higher education to offer voluntary, age-based early retirement to tenured faculty without violating the ADEA. *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, § 941, 112 Stat. 1581, 1834 (codified as amended at 29 U.S.C. §§ 623(m), (i)(6) (2000)).

35. *See* 29 U.S.C. §§ 626(f)(1)(B), (F)–(G) (2000).

1964,[36] which prohibits discrimination on the basis of race, color, national origin, sex, or religion, and by the Equal Pay Act,[37] which prohibits sex discrimination in wages. Congress began studying the problem of age discrimination in employment in the 1950s.[38] During the debates about the Civil Rights Act of 1964, Congress considered adding age as a protected class to be included under Title VII.[39] When age discrimination provisions failed to pass, Congress directed the then Secretary of Labor, Willard Wirtz, to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected."[40] One of the charges to Secretary Wirtz was to make a report that would include "recommendations for legislation to prevent arbitrary discrimination in employment because of age."[41]

Secretary Wirtz delivered his report to Congress on June 30, 1965.[42] The Wirtz Report uncovered substantial evidence of "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."[43] The main focus of the report was discrimination in hiring and its effects on unemployment among older adults.[44] Secretary Wirtz found that more than half of all employers applied arbitrary age limits that

36. Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e-2–17 (2000)).

37. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (2000)).

38. *See* EEOC v. Wyoming, 460 U.S. 226, 229 (1983) (discussing legislative history of the ADEA).

39. *See* Judith A. McMorrow, *Retirement and Worker Choice: Incentives to Retire and the Age Discrimination in Employment Act*, 29 B.C. L. REV. 347, 347 n.2 (1988) (citing Mayer G. Freed & Edwina Dowell, *The Age of Discrimination in Employment Act of 1967*, 6 CLEARINGHOUSE REV. 196, 196 (1972)).

40. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265 (repealed 1966).

41. *Id. See generally* 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, 73–90 (Monte B. Lake ed., 1982) (discussing the role of Secretary Wirtz's report in shaping the ADEA).

42. U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965) [hereinafter THE OLDER AMERICAN WORKER], *reprinted in* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 16–41(1981) [hereinafter LEGISLATIVE HISTORY].

43. THE OLDER AMERICAN WORKER, *supra* note 42, at 21, *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 37. *See also id.* at 5 (finding significant evidence of "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 group"), *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 22.

44. *Id.* at 6–7, 18–19, *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 23–24, 35–36.

were typically set from forty-five to fifty-five years of age,[45] that workers over forty-five represented less than five percent of new hires for most establishments,[46] and that one-fifth of employers hired no workers older than forty-five at all.[47] Secretary Wirtz further found that a "significant proportion" of the age limits in effect were arbitrary in the sense that they had been established "without any determination of their actual relevance to job requirements" and were defended on pretextual grounds.[48] The arbitrariness was underscored by the parallel finding that "[t]he competence and work performance of older workers are, by any general measures, at least equal to those of younger workers."[49] The Wirtz Report found that the consequences of such discrimination "embrace[d] a wide range of production loss, human hardship, and frustrations" and cost the economy billions of dollars.[50]

The Wirtz Report also recognized some important differences between discrimination based on age and other types of discrimination. The report emphasized that there is no antagonism on anyone's part toward an older person.[51] Rather, most common forms of discrimination against older workers involved inaccurate assumptions about the effects of age on their ability to do a job.[52] The Wirtz Report recognized that, unlike with race, "not all discrimination in [the age] area is 'arbitrary.'"[53] Thus, the Wirtz Report did not recommend the broad-brush exclusions that are applicable to race discrimination; it recommended legislation that would eliminate discrimination based on stereotypes with particular focus on arbitrary age ceilings in hiring.[54] For example, in *United States v. Florida Board of Regents*, the United States explained:

> Between 1965 and 1967, Congress's two relevant legislative committees and two select committees on aging conducted 18 days of hearings and compiled a record [that] consist[ed] of nearly 2100 pages of testimony and evidence

45. *Id.* at 6, *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 23.

46. *Id.* at 6–7, *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 23–24.

47. The OLDER AMERICAN WORKER, *supra* note 42, at 7, *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 24.

48. *See id.* (emphasis omitted), *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 24.

49. *Id.* at 8 (emphasis omitted), *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 25.

50. *Id.* at 18, *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 35.

51. *Id.* at 2, *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 20.

52. THE OLDER AMERICAN WORKER, *supra* note 42, at 2, *reprinted* in LEGISLATIVE HISTORY, *supra* note 42, at 20. *See* Blumrosen, *supra* note 41, at 79 (stating that "from the beginning, age discrimination was viewed as a different phenomena from race discrimination—a phenomena that did not flow from a long history of prejudice and subordination but rather, flowed from contemporary assumptions that individuals at a certain age lost the capacity to engage in certain activities").

53. THE OLDER AMERICAN WORKER, *supra* note 42, at 1, *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 19.

54. *Id.* at 21–22, *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 37–38.

> [concerning] the problem[s] of age discrimination in employment and the need for a national legislative response.[55]

Based on its findings, Congress enacted the ADEA in 1967.[56] The ADEA represents a legislative compromise: the substantive provisions of the ADEA are derived from Title VII, while the enforcement scheme incorporates the procedures of the Fair Labor Standards Act of 1938.[57] The ADEA provides for backpay, benefits, reinstatement, and liquidated damages in cases of willful violations.[58] In 1978, amendments to the ADEA "tolled the statute of limitations for an additional period up to one year, relaxed the notice requirements of the original Act, and expressly granted jury trials to resolve 'a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the ADEA."[59]

Senator Javits, the ADEA's principal sponsor, emphasized the statute's narrow scope.[60] "We in America pride ourselves on our free enterprise system," he declared, "particularly on the market as the only really objective test for the acceptance or rejection of the worth of goods or services."[61] Senator Javits explained that the ADEA was designed not to displace market

55. Brief for the United States at 3, United States v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (Nos. 98-796, 98-791). *See, e.g.*, *Employment Problems of Older Workers: Hearings Before the House Select Subcomm. on Labor of the House Comm. on Educ. & Labor on H.R. 10634 and Similar Bills*, 89th Cong. (1966); *Age Discrimination in Employment: Hearings Before the House Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor on H.R. 3651, H.R. 3768, and H.R. 4221*, 90th Cong. (1967); *Age Discrimination in Employment: Hearings Before the Senate Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare on S. 830 and S. 788*, 90th Cong. (1967); *Retirement and the Individual: Hearings Before the Senate Subcomm. on Retirement and the Individual of the Senate Special Comm. on Aging*, 90th Cong. (1967).

56. *See* H.R. REP. NO. 90-805, at 1 (1967), *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 74.

57. Fair Labor Standards Act of 1938, ch. 626, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219 (2000)). *Compare* 29 U.S.C. § 623(a) (2000) (ADEA prohibitions), *with* 42 U.S.C. § 2000e-2(a) (2000) (Title VII prohibitions). 29 U.S.C. § 626(b) (2000) states that the ADEA "shall be enforced in accordance with the powers, remedies, and procedures" of fair labor standards. *See also* H.R. REP. NO. 90-805, at 5–6 (1967), *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 78–79.

58. *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) (2000).

59. Mark J. Wolff, *Sex, Race, and Age: Double Discrimination in Torts and Taxes*, 78 WASH. U. L.Q. 1341, 1420 (2000) (quoting Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(c) (1994)) (footnotes omitted). For information on the 1978 amendments referenced in the text, see Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 4 (c), 92 Stat. 189, 191 (codified as amended at 29 U.S.C. § 626(e) (2000)) (extending the statute of limitations); § 4 (b), 92 Stat. at 190 (codified and amended at 29 U.S.C. § 626(d) (2000)) (relaxing notice requirements); § 4 (a)(2), 92 Stat. at 190 (codified and amended at 29 U.S.C. § 626(c)(1) (2000)) (providing for jury trials).

60. 113 CONG. REC. 31,254 (1967), *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 145.

61. *Id.*, *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 145.

mechanisms but to counter the "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."[62]

III. CASES IN THE CIRCUIT SPLIT

A. *Reverse Age Discrimination Not Actionable: Hamilton v. Caterpillar, Inc.*[63]

Hamilton was the first judicial interpretation of reverse age discrimination rendered on the appellate level. *Hamilton* involved a class action brought against Caterpillar by a group of employees between the ages of forty and fifty who alleged that the employer had violated the ADEA by extending early retirement benefits only to employees fifty and older.[64] The employer had closed two of its plants in Iowa and, as a result of negotiations with the union, offered a supplemental retirement plan to those employees fifty years and older who had worked for Caterpillar for ten or more years.[65] Hamilton and other members of his class sued Caterpillar because "they were too young to qualify for early retirement benefits" and the only basis for their exclusion was their age.[66]

The district court dismissed Hamilton's claim, holding that the ADEA does not prohibit reverse age discrimination.[67] The district court also held that, even if the ADEA did prohibit reverse discrimination, the special early retirement program at issue was a bona fide employee benefit plan protected by § 4(f)(2) of the ADEA.[68] The Seventh Circuit Court of Appeals affirmed the judgment of the district court based on its review of the first holding that there is no cause of action for reverse discrimination under the ADEA.[69] Judge Cudahy wrote the *Hamilton* opinion for the unanimous panel. In the absence of direct

62. *Id.*, *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 145.

63. 966 F.2d 1226 (7th Cir. 1992).

64. *Id.* at 1227.

65. *Id*. Caterpillar's previous pension plan provided early retirement benefits to workers who were either "60 years or older with 10 years of service and to workers 55 years or older with terms of service, that, when added to their age, totaled 85." *Id.*

66. *Id.* (emphasis omitted).

67. *Id.*

68. *Hamilton*, 966 F.2d at 1227. *See* 29 U.S.C. § 623(f)(2)(B)(ii) (2000). Furfaro and Josephson note that "[a]s in effect, at the time plaintiffs' claims arose, [§ 4(f)(2)] provided employers a safe harbor from charges of discrimination based on actions taken pursuant to 'any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the ADEA].' This provision underwent significant revision in 1990. Section 4(f)(2)(8)(ii) now provides a safe harbor for 'voluntary early retirement incentive plan(s) consistent with the relevant purpose or purposes of this chapter.'" Furfaro & Josephson, *supra* note 9, at 8 n.4.

69. *Hamilton*, 966 F.2d at 1228.

precedent on point, the court relied on dicta from the Seventh Circuit in *Karlen v. City Colleges of Chicago* and the First Circuit in *Schuler v. Polaroid Corp.* Seventh and First Circuit decisions.[70]

In the Seventh Circuit case of *Karlen v. City Colleges of Chicago*, the plaintiffs were three professors who challenged an early retirement program that was open to faculty members between the ages of fifty-five and sixty-nine who had been continuously employed full-time for at least ten years.[71] The complaint alleged that the plan violated the ADEA because it provided lower sick pay for faculty members retiring after age sixty-five and eliminated group insurance coverage for faculty members retiring after age sixty-five.[72] In his opinion in *Karlen*, Judge Posner examined the issue of the proper treatment of early retirement plans under the ADEA and noted that those plans involve discrimination in favor of, rather than against, older workers.[73] Far from being arbitrary discrimination, such plans give older workers a prized option "only slightly tarnished by the knowledge that sometimes employers offer it because they want to ease out older workers."[74]

Although the retirement plan in *Karlen* favored younger employees and the plaintiffs did not claim reverse discrimination, Judge Posner stated that "an early retirement plan that treats you better the older you are is not suspect under the [ADEA]."[75] Judge Posner opined that, unlike Title VII, which does not differentiate within the protected class, the ADEA "does not protect the young as well as the old, or even, we think, the younger against the older."[76] To further illustrate this point, Judge Posner noted that allowing workers older than forty but younger than the age of eligibility for early retirement to challenge Early Retirement Incentive Plans (ERIPs)[77] would result in ERIPs being outlawed, which was not the intent of Congress when adopting the ADEA.[78] Under those circumstances, the employer "could be confident of

70. *Id.* at 1227.

71. Karlen v. City Colls. of Chi., 837 F.2d 314, 315–16 (7th Cir. 1988), *cert. denied*, 486 U.S. 1044 (1988).

72. *Id.* at 316.

73. *Id.* at 317.

74. *Id*.

75. *Id*. at 318.

76. *Karlen*, 837 F.2d at 318 (emphasis omitted).

77. ERIP is a commonly used acronym for Early Retirement Incentive Plan. ERIPs often consist of "a one-time lump payment to induce an older worker to retire voluntarily." Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 N.Y.U. L. REV. 780, 814 (1997).

78. *Id.*

escaping liability . . . only by allowing retirement at age 40!"[79] Such result, in the words of Judge Posner, would be nothing but "*reductio ad absurdum*."[80]

Another case cited with approval by the *Hamilton* court was the First Circuit's decision in *Schuler v. Polaroid Corp*.[81] Polaroid, during the course of a workforce reduction, eliminated the position held by the fifty-seven-year-old plaintiff. The plaintiff accepted the severance plan and retired, but brought a suit against the employer alleging a violation of the ADEA. The plaintiff alleged that the employer had forced him to accept the severance package and leave because of his age.[82] Before addressing the merits of the plaintiff's age discrimination claim, the court discussed whether a severance plan could serve as a basis of the plaintiff's claim.[83] The court dismissed the idea that the plaintiff can "base his 'age discrimination' claim upon the attractive terms that the severance plan offered" because the plan itself was "a carrot, not a stick."[84] The court further stated that the ADEA "does not forbid treating older persons more generously than others."[85]

The *Hamilton* court began its analysis by pointing out that every court that ever considered the issue of reverse age discrimination indicated that younger workers had no cause of action under the ADEA.[86] The court disagreed with the plaintiff's argument that age discrimination is analogous to race or sex discrimination and "cuts both ways."[87] The court distinguished race and sex from age because age is not immutable, nor does it arise from birth.[88] The court found nothing in the legislative history of the ADEA to even suggest that "Congress believed age to be the equal of youth in the sense that the races and sexes are deemed to be equal."[89]

The next factor examined by the court was the age limit contained in the ADEA. The court reasoned that, by allowing only individuals forty years or older to sue under the ADEA, Congress did not intend to prevent reverse

79. *Id.*

80. *Id. Reductio ad absurdum* is translated from Latin as "reduction to the absurd," basically meaning disproof of an argument by showing that it leads to a ridiculous conclusion. BLACK'S LAW DICTIONARY 1283 (7th ed. 1999).

81. Schuler v. Polaroid Corp., 848 F.2d 276 (1st Cir. 1988).

82. *Id.* at 277–78.

83. *Id*. at 278.

84. *Id.*

85. *Id.* (emphasis omitted). The *Schuler* court found that the plaintiff could not establish a prima facie case of age discrimination because he was not replaced by a younger person, "rather, his position was effectively abolished." *Id. See also* State Police for Automatic Ret. Ass'n v. DiFava, 317 F.3d 6, 15 (1st Cir. 2003) (citing *Schuler* with approval for the proposition that the ADEA allows preferential treatment of older employees).

