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Passing the Buck: How the Supreme Court Could Have Sidestepped the Impact of Its Controversial Decision in Smith v. City of Jackson

Paul Stoehr

PASSING THE BUCK: HOW THE SUPREME COURT COULD HAVE SIDESTEPPED THE IMPACT OF ITS CONTROVERSIAL DECISION IN *SMITH v. CITY OF JACKSON*

INTRODUCTION

The American workforce is growing ever older. People are not only living longer, but they are remaining in the workforce longer as well.[1] The oldest baby boomers are nearing or have already reached retirement age, while the youngest (those born in 1964) have recently reached the age of forty.[2] Hence, an enormous group of workers is now protected by the Age Discrimination in Employment Act (ADEA).[3]

For that reason, the 2005 Supreme Court case *Smith v. City of Jackson*[4] was an important decision that had potentially far-reaching implications for many Americans. The case addressed the tenability under the ADEA of employment discrimination claims which alleged that a facially neutral employment decision had a disparate impact on older workers. Not only would the decision resolve a circuit split which had gone unresolved since 1993[5] as well as address an area of law which was the source of vigorous academic debate,[6] but it would also, at least in theory, have a large impact on

1. The United States Department of Labor's Bureau of Labor Statistics predicts that the number of workers over the age of 55 will grow by 49.1% over the next decade. United States Department of Labor, Bureau of Labor Statistics, *News: BLS Releases 2004–14 Employment Projections* (Dec. 7, 2005), *available at* http://www.bls.gov/news.release/pdf/ecopro.pdf; *cf. Most Employers Are Not Looking to Hire, Retain Older Workers, GAO Says*, DAILY LAB. REP., Dec. 6, 2005, at A7 (reporting that the growing number of older workers is a challenge to the economy that employers have yet to fully address).

2. *See* Lori D. Ecker & Joseph M. Gagliardo, *Allowing Disparate Impact Claims Under the ADEA*, 93 ILL. B.J. 198, 201 (2005); *see also* Kenneth R. Davis, *Age Discrimination and Disparate Impact: A New Look at an Age-Old Problem*, 70 BROOK. L. REV. 361, 361 (2005); Howard C. Eglit, *The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It Is Today, Where It's Going*, 31 U. RICH. L. REV. 579, 664 (1997).

3. 29 U.S.C. §§ 621–24 (2000). The ADEA protects workers over the age of 40.

4. 544 U.S. 228 (2005).

5. *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), an important disparate treatment case to be discussed later in more detail, was decided in 1993. *See infra* notes 56–57 (citing cases revealing the circuit split).

6. *See, e.g.*, Davis, *supra* note 2; Michael Evan Gold, *Disparate Impact Under the Age Discrimination in Employment Act of 1967*, 25 BERKELY J. EMP. & LAB. L. 1 (2004); Douglas C. Herbert & Lani Schweiker Shelton, *A Pragmatic Argument Against Applying the Disparate*

both employers and employees precisely because of the large numbers of older workers in the American workforce. Ostensibly, a decision for the plaintiffs in *Smith*, which would authorize disparate impact claims under the ADEA, would be a major victory for older employees and would lead to a higher number of successful age discrimination lawsuits.

As this Note will argue, however, the decision rendered by the Supreme Court in *Smith* was a less-than-satisfying answer to the disparate impact question. First, the holding of *Smith* makes it very unlikely that any plaintiff will in reality be able to state a cognizable disparate impact claim under the ADEA. Whereas in racial or sexual discrimination impact cases an employer has to demonstrate that the action which resulted in the disparate impact on the protected age group was a business necessity, employers being sued for age discrimination will now be able to successfully defend a disparate impact claim by showing only that its action was reasonable. As a result, few plaintiffs will be able to win a disparate impact suit because of the difficulty of showing that a business acted unreasonably.[7]

Second, both the plurality opinion in *Smith* and that of Justice O'Connor were based on unpersuasive reasoning. Each opinion seemed to do little more than simply summarize one of the opposing arguments of the disparate impact debate. Unfortunately, as was stated by Professor Kenneth Davis, this debate turns on "a series of counterarguments, none of which is convincing."[8] The Court may have authorized disparate impact claims under the ADEA, but its rationale for doing so left something to be desired.

Therefore, because of both the limited practical implications of the plurality's holding and the problematic reasoning of the Court's opinions, the Court should have deferred to the views of the Equal Employment Opportunity Commission (EEOC) and held not only that disparate impact suits were viable

Impact Doctrine in Age Discrimination Cases, 37 S. TEX. L. REV. 625 (1996); Judith J. Johnson, *Rehabilitate the Age Discrimination in Employment Act: Resuscitate the "Reasonable Factors Other Than Age" Defense and the Disparate Impact Theory*, 55 HASTINGS L.J. 1399 (2004); Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229 (1990); Rocco Cozza, Comment, *Does the Theory of Disparate Impact Liability Apply in Cases Arising Under the Age Discrimination in Employment Act?: A Question of Interpretation*, 41 DUQ. L. REV. 773 (2003); Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267 (1995); Jonas Saunders, Note, *Age Discrimination: Disparate Impact Under the ADEA After* Hazen Paper Co. v. Biggins*: Arguments in Favor*, 73 U. DET. MERCY L. REV. 591 (1996); Brendan Sweeney, Comment, *"Downsizing" the Age Discrimination in Employment Act: The Availability of Disparate Impact Liability*, 41 VILL. L. REV. 1527 (1996).

7. Courts have shown an unwillingness "to sit as a 'super-personnel department'" and question the reasonableness of business decisions. Evers v. Alliant Techsystems, Inc., 241 F.3d 948, 957 (8th Cir. 2001).

8. Davis, *supra* note 2, at 379.

under the ADEA, but also that businesses could defend themselves only by showing that their actions were a business necessity. Such an approach, which is similar to that taken by Justice Scalia's opinion in *Smith*,[9] would have addressed both of these issues. It would have provided a firm basis on which to rest the Court's holding and would have given ADEA plaintiffs at least a realistic possibility of stating a valid disparate impact claim.

Expanding on these ideas, Section I of this Note will provide the facts and procedural history of *Smith v. City of Jackson* as well as a brief summary of the history of disparate impact claims and the ADEA. Section II will then detail the holding of the case as well as the rationale behind the concurring opinions. Finally, Section III will provide an analysis of the case. It will focus on the limited application of the Court's holding and the unpersuasive nature of the opinions and argue that the Court should have deferred to the EEOC's interpretation of disparate impact liability under the ADEA.

I. HISTORICAL ANALYSIS

A. Facts and Procedural History of Smith v. City of Jackson

In October of 1998, the city of Jackson, Mississippi instituted a pay plan which gave raises to all city employees.[10] Several months later, in May of 1999, the city provided raises to all police officers and dispatchers.[11] The purpose of the overall plan, as stated by the city, was to "attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability."[12] The pay raise for the police personnel was intended to make the officers' salaries competitive with regional averages.[13]

The pay raises for the police department were structured so that officers with less than five years tenure on the force were given raises that were proportionately greater than those who had served longer than five years.[14] Because most of the officers over the age of forty (although not all) had been with the department longer than five years, they received proportionately lower

9. Justice Scalia wrote that "[t]his is an absolutely classic case for deference to agency interpretation." *Smith*, 544 U.S. at 243 (Scalia, J., concurring in part and concurring in the judgment). Unlike the position taken by this Note, however, Justice Scalia concurred with the plurality in its holding that disparate impact claims could be defended by citing reasonable factors rather than business necessity. *See id.*

10. *Id.* at 231 (plurality opinion).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Smith*, 544 U.S. at 231.

salary increases than did younger officers with shorter tenures.[15] Because of that disparity, a group of older officers filed suit against the city under the ADEA, alleging both disparate treatment and disparate impact claims.[16]

The United States District Court for the Southern District of Mississippi granted summary judgment to the city on both claims.[17] On the issue of the disparate treatment claim, the Fifth Circuit of the United States Court of Appeals reversed and remanded, stating that sufficient discovery concerning whether the city had acted with the requisite intent had not been completed.[18] The Court of Appeals affirmed the summary judgment on the disparate impact claim; however, ruling that even assuming that the officers had shown the facts necessary for a disparate impact claim, such claims were not cognizable under the ADEA.[19] The Supreme Court then granted certiorari[20] in order to determine whether disparate impact claims of employment discrimination were indeed available under the ADEA and to resolve a circuit split that had developed concerning the issue.[21]

B. Disparate Impact and the ADEA

1. A Brief History of the ADEA

The ADEA was passed in 1967, three years after the passage of the Civil Rights Act of 1964.[22] Title VII of the Civil Rights Act had made it illegal to discriminate on the basis of race, sex, or religion.[23] While Congress debated including "age" in Title VII along with the categories of "race, color, religion, sex, or national origin," it was ultimately not included.[24] Congress did,

15. *Id*.
16. *Id.* at 231.
17. *Id*.
18. *Id.*; *see* Smith v. City of Jackson, Miss., 351 F.3d 183, 198 (5th Cir. 2003).
19. *Smith*, 544 U.S. at 231; *see Smith*, 351 F.3d at 195.
20. Smith v. City of Jackson, Miss., 541 U.S. 958 (2004).
21. For an illustration of the circuit split, see *infra* notes 56–57.
22. Gold, *supra* note 6, at 12.
23. 42 U.S.C. § 2000e-2(a)(1)–(2) (2000). Title VII provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

24. *See* Eglit, *supra* note 2, at 581.

however, order the Secretary of Labor to conduct a study of the problem of age discrimination and to submit a report.[25] The Secretary subsequently issued a report detailing the problems associated with age discrimination and recommending that legislation be passed to combat those problems.[26] Two years later, after seeking more detailed recommendations, Congress enacted the ADEA.[27]

The ADEA states that it shall be unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."[28] That language (other than the word "age") is identical to the language of Title VII.[29] Unlike Title VII, however, the ADEA contains an important exception, which states that "otherwise prohibited" actions are not prohibited in situations "where the differentiation is based on reasonable factors other than age."[30] This "reasonable factors other than age" provision (RFOA provision) has been the basis of much of the controversy surrounding the ADEA and disparate impact.

