You Are Not Quite as Old as You Think: Making the Case for Reverse Age Discrimination under the ADEA

D. Aaron Lacy
You Are Not Quite as Old as You Think: Making the Case for Reverse Age Discrimination Under the ADEA

D. Aaron Lacy†

I. INTRODUCTION .............................................................................. 364

II. BACKGROUND OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT AND REVERSE DISCRIMINATION ............................................ 366
   A. Statutory History of the ADEA ............................................ 366
   B. The Evolution of Reverse Age Discrimination ........................ 370

III. CIRCUIT SPLIT ............................................................................ 372
   A. Case Law Rejecting Reverse Age Discrimination .................. 372
   B. Case Law Accepting Reverse Age Discrimination ................ 375

IV. SUPREME COURT ANALYSIS OF REVERSE AGE DISCRIMINATION............................................................................ 381

V. THE ADEA PROTECTS RELATIVELY YOUNGER MEMBERS OF THE PROTECTED CLASS FROM REVERSE AGE DISCRIMINATION... 383
   A. The Text .................................................................................. 384
      1. EEOC Regulation 29 C.F.R. §1625.2 is Clear and Substantiates the Plain Meaning of the ADEA ................ 389
      2. EEOC Regulation 29 C.F.R. §1625.2 is Entitled to Chevron Deference .............................................. 392
   B. Legislative History ........................................................................ 395
   C. Supreme Court Precedent and Other Antidiscrimination Statutes ................................................................... 397

VI. CONCLUSION .................................................................................. 402

† Assistant Professor of Law, Barry University School of Law. First, I thank God for allowing inspiration and direction. Second, I thank my wife, Toni and children, Khalil and Nia, for all of their love and understanding. Third, I thank the editors at the Berkeley Journal of Employment and Labor Law for all of their hard work in getting this article ready for publication. Fourth, I would like to thank my research assistant, Rebecca Morgan. Last, and certainly not least, I thank Associate Dean Alfreda Robinson for all of her assistance in not only making this publication possible but in assisting me in realizing a dream.
I.
INTRODUCTION

Age discrimination continues to burden the economy in the United States. Older people continually encounter age discrimination based on stereotypes about their ability to perform after they are perceived to be old. As a result, older people in the workplace are displaced from their jobs and are finding it difficult to find new employment. This type of discrimination is prohibited by the Age Discrimination in Employment Act (ADEA).

While discrimination against employees at least forty years old is prohibited by the ADEA, all employees at least forty years old are not equally protected. An employer is permitted to engage in reverse discrimination. Sometimes, employers inadvertently engage in reverse age discrimination in trying to prevent liability from age discrimination. Reverse age discrimination occurs when an employer favors a relatively older employee over a relatively younger employee in an employment decision. The key question in the reverse discrimination debate is whether the ADEA only prohibits discrimination against those individuals at least forty years old who are also disfavored in relation to younger workers or if it unequivocally prohibits discrimination based on age against any individual over the age of forty. The courts have attempted to avoid the plain meaning of the ADEA by terming claims by individuals at least forty years old who cannot show that they were disfavored in relation to a younger worker as reverse age discrimination.

In 2004, the United States Supreme Court held in General Dynamics Land Systems v. Cline that the ADEA does not prohibit favoring the old over the young. This holding allows employers to treat older people in the protected class differently than younger people in the protected class even though the Supreme Court has refused to allow different treatment of employees within the protected class on other occasions. The expression "reverse age discrimination" is a misnomer. The fact that some members within the protected class were beneficiaries of the discriminatory action does not somehow suspend the language of the ADEA. If employees are at least forty years old, they are within the protected class. An employer’s decision to treat them worse than relatively older employees because of the employees’ ages violates the ADEA.

6. Id.
Although other articles have been written about Cline and reverse age discrimination, this Article approaches this topic from a completely different perspective, namely that the Supreme Court's decision regarding reverse age discrimination is incorrect and inconsistent with the plain meaning of the ADEA and flies in the face of the Court's interpretation of other anti-discrimination jurisprudence.

Part II of this paper begins by discussing the history of the ADEA. It then looks at the beginnings of reverse discrimination and how different people view reverse discrimination. Part II also reviews how reverse discrimination shifted from race discrimination to age discrimination. Part III discusses the circuit split over whether the ADEA allows reverse age discrimination. Part IV examines the Supreme Court's analysis of the reverse discrimination issue in General Dynamics Land Systems, Inc. v. Cline. Part V argues, based on the EEOC regulation that addresses the issue, the text of the statute, the legislative history and prior civil rights case law, that Cline improperly narrowed Congress' intention in enacting the ADEA.

---


8. See infra Part II.
9. See infra Part II.A.
10. See infra Part II.B.
11. See infra Part III.
12. 540 U.S. 581 (2004); see infra Part IV.
13. See infra Part V.
II. BACKGROUND OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT AND REVERSE DISCRIMINATION

A. Statutory History of the ADEA

In response to growing civil rights movements in the 1960s, Congress enacted several different civil rights statutes designed to combat employment discrimination. The first statute was Title VII of the Civil Rights Act of 1964 (Title VII). Title VII forbids employment discrimination on the basis of race, color, religion, sex, or national origin. During the House and Senate debates prior to the enactment of Title VII, members of Congress considered adding age to the prohibited bases for employment discrimination. However, unlike race or sex, Congress felt age was not an immutable characteristic and decided not to include age under the protection of Title VII. Therefore, Congress ordered the Secretary of Labor, Willard Wirtz, to undertake a study to determine whether age discrimination should be included in an amendment to the Civil Rights Act.

17. See Woodruff, supra note 1, at 1296-97 (noting that proposals to add “age” to the Civil Rights Act by Representative John Dowdy and by Senator George Smathers were struck down in each house); see also H.R. Rep. No. 90-805, at 1.
18. Under the conditions in Cline, where General Dynamics no longer provided full health benefits to a retiree unless that person was at least fifty years old on July 1, 1997, age is transformed into an immutable characteristic and is functionally indistinguishable from sex, race, color, or national origin. Ordinarily, as the Seventh Circuit observed in Hamilton, age is not immutable. See Hamilton v. Caterpillar, Inc., 966 F.2d 1226, 1227 (7th Cir. 1992) (“Age is not a distinction that arises at birth. Nor is age immutable . . . .”). However, “snapshot” classifications, such as the ADEA’s forty year old and over protected class, operate in such a way as to convert age into an immutable characteristic. Age becomes not merely beyond a worker’s control, but also fixed at that precise moment, just as a snapshot photo freezes a moment in time.
20. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265-66 (1964) ("The Secretary of Labor shall make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected.").
This study resulted in the production of *The Older American Worker, Age Discrimination in Employment*.\textsuperscript{21} In this report, Secretary Wirtz recommended that Congress enact legislation to eliminate arbitrary age discrimination in employment.\textsuperscript{22} The report established that there were unfounded stereotypes that older workers were a significant burden on the economy and were less productive than younger workers.\textsuperscript{23} However, the report also determined that older age can sometimes affect job performance.\textsuperscript{24} Therefore, Secretary Wirtz recommended that age should be considered separately from race and gender, which do not accurately affect the job performance of an employee.\textsuperscript{25} Secretary Wirtz submitted the proposed act to Congress, and it was enacted as an amendment to the Fair Labor Standards Act in 1967.\textsuperscript{26}

Congress enacted the Age Discrimination in Employment Act\textsuperscript{27} (ADEA) in 1967 to protect employees from adverse employment actions based on age-based stereotypes.\textsuperscript{28} Section 623(a)(1) of the ADEA makes it "unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."\textsuperscript{29} Congress defined "any individual" at least forty years old to be within the Act's protected group because Congress understood that age discrimination can occur as early as forty years old.\textsuperscript{30}

\textsuperscript{21} See H.R. REP. NO. 90-805.

\textsuperscript{22} See id. at 2, 1967 U.S.C.C.A.N. at 2214 ("A clear cut and implemented Federal policy . . . would provide a foundation for a much-needed vigorous, nationwide campaign to promote hiring without discrimination on the basis of age."). The report, which dealt with workers age forty-five and older, focused primarily on age-restrictive hiring policies commonly practiced by employers. See Woodruff, supra note 1, at 1297. Secretary Wirtz recommended four actions to end such practices: first, eliminate arbitrary discrimination in employment; second, adjust institutional arrangements which disadvantage older workers; third, increase the availability of work for older workers; and fourth, enlarge educational concepts and institutions to meet the needs and opportunities of older age. 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, 582-83 (1997). These recommendations do not necessarily suggest that Congress did not intend the ADEA to reach reverse discrimination. Cf. Gen. Dynamics Land Sys., Inc. v. Cline, 296 F.3d 466, 474 (6th Cir. 2002) (Cole, J., concurring), rev'd 540 U.S. 581 (2004).

\textsuperscript{23} See Woodruff, supra note 1, at 1297. See H.R. REP. NO. 90-805.

\textsuperscript{24} See Van Ausdall, supra note 19, at 652 (quoting the Secretary's statement that "age is one minority group in which . . . all seek . . . eventual membership"); see also Eglit, supra note 22, at 582-83 (quoting substantially from the Secretary's report on the characteristics of age discrimination and the actions recommended to prevent it).

\textsuperscript{25} Id.

\textsuperscript{26} 29 U.S.C. §§ 201-219 (2000). The purpose of the FLSA is to correct and eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." Id. § 202(a).


\textsuperscript{28} See supra text accompanying notes 22-27.


\textsuperscript{30} See supra note 27 and text accompanying note 37.
The two primary purposes of the ADEA are to “prohibit arbitrary age discrimination in employment” and to “promote employment of older persons based on their ability rather than age.”

The ADEA, as originally enacted, protected employees between the ages of forty and sixty-five years old. However, in 1978, Congress amended the ADEA to raise the upper limit to seventy out of concerns that employers would be more inclined to force mandatory retirement after age sixty-five.

31. 29 U.S.C. § 621(b) (the Congressional findings and purpose). The third listed purpose is “to help employers and workers find ways of meeting problems arising from the impact of age on employment.” Id. In the keeping with these goals, courts must treat each ADEA case on its facts and merits, rather than making broad-based assumptions about what types of activities are or are not permissible. See H.R. REP. NO. 90-805, at 7, as reprinted in 1967 U.S.C.C.A.N. 2220. In the House report accompanying the original bill, Congress noted that “[t]he case-by-case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions.” Id. Several courts have also suggested that age discrimination claims must be evaluated on a case-by-case basis because age is a relative, rather than absolute, characteristic. See e.g., Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1428 (7th Cir. 1986) (recommending a case-by-case approach to determine whether an employer’s method of paying retirement benefits is a bona fide employee benefit plan under the ADEA); Rock v. Mass. Comm’n Against Discrimination, 424 N.E.2d 244, 248 (Mass. 1981) (“Because age is a relative rather than absolute status when taken as a basis for discrimination, it need not follow that all persons protected by the Act ADEA should be grouped together for purposes of delineating the extent of their protection.”) (quoting Moore v. Sears, Roebuck & Co., 464 F. Supp. 357, 366 (N.D. Ga. 1979)). The findings on which these purposes rest are:

The Congress hereby finds and declares that—

1. in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
2. the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
3. the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
4. the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

Id. § 621(a); see also H.R. REP. NO. 90-805, at 4, as reprinted in 1967 U.S.C.C.A.N. 2213, 2217. The Congressional reports that accompanied the 1978 and 1986 amendments also stated the Act’s purpose in this dual manner. See generally H.R. REP. NO. 99-756 (1986), as reprinted in 1986 U.S.C.C.A.N. 5628; S. REP. NO. 95-493 (1977), as reprinted in 1978 U.S.C.C.A.N. 504. For example, in the Senate report accompanying the 1978 amendments, the Senate placed equal value on all three prongs of the published Statement of Findings and Purpose, although it seemed to support its argument for raising the protected class’ maximum age to seventy on the grounds that mandatory retirement was arbitrary discrimination. S. REP. NO. 95-493, at 2-3, as reprinted in 1978 U.S.C.C.A.N. 506 (“A person with the ability and desire to work should not be denied that opportunity solely because of age.”). For an illustration of how the Department of Labor harmonized these purposes to Congress approval with regard to employee benefits that differentiate based on age, see S. REP. NO. 101-263, at 8 (1990), as reprinted in 1990 U.S.C.C.A.N. 1509, 1512-13.