86. *Hamilton*, 966 F.2d at 1227.

87. *Id.*

88. *Id.*

89. *Id.*

discrimination.[90] The court considered the EEOC regulations that provide that "[i]t is unlawful . . . to discriminate . . . by giving preference because of age between individuals 40 and over."[91] The regulations also offer an example of prohibited discrimination: if the victim is forty-two years old and his or her competitor is fifty-two, an employment decision cannot be made on the basis of either age.[92] The court noted that in the only two instances this regulation had been referenced in case law, it was cited for the proposition that "an older plaintiff may maintain a cause of action under the ADEA even if his replacement is over 40."[93] The court concluded that, to the extent that the EEOC regulation authorizes a cause of action for reverse age discrimination, "it exceeds the scope of the statute."[94]

Turning to the language of the ADEA, the court in *Hamilton* acknowledged that phrases like "because of such individual's age" and "on the basis of such individual's age" might be read to prohibit consideration of age per se in employment decisions.[95] However, the court pointed out that congressional findings that precede the statement of purpose in § 621 "refer specifically to the problems faced by 'older workers' and 'older persons.'"[96] Taking the context and the legislative history of the statute into account, the court expressed its conviction that Congress was not concerned about the plight of workers who were discriminated against because they were too young.[97] The crucial feature of age discrimination—the arbitrary denial of work opportunities on the basis of inaccurate stereotypes—was missing in the case of younger workers.[98] The court compared younger workers to the non-handicapped, stating that younger workers "cannot argue that they are similarly victimized."[99]

The court's analysis led it to conclude that Congress could have used overinclusive language.[100] The court suggested that Congress might have used such phrases as "because such individual is older" or "on the basis of such

90. *Id.*

91. *Hamilton*, 966 F.2d at 1227. *See* 29 C.F.R. § 1625.2(a) (2002) (interpreting discrimination between individuals protected by the ADEA).

92. *Id.* (stating that "if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor").

93. *Hamilton*, 966 F.2d at 1228 (citing LaMontagne v. Am. Convenience Prods., Inc., 750 F.2d 1405, 1411 n.4 (7th Cir. 1984); Miller v. Lyng, 660 F. Supp. 1375, 1377–78 n.2 (D.D.C. 1987)).

94. *Id.*

95. *Id.* at 1228 (citing 29 U.S.C. §§ 623 (a)(1), (a)(2), (b), (c)(1), (c)(2)).

96. *Id*. (quoting 29 U.S.C. §§ 621 (a)(1), (a)(2), (a)(3)).

97. *Id.*

98. *Hamilton*, 966 F.2d at 1228.

99. *Id.*

100. *Id.*

individual's advancing age," but had used a more "economical" and "graceful" language.[101] Finally, the court stated that it was "unwilling to open the floodgates" of litigation attacking every retirement plan and dismissed the plaintiffs' complaint.[102]

Hamilton produced little commentary, and the only criticism focused on the *Hamilton* court's approach to statutory construction.[103] *Hamilton*'s approach to interpreting the ADEA does seem somewhat result-oriented. In an opinion that barely exceeds two pages, the court gave little consideration to the plain language of the ADEA. Instead, the court read the central prohibition of the statute narrowly, in effect limiting the scope of the ADEA's application to discrimination "against *older* people on the basis of their age." The court's treatment of legislative history is not overly impressive either as the court did not cite to any specific portions of the congressional record for support of the proposition that Congress was less concerned about the plight of the younger workers within the protected category.

The strongest parts of the *Hamilton* opinion deal with the entire context of the ADEA and the central goal of the statute to prohibit *arbitrary* age discrimination. The court believed that allowing reverse discrimination claims would run contrary to the congressional purpose of the ADEA.[104] The *Hamilton* court clearly viewed the phenomenon of age discrimination as separate and distinct from any other kind of discrimination.[105] The court's concern about opening the floodgates of litigation is also well taken because allowing the cause of action for reverse discrimination would dramatically increase the reach of the ADEA.[106]

Following *Hamilton*, several courts rejected claims of reverse discrimination.[107] These courts accepted *Hamilton* as a practical and common sense approach to the problem of reverse discrimination.[108] The reasoning of these courts, however, added little to the understanding of the judicial interpretation of reverse discrimination, as none of the courts delved deeply into analysis. While some of the courts expressly relied on *Hamilton* for the proposition that reverse age discrimination is not actionable under the

101. *Id*.

102. *Id.*

103. *See, e.g.*, *Several Recent Circuit Court Cases Clarify the Application of the ADEA to Employee Benefit Plans*, ERISA LITIG. REP., Oct. 1992, at 7, 9 (characterizing *Hamilton* "a rather remarkable bit of statutory analysis").

104. *Hamilton*, 966 F.2d at 1228.

105. *Id.* at 1227 (distinguishing age discrimination from race and sex discrimination).

106. *See* discussion Part VI *infra*.

107. *E.g.*, Stone v. Travelers Corp., 58 F.3d 434, 437 (9th Cir. 1995); Greer v. Pension Benefit Guar. Corp., No. 00 CIV 1272 SAS, 2001 WL 137330, at *5 (S.D.N.Y. Feb 15, 2001); Dittman v. Gen. Motors Corp., 941 F. Supp. 284, 287 (D. Conn. 1996), *aff'd*, 116 F.3d 465 (2d Cir. 1997); Parker v. Wakelin, 882 F. Supp. 1131, 1140–41 (D. Me. 1995).

108. *See, e.g.*, *Greer*, 2001 WL 137330, at *4.

ADEA,[109] other courts dismissed plaintiffs' claims on alternative grounds.[110] For example, the Ninth Circuit in *Stone v. Travelers Corp.* rejected a reverse age discrimination claim under the ADEA that was based on an additional form of Voluntary Severance Option (VSO) made available to employees older than fifty-five.[111] In *Stone*, a fifty-two-year-old employee was given a choice of receiving his VSO as a lump sum or in monthly installments, while employees older than fifty-five could also receive their severance benefits in the form of a lifetime annuity.[112] Although the court found the plaintiff's claim of age discrimination to be "unusual," it rendered its judgment on a narrower statutory ground than the *Hamilton* court.[113] The court in *Stone* determined that the ADEA barred the plaintiff's claim because it specifies that the employer does not violate the statute solely because "'an employee pension benefit plan . . . provides for the attainment of a minimum age as a condition of eligibility.'"[114]

B. Reverse Age Discrimination Actionable: *Cline v. General Dynamics Land Systems, Inc.*[115]

Before *Cline*, two circuits laid the groundwork for allowing reverse age discrimination claims under the ADEA. The Tenth Circuit in *Greene v. Safeway Stores, Inc.*, reversed the grant of judgment as a matter of law to the defendant-employer despite the fact that the replacement worker chosen by the employer was five years older than the plaintiff.[116] The *Greene* court

109. *E.g.*, Lawrence v. Town of Irondequoit, 246 F. Supp. 2d 150, 161 (W.D.N.Y. 2002) (citing *Hamilton* to support its dismissal of plaintiff's claim based on reduction of retirement health care benefits only for people younger than eighty); *Greer*, 2001 WL 137330, at *4 (relying on *Hamilton* and *Dittman* to grant summary judgment for the employer); *Dittman*, 941 F. Supp. at 287 (citing *Hamilton* to support its conclusion that the "ADEA does not bar discrimination of the young in favor of the old"); *Parker*, 882 F. Supp. at 1140–41 (stating that it was only discrimination in favor of younger individuals that the law is designed to prohibit and then referencing the holding of *Hamilton*). As of this writing, the latest court pronouncement on the issue of reverse age discrimination also relied on *Hamilton* as precedent. *See* Feigl v. Ecolab, Inc., No. 03 C 2290, 2003 WL 22096506 (N.D. Ill. Sept. 9, 2003).

110. *E.g.*, *Stone*, 58 F.3d at 437.

111. *Id.* at 436.

112. *Id.*

113. *Id.* at 437.

114. *Id.* (quoting 29 U.S.C. § 623(*l*)(1)(A) (2000)). *See also Dittman*, 941 F. Supp. at 286–87 (holding that the minimum age requirement in the ERIP that was available to employees fifty years and older was permissible under the plain language of section 623(*l*)(1)(A) of the ADEA). *But see* Edwards v. Bd. of Regents of the Univ. of Ga., 2 F.3d 382, 383 (11th Cir. 1993) (sidestepping the issue of whether "reverse discrimination is, as a matter of law, ever covered by the ADEA").

115. 296 F.3d 466, 467 (6th Cir. 2001), *cert. granted*, 123 S. Ct. 1786 (2003).

116. 98 F.3d 554, 556–62 (10th Cir. 1996) (fifty-two year old replaced by fifty-seven year old).

acknowledged that in order to satisfy the fourth element of the *McDonnell Douglas* prima facie case,[117] plaintiff must ordinarily prove that a younger person replaced him or her.[118] The court reasoned, however, that the *McDonnell Douglas* approach is flexible and a plaintiff may be relieved of satisfying all four elements in an extraordinary case.[119]

The Tenth Circuit proceeded to examine the evidence of discrimination outside of the *McDonnell Douglas* prima facie proof scheme.[120] The court focused its inquiry on "whether Greene met 'his burden directly, by presenting direct or circumstantial evidence that age was a determining factor in his discharge.'"[121] The court weighed such evidence as the replacement of eight senior executives older than fifty with younger employees, positive feedback that the plaintiff received from management throughout his tenure, and certain statements made by the company president to Greene regarding Greene's inability to "fit with the new culture."[122] The court reasoned that by replacing the plaintiff with an older executive, the employer may have been creating a temporary replacement for the plaintiff.[123] The older replacement could have been hired just to ward off a discrimination suit under the ADEA.[124] The court thus concluded that "evidentiary showings altogether raised a fact question for the jury which could justify the trier of fact in disregarding [the] status [of] an older replacement and in nevertheless finding age discrimination."[125] Similarly, the Ninth Circuit in *Douglas v. Anderson* stated in dicta that replacement by an older employee does not necessarily foreclose prima facie evidence of discrimination "if other direct or circumstantial evidence supports an inference of discrimination."[126]

117. The four-part evidentiary procedure used in discrimination cases was introduced by the Supreme Court in *McDonnell Douglas Corp. v. Green* to allow plaintiffs, in cases of indirect discrimination, to establish an inference of discrimination and reallocate the burden of production to the defendant. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). In the context of a Title VII race-discrimination case, the plaintiff must carry the initial burden of establishing a prima facie case by showing the following:

> (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 [the] complainant's qualifications.

Id.

118. *Greene*, 98 F.3d at 559 (citing Lucas v. Dover Corp., 857 F.2d 1397, 1400 (10th Cir. 1988)).

119. *Id.*

120. *Id.* at 559–60.

121. *Id.* at 560 (quoting *Lucas*, 857 F.2d at 1400).

122. *Id.* at 560–61.

123. *Greene*, 98 F.3d at 561.

124. *Id.* (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1013 n.9 (1st Cir. 1979)).

125. *Id.* at 562.

126. 656 F.2d 528, 533 (9th Cir. 1981).

The *Cline* court squarely faced the issue of reverse discrimination. Cline and 195 other workers at General Dynamics Land Systems filed a class-action lawsuit against the company after it entered into a new collective bargaining agreement ("CBA2") with the United Auto Workers.[127] While a previous agreement that was in effect until July 1, 1997, required General Dynamics to provide full health benefits to retired workers with thirty years of seniority, CBA2 allowed the company to exclude retirees from receiving full health benefits.[128] The benefits were eliminated with one exception providing that those employees who were fifty years or older at the time CBA2 took effect would still be eligible to receive full health benefits upon retirement.[129] Cline and other employees in the forty to forty-nine-year-old age group alleged that the provision of health benefits given only to the future retirees who were, at the time, older than fifty violated the ADEA and the Ohio Civil Rights Act because it discriminated against the employees between the ages of forty and forty-nine solely on the basis of their age.[130]

The district court granted General Dynamics's motion to dismiss the plaintiffs' claim.[131] The lower court acknowledged that CBA2 "facially discriminated" by creating two classes of employees based solely on age.[132] The court concluded, however, that the ADEA does not allow claims for "reverse discrimination" because the statute was drafted to aid "*older* workers, not workers who suffer discrimination because they are too young."[133] In declining to recognize the claim for reverse discrimination, the district court relied on the established jurisprudence of other federal courts that held that "a claim of reverse age discrimination is not cognizable under [the] ADEA."[134] The district court also interpreted the plaintiffs' argument as a claim that they were wrongfully denied existing job benefits on the basis of age.[135] The district court reasoned that under the Employee Retirement Income Security Act of 1974 (ERISA),[136] the provision of health benefits was part of a welfare benefit plan that the company was not obligated to provide to all employees.[137]

127. Cline v. Gen. Dynamics Land Sys., Inc., 296 F.3d 466, 467 (6th Cir. 2001), *cert. granted*, 123 S. Ct. 1786 (2003).

128. *Id*. at 468.

129. *Id.*

130. *Id.*

131. Cline v. Gen. Dynamics Land Sys., Inc., 98 F. Supp. 2d. 846, 848 (N.D. Ohio 2000).

132. *Id.* at 848.

133. *Id.*

134. *Id.*

135. *Id.*

136. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. § 1001–1461 (2000)).

137. *Cline*, 98 F. Supp. 2d at 848.

The court stated that it would have been permissible to withhold retiree health benefits from all employees under the CBA2.[138]

1. Majority Opinion in *Cline*

The U.S. Court of Appeals for the Sixth Circuit reversed and remanded *Cline* for further proceedings.[139] The three-member panel produced a majority opinion written by Judge Ryan and joined by Judge Cole, a separate concurring opinion by Judge Cole, and a dissenting opinion by Judge Williams, a district court judge from Virginia sitting by designation.[140] The split decision "underscores the controversial nature of a reverse discrimination claim under the ADEA."[141]

The panel engaged in a lengthy analysis of the statutory language and focused on the "plain language" of the ADEA.[142] Judge Ryan stressed that there was no reason to resort to legislative history in order to ascertain the meaning of the ADEA because the language of the statute is "plain and unambiguous."[143] In reviewing the language of § 623(a)(1) and § 631(a) of the ADEA, the majority found that the wording of these sections prohibited an employer from discriminating against "any individual" forty years of age or older based on that person's age.[144] Judge Ryan emphasized that the use of the phrase "any individual" in the language of the statute indicated that the law was designed to equally protect all workers over forty, not just those at the higher end of the age spectrum.[145] He stated that, contrary to the conclusion of the district court, "any individual" could not be read to mean "older workers."[146] Judge Ryan also noted that "the fact that some members within the protected class were beneficiaries of the discriminatory action of which other members of the protected class—the plaintiffs—were victims, does not somehow suspend the language of the statute, which prohibits age discrimination against 'any individual' within the protected class."[147]

138. *Id.*

139. Cline v. Gen. Dynamics Land Sys., Inc., 296 F.3d 466, 472 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 1786 (2003).