2. Disparate Impact Theory and Its Application to the ADEA

ADEA claimants have historically utilized two distinct theories: disparate treatment and disparate impact.[31] Disparate treatment involves cases where the employer intentionally discriminates against older workers.[32] Conversely, disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another."[33] Proof of intent or motive is unnecessary.[34]

The theory of disparate impact was first recognized in the 1971 Supreme Court case *Griggs v. Duke Power Company*.[35] *Griggs* was a Title VII case that

25. *Smith*, 544 U.S. 228, 232 (2005).

26. *Id.* (citing WILLARD WIRTZ, SEC. OF LAB., THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 5 (June 1965), *reprinted in* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT (1981) [hereinafter WIRTZ REPORT]).

27. *See* Eglit, *supra* note 2, at 583.

28. 29 U.S.C. § 623(a)(2) (2000).

29. 42 U.S.C. § 2000e-2(a)(1)–(2) (2000).

30. 29 U.S.C. § 623(f)(1) (2000).

31. Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993).

32. *Id.* (stating that in such claims, "[p]roof of discriminatory motive is critical" (quoting Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977)).

33. *Id.* (quoting *Teamsters*, 431 U.S. at 335–36 n.15).

34. *Id.*

35. 401 U.S. 424 (1971). For a detailed history of *Griggs* and disparate impact claims under Title VII, see Robert Belton, *Title VII at Forty: A Brief Look at the Life, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431 (2005).

dealt with an employer's policy of requiring employees to either pass a test or to have a high school diploma.[36] Though the policy was facially neutral, it had an adverse and disproportionate effect on African-American employees.[37] In its holding, the Court stated that the plaintiffs did not need to show that Duke Power intentionally discriminated against them through the use of the test, and showing that the tests had a disparate impact on the black workers was sufficient as long as that test could not be defended as a business necessity.[38] As the Court wrote, disparate impact analysis was a permissible construction of the statute because "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[39]

Following *Griggs*, courts uniformly assumed that disparate impact claims were cognizable not only under Title VII, but also under the ADEA.[40] The language of the statutes was similar, and cases interpreting Title VII were often used in interpreting the ADEA.[41] The extension seemed logical. Several developments, however, cast doubt on this interpretation of the ADEA.

The first of these developments was the Supreme Court case *Wards Cove Packing Co., Inc. v. Atonio*,[42] decided in 1989. Like *Griggs*, *Wards Cove* was a racial discrimination suit brought under Title VII. While the case did not overturn *Griggs*, it narrowed considerably the scope of disparate impact claims by raising the burden of proof for plaintiffs and lowering it for defendants.[43] First, *Wards Cove* required that plaintiffs specify the particular business decision that caused the disparate impact.[44] Furthermore, *Wards Cove* held that defendants must only produce evidence to show that the "challenged

36. *Griggs*, 401 U.S. at 428.

37. *Id.* at 429.

38. *Id.* at 432–33.

39. *Id*. at 432.

40. Smith v. City of Jackson, Miss., 544 U.S. 228, 236–37 (2005); *see, e.g.*, Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419 (10th Cir. 1993); Maresco v. Evans Chemetics, 964 F.2d 106 (2d Cir. 1992); Wooden v. Bd. of Ed. of Jefferson City, Ky., 931 F.2d 376 (6th Cir. 1991); Arnold v. United States Postal Serv., 863 F.2d 994 (D.C. Cir. 1988); Blum v. Witco Chem. Corp., 829 F.2d 367 (3d Cir. 1987); Holt v. Gamewell Corp., 797 F.2d 36 (1st Cir. 1986); Monroe v. United Airlines, 736 F.2d 394 (7th Cir. 1984); EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984); Dace v. ACF Indus., 722 F.2d 374 (8th Cir. 1983), *modified*, 728 F.2d 976 (1984) (*per curiam*); Allison v. W. Union Tel. Co., 680 F.2d 1318 (11th Cir. 1982).

41. *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, 1096–99 (1993).

42. 490 U.S. 642 (1989).

43. *See* Eglit, *supra* note 41, at 1129–33 (summarizing the effect *Wards Cove* had on disparate impact litigation).

44. *Wards Cove*, 490 U.S. at 656 ("Our disparate-impact cases have always focused on the impact of *particular* hiring practices") (emphasis in original).

practice serves, in a significant way, the legitimate employment goals of the employer."[45]

In response to the decision in *Wards Cove*, which to many signaled "three major strides backwards in the battle against race discrimination,"[46] Congress enacted the Civil Rights Act of 1991.[47] That Act rejected *Wards Cove* (as well as other decisions which had narrowed the scope of disparate impact claims under Title VII) in large part and made various amendments to Title VII to ensure the continuing viability of disparate impact claims.[48] Significantly, however, the Civil Rights Act did not make the same amendments to the ADEA.[49] What exactly that legislative silence meant for disparate impact claims under the ADEA was not at all clear.[50]

Furthering the growing doubt concerning disparate impact claims in age discrimination cases was the 1993 Supreme Court case *Hazen Paper Company v. Biggins*.[51] *Hazen Paper* was a disparate treatment case brought under the ADEA. Though the Court expressly stated that the case considered only disparate treatment and was not addressing whether the ADEA encompassed disparate impact claims,[52] language in the decision cast considerable doubt on whether the Court believed that disparate impact claims were in fact viable under the ADEA. As the Court stated,

> [d]isparate treatment, thus defined, captures the essence of what [C]ongress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age. . . . Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes. . . . When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears.[53]

This language seemed to imply that, at least in the context of the ADEA, disparate treatment was the only theory of recovery. A business decision which was not made with discriminatory intent but which still had a disparate impact on older workers would not be based on "inaccurate and stigmatizing

45. *Id*. at 659. *Wards Cove* aided employers not only by articulating this lowered standard, but also by holding that employers only had the burden of production concerning the business justification rather than the burden of persuasion. *Id*.

46. *Id.* at 661 (Blackmun, J., dissenting).

47. *See generally* Eglit, *supra* note 41.

48. *Id*. at 1102.

49. *Id*. at 1103.

50. *Id*. at 1104.

51. 507 U.S. 604 (1993).

52. *Id.* at 610.

53. *Id*. at 610–11.

stereotypes" about the older workers and would therefore not fall under the penumbra of the ADEA as described by the *Hazen Paper* Court.

After *Hazen Paper*, the "tectonic plates" shifted[54] and a circuit split developed concerning whether disparate impact suits were available.[55] The Second, Eighth, and Ninth Circuits maintained that disparate impact was available as a theory of recovery under the ADEA, notwithstanding the Supreme Court's language in *Hazen Paper*.[56] Conversely, the First, Fifth, Seventh, Tenth, and Eleventh Circuits have held that disparate impact claims were not cognizable under the ADEA.[57] The Supreme Court nearly resolved the circuit split when it granted certiorari in the case of *Adams v. Florida Power Corp.*,[58] but it later dismissed certiorari as improvidently granted.[59]

II. THE RATIONALE OF THE *SMITH* COURT

A. The Plurality: A Narrowed Conception of Disparate Impact

Justice Stevens authored the primary opinion in *Smith v. City of Jackson*.[60] Parts I, II, and IV were joined by Justices Souter, Ginsburg, Breyer, and Scalia and are therefore binding precedent; Part III was joined by Justices Souter, Ginsburg, and Breyer.[61] Part I of the opinion detailed the facts and procedural history of *Smith*,[62] which are laid out in Section I.A. of this Note. Part II provided a very brief legislative history of the ADEA in relation to the issue of disparate impact claims.[63] Part III then detailed Justice Stevens' rationale for holding that the ADEA, like Title VII, encompasses disparate impact claims.[64]

54. Mullin v. Raytheon Co., 164 F.3d 696, 700 (1st Cir. 1999).

55. *See* Ecker & Gagliardo, *supra* note 2, at 199 (providing a brief summary of the circuit split and the rationale underlying the Courts of Appeals' decisions).

56. *E.g.*, Arnett v. Cal. Pub. Employees Ret. Sys., 179 F.3d 690 (9th Cir. 1999), *rev'd on other grounds*, 528 U.S. 1111 (2000); Smith v. Xerox Corp., 196 F.3d 358 (2d Cir. 1999); Smith v. City of Des Moines, Iowa, 99 F.3d 1466 (8th Cir. 1996); *see also* Ecker & Gagliardo, *supra* note 2, at 199.

57. *E.g.*, Adams v. Fla. Power Corp., 255 F.3d 1322 (11th Cir. 2001); Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999); Maier v. Lucent Techs., Inc., 120 F.3d 730 (7th Cir. 1997); Ellis v. United Airlines, 73 F.3d 999 (10th Cir. 1996); *see also* Ecker, *supra* note 2, at 199.

58. 534 U.S. 1054 (2001).

59. Adams v. Fla. Power Corp., 535 U.S. 228 (2002); *see Leading Cases*, 119 HARV. L. REV. 169, 343 n.48 (2005) (noting that certiorari may have been dismissed in *Adams* because the "case would have required a 'pronouncement in the abstract' on the availability of disparate impact" (quoting *Adams*, 255 F.3d at 1326 (Barkett, J., specially concurring)). *Adams* was appealed purely as a question of law. 255 F.3d at 1323.

60. 544 U.S. 228 (2005).

61. *Id.*

62. *Id.* at 231–32.

63. *Id.* at 232–33.

64. *Id.* at 233–40.

