GILMER *v.* INTERSTATE/JOHNSON LANE CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 90–18. Argued January 14, 1991—Decided May 13, 1991

Petitioner Gilmer was required by respondent, his employer, to register as a securities representative with, among others, the New York Stock Exchange (NYSE). His registration application contained, *inter alia*, an agreement to arbitrate when required to by NYSE rules. NYSE Rule 347 provides for arbitration of any controversy arising out of a registered representative's employment or termination of employment. Respondent terminated Gilmer's employment at age 62. Thereafter, he filed a charge with the Equal Employment Opportunity Commission (EEOC) and brought suit in the District Court, alleging that he had been discharged in violation of the Age Discrimination in Employment Act of 1967 (ADEA). Respondent moved to compel arbitration, relying on the agreement in Gilmer's registration application and the Federal Arbitration Act (FAA). The court denied the motion, based on *Alexander v. Gardner-Denver Co.*, 415 U. S. 36—which held that an employee's suit under Title VII of the Civil Rights Act of 1964 is not foreclosed by the prior submission of his claim to arbitration under the terms of a collective-bargaining agreement—and because it concluded that Congress intended to protect ADEA claimants from a waiver of the judicial forum. The Court of Appeals reversed.

Held: An ADEA claim can be subjected to compulsory arbitration. Pp. 24–35.

(a) Statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. See, *e. g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614. Since the FAA manifests a liberal federal policy favoring arbitration, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U. S. 1, 24, and since neither the text nor the legislative history of the ADEA explicitly precludes arbitration, Gilmer is bound by his agreement to arbitrate unless he can show an inherent conflict between arbitration and the ADEA's underlying purposes. Pp. 24–26.

(b) There is no inconsistency between the important social policies furthered by the ADEA and enforcing agreements to arbitrate age discrimination claims. While arbitration focuses on specific disputes between the parties involved, so does judicial resolution of claims, yet both can further broader social purposes. Various other laws, including

antitrust and securities laws and the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), are designed to advance important public policies, but claims under them are appropriate for arbitration. Nor will arbitration undermine the EEOC's role in ADEA enforcement, since an ADEA claimant is free to file an EEOC charge even if he is precluded from instituti g suit; since the EEOC has independent authority to investigate age discrimination; since the ADEA does not indicate that Congress intended that the EEOC be involved in all disputes; and since an administrative agency's mere involvement in a statute's enforcement is insufficient to preclude arbitration, see, *e. g.*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U. S. 477. Moreover, compulsory arbitration does not improperly deprive claimants of the judicial forum provided for by the ADEA: Congress did not explicitly preclude arbitration or other nonjudicial claims resolutions; the ADEA's flexible approach to claims resolution, which permits the EEOC to pursue informal resolution methods, suggests that out-of-court dispute resolution is consistent with the statutory scheme; and arbitration is consistent with Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts, since arbitration also advances the objective of allowing claimants a broader right to select the dispute resolution forum. Pp. 27–29.

(c) Gilmer's challenges to the adequacy of arbitration procedures are insufficient to preclude arbitration. This Court declines to indulge his speculation that the parties and the arbitral body will not retain competent, conscientious, and impartial arbitrators, especially when both the NYSE rules and the FAA protect against biased panels. Nor is there merit to his argument that the limited discovery permitted in arbitration will make it difficult to prove age discrimination, since it is unlikely that such claims require more extensive discovery than RICO and antitrust claims, and since there has been no showing that the NYSE discovery provisions will prove insufficient to allow him a fair opportunity to prove his claim. His argument that arbitrators will n issue written opinions, resulting in a lack of public knowledge of employers' discriminatory policies, an inability to obtain effective appellate review, and a stifling of the law's development, is also rejected, since the NYSE rules require that arbitration awards be in writing and be made available to the public; since judicial decisions will continue to be issued for ADEA claimants without arbitration agreements; and since Gilmer's argument applies equally to settlements of ADEA claims. His argument that arbitration procedures are inadequate because they do not provide for broad equitable relief is unpersuasive as well, since arbitrators have the power to fashion equitable relief; since the NYSE rules do not restrict the type of relief an arbitrator may award and provide for collective relief; since the

ADEA's provision for the possibility of collective action does not mean that individual attempts at conciliation are barred; and since arbitration agreements do not preclude the EEOC itself from seeking class-wide and equitable relief. Pp. 30–32.

(d) The unequal bargaining power between employers and employees is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context. Cf., *e. g., Rodriguez de Quijas, supra,* at 484. Such a claim is best left for resolution in specific cases. Here, there is no indication that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause. Pp. 32–33.

(e) Gilmer's reliance on *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, and its progeny, is also misplaced. Those cases involved the issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims, not the enforceability of an agreement to arbitrate statutory claims. The arbitration in those cases occurred in the context of a collective-bargaining agreement, and thus there was concern about the tension between collective representation and individual statutory rights that is not applicable in this case. And those cases were not decided under the FAA. Pp. 33–35.

895 F. 2d 195, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined; *post*, p. 36.

John T. Allred argued the cause and filed a brief for petitioner.

James B. Spears, Jr., argued the cause for respondent. With him on the brief was *Robert S. Phifer.**

*Briefs of *amici curiae* urging reversal were filed for the American Association of Retired Persons by *Cathy Ventrell-Monsees* and *Robert L. Liebross;* and for the American Federation of Labor et al. by *Laurence Gold* and *Marsha S. Berzon.*

Briefs of *amici curiae* urging affirmance were filed for the Center for Public Resources, Inc., by *Jay W. Waks;* for the Chamber of Commerce of the United States of America by *Peter G. Nash, Dixie L. Atwater, Michael J. Murphy,* and *Stephen A. Bokat;* for the Equal Employment Advisory Council et al. by *Robert E. Williams, Douglas S. McDowell, Ann Elizabeth Reesman,* and *Donald L. Goldman;* for the Lawyers' Committee for Civil Rights Under Law by *Alan E. Kraus, Nicholas deB. Katzenbach, Robert F. Mullen, David S. Tatel, Thomas J. Henderson,* and *Richard T. Seymour;* and for the Securities Industry Association, Inc., by *A. Robert Pietrzak* and *William J. Fitzpatrick.*

JUSTICE WHITE delivered the opinion of the Court.

The question presented in this case is whether a claim under the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.*, can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application. The Court of Appeals held that it could, 895 F. 2d 195 (CA4 1990), and we affirm.

I

Respondent Interstate/Johnson Lane Corporation (Interstate) hired petitioner Robert Gilmer as a Manager of Financial Services in May 1981. As required by his employment, Gilmer registered as a securities representative with several stock exchanges, including the New York Stock Exchange (NYSE). See App. 15–18. His registration application, entitled "Uniform Application for Securities Industry Registration or Transfer," provided, among other things, that Gilmer "agree[d] to arbitrate any dispute, claim or controversy" arising between him and Interstate "that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register." *Id.*, at 18. Of relevance to this case, NYSE Rule 347 provides for arbitration of "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative." App. to Brief for Respondent 1.

Interstate terminated Gilmer's employment in 1987, at which time Gilmer was 62 years of age. After first filing an age discrimination charge with the Equal Employment Opportunity Commission (EEOC), Gilmer subsequently brought suit in the United States District Court for the Western District of North Carolina, alleging that Interstate had discharged him because of his age, in violation of the

ADEA. In response to Gilmer's complaint, Interstate filed in the District Court a motion to compel arbitration of the ADEA claim. In its motion, Interstate relied upon the arbitration agreement in Gilmer's registration application, as well as the Federal Arbitration Act (FAA), 9 U. S. C. § 1 *et seq.* The District Court denied Interstate's motion, based on this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), and because it concluded that "Congress intended to protect ADEA claimants from the waiver of a judicial forum." App. 87. The United States Court of Appeals for the Fourth Circuit reversed, finding "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements." 895 F. 2d, at 197. We granted certiorari, 498 U. S. 809 (1990), to resolve a conflict among the Courts of Appeals regarding the arbitrability of ADEA claims.[1]

II

The FAA was originally enacted in 1925, 43 Stat. 883, and then reenacted and codified in 1947 as Title 9 of the United States Code. Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts. *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 219–220, and n. 6 (1985); *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 510, n. 4 (1974). Its primary substantive provision states that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of

[1] Compare the decision below with *Nicholson* v. *CPC Int'l Inc.*, 877 F. 2d 221 (CA3 1989).

any contract." 9 U. S. C. § 2. The FAA also provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration, § 3, and for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement, § 4. These provisions manifest a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 24 (1983).[2]

[2] Section 1 of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U. S. C. § 1. Several *amici curiae* in support of Gilmer argue that that section excludes from the coverage of the FAA *all* "contracts of employment." Gilmer, however, did not raise the issue in the courts below; it was not addressed there; and it was not among the questions presented in the petition for certiorari. In any event, it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment. The FAA requires that the arbitration clause being enforced be in writing. See 9 U. S. C. §§ 2, 3. The record before us does not show, and the parties do not contend, that Gilmer's employment agreement with Interstate contained a written arbitration clause. Rather, the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate. The lower courts addressing the issue uniformly have concluded that the exclusionary clause in § 1 of the FAA is inapplicable to arbitration clauses contained in such registration applications. See, *e. g.*, *Dickstein* v. *DuPont*, 443 F. 2d 783 (CA1 1971); *Malison* v. *Prudential-Bache Securities, Inc.*, 654 F. Supp. 101, 104 (WDNC 1987); *Legg, Mason & Co.* v. *Mackall & Coe, Inc.*, 351 F. Supp. 1367 (DC 1972); *Tonetti* v. *Shirley*, 219 Cal. Rptr. 616, 618, 173 Cal. App. 3d 1144 (1985); see also *Stokes* v. *Merrill Lynch, Pierce, Fenner & Smith*, 523 F. 2d 433, 436 (CA6 1975). We implicitly assumed as much in *Perry* v. *Thomas*, 482 U. S. 483 (1987), where we held that the FAA required a former employee of a securities firm to arbitrate his statutory wage claim against his former employer, pursuant to an arbitration clause in his registration application. Unlike the dissent, see *post*, at 38–41, we choose to follow the plain language of the FAA and the weight of authority, and we therefore hold that § 1's exclusionary clause does not apply to Gilmer's arbitration agreement. Consequently, we leave for another day the issue raised by *amici curiae*.

It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. Indeed, in recent years we have held enforceable arbitration agreements relating to claims arising under the Sherman Act, 15 U. S. C. §§ 1–7; § 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1961 *et seq.*; and § 12(2) of the Securities Act of 1933, 15 U. S. C. § 77*l*(2). See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614 (1985); *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220 (1987); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477 (1989). In these cases we recognized that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi*, 473 U. S., at 628.

Although all statutory claims may not be appropriate for arbitration, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Ibid.* In this regard, we note that the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims. See *McMahon*, 482 U. S., at 227. If such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an "inherent conflict" between arbitration and the ADEA's underlying purposes. See *ibid.* Throughout such an inquiry, it should be kept in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone*, 460 U. S., at 24.

III

Gilmer concedes that nothing in the text of the ADEA or its legislative history explicitly precludes arbitration. He

argues, however, that compulsory arbitration of ADEA claims pursuant to arbitration agreements would be inconsistent with the statutory framework and purposes of the ADEA. Like the Court of Appeals, we disagree.

A

Congress enacted the ADEA in 1967 "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U. S. C. § 621(b). To achieve those goals, the ADEA, among other things, 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." § 623(a)(1). This proscription is enforced both by private suits and by the EEOC. In order for an aggrieved individual to bring suit under the ADEA, he or she must first file a charge with the EEOC and then wait at least 60 days. § 626(d). An individual's right to sue is extinguished, however, if the EEOC institutes an action against the employer. § 626(c)(1). Before the EEOC can bring such an action, though, it must "attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." § 626(b); see also 29 CFR § 1626.15 (1990).

As Gilmer contends, the ADEA is designed not only to address individual grievances, but also to further important social policies. See, *e. g.*, *EEOC* v. *Wyoming*, 460 U. S. 226, 231 (1983). We do not perceive any inherent inconsistency between those policies, however, and enforcing agreements to arbitrate age discrimination claims. It is true that arbitration focuses on specific disputes between the parties in-

volved. The same can be said, however, of judicial resolution of claims. Both of these dispute resolution mechanisms nevertheless also can further broader social purposes. The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but, as noted above, claims under those statutes are appropriate for arbitration. "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi*, *supra*, at 637.

We also are unpersuaded by the argument that arbitration will undermine the role of the EEOC in enforcing the ADEA. An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action. Indeed, Gilmer filed a charge with the EEOC in this case. In any event, the EEOC's role in combating age discrimination is not dependent on the filing of a charge; the agency may receive information concerning alleged violations of the ADEA "from any source," and it has independent authority to investigate age discrimination. See 29 CFR §§ 1626.4, 1626.13 (1990). Moreover, nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes. Such disputes can be settled, for example, without any EEOC involvement. See, *e. g.*, *Coventry* v. *United States Steel Corp.*, 856 F. 2d 514, 522 (CA3 1988); *Moore* v. *McGraw Edison Co.*, 804 F. 2d 1026, 1033 (CA8 1986); *Runyan* v. *National Cash Register Corp.*, 787 F. 2d 1039, 1045 (CA6), cert. denied, 479 U. S. 850 (1986).[3] Finally, the mere involvement of an administrative

[3] In the recently enacted Older Workers Benefit Protection Act, Pub. L. 101–433, 104 Stat. 978, Congress amended the ADEA to provide that "[a]n individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary." See § 201. Congress also specified

agency in the enforcement of a statute is not sufficient to preclude arbitration. For example, the Securities Exchange Commission is heavily involved in the enforcement of the Securities Exchange Act of 1934 and the Securities Act of 1933, but we have held that claims under both of those statutes may be subject to compulsory arbitration. See *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220 (1987); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477 (1989).