140. *Id.* at 467; *see also* David L. Hudson, *Older Workers Claim Age Bias in Favor of Elders*, A.B.A. J. E-REPORT, Aug. 2, 2002, at 4.

141. *ADEA-Protected Workers Can Sue for 'Reverse Discrimination' Regarding Retiree Health Coverage Under 6th Circuit Ruling*, *at* http://www.thompson.com/libraries/benefits/self/samplenews/self0210a.html (Oct. 2002).

142. *Cline*, 296 F.3d at 469.

143. *Id.*

144. *Id.* (stating that § 623(a)(1) contained a clear and unambiguous prohibition "from defining the terms and benefits of . . . employment based solely on . . . age").

145. *Id.*

146. *Id.*

147. *Cline*, 296 F.3d at 472.

Congress's reference to "older persons" and "older workers" in the ADEA's Statement of Finding and Purpose did not alter the majority's analysis. Judge Ryan criticized the Seventh Circuit's decision in *Hamilton* for its reliance on the "hortatory, generalized language of Congress's Statement of Findings and Purpose in the ADEA," and insisted that the specific language of the statute should override the more generalized.[148] In addition, Judge Ryan relied on the EEOC's interpretations as being true to the statutory language because the EEOC determined in its guidelines that age discrimination within the protected class is unlawful regardless of the parties' respective ages.[149]

Judge Ryan insisted that the *Cline* case was not one of "reverse discrimination" because the term "has no ascertainable meaning in the law."[150] He explained that "[a]n action is either discriminatory or it is not discriminatory, and some discriminatory actions are prohibited by law."[151] Judge Ryan reiterated his concern about courts "address[ing] perceived inadequacies" in statutes and derided the district court for having engaged in an *interpretive* reading of the ADEA.[152] In Judge Ryan's view, the district court redrafted the statute by substituting for "any individual" the term "older workers" and referring only to "relatively older" employees within the protected group.[153] Judge Ryan further added that "[i]f Congress wanted to limit the ADEA to protect only those workers who are *relatively* older, it clearly had the power and acuity to do so," but it did not.[154] Thus, the Sixth Circuit held that CBA2 "denied a group of employees within the protected class an employee benefit based solely on [the employees'] age" and therefore violated the ADEA.[155]

2. Concurring Opinion in *Cline*

Judge Cole voiced "doubts as to whether Congress specifically intended" to allow reverse age discrimination claims.[156] The text and the structure of the ADEA indicated to Judge Cole that Congress's main goal was to prohibit age discrimination that favors younger over older employees.[157] Judge Cole reasoned, however, "that Congress's choice of language, whether specifically intended or not, also prohibits age discrimination that favors older over

148. *Id*. at 470.
149. *Id*. at 471 (citing 29 C.F.R. § 1625.2(a) (2000)). *See supra* note 91.
150. *Id*.
151. *Id.*
152. *Cline*, 296 F.3d at 469.
153. *Id.*
154. *Id.* at 472.
155. *Id*.
156. *Id.* (Cole, J., concurring).
157. *Cline*, 296 F.3d at 472–73 (Cole, J., concurring).

younger protected employees."[158] While conceding that the court's plain language interpretation was counterintuitive, Judge Cole insisted that the *Cline* decision was in line with existing canons of statutory construction.[159]

Judge Cole found that none of the exceptions to the plain meaning rule were implicated in the case of reverse discrimination under the ADEA.[160] He found the text of § 623 and § 631 to be unequivocal in the general prohibition of discrimination based on age.[161] Stating that reference to "older workers" in § 621(a) was "at most ambiguous," he found "no definite inconsistency" between the literal interpretation of § 623 and § 631 and the language of § 621(a).[162] Judge Cole also determined that congressional intent would not be undermined by allowing a cause of action for reverse discrimination because more favorable treatment by employers of older workers "furthers . . . arbitrary age discrimination in employment."[163]

Judge Cole rejected the social policy implications of allowing reverse discrimination claims under the ADEA and opined that such an interpretation of the statute would not lead to absurd results.[164] He illustrated his point by citing to several state court decisions that interpreted state anti-discrimination laws to allow reverse discrimination suits.[165] Judge Cole also attempted to reconcile the decision in *Cline* with the Supreme Court's decision in *O'Connor v. Consolidated Coin Caterers Corp*.[166] In *O'Connor*, the Supreme Court ruled that an ADEA plaintiff seeking to prove discrimination based upon indirect evidence is not required to demonstrate that he or she was replaced by a person outside of the protected class.[167] The Court suggested instead that a plaintiff may show, as part of the prima facie case, that he or she was replaced by a person "substantially younger."[168] Judge Cole distinguished *O'Connor* on the basis that *Cline* was a direct evidence case that did not rely upon the prima

158. *Id.* at 472.

159. *Id.* at 472–73, 476. Departures from the "plain meaning" rule of statutory construction are authorized in the Sixth Circuit "(1) where the text is ambiguous; (2) where a literal reading is inconsistent with other statutory provisions; (3) where a plain language reading is inconsistent with congressional intent; [or] (4) where the plain statutory meaning leads to absurd results." *Id.* at 473 (citing Vergos v. Gregg's Enters., Inc., 159 F.3d 989, 990 (6th Cir. 1998)).

160. *Id.* at 473.

161. *Id.*

162. *Cline*, 296 F.3d at 473 (Cole, J., concurring).

163. *Id.* at 474.

164. *Id.*

165. *Id.* at 474–75.

166. *Id.* at 472, 475.

167. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 313 (1996).

168. *Id.*

facie test[169] and on the basis that the Supreme Court did not address reverse discrimination in *O'Connor*.[170]

3. Dissenting Opinion in *Cline*

Dissenting, Judge Williams emphasized that "no court in the nation has recognized a claim for [reverse] age discrimination under the ADEA."[171] Judge Williams stressed that the purpose of the ADEA is to alleviate problems faced by older workers, not the problems of younger ones, especially if they are in the same protected class.[172] Section 621 of the statute refers to "older workers" and "older persons," which indicated to Judge Williams that Congress meant to prohibit employers from discriminating against older workers as opposed to younger ones.[173] Judge Williams found the reasoning of the *Hamilton* court to be persuasive.[174] Relying on the Seventh Circuit holding in *Hamilton*, Judge Williams stressed the difference between age, which arises from birth and is not immutable, and other protected categories such as race or sex.[175]

Judge Williams also noted that the Sixth Circuit's decision "potentially could have a devastating effect on the collective bargaining process, calling into question the validity of seniority and early retirement programs contained in collective bargaining agreements across the country."[176] Judge Williams also argued that a "common sense" understanding of the collective bargaining agreement, which provided for the change in retiree health benefits, necessitated a conclusion that "the ADEA was not intended to interfere with the collective bargaining process or with collective bargaining agreements."[177]

169. *Cline*, 296 F.3d at 475. The ADEA disparate treatment claims can be based either on direct or indirect evidence. *See* Hein v. All Am. Plywood Co., 232 F.3d 482, 488 (6th Cir. 2000). Direct evidence of discrimination is such "evidence which, if believed, would prove the existence of [unlawful discrimination] without any inferences or presumptions." Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 958 (5th Cir. 1993). An example of direct evidence of a discriminatory intent is a facially-discriminatory employment policy, such as the policy giving preferential treatment to workers older than fifty in *Cline*. The four-part prima facie framework of *McDonnell Douglas* is inapplicable in direct evidence cases. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). For discussion of the McDonnell Douglas evidentiary framework, see *supra* note 117.

170. *Cline*, 296 F.3d at 475 (Cole, J., concurring).

171. *Id.* at 476 (Williams, J., dissenting).

172. *Id*.

173. *Id.*

174. *Id*.

175. *Cline*, 296 F.3d at 476 (Williams, J., dissenting).

176. *Id.* at 476.

177. *Id*.

It was apparent to Judge Williams that the needs of older people increase with age, thus necessitating increased protection or increased benefits.[178]

IV. CRITICAL EVALUATION OF *CLINE*

A. Statutory Construction

At the core of the court's reasoning in *Cline*, and the split decision that the *Cline* court produced, lies a basic dispute about the proper approach to statutory construction. The two main approaches to statutory interpretation are the plain-meaning rule and the approach that takes into account the purposes behind the statute and its legislative history. It is well accepted that courts "'must give effect to the unambiguously expressed intent of Congress.'"[179] The issue of *how* to determine what constitutes ambiguity is less certain, as the Supreme Court has provided several criteria to determine ambiguity.[180] Under certain circumstances, for the statute to be unambiguous "[i]t need only be 'plain to anyone reading the Act' that the statute encompasses the conduct at issue."[181] However, the "plainness or ambiguity of statutory language" sometimes amounts to a complicated inquiry that takes into account "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[182]

If the statutory language is not manifestly unambiguous, the inquiry does not cease but proceeds to an examination of the statutory scheme to see if it is "'coherent and consistent.'"[183] In doing so, "absurd results are to be avoided and [the] internal inconsistencies in the statute must be dealt with."[184] When the plain meaning of a statute is not clear, legislative history becomes important in an attempt to divine congressional intent. Although Justice Scalia has vehemently opposed the use of legislative history in statutory

178. *Id.*

179. Atlantic Mut. Ins. Co. v. Comm'r, 523 U.S. 382, 387 (1998) (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

180. *See* Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (stating that specific canons of statutory construction "'are often countered . . . by some maxim pointing in a different direction'") (quoting Circuit City Stores v. Adams, Inc., 532 U.S. 105, 115 (2001)).

181. Salinas v. United States, 522 U.S. 52, 60 (1997) (quoting Gregory v. Ashcroft, 501 U.S. 452, 467 (1991)).

182. Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

183. *Id.* at 340 (quoting United States v. Ron Pair Enter., Inc., 489 U.S. 235, 240 (1989)).

184. United States v. Turkette, 452 U.S. 576, 580 (1981).

interpretation,[185] the majority of the Supreme Court finds legislative history instructive when interpreting statutes.[186]

Even when faced with a civil rights statute that seems unambiguous on its face, the Supreme Court has, in the past, engaged in an interpretive reading of the statute. One of the familiar examples is *Griggs v. Duke Power Co.*,[187] which involved a sweeping reconceptualization of Title VII. In *Griggs*, the Supreme Court enunciated a disparate impact theory of discrimination, finding that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[188] While the Supreme Court in *Griggs* increased the reach of Title VII, in other cases it has narrowed the scope of the statute's coverage.[189]

The majority and concurrence in *Cline* insisted that the plain meaning of the ADEA commands that the court should not look outside the statute itself.[190] The *Cline* majority's strident opposition to the idea of having to engage in an interpretive reading of the statute seems misplaced. That the panel itself was split regarding the breadth of the ADEA's reach confirms the fact that the language of the statute is anything but plain. That reasonable minds could differ regarding the meaning of the ADEA prohibition is also manifest in the diametrically opposing views of the Seventh and Sixth Circuits.

The *Cline* court's rigid application of the plain-meaning rule, while completely ignoring congressional intent, is an extreme example of the textualist approach to statutory interpretation.[191] The logic of the majority can

185. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 29–37 (Amy Gutmann ed., 1997).

186. *See, e.g.*, Gen. Bldg. Contractors Ass'n v. Pa., 458 U.S. 375, 384–91 (1982) (relying on the legislative history of the Civil Rights Act of 1866 to hold that 42 U.S.C. § 1981 can be violated only by purposeful discrimination).

187. 401 U.S. 424 (1971).

188. *Id.* at 431.

189. *E.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 481–84 (1999). *See* Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 54 (2000) (arguing that the Supreme Court in *Sutton* narrowed the scope of the Americans with Disabilities Act and disregarded the legislative history and the guidance provided by administrative interpretations of the statute). *See also infra* notes 185–188 and accompanying text.

190. *See supra* Parts III.B.1–2 for a discussion of the majority and concurring opinions in *Cline*.

191. Recent Case, Cline v. General Dynamics Land Systems, Inc., *296 F.3d 466 (6th Cir. 2002)*, 116 HARV. L. REV. 1533 *passim* (2003). The textualist approach to statutory construction is embodied in the views of Justice Scalia who advocates the "plain meaning" view. *See* Parmet, *supra* note 189, at 68–69. Under the textualist approach, "[w]hen the particular words at issue are not completely clear, their meaning may be discerned by analysis of the statute's text as a whole, dictionaries, grammar books, and the traditional common law canons of statutory construction."

be boiled down to a syllogism that Judge Ryan himself found amusing: "The ADEA expressly prohibits denying any employee within the protected class an employment benefit solely because of age. The CBA2 provision . . . denies . . . [such] benefit based solely on [the employee's] age. Therefore, the ADEA prohibits the CBA2 provision in question."[192] Courts, however, are charged with an infinitely more difficult task than applying syllogisms when it comes to statutory construction: "As in all cases of statutory construction, [the court's] task is to interpret the words of [the statute] in light of the purposes Congress sought to serve."[193]

B. The Language of the ADEA: 29 U.S.C. § 623(a)(1) and § 631(a)(2)

The categorical prohibition of discrimination "because of [an] individual's age"[194] in § 623(a)(1) of the ADEA may suggest that the prohibition applies symmetrically to the members of the protected group. Certainly, the literal reading of this section would lead to this conclusion. Moreover, there is some arguable support for this position in other portions of the statute as well. Phrases like "because of such individual's age," "on the basis of such individual's age," or "because of his age," if read literally, lend themselves to an interpretation that absolutely prohibits the use of age as a factor in employment decisions.[195]

In concluding that the prohibition against discrimination based on age encompasses discrimination against the older and the younger cohorts, the majority in *Cline* never considered the various meanings commonly ascribed to the word "age." The *Cline* court simply assumed that "age" means "chronological age." Most dictionaries, in fact, do offer "the length of time during which a being or thing has lived or existed" as the most common definition of "age."[196] The word "age," however, has many alternative meanings.[197] Among the accepted meanings are the "quality or state of being

Id. at 69 (footnotes omitted). Textualists eschew references to legislative history and statutory goals for fear of interjecting the judges own policy preferences into the law. *Id*.

192. Cline v. Gen. Dynamics Land Sys., Inc., 296 F.3d 466, 472 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 1786 (2003).

193. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979).

194. 29 U.S.C. § 623(a)(1) (2000).

195. *See id.* § 623(a)(1), (a)(2), (b), (c)(1), (c)(2); Hamilton v. Caterpillar, Inc., 966 F.2d 1226, 1228 (7th Cir. 1992).

196. *E.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 40 (1993). *See also* THE OXFORD ENGLISH DICTIONARY 176 (1961) (defining age as "[a] period of existence" and "[t]he whole duration of . . . existence").