Finally, Part IV of the opinion applied the holding to the facts of the case and narrowed the scope of the holding to only those claims which dealt with employment decisions that could not be defended as reasonable.[65]

Justice Stevens' analysis of the issue presented in *Smith* began with a short history of the ADEA in Part II of his opinion.[66] He stated that while Congress considered including age as one of the protected classes in the Civil Rights Act of 1964, it ultimately chose not to do so.[67] Instead, Congress requested that Secretary of Labor Willard Wirtz conduct a study concerning the issue of age discrimination, its sources, and how it affected the economy and individual workers.[68] In response to this request, Wirtz submitted a report entitled "The Older American Worker: Age Discrimination in Employment" (Wirtz Report).[69] The report stated that "there was little discrimination arising from dislike or intolerance of older people, but that 'arbitrary' discrimination did result from certain age limits."[70] The report also noted that certain "[i]nstitutional arrangements" indirectly discriminated against older workers.[71] In response to the Wirtz Report and the recommendations of the Secretary of Labor, Congress enacted the ADEA in 1967.[72] As Justice Stevens emphasized in his opinion, much of the language of the ADEA was identical to that of Title VII (except for substituting the words "race, color religion, sex, or national origin" with the word "age").[73] The major difference between the two statutes was that the ADEA, unlike Title VII, incorporated the RFOA provision.[74] That provision provided that "otherwise prohibited" employment decisions would not be illegal if they were based on "reasonable factors other than age."[75]

Having laid this foundation, Justice Stevens next moved to his argument concerning why disparate impact claims are cognizable under the ADEA.[76] As previously stated, the bulk of this argument, contained in Part III of Justice Stevens' opinion, was joined by only three other justices.[77]

Justice Stevens began this portion of his opinion by asserting the importance of *Griggs v. Duke Power Co.*, the 1971 Supreme Court case which had recognized disparate impact claims under Title VII, as very persuasive, if

65. *Smith*, 544 U.S. at 240–43.
66. *Id.* at 232–33.
67. *Id*. at 232.
68. *Id*.
69. *Id*. (citing WIRTZ REPORT, *supra* note 26).
70. *Smith*, 544 U.S. at 232 (citing WIRTZ REPORT, *supra* note 26).
71. *Id.* at 232 (citing WIRTZ REPORT, *supra* note 26, at 15).
72. *Id.* at 232–33.
73. *Id*. at 233 (citing 29 U.S.C. § 623(a)(2) (2000); 42 U.S.C. § 2000e-2(a)(2) (2000)).
74. *Id*.
75. *Smith*, 544 U.S. at 233 (quoting 29 U.S.C. § 623(f)(1)).
76. *Id*.
77. *Id.* at 229.

not technically binding, precedent.[78] He reiterated the tenet of statutory construction which states that statutes with substantially similar language will be presumed to have the same meaning unless Congress evinces a different intent.[79] This presumption is especially strong if the statutes were enacted within a short time of each other.[80] For that reason, the Court has generally assumed that the language of Title VII and the ADEA mean the same thing and that the Court's interpretations of one of the statutes may be applied to the other as well.[81] Because *Griggs* interpreted the language of Title VII as not requiring a plaintiff to show intent, thereby allowing disparate impact claims, the case is a "precedent of compelling importance" in addressing the issue of whether the ADEA also includes disparate impact claims.[82]

Justice Stevens then recounted some of the major points of the holding in *Griggs*. He noted first that though the tests and diploma requirements at issue in *Griggs* did not facially discriminate against African Americans, such tests were "not to become masters of reality."[83] As was stated in *Griggs*, Congress "directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[84] Therefore, employment decisions which had a disparate impact on protected classes, regardless of the actual intent or good faith of the employer, were prohibited by Title VII.[85] Justice Stevens also emphasized the fact that the EEOC's guidelines at the time of *Griggs* recommended that disparate impact claims be allowed under Title VII.[86] Finally, Justice Stevens mentioned, in a footnote, that both *Griggs* and the Wirtz Report specifically referred to high school diploma requirements as facially neutral employment qualifications which disparately impacted blacks and older workers, respectively.[87]

Furthermore, as stated by Justice Stevens, the language of both Title VII and the ADEA supports the idea of disparate impact claims.[88] Language in both statutes not only applies to actions which intentionally discriminate against individuals (disparate treatment), but also to any actions which have an adverse effect on the employee, regardless of the motivation.[89] The relevant language, found in § 4(a)(2) of the ADEA, states that prohibited actions

78. *Id*. at 234.
79. *Id*. at 233.
80. *Smith*, 544 U.S. at 233.
81. *Id*. at 233–34.
82. *Id.* at 234.
83. *Id.* at 234–35 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 433 (1971)).
84. *Id*. at 234 (quoting *Griggs*, 401 U.S. at 425–26) (emphasis in original).
85. *Smith*, 544 U.S. at 235.
86. *Id*. (citing *Griggs*, 401 U.S. at 433–34).
87. *Id.* at 235 n.5 (citing *Griggs*, 401 U.S. at 430; WIRTZ REPORT, *supra* note 26, at 21).
88. *Id*. at 235–36.
89. *Id.*

include those which, on the basis of age, "deprive any individual of employment opportunities," and those which "*otherwise adversely affect* his status as an employee."[90] It is not so much the intent of the employer that is controlling, but rather the effect on the employee.[91] This language, unlike the prohibition in § 4(a)(1) of the ADEA, which applies to actions that affect "*any individual* . . . because of *such individual's* age," has a wider scope than merely actions that are intentionally targeted against a single employee or group of employees.[92]

The legislative history and statutory text of the ADEA therefore strongly suggest that the Act encompasses claims of disparate impact.[93] For this reason, in the twenty years between *Griggs* and *Hazen Paper Co. v. Biggins*, all of the Courts of Appeals simply assumed that disparate impact claims were, in fact, available under the ADEA.[94] It was not until the Supreme Court stated in *Hazen Paper* that "disparate treatment 'captures the essence of what Congress sought to prohibit in the ADEA'"[95] that some of the Courts of Appeals changed tack and held that disparate impact claims under the ADEA were precluded.[96] In support of such holdings, the First, Seventh, Tenth, and Eleventh Circuits relied on an interpretation of the legislative history of the ADEA contrary to that detailed by Justice Stevens, the text of the ADEA (specifically the RFOA provision), and the Supreme Court's language in *Hazen Paper*.[97]

Justice Stevens, however, responded to the argument based on *Hazen Paper* by emphasizing that the questionable language was merely dicta.[98] As he observed, *Hazen Paper* was a disparate treatment case and therefore its holding was confined to such cases.[99] The Court in *Hazen Paper* carefully noted that it was not determining "whether a disparate impact theory of liability is available under the ADEA."[100]

Justice Stevens then addressed the argument espoused by some of the Courts of Appeals (and by Justice O'Connor's opinion in this case) that the

90. *Smith*, 544 U.S. at 235–36 (emphasis in original).

91. *Id*. at 236.

92. *Id.* at 236 n.6 (emphasis in original). Justice Stevens made this point to rebut Justice O'Connor, who asserted in her opinion that the difference between the two sections of the ADEA was immaterial and that the thrust of the ADEA was toward a prohibition of actions directly and intentionally targeted at individual workers. *Id.*

93. *Id*. at 236.

94. *Id.* at 236–37.

95. *Smith*, 544 U.S. at 238 (quoting Hazen Paper v. Biggins, 507 U.S. 604, 610 (1993)).

96. *Id*. at 237 (citing Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999); Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042 (6th Cir. 1998)).

97. *Id.* at 238.

98. *Id.*

99. *Id.* at 237.

100. *Smith*, 544 U.S. at 238 (quoting *Hazen Paper*, 507 U.S. at 612).

RFOA provision of the ADEA precludes disparate impact claims.[101] Justice Stevens argued that the RFOA provision actually supports the argument for allowing disparate impact claims under the ADEA.[102] As he stated, the RFOA provision is "simply unnecessary" in most disparate treatment cases.[103] If an employer is acting according to a factor other than age, then the action would not in fact be prohibited by the ADEA and the RFOA provision would not be needed.[104] Therefore, the RFOA provision must apply primarily to disparate impact cases.[105] In such cases, the prohibited activity is in fact not based on age but nevertheless adversely impacts older workers in relation to their younger counterparts.[106] Therefore, "the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'"[107]

Finally, Justice Stevens observed that the Department of Labor and the EEOC both supported an interpretation of the ADEA which allowed for disparate impact claims.[108] Therefore, he concluded that the legislative history, the force of precedents, the text of the ADEA, and the EEOC regulations supported a holding that disparate impact claims were at least theoretically available under the ADEA.[109]

Having determined that disparate impact claims were authorized by the ADEA, Justice Stevens turned in Part IV of his opinion to the issues of the scope of disparate impact liability and to whether the plaintiffs in the present case had established such a claim.[110] Justice Stevens wrote that the scope of disparate impact liability was narrower in the ADEA context than it was in Title VII.[111] First, the RFOA provision discussed in Part III of the opinion suggested that an employer must only show that its policy was reasonable, rather than a business necessity, in order to defend against a disparate impact claim.[112] Second, the Civil Rights Act of 1991 amended disparate impact

101. *Id.* at 238–40; *see, e.g.*, Adams v. Fla. Power Corp., 255 F.3d 1322, 1325–6 (11th Cir. 2001) (noting that the RFOA provision's inclusion in the ADEA shows that the ADEA, unlike Title VII, does not warrant disparate impact liability); *Mullin*, 164 F.3d at 702 (stating that if the RFOA provision "is not understood to preclude disparate impact liability, it becomes nothing more than a bromide to the effect that 'only age discrimination is age discrimination'").

102. *Smith*, 544 U.S. at 239.

103. *Id*. at 238.

104. *Id*.

105. *Id*. at 239.

106. *Id*. (quoting Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1997)).

107. *Smith*, 544 U.S. at 239.

108. *Id.*

109. *Id*. at 240.

110. *Id*. at 240–43. Part IV was part of the opinion of the Court, as it was joined by Justices Souter, Ginsburg, Breyer, and Scalia. *Id*. at 229.

111. *Id*. at 240.