Gilmer also argues that compulsory arbitration is improper because it deprives claimants of the judicial forum provided for by the ADEA. Congress, however, did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the ADEA. "[I]f Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." *Mitsubishi*, 473 U. S., at 628. Moreover, Gilmer's argument ignores the ADEA's flexible approach to resolution of claims. The EEOC, for example, is directed to pursue "informal methods of conciliation, conference, and persuasion," 29 U. S. C. § 626(b), which suggests that out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress. In addition, arbitration is consistent with Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts, see 29 U. S. C. § 626(c)(1) (allowing suits to be brought "in any court of competent jurisdiction"), because arbitration agreements, "like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise." *Rodriguez de Quijas*, *supra*, at 483.

certain conditions that must be met in order for a waiver to be knowing and voluntary. *Ibid.*

B

In arguing that arbitration is inconsistent with the ADEA, Gilmer also raises a host of challenges to the adequacy of arbitration procedures. Initially, we note that in our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims. Such generalized attacks on arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas, supra,* at 481. Consequently, we address these arguments only briefly.

Gilmer first speculates that arbitration panels will be biased. However, "[w]e decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators." *Mitsubishi, supra,* at 634. In any event, we note that the NYSE arbitration rules, which are applicable to the dispute in this case, provide protections against biased panels. The rules require, for example, that the parties be informed of the employment histories of the arbitrators, and that they be allowed to make further inquiries into the arbitrators' backgrounds. See 2 CCH New York Stock Exchange Guide ¶2608, p. 4314 (Rule 608) (1991) (hereinafter 2 N. Y. S. E. Guide). In addition, each party is allowed one peremptory challenge and unlimited challenges for cause. *Id.*, ¶2609, at 4315 (Rule 609). Moreover, the arbitrators are required to disclose "any circumstances which might preclude [them] from rendering an objective and impartial determination." *Id.*, ¶2610, at 4315 (Rule 610). The FAA also protects against bias, by providing that courts may overturn arbitration decisions "[w]here there was evident partiality or corruption in the arbitrators." 9 U. S. C.

§ 10(b). There has been no showing in this case that those provisions are inadequate to guard against potential bias.

Gilmer also complains that the discovery allowed in arbitration is more limited than in the federal courts, which he contends will make it difficult to prove discrimination. It is unlikely, however, that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as RICO and antitrust claims. Moreover, there has been no showing in this case that the NYSE discovery provisions, which allow for document production, information requests, depositions, and subpoenas, see 2 N. Y. S. E. Guide ¶2619, pp. 4318–4320 (Rule 619); Securities and Exchange Commission Order Approving Proposed Rule Changes by New York Stock Exchange, Inc., Nat. Assn. of Securities Dealers, Inc., and the American Stock Exchange, Inc., Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses, 54 Fed. Reg. 21144, 21149–21151 (1989), will prove insufficient to allow ADEA claimants such as Gilmer a fair opportunity to present their claims. Although those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi, supra,* at 628. Indeed, an important counterweight to the reduced discovery in NYSE arbitration is that arbitrators are not bound by the rules of evidence. See 2 N. Y. S. E. Guide ¶2620, p. 4320 (Rule 620).

A further alleged deficiency of arbitration is that arbitrators often will not issue written opinions, resulting, Gilmer contends, in a lack of public knowledge of employers' discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law. The NYSE rules, however, do require that all arbitration awards be in writing, and that the awards contain the names of the parties, a summary of the issues in controversy, and a

description of the award issued. See *id.*, ¶¶ 2627(a), (e), at 4321 (Rule 627(a), (e)). In addition, the award decisions are made available to the public. See *id.*, ¶ 2627(f), at 4322 (Rule 627(f)). Furthermore, judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements. Finally, Gilmer's concerns apply equally to settlements of ADEA claims, which, as noted above, are clearly allowed.[4]

It is also argued that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions. As the court below noted, however, arbitrators do have the power to fashion equitable relief. 895 F. 2d, at 199–200. Indeed, the NYSE rules applicable here do not restrict the types of relief an arbitrator may award, but merely refer to "damages and/or other relief." 2 N. Y. S. E. Guide ¶ 2627(e), p. 4321 (Rule 627(e)). The NYSE rules also provide for collective proceedings. *Id.*, ¶ 2612(d), at 4317 (Rule 612(d)). But "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Nicholson* v. *CPC Int'l Inc.*, 877 F. 2d 221, 241 (CA3 1989) (Becker, J., dissenting). Finally, it should be remembered that arbitration agreements will not preclude the *EEOC* from bringing actions seeking class-wide and equitable relief.

C

An additional reason advanced by Gilmer for refusing to enforce arbitration agreements relating to ADEA claims is

[4] Gilmer also contends that judicial review of arbitration decisions is too limited. We have stated, however, that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute" at issue. *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 232 (1987).

his contention that there often will be unequal bargaining power between employers and employees. Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context. Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we nevertheless held in *Rodriguez de Quijas* and *McMahon* that agreements to arbitrate in that context are enforceable. See 490 U. S., at 484; 482 U. S., at 230. As discussed above, the FAA's purpose was to place arbitration agreements on the same footing as other contracts. Thus, arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2. "Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *Mitsubishi*, 473 U. S., at 627. There is no indication in this case, however, that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application. As with the claimed procedural inadequacies discussed above, this claim of unequal bargaining power is best left for resolution in specific cases.

IV

In addition to the arguments discussed above, Gilmer vigorously asserts that our decision in *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), and its progeny—*Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728 (1981), and *McDonald* v. *West Branch*, 466 U. S. 284 (1984)—preclude arbitration of employment discrimination claims. Gilmer's reliance on these cases, however, is misplaced.

In *Gardner-Denver*, the issue was whether a discharged employee whose grievance had been arbitrated pursuant to

an arbitration clause in a collective-bargaining agreement was precluded from subsequently bringing a Title VII action based upon the conduct that was the subject of the grievance. In holding that the employee was not foreclosed from bringing the Title VII claim, we stressed that an employee's contractual rights under a collective-bargaining agreement are distinct from the employee's statutory Title VII rights:

> "In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence." 415 U. S., at 49–50.

We also noted that a labor arbitrator has authority only to resolve questions of contractual rights. *Id.*, at 53–54. The arbitrator's "task is to effectuate the intent of the parties" and he or she does not have the "general authority to invoke public laws that conflict with the bargain between the parties." *Id.*, at 53. By contrast, "in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process." *Id.*, at 54. We further expressed concern that in collective-bargaining arbitration "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Id.*, at 58, n. 19.[5]

[5] The Court in *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), also expressed the view that arbitration was inferior to the judicial process for resolving statutory claims. *Id.*, at 57–58. That "mistrust of the arbitral process," however, has been undermined by our recent arbitration decisions. *McMahon*, 482 U. S., at 231–232. "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626–627 (1985).

Barrentine and *McDonald* similarly involved the issue whether arbitration under a collective-bargaining agreement precluded a subsequent statutory claim. In holding that the statutory claims there were not precluded, we noted, as in *Gardner-Denver*, the difference between contractual rights under a collective-bargaining agreement and individual statutory rights, the potential disparity in interests between a union and an employee, and the limited authority and power of labor arbitrators.

There are several important distinctions between the *Gardner-Denver* line of cases and the case before us. First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA, which, as discussed above, reflects a "liberal federal policy favoring arbitration agreements." *Mitsubishi*, 473 U. S., at 625. Therefore, those cases provide no basis for refusing to enforce Gilmer's agreement to arbitrate his ADEA claim.

V

We conclude that Gilmer has not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

Section 1 of the Federal Arbitration Act (FAA) states:

> "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U. S. C. § 1.

The Court today, in holding that the FAA compels enforcement of arbitration clauses even when claims of age discrimination are at issue, skirts the antecedent question whether the coverage of the Act even extends to arbitration clauses contained in employment contracts, regardless of the subject matter of the claim at issue. In my opinion, arbitration clauses contained in employment agreements are specifically exempt from coverage of the FAA, and for that reason respondent Interstate/Johnson Lane Corporation cannot, pursuant to the FAA, compel petitioner to submit his claims arising under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. § 621 *et seq.*, to binding arbitration.

I

Petitioner did not, as the majority correctly notes, *ante*, at 25, n. 2, raise the issue of the applicability of the FAA to employment contracts at any stage of the proceedings below. Nor did petitioner raise the coverage issue in his petition for writ of certiorari before this Court. It was *amici* who first raised the argument in their briefs in support of petitioner prior to oral argument of the case. See Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae;* Brief for American Association of Retired Persons as *Amicus Curiae;* Brief for Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* 17–18.

Notwithstanding the apparent waiver of the issue below, I believe that the Court should reach the issue of the coverage of the FAA to employment disputes because resolution of the

question is so clearly antecedent to disposition of this case. On a number of occasions, this Court has considered issues waived by the parties below and in the petition for certiorari because the issues were so integral to decision of the case that they could be considered "fairly subsumed" by the actual questions presented. See, *e. g.*, *Teague* v. *Lane*, 489 U. S. 288, 300 (1989) ("The question of retroactivity with regard to petitioner's fair cross section claim has been raised only in an *amicus* brief. Nevertheless, that question is not foreign to the parties, who have addressed retroactivity with respect to petitioner's *Batson* claim. Moreover, our *sua sponte* consideration of retroactivity is far from novel" (citations omitted)); *Batson* v. *Kentucky*, 476 U. S. 79, 84–85, n. 4 (1986) (notwithstanding petitioner's seemingly deliberate failure to raise the equal protection issue, "[w]e agree with the State that resolution of petitioner's claim properly turns on application of equal protection principles and express no view on the merits of any of petitioner's Sixth Amendment arguments"); *Mapp* v. *Ohio*, 367 U. S. 643, 646, n. 3 (1961) ("Although appellant chose to urge what may have appeared to be the surer ground for favorable disposition and did not insist that *Wolf* be overruled, the *amicus curiae*, who was also permitted to participate in the oral argument, did urge the Court to overrule *Wolf*"). See also R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 6.26 (6th ed. 1986) (describing rule concerning need for presenting questions below and in petition for certiorari, and deviations from rule).

Only this Term, the Court has on at least two occasions decided cases on grounds not argued in any of the courts below or in the petitions for certiorari. In *Arcadia* v. *Ohio Power Co.*, 498 U. S. 73 (1990), we decided the case on an issue that not only was not raised below or in any of the papers in this Court, but that also was not raised at any point during oral argument before the Court. "In our view, however," the decided question was "antecedent to these [issues presented] and ultimately dispositive of the present dispute." *Id.*, at

77. Similarly, in *McCleskey* v. *Zant*, 499 U. S. 467 (1991), the Court issued a decision on a question which the parties had not argued below and evidently had not anticipated would be at issue in this Court, "since respondent did not even mention *Sykes* or cause-and-prejudice in its brief or at oral argument, much less request the Court to adopt this standard." *Id.*, at 522–523 (MARSHALL, J., dissenting).

In my opinion the considerations in favor of reaching an issue not presented below or in the petition for certiorari are more compelling in this case than in the cited cases. Here the issue of the applicability of the FAA to employment contracts was adequately briefed and raised by the *amici* in support of petitioner. More important, however, is that respondent and its *amici* had full opportunity to brief and argue the same issue in opposition. See Brief for Respondent 42–50; Brief for Securities Industry Association, Inc., as *Amicus Curiae* 18–20; Brief for Equal Employment Advisory Council et al. as *Amici Curiae* 14–16. Moreover, the Court amply raised the issue with the parties at oral argument, at which both sides were on notice and fully prepared to argue the merits of the question. Finally, as in *Arcadia*, the issue whether the FAA even covers employment disputes is clearly "antecedent . . . and ultimately dispositive" of the question whether courts and respondent may rely on the FAA to compel petitioner to submit his ADEA claims to arbitration.

II

The Court, declining to reach the issue for the reason that petitioner never raised it below, nevertheless concludes that "it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment. . . . Rather, the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate." *Ante*, at 25, n. 2. In my

opinion the Court too narrowly construes the scope of the exclusion contained in § 1 of the FAA.

There is little dispute that the primary concern animating the FAA was the perceived need by the business community to overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities. The Act was drafted by a committee of the American Bar Association (ABA), acting upon instructions from the ABA to consider and report upon "the further extension of the principle of commercial arbitration." Report of the Forty-third Annual Meeting of the ABA, 45 A. B. A. Rep. 75 (1920). At the Senate Judiciary Subcommittee hearings on the proposed bill, the chairman of the ABA committee responsible for drafting the bill assured the Senators that the bill "is not intended [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this." Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923). At the same hearing, Senator Walsh stated:

> "The trouble about the matter is that a great many of these contracts that are entered into are really not [voluntary] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment. A man says, 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all." *Ibid.*

Given that the FAA specifically was intended to exclude arbitration agreements between employees and employers, I see no reason to limit this exclusion from coverage to arbitration clauses contained in agreements entitled "Contract of Employment." In this case, the parties conceded at oral argument that Gilmer had no "contract of employment" as such with respondent. Gilmer was, however, required as a condition of his employment to become a registered representative of several stock exchanges, including the New York Stock Exchange (NYSE). Just because his agreement to arbitrate any "dispute, claim or controversy" with his employer that arose out of the employment relationship was contained in his application for registration before the NYSE rather than in a specific contract of employment with his employer, I do not think that Gilmer can be compelled pursuant to the FAA to arbitrate his employment-related dispute. Rather, in my opinion the exclusion in § 1 should be interpreted to cover any agreements by the employee to arbitrate disputes with the employer arising out of the employment relationship, particularly where such agreements to arbitrate are conditions of employment.