197. "Age" has been variously defined. *E.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 40 (1993) (defining age as "the time of life at which one becomes naturally or conventionally qualified or disqualified for something" and "a measure of the development, capacity, condition, or quality of an individual"); THE OXFORD ENGLISH DICTIONARY 176 (1961) (defining age as "[a] naturally distinct portion of the existence of a man

old,"[198] "[t]he latter part of life, when the physical effects of protracted existence become apparent; old age,"[199] or "state of having lived long."[200] Common to all these definitions is that age is viewed as a state relative to youth or younger generations as well as the connotation of advancement and maturity associated with the word "age."

The use of dictionary meanings of words in construing legislation is a common practice for the courts.[201] While by no means "substitute[s] for close analysis of what words mean as used in a particular statutory context,"[202] dictionaries are useful in statutory construction. The existence of alternative definitions of the word "age" supports the proposition that the wording of the ADEA is open to interpretation.[203] By failing to include the alternative meanings of the word "age" in its construction of the statutory prohibition against age discrimination, the Sixth Circuit departed from the plain meaning approach that it espoused.

Instead of focusing on the meanings of the word "age" in interpreting the statute, the *Cline* majority relied heavily on the ADEA's references to "individuals" as opposed to groups.[204] The Supreme Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.* is instructive in understanding the weight that the Supreme Court assigns to the ADEA prohibition of discrimination against an "individual." In *O'Connor*, the Supreme Court

or other being," and "a generation"); THE AMERICAN HERITAGE COLLEGE DICTIONARY 24–25 (3d ed. 2000) (defining age as "one of the stages of life," and "the period of history during which a person lives").

198. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 40 (1993). *See also* THE AMERICAN HERITAGE COLLEGE DICTIONARY 24–25 (3d ed. 2000) (defining age as "[t]he state of being old").

199. THE OXFORD ENGLISH DICTIONARY 176 (1961). *See also* THE OXFORD REFERENCE DICTIONARY 11 (1989) (defining age as "the later part of life, old age"); WEBSTER'S II NEW COLLEGE DICTIONARY 21 (1995) (defining age as "[t]he latter portion of life").

200. ENCARTA WORLD ENGLISH DICTIONARY, *at* http://encarta.msn.com/encnet/features/dictionary/dictionaryhome.aspx (2003).

201. *See* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 225–27 (1994) (considering dictionary definitions of the word "modify" in interpreting the Communications Act); Nat'l R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 417–19 (1992) (reviewing various dictionary definitions of the word "required" in interpreting condemnation provisions of the Rail Passenger Service Act). *See also* Note, *Looking it Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1437 (1994) (finding that "the Supreme Court has referred to dictionaries in more than six hundred cases over a period of two centuries").

202. *MCI Telecomms.*, 512 U.S. at 240 (Stevens, J., dissenting).

203. *See id.* at 227 (stating that "[m]ost cases of verbal ambiguity in statutes involve . . . a selection between accepted alternative meanings shown as such by many dictionaries"); *Nat'l R.R. Passenger Corp.*, 503 U.S. at 418 (stating that "[t]he existence of alternative dictionary definitions . . . each making sense under the statute, itself indicates that the statute is open to interpretation").

204. Cline v. Gen. Dynamics Land Sys., Inc., 296 F.3d 466, 469–70 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 1786 (2003).

considered whether an employee "must show that he was replaced by someone outside the age group protected by the ADEA to make out a prima facie case" of age discrimination.[205] The plaintiff was fifty-six years old when he was fired and replaced by a forty-year-old.[206] The district court found that the plaintiff failed to establish a prima facie case under the *McDonnell Douglas* framework because he had produced no evidence that he was replaced with a person outside the protected class.[207] The Fourth Circuit affirmed the district court's dismissal of the case and held that an ADEA plaintiff must prove that he was replaced by an individual with comparable qualifications who is not within the age group that is protected by the ADEA.[208]

Without deciding the propriety of applying the *McDonnell Douglas* evidentiary framework to cases brought under the ADEA, the Supreme Court reversed the appellate court's decision.[209] The Court scrutinized the language of the ADEA and determined that the ADEA "does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older."[210] The Court concluded that "[t]he fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age."[211] Justice Scalia, writing for the unanimous court, stated:

> [T]he prima facie case requires "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion . . . ." In the age-discrimination context, such an inference cannot be drawn from the replacement of one worker with another worker insignificantly younger. Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is *substantially younger* than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.[212]

There are two possible readings of *O'Connor*. The Supreme Court's statement that so long as the aggrieved party "has lost out because of his age,"

205. 517 U.S. 308, 309 (1996). *See supra* note 117 for a discussion of the framework of the McDonnell Douglas *prima facie* case of discrimination.

206. *Id.* at 309–10.

207. O'Connor v. Consol. Coin Caterers Corp., 829 F. Supp. 155, 158, 160 (W.D.N.C. 1993).

208. O'Connor v. Consol. Coin Caterers Corp., 56 F.3d 542, 546, 550 (4th Cir. 1995).

209. *O'Connor*, 517 U.S. at 311–13. Because the parties did not contest the propriety of applying the *McDonnell Douglas* analysis to ADEA cases, the Court proceeded on the assumption that such application was appropriate. *Id.* at 311.

210. *Id.* at 312.

211. *Id.*

212. *Id.* at 312–13 (emphasis in original omitted) (citation omitted) (emphasis added). The Court pointed out that "there can be no greater inference of age discrimination . . . when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old." *Id.* at 312.

the claim for age discrimination will stand even if both people are in the protected class, appears to support the claim for reverse discrimination. Such an interpretation, however, would take the Court's statements out of context. Unlike *Cline*, *O'Connor* involved a plaintiff who was older than the defendant. The Court's specific reference to an employee "*younger* than the plaintiff" indicates that the Court contemplated that the plaintiff in the ADEA case must be older (or substantially older) in order to establish a prima facie case.[213]

On the other hand, it may be argued that the Supreme Court's pronouncements in *O'Connor* are only marginally relevant to the issue of reverse discrimination. The primary focus of the Supreme Court's decision in *O'Connor* was whether the replacement worker must be outside the protected class, not whether a younger plaintiff may bring a claim under the ADEA. The Court pointed out that a *substantial* age gap was important in establishing the inference of discrimination.[214] Nevertheless, when viewed in conjunction with the provisions of the ADEA that refer to the rights of "older" individuals, the "substantially younger" test established in *O'Connor* is difficult to reconcile with the idea of youth discrimination.

The Supreme Court's reliance on the word "individual" is also manifest in its interpretation of other anti-discrimination statutes. For example, in *Sutton v. United Air Lines, Inc.*, the Supreme Court faced the issue of whether corrective and mitigating measures should be taken into account when determining whether an individual is disabled under the Americans with Disabilities Act of 1990 ("ADA").[215] The Court relied on the "individualized inquiry" mandated by the ADA provisions that dictate that the disabilities be evaluated "with respect to an individual" and in terms of the impact of a condition on "such individual."[216] The Court concluded that determination of an employee's disability should be made with reference to the mitigating measures he or she employs.[217]

Sutton, however, may be distinguished for the most obvious reason that it dealt not with the ADEA but with a parallel provision of the ADA.[218] Another

213. *Id.* at 313 (emphasis added). *See also* Stein v. Nat'l City Bank, 942 F.2d 1062, 1064–65 (6th Cir. 1991) (listing, as the fourth element of the prima facie case, the fact that a person younger than the plaintiff was selected for the position over the plaintiff).

214. *See O'Connor*, 517 U.S. at 312. "[T]he fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." *Id*. at 313.

215. 527 U.S. 471, 481 (1999). *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2000)).

216. *Sutton*, 527 U.S. at 483 (citing 42 U.S.C. § 12102(2) and concluding that the determination of disability is based on the effects of the impairment on the individual's life).

217. *Id*. at 482.

218. There is no indication in any of the Supreme Court's ADEA decisions that the Court finds it necessary to harmonize the interpretation of the ADEA and the ADA. The only two Supreme Court ADA cases that cited a case arising under the ADEA are *EEOC v. Waffle House*,

factor that reduces the impact of the Court's analysis in *Sutton* on the approach to the interpretation of the ADEA is that the *Sutton* Court's reliance on the "individualized inquiry" was just one of the factors that the Court considered in reaching its conclusion. By contrasting the congressional finding that 43 million Americans are disabled with the studies showing that approximately 160 million people in the United States suffer from serious impairments, the Court determined that Congress did not intend to bring all those whose uncorrected conditions amount to disabilities within the protection of the ADA.[219] In fact, the Court stated that the inquiry into congressional findings was critical to its decision.[220] The importance of congressional findings was informed by the fact that they were included in the text of the ADA and therefore give content to the term "disability."[221] While purporting to rely on the plain meaning of the ADA, the Court also considered "the letter and the spirit of the ADA,"[222] reflected on whether the opposite approach would create an anomalous result,[223] and examined congressional findings that had been enacted as part of the ADA.[224]

Thus, it appears that the exclusive focus of the *Cline* court on the effects of discrimination on an individual is misplaced. A broader analysis comparing the central prohibition of the ADEA with the entire statutory scheme, which had been the unanimous view of the courts prior to *Cline*, is a more logical approach.

Inc., and *Olmstead v. L.C. ex rel. Zimring*. In both cases, the ADEA reference appeared in dicta. *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 299–300 n.1 (2002) (Thomas, J., dissenting) (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991), which was brought under the ADEA, in support of the proposition that claims brought under the ADA may be subject to compulsory arbitration); Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 617 n.1 (1999) (Thomas, J., dissenting) (suggesting that Title VII cases should be consulted for definitions of "discrimination" and referring to the Court's reliance on Title VII cases in the ADEA case of *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)).

219. *Sutton*, 527 U.S. at 484–87. The congressional finding that 43 million people are disabled is based on the functional understanding of disability. *Id.* at 485–86. By contrast, studies based on nonfunctional approaches to disability estimate the number of the disabled to include more than 160 million people. *Id.* at 485. Therefore, the congressional finding of the substantially lower number of 43 million people "reflects an understanding that those whose impairments are largely corrected by medication or other devices are not 'disabled' within the meaning of the ADA." *Id.* at 486.

220. *Id.* at 484.

221. *Id.* at 487.

222. *Id.* at 484.

223. *Id.*

224. *Sutton*, 527 U.S. at 484–89.

C. The Language of the ADEA: 29 U.S.C. § 621

While § 623 and § 631 of the ADEA prohibit age discrimination against any individual, the ADEA's purpose section manifests concern with the "older worker."[225] The court in *Cline* purported to have easily reconciled the relevant provisions of the ADEA by summarily concluding that "[i]n § 621, Congress declared its intention to protect older workers, and in § 623 and § 631, it identified the older workers it intends to protect as 'any individual' age 40 or older."[226] The rigid reliance on this language of the ADEA, which proscribes discrimination "because of . . . age,"[227] appears to render superfluous the references to "older workers" in the purpose section of the statute.[228] As such, it runs afoul of the necessity to "interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."[229]

Admittedly, the term "older employee" is itself open to interpretation. One plausible reading of the reference to "older employee" is that it sets apart the protected category—employees older than forty—from employees outside a protected class. Another reading zeroes in on the comparative form of the adjective "old,"[230] which suggests that the plaintiff in an ADEA case must be older than the competitor employee who was treated more favorably. While the text of the ADEA does not conclusively answer which definition Congress had in mind, the legislative history discussed in Part IV.F of this Note tends to support the latter interpretation. Indeed, the concurring judge in *Cline* admitted that it might be reasonable to read "older" as a comparative category.[231] Moreover, the Supreme Court's use of the term "older" in *O'Connor* demonstrates that the ADEA only protects older employees as related to those who are chronologically younger.[232]

While the *Cline* majority criticized the *Hamilton* court for relying too much on the congressional statement of purpose, calling the language in § 621

225. 29 U.S.C. § 621(a)(1), (a)(3) (2000).

226. Cline v. Gen. Dynamics Land Sys. Inc., 296 F.3d 466, 471 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 1786 (2003).

227. 29 U.S.C. § 623(a)(1), (a)(2) (2000).

228. *Id.* § 621(a)(1), (a)(3).

229. *Cline*, 296 F.3d at 471 (internal quotations omitted) (citations omitted); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (requiring courts to interpret a statute "'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole'") (citations omitted)).

230. *See* THE OXFORD REFERENCE DICTIONARY 176 (1989) (defining "comparative degree" as "the form expressing a higher degree of quality").

231. *Cline*, 296 F.3d at 472–73 (Cole, J., concurring).

232. *See supra* text accompanying notes 190–199.

"hortatory,"[233] the importance of congressional findings should not be underestimated.[234] Congress saw it fit to include the findings in the ADEA provisions. In addition, two other sections of the ADEA specifically reference the purposes of the statute in their text.[235] The prohibitions of the ADEA cannot be understood apart from the congressional statement of findings and purpose that provides:

> (1) in the face of rising productivity and affluence, *older* workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of *older* persons;
>
> (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 grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.[236]

The multiple references to "older" persons in the statement of finding and purpose recognize that discrimination occurs with greater frequency and causes greater harm to older employees.[237] The statement also underscores that the main thrust of congressional concern was *arbitrary* age discrimination.[238] Arbitrary age discrimination significantly differs from employment decisions made on the basis of age. "Decisions made on the basis of age means [sic] that the employer considers the age of an employee . . . when it makes employment decisions because the characteristic of age is actually relevant to the choice being made, and thus needs to be taken into account by the decision maker."[239]

233. *Cline*, 296 F.3d at 470.

234. *See* Sutton v. United Airlines, 527 U.S. 471, 484 (1999). *See also supra* text accompanying notes 205–208.

235. 29 U.S.C. § 623(j)(2) (2000) (stating that it is not unlawful for a government employer to refuse to hire or discharge any individual "pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter"); *id*. § 623(f)(2)(B)(ii) (stating that it shall not be unlawful for an employer "to observe the terms of a . . . voluntary early retirement incentive plan [that is] consistent with the relevant purpose or purposes of this chapter").

236. *Id*. § 621(a) (emphasis added).

237. 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, 272 (1995).

238. *See* Blumrosen, *supra* note 41, at 74–83.