112. *Smith*, 544 U.S. at 240.

liability under Title VII but said nothing about such liability under the ADEA.[113] *Wards Cove Packing Co. v. Atonio*[114] limited the availability of disparate impact claims, but the Civil Rights Act modified that holding in relation to Title VII cases.[115] Therefore, the full thrust of *Wards Cove* and its rather strict limitations on disparate impact liability were still binding in ADEA cases.[116]

As Justice Stevens wrote, various policy considerations supported this narrowed conception of disparate impact liability.[117] First, unlike race or gender, age is often related to an individual's ability to adequately perform at work.[118] While this fact may be exaggerated by stereotypes about the capacity of older workers, it is undoubtedly true that age, unlike race, may affect work performance.[119] Therefore, some legitimate qualifications or criteria used for employment decisions may necessarily and permissibly affect older workers in disproportionate numbers.[120] Second, age discrimination has generally been milder and less rooted in a history of hate, bigotry, and stereotypes than has the discrimination prohibited by Title VII.[121] While age discrimination is certainly a problem, the history and roots of age discrimination in comparison to racial or ethnic discrimination warrant that the ADEA provide less protection against unintentional forms of employment discrimination.[122]

Finally, then, Justice Stevens applied this narrowed conception of disparate impact to the *Smith* plaintiffs, concluding that while disparate impact claims were available, the plaintiffs failed to establish their particular claim.[123] He first noted that the plaintiffs merely pointed to the pay plan that, in general, treated older workers somewhat less generously than younger workers.[124] Whereas *Wards Cove* required plaintiffs to identify the "*specific* employment practices that are allegedly responsible for any observed statistical

113. *Id*.

114. 490 U.S. 642 (1989).

115. *Smith*, 544 U.S. at 240.

116. *Id*.

117. *Id.*

118. *Id.*

119. *Id*. Justice Stevens also noted that the Wirtz Report supported this claim. *Id.* It stated that "certain circumstances . . . unquestionably affect older workers more strongly, as a group, than they do younger workers." *Id*. at 240–41 (quoting WIRTZ REPORT, *supra* note 26, at 11).

120. *Smith*, 544 U.S. at 241.

121. *Id.* Title VII protects against discrimination based on the basis of, "individual's race, color, religion, sex, or national origin." 42 U.S.C. § 20002-2(a)(1)–(2) (2000). One of the primary purposes of Title VII was to eliminate negative stereotypes. *See* Davis, *supra* note 2, at 375.

122. *Smith*, 544 U.S. at 243.

123. *Id*.

124. *Id.* at 241.

disparities,"[125] the plaintiffs in *Smith* alleged no such specific practice that was disproportionately affecting older workers.[126] Moreover, even if the plaintiffs had identified a more specific practice, the pay plan in question was based on reasonable factors other than age and was therefore permissible.[127] The pay plan was designed to increase the salaries of junior officers in order to make them competitive with surrounding cities; therefore salary increases were determined by seniority and rank.[128] As Justice Stevens wrote, "Reliance on seniority and rank is unquestionably reasonable."[129] There may have been other ways to reach the same goal while avoiding the disparate impact on the older officers, but that fact does not matter in the ADEA context.[130] Unlike the business necessity defense seen in Title VII impact cases, the employer need not show that its policy was the best and essentially only way of achieving the goal; the employer must only show that it acted reasonably.[131]

B. Deference to the EEOC Guidelines: Justice Scalia's Concurring Opinion

Justice Scalia concurred in Parts I, II, and IV of the Court's opinion and concurred in the judgment of the Court.[132] The thrust of his argument was that the Court should defer to the views of the EEOC in interpreting the ADEA, which supported the availability of disparate impact claims, under the holding of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[133] The *Chevron* Court held that when reviewing an ambiguously worded statute which has been interpreted by the agency that administers it, the Court should defer to the agency's interpretation if "the agency's answer is based on a permissible construction of the statute."[134] According to Justice Scalia, Congress gave the EEOC authority to issue guidelines, and the regulations espoused by the EEOC were reasonable.[135]

Justice Scalia first noted that the ADEA granted the EEOC the authority to issue rules and regulations in relation to its enforcement power under the

125. *Id*. at 241 (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989)).

126. *Id.*

127. *Smith*, 544 U.S. at 241.

128. *Id.* at 242.

129. *Id.*

130. *See id.* at 243.

131. *Id*.

132. *Smith*, 544 U.S. at 243 (Scalia, J., concurring in part and concurring in the judgment).

133. *Id*. (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

134. *Chevron*, 467 U.S. at 842–43. It should be noted that *United States v. Mead Corp.* limited the *Chevron* doctrine to cases where "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law." United States v. Mead Corp., 533 U.S. 218, 226–27 (2002). Justice Scalia, however, rejected this approach, but stated that EEOC interpretations would be due deference under *Mead* as well. *Smith*, 544 U.S. at 244–45 (Scalia, J., concurring in part and concurring in the judgment).

135. *Smith*, 544 U.S. at 243 (Scalia, J., concurring in part and concurring in the judgment).

statute.[136] Pursuant to this power, the EEOC issued regulations which stated that

> [w]hen an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as business necessity.[137]

This regulation affirmed the position of the Department of Labor, which was the agency originally in charge of enforcing the ADEA, and it was a position that had been consistently supported by the EEOC since it was originally promulgated.[138] Because the EEOC had the authority to issue guidelines and because the guidelines it issued were reasonable (as shown in Part III of Justice Stevens's opinion), "[t]his [was] an absolutely classic case for deference to agency interpretation."[139]

Having established his argument concerning deference to EEOC interpretation, Justice Scalia then spent the remainder of his concurrence addressing the various arguments posed by Justice O'Connor's opinion.[140] He first responded to Justice O'Connor's argument that the EEOC has not addressed the issue at all by referencing the language of the EEOC regulation quoted above.[141] He then stated that this regulation applies not merely to the reasonable factors other than age provision, as Justice O'Connor argued, but to any action which adversely impacts older workers.[142] The regulation therefore applies not only to the RFOA provision, but also to the prohibitions in § 4(a)(2) of the ADEA.[143] Finally, Justice Scalia addressed the fact that the EEOC regulations refer to business necessity rather than reasonable factors other than age as the proper defense to a disparate impact claim.[144] He stated that merely because the Court does not defer to the EEOC's interpretation of the RFOA does not mean that it may not defer to the EEOC's views

136. *Id*. (citing 29 U.S.C. § 628(2000)).

137. *Id*. at 244 (quoting 29 C.F.R. § 1625.7(d) (2004)).

138. *Id*. Justice Scalia emphasized the many disparate impact cases in which the EEOC has either been a party or has filed a brief as amicus curiae. *Id*. (citing Brief for EEOC as Amicus Curiae Supporting Plaintiffs-Appellees at 12, Meacham v. Knolls Atomic Power Lab., 381 F.3d 56 (2nd Cir. 2004) (No. 02-4083(L)); Brief for EEOC as Amicus Curiae Supporting Plaintiffs-Appellants Seeking Reversal at 8, Sitko v. Goodyear Tire & Rubber Co., No. 02-4083 (6th Cir., pending)).

139. *Id.* at 243.

140. *Smith*, 544 U.S. at 245–47.

141. *Id*. at 245.

142. *Id*. at 246.

143. *Id*.

144. *Id*. at 247.

concerning the availability of disparate impact.[145] The two distinct ideas need not "stand or fall together."[146]

C. Categorical Prohibition of Disparate Impact under the ADEA: Justice O'Connor's Concurring Opinion

Justice O'Connor authored a strongly worded opinion that concurred in the judgment but sharply disagreed on the reasoning.[147] Justice O'Connor, joined by Justices Kennedy and Thomas, stated that she would have held that the ADEA categorically denies disparate impact claims.[148] Justice O'Connor's concurrence reasoned that the legislative history, text, and purpose of the ADEA demonstrate that Congress did not intend to authorize disparate impact claims.[149] She then addressed the primary arguments of the plurality and Justice Scalia, arguing that *Griggs v. Duke Power Co.* should not be applied to the ADEA and that the EEOC guidelines should not be given deference.[150]

Justice O'Connor began her concurring opinion by addressing the text of the ADEA. She quoted § 4(a) of the statute and reaffirmed the plurality's holding that § 4(a)(1) does not deal with disparate impact claims.[151] She then addressed the issue of whether § 4(a)(2) authorizes disparate impact claims, as the plurality and the plaintiffs argued.[152] In making her argument that § 4(a)(2) does not in fact authorize such claims, Justice O'Connor emphasized the similarities between § 4(a)(1) and § 4(a)(2).[153] Section 4(a)(2) uses the "phrase 'because of . . . age' in precisely the same manner as does the preceding paragraph—to make plain that an employer is liable only if its adverse action against an individual is *motivated by* the individual's age."[154] The only difference is that § 4(a)(1) refers to actions that are "*inherently harmful*," such as refusing to hire or discharging, while § 4(a)(2) refers to "*facially neutral*" actions, such as "limiting, segregating, or classifying" employees.[155] Therefore, § 4(a)(2)'s language concerning whether the action "deprive[s] or tend[s] to deprive [an] individual of employment opportunities or otherwise adversely affect his status as an employee" simply means that the employer's action must in fact harm the plaintiff.[156]

145. *Smith*, 544 U.S. at 247.
146. *Id*.
147. *Id*. at 247–68 (O'Connor, J., concurring).
148. *Id*. at 248.
149. *Id*.
150. *Smith*, 544 U.S. at 248.
151. *Id.* at 248–49.
152. *Id*. at 249.
153. *Id*. at 249–50.
154. *Id*. at 249.
155. *Smith*, 544 U.S. at 249.
156. *Id*. (quoting 29 U.S.C. § 623(a)(2) (2000)).