32. See Age Discrimination in Employment Act of 1967, Pub. L. NO. 90-202, 81 Stat. 602, 607 (1967). Although airline stewardesses required to retire at the age of thirty-two presented a compelling reason to reduce the age minimum further, Congress declined to do so out of concern that lowering the minimum would weaken the ADEA’s primary purpose of “the promotion of employment opportunities for older workers.” H.R. REP. NO. 90-805, at 6, as reprinted in 1967 U.S.C.C.A.N. 2219.
sixty-five. Finally, in 1986, Congress amended the ADEA and removed the upper age limit altogether.

The language of the ADEA mirrors the language of Title VII, simply replacing the words "race, color, religion, sex and national origin" with "age." In addition, the language of the ADEA also retains the neutral prohibitory language of Title VII, prohibiting employment discrimination with respect to "any individual ... because of such individual's age." Just like Title VII, the ADEA broadly prohibits discrimination in the areas of "hiring, discharges, treatment during employment, advertising, and retaliation." While the ADEA provides several exceptions that enable an employer to consider age, the employer may not rely solely on age in its employment decision.

33. See Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978); see also S. REP. NO. 95-493, at 7, as reprinted in 1978 U.S.C.C.A.N. 510; MARC ROSENBLUM, THE NEXT STEPS IN COMBATING AGE DISCRIMINATION IN EMPLOYMENT: WITH SPECIAL REFERENCE TO MANDATORY RETIREMENT POLICY: A WORKING PAPER 5, 8 (1977); KALET, supra note 14, at 7-9. Due to a lack of information regarding the impact of unemployment on those older than age seventy, Congress was not prepared to entirely abolish the upper age limit. S. REP. NO. 95-493, at 7, as reprinted in 1978 U.S.C.C.A.N. 510. However, Congress felt that raising the age limit would still substantially reduce the effects of mandatory retirement. Id.


(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.

42 U.S.C. § 2000e-2(a). By comparison, the ADEA makes it unlawful for an employer:

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

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


36. Id. § 623.

37. See Dennard, Jr. & Kelly, supra note 35, at 726.

38. See infra notes 50-51 and accompanying text. Section 623(f) of the ADEA allows an employer to consider age in an employment decision when age is "a bona fide occupational qualification, . . . to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this [Act, and] to observe the terms of a bona fide employee benefit plan." 29 U.S.C. § 623(f). The statute also permits an employer:
B. The Evolution of Reverse Age Discrimination

The theory of reverse discrimination has evolved under civil rights case law.\(^\text{39}\) Traditionally, reverse discrimination used to refer to racial discrimination. For example, a non-minority employee may successfully state a claim for relief under Title VII when discriminated against in favor of a minority employee.\(^\text{41}\) Under Title VII, non-minority employees have successfully challenged employer actions that show a preference for traditionally disenfranchised individuals.\(^\text{42}\)

---

\(^{39}\) See 29 U.S.C. § 623(f); see, e.g., Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 120-21 (1985) ("[I]f TWA does grant some disqualified captains the 'privilege' of 'bumping' less senior flight engineers, it may not deny this opportunity to others because of their age."); Karlen v. City Colls. of Chi., 837 F.2d 314, 318-19 (7th Cir. 1988) (holding that qualification for an early retirement plan cannot be solely based on age); Miss. Power & Light Co. v. Local Union Nos. 605 & 985, 945 F. Supp. 980, 985 (S.D. Miss. 1996) (concluding that a workplace transfer policy that uses age as the sole criteria facially violates the ADEA), aff’d, 102 F.3d 551 (5th Cir. 1996).

\(^{40}\) Id.; see, e.g., Loeffler v. Frank, 486 U.S. 549 (1988) (awarding prejudgment interest to a male postal worker for sex discrimination under Title VII); Zambetti v. Cuyahoga Cmty. Coll., 314 F.3d 249 (6th Cir. 2002) (holding that an employer violated Title VII when it awarded several promotions to lesser-qualified black coworkers instead of the white plaintiff).
Due to the similarities between the prohibitory language of Title VII and the ADEA, courts have frequently applied Title VII substantive case law to ADEA claims. Consequently, ADEA plaintiffs have attempted application of Title VII discrimination theories to their age discrimination claims. One of those applications is reverse discrimination. Reverse age discrimination is a rather new issue to the civil rights horizon. One form of reverse age discrimination is defined as the right of a younger protected worker to sue his employer because the employer gave preferential employment benefits to someone older because of age.

However, traditionally there are potentially two types of reverse age discrimination claims. First, where a twenty-five year old is disfavored compared to a thirty-five or forty-five year old. Second, where a forty-five year old is disfavored compared to a fifty-five year old. The district court found that the Cline case falls into this second type of traditionally thought of reverse age discrimination claim. However, the Sixth Circuit determined that “even if we granted the district court its definition of ‘reverse discrimination,’ it is clear that Cline and his classmates did not suffer ‘reverse age discrimination.’” The Court continued, “[b]y the plain language of the ADEA they are the victims of ‘age discrimination.”

43. See Graffam v. Scott Paper Co., 870 F. Supp. 389, 394 (D. Me. 1994) (“Because of the similarity between the ADEA and Title VII of the Civil Rights Act, federal courts have historically applied the standards used for Title VII to ADEA.”), aff’d, 60 F.3d 809 (1st Cir. 1995). Despite an overall consensus that Title VII law may generally be applied to the ADEA, courts have not always agreed on the extent of the analogy. See Barry Bennett Kaufman, Preferential Hiring Policies for Older Workers Under the Age Discrimination in Employment Act, 56 S. CAL. L. REV. 825, 842-46 (1983). One major disagreement in the federal courts has been over whether the ADEA parallels Title VII in allowing relief on a theory of disparate impact. See, e.g., Peter Reed Corbin & John E. Duvall, Employment Discrimination, 53 MERCER L. REV. 1367, 1384-85 (2002); Dennard, Jr. & Kelly, supra note 35, at 736-36. For example, the Seventh Circuit noted that “[t]he adverse impact analysis developed in Title VII cases cannot be extended easily to age cases.” Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1428 (7th Cir. 1986). Conversely, the Graffam court found that the plaintiff established a prima facie case of discrimination under the Title VII disparate impact test. Graffam, 870 F. Supp. at 399.

44. See Hamilton v. Caterpillar, 966 F.2d 1226, 1227 (7th Cir. 1992). A common argument is that “age discrimination is like race or sex discrimination -- it cuts both ways.” Id.


46. See Fuhrman, supra note 41, at 600-01.

47. The Circuit Court felt that “presumably, what the district judge and others mean when they conclude that the ADEA does not prohibit ‘reverse discrimination’ is that otherwise prohibited discrimination is permitted if the victims are literally (statutorily) within the protected class, but are a group within the class who in most cases are the beneficiaries of discrimination against others.” Cline, 296 F.3d at 471.

48. Cline, 296 F.3d at 471. The explanation, which continued with the fact that some members within the protected class were beneficiaries of the discriminatory action of which other members of the
Therefore, in reality, the Cline case does not involve reverse discrimination.\(^49\)

III.
CIRCUIT SPLIT

A. Case Law Rejecting Reverse Age Discrimination

In Hamilton v. Caterpillar Inc.,\(^50\) the Seventh Circuit held that the ADEA did not permit reverse age discrimination claims brought by younger members of the protected class.\(^51\) In Hamilton, Michael Hamilton, the named class representative in a class action against Caterpillar Corporation, claimed that Caterpillar's Special Early Retirement Program ("SERP") violated the ADEA because it discriminated against employees between the ages of forty and fifty because of their age.\(^52\) The SERP provided that upon closing of a plant, only employees who were fifty years old with ten years of service would be eligible for benefits. By June of 1988, Caterpillar closed both Iowa plants and laid off all of the employees that worked in those plants.\(^53\) In 1990, Hamilton initiated a class action on behalf of employees between the age forty and fifty with at least ten years of service at the time of the plant closings, but who because of the SERP were too young to receive benefits.\(^54\)

The district court dismissed the claim, holding that reverse age discrimination is not prohibited by the ADEA.\(^55\) In addition, the court concluded that even if reverse age discrimination was prohibited by the ADEA, the SERP was a bona fide employee benefit plan.\(^56\)

\(^49\) However, it is interesting to note that age discrimination of this type has been understood to be reverse age discrimination, when in fact it is nothing more than just age discrimination as the disfavored person is within the protected group and being discriminated because of their age. However, it is obvious that because of the negative connotation associated with reverse discrimination, see infra Part III.A, this label is being used to describe an action that disfavors the majority, however, I have and will continue to use the label reverse age discrimination throughout to avoid confusion. See also infra note 120 and accompanying text.

\(^50\) 966 F.2d 1226 (7th Cir. 1992).

\(^51\) Id. at 1228.

\(^52\) Id. at 1227. Hamilton's theory of discrimination is the third category of reverse discrimination plaintiffs: plaintiffs over age forty claiming a violation of the ADEA because older members of the protected group receive preferential treatment. See infra text accompanying note 87.

\(^53\) Id.

\(^54\) Id.

\(^55\) Id.

\(^56\) Id. Several other courts have skirted the question of reverse discrimination. See infra notes 69-70 and accompanying text.
On appeal, the Seventh Circuit observed that whether the ADEA permits claims for reverse age discrimination was an issue of first impression for the court and looked to the reasoning of prior federal court decisions for guidance. First, the Hamilton court looked to Karlen v. City Colleges of Chicago, a Seventh Circuit decision. In Karlen, three professors claimed that an Early Retirement Program violated the ADEA by discriminating against older employees within the protected group. The Karlen court concluded that, unlike Title VII's protection for all sexes and races, the ADEA did not protect people of all ages equally. Additionally, the Hamilton court looked to Schuler v. Polaroid Corp., a First Circuit decision holding that preference for older persons was not forbidden by the ADEA. Schuler was fifty-seven years old and claimed that he was constructively discharged by Polaroid in violation of the ADEA. The court found that the severance package offered to Schuler was used only to convince employees to retire, not forcing them to retire, which was not forbidden by the ADEA. Finally, the Hamilton court noted that in Wehrly v. American Motor Sales Corp., a federal district court categorically held that the ADEA does not permit claims for reverse age discrimination. The

57. Hamilton, 966 F.2d at 1227.
58. 837 F.2d 314 (7th Cir. 1988).
59. Id. at 315, 318. Karlen was an appeal of summary judgment granted in favor of the defendants. Id. at 320.
60. Id. at 315, 318. This fact pattern is the opposite of that which faced the Hamilton court. See infra text accompanying notes 77-83. Consequently, aside from the language quoted in note 96, infra, the Karlen court focused its analysis on discrimination against relatively older employees. Id. at 318-20. The court concluded that the sick leave and insurance portions of the Early Retirement Plan resembled more of a stick and less of a carrot, and, therefore, summary judgment for the defendants was inappropriate. Id. at 320.
61. Id. at 318. “Title VII protects whites and men as well as blacks and women, but the Age Discrimination in Employment Act does not protect the young as well as the old, or even, we think, the younger against the older.” Id. The court was primarily concerned with the policy implications of permitting reverse discrimination. It concluded that if “workers 40 or older but younger than the age of eligibility for early retirement could complain . . . early retirement plans would effectively be outlawed, and that was not the intent of the framers of the (ADEA).” Id.
62. 848 F.2d 276 (1st Cir. 1988).
63. Id. at 278 (“[T]he act does not forbid treating older persons more generously than others.”).
64. Id. at 277-78.
65. Id. at 278. The court said that the severance package was “a carrot, not a stick,” which was forbidden by the ADEA. Id. at 278. The language in Schuler on which the Hamilton court relied, cited in supra note 63, was in the context of the First Circuit’s critique of the plaintiff, Schuler, basing his ADEA claim on the severance package. Id.
67. Hamilton, 966 F.2d at 1227. In Wehrly, the court granted summary judgment in favor of defendant employer when a forty-two year old claimed that the employer had discriminated against him when he was constructively discharged, denied a request for special early retirement, and denied a promotion. 678 F. Supp. at 1377. Citing Karlen, the Wehrly court concluded that the ADEA would place an unreasonably high burden on employers if a plaintiff were able to establish a prima facie case because he was too young, rather than too old, for a benefit program. Id. at 1382-83.
*Hamilton* court cited these three cases for the proposition that the ADEA does not protect younger employees to the same extent that it protects older employees within the protected class.  