239. Pontz, *supra* note 237, at 273 n.36.

In contrast, arbitrary age discrimination entails consideration of age, despite the fact that age bears no relation to the choice being made and should not factor into the decision-making.[240]

Examples of permissible age considerations abound not only in the ADEA, but in other federal legislation as well. A person's age, at any level, will either grant the right to or prohibit access to societal benefits.[241] Age prohibits young people from voting, working, drinking alcohol, and driving, and it initiates the right or obligation to serve in the armed services.[242] Age also serves as a restriction on an individual's ability to serve as America's elected presidents, senators, and representatives.[243] Some classes of benefits, such as Social Security, are primarily available to people of advanced age.[244] In addition to Social Security, there are more than a hundred federal, state, and local programs that exclusively benefit senior citizens.[245]

In the context of employment, the most obvious examples of federal legislation that provide enhanced benefits to older individuals are certain provisions of ERISA and the Internal Revenue Code ("I.R.C.").[246] These benefits become available upon attainment of a minimum age and thus facially differentiate between employees in the category protected by the ADEA. For example, only employees that are fifty-five and older are allowed a diversified account under the Employee Stock Ownership Plan.[247] Once an employee reaches the age of fifty-nine and a half, the I.R.C. allows a ten percent tax waiver on early distributions from qualified retirement plans.[248] Age sixty-five

240. *Id.*

241. McMorrow, *supra* note 39, at 352.

242. *Id.* (citing U.S. CONST. amend. XXVI, §1 (right to vote accrues at age 18); 29 U.S.C. § 203(*l*)(1) (2000) (child labor is restricted to ages sixteen and older); 23 U.S.C. § 158 (2000) (federal highway funds are withheld from states that allow persons younger than twenty-one years of age to purchase alcohol); 10 U.S.C. § 519 (2000) (individuals who are at least eighteen years of age may be temporarily enlisted in the military during war time)); *see also, e.g.*, MO. REV. STAT. § 302.178.1 (Supp. 2002) (intermediate driver's license available to persons older sixteen).

243. U.S. CONST. art. I, § 2, cl. 2 (limiting the age of representatives to twenty-five years or older); U.S. CONST. art. I, § 3, cl. 3 (limiting the age of Senators to thirty years or older); U.S. CONST. art. II, § 1, cl. 4 (limiting the age of the President to thirty-five years or older).

244. McMorrow, *supra* note 39, at 352. *See* 42 U.S.C. § 416(*l*) (2000) (determining Social Security eligibility by reference to a "normal retirement age" of sixty-five).

245. McMorrow, *supra* note 39, at 352. *See, e.g.*, 29 U.S.C. § 1002(24) (2000) (employee retirement income security); 45 U.S.C. § 231a(a)(1)(i) (2000) (annuity eligibility requirements).

246. Brief of the ERISA Industry Committee as Amicus Curiae in Support of Petitioner at *4–*13, Gen. Dynamics Land Sys., Inc., v. Cline, 123 S. Ct. 1786 (2003) (No. 02-1080), *available at* 2003 WL 21649495. *See* 26 U.S.C. § 401(a) (2000); *id*. § 72(t)(2).

247. 26 U.S.C. § 401(a)(28)(B)(iii) (2000). *See* Brief of the ERISA Industry Committee as Amicus Curiae in Support of Petitioner, *supra* note 246, at *5 (citing 26 U.S.C. § 401(a)(28)(B)(iii) (2000)).

248. *See* Brief of the ERISA Industry Committee as Amicus Curiae in Support of Petitioner, *supra* note 246, at *5 (citing 26 U.S.C. § 72(t)(2)(A)(i) (2000)).

serves as a milestone that enables an individual to receive retirement benefits immediately upon termination of employment, provided that the employee began participating in the plan at least ten years earlier.[249]

All of these statutes are premised on the implicit acceptance of the validity of generalizations about old age and the fact that "age distinctions are not always arbitrary because the needs of individuals may vary according to their age."[250] When viewed in conjunction with congressional recognition of permissible age distinctions reflected in other federal legislation, the statement of findings and purpose contained in § 621 of the ADEA supports the view that, in enacting the ADEA, Congress sought to address the issues faced by American workers as they grow older. The purposes of the ADEA are not compromised when older workers within the protected group are given preferential treatment. Therefore, the purpose section of the ADEA appears consistent with precluding a cause of action for reverse age discrimination.

D. Significance of the Protected Class Under the ADEA

The *Cline* court paid little attention to the fact that the ADEA uses an arbitrary minimum age threshold to trigger its protections. This minimum age criterion is a powerful reminder that the ADEA itself discriminates on the basis of age. The Committee on Education and Labor chose forty as the lower age limit because of testimony that "indicated this to be the age at which age discrimination in employment becomes evident."[251] The Committee determined that "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."[252]

By originally defining the protected class as employees between the ages of forty and sixty-five, Congress was "obviously unwilling to prohibit all age-based restrictions in employment."[253] The affirmative grant of the right to be free from age discrimination solely to people forty and older appears to be a feature that is truly unique to the ADEA. Remarkably, when Congress passed

249. *See id.* at *5 (citing 26 U.S.C. § 401(a)(14) (2000); 29 U.S.C. § 1056(a) (2000)).

250. McMorrow, *supra* note 39, at 352. *See, e.g.*, H.R. REP. NO. 90-805, at 7 (1967), *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 80 (1981) (noting that "[t]oo many different types of situations in employment occur for the strict application of general prohibitions and provisions").

251. H.R. REP. NO. 90-805, at 6 (1967), *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 79 (altering the lower age limit from forty-five in the original bill to forty).

252. *Id.*

253. McMorrow, *supra* note 39, at 352. For example, by originally limiting the protected class, Congress knowingly allowed discriminatory practices such as mandatory retirement of stewardesses at age thirty-two. *Id.* at 352–53.

the Age Discrimination Act in 1975, it provided no minimum age threshold.[254] "By not setting a minimum age for protection under the [Age Discrimination Act], Congress suggested that the young are often subject to discrimination and, therefore, warrant protection as well."[255] Within the framework of the Age Discrimination Act, which prohibits discrimination in federal employment, Congress was concerned with younger workers as well as older ones.[256] By contrast, exclusion of the young from the purview of the ADEA suggests that Congress implicitly rejected the idea that relatively younger workers need protection under the ADEA.

E. The ADEA Exceptions

The impropriety of allowing a cause of action for reverse age discrimination becomes even clearer when the ADEA exceptions are considered. Unlike Title VII, which prohibits employment decisions in which race plays any role[257] and allows very limited exceptions for other categories based only on bona fide occupational qualifications (BFOQs),[258] the ADEA is subject "to an unprecedented number of exceptions."[259] The ADEA recognizes a BFOQ exception,[260] a general exception for "reasonable factors other than age,"[261] exceptions for executives,[262] and exceptions for certain aspects of fringe benefits and retirement plans.[263] The "statutory defenses are consistent

254. The Age Discrimination Act of 1975, Pub. L. No. 94-135, 78 Stat. 728 (codified as amended at 42 U.S.C. §§ 6101–07 (2000)). The Age Discrimination Act protects individuals from age discrimination not only in employment, but in programs and activities receiving federal assistance. *See* 42 U.S.C. § 6101–02 (2000).

255. Fuhrman, *supra* note 15, at 599.

256. *See id*. at 599 n.114 (citing 121 CONG. REC. 9212 (1975) (statement of Rep. Brademas stating that the Act's "provisions are broad and it is the intent of the committee that it apply to age discrimination at all age levels, from the youngest to the oldest")); Woodruff, *supra* note 20, at 1304 (stating that in passing the Age Discrimination Act, Congress was aware that employees younger than forty can also be subjected to age discrimination).

257. This statement is limited to the extent that courts have interpreted Title VII to tolerate affirmative action. *See* United Steelworkers of Am., AFL–CIO–CLC v. Weber, 443 U.S. 193, 208 (1979) (holding that Title VII does not prohibit "all private, voluntary, race-conscious affirmative action plans").

258. Civil Rights Act of 1964, § 703(e)(1), Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in 42 U.S.C. § 2000e(1) (2000)). *See also* Civil Rights Act of 1964, §§ 702, 703(e)(2), Pub. L. No. 88-352, 78 Stat. 252 (codified as amended in 42 U.S.C. §§ 2000e(j), 2000e-1(a), 2000e-2(e)(2)(2000)) (setting out exceptions to prohibitions against religious discrimination).

259. George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 495 (1995).

260. 29 U.S.C. § 623(f)(1) (2000).

261. *Id.*

262. *Id.* § 631(c) (permitting under certain conditions compulsory retirement after age 65 of "bona fide executive[s]" or persons who occupy a "high policymaking position").

263. *Id.* § 623(f)(2).

with the ADEA's [objective] of prohibiting only arbitrary age discrimination in employment."[264]

It is uncontested that the ADEA "does not require older workers to be treated more favorably than younger ones."[265] However, among the ADEA exceptions, one is a particularly telling example of Congress's willingness to allow employers to treat older workers within the protected category more favorably than the younger ones.[266] Rather than eliminating age classifications in the abstract, Congress expressed its special concern for older workers in § 623(f)(2) of the ADEA by permitting bona fide seniority systems and bona fide employee benefit plans.[267]

While the OWBPA, which amended the ADEA in 1990, posits that an involuntary retirement plan constitutes a violation of the ADEA, it permits ERIPs that are voluntary and consistent with the ADEA's relevant purpose to prohibit arbitrary age discrimination in employment.[268] The OWBPA also sanctions certain typical features of early retirement plans by specifically describing them as consistent with the purposes of the ADEA. These features include: (1) requiring a minimum age as a condition of eligibility for participation; (2) providing subsidized early retirement benefits, and (3) providing supplements to Social Security benefits.[269]

It stands to reason that insofar as seniority systems and ERIPs favor older employees over younger ones, "Congress in the Act has expressed at least tacit approval" of employers that "favor the aged over the young."[270] As Issacharoff and Harris eloquently stated when assessing ERIP provisions, "[w]hen it came to benefiting older workers . . . delineations based on age and violations of the equal treatment principle proved to be more than just acceptable—they were required."[271] The need for older cohorts within the protected class to have additional protection or preferential treatment is a

264. Pontz, *supra* note 237, at 276.

265. *See* Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog that Didn't Bark*, 39 WAYNE L. REV. 1093, 1123 n.113 (1993).

266. *See* 29 U.S.C. § 623(f)(2) (2000).

267. *See* Neil H. Abramson, *Early Retirement Incentives Under the ADEA*, 11 INDUS. REL. L.J. 323, 351 n.157 (1989).

268. 29 U.S.C. § 623(f)(2)(A), (B)(ii) (2000). *See supra* notes 33-35 and accompanying text for a general overview of the OWBPA. The OWBPA permits age distinctions in employee benefit plans only if the benefits paid or the costs incurred on behalf of an older worker are at least equal to those of a younger worker. *Id.* § 623(f)(2)(B)(i).

269. Pub. L. No. 101-433, Title I, § 103, 104 Stat. 978 (1990); 29 U.S.C. 623(f)(2)(B)(ii) (2000).

270. *See* Abramson, *supra* note 267, at 351 n.157.

271. Issacharoff & Harris, *supra* note 77, at 816.

contested issue.[272] Regardless of one's opinion on whether this need is truly justified, the congressional intent as exemplified by the seniority and benefit exceptions cannot be ignored. Recognizing a cause of action for reverse discrimination under the ADEA will lead to the glaring inconsistency of allowing preferential treatment of older cohorts within the protected category in one context, yet disavowing benefits that may accrue to older workers in other contexts.

F. Legislative History

One must wonder whether those who supported the passage of the ADEA truly contemplated that younger workers would be able to claim the protection of the statute because they were treated less favorably than older workers. Careful examination of the congressional record reveals few comments that considered the possibility of reverse discrimination. Senator Dominick stated that "under at least one interpretation of this bill[,] it would be legal to discriminate on the ground of age as between any two people" in the category of workers between forty to sixty-five.[273] Senator Dominick specifically questioned whether the creation of the protected category of people over forty would open the employer up to a charge by a younger worker within the protected class if the employer gives preferential treatment to an older employee.[274]

The only response to Senator Dominick's concern came in the comment by Senator Yarborough who stated that it was not the intent of the law 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 ago [sic]."[275] The conflicting comments of Senators Dominick and Yarborough may be indicative of the competing congressional purpose. Conversely, the lack of response from other members of Congress to the possibility of intragroup discrimination may simply reveal that the

272. *See id*. at 783, 795, 816 (stating that the ADEA became a wealth-grabbing mechanism for older white male employees). Issacharoff & Harris argue that "[t]his profile of both the typical ADEA plaintiff and the subject of litigation suggests that the ADEA has developed into a wrongful termination cause of action . . . rather than the protection against categorical action based on the sort of invidious motivation generally associated with the term 'discrimination' and originally envisioned by Congress." *Id*. at 796.

273. S. REP. NO. 723, at 15 (1967) (individual views of Sen. Dominick), *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 119–20.

274. *Id.* at 15–16. Senator Dominick noted that "one committee counsel has stated that if both parties are within the protected age, neither can sue, while another counsel interprets the bill to mean just the opposite." *Id.* at 16.

275. 113 CONG. REC. 31,255 (1967), *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 146.

supporters of the bill did not see the problem of reverse age discrimination as an issue.

In fact, the entire congressional debate was based on reports that detailed age discrimination in the classic sense—in favor of younger workers. In enacting the ADEA, Congress "clearly was concerned with the plight of the older worker and the fact that discrimination seemed to intensify as employees progressed in age."[276] The frequent references to "senior citizens" by the bill's sponsors can hardly be translated to mean people in their early forties.[277]

In addition, the legislative history of the ADEA is replete with evidence that Congress was not concerned with the "hazards of age classifications *per se*," but rather with the inaccurate stereotypes and misconceptions about the abilities of older workers.[278] Congress's concern with arbitrary age discrimination is illustrated by President Johnson's message to Congress recommending enactment of the ADEA in which he characterized the ADEA as "a law prohibiting arbitrary and unjust discrimination in employment because of a person's age."[279] The legislative history suggests that Congress did not seek to eliminate "all age classifications from the workplace, regardless of which age cohort benefited from those classifications."[280] In the words of Senator Yarborough, the ADEA is "not directed to all instances of differentiation on the basis of age."[281]

The Wirtz Report that argued for passage of the federal age discrimination statute did not focus on animus-based discrimination against older workers.[282] Researchers have also found that "'the kind of 'we–they' thinking that foster[s] racial, ethnic, and sexual discrimination is unlikely to play a role in the treatment of the elderly worker . . . because the people who make the firing and hiring decisions are often older individuals."[283] Therefore, to presume the existence of such animus *within* the protected group seems unreasonable. Consequently, providing greater benefits to older employees does not entail

276. Abramson, *supra* note 267, at 351.

277. *E.g.*, 113 CONG. REC. 2467 (1967) (statement of Sen. Yarborough), *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 66.

278. Abramson, *supra* note 267, at 351.

279. Lyndon B. Johnson, AID FOR THE AGED: A MESSAGE FROM THE PRESIDENT, H.R. Doc. No. 40, 90th Cong. (Jan. 23, 1967), *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 60, 61.

280. Abramson, *supra* note 267, at 351.

281. 113 CONG. REC. 2467 (1967) (statement of Sen. Yarborough), *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 66.

282. *See supra* notes 41–52 and accompanying text. *See also* DAVID NEUMARK, AGE DISCRIMINATION LEGISLATION IN THE UNITED STATES 18 (Nat'l Bureau of Econ. Research, Working Paper No. 8152, 2001) (citing THE OLDER AMERICAN WORKER, *supra* note 42), *available at* http://www.nber.org/papers/w8152. By contrast, race discrimination has a "well-documented history of animus," which sets it apart from age discrimination. *See id*.