Whereas the plurality read § 4(a)(2) to state that any action which adversely affects the individual because of the individual's age was prohibited, regardless of intent, Justice O'Connor reasoned that the phrase "because of such individual's age" modifies the entire paragraph.[157] The phrase should not be given different meanings in § 4(a)(1) and § 4(a)(2).[158] Therefore, the intent of the employer is a necessary part of any discrimination claim. Finally, the incongruity between the plural at the beginning of the § 4(a)(2) and the singular at the end does not support the plurality's holding because the singular phrase "because of such individual's age" prohibits employment decisions if they are made "because of *even one* employee's age and *that individual* (alone or together with others) is harmed."[159]

Justice O'Connor next addressed the RFOA provision and the plurality's argument that the provision supports the authorization of disparate impact claims.[160] Justice O'Connor stated that the RFOA provision is designed not to address situations in which the employer acts according to reasonable, non-age related factors that nonetheless adversely impact older employees; rather, she stated that the RFOA provision provides an "independent *safe harbor* from liability."[161] The RFOA provision was included so that an employer could rebut an employee's prima facie case of discrimination by showing that it was acting according to "a reasonable nonage factor."[162] The provision may be somewhat redundant, but it was inserted in an act of cautionary drafting.[163] Moreover, the RFOA provision emphasizes that an employer in a mixed-motive case may take the adverse action as long as it is substantially based on a reasonable factor other than age.[164] As long as the employer does not rely on an irrational nonage factor, it is safe from liability.[165]

Part II of Justice O'Connor's concurring opinion addressed the legislative history and purposes of the ADEA. Like the plurality, Justice O'Connor began by citing the Wirtz Report.[166] She emphasized two major points of the report.[167] First, the report detailed that age discrimination was of a different nature than the types of discrimination covered under Title VII because there was no history of "intolerance or animus" toward older workers and because

157. *Id.* at 250.
158. *Id*.
159. *Id*. at 250–51.
160. *Smith*, 544 U.S. at 251.
161. *Id.* at 252.
162. *Id.*
163. *Id.*
164. *Id.* at 253.
165. *Smith*, 544 U.S. at 253.
166. *Id.* at 254.
167. *Id.*

age was often in fact related to an employee's ability to perform effectively.[168] "Second, the Wirtz Report drew a sharp distinction between 'arbitrary discrimination' (which the Report clearly equates with disparate treatment) and circumstances or practices having a disparate impact on older workers."[169] While the report recommended legislation to deal with the problem of arbitrary discrimination, it recommended various non-coercive measures to address the problems normally associated with disparate impact claims.[170] Because the ADEA was drafted in response to the report, the statute should be read to only address disparate treatment claims.[171]

As Justice O'Connor wrote, the espoused purposes of the ADEA also demonstrate that the statute was intended only to curb disparate treatment.[172] These purposes included: "[1] to promote employment of older persons based on their ability rather than age; [2] to prohibit arbitrary age discrimination in employment; [and 3] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[173] The substantive provisions that followed dealt with these purposes in turn.[174] Relevant to the case at hand, § 4 addressed the issue of ending arbitrary discrimination.[175] Conversely, the other two purposes were addressed in sections that required studies, research, and other non-coercive methods of educating employers and the public about the problems associated with age and employment.[176]

Justice O'Connor asserted two more reasons why the ADEA does not authorize disparate impact claims. First, Congress did not discuss disparate impact claims in any way before passing the ADEA.[177] Such legislative silence, according to Justice O'Connor, is "telling."[178] Second, policy considerations underlying the ADEA warrant the same result.[179] Older workers have not suffered from the "entrenched historical patterns of discrimination, like racial minorities have."[180] Moreover, older workers may in fact be less employable than their younger counterparts.[181] Their abilities may decline, they may be less knowledgeable about technological advances,

168. *Id.* at 254–55 (citing WIRTZ REPORT, *supra* note 26, at 2).
169. *Id.* at 255 (citing WIRTZ REPORT, *supra* note 26, at 2, 21–22).
170. *Smith*, 544 U.S. at 256.
171. *Id*.
172. *Id.* at 256–58.
173. *Id*. at 257 (citing 29 U.S.C. § 621(b) (2000)).
174. *Id*.
175. *Smith*, 544 U.S. at 257.
176. *Id*. at 257–58 (citing 29 U.S.C. §§ 622(a), 624(a)(1)).
177. *Id*. at 258.
178. *Id.* at 258.
179. *Id*.
180. *Smith*, 544 U.S. at 258.
181. *Id*. at 259.

and their benefits and high salaries make employing them more expensive.[182] For these reasons, employers should be allowed to make business decisions that adversely affect older workers.[183]

Justice O'Connor devoted Part III of her concurrence to counter the main points of the plurality. She addressed Justice Stevens's argument that *Griggs* should be extended to the ADEA context and Justice Scalia's argument that the Court should defer to the EEOC.

Justice O'Connor began by noting the obvious textual similarities between Title VII and the ADEA and by referencing the rule that similar statutory language is normally interpreted similarly.[184] As she also observed, however, "this is not a rigid or absolute rule," and the Court should be cognizant of contrary indications of congressional intent.[185] According to Justice O'Connor, the ADEA and Title VII should be interpreted differently.[186] The two statutes have different textual provisions, as detailed earlier in the opinion.[187] Also, the ADEA was intended to address a form of discrimination different from that at which Title VII was aimed.[188] Finally, *Griggs* should not be a binding interpretation of the text of the ADEA.[189] Not only was the decision in *Griggs* not actually based on the text of Title VII,[190] "[b]ut *Griggs* was decided four years *after* the ADEA's enactment."[191] Congress could not have known that the language of Title VII (and by extension, the ADEA) would be interpreted as it was.[192]

Finally, Justice O'Connor addressed the Department of Labor and EEOC regulations cited by the plurality, and especially Justice Scalia, stating that she did not believe the guidelines were deserving of deference and that she would "give no weight to the statements in question."[193] First, she argued that the Department of Labor guidelines were practical guidelines designed to aid employers in attempting to comply with the RFOA provision.[194] They were meant to explain the RFOA provision and how employers could ensure that their policies would fall under it; the statement did not even address the

182. *Id*.
183. *See id*.
184. *Id.* at 260.
185. *Smith*, 544 U.S. at 260.
186. *Id*. at 262.
187. *Id*. at 261; *see supra* notes 22–30 and accompanying text.
188. *Smith*, 544 U.S. at 261 (O'Connor, J., concurring).
189. *Id*. at 261–62.
190. *Id.* Justice O'Connor wrote that, as the plurality "tacitly acknowledges," *Griggs* was based on the purposes of Title VII (i.e., rectifying past harms) rather than on the text. *Id.*
191. *Id*. at 260.
192. *Id*.
193. *Smith*, 544 U.S. at 262–63.
194. *Id*. at 263.

"ADEA's *prohibitory* provisions."[195] The EEOC guideline is subject to the same criticism.[196] "Quite simply, the agency has not actually exercised its delegated authority to resolve any ambiguity in the relevant provision's text, much less done so in a reasonable or persuasive manner."[197] Finally, this EEOC statement is contrary to the actual holding of the Court.[198] While the statement interprets the RFOA provision to require that an employer defend a policy as a business necessity, the Court held that companies may defend themselves by merely showing that their actions are reasonable rather than necessary.[199]

In closing, Part IV of Justice O'Connor's concurring opinion argued that if disparate impact claims must be allowed under the ADEA, they should be strictly limited.[200] Employers must be able to defend against such claims by citing reasonable factors, which Justice O'Connor defines as factors that are "rationally related to some legitimate business objective."[201] Moreover, claims should be subject to the strict pleading requirements of *Wards Cove*.[202]

III. ANALYSIS

The *Smith v. City of Jackson* decision undoubtedly resolved the circuit split regarding the issue of disparate impact liability under the ADEA, bringing at least some closure to the matter. The answer provided by the Supreme Court, however, was unsatisfactory. On a theoretical level, the rationale of both the plurality's and Justice O'Connor's opinions was rather unpersuasive. On a more practical level, while the plurality's holding theoretically authorized impact suits, it narrowed such claims to the point that very few claimants will actually be successful in their disparate impact cases. For those reasons, the Court should have taken an approach similar (although not identical) to Justice Scalia's and deferred to the EEOC's interpretation of the ADEA, which would allow for disparate impact suits and require businesses to defend them on the grounds of business necessity.[203] Such deference is appropriate because the

195. *Id*.

196. *Id.* at 264.

197. *Id*. at 265.

198. *Smith*, 544 U.S. at 266.

199. *Id.* at 266–67 (citing W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 419 (1985), a case which distinguished the terms "reasonableness" and "business necessity").

200. *Id*. at 267.

201. *Id.*

202. *Id.* at 267.

203. Although Justice Scalia advocated such deference to the EEOC, he concurred in the plurality's holding, which allowed businesses to justify actions which disparately impacted older workers by showing that it was based on reasonable factors other than age rather than a business necessity. *See Smith*, 544 U.S. at 243, 245 (Scalia, J., concurring in part and concurring in the judgment).

debate regarding disparate impact suits is so inconclusive. Moreover, upholding the business necessity defense in accordance with the EEOC's interpretation would have provided a better practical result than the compromised position taken by the *Smith* plurality.

A. Rehashing Old Arguments: The Unpersuasive Rationale of the Court

Aside from any practical problems spawned by *Smith*'s holding, the rationale of both the plurality's and Justice O'Connor's opinions are less than persuasive.[204] Part of the problem with the plurality's reasoning is that the facts of the case did not support the holding. Had the Jackson police officers stated a claim which somehow met the stringent standards set by the Court, the plurality could have rested its reasoning on a concrete example of what it considered a proper ADEA disparate impact claim. More importantly, though, the reasoning of both the plurality and Justice O'Connor is unpersuasive because the entire disparate impact debate has proven to be particularly inconclusive.

As mentioned previously in this Note, the issue of allowing disparate impact claims under the ADEA has been the source of a great deal of judicial and academic discussion.[205] Just as a circuit split developed among the various Courts of Appeals, a split also developed among academics.[206] Neither side has gained a clear advantage. The problem is that although there are legitimate arguments on both sides of the debate, none of the arguments are particularly conclusive or persuasive.[207] Judicial opinions and academic articles advocating one side or the other seem to simply pick a conclusion and then support it by choosing from a "grab bag of arguments."[208]

204. *See* Sarah Benjes, Comment, Smith v. City of Jackson*: A Pretext of Victory for Employees*, 83 DENV. U. L. REV. 231, 246 (2005) (referring to both opinions as containing "lengthy rhetoric").