My reading of the scope of the exclusion contained in § 1 is supported by early judicial interpretations of the FAA. As of 1956, three Courts of Appeals had held that the FAA's exclusion of "contracts of employment" referred not only to individual contracts of employment, but also to collective-bargaining agreements. See *Lincoln Mills of Ala.* v. *Textile Workers Union of America*, 230 F. 2d 81 (CA5 1956), rev'd, 353 U. S. 448 (1957); *United Electrical, Radio & Machine Workers of America* v. *Miller Metal Products, Inc.*, 215 F. 2d 221 (CA4 1954); *Amalgamated Assn. of Street, Electric R. and Motor Coach Employees of America* v. *Pennsylvania Greyhound Lines, Inc.*, 192 F. 2d 310 (CA3 1951). Indeed, the application of the FAA's exclusionary clause to arbitration provisions in collective-bargaining agreements was one of the issues raised in the petition for certiorari and

briefed at great length in *Lincoln Mills* and its companion cases, *Goodall-Sanford, Inc.* v. *Textile Workers*, 353 U. S. 550 (1957), and *General Electric Co.* v. *Electrical Workers*, 353 U. S. 547 (1957). Although the Court decided the enforceability of the arbitration provisions in the collective-bargaining agreements by reference to § 301 of the Labor Management Relations Act, 1947, 29 U. S. C. § 185, it did not reject the Courts of Appeals' holdings that the arbitration provisions would not otherwise be enforceable pursuant to the FAA since they were specifically excluded under § 1. In dissent, Justice Frankfurter perceived a

> "rejection, though not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective-bargaining agreements in the silent treatment given that Act by the Court's opinion. If an Act that authorizes the federal courts to enforce arbitration provisions in contracts generally, but specifically denies authority to decree that remedy for 'contracts of employment,' were available, the Court would hardly spin such power out of the empty darkness of § 301. I would make this rejection explicit, recognizing that when Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts." *Textile Workers* v. *Lincoln Mills*, 353 U. S., at 466.

III

Not only would I find that the FAA does not apply to employment-related disputes between employers and employees in general, but also I would hold that compulsory arbitration conflicts with the congressional purpose animating the ADEA, in particular. As this Court previously has noted, authorizing the courts to issue broad injunctive relief is the cornerstone to eliminating discrimination in society. *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 415 (1975). The ADEA, like Title VII of the Civil Rights Act of 1964, au-

thorizes courts to award broad, class-based injunctive relief to achieve the purposes of the Act. 29 U. S. C. § 626(b). Because commercial arbitration is typically limited to a specific dispute between the particular parties and because the available remedies in arbitral forums generally do not provide for class-wide injunctive relief, see Shell, ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?, 68 Texas L. Rev. 509, 568 (1990), I would conclude that an essential purpose of the ADEA is frustrated by compulsory arbitration of employment discrimination claims. Moreover, as Chief Justice Burger explained:

> "Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens." *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 750 (1981) (dissenting opinion).

In my opinion the same concerns expressed by Chief Justice Burger with regard to compulsory arbitration of Title VII claims may be said of claims arising under the ADEA. The Court's holding today clearly eviscerates the important role played by an independent judiciary in eradicating employment discrimination.

IV

When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to statutory claims, to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship. In recent years, however, the Court

"has effectively rewritten the statute,"[1] and abandoned its earlier view that statutory claims were not appropriate subjects for arbitration. See *Mitsubishi Motors* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 646–651 (1985) (STEVENS, J., dissenting). Although I remain persuaded that it erred in doing so,[2] the Court has also put to one side any concern about the inequality of bargaining power between an entire industry, on the one hand, and an individual customer or employee, on the other. See *ante*, at 32–33. Until today, however, the Court has not read § 2 of the FAA as broadly encompassing disputes arising out of the employment relationship. I believe this additional extension of the FAA is erroneous. Accordingly, I respectfully dissent.

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[1] See *Perry* v. *Thomas*, 482 U. S. 483, 493 (1987) (STEVENS, J., dissenting); *id.*, at 494 (O'CONNOR, J., dissenting); *Southland Corp.* v. *Keating*, 465 U. S. 1, 36 (1984) (O'CONNOR, J., dissenting) ("[T]oday's exercise in judicial revisionism goes too far").

[2] See *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 252–253 (1987) (BLACKMUN, J., concurring in part and dissenting in part); *id.*, at 268 (STEVENS, J., concurring in part and dissenting in part); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 486 (1989) (STEVENS, J., dissenting).

Because respondent exhausted his administrative remedies under Title VII, see *ante*, at 369, there is no need in this case to reach the question whether persons whose Title VII rights have been violated may bring suit directly in federal court alleging an invidious conspiracy to deny those Title VII rights. I note, however, that the majority's desire not to undercut the administrative enforcement scheme, including the encouragement of voluntary conciliation, provided by Title VII would be completely fulfilled by insisting that § 1985 (3) plaintiffs exhaust whatever Title VII remedies they may have. The concerns expressed in the majority opinion do not provide a basis for precluding redress altogether under § 1985 (3).

SOUTHEASTERN COMMUNITY COLLEGE *v.* DAVIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78-711. Argued April 23, 1979—Decided June 11, 1979

Respondent, who suffers from a serious hearing disability and who seeks to be trained as a registered nurse, was denied admission to the nursing program of petitioner Southeastern Community College, a state institution that receives federal funds. An audiologist's report indicated that even with a hearing aid respondent cannot understand speech directed to her except through lipreading, and petitioner rejected respondent's application for admission because it believed her hearing disability made it impossible for her to participate safely in the normal clinical training program or to care safely for patients. Respondent then filed suit against petitioner in Federal District Court, alleging, *inter alia*, a violation of § 504 of the Rehabilitation Act of 1973, which prohibits discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap." The District Court entered judgment in favor of petitioner, confirming the audiologist's findings and concluding that respondent's handicap prevented her from safely performing in both her training program and her proposed profession. On this basis, the court held that respondent was not an "otherwise qualified handicapped individual" protected by § 504 and that the decision to exclude her was not discriminatory within the meaning of § 504. Although not disputing the District Court's factfindings, the Court of Appeals reversed, holding that in light of intervening regulations of the Department of Health, Education, and Welfare (HEW), § 504 required petitioner to reconsider respondent's application for admission without regard to her hearing ability, and that in determining whether respondent was "otherwise qualified," petitioner must confine its inquiry to her "academic and technical qualifications." The Court of Appeals also suggested that § 504 required "affirmative conduct" by petitioner to modify its program to accommodate the disabilities of applicants.

Held: There was no violation of § 504 when petitioner concluded that respondent did not qualify for admission to its program. Nothing in the language or history of § 504 limits the freedom of an educational institution to require reasonable physical qualifications for admission to

a clinical training program. Nor has there been any showing in this case that any action short of a substantial change in petitioner's program would render unreasonable the qualifications it imposed. Pp. 405–414.

(a) The terms of § 504 indicate that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context, but do not mean that a person need not meet legitimate physical requirements in order to be "otherwise qualified." An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap. HEW's regulations reinforce, rather than contradict, this conclusion. Pp. 405–407.

(b) Section 504 does not compel petitioner to undertake affirmative action that would dispense with the need for effective oral communication, such as by giving respondent individual supervision whenever she attends patients directly or by dispensing with certain required courses for respondent and training her to perform some but not all of the tasks a registered nurse is licensed to perform. On the record, it appears unlikely that respondent could benefit from any affirmative action that HEW regulations reasonably could be interpreted as requiring with regard to "modifications" of postsecondary educational programs to accommodate handicapped persons and the provision of "auxiliary aids" such as sign-language interpreters. Moreover, an interpretation of the regulations that required the extensive modifications necessary to include respondent in the nursing program would raise grave doubts about their validity. Neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds, and thus even if HEW has attempted to create such an obligation itself, it lacks the authority to do so. Pp. 407–412.

(c) The line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons will not always be clear, and situations may arise where a refusal to modify an existing program to accommodate the needs of a disabled person amounts to discrimination against the handicapped. In this case, however, petitioner's unwillingness to make major adjustments in its nursing program does not constitute such discrimination. Uncontroverted testimony established that the purpose of petitioner's program was to train persons who could serve the nursing profession in all customary ways, and this type of purpose, far from reflecting any animus against handicapped individuals, is shared by many if not most of the institutions that train persons to render professional service. Section 504 imposes no requirement upon an educational institution to lower or to effect substantial

modifications of standards to accommodate a handicapped person. Pp. 412–413.

574 F. 2d 1158, reversed and remanded.

POWELL, J., delivered the opinion for a unanimous Court.

Eugene Gressman argued the cause for petitioner. With him on the briefs was *Edward L. Williamson.*

Marc P. Charmatz argued the cause for respondent. With him on the brief were *Seymour DuBow, Philip A. Diehl,* and *Warren L. Pate.**

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*A brief of *amici curiae* urging reversal was filed by the Attorneys General for their respective States as follows: *Francis X. Bellotti* for Massachusetts, *J. Marshall Coleman* for Virginia, *Robert K. Corbin* for Arizona, *Carl R. Ajello* for Connecticut, *Richard S. Gebelein* for Delaware, *Jim Smith* for Florida, *Arthur K. Bolton* for Georgia, *Wayne Minami* for Hawaii, *David H. Leroy* for Idaho, *Theodore L. Sendak* for Indiana, *Tom Miller* for Iowa, *Robert T. Stephan* for Kansas, *William J. Guste, Jr.,* for Louisiana, *Stephen H. Sachs* for Maryland, *A. F. Summer* for Mississippi, *John D. Ashcroft* for Missouri, *Michael T. Greely* for Montana, *Paul L. Douglas* for Nebraska, *Thomas D. Rath* for New Hampshire, *John J. Degnan* for New Jersey, *Robert Abrams* for New York, *Rufus L. Edmisten* for North Carolina, *Allen I. Olson* for North Dakota, *William J. Brown* for Ohio, *Jan Eric Cartwright* for Oklahoma, *James A. Redden* for Oregon, *Daniel R. McLeod* for South Carolina, *William M. Leech, Jr.,* for Tennessee, *Mark White* for Texas, *Slade Gorton* for Washington, *Chauncey H. Browning, Jr.,* for West Virginia, and *Bronson C. LaFollette* for Wisconsin. Briefs of *amici curiae* urging reversal were filed by *Joseph A. Keyes, Jr.,* for the Association of American Medical Colleges; by *Daniel I. Sherry* for the Board of Trustees of Prince George's Community College; by *Susan A. Cahoon, William A. Wright,* and *Douglas S. McDowell* for the Equal Employment Advisory Council; and by *Richard A. Fulton* and *David M. Dorsen* for the National Institute for Independent Colleges and Universities et al.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree, Assistant Attorney General Days, Brian K. Landsberg, Jessica Dunsay Silver,* and *Vincent F. O'Rourke, Jr.,* for the United States; by *George Deukmejian,* Attorney General, and *Katherine E. Stone* and *G. R. Overton,* Deputy Attorneys General, for the State of California; by *Frank*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents a matter of first impression for this Court: Whether § 504 of the Rehabilitation Act of 1973, which prohibits discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap," forbids professional schools from imposing physical qualifications for admission to their clinical training programs.

I

Respondent, who suffers from a serious hearing disability, seeks to be trained as a registered nurse. During the 1973–1974 academic year she was enrolled in the College Parallel program of Southeastern Community College, a state institution that receives federal funds. Respondent hoped to progress to Southeastern's Associate Degree Nursing program, completion of which would make her eligible for state certification as a registered nurse. In the course of her application to the nursing program, she was interviewed by a member of the nursing faculty. It became apparent that respondent had difficulty understanding questions asked, and on inquiry she acknowledged a history of hearing problems and dependence on a hearing aid. She was advised to consult an audiologist.

J. Laski and *Michael Churchill* for the American Coalition of Citizens with Disabilities et al.; by *Stanley Fleishman* for the California Association for the Physically Handicapped et al.; by *Ann Fagan Ginger* for the Center for Independent Living et al.; by *Douglas L. Parker* for the Institute for Public Representation et al.; and by *John E. Kirklin* for the New York City Council of Organizations Serving the Deaf et al.

Briefs of *amici curiae* were filed by *Edward G. Biester, Jr.*, Attorney General, and *Robert E. Rains, Allen C. Warshaw*, and *J. Justin Blewitt, Jr.*, Deputy Attorneys General, for Pennsylvania; by *John D. Lane* for the American Association for the Advancement of Science et al.; by *Fred Okrand* and *Sam Rosenwein* for the American Civil Liberties Union et al.; by *Sheldon Elliot Steinbach* for the American Council on Education; and by *Elizabeth C. Bunting* for the Board of Governors of the University of North Carolina.