283. *See* Neumark, *supra* note 282, at 18 (quoting RICHARD POSNER, AGING AND OLD AGE 320 (1995)).

stigmatization of younger workers within the protected group, which is commonly associated with race or sex discrimination. Allowing a cause of action for reverse discrimination would replace the congressional "concern for the vulnerability of older workers at the end of the life-cycle . . . by an inflexibly reactive approach which [makes] any age classification presumptively invalid."[284]

G. The EEOC Interpretation

The majority in *Cline* placed great reliance on the EEOC's interpretation of intragroup discrimination under the ADEA. "[T]he EEOC has statutory authority to investigate claims and bring actions independent" of the ability of individual employees to bring claims.[285] The EEOC has interpreted the ADEA in 29 C.F.R. § 1625.2(a), which states:

> It is unlawful . . . for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 or over. Thus, if two people apply for the same position, and one . . . is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must base such decision on the basis of some other factor.[286]

The EEOC Policy Guidance further elaborates on the issue and posits that "discrimination on the basis of age is generally unlawful even between individuals who are within the Protected Age Group."[287] In addition, in section 1625.2(b) of its guidelines the EEOC provides that "additional benefits, such as increased severance pay, to older employees within the protected group may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination."[288]

The positions expressed by the EEOC in sections 1625.2(a) and (b) of its guidelines appear to be somewhat inconsistent. While subsection (a) makes

284. Issacharoff & Harris, *supra* note 77, at 831.

285. EEOC v. Am. & Efird Mills, Inc., 964 F.2d 300, 301 (4th Cir. 1992). Originally, Congress gave responsibility for enforcing the ADEA to the Department of Labor. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-902, §§ 6-7, 81 Stat. 602, 604-605 (1967). In 1979, Congress transferred these responsibilities to the EEOC. Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 92 Stat. 3781, 3781 (1978).

286. 29 C.F.R. § 1625.2(a) (2002).

287. EEOC: CASES INVOLVING THE EXTENSION OF ADDITIONAL BENEFITS TO OLDER WORKERS, POLICY GUIDANCE 2 (1988), *reprinted in* EEOC, TECHNICAL ASSISTANCE PROGRAM, AGE DISCRIMINATION, § V(F) (1998). Notably, the Department of Labor, which was in charge of enforcing the ADEA before the EEOC, issued several opinion letters that allowed for preferential treatment of older workers within the protected group. *See* Barry Bennett Kaufman, *Preferential Hiring Policies for Older Workers Under the Age Discrimination in Employment Act*, 56 S. CAL. L. REV. 825, 834 (1983). One of those letters approved the exclusion of workers older than fifty from "'comparatively undesirable work assignments' such as compulsory overtime." *Id.* (quoting WH-419, EMPL. PRAC. GUIDE (CCH) ¶ 5036 (July 1977)).

288. 29 C.F.R. § 1625.2(b).

age an entirely impermissible characteristic to consider in employment decisions, implicit in subsection (b) is the recognition by the EEOC of the increased needs of older people within the protected group and the likelihood that older individuals experience age discrimination to a greater extent than younger ones. There are no reported cases where the courts have turned to subsection (b) of the EEOC regulations, possibly because the claims of reverse age discrimination have been exceedingly rare. The court in *Cline* also ignored subsection (b) of the guidelines although the benefits at issue in *Cline* seem to fit under the category of "additional benefits" contemplated by the EEOC in section 1625(b) of the regulations.[289]

In order to determine whether *Cline's* reliance on section 1625.2(a) of the EEOC guidelines was justified, it is important to examine the role of the EEOC guidelines in interpreting the civil rights statutes. Despite the fact that the courts often consider the EEOC guidelines and afford deference to the EEOC in their decisions,[290] the EEOC's interpretations are not entitled to *Chevron* deference.[291] As the Supreme Court explained in *United States v. Mead Corp.*, "'interpretations contained in policy statements, agency manuals, and enforcement guidelines'" do not fall within the *Chevron* framework.[292] This explanation means that the EEOC interpretations are not binding and are only accorded deference when they support the views of the courts on a substantive issue.[293]

289. *See* Cline v. Gen. Dynamics Land Sys., Inc., 296 F.3d 466, 471 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 1786 (2003) (citing to 29 C.F.R. § 1625.2(a), but not §1625.2(b)). The *Cline* court may have been unwilling to raise the § 1625.2(b) exceptions if the parties did not assert them.

290. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (administrative interpretation of the Act by the enforcing agency, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"). *See also* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976) (courts may refer to the EEOC interpretations for guidance but need not follow them); *Cline*, 296 F.3d at 471 (6th Cir. 2002). "The EEOC's interpretation of the ADEA 'is significant because an agency's interpretation of an ambiguous provision within the statute it is authorized to implement is entitled to judicial deference.'" *Cline*, 296 F.3d at 471 (quoting Burzynski v. Cohen, 264 F.3d 611, 619 (6th Cir. 2001)).

291. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (stating that the court should not impose its own construction of the statute if it determines that the agency's interpretation of the statute is based on a permissible construction).

292. United States v. Mead Corp., 533 U.S. 218, 223 n.17 (2001) (quoting Christensen v. Harris County, 529 U.S. 576, 587 (2000)).

293. *See generally* John S. Moot, Comment, *An Analysis of Judicial Deference to EEOC Interpretive Guidelines*, 1 ADMIN. L.J. 213 (1987). For example, the Supreme Court, in *Sutton v. United Air Lines, Inc.*, determined that the EEOC regulations defining "physical impairment" without reference to corrective measures were an impermissible interpretation of the ADA. 527 U.S. 471, 479–82 (1999). The Court found that the guidelines' approach was "contrary to both the letter and the spirit of the ADA." *Id.* at 484.

It is apparent that the *Cline* court's reliance on the EEOC's interpretation of the ADEA is tenuous at best. The selective use of only section 1625.2(a) of the EEOC guidelines and the inherent tension between the two subsections of the EEOC guidelines raise concerns about the reliance of the *Cline* court on the position expressed by the EEOC. The *Hamilton* court's rejection of the EEOC guidance on the issue of reverse discrimination seems to be a more sound approach.[294]

H. State Law

The concurring opinion in *Cline* relied on the growing trend among state courts to recognize a cause of action for reverse age discrimination based on the states' anti-discrimination laws.[295] The ADEA does not preempt state laws that provide additional protection against age discrimination in employment.[296] Section 633(a) states that the ADEA will not affect the jurisdiction of the state agencies performing similar functions, and § 633(b) gives state proceedings certain priorities over federal actions relating to age discrimination.[297] The language of the ADEA providing that the commencement of a federal action shall supersede state claims only means that the state proceedings will be stayed, but not dismissed.[298] Several courts have explicitly recognized that state age discrimination laws do not need to conform to the ADEA.[299] In fact, some courts have held that the ADEA "anticipates and encourages state regulation."[300]

States vary considerably in the age range at which they provide protection.[301] The New Jersey Law Against Discrimination ("LAD") is a typical example of a state law that contains a broad prohibition against age discrimination in employment by stating that it is unlawful for an employer

294. *See* Hamilton v. Caterpillar, Inc., 966 F.2d 1226, 1227–28 (7th Cir. 1992).

295. *Cline*, 296 F.3d at 474–75 (Cole, J., concurring).

296. 29 U.S.C. § 633(a) (2000); *see also* Hulme v. Barrett, 449 N.W.2d 629, 631 (Iowa 1989) (stating that "[t]he federal Act does not preempt state age discrimination laws").

297. 29 U.S.C. §§ 633(a)–(b) (2000).

298. Dunlop v. Pan Am. World Airways, Inc., 672 F.2d 1044, 1049 n.7 (2d Cir. 1982).

299. *E.g.*, Johnson v. Labor & Indus. Review Comm'n, 547 N.W.2d 783, 787 (Wis. Ct. App. 1996) (stating that "state age discrimination laws do not need to conform to federal law"); Kunzman v. Enron Corp., 902 F. Supp. 882, 902 (N.D. Iowa 1995) (stating that the ADEA "does not preempt state age discrimination laws, so that the state court looks to its own act to determine if plaintiff is a protected person"); Fink v. Kitzman, 881 F. Supp. 1347, 1366 (N.D. Iowa 1995).

300. *E.g.*, Hillman v. Consumers Power Co., 282 N.W.2d 422, 424 (Mich. Ct. App. 1979).

301. *See, e.g.*, IOWA CODE ANN. § 216.6(3) (West 2000) (age eighteen or older); N.Y. EXEC. LAW § 296(3-a)(a) (Consol. 1975) (age eighteen or older); WIS. STAT. ANN. § 111.33(1) (West 2002) (age forty or older). Numerous states do not limit age discrimination protection to any particular age. *E.g.*, CONN. GEN. STAT. ANN. § 46a-60(a)(1) (West 1995); FLA. STAT. ANN. § 760.10(1)(a) (West 1997); ME. REV. STAT. ANN. tit. 5, § 4572 (West 2002); N.H. REV. STAT. ANN. § 354-A:7 (1995); N.C. GEN. STAT. § 143-422.2 (2001).

"because of the . . . age . . . of any individual . . . to refuse to hire or employ or to bar or to discharge or require to retire . . . or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.[302] The LAD also provides that "[a]ll persons shall have the opportunity to obtain employment . . . without discrimination because of . . . age. . . . This opportunity is recognized as and declared to be a civil right."[303] The LAD does not contain a minimum age requirement, but does provide an exception to age discrimination by allowing employers to refuse to hire a person younger than eighteen years of age or hire or promote a person older than seventy years of age.[304]

The New Jersey Supreme Court addressed the issue of reverse discrimination under the LAD in *Bergen Commercial Bank v. Sisler*.[305] In *Sisler*, the court held that a twenty-five-year-old employee stated a legally sufficient claim when he alleged that he had been terminated because he was too young to occupy the position of bank vice-president and had been replaced with a thirty-one-year-old employee.[306] Having noted that, unlike the ADEA, the LAD does not limit the class of plaintiffs to those older than forty,[307] the court found that "the LAD's prohibition against age discrimination is broad enough to accommodate [a] claim of age discrimination based on youth."[308] In an attempt to divine legislative intent behind the LAD, the court conducted an exhaustive search of sources, including the text of the statute, legislative history, legal commentary, and prior precedent.[309] The court emphasized that, consistent with the underlying purpose of the state anti-discrimination laws, the LAD was to be construed liberally.[310] The court determined that the intent of New Jersey legislation was to "'discourage the use of categories in employment decisions which ignore the individual characteristics of particular applicants.'"[311] The court did observe, however, that the job market generally favors younger workers, and concluded that a plaintiff alleging reverse age discrimination "clearly bears a heavy burden in demonstrating that his

302. N.J. STAT. ANN. § 10:5-12(a) (West 2002) (also listing "race, creed, color, national origin, ancestry, . . . marital status, affectional or sexual orientation, genetic information, sex or atypical hereditary cellular or blood trait of any individual" among the protected factors).

303. *Id.* at § 10:5-4 (West 2002).

304. *Id.* at §§ 10:5-2.1, 10:5-12(a) (West 2002).

305. 723 A.2d 944 (N.J. 1999).

306. *Id.* at 948, 957.

307. *Id.* at 952. *See also* N.J. STAT. ANN. §§ 10:5-2.1, 10:5-12(a) (West 2002) (LAD protects individuals against age discrimination beginning at age eighteen.).

308. *Sisler*, 723 A.2d at 957.

309. *Id.* at 950–53.

310. *Id.* at 958.

311. *Id.* (quoting Ogden v. Bureau of Labor, 682 P.2d 802, 810 (Or. Ct. App. 1984), *aff'd*, 698 P.2d 189 (Or. 1985) (en banc)).

employer had 'some reason or inclination' to discriminate against youthful employees."[312]

Similarly, the Michigan Court of Appeals held that the state's civil rights act allowed a cause of action for discrimination on the basis of youth in *Zanni v. Medaphis Physician Services Corp*.[313] Unlike the ADEA, Michigan's Elliott-Larsen Civil Rights Act covers persons eighteen years of age and older.[314] In *Zanni*, a thirty-one-year-old account executive claimed that she was discriminated against because of her relative youth.[315] The plaintiff alleged that after her supervisor told her that her voice sounded too young on the phone and that a client wanted an older account executive, she was replaced by an older, less qualified employee.[316] The court expressly relied on the plain language of the state statute, which prohibits discrimination based on "chronological age," in recognizing the cause of action.[317] The court found nothing in the statute that limited its applicability to any particular age group.[318]

The court noted that its holding was in line with goal of the statute, namely "to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases."[319] The court observed that the potential for younger workers to be judged on the basis of inaccurate stereotypes exists in spite of their relative youth.[320] The court found the case law construing the ADEA inapposite for the purposes of interpreting the state statute because the ADEA specifically limits the protected category to individuals older than forty.[321] Several other state courts echoed the reasoning of *Sisler* and *Zanni*.[322]

By contrast, the Massachusetts Supreme Court refused to extend the protection of the state anti-discrimination statute to younger employees.[323] In *Rock v. Massachusetts Commission Against Discrimination*, the employer

312. *Id*. at 960. The court found that Sisler's allegations that the chairman of the bank was shocked to discover his age and advised Sisler not to reveal his age to other bank officers because he would be embarrassed if other people found out it was sufficient to establish a prima facie showing of an "unusual" tendency to discriminate against a majority plaintiff. *Id.* at 959.

313. 612 N.W.2d 845, 847 (Mich. Ct. App. 2000).

314. MICH. COMP. L. SERV. §§ 37.2101–2804 (Lexis 2001).

315. *Zanni*, 612 N.W.2d at 846.

316. *Id.*

317. *Id.* at 847.

318. *Id*.

319. *Id.*

320. *Zanni*, 612 N.W.2d at 848. The court noted, "[j]ust as an older worker may be inaccurately perceived as less energetic and resistant to new ideas, a younger worker may be unfairly viewed as immature and unreliable, without regard for individual merits." *Id.*

321. *Id.* at 847.

322. *See, e.g.*, Ogden v. Bureau of Labor, 699 P.2d 189, 192 (Or. 1985) (en banc) (interpreting the Oregon age discrimination law to allow claims by younger workers).