205. *See supra* note 6 and accompanying text.

206. *Compare* Johnson, *supra* note 6, at 1402 (arguing in favor of disparate impact), *and* Kaminshine, *supra* note 6, at 234 (same), *and* Mack A. Player, Wards Cove Packing *or Not* Wards Cove Packing*? That is Not the Question: Some Thoughts on Disparate Impact Analysis Under the Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819 (1997) (same), *and* Saunders, *supra* note 6, at 593 (same), *with* Davis, *supra* note 2 (arguing against disparate impact), *and* Herbert & Shelton, *supra* note 6, at 626–27 (same), *and* Cozza, *supra* note 6, at 793 (same), *and* Pontz, *supra* note 6, at 270–71 (same).

207. *See* Davis, *supra* note 2, at 379 ("The analysis then turns to a series of counterarguments, none of which is convincing."); Player, *supra* note 206, at 826 (stating that "[s]ound arguments are made on both sides, but appear, in the abstract, to be inconclusive"). *See generally* Stuart L. Bass & George S. Roukis, *Age Discrimination in Employment: Will Employers Focus on Business Necessities and the 'ROFTA' Defense?*, 104 COM. L.J. 229, 239 (1999) (lamenting the "confused body of law" surrounding disparate impact liability under the ADEA).

208. Davis, *supra* note 2, at 421.

The members of the *Smith* Court seemed to do exactly that. While Justice Stevens sampled from the usual arguments made by pro-impact advocates, Justice O'Connor summarized the arguments of those opposed to disparate impact. Contrary conclusions were reached on rather tenuous inferences from the same general pool of arguments and evidence.

1. Summarizing the Debate

a. Textual Arguments

As Justice Stevens's and Justice O'Connor's differing interpretations of the textual provisions of the ADEA exemplify, the meaning of the words of the statute is ambiguous. Because much of the ADEA's language parallels that of Title VII and both the Supreme Court and Congress have explicitly stated that Title VII encompasses disparate impact claims, proponents of impact suits argue that the ADEA must also include such suits.[209] Opponents argue, however, that the words of the ADEA, especially the phrase "'because of such individual's age' scream intent."[210] The RFOA provision is also cited by both sides in support of their respective arguments. Some claim that if the RFOA provision does not preclude disparate impact claims, "it becomes nothing more than a bromide to the effect that 'only age discrimination is age discrimination.'"[211] Others argue, however, that the RFOA provision would in fact have "no meaning at all" if the ADEA did not authorize disparate impact cases.[212] Ultimately, scholars on both sides make valid arguments (as do Justices Stevens and O'Connor), but the only sure conclusion appears to be that statutory interpretation of the ADEA concerning disparate impact claims is ambiguous and inconclusive.

b. Legislative Intent Arguments

Similarly, the legislative intent for the ADEA also appears to be inconclusive. Similarities and differences from Title VII, while perhaps somewhat helpful in determining Congress's intent, do not solve the problem, because disparate impact was not authorized until *Griggs*, a case decided several years after both statutes were written.[213] Congress could not have foreseen how *Griggs* would interpret Title VII.[214] Moreover, the Wirtz Report ultimately proves to be rather unhelpful because both sides cite different (or

209. *See* Smith v. City of Jackson, Miss., 544 U.S. 228, 234 (2005) ("*Griggs* is . . . a precedent of compelling importance.").

210. Cozza, *supra* note 6, at 792; *see also* Saunders, *supra* note 6, at 592 (arguing that "the [ADEA's] express language only provides for the disparate treatment theory of liability").

211. Mullin v. Raytheon Co., 164 F.3d 696, 702 (1st Cir. 1999).

212. Johnson, *supra* note 6, at 1416.

213. *See Smith*, 544 U.S. at 260 (O'Connor, J., concurring).

214. *Id.*

even the same) parts of the Secretary's report in support of their respective positions.[215] For example, Justice O'Connor cited the fact that the Wirtz Report found no evidence of age discrimination based on animus toward older workers to show that only intentional age discrimination is a problem.[216] Conversely, Justice Stevens pointed toward the same finding and compared it favorably to *Griggs*, where the Court found no evidence of racial animus yet still upheld the validity of the disparate impact claim.[217]

c. Arguments Based on Precedent

Until the *Smith* decision, Supreme Court precedents also did not provide definitive guidance to the disparate impact question. *Griggs* provided evidence that impact suits were cognizable under Title VII, but the differences between Title VII and the ADEA prevented this case from being binding in the ADEA context.[218] *Hazen Paper v. Biggins* was certainly an important case, but again the impact was ambiguous. Disparate impact opponents pointed to the Court's language in the case stating that "[d]isparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA."[219] Proponents reminded them, however, that the Court had also stated that the plaintiff in the case had stated only a disparate treatment claim and that the Court was therefore not deciding whether disparate impact claims are available under the ADEA.[220]

215. *Compare id.* at 235 n.5 (plurality opinion), *with id.* at 254–56 (O'Connor, J., concurring); *see also* Kaminshine, *supra* note 6, at 290–92 (providing an "alternative construction" of the report which favors disparate impact); Player, *supra* note 206, at 828 (stating that "opponents of impact analysis rely quite heavily on the [Wirtz Report]").

216. *See Smith*, 544 U.S. at 255 (O'Connor, J., concurring) (citing WIRTZ REPORT, *supra* note 26, at 2).

217. *Id*. at 235 n.5 (plurality opinion) (citing Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971); WIRTZ REPORT, *supra* note 26, at 6).

218. *See id*. at 234 ("*Griggs* is therefore a precedent of compelling importance."); *id*. at 262 (O'Connor, J., concurring) (noting the textual differences between the ADEA and Title VII, and arguing that the *Griggs* "rationale finds no parallel in the ADEA context").

219. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993); *see Smith*, 544 U.S. at 247–48 (O'Connor, J., concurring).

220. *Hazen Paper*, 507 U.S. at 610; *see Smith*, 544 U.S. at 238 (plurality opinion).

d. Policy Arguments[221]

Because the text, legislative history, and case law seem inconclusive, the issue must turn on policy. Again, however, the ideas summarized by the *Smith* Court are rather inconclusive, primarily because they often draw from the same background facts to make contrary conclusions.

First, the problem of age discrimination is certainly different from the problem of gender, religious, and especially racial discrimination. Opponents of disparate impact use these differences to argue that because ageism does not have the same malevolent history as the problems accompanying racism, disparate impact should be precluded in age discrimination cases.[222] Everyone at some point ages and their jobs are often filled by younger workers; such is the progression of life.[223] In response to this claim, however, proponents of disparate impact argue that such claims are necessary because the inaccurate stereotypes about older people that cause employment discrimination are unlikely to simply disappear.[224] Though ageism is not usually the source of any particular malice, the unconscious use of stereotypes necessitates the availability of disparate impact claims.[225] While everyone ages, old age "is surely as immutable as one's race or gender."[226]

Another point of contention is the fact that, unlike race, age directly correlates with both the ability of the worker and a company's expenses in

221. *See* Gold, *supra* note 6, at 73–85 (providing an excellent survey of the various policies and purposes behind the ADEA). This treatment of the policy debate is by no means exhaustive, and the Court itself did not address many of the policies put forward by commentators. One such interesting policy is that disparate impact claims should be allowed because keeping older workers employed saves the government money on various social programs. *See id.* at 84–85. Another states that disparate impact claims should not be allowed because ADEA cases, unlike Title VII cases, are argued before juries, and juries are simply not able to sufficiently conduct the complex statistical analysis required in disparate impact claims. *See* Herbert & Shelton, *supra* note 6, at 650–60.

222. *Smith*, 544 U.S. at 258–59 (O'Connor, J., concurring) ("[D]isparate impact liability under the ADEA cannot be justified and is not necessary, as a means of redressing the cumulative effects of past discrimination."); *see* Eglit, *supra* note 2, at 616 ("[T]he kind of 'we-they' thinking that fosters racial, ethnic, and sexual discrimination is unlikely to play a large role" in age discrimination "because the people who do the hiring and firing are generally as old as the people they hire and fire." (quoting RICHARD A. POSNER, AGING AND OLD AGE 320–21 (1995)).

223. Pontz, *supra* note 6, at 315 (observing that even absent discrimination, "older employees are constantly moving out of the labor market, while younger ones move in").

224. Eglit, *supra* note 2, at 683; *cf. Smith*, 544 U.S. at 240–41 (positing that Congress inserted the RFOA provision into the ADEA as a reflection of the historical differences between the two kinds of discrimination).

225. Johnson, *supra* note 6, at 1435.

226. Kaminshine, *supra* note 6, at 307.

employing such workers.[227] First, older workers are almost universally more expensive to employ because, for example, they have higher salaries and fringe benefits.[228] Therefore, when companies downsize, older workers are often the first to go.[229] The two sides of the debate perceive this reality of the modern economy differently, however. Proponents argue that the "plight of older workers in the current economy," where they are often the first workers laid-off, warrants the greater protection provided by disparate impact claims.[230] Opponents of disparate impact, however, spin the same facts differently, claiming that allowing disparate impact claims will preclude businesses from making necessary, albeit painful, decisions during difficult economic times.[231]

Furthermore, age (again, unlike race) may and sometimes does in fact correlate with a worker's ability to perform adequately.[232] While "individuals vary as to how they age and how they adapt to aging,"[233] there is certainly a connection between age and ability.[234] Proponents argue that disparate impact analysis is needed to prevent employers from making stereotypes about older workers and to force them to evaluate workers solely on ability.[235] Conversely, opponents argue that disparate impact claims should not be allowed to punish employers who are simply making decisions based on ability, even if those decisions have a disparate impact on older workers.[236]

227. *Smith*, 544 U.S. at 240 (noting that age often "has relevance to an individual's capacity to engage in certain types of employment"); *id.* at 259 (O'Connor, J., concurring) (concluding that "there often *is* a correlation between an individual's age and her ability to perform a job").