On the basis of an examination at Duke University Medical Center, respondent was diagnosed as having a "bilateral, sensori-neural hearing loss." App. 127a. A change in her hearing aid was recommended, as a result of which it was expected that she would be able to detect sounds "almost as well as a person would who has normal hearing." *Id.*, at 127a–128a. But this improvement would not mean that she could discriminate among sounds sufficiently to understand normal spoken speech. Her lipreading skills would remain necessary for effective communication: "While wearing the hearing aid, she is well aware of gross sounds occurring in the listening environment. However, she can only be responsible for speech spoken to her, when the talker gets her attention and allows her to look directly at the talker." *Id.*, at 128a.

Southeastern next consulted Mary McRee, Executive Director of the North Carolina Board of Nursing. On the basis of the audiologist's report, McRee recommended that respondent not be admitted to the nursing program. In McRee's view, respondent's hearing disability made it unsafe for her to practice as a nurse.[1] In addition, it would be impossible for respondent to participate safely in the normal clinical training program, and those modifications that would be necessary to enable safe participation would prevent her from

[1] McRee also wrote that respondent's hearing disability could preclude her practicing safely in "any setting" allowed by "a license as L[icensed] P[ractical] N[urse]." App. 132a. Respondent contends that inasmuch as she already was licensed as a practical nurse, McRee's opinion was inherently incredible. But the record indicates that respondent had "not worked as a licensed practical nurse except to do a little bit of private duty," *id.*, at 32a, and had not done that for several years before applying to Southeastern. Accordingly, it is at least possible to infer that respondent in fact could not work safely as a practical nurse in spite of her license to do so. In any event, we note the finding of the District Court that "a Licensed Practical Nurse, unlike a Licensed Registered Nurse, operates under constant supervision and is not allowed to perform medical tasks which require a great degree of technical sophistication." 424 F. Supp. 1341, 1342–1343 (EDNC 1976).

realizing the benefits of the program: "To adjust patient learning experiences in keeping with [respondent's] hearing limitations could, in fact, be the same as denying her full learning to meet the objectives of your nursing programs." *Id.*, at 132a–133a.

After respondent was notified that she was not qualified for nursing study because of her hearing disability, she requested reconsideration of the decision. The entire nursing staff of Southeastern was assembled, and McRee again was consulted. McRee repeated her conclusion that on the basis of the available evidence, respondent "has hearing limitations which could interfere with her safely caring for patients." *Id.*, at 139a. Upon further deliberation, the staff voted to deny respondent admission.

Respondent then filed suit in the United States District Court for the Eastern District of North Carolina, alleging both a violation of § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U. S. C. § 794 (1976 ed., Supp. III),[2]

[2] The statute, as set forth in 29 U. S. C. § 794 (1976 ed., Supp. III), provides in full:

"No otherwise qualified handicapped individual in the United States, as defined in section 706 (7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.*"

The italicized portion of the section was added by § 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, 92 Stat. 2982. Respondent asserts no claim under this portion of the statute.

and a denial of equal protection and due process. After a bench trial, the District Court entered judgment in favor of Southeastern. 424 F. Supp. 1341 (1976). It confirmed the findings of the audiologist that even with a hearing aid respondent cannot understand speech directed to her except through lipreading, and further found:

> "[I]n many situations such as an operation room intensive care unit, or post-natal care unit, all doctors and nurses wear surgical masks which would make lipreading impossible. Additionally, in many situations a Registered Nurse would be required to instantly follow the physician's instructions concerning procurement of various types of instruments and drugs where the physician would be unable to get the nurse's attention by other than vocal means." *Id.*, at 1343.

Accordingly, the court concluded:

> "[Respondent's] handicap actually prevents her from safely performing in both her training program and her proposed profession. The trial testimony indicated numerous situations where [respondent's] particular disability would render her unable to function properly. Of particular concern to the court in this case is the potential of danger to future patients in such situations." *Id.*, at 1345.

Based on these findings, the District Court concluded that respondent was not an "otherwise qualified handicapped individual" protected against discrimination by § 504. In its view, "[o]therwise qualified, can only be read to mean otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available." 424 F. Supp., at 1345. Because respondent's disability would prevent her from functioning "sufficiently" in Southeastern's nursing program, the court

held that the decision to exclude her was not discriminatory within the meaning of § 504.[3]

On appeal, the Court of Appeals for the Fourth Circuit reversed. 574 F. 2d 1158 (1978). It did not dispute the District Court's findings of fact, but held that the court had misconstrued § 504. In light of administrative regulations that had been promulgated while the appeal was pending, see 42 Fed. Reg. 22676 (1977),[4] the appellate court believed that § 504 required Southeastern to "reconsider plaintiff's application for admission to the nursing program without regard to her hearing ability." 574 F. 2d, at 1160. It concluded that the District Court had erred in taking respondent's handicap into account in determining whether she was "otherwise qualified" for the program, rather than confining its inquiry to her "academic and technical qualifications." *Id.*, at 1161. The Court of Appeals also suggested that § 504 required "affirmative conduct" on the part of Southeastern to modify its program to accommodate the disabilities of applicants, "even when such modifications become expensive." 574 F. 2d, at 1162.

Because of the importance of this issue to the many institutions covered by § 504, we granted certiorari. 439 U. S. 1065 (1979). We now reverse.[5]

[3] The District Court also dismissed respondent's constitutional claims. The Court of Appeals affirmed that portion of the order, and respondent has not sought review of this ruling.

[4] Relying on the plain language of the Act, the Department of Health, Education, and Welfare (HEW) at first did not promulgate any regulations to implement § 504. In a subsequent suit against HEW, however, the United States District Court for the District of Columbia held that Congress had intended regulations to be issued and ordered HEW to do so. *Cherry* v. *Mathews*, 419 F. Supp. 922 (1976). The ensuing regulations currently are embodied in 45 CFR pt. 84 (1978).

[5] In addition to challenging the construction of § 504 by the Court of Appeals, Southeastern also contends that respondent cannot seek judicial relief for violations of that statute in view of the absence of any express private right of action. Respondent asserts that whether or not § 504

II

As previously noted, this is the first case in which this Court has been called upon to interpret § 504. It is elementary that "[t]he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J., concurring); see *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U. S. 322, 330 (1978); *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 472 (1977). Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.[6]

provides a private action, she may maintain her suit under 42 U. S. C. § 1983. In light of our disposition of this case on the merits, it is unnecessary to address these issues and we express no views on them. See *Norton* v. *Mathews*, 427 U. S. 524, 529–531 (1976); *Moor* v. *County of Alameda*, 411 U. S. 693, 715 (1973); *United States* v. *Augenblick*, 393 U. S. 348, 351–352 (1969).

[6] The Act defines "handcapped individual" as follows:

"The term 'handicapped individual' means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." § 7 (6) of the Rehabilitation Act of 1973, 87 Stat. 361, as amended, 88 Stat. 1619, 89 Stat. 2–5, 29 U. S. C. § 706 (6).

This definition comports with our understanding of § 504. A person who

The court below, however, believed that the "otherwise qualified" persons protected by § 504 include those who would be able to meet the requirements of a particular program in every respect except as to limitations imposed by their handicap. See 574 F. 2d, at 1160. Taken literally, this holding would prevent an institution from taking into account any limitation resulting from the handicap, however disabling. It assumes, in effect, that a person need not meet legitimate physical requirements in order to be "otherwise qualified." We think the understanding of the District Court is closer to the plain meaning of the statutory language. An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.

The regulations promulgated by the Department of HEW to interpret § 504 reinforce, rather than contradict, this conclusion. According to these regulations, a "[q]ualified handicapped person" is, "[w]ith respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity . . . ." 45 CFR § 84.3 (k)(3) (1978). An explanatory note states:

> "The term 'technical standards' refers to *all* nonacademic admissions criteria that are essential to participation in the program in question." 45 CFR pt. 84, App. A, p. 405 (1978) (emphasis supplied).

has a record of, or is regarded as having, an impairment may at present have no actual incapacity at all. Such a person would be exactly the kind of individual who could be "otherwise qualified" to participate in covered programs. And a person who suffers from a limiting physical or mental impairment still may possess other abilities that permit him to meet the requirements of various programs. Thus, it is clear that Congress included among the class of "handicapped" persons covered by § 504 a range of individuals who could be "otherwise qualified." See S. Rep. No. 93-1297, pp. 38-39 (1974).

A further note emphasizes that legitimate physical qualifications may be essential to participation in particular programs.[7] We think it clear, therefore, that HEW interprets the "other" qualifications which a handicapped person may be required to meet as including necessary physical qualifications.

III

The remaining question is whether the physical qualifications Southeastern demanded of respondent might not be necessary for participation in its nursing program. It is not open to dispute that, as Southeastern's Associate Degree Nursing program currently is constituted, the ability to understand speech without reliance on lipreading is necessary for patient safety during the clinical phase of the program. As the District Court found, this ability also is indispensable for many of the functions that a registered nurse performs.

Respondent contends nevertheless that § 504, properly interpreted, compels Southeastern to undertake affirmative action that would dispense with the need for effective oral communication. First, it is suggested that respondent can be given individual supervision by faculty members whenever she attends patients directly. Moreover, certain required courses might be dispensed with altogether for respondent. It is not

[7] The note states:

"Paragraph (k) of § 84.3 defines the term 'qualified handicapped person.' Throughout the regulation, this term is used instead of the statutory term 'otherwise qualified handicapped person.' The Department believes that the omission of the word 'otherwise' is necessary in order to comport with the intent of the statute because, read literally, 'otherwise' qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be 'otherwise qualified' for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms 'qualified' and 'otherwise qualified' are intended to be interchangeable." 45 CFR pt. 84, App. A, p. 405 (1978).

necessary, she argues, that Southeastern train her to undertake all the tasks a registered nurse is licensed to perform. Rather, it is sufficient to make § 504 applicable if respondent might be able to perform satisfactorily some of the duties of a registered nurse or to hold some of the positions available to a registered nurse.[8]

Respondent finds support for this argument in portions of the HEW regulations discussed above. In particular, a provision applicable to postsecondary educational programs requires covered institutions to make "modifications" in their programs to accommodate handicapped persons, and to provide "auxiliary aids" such as sign-language interpreters.[9] Respondent

[8] The court below adopted a portion of this argument:

"[Respondent's] ability to read lips aids her in overcoming her hearing disability; however, it was argued that in certain situations such as in an operating room environment where surgical masks are used, this ability would be unavailing to her.

"Be that as it may, in the medical community, there does appear to be a number of settings in which the plaintiff could perform satisfactorily as an RN, such as in industry or perhaps a physician's office. Certainly [respondent] could be viewed as possessing extraordinary insight into the medical and emotional needs of those with hearing disabilities.

"If [respondent] meets all the other criteria for admission in the pursuit of her RN career, under the relevant North Carolina statutes, N. C. Gen. Stat. §§ 90-158, *et seq.*, it should not be foreclosed to her simply because she may not be able to function effectively in all the roles which registered nurses may choose for their careers." 574 F. 2d 1158, 1161 n. 6 (1978).

[9] This regulation provides:

"(a) *Academic requirements.* A recipient [of federal funds] to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

"(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

"(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature." 45 CFR § 84.44 (1978).

argues that this regulation imposes an obligation to ensure full participation in covered programs by handicapped individuals and, in particular, requires Southeastern to make the kind of adjustments that would be necessary to permit her safe participation in the nursing program.

We note first that on the present record it appears unlikely respondent could benefit from any affirmative action that the regulation reasonably could be interpreted as requiring. Section 84.44 (d)(2), for example, explicitly excludes "devices or services of a personal nature" from the kinds of auxiliary aids a school must provide a handicapped individual. Yet the only evidence in the record indicates that nothing less than close, individual attention by a nursing instructor would be sufficient to ensure patient safety if respondent took part in the clinical phase of the nursing program. See 424 F. Supp., at 1346. Furthermore, it also is reasonably clear that § 84.44 (a) does not encompass the kind of curricular changes that would be necessary to accommodate respondent in the nursing program. In light of respondent's inability to function in clinical courses without close supervision, Southeastern, with prudence, could

allow her to take only academic classes. Whatever benefits respondent might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives. Such a fundamental alteration in the nature of a program is far more than the "modification" the regulation requires.

Moreover, an interpretation of the regulations that required the extensive modifications necessary to include respondent in the nursing program would raise grave doubts about their validity. If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute.

The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps. Section 501 (b), governing the employment of handicapped individuals by the Federal Government, requires each federal agency to submit "an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals . . . ." These plans "shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met." Similarly, § 503 (a), governing hiring by federal contractors, requires employers to "take affirmative action to employ and advance in employment qualified handicapped individuals . . . ." The President is required to promulgate regulations to enforce this section.

Under § 501 (c) of the Act, by contrast, state agencies such as Southeastern are only "encourage[d] . . . to adopt and implement such policies and procedures." Section 504 does not refer at all to affirmative action, and except as it applies to

federal employers it does not provide for implementation by administrative action. A comparison of these provisions demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so.[10]

Although an agency's interpretation of the statute under which it operates is entitled to some deference, "this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Teamsters* v. *Daniel*, 439 U. S. 551, 566 n. 20 (1979). Here, neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds.[11] Accordingly, we hold that even if

[10] Section 115 (a) of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 added to the 1973 Act a section authorizing grants to state units for the purpose of providing "such information and technical assistance (including support personnel such as interpreters for the deaf) as may be necessary to assist those entities in complying with this Act, particularly the requirements of section 504." 92 Stat. 2971, 29 U. S. C. § 775 (a) (1976 ed., Supp. III). This provision recognizes that on occasion the elimination of discrimination might involve some costs; it does not imply that the refusal to undertake substantial changes in a program by itself constitutes discrimination. Whatever effect the availability of these funds might have on ascertaining the existence of discrimination in some future case, no such funds were available to Southeastern at the time respondent sought admission to its nursing program.