323. Rock v. Mass. Comm'n Against Discrimination, 424 N.E.2d 244, 249 (Mass. 1981).

offered additional early retirement benefits to employees who were older than fifty-five.[324] Employees between the ages of forty and fifty-five brought a suit under the Massachusetts anti-discrimination law.[325] The court found that offering additional retirement benefits to older cohorts within the protected class did not constitute unlawful discrimination.[326] The court explicitly relied on federal case law that interpreted the ADEA and stated that the "concept of a 'protected class' has a narrower application in age discrimination cases than in the race or sex discrimination context."[327]

The court recognized that "'[b]ecause age is a relative rather than absolute status when taken as a basis for discrimination, it need not follow that all persons protected by the [ADEA] should be grouped together for purposes of delineating the extent of their protection.'"[328] The court also indicated that "the history, language, and spirit" of the state anti-discrimination statute mandated that the plaintiff show an injury to an expected employment benefit—an injury that was absent in the case of additional early retirement benefits.[329] Younger employees lost no reasonably expected employee benefit, and the legislative history of the act indicated that the statute was only concerned with injuries to older workers resulting from a refusal to hire, demotion, or discharge based on age.[330]

The review of state court decisions illuminates the important distinctions between the ADEA and state civil rights statutes. The distinguishing feature of the states' age discrimination statutes, which gave rise to successful reverse age discrimination claims, is the absence of the lower age threshold defining the protected class. The absence of the lower age limit indicates that state legislatures were equally concerned with the plight of young as well as older workers. In addition, unlike the ADEA, state statutes do not contain the numerous exceptions listed in the ADEA.[331] Thus, interpreting state statutes to prohibit consideration of age per se is in line with the blanket prohibition of state statutes against age discrimination.

Despite the fact that state courts have been more active in the area of reverse age discrimination, only four jurisdictions—New Jersey, Michigan,

324. *Id.* at 245.

325. *Id.* (citing MASS. GEN. LAWS ch. 151B, § 4(1) (2000)).

326. *Id.* at 248.

327. *Id.* at 247–48.

328. *Rock*, 424 N.E.2d at 248 (quoting Moore v. Sears, Roebuck & Co., 464 F. Supp. 357, 366 (N.D. Ga. 1979)).

329. *Id.* at 246–47.

330. *Id.*

331. *See, e.g.*, IOWA CODE ANN. § 216.6(5) (West 2001) (exception for employees aged forty-five and older in bona fide apprenticeship programs); WIS. STAT. ANN. § 111.33(2)(e) (West 2002) (exception for hiring to a position in which knowledge and experience is required for future advancement to a managerial or executive position).

Maine and Oregon—have extended the states' age discrimination protection to younger plaintiffs.[332] In addition to representing a minority view, state law decisions do not inform interpretation of a federal statute and do not aid in the attempt to divine congressional intent. Because there are no prohibitions against states expanding upon the federal anti-discrimination legislation, "state law can supplement the protection afforded under the ADEA."[333] The lack of preemption "paves the way for influential state legislation . . . which prohibits age discrimination without targeting a specific age group."[334] Thus, states are free to enact laws that will permit reverse age discrimination lawsuits for people in their forties as well as for younger workers. Considering that the ADEA only provides "minimum standards for barring age discrimination in employment for workers,"[335] such a result would be both fair and desirable.

V. TITLE VII AND THE ADEA ANALOGY

It may seem anomalous, at first glance, to recognize reverse race and sex discrimination claims under Title VII and to refuse a cause of action for reverse age discrimination under the ADEA. A number of substantive provisions of the ADEA are modeled after Title VII.[336] It has also been widely accepted that, in addition to some common language, the ADEA and Title VII share "a common purpose: 'the elimination of discrimination in the workplace.'"[337] Although Title VII and the ADEA share a common origin, the two statutes diverge in many aspects, as evidenced by the text of the statutes and their legislative histories.[338]

332. *See* Cline v. Gen. Dynamics Land Sys., 296 F.3d 466, 474–75 (6th Cir. 2002) (Cole, J., concurring).

333. *See* Fuhrman, *supra* note 15, at 600.

334. *Id.*

335. THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, 113 Cong. Rec. 2467 (statement of Sen. Yarborough), *reprinted in* LEGISLATIVE HISTORY, *supra* note 42, at 66.

336. *See* 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, 87 (1999).

337. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995) (quoting Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979)).

338. There is a marked disagreement among scholars whether differences and similarities between Title VII and the ADEA warrant treating the categories protected by the statutes in the same manner or require substantial divergence. *Compare, e.g.*, Julie Vigil, Comment, *Expanding the Hostile Environment Theory to Cover Age Discrimination: How Far is Too Far?*, 23 PEPP. L. REV. 565, 592 (1996) (finding no support for treating the two statutes differently), *with* Pontz, *supra* note 237, at 310–314 (taking the position that the disparate impact theory available under Title VII should not be extended to claims under the ADEA). This Note does not attempt to resolve the conflicting points of view. The author's only contention is that for the purposes of recognizing a cause of action for reverse age discrimination, the two statutes cannot and should not be equated.

The ADEA was enacted as an independent statute, rather than an amendment to Title VII. Apart from the ADEA's narrower objectives, other characteristics distinguish it from Title VII. "Unlike Title VII, which provides equal protection from discrimination for men and women, blacks and whites, and so on, the ADEA extends only to individuals over the age of [forty]."[339] Some legal scholars suggest that this distinction may imply that a "protected age group" in fact translates into preferential treatment and creates a privileged class of citizens.[340] Without challenging the propriety of conclusions about the "rent-seeking" behavior of senior citizens, it remains a fact that the framers of the ADEA sought to protect only older adults.

The Supreme Court's decision in *Hazen Paper Co. v. Biggins* indicates that the substantive analysis of age discrimination claims under the ADEA should be distinct from the principles underlying Title VII claims.[341] The central issue in *Hazen Paper* was the relationship between age discrimination and seniority systems.[342] The Court ruled that there was no cause of action under the ADEA "when the factor motivating the employer is some feature other than the employee's age."[343] The Court found that the use of factors that correlated with age was acceptable under the ADEA.[344]

In *Hazen Paper*, Justice O'Connor stated that "[i]t is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age."[345] Justice O'Connor further noted that in enacting the ADEA, Congress sought to eliminate the use of "inaccurate and denigrating generalization[s] about

339. Clint Bolick, *The Age Discrimination in Employment Act: Equal Opportunity or Reverse Discrimination?*, CATO INSTITUTE POLICY ANALYSIS No. 82 (1987), *available at* http://www.cato.org/pubs/pa/pa082.html.

340. *See id.* (arguing that the ADEA has been transformed into an artificial advantage for the elderly in violation of the principal of equal opportunity and economic liberty); Issacharoff & Harris, *supra* note 77, *passim* (opining that the ADEA amendments forced the transfer of wealth to the least deserving group of society); Rutherglen, *supra* note 259, at 521 (finding that the ADEA has lost its justification because the primary beneficiaries are not a historically disadvantaged group).

341. 507 U.S. 604 (1993). *See* H. Lane Dennard, Jr. & Kendall L. Kelly, Price Waterhouse: *Alive and Well Under the Age Discrimination in Employment Act*, 51 MERCER L. REV. 721, 744 (2000) (noting that the Supreme Court's decisions in *Hazen Paper* and Kimel v. Florida Board Of Regents, 528 U.S. 62 (2000), set the ADEA apart from Title VII).

342. *Hazen Paper*, 507 U.S. at 608.

343. *Id.* at 609.

344. *Id.* at 611–12.

345. *Id*. at 610. AARP contends that, "[b]ased on this comment[,] an alarming number of federal circuit and district courts have held that [the] ADEA only prohibits discrimination based on inaccurate and stigmatizing stereotypes about older workers." AARP, THE POLICY BOOK: AARP PUBLIC POLICIES 2002 4–5 (2002), *available at* http://www.aarp.org/ppa/ch4.pdf. "Even more troubling," says AARP, is that "the courts are requiring age discrimination victims to produce evidence that such stereotypes were operative." *Id.*

age,"[346] and that "'age discrimination rarely [is] based on the sort of animus motivating some other forms of discrimination.'"[347] In addition to reiterating the "older employee" standard for application of the ADEA, the *Hazen Paper* Court dismissed the idea that the principles of Title VII application could be directly imported into the ADEA.[348] In light of the difference in rationale of the ADEA and Title VII, the majority opinion refused to rule on whether the disparate impact theory of liability should be extended to age.[349] The concurrence explicitly acknowledged that there were "substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."[350]

Some critics view *Hazen Paper* as narrowing the scope of and eroding the application of the ADEA.[351] Others applaud the *Hazen Paper* Court for recognizing the differences inherent in discrimination against various protected groups and, specifically, in differentiating between "impermissible stereotyping" and "valid economic generalizations."[352] *Hazen Paper* has been widely criticized by the proponents of disparate impact analysis under the ADEA.[353] One of the criticisms centers on the *Hazen Paper* decision running contrary to the doctrine of *in pari materia* which posits that "the interpretation of one statute 'may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships.'"[354] The very definition of the doctrine of *in pari materia* belies its application in the context of reverse discrimination.[355] The similarity of persons or relationships is precisely what is missing from ADEA and Title VII.

346. *Hazen Paper*, 507 U.S. at 610.

347. *Id.* at 612 (quoting EEOC v. Wyoming, 460 U.S. 226, 231 (1983)).

348. *See, e.g.*, Brendan Sweeney, Comment, *"Downsizing" the Age Discrimination in Employment Act: the Availability of Disparate Impact Liability*, 41 VILL. L. REV. 1527, 1558 (1996); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 733 n.20 (3d Cir. 1995) (stating that *Hazen Paper* disposes of the assumption "that interpretations of the ADEA parallel interpretations of Title VII").

349. *Hazen Paper*, 507 U.S. at 610.

350. *Id.* at 618 (Kennedy, J., concurring).

351. *See, e.g.*, Alexander, *supra* note 336, at 107–08.

352. *See* Michael J. Van Sistine & Bruce Meredith, *The Legality of Early Retirement Incentive Plans: Can Quantum Physics Help Resolve the Current Uncertainty?*, 84 MARQ. L. REV. 587, 634 (2001).

353. *E.g.*, Alexander, *supra* note 336, at 88–92 (arguing that statutory language, history, and policy considerations support employing the same analytical approach to the two statutes).

354. *See id.* at 88 (quoting Nat'l Fed'n of Fed. Employees v. Dep't of Interior, 526 U.S. 86 (1999)).

355. *In pari materia* is translated from Latin as "in the same matter." BLACK'S LAW DICTIONARY 794 (7th ed. 1999). "It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." *Id.*

The idea that the principles of Title VII application cannot be transferable in all their particulars to the ADEA is especially relevant in the context of reverse discrimination. The lack of symmetry in the application of discrimination principles in the context of age is in line with the Supreme Court's reasoning in *Hazen Paper*.

A. Immutability

In addition to the differences in the statutory language and the histories of the ADEA and Title VII, the cause of action for reverse discrimination should not be recognized under the ADEA because of substantive differences between the characteristics that the two statutes seek to protect. Unlike race, sex, national origin and, to some extent, religion, age is not a fixed and immutable characteristic. A trait is immutable when an "individual has little or no control over it,"[356] and has sometimes been defined as the inability of individuals to enter or leave a particular group.[357] While an alien can eventually move out of his or her group by acquiring citizenship, or a Democrat or Republican may change political affiliation, presumably no such choice is available to people of a certain race, sex, or national origin.[358] Immutability is important in the context of discrimination because individuals in groups such as race, sex, and national origin who possess immutable characteristics cannot ever leave their group, are more vulnerable, and thus require more protection.[359]

Unlike race or sex, age represents a continuum and an inevitable guarantee that, in the normal course of events, all of us will age. As such, age is not immutable.[360] The main feature that sets it apart from race or sex is that at some point every member of society will join this presumably disadvantaged group.[361] If not yet associated with the social group of the elderly, most of the younger people have family members in the older cohorts. Therefore, mutability serves as a safeguard from potentially rampant abuse, which is more likely to occur against a group with which the abuser has neither immediate nor potential affiliation.[362]

356. Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107, 147 (1990).

357. *See* Van Sistine & Meredith, *supra* note 352, at 609.

358. *See* Simon, *supra* note 356, at 147–49.

359. *See id*. at 149; Van Sistine & Meredith, *supra* note 352, at 609.

360. Some critics have argued that age is immutable in one sense but not in another. *See* Simon, *supra* note 356, at 148 (stating that age is immutable because "one can never grow younger," yet not immutable because "no one is fixed at a particular age").

361. *See* Van Sistine & Meredith, *supra* note 352, at 610.

362. *See id.*

Thus, age is unique among other characteristics protected by antidiscrimination laws because it is not immutable.[363] This realization requires that age be treated differently from other "prototypical" groups protected by the classic age-discrimination theory.[364] Numerous distinctions between age and race or sex have led some scholars to conclude that "separate models must be used to determine the legality of age-based distinctions depending upon the context in which the distinctions are made."[365] Van Sistine and Meredith argue that in some situations older people are subject to the same type of stereotyping and arbitrary discrimination as African-Americans, while in other situations the different treatment is based on valid generalizations about age.[366] They cite ERIPs as an example of the latter situation because an ERIP is a "valuable benefit" rather than an "adverse treatment based on prejudice."[367] ERIPs are premised on "the employer's desire to save money" and to increase older workers' retirement options.[368] Relying on the text of OWBPA and the ADEA's congressional history, the authors conclude that age distinctions within a voluntary ERIP should not be viewed as evidence of discrimination.[369]

The logic of Van Sistine and Meredith's analysis can be extended to other benefits made available to older cohorts within the protected class. Because of the differences between the protected categories and the fact that the ADEA is a limited legislative remedy, it is best to analyze the phenomenon of reverse age discrimination using a more pragmatic and flexible approach. Recognizing that a more favorable treatment of the older workers within the protected class does not constitute discrimination in the classic sense, is part and parcel of such an approach.

B. Age versus Race and Sex Discrimination in the Constitutional Context

The difference in the doctrinal underpinnings of race and sex discrimination is underscored by the different treatment afforded to race and sex discrimination by the Supreme Court in equal protection cases.[370] Despite

363. Arguably, disability also shares non-immutable characteristics because anyone is potentially subject to disability. However, unlike aging, disability does not, in the normal course of events, occur to every person, but affects only a percentage of the population.

364. Van Sistine & Meredith, *supra* note 352, at 598.

365. *Id.* at 596. The authors further argue that the "classical discrimination theory simply does not provide one overarching principle by which all age distinctions can be judged" and suggest that ERIPs should not trigger classical discrimination scrutiny. *Id.* at 596, 655.

366. *Id*. at 614.

367. *Id.*

368. *Id.*

369. Van Sistine & Meredith, *supra* note 352, at 642–43, 655.

370. *See* Christine Godsil Cooper, *Where Are We Going With* Gilmer*?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 224 (1992)

the fact that the constitutional body of law is distinct and separate from case law under anti-discriminatory statutes, it is a well-suited source for reviewing the difference in treatment of age and other categories. What makes the Supreme Court's equal protection decisions particularly relevant is that they "represent the most developed body of theory" providing conceptual justifications for why specific groups require protection.[371]

While race is considered a suspect classification and requires strict scrutiny by the courts,[372] gender is termed a "semi-suspect" classification with attendant intermediate scrutiny,[373] and age enjoys no suspect classification and commands only rational-basis review.[374] A classic example is the Supreme Court's comparison of race and age in *Massachusetts Board of Retirement v. Murgia*.[375] In *Murgia*, the Court sustained the rationality standard in evaluating mandatory retirement law for state police officers.[376]

The *Murgia* Court advanced several arguments in support of its different treatment of age as opposed to race or national origin. First, the older workers have not experienced a "'history of purposeful unequal treatment'" by the government.[377] Second, the older workers have not experienced bias because of "stereotyped characteristics not truly indicative of their abilities."[378] Third, the Court did not see the aged as a "'discrete and insular group' in need of 'extraordinary protection.'"[379] Finally, the Court acknowledged that, unlike an immutable characteristic such as race, age does ultimately affect a person's

(acknowledging that in the constitutional context, the courts consider age discrimination to be "less loathsome than race discrimination").