Next, the Seventh Circuit analyzed the case by looking at § 631(a) of the ADEA, which establishes individuals at least forty years old as the protected class. Contrasting reverse discrimination claims under Title VII to reverse age discrimination under the ADEA, the court concluded that if the ADEA were intended to protect relatively younger employees to the same extent as relatively older employees, there would be no reason for denying protection to employees under forty years old. The court reasoned that

> [i]f the Act were really meant to prevent reverse age discrimination, limiting the protected class to those forty and above would make little sense. To illustrate the point, imagine that only racial minorities and women could bring suit under Title VII. If Title VII so limited the plaintiff class, we would be unlikely to read that statute to prohibit reverse discrimination, either.

Finally, the court placed little importance on the EEOC regulation found at 29 C.F.R. § 1625.2(a) based on a narrow interpretation of the Congressional intent in enacting the ADEA. 29 C.F.R. § 1625.2(a) states in part that it is unlawful in situations where this Act applies, for an employer to discriminate by giving preference to individuals forty and over. Thus, if two people apply for the same position, and one is forty-two and the other is fifty-two, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor. This regulation is significant because it shows that the EEOC agrees with the plain language interpretation of the ADEA.

While the court accepted that a literal reading of both the text of the ADEA and the EEOC regulation would permit reverse age discrimination claims within the protected class, the court ultimately concluded that such
a reading of § 1625.2 exceeded the scope of the ADEA. The court determined that the context of the Findings and Purpose section in § 621 of the ADEA, which refers to “older workers,” “older persons,” and “arbitrary age discrimination,” suggested that Congress intended that “discriminating against older people on the basis of their age is arbitrary” discrimination. Finally, the court determined that, although the ADEA’s language as written is overinclusive, it was “unwilling to open the floodgates to attacks on every retirement plan because Congress chose more graceful language.”

B. Case Law Accepting Reverse Age Discrimination

In Cline v. General Dynamics Land Systems, Inc., the Sixth Circuit held that the ADEA allows members of the protected class to bring reverse age discrimination claims. In Cline, employees of General Dynamics claimed that a health benefits provision of a new collective bargaining agreement (“CBA2”) between General Dynamics and the union discriminated against employees between forty and forty-nine years old. Prior to CBA2, which went into effect July 1, 1997, the parties operated under a collective bargaining agreement (“CBA1”) that provided full health

---

74. Id. at 1228. “[T]o the extent that regulation 1625.2 can be read to authorize reverse age discrimination suits, we think that it exceeds the scope of the statute.” Id. The Hamilton court found only two prior cases that had interpreted regulation 1625.2(a): La Montagne v. Am. Convenience Prods., Inc., 750 F.2d 1405 (7th Cir. 1984), and Miller v. Lyng, 660 F. Supp. 1375 (D.D.C. 1987). 966 F.2d at 1228. Both of these cases cited the regulation “for the proposition that an older plaintiff may maintain a cause of action under the ADEA even if his replacement is over 40.” Id. The La Montagne court read the regulation to “merely [clarify] the point that an employer is not insulated from liability for age discrimination when he chooses among people in the protected class.” 750 F.2d at 1411 n.4. The Miller decision lends a bit more support to the Hamilton court’s position. The Miller court read the regulation, “it is now hornbook law that the ADEA covers ‘discrimination based on age between younger and older persons within the group protected by the Act.’” 660 F. Supp. at 1378 n.2 (quoting 3 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 98.53, at 21-46 (rev. ed. 1986)). However, the Miller court also indicated that the employee’s replacement must be a significantly younger worker. Id.

75. Hamilton, 966 F.2d at 1228. The court postulated that “Congress was concerned that older people were being cast aside on the basis of inaccurate stereotypes about their abilities. The young . . . cannot argue that they are similarly victimized.” Id. The Sixth Circuit specifically rejected this reading that the plaintiff must be both older than his replacement and within the protected class. See Cline v. Gen. Dynamics Land Sys., Inc., 296 F.3d 466 (6th Cir. 2002), rev’d, 540 U.S. 581 (2004); infra Part III.B.

76. Hamilton, 966 F.2d at 1228; see also supra note 41 and infra note 101 (quoting §§ 621, 631).


78. Id. at 467. While the facts of Cline were clearly what courts traditionally considered a “reverse discrimination” challenge, the Cline court expressly rejected this terminology. Id. at 471. The court argued, “An action is either discriminatory or it is not discriminatory . . . . By the plain language of the ADEA [plaintiffs] are the victims of ‘age discrimination.’” Id.

79. Id. at 467-68. The plaintiffs also alleged that the health benefits provision violated the Ohio Civil Rights Act. Id. In addition to these discrimination claims, the plaintiffs asked the district court to “determine whether the Cline group had standing to sue and whether their claims were ripe.” Id. at 468.
benefits to retired employees with at least thirty years of seniority.\textsuperscript{80} Under CBA2, General Dynamics no longer provided full health benefits to a retiree unless that person was at least fifty years old on July 1, 1997.\textsuperscript{81}

The district court held the claims were reverse age discrimination and dismissed the claims.\textsuperscript{82} The court relied on \textit{Hamilton, Dittman v. General Motors Corp.-Delco Chassis Division},\textsuperscript{83} and \textit{Parker v. Wakelin}\textsuperscript{84} for the proposition that reverse age discrimination is not permitted under the ADEA.\textsuperscript{85} Like the \textit{Dittman} and \textit{Parker} courts, the district court in \textit{Cline} agreed with the \textit{Hamilton} court’s interpretation of the congressional intent in enacting the ADEA.\textsuperscript{86} Ultimately, the district court determined that while “CBA2 ‘facially discriminates’ by creating two classes of employees based solely on age,” the ADEA does not allow for employees to bring a reverse age discrimination claim.\textsuperscript{87}

The circuit court began its analysis by interpreting the language of both § 631 and § 623 of the ADEA.\textsuperscript{88} In order to determine the Congressional intent in enacting the ADEA, the court applied typical principles of statutory interpretation: (1) the plain meaning of the statute determines legislative intent; (2) if the language of the statute is ambiguous, a court looks to the legislative history to determine the Congressional intent; and (3) if the plain meaning of the language causes a result that the court views

\textsuperscript{80} Id.

\textsuperscript{81} Id. The plaintiffs, who were all between the ages of forty and forty-nine on July 1, 1997, divided into three groups for the lawsuit. Id. The first group, the Cline group was comprised of current employees who were no longer eligible for retirement health benefits under CBA2. Id. There were 183 members of this group. Id. The second group included ten employees who retired prior to July 1, 1997, in order to receive health benefits under CBA1. Id. The third group consisted of three employees who retired after July 1, 1997, thereby becoming ineligible for health benefits. Id. The plaintiffs alleged that providing health benefits solely to employees at least fifty years old was discrimination based on age. Id.


\textsuperscript{83} 941 F. Supp. 284 (D. Conn. 1996), aff’d, 116 F.3d 465 (2d Cir. 1997); see also infra note 104 (citing cases decided on grounds other than directly on whether the ADEA allows reverse discrimination). In \textit{Dittman}, a group of employees between forty and fifty years old challenged a retirement provision that was only available to employees over fifty years old. 941 F. Supp. at 286. The district court based its holding on a conclusion that the retirement plan was a bona fide employee benefits program. Id. at 286-87.

\textsuperscript{84} 882 F. Supp. 1131 (D. Me. 1995), aff’d in part, rev’d in part on other grounds, 123 F.3d 1 (1st Cir. 1997). Likewise, a group of teachers between forty and fifty years old challenged a pension benefit system that favored teachers over fifty years old in \textit{Parker}. 882 F. Supp. at 1140-41. The \textit{Parker} court found that the plaintiffs lacked standing for a disparate impact claim against the retirement system. Id. at 1140. As in \textit{Dittman}, the \textit{Parker} court relied on \textit{Hamilton} to support its holding. Id. at 1140-41.

\textsuperscript{85} Cline, 98 F. Supp. 2d at 848.

\textsuperscript{86} Id.; see also infra notes 133-40 and accompanying text.


\textsuperscript{88} Id. at 468-70. For the text of § 631(a), see infra note 101. For the text of § 623(a)(1)-(2), see supra notes 32-35 and accompanying text.
as inconsistent with the obvious intent of Congress, the court’s reading of the statute must remain true to the language of the statute and may not attempt to cure the problem.\textsuperscript{89} Looking at the language of the ADEA, the court determined that the protection of individuals at least forty years old contained in § 631, when read together with the prohibition on discrimination against “any individual” in § 623, clearly indicates that “an employer may not discriminate against any worker age forty or older on the basis of age.”\textsuperscript{90}