228. *See* Eglit, *supra* note 2, at 688; Gold, *supra* note 6, at 79–80; Kaminshine, *supra* note 6, at 232. African Americans and women, by contrast, are not inherently more expensive to employ than are whites or men. Kaminshine, *supra* note 6, at 232. *But see* Johnson, *supra* note 6, at 1401 (arguing that a "realistic assessment of the relative productivity of workers" will show that older workers are not necessarily more expensive (quoting Gary Minda, *Opportunistic Downsizing of Aging Workers: The 1990s Version of Age and Pension Discrimination in Employment*, 48 HASTINGS L.J. 511, 539–50 (1997))).

229. *See* Johnson, *supra* note 6, at 1406. *But see* Barbara Rose, *Age-Bias Landscape Shifts*, CHI. TRIB., Mar. 31, 2005, at A1 (reporting that age discrimination claims have been steady for the last decade).

230. Sweeney, *supra* note 6, at 1576; *see* Johnson, *supra* note 6, at 1406 (arguing that "[t]he now too-common corporate practice of downsizing" shows the need for heightened protection of older workers).

231. Cozza, *supra* note 6, at 793; *see* Ecker & Gagliardo, *supra* note 2, at 198 (expressing employers' concern "that applying disparate impact analysis under the ADEA would create undue court scrutiny of every cost-based employment decision").

232. *See Smith*, 544 U.S. at 240, 259 (O'Connor, J., concurring).

233. Eglit, *supra* note 2, at 678.

234. Pontz, *supra* note 6, at 302.

235. Gold, *supra* note 6, at 78.

236. *See* Cozza, *supra* note 6, at 793.

2. The Tiebreaker

As this survey of the debate has shown, there is simply no definitive solution to the disparate impact problem in the ADEA context. Such a dilemma is of course not particularly foreign to Supreme Court jurisprudence. Many cases that reach the Supreme Court include two competing arguments that are both reasonable and widely supported.[237] These cases have almost always been argued fully and completely at the appellate level and in academia. Otherwise, the issue would not be fully ripe for Supreme Court review.[238] This case, however, and the debate surrounding it, seems particularly troublesome.[239] For that reason, judicial deference to an administrative agency is especially appropriate.

First, it must be noted that Justice Scalia's concurring opinion in which he advocates deference to the EEOC's interpretation of the ADEA is not without its problems, as Justice O'Connor makes abundantly clear.[240] Whether EEOC regulations or interpretations of the ADEA (or other statutes) are deserving of judicial deference under *Chevron* is certainly a debatable issue.[241] What this Note advocates, however, is not so much strict adherence to the *Chevron* doctrine, but simple deference to appropriate agencies in cases such as *Smith* where there is no satisfactory answer to a debate, and where a particular agency has more expertise than does the Court. As the *Chevron* Court stated,

> the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."[242]

237. Pontz, *supra* note 6, at 302.

238. *See* Michael C. Dorf, *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 66 (1998).

> The Court sometimes defers decision on a relatively novel question of federal law so that the issue can 'percolate' in the state and lower federal courts. Rather than decide such issues immediately, the Court hopes to address them with the benefit of well-reasoned opinions by the federal courts of appeals and perhaps the state courts of last resort.

Id. at 65.

239. *See* Player, *supra* note 206, at 826 ("Sound arguments are made on both sides, but appear, in the abstract, to be inconclusive.").

240. *See* Smith v. City of Jackson, Miss., 544 U.S. 228, 263 (2005) (O'Connor, J., concurring).

241. *See id*. at 265 n.2 (citing Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004), which "decline[ed] to address whether EEOC's regulations interpreting the ADEA [were] entitled to *Chevron* deference."). The subtleties of the *Chevron* doctrine are outside the scope of this Note.

242. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984) (quoting Accord Capital Cities Cable, Inc. v. Crise, 467 U.S. 691, 699–700 (1984)).

The EEOC is better equipped to handle the difficult policy questions that accompany the issue of disparate impact liability and to assess practical results and implications of changes in the law.[243] The EEOC's interpretation is also a reasonable interpretation of the ADEA.[244] In cases such as *Smith*, where the debate is inconclusive and an administrative agency has taken a reasonable position, the Court should look to that agency's interpretation as the proverbial tiebreaker. In this case, then, the Court should have deferred to the EEOC's interpretation of the ADEA that allows for disparate impact suits and requires businesses to assert a business necessity defense, rather than a reasonableness defense, in response to such suits.

B. The Limited Practical Implications of Smith

In addition to the problems with its reasoning, the *Smith* holding poses practical problems as well. At first glance, the decision seems to be a major victory for older workers in America. It authorizes disparate impact claims under the ADEA where some courts and commentators had seriously questioned the continuing viability of such claims.[245] In fact, shortly after *Smith* was decided, many commentators hailed the case as an important triumph for plaintiffs and employees. Gerald D. Skoning, a Chicago attorney, called the decision "the most significant employment discrimination decision by the Supreme Court in this decade, probably in a couple of decades."[246] Similarly, AARP attorney Daniel Kohrman hailed the decision as "a huge victory that will make it possible to bring important cases with broad impact."[247] The praise, however, has been tempered by an examination of the practical reality of the decision.

First, the foundation underlying *Smith*'s precedential value is rather shaky. The *Smith* decision garnered only a plurality. While five Justices (Justices

243. *See id.* at 864 (stating that "policy arguments are more properly addressed to legislators or administrators, not to judges.").

244. *See, e.g.*, Smith v. Xerox Corp., 196 F.3d 358, 365 (2d Cir. 1999) (assuming that the business necessity defense applies to ADEA disparate impact cases); *see also Smith*, 544 U.S. at 239 (citing the Department of Labor and EEOC interpretations). *But see id.* at 266 (O'Connor, J., concurring) (pointing out the difference between reasonable factors other than age (the statute language) and business necessity (the EEOC's interpretation)).

245. *See, e.g.*, Mullin v. Raytheon Co., 164 F.3d 696, 702 (1999) (explaining that after *Hazen Paper*, many courts questioned the availability of disparate impact claims under the ADEA).

246. Francine Knowles, *What Ruling Means to Workers Employers*, CHI. SUN-TIMES, Mar. 31, 2005, at 55–56.

247. Jan Crawford Greenburg, *Age-Bias Law Extended*, CHI. TRIB., Mar. 31, 2005, at 1. Kohrman went on to state that the decision would help older employees protect themselves against employer policies based on "unfounded stereotypes." *Id.*; *see also* Joan Biskupic, *Justices Rule for Over-40 Workers; Deliberate Bias not a Condition*, USA TODAY, Mar. 31, 2005 (quoting AARP lawyer Laurie McCann's statement that because employees rarely have a "smoking gun," the decision was "a huge shot in the arm for age-discrimination plaintiffs").

Stevens, Souter, Breyer, Ginsburg, Scalia) agreed on three parts of the opinion, only four (excluding Justice Scalia) agreed on Part III of the opinion. It was that section that provided the crucial parts of the rationale for the holding. Furthermore, former Chief Justice Rehnquist took no part in the holding.[248] Had the Chief Justice taken part in the disposition of the case, he likely would have joined Justice O'Connor's opinion rather than that of Justice Stevens. The former Chief Justice made it clear on several occasions that he did not support disparate impact claims in the context of the ADEA.[249] Ultimately, however, the former Chief Justice's vote would not have changed the outcome of *Smith*; the vote would have remained 5-4 on the section providing the holding.[250]

The recent changes to the makeup of the Supreme Court could affect the foundation of the *Smith* decision. Newly appointed Chief Justice Roberts appears to be relatively conservative and would likely vote the same way as the former Chief Justice.[251] Also, newly appointed Justice Alito has shown some signs that he is willing to limit employment discrimination claims.[252] While the new votes would not have been sufficient by themselves to change the outcome of *Smith*, the rightward movement of the Court could pose future problems for a holding like *Smith*.[253]

Regardless of whether *Smith* could withstand a challenge in a more conservative Court, the praise of its holding has also been tempered by the likelihood that few age discrimination claimants will be successful under

248. *Smith*, 544 U.S. at 243.

249. *See* Markham v. Geller, 451 U.S. 945, 948 (1981) (Rehnquist, J., dissenting from denial of certiorari) (emphasizing that the Supreme Court had never authorized disparate impact claims under the ADEA). The former Chief Justice also joined Justice Kennedy's concurrence in *Hazen Paper Co. v. Biggins*, an opinion that implied that disparate impact claims were disfavored. 507 U.S. 604, 617–18 (1993) (Kennedy, J., concurring). *See generally* Eglit, *supra* note 2, at 696–97 (summarizing Chief Justice Rehnquist's views concerning disparate impact claims).

250. Whether the former Chief Justice's presence would have had some other effect, such as influencing fellow conservative Justice Scalia's vote is a separate and unanswerable question.

251. No cases from Chief Justice Roberts' short time serving on the D.C. Circuit shed light on his views concerning this issue, however.

252. *See* Sheridan v. DuPont Co., 100 F.3d 1061, 1078 (3d Cir. 1996) (Alito, J., concurring in part and dissenting inpart). In *Sheridan*, a case dealing with sexual discrimination, then-Judge Alito dissented in part from a Third Circuit decision that altered the summary judgment standard in the employee's favor. *Id*. While *Sheridan* did not deal with age discrimination, the case could show a tendency on the part of Justice Alito to favor employers in employment discrimination cases, thereby demonstrating that he could be opposed to disparate impact liability.

253. *See generally* Charles Babington, *Alito is Sworn in on High Court*, WASH. POST, Feb. 1, 2006, at A11 (concerning the issue of whether "[c]onservatives hope the cerebral and relatively young Roberts and Alito will join Thomas and Antonin Scalia to form a long-lasting right-center-bloc that will frequently attract at least one other justice . . . to overturn liberal rulings").