[11] The Government, in a brief *amicus curiae* in support of respondent, cites a Report of the Senate Committee on Labor and Public Welfare on the 1974 amendments to the 1973 Act and several statements by individual Members of Congress during debate on the 1978 amendments, some of which indicate a belief that § 504 requires affirmative action. See Brief for United States as *Amicus Curiae* 44–50. But these isolated statements by individual Members of Congress or its committees, all made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment. *Quern* v. *Mandley*, 436 U. S. 725, 736 n. 10 (1978); *Los Angeles Dept. of*

HEW has attempted to create such an obligation itself, it lacks the authority to do so.

IV

We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State. Thus, situations may arise where a

Water & Power v. *Manhart*, 435 U. S. 702, 714 (1978). Nor do these comments, none of which represents the will of Congress as a whole, constitute subsequent "legislation" such as this Court might weigh in construing the meaning of an earlier enactment. Cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969).

The Government also argues that various amendments to the 1973 Act contained in the Rehabilitation Act Amendments of 1978 further reflect Congress' approval of the affirmative-action obligation created by HEW's regulations. But the amendment most directly on point undercuts this position. In amending § 504, Congress both extended that section's prohibition of discrimination to "any program or activity conducted by any Executive agency or by the United States Postal Service" and authorized administrative regulations to implement only *this amendment*. See n. 2, *supra*. The fact that no other regulations were mentioned supports an inference that no others were approved.

Finally, we note that the assertion by HEW of the authority to promulgate any regulations under § 504 has been neither consistent nor longstanding. For the first three years after the section was enacted, HEW maintained the position that Congress had not intended any regulations to be issued. It altered its stand only after having been enjoined to do so. See n. 4, *supra*. This fact substantially diminishes the deference to be given to HEW's present interpretation of the statute. See *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 143 (1976).

refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.

In this case, however, it is clear that Southeastern's unwillingness to make major adjustments in its nursing program does not constitute such discrimination. The uncontroverted testimony of several members of Southeastern's staff and faculty established that the purpose of its program was to train persons who could serve the nursing profession in all customary ways. See, *e. g.*, App. 35a, 52a, 53a, 71a, 74a. This type of purpose, far from reflecting any animus against handicapped individuals, is shared by many if not most of the institutions that train persons to render professional service. It is undisputed that respondent could not participate in Southeastern's nursing program unless the standards were substantially lowered. Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.[12]

[12] Respondent contends that it is unclear whether North Carolina law requires a registered nurse to be capable of performing all functions open to that profession in order to obtain a license to practice, although McRee, the Executive Director of the State Board of Nursing, had informed Southeastern that the law did so require. See App. 138a–139a. Respondent further argues that even if she is not capable of meeting North Carolina's present licensing requirements, she still might succeed in obtaining a license in another jurisdiction.

Respondent's argument misses the point. Southeastern's program, structured to train persons who will be able to perform all normal roles of a registered nurse, represents a legitimate academic policy, and is accepted by the State. In effect, it seeks to ensure that no graduate will pose a danger to the public in any professional role in which he or she might be cast. Even if the licensing requirements of North Carolina or some other State are less demanding, nothing in the Act requires an educational institution to lower its standards.

One may admire respondent's desire and determination to overcome her handicap, and there well may be various other types of service for which she can qualify. In this case, however, we hold that there was no violation of § 504 when Southeastern concluded that respondent did not qualify for admission to its program. Nothing in the language or history of § 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program. Nor has there been any showing in this case that any action short of a substantial change in Southeastern's program would render unreasonable the qualifications it imposed.

V

Accordingly, we reverse the judgment of the court below, and remand for proceedings consistent with this opinion.

So ordered.

MOORE ET AL. v. SIMS ET UX.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

No. 78-6. Argued February 26, 1979—Decided June 11, 1979

When school authorities reported suspected abuse of one of adult appellees' children to the Texas Department of Human Resources (Department), the Department took temporary custody of all three of appellees' minor children and instituted suit in the Harris County, Tex., Juvenile Court for their emergency protection under Title 2 of the Texas Family Code. The Juvenile Court entered an emergency *ex parte* order giving temporary custody to the Department. Appellees then filed a motion to modify the *ex parte* order, but when they were unable to obtain an immediate hearing, they filed a habeas corpus petition in Harris County rather than renewing the motion or appealing the *ex parte* order. The Harris County court ultimately entered an order transferring venue to the Montgomery County Juvenile Court, and at the Harris County judge's direction the Department filed another suit, which was also transferred to Montgomery County, while temporary custody of the children was continued in the Department. Rather than attempting to expedite a hearing in the Montgomery County court, appellees filed an action in Federal District Court, broadly challenging the constitutionality of the interrelated parts of Title 2's statutory scheme defining the contours of the parent-child relationship and the permissible areas and modes of state intervention. The District Court denied appellees a temporary restraining order, but later held that the state court's temporary orders had expired and that the children had to be returned to their parents. The Department then filed a new suit in the Montgomery County court, which issued a show-cause order and writ of attachment ordering that the child suspected of being abused be delivered to the temporary custody of his grandparents. Appellees countered by filing in the Federal District Court a second application for a temporary restraining order addressed to the Montgomery County Juvenile Court and this was granted. A three-judge District Court thereafter preliminarily enjoined the Department and other defendants from filing or prosecuting any state suit under the challenged state statutes until a final determination by the three-judge court. Subsequently, this determination was made, the court concluding that abstention under the doctrine of *Younger* v. *Harris*, 401 U. S. 37, was unwarranted because the litigation was "multi-

in these additional methods constituted gross negligence on the part of the city. *Ibid.*

The chain of inferences drawn by the Court of Appeals directly conflicts with *Tuttle*'s instruction that "considerably more proof than the single incident will be necessary in every case to establish . . . the requisite fault on the part of the municipality." 471 U. S., at 824. There was no evidence in the record, apart from the speculative inferences suggested by the Court of Appeals, from which jurors reasonably could conclude that the city's training in the apprehension of fleeing vehicles manifested recklessness or deliberate indifference. Respondent therefore failed to prove an essential element of her claim, and a directed verdict should have been entered in favor of the city. Accordingly I would reverse the Court of Appeals for the First Circuit and would remand for the entry of judgment in favor of petitioner in this case. I respectfully dissent from the Court's judgment dismissing this case as improvidently granted.

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, ET AL. *v.* ARLINE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-1277. Argued December 3, 1986—Decided March 3, 1987

Section 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794 (Act), provides, *inter alia*, that no "otherwise qualified handicapped individual," as defined in 29 U. S. C. § 706(7), shall, solely by reason of his handicap, be excluded from participation in any program receiving federal financial assistance. Section 706(7)(B) defines "handicapped individual" to mean any person who "(i) has a physical . . . impairment which substantially limits one or more of [his] major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." Department of Health and Human Services (HHS) regulations define "physical impairment" to mean, *inter alia*, any physiological disorder affecting the respiratory system, and define "major life activities" to include working. Respondent was hospitalized for tuberculosis in 1957. The disease went into remission for the next 20 years, during which time respondent began teaching elementary school in Florida. In 1977, March 1978, and November 1978, respondent had relapses, after the latter two of which she was suspended with pay for the rest of the school year. At the end of the 1978–1979 school year, petitioners discharged her after a hearing because of the continued recurrence of tuberculosis. After she was denied relief in state administrative proceedings, she brought suit in Federal District Court, alleging a violation of § 504. The District Court held that she was not a "handicapped person" under the Act, but that, even assuming she were, she was not "qualified" to teach elementary school. The Court of Appeals reversed, holding that persons with contagious diseases are within § 504's coverage, and remanded for further findings as to whether respondent was "otherwise qualified" for her job.

Held:

1. A person afflicted with the contagious disease of tuberculosis may be a "handicapped individual" within the meaning of § 504. Pp. 280–286.

(a) Respondent is a "handicapped individual" as defined in § 706(7)(B) and the HHS regulations. Her hospitalization in 1957 for a disease that affected her respiratory system and that substantially limited "one or more of [her] major life activities" establishes that she has a "record of . . . impairment." Pp. 280–281.

(b) The fact that a person with a record of impairment is also contagious does not remove that person from § 504's coverage. To allow an employer to justify discrimination by distinguishing between a disease's contagious effects on others and its physical effects on a patient would be unfair, would be contrary to § 706(7)(B)(iii) and the legislative history, which demonstrate Congress' concern about an impairment's effect on others, and would be inconsistent with § 504's basic purpose to ensure that handicapped individuals are not denied jobs because of the prejudice or ignorance of others. The Act replaces such fearful, reflexive reactions with actions based on reasoned and medically sound judgments as to whether contagious handicapped persons are "otherwise qualified" to do the job. Pp. 281–286.

2. In most cases, in order to determine whether a person handicapped by contagious disease is "otherwise qualified" under § 504, the district court must conduct an individualized inquiry and make appropriate findings of fact, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (*e. g.*, how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm. In making these findings, courts normally should defer to the reasonable medical judgments of public health officials. Courts must then determine, in light of these findings, whether any "reasonable accommodation" can be made by the employer under the established standards for that inquiry. Pp. 287–288.

3. Because the District Court did not make appropriate findings, it is impossible for this Court to determine whether respondent is "otherwise qualified" for the job of elementary school teacher, and the case is remanded for additional findings of fact. Pp. 288–289.

772 F. 2d 759, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 289.

Brian T. Hayes argued the cause for petitioners. With him on the briefs was *John D. Carlson*.

Solicitor General Fried argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Reynolds*, *Deputy*

Solicitor General Ayer, *Deputy Assistant Attorney General Carvin*, *Richard J. Lazarus*, and *Mark L. Gross*.

George K. Rahdert argued the cause for respondent. With him on the brief was *Steven H. Malone*.*

JUSTICE BRENNAN delivered the opinion of the Court.

Section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U. S. C. § 794 (Act), prohibits a federally funded state program from discriminating against a handicapped individual solely by reason of his or her handicap. This case presents the questions whether a person afflicted with tuberculosis, a contagious disease, may be considered a "handicapped individual" within the meaning of § 504 of the Act, and, if so, whether such an individual is "otherwise qualified" to teach elementary school.

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*Briefs of *amici curiae* urging reversal were filed for the Equal Employment Advisory Council by *Robert E. Williams*, *Douglas S. McDowell*, and *Thomas R. Bagby*; and for Congressman William E. Dannemeyer et al. by *William E. Dannemeyer, pro se*.

Briefs of *amici curiae* urging affirmance were filed for the Association for Retarded Citizens of the United States et al. by *Thomas K. Gilhool*, *Michael Churchill*, *Frank J. Laski*, *Timothy M. Cook*, *Stanley S. Herr*, and *Donald S. Goldman*; and for the Employment Law Center et al. by *Robert E. Borton*.

Briefs of *amici curiae* were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General, *Andrea Sheridan Ordin*, Chief Assistant Attorney General, and *Marian M. Johnston* and *M. Anne Jennings*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Stephen H. Sachs* of Maryland, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *W. Cary Edwards* of New Jersey, *Robert Abrams* of New York, and *Bronson C. La Follette* of Wisconsin; for the American Medical Association by *Benjamin W. Heineman, Jr.*, and *Carter G. Phillips*; for the American Public Health Association et al. by *Nan D. Hunter* and *Herbert Semmel*; for Doctors for AIDS Research and Education by *Stanley Fleishman*, *Joseph Lawrence*, *Susan D. McGreivy*, and *Paul Hoffman*; for the Epilepsy Foundation of America by *Alexandra K. Finucane*; for the National School Boards Association by *Gwendolyn H. Gregory*, *August W. Steinhilber*, and *Thomas A. Shannon*; and for Senator Cranston et al. by *Arlene Mayerson*.

I

From 1966 until 1979, respondent Gene Arline taught elementary school in Nassau County, Florida. She was discharged in 1979 after suffering a third relapse of tuberculosis within two years. After she was denied relief in state administrative proceedings, she brought suit in federal court, alleging that the school board's decision to dismiss her because of her tuberculosis violated § 504 of the Act.[1]

A trial was held in the District Court, at which the principal medical evidence was provided by Marianne McEuen, M.D., an assistant director of the Community Tuberculosis Control Service of the Florida Department of Health and Rehabilitative Services. According to the medical records reviewed by Dr. McEuen, Arline was hospitalized for tuberculosis in 1957. App. 11–12. For the next 20 years, Arline's disease was in remission. *Id.*, at 32. Then, in 1977, a culture revealed that tuberculosis was again active in her system; cultures taken in March 1978 and in November 1978 were also positive. *Id.*, at 12.

The superintendent of schools for Nassau County, Craig Marsh, then testified as to the school board's response to Arline's medical reports. After both her second relapse, in the spring of 1978, and her third relapse in November 1978, the school board suspended Arline with pay for the remainder of the school year. *Id.*, at 49–51. At the end of the 1978–1979 school year, the school board held a hearing, after which it discharged Arline, "not because she had done anything wrong," but because of the "continued reoccurence *[sic]* of tuberculosis." *Id.*, at 49–52.