After determining that all individuals at least forty years old are appropriate ADEA plaintiffs, the Sixth Circuit criticized Hamilton on other bases.\textsuperscript{91} First, the court rejected Hamilton and its progeny for relying too heavily on the generalized language of the Findings and Purpose in § 621.\textsuperscript{92} Second, the court criticized Hamilton for the fact that it reversed one of the traditional rules of statutory interpretation that “the more direct and specific language of a statute trumps the more generalized.”\textsuperscript{93} The court also accepted that the general purpose of the ADEA was to protect “older workers,” but surmised that protecting any worker at least forty years old was not inconsistent with this goal.\textsuperscript{94} Additionally, the court found its interpretation of the ADEA to be consistent with the interpretation of the EEOC in regulation § 1625.2 and criticized the Hamilton court’s failure to give the appropriate deference to EEOC.\textsuperscript{95} Finally, the court rejected the Hamilton court’s determination of the overinclusive nature of the statute’s language.\textsuperscript{96} The Cline court reasoned, “[I]f Congress wanted to limit the

\begin{footnotes}
\item[89.] Cline, 296 F.3d at 469. The court noted that the “primary rule of statutory construction is to ascertain and give effect to the legislative intent.” \textit{Id.} (quoting Hedgepeth v. Tenn., 215 F.3d 608, 616 (6th Cir. 2000)).
\item[90.] \textit{Id.} The Sixth Circuit then rejected the Hamilton interpretation of the appropriate ADEA plaintiff, which had been adopted by the district court. \textit{Id.} at 470. The court observed that the Hamilton version would require the “any individual” language in § 623 to be interpreted as “older workers,” meaning only individuals who are both forty years old and relatively older than their replacement. \textit{Id.} The court said, “[w]e think the plain meaning of the statute will not bear that reading.” \textit{Id.} at 469.
\item[91.] \textit{Id.} at 469-71.
\item[92.] \textit{Id.} at 470. For the full text of the statement of findings and purpose, see supra note 41 and accompanying text.
\item[93.] \textit{Id.} at 470.
\item[94.] \textit{Id.} The court also reframed the question presented in a protected class reverse discrimination context. \textit{Id.} Rather than determining whether the ADEA prohibited discrimination against “older workers,” the Sixth Circuit posited that the question is really “whether any worker over the age of 40 (‘any individual’) may be discriminated against on the basis of age.” \textit{Id.}
\item[95.] In a concurring opinion, Circuit Judge Cole observed that the Sixth Circuit’s reasoning, but not that of the Hamilton court, does not render § 623(l)(1)(A) meaningless. \textit{Id.} at 473 (Cole, J., concurring). Judge Cole observed, “[s]ection 623(l)(1)(A) allows an employer to set a minimum age as a condition for eligibility in a pension plan. If younger protected employees could not sue their employers for the preferable pension treatment of older employees, then the minimum age exception in [the section] would not be necessary . . . .” \textit{Id.} (citation omitted).
\item[96.] \textit{Id.} at 471-72.
\end{footnotes}
ADEA to protect only those workers who are relatively older, it clearly had the power and acuity to do so. It did not.\textsuperscript{97}

In his concurring opinion, Judge Cole felt that permitting reverse age discrimination claims to proceed furthers two of the purposes of the ADEA.\textsuperscript{98} First, he argued that a fifty year old person is just as disadvantaged by discrimination in favor of a younger person or in favor of an older person.\textsuperscript{99} Second, he determined that reverse age discrimination claims would reduce the burden on commerce created by unemployed older people.\textsuperscript{100} Last, he rejected the notion that reverse age discrimination claims were illogical by acknowledging that state discrimination laws have been interpreted to allow reverse age discrimination claims.\textsuperscript{101}

Judge Cole also reconciled the \textit{Consolidated Coin} "substantially younger" test with the court's holding.\textsuperscript{102} In \textit{Consolidated Coin}, plaintiff James O'Connor was fired at fifty-six years old and replaced by a forty year old.\textsuperscript{103} He filed suit against his employer under the ADEA, claiming that his termination was because of his age.\textsuperscript{104} On appeal, the Fourth Circuit held that in order to establish a prima facie case of age discrimination, O'Connor had to initially satisfy the elements of \textit{McDonnell Douglas}' prima facie case, a four-element test used to show an inference of discriminatory treatment in Title VII cases.\textsuperscript{105} Because the Fourth Circuit interpreted the last element of the prima facie case as requiring the plaintiff to show replacement by someone outside the protected class, the court determined that the plaintiff failed to prove a prima facie case.\textsuperscript{106}
Without ruling on whether the *McDonnell Douglas* test is appropriate in an ADEA case, the Supreme Court determined that there was no requirement that the former employee's replacement be outside the protected age group.\footnote{Id. at 312.} In reaching this determination, the Court looked to the language of the ADEA which states that it is unlawful to discriminate against "any individual . . . because of such individual's age," which is articulated in § 623. In addition, the Court referred to the Act's language that limits the protected class to those employees at least forty years old, established by § 631.\footnote{Id.} The Court noted that the language of these sections does not prohibit discrimination against employees because they are aged forty or older. Rather, it prohibits discrimination against employees because of their age, but limits the protected class to those who are at least forty years old.\footnote{Id. at 312-13. The Court concluded that "the prima facie case requires 'evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion.'" Id. (alteration in original) (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977)).} The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant so long as he has lost out because of his age.\footnote{Id. at 313.}

Following this reasoning, the Court argued that a prima facie case requires establishing that an employment decision was based on an illegal discriminatory criterion and not where the plaintiff's replacement fell in relation to the protected class.\footnote{Id.} The Court concluded that replacement by a person "substantially younger" than the plaintiff is a more reliable indication of age discrimination than replacement by someone outside the protected class.\footnote{Id. at 313.} Replacement by someone only insignificantly younger would not establish a prima facie case at all.\footnote{Id.}

Judge Cole distinguished the facts in *Consolidated Coin* from those in the case at issue, determining that the present case was a case of "direct evidence age discrimination," and therefore, the prima facie case created in the *Consolidated Coin* opinion did not apply to this case.\footnote{Cline v. Gen. Dynamics Land Sys., Inc., 296 F.3d 466, 475 (6th Cir. 2002), rev'd, 540 U.S. 581 (2004).} Nevertheless, he observed that the word "substantially younger" suggested that the ADEA did not permit reverse age discrimination claims.\footnote{Id.} However, Judge Cole first refuted this suggestion by noting that in *Consolidated Coin*, the
Supreme Court was not considering reverse age discrimination. Second, Judge Cole observed that in Consolidated Coin, the Supreme Court even "acknowledged that members within the protected class may sue one another." Last, Judge Cole observed that the Cline court followed the same methodology for statutory interpretation that the Supreme Court used in Consolidated Coin to determine whether the ADEA would allow a reverse age discrimination claim.

Thus, comparing Cline and Hamilton, the Court of Appeals for the Sixth Circuit followed the literal language of the ADEA's prohibitory language and the EEOC's regulations while the Seventh Circuit followed policy arguments. However, in a technical sense, the Cline case does not involve reverse discrimination. Reverse discrimination involves a claim brought by someone outside the protected class. For example, a race discrimination claim brought by an African American would not be labeled as reverse race discrimination because the African American would be a member of the protected class under Title VII. Because the Sixth Circuit's decision in Cline conflicted with other court of appeals' decision

116. Id. Judge Cole also posited that "had the Supreme Court also considered the question of reverse age discrimination[,] I believe it would have expressed the fourth part of the prima facie test as requiring proof of 'substantial difference in age' as opposed to 'substantially younger.'" Id.

117. Id.

118. Id. Judge Cole concluded, "although a close call, I do not believe that our result violates Supreme Court precedent." Id. at 476.

119. See id.; Cline v. Gen. Dynamics Land Sys., Inc., 98 F. Supp. 2d 846 (N.D. Ohio 2000), rev'd, 296 F.3d 466 (6th Cir. 2002), rev'd, 540 U.S. 581 (2004). To date, the court of appeals for the Sixth Circuit is the only appellate court to accept the EEOC's regulations and the plain language reading of the ADEA regarding "reverse age discrimination." Id.

120. See, e.g., Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 (6th Cir. 1994) (holding that a prima facie showing of reverse discrimination requires a showing that the employer discriminated against employees who were similarly-situated but not members of the protected class); Murphy v. Milwaukee Area Technical Coll., 976 F. Supp. 1212, 1216 (E.D. Wis. 1997) ("Strict application of the McDonnell Douglas standard would eliminate all cases of reverse discrimination by preventing a plaintiff from making out a prima facie case because, by definition, the plaintiff is not a member of a protected class"); Jones v. Slater Steels Corp., 660 F. Supp. 1570, 1575 (N.D. Ind. 1987) (holding that the prima facie test in reverse discrimination cases "must be modified to reflect the fact that the majority, rather than the minority, is the object of reverse discrimination"). This is not the case in Cline: Cline was a member of the protected class and therefore could not bring a reverse age discrimination case.

121. While it may seem like Title VII and the ADEA differ on this point, because a white employee and a black employee can have a claim for race discrimination if they are disfavored because of race. The ADEA only allows for claims for age discrimination if you are at least forty years old. Title VII has a protected class; however, the protected class is quite broad, people of any race. The ADEA has protected class, anyone at least forty years old. Therefore, as long as the plaintiff has a race, the plaintiff will have a cause of action. Just as in the ADEA, as long as they plaintiff is at least forty years old, the plaintiff should have a cause of action.
in ADEA reverse age discrimination cases, the Supreme Court granted certiorari.

IV. SUPREME COURT ANALYSIS OF REVERSE AGE DISCRIMINATION

In *General Dynamics Land Systems, Inc. v. Cline* the U.S. Supreme Court, in a 6-3 decision, concluded that the ADEA does not prohibit favoring the relatively old over the relatively young, even when the young are at least forty years old and therefore within the statute’s protected class. In reaching this decision, the Court argued that although the Act’s discrimination clause was open to argument “in the abstract,” Congress’ intent ultimately supported a holding disallowing reverse age discrimination claims. Specifically, the Court found that discrimination because of age is different from discrimination because of race or sex, which is precisely why Congress did not include age as a Title VII category in the Civil Rights Act of 1964. Additionally, the Court pointed to the ADEA’s legislative history, which specifically indicated that Congress was concerned with protecting older employees relative to younger employees.

Next, the Court considered and rejected each of Cline’s three arguments. First, the Court disagreed with the contention that the meaning of “age” was plain and unambiguous in the statute since age can have different meanings, depending on the context in which it is used. The Court concluded that a narrow reading, defining age as “old age,” was “the more natural one in the textual setting.” Next, the Court disagreed with Cline’s contention that one of the ADEA’s sponsors in the Senate intended the Act to cover preferential treatment of the relatively old against the relatively young, which supported the conclusion that a younger member of the protected class could bring a claim against an employer for favoring an older member of the protected class. Finally, the Court rejected the

125. *See id.* at 583.
126. *Id.* at 581. The Court stated that the clause “discriminat[ion] . . . because of [an] individual’s age” could be interpreted in different ways since “age” lacks an express modifier. *Id.* (alterations and omission in original) (quoting 29 U.S.C. §623(a)(1) (2000)) (internal quotation marks omitted).
127. *Id.*
128. *See id.*
129. *See id.* at 584-91.
130. *Id.* at 594-97.
131. *Id.* at 596-97.
132. *Id.* at 597-99. Specifically, the Court cited precedent indicating that the words of a bill’s sponsor are not dispositive in analyzing the legislative history of a bill. *Id.*
contention that it should grant deference to the EEOC, which read the statute as allowing a reverse age discrimination claim, because the Court felt that the EEOC’s reading was clearly wrong in light of the Court’s reasoning.\textsuperscript{133}

Justices Scalia and Thomas each dissented. In his dissent, Justice Scalia argued that the EEOC’s interpretation of the statute was controlling because the Commission is the administrative agency that Congress has tasked with the responsibility to enforce the ADEA.\textsuperscript{134} Justice Scalia argued that the EEOC’s interpretation was neither foreclosed by the text of the ADEA nor unreasonable, and thus the Court should have deferred to the EEOC regulation.\textsuperscript{135}

Justice Thomas’s dissent, in which Justice Kennedy joined, criticized the majority’s new canon of statutory interpretation. Specifically, Justice Thomas criticized the Court for creating a “social history” analysis as a “new tool” of statutory interpretation.\textsuperscript{136} Because Justice Thomas believed that the plain meaning of “age” in the statute was unambiguous, he determined that the clear language of the ADEA supported all claims of discriminatory treatment by any member of the protected class.\textsuperscript{137}