Smith's narrowed conception of disparate impact suits.[254] Stephen Bokat, executive vice president of the National Chamber Litigation Center, described the decision as "the [C]ourt opening the door to disparate impact age claims, but opening it only a narrow crack."[255] Likewise, Pittsburgh attorney Carole Katz said that "[i]n some ways, [the Court has] given with one hand and taken away with the other."[256] The situations in which *Smith* will actually apply appear to be few and far between. While the decision appears to be a victory for plaintiffs, "there may, in fact, be less to the decision than it initially appears."[257] As an initial example, while the Court opened the door to disparate impact claims in theory, it held that the plaintiffs in the case had not established a valid claim.[258]

Because the Court determined that businesses could defend disparate impact claims by demonstrating that the employment decision was based on a reasonable factor other than age, the scope of available claims is considerably narrower than in Title VII cases where the employer must show that the policy was a business necessity. The Court did not precisely define what exactly constitutes a reasonable factor,[259] but it is clear that reasonableness is not the same as a business necessity.[260] Professor Michael Gold stated that a reasonable factor is one that is not irrational and that serves a "legitimate business goal."[261] Professor Mack Player stated that reasonableness falls somewhere along a spectrum between illegality and necessity.[262] He

254. *See* Benjes, *supra* note 204, at 246 ("The lengthy rhetoric of the plurality and Justice O'Connor in *Smith* seeking to rationalize their opposing arguments about disparate impact claims was a moot exercise because the end result of this case, and virtually all future cases of disparate impact claims under ADEA will be the same: the employee will be unable to establish a prima facie case of disparate impact.").

255. Greenburg, *supra* note 247.

256. Jim McKay, *Ruling Unlikely to Lead to Slew of New Lawsuits*, PITT. POST GAZETTE, Mar. 31, 2005, at D10. Katz went on to say that she did not believe that the decision would result in an "onslaught of litigation," even in regions with older populations. *Id.*

257. Sid Steinberg, *'Disparate Impact' May Result in Less Than It Appears*, LEGAL INTELLIGENCER, Apr. 13, 2005, at 5.

258. Smith v. City of Jackson, Miss., 544 U.S. 228, 243 (2005). It must be noted that a possible grounds for the dismissal of certiorari in *Adams v. Fla. Power Corp.*, 535 U.S. 228 (2002), was the fact that the Court did not want to make a "pronouncement in the abstract," because the trial court had made no findings of fact. *See Leading Cases*, *supra* note 59, at 343 n.48. While the trial court did make findings in the present case, the *Smith* plurality's holding still has some semblance to a "pronouncement in the abstract" because the Court was presented with a "woefully underdeveloped record." *Id.* at 343. Moreover, the particular facts of the case did not demonstrate a concrete example of a successful disparate impact case. *See id.*

259. The Court did note, however, that "[r]eliance on seniority and rank is unquestionably reasonable." *Smith*, 544 U.S. at 242.

260. Davis, *supra* note 2, at 384.

261. Gold, *supra* note 6, at 56.

262. Player, *supra* note 206, at 839.

ultimately determined that reasonableness should be defined as "business rationality."[263]

With these definitions in mind, *Smith*'s lack of practical implications becomes apparent. It is very difficult to think of a situation in which a business would act in a way to fall under the definition of disparate impact provided in *Smith*. The business would have to take an action that was not supported by any kind of business rationality, the action could not be intended to harm older workers, yet the action would nevertheless have to harm older workers disproportionately. One possible scenario could involve an employer requiring its employees to take some sort of computer literacy test even though the employees did not use computers for their work. Such a test would almost surely have a disparate impact on older workers, and it would also be unreasonable. However, examples of such situations would probably be quite isolated because businesses normally do not act in such an irrational fashion. Moreover, if a business was acting unreasonably, such unreasonableness could possibly serve as indirect evidence of discriminatory intent, rendering the impact claim superfluous.

As Professor Kaminshine wrote, "rarely will a neutral practice prove so irrational as to serve no plausible business interest or convenience."[264] Businesses simply do not act that way. Businesses will certainly have to be careful about pay plans, reductions in force, and other issues, but "[m]ost employers already are somewhat sensitive to any plans that seem to have any disparate impact on any protected class."[265] Because "disparate impact protection under the ADEA is a fragile veneer pierced by any reasonable explanation,"[266] the effect of allowing disparate impact claims under the ADEA in only these circumstances will be very slim indeed.

The practical effect, then, of *Smith* is to remove essentially, if not actually, disparate impact liability from the ADEA. Such a compromised result serves no one well. Courts that recognized disparate impact suits had uniformly applied the business necessity standard rather than the reasonableness standard.[267] Most commentators agreed with this approach as well.[268] Applying the business necessity standard would also align ADEA cases with

263. *Id*. at 840.

264. Kaminshine, *supra* note 6, at 313.

265. Rose, *supra* note 229 (quoting Chicago attorney Donald McNeil).

266. Davis, *supra* note 2, at 386.

267. *See, e.g.*, Smith v. City of Des Moines, Iowa, 99 F.3d 1466, 1471 (8th Cir. 1996) (discussing the scope of the business necessity defense); Maresco v. Evans Chemetics, 964 F.2d 106, 115 (2d Cir. 1992).

268. *See* Davis, *supra* note 2, at 386 (arguing that allowing businesses to defend with any reasonable factor, rather than with business necessity, would render the ADEA too "fragile"); Saunders, *supra* note 6, at 599 (assuming that business necessity applies). *But see* Johnson, *supra* note 6, at 1402 (employer should have to justify action as a "reasonable factor other than age").

Title VII cases. Whereas the reasonableness standard is unclear,[269] the business necessity defense is relatively well defined, partly because of extensive Title VII litigation.[270]

Moreover, requiring a business necessity defense from employers would still not result in an avalanche of successful disparate impact cases that could potentially harm businesses. Even before *Hazen Paper*, when all of the circuits recognized disparate impact liability under the ADEA, it was still rather difficult for plaintiffs to escape the summary judgment phase of litigation concerning their impact claims.[271] There is no reason why that fact would change now.

Finally, if disparate impact liability as advocated here proved too difficult for businesses to defend against, or if Congress determined that it did not agree with such an interpretation of the ADEA, Congress could always address the matter by amending the statute.[272] As was stated in *Chevron*, "policy arguments are more properly addressed to legislators or administrators, not to judges."[273] The legislature is better suited to address the difficult policy issues that accompany the disparate impact debate, and Congress is probably the appropriate body to make substantive changes to the interpretation of the ADEA.[274]

269. *See supra* notes 259–63 and accompanying text (describing unsettled meaning of reasonableness); *see also* Player, *supra* note 206, at 839 (stating that the reasonable factor defense has been "virtually unlitigated under the ADEA"); Benjes, *supra* note 204, at 249 (stating that the *Smith* Court did not offer any standards by which to judge reasonableness).

270. *Cf.* Eglit, *supra* note 41, at 1096–100 (summarizing the "joint doctrinal development" of the ADEA and Title VII).

271. *See, e.g.*, Smith v. Xerox Corp., 196 F.3d 358, 358 (2d Cir. 1999) (holding that disparate impact claims are available under the ADEA, but denying plaintiffs' claim on the facts); Dist. Council 37 v. N.Y. City Dep't of Parks & Recreation, 113 F.3d 347, 347 (2d Cir. 1997) (upholding jury verdict against the employee on the facts of the case); Smith v. City of Des Moines, Iowa, 99 F.3d 1466, 1466 (8th Cir. 1996) (recognizing the availability of disparate impact claims but also that defendant's actions were justified as a business necessity); Holt v. Gamewell Corp., 797 F.2d 36, 36–37 (1st Cir. 1986) (holding that plaintiff did not state a cognizable disparate impact claim). *But see* Arnett v. Cal. Pub. Ret. Sys., 179 F.3d 690, 690 (9th Cir. 1999), *rev'd on other grounds*, 528 U.S. 1111 (2000) (holding that plaintiffs stated a cognizable disparate impact cause of action); Fisher v. Transco Servs.-Milwaukee, Inc., 979 F.2d 1239, 1239 (7th Cir. 1992) (reversing summary judgment against plaintiff alleging disparate impact case).

272. After all, Congress took a similar action when it passed the Civil Rights Act of 1991. *See supra* notes 46–50 and accompanying text.

273. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 864 (1984).

274. *See* Sweeney, *supra* note 6, at 1577 (arguing that Congress should amend the ADEA to explicitly authorize disparate impact claims in the same manner as it amended Title VII through the Civil Rights Act of 1991); *see also* Pontz, *supra* note 6, at 322 n.325.

CONCLUSION

The *Smith v. City of Jackson* decision at least partially settled a longstanding debate concerning disparate impact liability in age discrimination suits. As a result of the *Smith* plurality's holding, disparate impact claims are now unambiguously cognizable under the ADEA. Under *Smith*, though, such claims are available in a narrower set of circumstances than are comparable suits under Title VII. Businesses may defend against disparate impact suits not by showing that its actions were necessary, but simply by producing evidence showing that they were reasonable.

The *Smith* decision is problematic for two reasons. First, the reasonings of both the plurality and Justice O'Connor were unconvincing. Second, because the Court significantly narrowed the scope of disparate impact claims, age discrimination plaintiffs will be hard-pressed to plead a successful disparate impact case. Because of these two problems, the Court should have deferred to the views of the EEOC and held that disparate impact claims are not only available under the ADEA, but also that they may only be defended on the grounds of business necessity. Such a holding would have been more persuasive than simply citing conflicting sides of an inconclusive debate. It also would have made impact claims feasible to at least a few more plaintiffs than did the *Smith* decision.

PAUL STOEHR*

* J.D. Candidate, Saint Louis University School of Law, 2007; B.A., History, Saint Louis University. I would like to thank Professor Nicole Porter for her assistance in writing this Note. Thanks also to my parents and to Jenn for her understanding.