In her trial memorandum, Arline argued that it was "not disputed that the [school board dismissed her] solely on the basis of her illness. Since the illness in this case qualifies the

[1] Respondent also sought relief under 42 U. S. C. § 1983, alleging that the board denied her due process of law. Both the District Court and the Court of Appeals rejected this argument, and respondent did not present the issue to this Court.

Plaintiff as a 'handicapped person' it is clear that she was dismissed solely as a result of her handicap in violation of Section 504." Record 119. The District Court held, however, that although there was "[n]o question that she suffers a handicap," Arline was nevertheless not "a handicapped person under the terms of that statute." App. to Pet. for Cert. C–2. The court found it "difficult . . . to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person." The court then went on to state that, "even assuming" that a person with a contagious disease could be deemed a handicapped person, Arline was not "qualified" to teach elementary school. *Id.*, at C–2—C–3.

The Court of Appeals reversed, holding that "persons with contagious diseases are within the coverage of section 504," and that Arline's condition "falls . . . neatly within the statutory and regulatory framework" of the Act. 772 F. 2d 759, 764 (CA11 1985). The court remanded the case "for further findings as to whether the risks of infection precluded Mrs. Arline from being 'otherwise qualified' for her job and, if so, whether it was possible to make some reasonable accommodation for her in that teaching position" or in some other position. *Id.*, at 765 (footnote omitted). We granted certiorari, 475 U. S. 1118 (1986), and now affirm.

II

In enacting and amending the Act, Congress enlisted all programs receiving federal funds in an effort "to share with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted." 123 Cong. Rec. 13515 (1977) (statement of Sen. Humphrey). To that end, Congress not only increased federal support for vocational rehabilitation, but also addressed the broader problem of discrimination against the handicapped by including § 504, an antidiscrimination provision patterned after Title VI of the Civil Rights

Act of 1964.[2] Section 504 of the Rehabilitation Act reads in pertinent part:

> "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U. S. C. § 794.

In 1974 Congress expanded the definition of "handicapped individual" for use in § 504 to read as follows:[3]

[2] Congress' decision to pattern § 504 after Title VI is evident in the language of the statute, compare 29 U. S. C. § 794 with 42 U. S. C. § 2000d, and in the legislative history of § 504, see, *e. g.*, S. Rep. No. 93-1297, pp. 39-40 (1974); S. Rep. No. 95-890, p. 19 (1978). Cf. TenBroek & Matson, The Disabled and the Law of Welfare, 54 Cal. L. Rev. 809, 814-815, and nn. 21-22 (1966) (discussing theory and evidence that "negative attitudes and practices toward the disabled resemble those commonly attached to 'underprivileged ethnic and religious minority groups' "). The range of programs subject to § 504's prohibition is broader, however, than that covered by Title VI, because § 504 covers employment discrimination even in programs that receive federal aid with a primary objective other than the promotion of employment. See *Consolidated Rail Corporation* v. *Darrone*, 465 U. S. 624 (1984); Note, Accommodating the Handicapped: Rehabilitating Section 504 after *Southeastern*, 80 Colum. L. Rev. 171, 174-175, and n. 21 (1980).

[3] The primary focus of the 1973 Act was to increase federal support for vocational rehabilitation; the Act's original definition of the term "handicapped individual" reflected this focus by including only those whose disability limited their employability, and those who could be expected to benefit from vocational rehabilitation. After reviewing the Department of Health, Education, and Welfare's subsequent attempt to devise regulations to implement the Act, however, Congress concluded that the definition of "handicapped individual," while appropriate for the vocational rehabilitation provisions in Titles I and III of the Act, was too narrow to deal with the range of discriminatory practices in housing, education, and health care programs which stemmed from stereotypical attitudes and ignorance about the handicapped. S. Rep. No. 93-1297, at 16, 37-38, 50.

> "[A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U. S. C. § 706(7)(B).

The amended definition reflected Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from "archaic attitudes and laws" and from "the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps." S. Rep. No. 93-1297, p. 50 (1974). To combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of "handicapped individual" so as to preclude discrimination against "[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all." *Southeastern Community College* v. *Davis*, 442 U. S. 397, 405-406, n. 6 (1979).[4]

In determining whether a particular individual is handicapped as defined by the Act, the regulations promulgated by the Department of Health and Human Services are of significant assistance. As we have previously recognized, these regulations were drafted with the oversight and approval of Congress, see *Consolidated Rail Corporation* v. *Darrone*, 465 U. S. 624, 634-635, and nn. 14-16 (1984); they provide "an important source of guidance on the meaning of § 504." *Alexander* v. *Choate*, 469 U. S. 287, 304, n. 24 (1985). The

[4] See *id.*, at 39 ("This subsection includes within the protection of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause (A) in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped"); *id.*, at 37-39, 63-64; see also 120 Cong. Rec. 30531 (1974) (statement of Sen. Cranston).

regulations are particularly significant here because they define two critical terms used in the statutory definition of handicapped individual.[5] "Physical impairment" is defined as follows:

> "[A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine." 45 CFR § 84.3(j)(2)(i) (1985).

In addition, the regulations define "major life activities" as

> "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." § 84.3(j)(2)(ii).

III

Within this statutory and regulatory framework, then, we must consider whether Arline can be considered a handicapped individual. According to the testimony of Dr.

[5] In an appendix to these regulations, the Department of Health and Human Services explained that it chose not to attempt to "set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list." 45 CFR pt. 84, Appendix A, p. 310 (1985). Nevertheless, the Department went on to state that "such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, [and] emotional illness" would be covered. *Ibid.* The Department also reinforced what a careful reading of the statute makes plain, "that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities." *Ibid.* Although many of the comments on the regulations when first proposed suggested that the definition was unreasonably broad, the Department found that a broad definition, one not limited to so-called "traditional handicaps," is inherent in the statutory definition. *Ibid.*

McEuen, Arline suffered tuberculosis "in an acute form in such a degree that it affected her respiratory system," and was hospitalized for this condition. App. 11. Arline thus had a physical impairment as that term is defined by the regulations, since she had a "physiological disorder or condition . . . affecting [her] . . . respiratory [system]." 45 CFR § 84.3(j)(2)(i) (1985). This impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment. Thus, Arline's hospitalization for tuberculosis in 1957 suffices to establish that she has a "record of . . . impairment" within the meaning of 29 U. S. C. § 706(7)(B)(ii), and is therefore a handicapped individual.

Petitioners concede that a contagious disease may constitute a handicapping condition to the extent that it leaves a person with "diminished physical or mental capabilities," Brief for Petitioners 15, and concede that Arline's hospitalization for tuberculosis in 1957 demonstrates that she has a record of a physical impairment, see Tr. of Oral Arg. 52–53. Petitioners maintain, however, that Arline's record of impairment is irrelevant in this case, since the school board dismissed Arline not because of her diminished physical capabilities, but because of the threat that her relapses of tuberculosis posed to the health of others.[6]

[6] See Brief for Petitioners 15–16 (Act covers conditions that leave individuals with "diminished physical or mental capabilities," but not conditions that could "impair the health of others"); Pet. for Cert. 13–14 ("[T]he concept of a 'handicap' [should be limited] to physical and mental conditions which result in either a real or perceived diminution of an individual's capabilities. . . . [A]n individual suffering from a contagious disease may not necessarily suffer from any physical or mental impairments affecting his ability to perform the job in question. In other words, an employer's reluctance to hire such an individual is not due to any real or perceived inability on the individual's part, but rather because of the employer's reluctance to expose its other employees and its clientele to the threat of infection").

We do not agree with petitioners that, in defining a handicapped individual under § 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant in a case such as this. Arline's contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis. It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.[7]

Nothing in the legislative history of § 504 suggests that Congress intended such a result. That history demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual. Congress extended coverage, in 29 U. S. C. § 706(7)(B)(iii), to those individuals who are simply "regarded as having" a physical or mental impairment.[8] The Senate Report provides as an example of a person who would be covered under this subsection "a person with some kind of visible physical impairment which in fact does not substantially limit that person's functioning." S. Rep. No. 93–1297, at 64.[9]

[7] The United States argues that it is possible for a person to be simply a carrier of a disease, that is, to be capable of spreading a disease without having a "physical impairment" or suffering from any other symptoms associated with the disease. The United States contends that this is true in the case of some carriers of the Acquired Immune Deficiency Syndrome (AIDS) virus. From this premise the United States concludes that discrimination solely on the basis of contagiousness is never discrimination on the basis of a handicap. The argument is misplaced in this case, because the handicap here, tuberculosis, gave rise both to a physical impairment *and* to contagiousness. This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.

[8] See n. 4, *supra*.

[9] Congress' desire to prohibit discrimination based on the effects a person's handicap may have on others was evident from the inception of the

Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.[10]

Act. For example, Representative Vanik, whose remarks constitute "a primary signpost on the road toward interpreting the legislative history of § 504," *Alexander* v. *Choate*, 469 U. S. 287, 295–296, and n. 13 (1985), cited as an example of improper handicap discrimination a case in which "a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance 'produced a nauseating effect' on his classmates." 117 Cong. Rec. 45974 (1971). See also 118 Cong. Rec. 36761 (1972) (remarks of Sen. Mondale) (a woman "crippled by arthritis" was denied a job not because she could not do the work but because "college trustees [thought] 'normal students shouldn't see her' "); *id.*, at 525 (remarks of Sen. Humphrey); cf. Macgregor, Some Psycho-Social Problems Associated with Facial Deformities, 16 Am. Sociological Rev. 629 (1961).

[10] The Department of Health and Human Services regulations, which include among the conditions illustrative of physical impairments covered by the Act "cosmetic disfigurement," lend further support to Arline's position that the effects of one's impairment on others is as relevant to a determination of whether one is handicapped as is the physical effect of one's handicap on oneself. 45 CFR § 84.3(j)(2)(i)(A) (1985). At oral argument, the United States took the position that a condition such as cosmetic disfigurement could not substantially limit a major life activity within the meaning of the statute, because the only major life activity that it would affect would be the ability to work. The United States recognized that "working" was one of the major life activities listed in the regulations, but said that to argue that a condition that impaired *only* the ability to work was a handicapping condition was to make "a totally circular argument which lifts itself by its bootstraps." Tr. of Oral Arg. 15–16. The argument is not circular, however, but direct. Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work. "[T]he primary goal of the Act is to increase employment of the handicapped." *Consolidated Rail Corporation* v. *Darrone*, 465 U. S., at 633, n. 13; see also *id.*, at 632 ("Indeed, enhancing employment of the handicapped was so much the focus of the 1973 legislation that Congress the next year felt it necessary to amend the statute to clarify whether § 504 was intended to prohibit other types of discrimination as well").

Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.[11] Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness.[12] Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious.[13] The Act is

[11] S. Rep. No. 93-1297, at 50; see n. 4, *supra*. See generally, TenBroek & Matson, 54 Cal. L. Rev., at 814; Strauss, Chronic Illness, in The Sociology of Health and Illness 138, 146-147 (P. Conrad & R. Kern eds. 1981).

[12] The isolation of the chronically ill and of those perceived to be ill or contagious appears across cultures and centuries, as does the development of complex and often pernicious mythologies about the nature, cause, and transmission of illness. Tuberculosis is no exception. See R. Dubos & J. Dubos, The White Plague (1952); S. Sontag, Illness as Metaphor (1978).

[13] Senator Humphrey noted the "irrational fears or prejudice on the part of employers or fellow workers" that make it difficult for former cancer patients to secure employment. 123 Cong. Rec. 13515 (1977). See also Feldman, Wellness and Work, in Psychosocial Stress and Cancer 173-200 (C. Cooper ed. 1984) (documenting job discrimination against recovered cancer patients); S. Sontag, *supra*, at 6 ("Any disease that is treated as a mystery and acutely enough feared will be felt to be morally, if not literally, contagious. Thus, a surprisingly large number of people with cancer find themselves being shunned by relatives and friends . . . as if cancer, like TB, were an infectious disease"); Dell, Social Dimensions of Epilepsy: Stigma and Response, in Psychopathology in Epilepsy: Social Dimensions 185-210 (S. Whitman & B. Hermann eds. 1986) (reviewing range of discrimination affecting epileptics); Brief for Epilepsy Foundation of

carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of "handicapped individual" is broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief. The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent.[14] We conclude that

America as *Amicus Curiae* 5-14 ("A review of the history of epilepsy provides a salient example that fear, rather than the handicap itself, is the major impetus for discrimination against persons with handicaps").

[14] Congress reaffirmed this approach in its 1978 amendments to the Act. There, Congress recognized that employers and other grantees might have legitimate reasons not to extend jobs or benefits to drug addicts and alcoholics, but also understood the danger of improper discrimination against such individuals if they were categorically excluded from coverage under the Act. Congress therefore rejected the original House proposal to exclude addicts and alcoholics from the definition of handicapped individual, and instead adopted the Senate proposal excluding only those alcoholics and drug abusers "whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment . . . would constitute a direct threat to property or the safety of others." 29 U. S. C. § 706(7)(B). See 124 Cong. Rec. 30322 (1978); Brief for Senator Cranston et al. as *Amici Curiae* 35-36; 43 Op. Atty. Gen. No. 12 (1977).