In addition, Justice Thomas expressed concern about the implications of the majority’s decision for race and sex discrimination claims under Title VII.\textsuperscript{138} Backed by case law and legislative history, Justice Thomas noted that the “social history” of Title VII indicated that the impetus of the statute and the purpose of the Act were aimed at preventing invidious discrimination against blacks and women.\textsuperscript{139} However, subsequent cases have held that whites and men could also bring discrimination claims under Title VII.\textsuperscript{140} Justice Thomas argued that if “social history” should play such a key role in interpreting a statute, it would certainly follow that whites and men are not protected under Title VII and thus a number of important Title VII cases would have been decided incorrectly.\textsuperscript{141} Analogizing between Title VII and the ADEA, Justice Thomas concluded that it was illogical to allow reverse discrimination claims under Title VII and not allow reverse age discrimination claims under the ADEA.\textsuperscript{142}

\textsuperscript{133} Id. at 599.
\textsuperscript{134} Id. at 601 (Scalia, J., dissenting). In addition, Justice Scalia attacked the Court’s method of statutory interpretation, arguing that the meaning of “age” in the statute was unambiguous. Id.
\textsuperscript{135} Id. (Scalia, J., dissenting).
\textsuperscript{136} Id. at 606 (Thomas, J., dissenting).
\textsuperscript{137} Id. at 602-06.
\textsuperscript{138} Id. at 608-13.
\textsuperscript{139} Id. at 608-10.
\textsuperscript{140} Id. at 608-12.
\textsuperscript{141} Id. at 610-12.
\textsuperscript{142} Id. at 612-13.
V.
THE ADEA PROTECTS RELATIVELY YOUNGER MEMBERS OF THE
PROTECTED CLASS FROM REVERSE AGE DISCRIMINATION

The key question in the reverse age discrimination debate is whether
the ADEA only prohibits discrimination against those individuals at least
forty years old who are disfavored in relation to younger workers or
whether the Act unequivocally prohibits discrimination based on age
against any individual at least forty years old. This question is answered
by determining what Congress intended through statutory interpretation.
When faced with conflicting interpretations of a statute's text, a court's
responsibility is to determine the legislature’s intent when the statute was
enacted. When faced with conflicting interpretations of a statute's text, a court’s
responsibility is to determine the legislature’s intent when the statute was
enacted.143 Tools of statutory interpretation, which lead the inquiry towards
the statute’s language, structure, subject matter, context, and history, guide
a court to a greater understanding of the legislative intent. However, the
value of these canons of statutory interpretation can be debated. In
addition, their use is susceptible to the different interpretations of judges
and may change slightly over time as courts change. Nevertheless, these
tools remain the primary method of understanding legislative intent.

This section analyzes current federal court views of statutory
interpretation of the sections of the ADEA, which are critical to the reverse
age discrimination inquiry. The inquiry begins with the statute itself,
examining the plain meaning of the language contained in § 621, § 631,
and § 623. Next, this section considers agency regulations that interpret the
statutory language. The inquiry then considers any assistance provided
by the Act’s legislative history. Finally, the inquiry moves on to the

---

143. See supra Part III.
144. See Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998).
145. Id.
need not be conclusive and are often countered, of course, by some maxim pointing in a different
147. See generally WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF
STATUTORY INTERPRETATION (1999). For example, the Supreme Court found that legislative history
shows Congress did not intend a municipality to be a “person” for purposes of recovering damages
itself on grounds that the same legislative history did support a finding that a municipality is a person in
Monell v. Department of Social Services of New York, 436 U.S. 658, 690-91 (1978). For a criticism of
traditional theories of statutory interpretation, see William N. Eskridge, Jr. & Philip P. Frickey, Statutory
Interpretation as Practical Reasoning, 42 STAN. L. REV. 321 (1990) (exploring theories of interpretation
and advocating a new “practical reasoning” approach).
148. Chickasaw Nation, 534 U.S. at 94.
149. See infra Part V.A.1
150. See infra Part V.A.1.
151. See infra Part V.A.1.i and Part V.A.1.ii.
152. See infra Part V.A.2.
policy arguments for and against allowing reverse age discrimination suits by members of the protected class.153

A. The Text

The text of a statute is always the starting point and thus, the text of the ADEA is the starting point for our statutory analysis.154 The Supreme Court has “stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”155 When the language of a statute is unambiguous, a court should not look beyond it to determine legislative intent.156 However, if two reasonable people could interpret the statutory language differently, the language is ambiguous and the inquiry must continue onto the next level of analysis.157

However, applying the principles of statutory interpretation to the text of the ADEA reveals that the Act contains no considerable ambiguity.158 First, read alone, the prohibitory language of § 623 is not ambiguous.159 This section makes clear that it is unlawful for any employer to discriminate against “any individual . . . because of such individual’s age.”160 The plain meaning of the words “any individual” rejects any suggestion that the term is defined by relationship to another individual, such as a younger or older person.161 An individual is “a single or particular being . . . or group of beings.”162 Section 623 contains no reference to older workers, older persons, or any other language that would indicate a congressional intent that the words should be given any meaning besides the ordinary plain meaning.163 Second, this section becomes even more clear when read in

---

153. See infra Part V.A.3.


155. Conn. Nat’l Bank v. Germain, 503 U.S. 249, 253-54 (1992). When “the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” Id. (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)).


158. See infra text accompanying notes 184-98.

159. See infra notes 185-91 and accompanying text. For the text of § 623(a)(1)-(2), see supra note 36 and accompanying text.


161. See infra text accompanying note 187. When construing statutory language, a court should interpret words according to their ordinary meaning. Crane v. Comm’r, 331 U.S. 1, 6 (1947) (“[T]he words of statutes . . . should be interpreted where possible in their ordinary, everyday senses.”).

162. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1152 (3d ed. 1966).

163. See 29 U.S.C. § 623. The Act's definition of "employee" also refers to "individuals." Id. § 630(f) ("The term 'employee' means an individual employed by any employer . . . ").
conjunction with § 631, which establishes the Act’s protected group.\footnote{164} Section 631 defines those who fall under the protection of the Act as those “[i]ndividuals at least 40 years of age.”\footnote{165} Last, as with § 631 and § 623, no other section in the Act refers to the workers protected by the ADEA as anything but individuals.\footnote{166}

Rebecca Ennis, a commentator, has argued that the word “age” is ambiguous because it has multiple dictionary definitions.\footnote{167} One definition says that age means “the length of time during which a being or thing has existed”\footnote{168} and another defines it as “advanced years” or “old age.”\footnote{169} Therefore, this commentator concludes that the multitude of definitions of this word supports the proposition that the language is ambiguous.\footnote{170} However, in his dissent, Justice Thomas conceded that while the word “age” could have the alternative meaning of old age, he concluded that old age is not the primary use of the word “age”, and the use of the word “age” in other sections of the ADEA effectively destroys any doubt as to the intended meaning of the word “age.”\footnote{171}

Moreover, the Court noted that the language in a statute always has to glean its meaning from the surrounding words, as well as from the social and legislative history at the time of the statute’s enactment.\footnote{172} Here, the Court found that the word “age” means old age especially when combined with “discrimination.”\footnote{173}

Ennis argues that § 621(a), which sets forth Congress’s statement and findings, refers exclusively to problems faced by “older persons” and “older workers.”\footnote{174} The phrases “older persons” and “older workers” could refer to older people in general, which would indeed indicate that reverse age discrimination is protected.\footnote{175} On the other hand, she goes on to argue, the

\footnotesize{164. See id. §§ 623, 631; see also supra text accompanying note 123.}
\footnotesize{165. 29 U.S.C. § 631(a).}
\footnotesize{166. See id. §§ 621-634.}
\footnotesize{167. Ennis, supra note 7, at 764.}
\footnotesize{168. RANDOM HOUSE UNABRIDGED DICTIONARY 37 (2nd ed. 1993).}
\footnotesize{170. Minkin, supra note 169, at 248.}
\footnotesize{171. Cline, 540 U.S. at 602-05 (Thomas, J., dissenting). Justice Thomas also argued that his interpretation of the statute was not defeated by the limitation of the protected class to those forty years of age and older. Id. at 1251 (Thomas, J., dissenting). He said that “[a] person over 40 fired due to irrational age discrimination (whether because the worker is too young or too old) might have a more difficult time recovering from the discharge and finding new employment.” Id.}
\footnotesize{172. Id. at 596-97.}
\footnotesize{173. Id. at 596.}
\footnotesize{175. Minkin, supra note 169, at 252.
phrases could refer to the class of people protected by the ADEA, those at least forty years old, in which case any discrimination within that class might be prohibited whether in favor of the older or younger members of the class.\textsuperscript{176} She concludes that these examples show why the ADEA is ambiguous when it might seem to be unambiguous at first glance.\textsuperscript{177}

This argument is clearly incorrect based on the basic principles of statutory interpretation. The references to "older workers" and "older persons" in the ADEA section on Findings and Purpose do not create ambiguity with the rest of the statute.\textsuperscript{178} Federal courts have consistently held that preamble language\textsuperscript{179} does not supersede the language in the body of a statute.\textsuperscript{180} A court may resort to using the preamble only as a guide to interpret the legislative intent when the language of the statute is ambiguous.\textsuperscript{181} Because the intent to protect any individual at least forty years old is clear in the text of the ADEA, a court should not look to the ADEA's preamble for interpretive guidance.\textsuperscript{182} Additionally, using the language contained in the text of the Findings and Purpose to create ambiguity would violate one of the principles of statutory interpretation, namely that statutory interpretation may not be used to create ambiguity where none otherwise exists.\textsuperscript{183} Finally, even if a court considers § 621's

\begin{itemize}
\item \textsuperscript{176} See id.; see also Rogers, supra note 7, at 335 (explaining that the phrase "older workers" could be interpreted to refer to the ADEA's protected class).
\item \textsuperscript{177} See generally Rogers, supra note 7, at 336, which explains that the ADEA's exemptions for minimum age requirements on pension plans can only serve to protect employers from claims by younger employees that they are being discriminated against in favor of older employees. These provisions would also contribute to ambiguity, as they could be inconsistent with the statute's statement of findings.
\item \textsuperscript{178} See supra notes 174-77 and accompanying text.
\item \textsuperscript{179} Section 621 of the ADEA falls well within the dictionary definition of a preamble: "the introductory part of a statute . . . that states the reasons and intent of the law . . . or is used for other explanatory purposes . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1783 (3d ed. 1966).
\item \textsuperscript{180} See, e.g., Coosaw Mining Co. v. South Carolina ex rel. Tillman, 144 U.S. 550, 563 (1892) ("[E]xpress provisions in the body of an act cannot be controlled or restrained by the title or preamble."); Samuels v. District of Columbia, 650 F. Supp. 482, 484 (D.D.C. 1986) (criticizing the defendant's reliance on the preamble of the Fair Housing Act to avoid liability. "[T]he preamble of the Housing Act is merely a general statement of policy which does not mitigate and certainly does not override the specific requirements laid out in the body of the statute.").
\item \textsuperscript{181} Price v. Forrest, 173 U.S. 410, 427 (1899); Beard v. Rowan, 34 U.S. 301, 317 (1835) ("The preamble in the act may be resorted to, to aid in the construction of the enacting clause, when any ambiguity exists."). According to the Price court:

\begin{quote}
Although a preamble has been said to be a key to open the understanding of a statute, we must not be understood as adjudging that a statute, clear and unambiguous in its enacting parts, may be so controlled by its preamble as to justify a construction plainly inconsistent with the words used in the body of the statute. We mean only to hold that the preamble may be referred to in order to assist in ascertaining the intent and meaning of a statute fairly susceptible of different constructions.
\end{quote}
\item \textsuperscript{182} See supra text accompanying notes 183-91.
\item \textsuperscript{183} PGA Tour, Inc. v. Martin, 532 U.S. 661, 689 (2001) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates
"older workers" language against the "any individual" language contained in the remainder of the statute, the prohibition of discrimination against "any individual" must prevail under the principle of statutory interpretation that states that the specific language of a statute trumps the more general language of a statute. While "older worker" seems more specific, it really is more general because "older worker" could apply to any employee at least forty years old or to someone who is relatively older by comparison to someone relatively younger. The language "any individual" is clearly more specific because it refers to everyone.