371. Van Sistine & Meredith, *supra* note 352, at 600-01; *see also* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 133 (1976) (noting that "in the case of defining the term 'discrimination,' which Congress has nowhere in Title VII defined, those cases afford an existing body of law analyzing and discussing that term in a legal context not wholly dissimilar to the concerns which Congress manifested in enacting Title VII").

372. Miller v. Johnson, 515 U.S. 900, 904 (1995) (racial and ethnical distinctions are inherently suspect); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (noting that laws classifying citizens on the basis of race cannot be upheld under strict scrutiny unless narrowly tailored to achieve a compelling state interest).

373. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982). The court stated that the party seeking to defend gender classifications must demonstrate "that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* (quotations omitted).

374. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) (reasoning that "[o]ld age . . . does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it").

375. 427 U.S. 307 (1976) (per curiam).

376. *Id.* at 312.

377. *Id.* at 313 (quoting San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

378. *Id.*

379. *Id.* (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938)).

ability to work.[380] Applying rational basis scrutiny, the Court had no trouble concluding that mandatory retirement at fifty was constitutional because it removed from police service those whose fitness "presumptively . . . diminished with age."[381] Other decisions have echoed the Court's reasoning in *Murgia*.[382]

In summary, the Supreme Court has recognized the fundamental differences between age and other protected categories and ultimately has refused to treat age classifications as suspect. The Supreme Court's approach to age classifications thus supports the conclusion that the ADEA protection does not need to be harmonized with Title VII and may run "one way."

VI. SOCIAL POLICY CONSIDERATIONS

In his concurring opinion in *Cline*, Judge Cole cited Congress's finding that "all age discrimination burdens commerce" in support of his opinion that recognizing claims for "reverse discrimination suits would alleviate the congressionally identified burden on commerce."[383] Judge Cole's comment is ironic in light of the costs that commerce will ultimately have to absorb as a result of reverse discrimination suits under the ADEA. The effects of recognizing a cause of action for reverse age discrimination are potentially far-reaching. The dissent in *Cline* expressed its concern that it would open the floodgates to litigation attacking benefits to older individuals if the reverse discrimination claims are permitted.[384] The Equal Employment Advisory Council ("EEAC") views *Cline* as "vastly . . . expand[ing] the number of employment actions potentially subject to challenge under the ADEA."[385] By failing to read the central prohibition of the ADEA in the context of other statutory provisions and relevant legislative history, the *Cline* court gave the ADEA "'a meaning so broad that it is inconsistent with its accompanying

380. *Murgia*, 427 U.S. at 315. As an Equal Protection Clause case, *Murgia* focused on the absence of evidence of the states discriminating on the basis of age. Many of the statements regarding age in *Murgia* appear contrary to the congressional findings in the ADEA. The *Murgia* analogy is only used in this Note to underscore the difference in the interpretation of the ADEA and Title VII by the Supreme Court. The implications of the distinctions between race and age discrimination "need not be identical in the constitutional and statutory contexts." Note, *The Age Discrimination and Employment Act of 1967*, 90 HARV. L. REV. 380, 387 (1976).

381. *Id.* at 315–16.

382. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) (underscoring the differences in rationales and remedial schemes of the ADEA and Title VII). In *Kimel*, the Supreme Court held that rational basis scrutiny was an appropriate measure of evaluating state-sponsored discrimination against older workers under the Fourteenth Amendment. *Id.*

383. Cline v. Gen. Dynamics Land Sys., Inc., 296 F.3d 466, 474 (6th Cir. 2002), *cert. granted*, 123 S.Ct. 1786 (2003) (Cole, J., concurring).

384. *See id.* at 476 (Williams, J., dissenting).

385. E-mail from Robert E. Williams, Attorney, Equal Employment Advisory Council, to Author (Oct. 15, 2002, 09:07:33 CST) (on file with author).

words.'"[386] In light of the continuous graying of America, if the ADEA is viewed as a symmetrical legislation, the claims of "youth" discrimination within the protected class will grow exponentially.[387]

The cause of action for reverse age discrimination has the potential effect of invalidating any retirement policy program that distinguishes between employees based on age. The business community perceives "a serious problem for any employer that establishes a minimum eligibility age for retiree health insurance benefits[,] or indeed, for any benefit other than a pension."[388] The challenged practices may include severance pay as well as medical and life insurance made available to older employees during such events as reductions-in-force or negotiated contracts with unions. Other practices, such as varying the amount of benefits in favor of older employees or using premiums paid by younger workers to subsidize the cost of insurance of older employees,[389] will also be threatened if the *Cline* decision is allowed to stand.

The *Cline* decision is likely to have the most direct negative impact on the health benefits offered to retirees.[390] Presently, "[m]ore than one-third of seniors—almost fourteen million people on Medicare—receive health insurance" through employment.[391] Employers typically require that the covered employees meet the combination of age and service requirements, with the most prevalent minimum age being fifty-five.[392] Because of the prohibitive costs of insurance premiums, which were estimated to rise sixteen percent in the year 2002,[393] many employers have already scaled back the

386. AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 408 (1999) (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995); *see also* Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961) (denouncing interpretations that give "unintended breadth to the Acts of Congress").

387. It is estimated that by 2004, more than half of the American workforce will be in the age group protected by the ADEA. Pontz, *supra* note 237, at 270 n.19.

388. E-mail from Robert E. Williams, Attorney, Equal Employment Advisory Council, to Author (Oct. 15, 2002, 09:07:33 CST) (on file with author); *see* 29 U.S.C. § 623(*l*)(1)(A) (2000) (permitting a minimum age threshold for pension plans).

389. Brief of the Central States, Southeast and Southwest Areas Health and Welfare Fund as Amicus Curiae in Support of Petitioner at *4–*9, Gen. Dynamics Land Sys., Inc. v. Cline, 123 S. Ct. 1786 (2003) (No. 02-1080), *available at* 2003 WL 21649487.

390. *See* Brief of the ERISA Industry Committee as Amicus Curiae in Support of Petitioner, *supra* note 246, at *19.

391. *New Survey Shows Retiree Health Benefits Continue to Decline*, at 1, *at* http://www.cmwf.org/media/releases/gabel506%5Frelease04152002.html (last modified April 15, 2002).

392. HENRY J. KAISER FAMILY FOUNDATION AND HEWITT ASSOC., *The Current State of Retiree Health Benefits: Findings from the Kaiser/Hewitt 2002 Retiree Health Survey*, at 2 (2002), *available at* http://www.kff.org/content /2002/3251/3251.pdf.

393. Adam Marcus, *Cost of Retiree Benefits Rising*, *at* http://www.hon.ch/News/HSN/510678.html (Dec. 5, 2002).

health coverage that they offer.[394] The provision of enhanced health benefits to older employees is voluntary on the part of the employers and not mandated by law.[395] If the employers are threatened with the possibility of lawsuits for reverse age discrimination because of their inability to provide health benefits for the younger employees in the ADEA-protected class, they are likely to decline offering any health benefits to retirees. Instead of encouraging a socially-beneficial practice that helps meet the congressional concern for older workers, the *Cline* holding provides a perverse incentive to the employer and encourages the employer not to provide any benefits at all.[396]

Recognizing a cause of action for reverse age discrimination also poses a substantial threat to the collective bargaining process. In 2001, 13.4% or approximately 16.4 million wage and salary workers were union members.[397] These workers had median weekly earnings of $718, as compared to a median of $575 for workers who were not represented by unions.[398] The economic well-being of union workers and their families will be threatened if collective bargaining agreements are allowed to be undermined by claims of reverse discrimination. The concern of the dissent in *Cline* about the impact of the *Cline* decision on the stability of labor relations is well-taken. Because of the shadow cast by the Sixth Circuit on all types of benefits that use age as a criterion for determining eligibility, employers, unions, and the collective bargaining process itself will suffer because negotiated agreements may become subject to a new level of judicial scrutiny.

394. *See* Bruce Stuart et al., *Employer-Sponsored Health Insurance and Prescription Drug Coverage For New Retirees: Dramatic Declines in Five Years*, at W3–334 (July 23, 2003) (stating that "the number of large employers (500 employees or more) offering coverage to Medicare-eligible retirees declined from 57 percent in 1987 to 23 percent in 2001"), *available at* http://www.healthaffairs.org/WebExclusives/Stuart_Web_Excl_072303.htm. The decline in the number of retirees covered was accompanied by "reduced benefits or increased employees' share of premiums, or both." *Id.*

395. *See* Pamela Perun, *Phased Retirement Programs for the Twenty-First Century Workplace*, 35 J. MARSHALL L. REV. 633, 635 (2002) (noting that "[n]othing in ERISA or the [tax] [c]ode requires employers to establish benefit plans or mandates the types of benefits those plans must offer").

396. Even the AARP expressed fear that in the current economic slump, the employers, fearing a lawsuit and attempting to cut costs, will decide not to provide retirement benefits to any workers older than 40. *See* Andrew Brownstein, *'Younger' Workers Can Sue Under the ADEA, Sixth Circuit Finds*, 38 TRIAL 82, 82 (Oct. 2002) (interviewing Tom Osborne, senior attorney for the AARP).

397. News Release, Bureau of Labor and Statistics, U.S. Dep't of Labor, *Union Members Summary*, Feb. 25, 2003, *at* http://www.bls.gov/news.release/union2.nr0.htm

398. *Id.* The Department of Labor noted that "[t]he difference [in wages] reflects a variety of influences in addition to coverage by a collective bargaining agreement." *Id.* Undoubtedly, however, the superior wages are correlated with the union representation.

The ADEA, like other employment discrimination statutes, does not exempt the terms of collective bargaining agreements from its reach.[399] However, the courts have recognized the importance of collective bargaining and have demonstrated judicial respect towards such agreements in a variety of cases dealing with employment discrimination. For example, in the context of Title VII, the Supreme Court ruled in *Trans World Airlines, Inc. v. Hardison* that an employer was not required to make an exception to seniority rules that determined shift assignments in order to accommodate an employee's religious observance.[400] The Court emphasized the importance of collective bargaining and the seniority rights obtained through such bargaining: "Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy."[401]

In the end, it will be society at large that will ultimately pay for reverse discrimination lawsuits. While offering the entire range of benefits to all workers older than forty will likely be cost-prohibitive to employers, the only alternative left for them would be to deny the benefits altogether. Unlike in the context of race and sex, this action will affect every member of the society if not immediately, then later in life either directly or through aging parents and other family members. As the dissent in *Cline* deftly noted, the needs of older people increase with age,[402] and it stands to reason that older individuals require greater protection. "Pension, and medical and life insurance plans must take account of age, if only because life expectancy and health decrease as age

399. *See* 29 U.S.C. §§ 630(a), (d) (2000) (specifically listing "labor organizations" as one type of covered entity subject to its provisions).

400. 432 U.S. 63, 79 (1977).

401. *Id.* In the context of the ADA, the Supreme Court has recently addressed the interaction between a "reasonable accommodation" and a bona fide seniority system in *US Airways, Inc. v. Barnett*. 535 U.S. 391 (2002). While the seniority system at issue in *Barnett* was not a collectively-bargained system, but rather a system unilaterally imposed by management, the Court relied on cases that involved seniority systems negotiated under the collective bargaining agreement. *See id.* at 403–404 (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 at 79-80; Smith v. Midland Brake, Inc., 180 F.3d 1154, 1175 (10th Cir. 1999); Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1047–48 (7th Cir. 1996); Shea v. Tisch, 870 F.2d 786, 790 (1st Cir. 1989); Carter v. Tisch, 822 F.2d 465, 469 (4th Cir. 1987)). The Supreme Court in *Barnett* held that the "reasonable accommodation" standard does not ordinarily compel the employer to violate provisions of a seniority system in order to permit the job transfer of a disabled employee. *See id.* at 393-94. Nevertheless, the Court made clear that an employee may "present evidence of special circumstances" that warrants a finding that an accommodation is reasonable despite its impact on a seniority system. *Id.* at 394. Similarly, case law has recognized that collectively-bargained seniority trumps the need for accommodation under the Rehabilitation Act of 1973. 29 U.S.C. §§ 791, 793–94 (2000). The Seventh Circuit, for example, was willing to uphold a collective bargaining agreement when the rights of the protected class were negatively affected. *Eckles*, 94 F.3d at 1051–52.

402. Cline v. Gen. Dynamics Land Sys., Inc., 269 F.3d. 466, 476 (Williams, J., dissenting).

increases."[403] Finally, as noted by the concurrence in *Cline*, there is something inherently counterintuitive about prohibiting a preferential policy toward older members of the protected group.[404] The entire concept of setting the "younger old" against the "older old" appears bizarre and objectionable.[405]

VII. CONCLUSION

The argument that reverse age discrimination is actionable under the ADEA, while plausible, is not convincing. The strongest clues to congressional understanding of the nature of the protection offered by the ADEA are found not only in the text of the ADEA's central prohibition but also in the context of the entire statute and its legislative history. The multiple references in the ADEA to "older" adults, as well as the statute's stated purpose of eradicating only arbitrary discrimination in employment, underscore the fact that the blanket prohibition of employment discrimination on the basis of age was not the intent of Congress.

The ADEA exceptions, especially those concerning seniority and ERIPs, exemplify Congress's recognition that age, unlike race or sex, must be taken into account in certain circumstances. Legislative history, while not explicit on the subject, also supports the view that protection of the younger workers was not the goal of the ADEA's framers. Legislative and judicial recognition of age as being profoundly different from other categories that require protection lends credence to the conclusion that the interpretation of the ADEA should be treated differently from Title VII.

While the ADEA provides minimum standards for combating age discrimination in employment, younger workers are not left without recourse because states are free to enact statutes that will offer symmetrical protection. The economic and social ramifications of allowing reverse age discrimination claims cannot be overstated. Fearing a potential ADEA lawsuit, employers will be hesitant to offer increased benefits to older workers. Such a result would frustrate, not serve, Congress's end. Therefore, the Supreme Court will need to cure the circuit split created by *Cline* and should do so by overruling *Cline*.

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403. Rutherglen, *supra* note 259, at 498.

404. *See supra* Part III.B.2 for a discussion of Judge Cole's concurrence in *Cline*.

405. The senior attorney for the AARP, while acknowledging that the AARP has never in the past taken the side of the employer, called the idea "distasteful." *See* Brownstein, *supra* note 396, at 82.

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