This approach is also consistent with that taken by courts that have addressed the question whether the Act covers persons suffering from conditions other than contagious diseases that render them a threat to the safety of others. See, *e. g.*, *Strathie* v. *Department of Transportation*, 716 F. 2d 227, 232-234 (CA3 1983); *Doe* v. *New York University*, 666 F. 2d 761, 775 (CA2 1981).

the fact that a person with a record of a physical impairment is also contagious does not suffice to remove that person from coverage under § 504.[15]

[15] The dissent implies that our holding rests only on our "own sense of fairness and implied support from the Act," *post*, at 289, and that this holding is inconsistent with *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981). It is evident, however, that our holding is premised on the plain language of the Act, and on the detailed regulations that implement it, neither of which the dissent discusses and both of which support the conclusion that those with a contagious disease such as tuberculosis may be considered "handicapped" under the Act. We also find much support in the legislative history, while the dissent is unable to find any evidence to support its view. Accordingly, the dissent's construction of the Act to exclude those afflicted with a contagious disease is not only arbitrary (and therefore unfair) but unfaithful to basic canons of statutory construction.

Nothing in *Pennhurst* requires such infidelity. The statutory provision at issue there was held to be "simply a general statement of 'findings' " and to express "no more than . . . a congressional preference for certain kinds of treatment." *Id.*, at 19. See *Wright* v. *Roanoke Redevelopment and Housing Auth.*, 479 U. S. 418, 423 (1987) ("In *Pennhurst* . . . the statutory provisions were thought to be only statements of 'findings' indicating no more than a congressional preference—at most a 'nudge in the preferred directio[n]' "). The contrast between the congressional preference at issue in *Pennhurst* and the antidiscrimination mandate of § 504 could not be more stark.

Nor is there any reason to think that today's decision will extend the Act beyond manageable bounds. Construing § 504 not to exclude those with contagious diseases will complement rather than complicate state efforts to enforce public health laws. As we state, *infra*, at 288, courts may reasonably be expected normally to defer to the judgments of public health officials in determining whether an individual is otherwise qualified unless those judgments are medically unsupportable. Conforming employment decisions with medically reasonable judgments can hardly be thought to threaten the States' regulation of communicable diseases. Indeed, because the Act requires employers to respond rationally to those handicapped by a contagious disease, the Act will assist local health officials by helping remove an important obstacle to preventing the spread of infectious diseases: the individual's reluctance to report his or her condition. It is not surprising, then, that in their brief as *amici curiae* in support of respondent, the States of California, Maryland, Michigan, Minnesota, New Jersey, New York, and Wisconsin conclude that "inclusion of communicable diseases within the ambit of Section 504 does not reorder the priorities of state regulatory agencies . . . [and] would not alter the balance between state and federal authority." Brief for State of California et al. 30.

IV

The remaining question is whether Arline is otherwise qualified for the job of elementary schoolteacher. To answer this question in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.[16] The basic factors to be considered in conducting this inquiry are well established.[17] In the con-

[16] A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk. The Act would not require a school board to place a teacher with active, contagious tuberculosis in a classroom with elementary schoolchildren. Respondent conceded as much at oral argument. Tr. of Oral Arg. 45.

[17] "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Southeastern Community College* v. *Davis*, 442 U. S. 397, 406 (1979). In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. 45 CFR § 84.3(k) (1985). When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions. *Ibid.* Accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on a grantee, *Southeastern Community College* v. *Davis*, 442 U. S., at 412, or requires "a fundamental alteration in the nature of [the] program," *id.*, at 410. See 45 CFR § 84.12(c) (1985) (listing factors to consider in determining whether accommodation would cause undue hardship); 45 CFR pt. 84, Appendix A, p. 315 (1985) ("[W]here reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be-

text of the employment of a person handicapped with a contagious disease, we agree with *amicus* American Medical Association that this inquiry should include

> "[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." Brief for American Medical Association as *Amicus Curiae* 19.

In making these findings, courts normally should defer to the reasonable medical judgments of public health officials.[18] The next step in the "otherwise-qualified" inquiry is for the court to evaluate, in light of these medical findings, whether the employer could reasonably accommodate the employee under the established standards for that inquiry. See n. 17, *supra*.

Because of the paucity of factual findings by the District Court, we, like the Court of Appeals, are unable at this stage of the proceedings to resolve whether Arline is "otherwise qualified" for her job. The District Court made no findings as to the duration and severity of Arline's condition, nor as to the probability that she would transmit the disease. Nor did the court determine whether Arline was contagious at the time she was discharged, or whether the School Board could

considered discrimination"); *Davis*, *supra*, at 410–413; *Alexander* v. *Choate*, 469 U. S., at 299–301, and n. 19; *Strathie* v. *Department of Transportation*, 718 F. 2d, at 231.

[18] This case does not present, and we do not address, the question whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied.

have reasonably accommodated her.[19] Accordingly, the resolution of whether Arline was otherwise qualified requires further findings of fact.

V

We hold that a person suffering from the contagious disease of tuberculosis can be a handicapped person within the meaning of § 504 of the Rehabilitation Act of 1973, and that respondent Arline is such a person. We remand the case to the District Court to determine whether Arline is otherwise qualified for her position. The judgment of the Court of Appeals is

Affirmed.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA joins, dissenting.

In *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981), this Court made clear that, where Congress intends to impose a condition on the grant of federal funds, "it must do so unambiguously." *Id.*, at 17. This principle applies with full force to § 504 of the Rehabilitation Act, which Congress limited in scope to "those who actually 'receive' federal financial assistance." *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U. S. 597, 605 (1986). Yet, the Court today ignores this principle, resting its holding on its own sense of fairness and implied support from the Act. *Ante*, at 282–286. Such an approach, I believe, is foreclosed not only by *Pennhurst*, but also by our prior decisions interpreting the Rehabilitation Act.

Our decision in *Pennhurst* was premised on the view that federal legislation imposing obligations only on recipients of

[19] Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies. See n. 17, *supra*; 45 CFR § 84.12 and Appendix A, pp. 315–316 (1985).

federal funds is "much in the nature of a contract." 451 U. S., at 17. See also *Board of Education of Hendrick Hudson Central School District* v. *Rowley*, 458 U. S. 176, 204, n. 26 (1982). As we have stated in the context of the Rehabilitation Act, "'Congress apparently determined it would require . . . grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds.'" *United States Department of Transportation* v. *Paralyzed Veterans of America*, *supra*, at 605, quoting *Consolidated Rail Corporation* v. *Darrone*, 465 U. S. 624, 633, n. 13 (1984). The legitimacy of this *quid pro quo* rests on whether recipients of federal funds voluntarily and knowingly accept the terms of the exchange. *Pennhurst*, *supra*, at 17. There can be no knowing acceptance unless Congress speaks "with a clear voice" in identifying the conditions attached to the receipt of funds. 451 U. S., at 17.

The requirement that Congress unambiguously express conditions imposed on federal moneys is particularly compelling in cases such as this where there exists longstanding state and federal regulation of the subject matter. From as early as 1796, Congress has legislated directly in the area of contagious diseases.[1] Congress has also, however, left significant leeway to the States, which have enacted a myriad of public health statutes designed to protect against the introduction and spread of contagious diseases.[2] When faced

[1] See, *e. g.*, 42 U. S. C. §§ 243, 264; Act of May 27, 1796, ch. 31, 1 Stat. 474; see generally Morgenstern, The Role of the Federal Government in Protecting Citizens from Communicable Diseases, 47 U. Cin. L. Rev. 537 (1978).

[2] The coverage of state statutes regulating contagious diseases is broad, addressing, *inter alia*, reporting requirements, quarantines, denial of marriage licenses based on the presence of certain diseases, compulsory immunization, and certification and medical testing requirements for school employees. See, *e. g.*, Ariz. Rev. Stat. Ann. § 36.621 *et seq.* (1986) (reporting requirements); Conn. Gen. Stat. §§ 19a-207, 19a-221 (1985) (quarantines); Fla. Stat. §§ 741.051-741.055 (1985) (marriage licenses); Mass. Gen. Laws § 71:55B (1984) (certification requirements for school employees); Miss.

with such extensive regulation, this Court has declined to read the Rehabilitation Act expansively. See *Bowen* v. *American Hospital Assn.*, 476 U. S. 610, 642-647 (1986); *Alexander* v. *Choate*, 469 U. S. 287, 303, 307 (1985). Absent an expression of intent to the contrary, "Congress . . . 'will not be deemed to have significantly changed the federal-state balance.'" *Bowen* v. *American Hospital Assn.*, *supra*, at 644, quoting *United States* v. *Bass*, 404 U. S. 336, 349 (1971).

Applying these principles, I conclude that the Rehabilitation Act cannot be read to support the result reached by the Court. The record in this case leaves no doubt that Arline was discharged because of the contagious nature of tuberculosis, and not because of any diminished physical or mental capabilities resulting from her condition.[3] Thus, in the language of § 504, the central question here is whether discrimination on the basis of contagiousness constitutes discrimination "by reason of . . . handicap." Because the language of the Act, regulations, and legislative history are

Code Ann. § 37-7-301(i) (Supp. 1986) (compulsory immunization of school students); W. Va. Code § 16-3-4a (1985) (medical testing).

[3] In testifying concerning his reasons for recommending Arline's termination, petitioner Craig Marsh, Superintendent of Schools of Nassau County, Florida, stated that "I felt like that for the benefit of the total student population and . . . personnel in Nassau County and the public benefit, that it would be best if—not to continue or offer Mrs. Arline any employment." App. 62. Marsh added:

"I am charged and so is the school board, with the responsibility for the protecting, the safety, health and welfare of students, every student in Nassau County. And the record clearly states that, you know, after all—after the third time that I had knowledge of Mrs. Arline's recurring condition, which was infectious at the time of each reoccurrence, that I felt like it [was] in the best interest of the school system of Nassau County that she be dismissed from the classroom." *Id.*, at 81.

Before Arline's termination, Marsh consulted with Dr. Marianne McEuen, who testified that she recommended the termination because of the threat that Arline's condition posed to the health of the small children with whom Arline was in constant contact. *Id.*, at 12-17.

silent on this issue,[4] the principles outlined above compel the conclusion that contagiousness is not a handicap within the meaning of § 504. It is therefore clear that the protections of the Act do not extend to individuals such as Arline.

In reaching a contrary conclusion, the Court never questions that Arline was discharged because of the threat her condition posed to others. Instead, it posits that the contagious effects of a disease cannot be "meaningfully" distinguished from the disease's effect on a claimant under the Act. *Ante*, at 282. To support this position, the Court observes that Congress intended to extend the Act's protections to individuals who have a condition that does not impair their mental and physical capabilities, but limits their major life activities because of the adverse reactions of others. This congressional recognition of a handicap resulting from the reactions of others, we are told, reveals that Congress intended the Rehabilitation Act to regulate discrimination on the basis of contagiousness. *Ante*, at 284.

This analysis misses the mark in several respects. To begin with, Congress' recognition that an individual may be handicapped under the Act solely by reason of the reactions of others in no way demonstrates that, for the purposes of interpreting the Act, the reactions of others to the condition cannot be considered separately from the effect of the condition on the claimant. In addition, the Court provides no basis for extending the Act's generalized coverage of individuals suffering discrimination as a result of the reactions of others to coverage of individuals with contagious diseases. Although citing examples of handicapped individuals described in the regulations and legislative history, the Court points to nothing in these materials suggesting that Congress contemplated that a person with a condition posing a threat to the health of others may be considered handicapped under

[4] See, *e. g.*, 29 U. S. C. § 701 *et seq.*; 45 CFR pt. 84 (1985); H. R. Rep. No. 95-1149 (1978); S. Rep. No. 95-890 (1978); S. Rep. No. 93-1297 (1974); H. R. Rep. No. 93-244 (1973); S. Rep. No. 93-318 (1973).

the Act.[5] Even in an ordinary case of statutory construction, such meager proof of congressional intent would not be determinative. The Court's evidence, therefore, could not possibly provide the basis for "knowing acceptance" by such entities as the Nassau County School Board that their receipt of federal funds is conditioned on Rehabilitation Act regulation of public health issues. *Pennhurst*, 451 U. S., at 17.

In *Alexander* v. *Choate*, *supra*, at 299, this Court stated that "[a]ny interpretation of § 504 must . . . be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." The Court has wholly disregarded this admonition here.

[5] In fact, two of the examples cited by the Court may be read to support a contrary conclusion. The 1978 amendments to the Rehabilitation Act, cited by the majority, *ante*, at 285, n. 14, specifically exclude from the definition of a handicapped person alcoholics and drug abusers that "constitute a *direct threat to* property or *the safety of others*." 29 U. S. C. § 706(7)(B) (emphasis added). If anything, this exclusion evinces congressional intent to avoid the Act's interference with public health and safety concerns. See Oversight Hearings on Rehabilitation Act of 1973 before the Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 2d Sess., 503 (1978) (statement of Rep. Hyde) ("Congress needs to give thoughtful and wide-ranging consideration to the needs of handicapped persons, balanced against the realities of public safety, economics, and commonsense"). This intent is also present in the statements of Representative Vanik relied on by the Court. See *ante*, at 283, n. 9. Representative Vanik expressed apparent disapproval of a court ruling that "'a cerebral palsied child, *who was not a physical threat* and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance "produced a nauseating effect" on his classmates.'" *Ante*, at 283, n. 9, quoting 117 Cong. Rec. 45974 (1971) (emphasis added).