The Supreme Court looks at the statute as a whole to determine whether a statute is ambiguous. This "whole act" approach incorporates the entire statutory text but does not prevent a court from finding that some portions of the text have stronger implications than other portions. The Cline Court determined that identical words in different sections of a statute do not always have to have the same meaning, especially when the word in question has more than one common meaning. The Cline majority summarily dismissed the argument that the word "age" in the ADEA should be read in a similar way as to the words race and sex in Title VII. The Court reasoned that the word "age" in the ADEA is not analogous to the words "race" and "sex" in Title VII as race and sex are "general terms that in every day usage require modifiers to indicate any relatively narrow application." However, this is true only if one assumes that race and sex are in fact read more narrowly than age.

---

184. Townsend v. Little, 109 U.S. 504, 512 (1883); see also 3A NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 74.09, at 395 (5th ed. 1992) ("When . . . two different parts of the same statute appear to conflict, the court should first examine the language to determine whether they may be reconciled.").

185. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000). "A court must . . . interpret the statute 'as a symmetrical and coherent regulatory scheme' and 'fit, if possible, all parts into a harmonious whole.'" Id. (citations omitted).

186. See SINGER, supra note 184, § 47.02, at 212.

187. Cline v. Gen. Dynamics Land Sys., Inc., 540 U.S. 581, 594-96 (2004) ("The presumption of uniform usage thus relents when a word used has several commonly understood meanings among which a speaker can alternate in the course of an ordinary conversation, without being confused or getting confusing.").

188. Id. at 596.

189. Id. The Court further noted that "the prohibition of age discrimination is readily read more narrowly than analogous provisions dealing with race and sex. That narrower reading is the more natural one in the textual setting, and it makes perfect sense because of Congress's demonstrated concern with distinctions that hurt older people." Id.
Additionally, another principle of statutory interpretation states that no section of a statute should be rendered superfluous by statutory interpretation. This principle further supports the clear meaning of the ADEA, which dictates that all individuals at least forty years old are protected by the ADEA. Section 623(l)(1)(A) of the ADEA allows an employer to set a minimum age for retirement benefits eligibility in connection with a bone fide pension plan. Section 623 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." Section 631 limits that age discrimination prohibition to "individuals who are at least 40 years of age." Thus taken together, §§ 623 and 631 clearly prohibit using age as a basis for employment decisions involving people at least forty years old. If Congress had not contemplated the possibility of a relatively younger member of the protected class suing an employer for favoring older members of the protected class, § 623(l)(1)(A) would be unnecessary since the ADEA would not need a provision protecting employers from suits involving pension plans because only relatively younger employees could sue based on a minimum retirement age. Additionally, because §§ 623 and 631 cannot be reasonably read to be completely inconsistent with § 621(a)'s reference to "older workers" and because § 623(l)(1)(A) has significance only if §§ 623 and 631 permit reverse age discrimination claims, there is no reason to look beyond the statute.

Further, Congress enacted an exemption for pension plans and the benefits and seniority system in § 623(f), the 1990 Older Workers Benefit Protection Act ("OWBPA") amendments to the ADEA. The OWBPA

---


191. Id.

192. Section 623 provides:

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section—

1. It shall not be a violation of subsection (a), (b), (c), or (e) solely because—

   (A) an employee pension benefit plan . . . provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits . . .


195. See Cline, 296 F.3d at 473.

196. See Cline, 296 F.3d at 473.

197. See Cline, 296 F.3d at 473.

198. See supra note 38.
was enacted after the Karlen and Schuler decisions, the cases on which the Hamilton court relied to conclude that the ADEA barred reverse age discrimination claims.\textsuperscript{199} In Karlen, the plaintiff challenged an early retirement plan and in Schuler, the plaintiff challenged a voluntary severance option, both which were squarely addressed in the OWBPA.\textsuperscript{200} Had Congress wanted to bar all ADEA challenges by relatively younger members of the protected class against relatively older members of the protected class, it easily could have done so.\textsuperscript{201} Congress instead chose to enact several explicit exceptions to the overall ban on age discrimination against employees at least forty years old.\textsuperscript{202} If a court were to add to these specific exemptions, Congress’ intent to prevent age discrimination in its many different forms would be abrogated.\textsuperscript{203}

1. EEOC Regulation 29 C.F.R. §1625.2 is Clear and Substantiates the Plain Meaning of the ADEA

The plain meaning of the language in the ADEA is bolstered by the interpretation of the EEOC. Even though the Supreme Court in Cline determined that Congress had not directly addressed the issue of discrimination between relatively younger persons and older persons in the protected age group, the Supreme Court should have granted deference to the reasonable interpretation of the EEOC. The EEOC is the agency charged with the duty to interpret and apply the ADEA. The EEOC has squarely addressed the issue of discrimination between members of the protected age group and whether an employer can favor one member of the protected group over another based on relative age. The EEOC issued a regulation pursuant to notice and comment rulemaking procedures, and its regulation substantiates that the plain meaning interpretation of the ADEA is accurate. The EEOC’s regulation provides as follows:

\textsuperscript{199} See supra notes 57-65 and accompanying text.
\textsuperscript{201} See Cline, 296 F.3d at 471-72. The Senate Report of OWBPA emphasized the broad sweep of the ADEA and the very narrow circumstances in which the abridgment of its prohibition on age discrimination is appropriate. See S. REP. No. 101-263, at 5-6, as reprinted in 1990 U.S.C.C.A.N. 1510-11.
\textsuperscript{203} See supra note 41 and accompanying text; see also United States v. Johnson, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others.").
Discrimination between individuals protected by the Act.

(a) It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other is 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor.

(b) The extension of additional benefits, such as increased severance pay, to older employees within the protected group may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination. The extension of those additional benefits may not be used as a means to accomplish practices otherwise prohibited by the Act.\textsuperscript{204}

EEOC regulation § 1625.2 is not ambiguous, unpersuasive, or nonbinding. The regulation is a clear and internally consistent explanation of the EEOC’s interpretation of the ADEA and is therefore entitled to \textit{Chevron} deference.\textsuperscript{205}

The Court, however, found that it was not necessary to give deference to the EEOC in \textit{Cline}.\textsuperscript{206} Specifically, the Court determined that it was not necessary to decide how much deference to give an agency when the agency was clearly wrong, as was the EEOC in the \textit{Cline} case.\textsuperscript{207} Ennis argues that the Court clarified its position on \textit{Chevron} deference in a footnote by saying “[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”\textsuperscript{208} In \textit{Cline}, she argues, the Court employed the traditional tools of statutory interpretation by looking to the legislative history of an ambiguous statute and found that Congress had the intention to protect older employees from

\textsuperscript{204} 29 C.F.R. § 1625.2. This regulation has been applied in two EEOC opinions, both of which substantiate the plain meaning interpretation of the ADEA. See, e.g., Garrett v. Runyon, 1997 WL 574739 (E.E.O.C. Sept. 5, 1997) (holding that while a tie-breaker provision in collective bargaining agreement benefited older employees, § 1625.2 provides protection from age discrimination to both the relatively older and younger individuals who fall within the ambit of the ADEA); Garrett v. Henderson, 1999 WL 909980 (E.E.O.C. Sept. 30, 1999) (reaffirming the EEOC’s previous decision over request for reconsideration).

\textsuperscript{205} See supra note 183.

\textsuperscript{206} See \textit{Cline}, 540 U.S. at 599.

\textsuperscript{207} See \textit{Cline}, 540 U.S. at 604-06 (Thomas, J., dissenting). Justice Thomas noted that “[e]ven if the Court disagrees with my interpretation of the language of the statute, it strains credulity to argue that such a reading is so unreasonable that an agency could not adopt it.” \textit{Id.} at 606.

discrimination in favor of younger employees.\textsuperscript{209} Therefore, there was no need to grant \textit{Chevron} deference to the EEOC regulation, since, as the \textit{Cline} Court concluded, the EEOC’s regulation was “clearly wrong.”\textsuperscript{210}

However, the regulation is not ambiguous and clearly states that when an employer must choose between protected individuals, the employer cannot use age to distinguish between them.\textsuperscript{211} Second, the regulation is neither foreclosed by the statutory language nor unreasonable.\textsuperscript{212} The regulation confirms that all individuals at least forty years old are protected from age discrimination without regard to their relative ages. The regulation frames the issue as requiring a choice between preferring one employee in the protected age group over another employee in the protected age group. Section 1625.2 makes clear that the employer cannot base its decision upon age when making employment decisions between persons in the protected age group. Yet this is precisely what General Dynamics did in CBA\textsuperscript{2}.\textsuperscript{213} General Dynamics permitted workers at least fifty years old by July 1, 1997, to retain their eligibility for retirement health benefits while eliminating eligibility for the same benefits for those between forty years old and fifty years old, solely because of their age.\textsuperscript{214} CBA\textsuperscript{2} clearly shows age discrimination within the protected age group, which is expressly prohibited by the EEOC’s regulation.\textsuperscript{215} Thus, given that § 1625.2 substantiates the plain meaning of the ADEA and should be afforded \textit{Chevron} deference, \textit{Cline} appears to be wrongly decided.

Additionally, though not noted by the Court, it is significant that subsections (a) and (b) of EEOC regulation § 1625.2 conflict with each other.\textsuperscript{216} While subsection (a) seems to eliminate reverse age discrimination, subsection (b) seems to recognize, as does the ADEA itself, that older employees face additional problems relating to age discrimination and must receive additional protection.\textsuperscript{217} Therefore, Ennis argues it would have been impossible for the \textit{Cline} Court to defer to both subsections of this EEOC regulation at the same time.\textsuperscript{218}

However, this logic is faulty for several reasons. First, subsection (b) does not conflict with subsection (a). Subsection (b) only permits an employer to extend additional benefits to older employees within the

\begin{itemize}
  \item \textsuperscript{209} See \textit{Cline}, 540 U.S. at 585-92.
  \item \textsuperscript{210} Id. at 600.
  \item \textsuperscript{211} 29 C.F.R. § 1625.2.
  \item \textsuperscript{212} Id. at 601 (Scalia, J., dissenting).
  \item \textsuperscript{213} Id. at 584.
  \item \textsuperscript{214} Id.
  \item \textsuperscript{215} Id.; see 29 C.F.R. § 1625.2.
  \item \textsuperscript{216} Ennis, \textit{supra} note 7, at 766.
  \item \textsuperscript{217} See Minkin, \textit{supra} note 169, at 260-61.
  \item \textsuperscript{218} Ennis, \textit{supra} note 7, at 764.
\end{itemize}
protected age group "if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination."219

Second, subsection (b) only authorizes the extension of additional benefits to older employees within the protected age group; it does not authorize the withdrawal or elimination of benefits from younger employees within the protected age group. Ennis’s argument distorts the ordinary meaning of "additional." "Additional" means "existing or coming by way of addition." Addition also means something added, over and above and besides.220 There were no additional benefits provided to the older employees in the Cline case. Instead, benefits were eliminated from younger employees within the protected age group.

Finally, the last sentence of subsection (b) provides that the extension of additional benefits to older employees may not be used as a means to accomplish practices otherwise prohibited by the ADEA.222 This ending language of subsection (b) reinforces two important points, namely that subsection (b) allows only the extension of additional benefits to older employees, not the withdrawal or elimination of benefits from younger employees, and even the extension of additional benefits to older employees must not be for the purpose of violating the substantive terms of the ADEA. Thus, subsection (a) and subsection (b) do not conflict and therefore the EEOC regulation suffers from none of the problems that Ennis describes.

2. EEOC Regulation 29 C.F.R. §1625.2 is Entitled to Chevron Deference

The Court used Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,223 to announce its now-famous two-step inquiry in reference to the level of deference it would give to agencies regarding their regulations.224 The first step is to determine whether Congress has addressed the precise issue in controversy.225 The second step is whether the agency

219. 29 C.F.R. § 1625.2(b).
222. 29 C.F.R. § 1625.2(b).
224. The Court stated:
When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

225. See id. at 862.
REVERSE DISCRIMINATION UNDER THE ADEA

interpretation represents a "reasonable" or "permissible" reading of the Act. The Supreme Court held in Chevron that:

The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

The degree of deference that courts extend to agency regulations turns on four key factors: (1) the scope of the rulemaking power extended to the agency by Congress, (2) the use of notice and comment rulemaking procedures, (3) whether that interpretive authority rests solely with one agency, and (4) whether or not the agency's regulation is based on a permissible or reasonable construction of the statute.

First, it must be determined how much authority Congress granted the EEOC regarding rulemaking with respect to the ADEA. Congress extended to the EEOC broad authority to issue rules interpreting and implementing the ADEA:

[The Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.]

This grant of rulemaking authority over the ADEA is more expansive than the more limited grant of rulemaking authority Congress granted to the EEOC with respect to Title VII. The more expansive terms of the ADEA's grant of rulemaking authority indicate that Congress intended the

---

226. Id. at 863-64.
227. Id. at 843-44. (citations omitted).
228. Central Forwarding, Inc. v. Interstate Commerce Comm'n, 698 F. 2d 1266, 1271-72 (5th Cir. 1983).
230. Compare §713(a) of Title VII, 42 U.S.C. §2000-12(a) ("The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter.").
EEOC to have the broadest possible range of rulemaking authority with respect to the ADEA.\textsuperscript{231}

Second, the EEOC engaged in notice and comment rulemaking when it enacted § 1625.2.\textsuperscript{232} Indeed, some changes to the language of the regulation resulted from the notice and comment process.\textsuperscript{233} Notice and comment rulemaking is a significant factor, suggesting that \textit{Chevron} deference is warranted.\textsuperscript{234}

Third, interpretive power over the ADEA is not split between multiple agencies but resides exclusively with the EEOC.\textsuperscript{235} This singular grant of rulemaking authority eliminates the possibility of confusion that exists when multiple agencies are given interpretive authority.\textsuperscript{236} When interpretive authority is not split between multiple agencies but resides in one clearly authoritative body, the Supreme Court generally applies \textit{Chevron} deference.\textsuperscript{237}

Once \textit{Chevron} deference is applied, there can be no question that § 1625.2 is relevant, reasonable, and that it determines whether an employer can consider age in making employment decisions regarding employees within the protected class. The regulation is unambiguous, explicit, and speaks directly to the question of discrimination between persons in the protected class. The regulation prohibits an employer from using age as a basis to distinguish between persons within the protected age group. Even


\textsuperscript{232} See 46 Fed. Reg. 47,724 (Sept. 29, 1981). These regulations were proposed in 1979, and adopted in 1981. \textit{id}.

\textsuperscript{233} The Commission explained in 46 Fed. Reg. 47,724 (Sept. 29, 1981) that it was making changes in response to public comments.


\textsuperscript{235} 29 U.S.C. § 628.

\textsuperscript{236} See, e.g., Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (refusing to apply \textit{Chevron} deference where interpretive authority for the ADA was split between three agencies, none of which had authority to interpret the term “disability” because it fell outside Titles I-V); Skidmore v. Swift, 323 U.S. 134 (1944) (where Administrator is not clearly authorized to interpret Fair Labor Standards Act, his interpretive bulletins and informal rulings are not entitled to \textit{Chevron} deference).

though the Supreme Court decided to look beyond the language of the ADEA to the legislative history, the Court should have deferred to the EEOC’s reasonable interpretation of the ADEA in § 1625.2. Although the ADEA and the EEOC regulations are clear and hence there is no reason to rely on the legislative history, the legislative history merely confirms that the plain meaning of the language in the ADEA is correct.

B. Legislative History

Although a court should not resort to the legislative history of a statute when the text is clear, the legislative history can provide insight into the legislature’s intent in enacting the statute. However, legislative history will not be used when it contradicts the plain meaning of the statute’s text. Despite the lesser value of the legislative history, it can assist a court in determining what the legislature would have done “had it possessed the foresight to anticipate what has happened since the statute’s enactment.”

In this case, the legislative history also supports the conclusion that the ADEA generally prohibits an employer from discriminating between all protected employees based solely on age. In a separate statement attached to the Senate Report, Senator Dominic presented a question concerning whether an employer would still be open to a charge of age discrimination whether he hired a forty-two year old over a sixty-two year old or a sixty-two year old over a forty-two year old. Senator Dominic noted that one committee counsel had stated that neither may sue, while another counsel had stated that both may sue.

In response to this query, Senators Javits and Yarborough, two of the Act’s principal sponsors, engaged in a colloquy on the Senate floor to clarify that the ADEA would prohibit either suit if the decision was made on the basis of age. Senator Javits began the exchange as follows:

---

238. See 2A SINGER, supra note 157, § 45.02, at 15-16; see also Eskridge & Frickey, supra note 147, at 357 (noting that legislative history has a “second-best status... as an interpretive guide”).

239. Id. at 357. As Eskridge and Frickey explain:

Unlike the statutory text, it was not enacted into law, and giving conclusive effect to clear legislative history when statutory language is ambiguous or vague is in tension with Article I requirements. It also may threaten to promote rent-seeking by private interests... Thus, even crystal-clear legislative history will not always control interpretation, and in any event other interpretive sources will be considered.

Id.

240. I say lesser value because it is difficult to know why a statute was enacted. Just because there are statements from some members of the legislature, does not mean all members of the legislature enacted the statute for that particular reason.

241. Id.


243. Id. at 16.
The Senator from Colorado, in his individual views, has raised the possibility that the bill might not forbid discrimination between two persons each of whom would be between the ages of forty and sixty-five. As I understand it, that is not the intent of the legislation. I do not think any such reading is justified by the terms of the bill. I think we should nail this down. Section four of the bill specifically prohibits discrimination against any "individual" because of his age. It does not say that the discrimination must be in favor of someone younger than age forty. In other words, if two individuals ages fifty-two and forty-two apply for the same job, and the employer selected the man age forty-two solely because he is younger than the man fifty-two, then [the employer] will have violated the act . . . . Would the Senator from Texas be kind enough to advise the Senate whether he agrees with that interpretation of the bill?244

Senator Yarborough, the floor manager of the bill, then responded as follows:

It was not the intent of the sponsors of this legislation . . . to permit discrimination in employment on account of age, whether discrimination might be attempted between a man thirty-eight and one fifty-two years of age, or between one forty-two and one fifty-two years of age. If two men applied for employment under the terms of this law, and one was forty-two and one was fifty-two, . . . [the] employer . . . could not turn either one down on the basis of the age factor . . . . The law prohibits age being a factor in the decision to hire, as to one age over the other, whichever way his decision went.245

While the stray remarks of a single representative are not controlling, those statements by the bill’s sponsors are entitled to significant weight.246 The Cline Court brushed aside the statements of Senator Yarborough as "the only item in all the 1967 hearings, reports and debates going against the grain of the common understanding of age discrimination."247

Although they are not binding on a court, statements of an act’s sponsor are entitled to deference when the statement is consistent with the plain reading and the legislative history of the act.248 Isolated statements contained in the legislative history are normally accorded very little weight, particularly when weighed against the plain language of the statute.249 However, in this case, the statements contained in the legislative history give credence to the plain language of the statute, namely, that an employer

245. 113 CONG. REC. 31, 255 (emphasis added).
248. See 2A SINGER, supra note 157, § 48.15, at 475-77.
may not discriminate against any individual within the protected class because of age. Congress, in enacting the ADEA, intended it to be a sweeping prohibition against age discrimination in the workplace, with certain narrowly tailored exceptions. Therefore, this broad intention allows for claims of reverse age discrimination brought by younger members of the protected class against employers for favoring older members of the protected class in employment decisions.

C. Supreme Court Precedent and Other Antidiscrimination Statutes

In the Title VII context, Congress used "race" to mean African American race and "sex" to mean female sex. Ennis attempts to bolster the Court's argument by arguing that age cannot be considered an immutable characteristic and as a consequence, age neither requires nor receives the same level of protection as race and sex. Additionally, she argues that the fundamental difference between employment discrimination based on age and employment discrimination based on race or sex is illustrated by the fact that Congress failed to include a prohibition on age discrimination in Title VII. Moreover, Ennis argues that the Supreme Court has never dealt with age-based treatment as carefully as race and sex classifications, which respectively enjoy strict and intermediate level scrutiny. She goes on to argue that the Court has held that age is not a suspect class, as the people within the class have not traditionally been discriminated against. Therefore, given the fundamental difference between age, race, and sex, it is not surprising that the Cline Court chose not to allow reverse age discrimination as it had done with reverse race and sex discrimination.

However, Ennis' argument fails for two reasons. First, Congress considered everyone at least forty years of age to be "older." Once a person enters the protected age group, age becomes an immutable characteristic because one is forever in the protected class, just as people who are born a particular race or sex. Second, and equally as important, Ennis argues for an analysis of a constitutional violation regarding race, sex, or age and the level of scrutiny each is entitled. However, Cline deals with a statutory

---

250. See supra notes 38-39 and accompanying text; see also supra Part V.A.1.
251. See supra text accompanying notes 209-23.
252. See infra notes 258-267 and accompanying text.
253. See Minkin, supra note 169, at 269 (arguing that age is not immutable as everyone will eventually become a member of the class).
256. For a discussion of why age is not afforded the same protection as race and gender, see generally Minkin, supra note 169, at 266-72.
interpretation and the appropriate interpretation afforded to the ADEA, not a violation of the Fourteenth Amendment. Additionally, as the Supreme Court has explained on more than one occasion, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”

Title VII cases are clearly analogous and provide further support for the plain meaning interpretation of the ADEA. In *Oncale v. Sundowner Offshore Services*, Inc., the Supreme Court held that male-on-male sexual harassment violates Title VII of the Civil Rights Act of 1964. This was not characterized as a reverse discrimination case, nor was it problematic that Congress clearly was not concerned with male-on-male sexual harassment in the workplace when it enacted Title VII. In enacting Title VII, Congress was principally concerned about employment discrimination directed against racial minorities and women; its principal concern was certainly not discrimination against men, much less discrimination in the form of male-on-male sexual harassment. The Supreme Court nonetheless concluded that such discrimination violates Title VII because the text of Title VII broadly applies to all employment decisions that discriminate against an individual because of such individual’s sex.

Similarly, in *McDonald v. Santa Fe Trail Transportation Co.*, the Supreme Court held that Title VII protects whites from employment discrimination based on race, even though discrimination against racial minorities was the main purpose behind Title VII’s prohibition against discrimination based on race. In *McDonald*, the Supreme Court relied on

---

257. 523 U.S. 75, 79 (1998); see H.J. Inc. v. NW. Bell Tel. Co., 492 U.S. 229, 248 (1989) (The occasion for enactment of the RICO statute “was the perceived need to combat organized crime,” but Congress “chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.”).

258. *Oncale*, 523 U.S. at 82.

259. See supra note 247.


261. Id. at 79-80.


263. Id. at 278-280. See 110 CONG. REC. 6552 (1964) (statement of Sen. Humphrey) (“The goals of this bill are simple ones: To extend to Negro citizens the same rights and the same opportunities that white Americans take for granted”). President Kennedy, in announcing his Civil Rights proposal, identified several social problems, such as how a “Negro baby born in America today . . . has about one-half as much chance of completing a high school as a white baby, one-third as much chance of becoming a professional man, twice as much chance of becoming unemployed, . . . and the prospects of earning only half as much.” Radio and Television Report to the American People on Civil Rights, PUB. PAPERS No. 237, at 468-469 (June, 11, 1963). He gave no examples, and cited no occurrences, of discrimination against whites or indicated that such discrimination motivated him (even in part) to introduce the bill. Considered by some to be the impetus for the submission of a Civil Rights bill to Congress, see R. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964, at 24 (1990), the 1961 Civil Rights Commission Report focused its employment section solely on discrimination against racial minorities, noting that the “twin problems” of
the fact that the language of Title VII prohibits discrimination against "any individual" because of "such individual's race." The prohibition is "not limited to discrimination against members of any particular race." The Court also relied on the EEOC's interpretation of Title VII and on statements from the legislative history of the enactment of Title VII.

Oncale and McDonald are particularly relevant to the reverse age discrimination issue because Congress modeled the ADEA's substantive prohibitions on Title VII's substantive prohibitions. Indeed, the substantive prohibitions are almost identical. Therefore, it is not surprising that Congress' prohibition in the ADEA sweeps more broadly than the immediate problem that brought about the enactment of the law. Congress enacted Title VII to protect any individual against discrimination because of race and sex, even though the principal problem that Congress sought to redress was discrimination based on a person's minority race or female sex. Similarly, Congress, by enacting the ADEA, mandated a prohibition that protects any individual in the protected class against discrimination because of age, even though the principal problem that Congress sought to redress was discrimination directed at individuals based on their relatively older age.

Even outside the context of discrimination statutes, the Supreme Court has expanded the coverage of statutes to go beyond what Congress had in mind when it enacted the statute. For example, in Nevada Department of Human Resources v. Hibbs, the Supreme Court recognized the right of a

unemployment and a lack of skilled workers "are magnified for minority groups that are subject to discrimination." U.S. COMM'N ON CIVIL RIGHTS, EMPLOYMENT: 1961 U.S. COMMISSION ON CIVIL RIGHTS REPORT 3, at 1 (1961). It also discussed and analyzed the more severe unemployment statistics of black workers compared to white workers. See id. at 1-4; see also id. at 153 (summarizing findings of the Commission, listing examples only of discrimination against blacks). The report presented no evidence of any problems (or even any incidents) of discrimination against whites. The congressional debates and hearings, although filled with statements decrying discrimination against racial minorities and setting forth the disadvantages those minorities suffered, contain no references to any problem of discrimination against whites. See, e.g., 110 CONG. REC. 7204 (1964) (statement of Sen. Clark) ("I turn now to the background of racial discrimination in the job market, which is the basis for the need for this legislation. I suggest that economics is at the heart of racial bias. The Negro has been condemned to poverty because of lack of equal job opportunities. This poverty has kept the Negro out of the mainstream of American life.").

265. 427 U.S. at 278-79.
266. Id. at 279-80.
267. See id. at 280 (citing 110 CONG. REC. 2578 (1964) (remarks of Rep. Celler); id. at 7218 (memorandum of Sen. Clark); id. at 7213 (memorandum of Sens. Clark and Case); id. at 8912 (remarks of Sen. Williams).
268. Compare 29 U.S.C. 623(a)(1) (making it unlawful for an employer to "discriminate against any individual . . . because of such individual's age") with 42 U.S.C. 2000e-2(a)(1) (making it unlawful for an employer to "discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin").
man to sue for family leave to care for his ailing wife under the Family and Medical Leave Act of 1993 (FMLA).\textsuperscript{270} The Court acknowledged that one of the primary purposes of the FMLA was to remedy sexual stereotyping in the workplace and counter widely-held beliefs that women should carry a heavier share of family duties.\textsuperscript{271} Once more, Hibbs was neither classified nor understood to be a case of reverse discrimination. Hibbs was a case where the employee fell within the protected class and was thus entitled to protection by the FMLA.

In Oncale, McDonald, and Hibbs, the Supreme Court has recognized that when Congress chooses to protect a particular characteristic such as race, sex, or age and prohibits employers from acting on that basis, any person who is covered by the statute has a right of action when the employer acts based on that characteristic. Just as all persons can sue for race and sex discrimination when they are singled out for adverse treatment on those grounds, all people at least forty years old should have a claim of age discrimination when an employer makes an employment decision on the basis of age.

Disability discrimination under the Americans with Disabilities Act (ADA) operates in a different fashion while proving a very important point. Under the ADA, only employees who meet the statutory definition of "otherwise qualified individuals with a disability" have standing to sue.\textsuperscript{272} Therefore, people who are not disabled cannot sue a business for refusing to hire them because they do not fall within the class of protected people under the ADA. This limitation on those protected by the ADA suggests that Congress knew how to draft a discrimination statute to limit reverse discrimination. Moreover, it proves that Congress actually limits reverse discrimination when it determines such limitation to be appropriate. Congress limited the class of persons eligible to bring ADEA claims, which limits the protections of the Act to people at least forty years old. Just as Congress precluded people under forty years old from bringing an action for age discrimination,\textsuperscript{273} it excluded non-disabled people from bringing suit under the ADA. It is clear that the structure and operation of other nondiscrimination statutes reinforces the plain-meaning interpretation of the ADEA.

Congress' decision to limit the ADEA's protections to persons who are at least forty years old does not refute the notion that the ADEA forbids

\textsuperscript{271} Hibbs, 538 U.S. at 722-23.
\textsuperscript{273} Congress has determined that members of the workforce at least forty years old are entitled to protection from arbitrary discrimination on account of their age. Congress was well aware of the plight of middle-aged workers when they determined the parameters of the protected age group. S. REP. NO. 90-723 (1967).
discrimination against younger individuals in favor of older workers. Instead, it only shows that Congress chose not to prohibit discrimination because of an individual’s age when the aggrieved employee is under forty years old. Clearly, Congress determined that employees who are under forty years old, as a class, do not face the same difficulties in the workplace or in regaining employment, as employees who are at least forty years old. Therefore, Congress chose not to extend protection to employees who are under forty years old. With respect to those employees who are at least forty years old, however, Congress enacted an expansive prohibition against any discrimination based on age, not just discrimination based on older age.

There is nothing absurd about permitting a forty year old, but not a thirty-nine year old, to challenge a preference in favor of a fifty year old that is based on age. Congress made a conscious decision to protect people who are forty years old, but not people who are thirty-nine years old, from arbitrary age discrimination. For example, there is no question that an employee who is at least forty years old may sue under the ADEA when discriminated against in favor of someone who is thirty years old, but that a thirty-nine year old who is discriminated against in favor of the same thirty year old may not sue. For the same reason, an employee who is at least forty years old may sue to challenge a preference in favor of someone who is fifty years old, but a person who is thirty-nine years old may not sue over the same decision. Although in both situations, the thirty-nine year old and forty year old may be aggrieved by arbitrary age consideration, Congress rationally decided that people at least forty years old have a greater difficulty in finding reemployment than people under forty years old, and thus protection was extended only to those people at least forty years old.

Cline was decided incorrectly by the Supreme Court. The text of the ADEA is clear on its face. There is no reason to go beyond the plain meaning of the text. However, even if the text were unclear, the EEOC was tasked by Congress to enact interpretive regulations. Those regulations speak directly to the issue of reverse age discrimination and clearly allow for such a claim. The legislative history even bolsters the plain meaning of [274] Such an interpretation also comports with the many findings of WILLARD WIRTZ, U.S. DEP’T. OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965), and the parallel findings in the ADEA itself. See, e.g., 29 U.S.C. § 621(a)(1) (finding that “older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs”); § 621(a)(3) (finding that “the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers”).

275. Cf. O’Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996) (noting that the ADEA “does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older”).
the ADEA and the EEOC regulations. Finally, the Supreme Court precedent interpreting other anti-discrimination statutes makes it even more obvious that the ADEA allows for a claim of reverse age discrimination.

VI.
CONCLUSION

The discrimination prohibited by the ADEA is discrimination "because of [an] individual's age," though the prohibition is "limited to individuals who are at least 40 years of age[.]") This language does not ban discrimination against employees because they are aged forty or older; it bans discrimination against employees because of their age, but limits the protected class to those who are forty or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age.276

Justice Scalia made this statement for a unanimous Supreme Court in Consolidated Coin. The Supreme Court decision in Cline does not allow the purpose of the ADEA to be truly realized. This decision allows age discrimination to persist because it allows an employer to disfavor a forty year old employee even though that employee is protected by the ADEA against such treatment. In Cline, the Supreme Court incorrectly decided that for employees within the protected class, employers are permitted to favor older employees over younger employees. This ruling provides some people within the protected class less rights and protection than others what receive and is clearly not the intention of Congress. As a result, this decision sets back the move for equal rights for older employees.

The Supreme Court incorrectly decided Cline. The plain meaning of the ADEA, EEOC's interpretive regulations, the ADEA's legislative history, and prior Supreme Court case law based on the interpretation of other anti-discrimination statutes call for one result. That result is that the ADEA allows for a claim of reverse age discrimination.

The Cline decision leaves very few avenues open for people who wish to file reverse age discrimination claims. However, because the ADEA does not preempt state age discrimination laws, states are free to increase the ADEA's protections.277 This fact has provided states the opportunity to develop their own laws governing age discrimination. Thus far only four

276. Id. at 312 (citation omitted).

277. Section 633(a) states that the ADEA will not affect the jurisdiction of the state agencies performing similar functions, and § 633(b) gives state proceedings some priority over federal actions relating to age discrimination. 29 U.S.C. §§ 633(a)-(b) (2000). See also Hulme v. Barrett, 449 N.W.2d 629, 631 (Iowa 1989) (deciding "the federal Act does not preempt state age discrimination laws"); Adams v. Leatherbury, 388 So.2d 510, 513 (Ala. 1980) (finding the ADEA does not preempt state law); Maine Human Rts. Comm'n v. Kennebec Water Power Co., 468 A.2d 307, 310 (Me. 1983) (determining that the "ADEA does not preempt state age discrimination in employment law").
states have made an allowance for reverse age discrimination claims as courts have begun to interpret state antidiscrimination laws to allow reverse age discrimination claims.\(^{278}\)

A second option would be for Congress to amend the ADEA once more and inform the courts of its original intention, namely to prevent all kinds of age discrimination. Congress should clarify that employers are not allowed to favor one protected employee over another based solely on relative age. Congress should emphasize to the Supreme Court that it meant what it said when it enacted the ADEA: that the discrimination prohibited by the ADEA is discrimination because of an individual’s age and everyone within the protected class is protected equally.

Based on the plain meaning of the ADEA, the EEOC regulations, the legislative history, and prior Supreme Court decisions interpreting antidiscrimination statutes \textit{Cline} should have been an easy decision. Instead the Supreme Court went out of their way to create a decision that is contrary to logic. Relatively younger employees in the ADEA’s protected class must now seek other alternatives to have their rights protected. Congress is unlikely to amend the ADEA\(^{279}\) and it seems the only avenue available is through state statutes that protect against age discrimination. Because only a few states recognize this cause of action, it seems that a large group of those Congress intended to protect are now and forever unprotected.