ASTORIA FEDERAL SAVINGS & LOAN ASSOCIATION *v.* SOLIMINO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 89-1895. Argued April 17, 1991—Decided June 10, 1991

Respondent Solimino filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that petitioner Astoria Federal Savings and Loan Association had dismissed him because of his age, in violation of the Age Discrimination in Employment Act of 1967 (Age Act). Under a worksharing agreement, the EEOC referred his claim to the state agency responsible for claims under New York's Human Rights Law. That agency found no probable cause under state law to believe that he was terminated on account of age, and its decision was upheld on administrative review. Rather than appealing that decision to state court, Solimino filed in the Federal District Court an Age Act suit grounded on the same factual allegations considered in the state proceedings. The court granted Astoria's motion for summary judgment, holding that the State's age-discrimination findings precluded federal litigation of the claim. The Court of Appeals reversed, inferring from the Age Act's structure a legislative intent to deny preclusive effect to such state administrative proceedings.

Held: Judicially unreviewed state administrative findings have no preclusive effect on age-discrimination proceedings in federal court. While well-established common-law principles, such as preclusion rules, are presumed to apply in the absence of a legislative intent to the contrary, Congress need not state expressly its intention to overcome a presumption of administrative estoppel. Clear-statement requirements are appropriate only where weighty and constant values are at stake, or where an implied legislative repeal is implicated. *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 243; *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248; *Morton* v. *Mancari*, 417 U. S. 535, 551. Such values are not represented by the lenient presumption in favor of administrative estoppel, the suitability of which varies according to context; nor does a finding against estoppel in this case give rise to an implied legislative repeal. Thus, the test for the presumption's application is whether administrative preclusion would be inconsistent with Congress' intent in enacting the particular statute. *University of Tennessee* v. *Elliott*, 478 U. S. 788, 796. The Age Act implies, in its filing requirements, that federal courts should recognize no preclusion by state administrative

findings. Both § 14(b) and § 7(d)(2) assume the possibility of federal consideration after state review. However, such proceedings would be strictly *pro forma*, with the employer likely enjoying an airtight defense, if state administrative findings were given preclusive effect. The provision, in § 14(b), for a claim's consideration in federal court after state proceedings are concluded would as a result be left essentially without effect, notwithstanding the rule that statutes should be read to avoid rendering superfluous any parts thereof. Administrative preclusion was likewise found not to apply with respect to claims arising under Title VII of the Civil Rights Act of 1964 in *Elliott, supra*, which held that Title VII's provision directing the EEOC to accord substantial weight to state administrative findings allowed for something less than preclusion. *Id.*, at 795. It is immaterial that the Age Act lacks a similar delimitation, since the Title VII provision was only the most obvious piece of evidence that administrative estoppel does not operate in a Title VII suit. This holding also comports with the Age Act's broader scheme and enforcement provisions, and, although Congress' wisdom in deciding against administrative preclusion is not relevant to this determination, its choice has plausible policy support. Pp. 107-114.

901 F. 2d 1148, affirmed and remanded.

SOUTER, J., delivered the opinion for a unanimous Court.

Paul J. Siegel argued the cause for petitioner. With him on the brief were *Roger S. Kaplan* and *Anthony H. Atlas*.

Leonard N. Flamm argued the cause for respondent. With him on the brief was *Joseph J. Gentile*.

Amy L. Wax argued the cause *pro hac vice* for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Starr, Assistant Attorney General Gerson, Deputy Solicitor General Roberts, Robert A. Long, Jr., Donald R. Livingston, Gwendolyn Young Reams*, and *Lamont N. White*.*

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*Briefs of *amici curiae* urging reversal were filed for the Atlantic Legal Foundation by *Martin S. Kaufman* and *Douglas Foster*; and for the Equal Employment Advisory Council by *Robert E. Williams* and *Douglas S. McDowell*.

Briefs of *amici curiae* urging affirmance were filed for the New York State Division of Human Rights by *Robert Abrams*, Attorney General, *O. Peter Sherwood*, Solicitor General, and *Sanford M. Cohen* and *Marjorie*

JUSTICE SOUTER delivered the opinion of the Court.

The question presented is whether claimants under the Age Discrimination in Employment Act of 1967 (Age Act or Act), 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.*, are collaterally estopped to relitigate in federal court the judicially unreviewed findings of a state administrative agency made with respect to an age-discrimination claim. We hold that such findings have no preclusive effect on federal proceedings.

Respondent Angelo Solimino had worked for petitioner Astoria Federal Savings and Loan Association for almost 40 years when at age 63 he was dismissed from his position as a vice president in the mortgage department. Less than two weeks later, on March 18, 1982, he filed a charge of age discrimination with the Equal Employment Opportunity Commission (EEOC). Under a worksharing agreement between it and the state agency, see 29 CFR § 1626.10 (1990), the EEOC referred the matter to the New York State Division of Human Rights, which is responsible for preliminary investigation and disposition of age-discrimination cases under New York's Human Rights Law. On January 25, 1983, after a hearing at which both parties were represented by counsel, the state agency found no probable cause to believe that petitioner had terminated respondent because of his age. The ruling was affirmed on review for abuse of discretion by the State Human Rights Appeal Board on May 30, 1984. Although both the Division and the Appeal Board entertained respondent's complaint only on state-law grounds, neither party suggests that the elements of an age-discrimination claim differ as between the state and federal statutes.

Respondent did not seek review of the board's decision in state court, but instead filed an Age Act suit in the United States District Court for the Eastern District of New

Fujiki, Assistant Attorneys General; and for the American Association of Retired Persons by *Cathy Ventrell-Monsees*.

York grounded on the same factual allegations considered in the state administrative proceedings. The District Court granted petitioner's motion for summary judgment, 715 F. Supp. 42 (1989), and relied heavily on the decision in *Stillians* v. *Iowa*, 843 F. 2d 276 (CA8 1988), in holding the common-law presumption of administrative estoppel to prevail by virtue of Congress' failure in either the language or legislative history of the Age Act "actually [to] addres[s] the issue." 715 F. Supp., at 47. It ruled accordingly that the determination of the State's Human Rights Division that petitioner had not engaged in age discrimination precluded federal litigation of the claim. The Court of Appeals for the Second Circuit reversed, 901 F. 2d 1148 (1990), inferring from the Act's structure a legislative intent to deny preclusive effect to such state administrative proceedings. We granted certiorari, 498 U. S. 1023 (1991), to resolve the conflict between the ruling here under review, see also *Duggan* v. *Board of Education of East Chicago Heights, Dist. No. 169, Cook County, Ill.*, 818 F. 2d 1291 (CA7 1987), and those of the Eighth Circuit in *Stillians*, *supra*, and of the Ninth Circuit in *Mack* v. *South Bay Beer Distributors, Inc.*, 798 F. 2d 1279 (1986).

We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *United States* v. *Utah Constr. & Mining Co.*, 384 U. S. 394, 422 (1966). Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their

burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. See *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 326 (1979). The principle holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal, see *University of Tennessee* v. *Elliott*, 478 U. S. 788, 798 (1986), which acts in a judicial capacity.

Courts do not, of course, have free rein to impose rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand. In this context, the question is not whether administrative estoppel is wise but whether it is intended by the legislature. The presumption holds nonetheless, for Congress is understood to legislate against a background of common-law adjudicatory principles. See *Briscoe* v. *LaHue*, 460 U. S. 325 (1983); *United States* v. *Turley*, 352 U. S. 407, 411 (1957). Thus, where a common-law principle is well established, as are the rules of preclusion, see, *e. g.*, *Parklane Hosiery*, *supra*; *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313 (1971); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371 (1940), the courts may take it as given that Congress has legislated with an expectation that the principle will apply except "when a statutory purpose to the contrary is evident." *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779, 783 (1952).

This interpretative presumption is not, however, one that entails a requirement of clear statement, to the effect that Congress must state precisely any intention to overcome the presumption's application to a given statutory scheme. Rules of plain statement and strict construction prevail only to the protection of weighty and constant values, be they constitutional, see, *e. g.*, *Atascadero State Hosp.* v. *Scanlon*, 473 U. S. 234, 243 (1985) (requiring plain statement of intention to abrogate immunity of States under the Eleventh Amendment), or otherwise, see, *e. g.*, *EEOC* v. *Arabian American*

Oil Co., 499 U. S. 244, 248 (1991) (requiring plain statement of extraterritorial statutory effect, "to protect against unintended clashes between our laws and those of other nations which could result in international discord"). See generally Eskridge, Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007 (1989). "In traditionally sensitive areas, . . . the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States* v. *Bass*, 404 U. S. 336, 349 (1971). Similar superior values, of harmonizing different statutes and constraining judicial discretion in the interpretation of the laws, prompt the kindred rule that legislative repeals by implication will not be recognized, insofar as two statutes are capable of coexistence, "absent a clearly expressed congressional intention to the contrary." *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974).

But the possibility of such an implied repeal does not cast its shadow here. We do not have before us the judgment of a state court, which would by law otherwise be accorded "the same full faith and credit in every court within the United States . . . as [it has] by law or usage in the courts of such State." 28 U. S. C. § 1738. In the face of § 1738, we have found state-court judgments in the closely parallel context of Title VII of the Civil Rights Acts of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, see *Lorillard* v. *Pons*, 434 U. S. 575, 584 (1978), to enjoy preclusive effect in the federal courts. See *Kremer* v. *Chemical Constr. Corp.*, 456 U. S. 461 (1982); see also *Allen* v. *McCurry*, 449 U. S. 90 (1980). This case, by contrast, implicates no such implied repeal, as § 1738 is inapplicable to the judicially unreviewed findings of state administrative bodies. See *Elliott*, *supra*, at 794. Nor does administrative preclusion represent independent values of such magnitude and constancy as to justify the protection of a clear-statement rule. Although administrative estoppel is favored as a matter of general policy, its

suitability may vary according to the specific context of the rights at stake, the power of the agency, and the relative adequacy of agency procedures. Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 57–58 (1974); *Pearson* v. *Williams*, 202 U. S. 281, 285 (1906). The presumption here is thus properly accorded sway only upon legislative default, applying where Congress has failed expressly or impliedly to evince any intention on the issue.

In *Elliott*, which also dealt with Title VII, the test for the presumption's application was thus framed as the question "whether a common-law rule of preclusion would be consistent with Congress' intent in enacting [the statute]." 478 U. S., at 796. See also *Brown* v. *Felsen*, 442 U. S. 127, 136 (1979); Restatement (Second) of Judgments § 83(4)(a) (1982). In contrast to 42 U. S. C. § 1983, in which the Court discerned "'[n]othing . . . remotely express[ing] any congressional intent to contravene the common-law rules of preclusion,'" 478 U. S., at 797 (quoting *Allen* v. *McCurry*, 449 U. S. 90, 97–98 (1980)), Title VII was found by implication to comprehend just such a purpose in its direction that the EEOC accord "'substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local [employment discrimination] law.'" *Elliott*, *supra*, at 795 (quoting 42 U. S. C. § 2000e–5(b)). What does not preclude a federal agency cannot preclude a federal court, see *Kremer*, *supra*, at 470, and n. 7; *Duggan*, 818 F. 2d, at 1294; we accordingly held that in the district courts the "substantial weight" standard allowed clearly for something less than preclusion. *Elliott*, 478 U. S., at 795.

We reach the same result here, for the Age Act, too, carries an implication that the federal courts should recognize no preclusion by state administrative findings with respect to age-discrimination claims. While the statute contains no express delimitation of the respect owed to state agency findings, its filing requirements make clear that collateral estoppel is not to apply. Section 14(b) requires that where a State has its own age-discrimination law, a federal Age Act complainant must first pursue his claim with the responsible state authorities before filing in federal court. 29 U. S. C. § 633(b); *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750 (1979). It further provides that "no suit may be brought under [the Age Act] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated." The deadline for filing with the EEOC likewise refers to the termination of prior state administrative action, § 7(d)(2) providing that where § 14(b) applies "[s]uch a charge shall be filed . . . within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier." 29 U. S. C. § 626(d)(2). Both provisions plainly assume the possibility of federal consideration after state agencies have finished theirs.

And yet such federal proceedings would be strictly *pro forma* if state administrative findings were given preclusive effect. It goes without saying that complainants who succeed in state proceedings will not pursue suit in federal court (except perhaps when the state remedy, or its enforcement, is thought to be inadequate); § 14(b)'s requirement that claimants file with state authorities before doing so in federal court was in fact "intended to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings." *Oscar Mayer*, *supra*, at 756. A complainant who looks to a federal court after termination of state proceedings will therefore ordinarily do so only when the state agency has held against him. In such a case, however, the employer would likely enjoy an airtight defense of collateral estoppel if a state agency determination on the merits were given preclusive effect. Cf. *Kremer*, *supra*, at 479–480. Insofar as applying preclusion would thus reduce to insignificance those cases in

which federal consideration might be pursued in the wake of the completed proceedings of state agencies, § 14(b)'s provision for just such consideration would be left essentially without effect. But of course we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof. See, *e. g.*, *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955).

That the Age Act lacks the "substantial weight" provision of Title VII's § 2000e–5(b) stressed in *Elliott* is immaterial. There was nothing talismanic about that language; it was "simply the most obvious piece of evidence that administrative *res judicata* does not operate in a Title VII suit." *Duggan*, *supra*, at 1297. It would indeed be ironic if that section were to make the difference between that statute and the Age Act insofar as preclusion in federal courts is concerned, for the language was added to Title VII not because the EEOC was applying administrative preclusion, or "giving state administrative decisions too much weight, but because it was affording them too little." *Kremer*, *supra*, at 471, n. 8. Similar provision has been unnecessary in the Age Act, for as to age-discrimination claims the EEOC of its own accord came to extend some level of deference to the determinations of state authorities. See Brief for United States et al. as *Amici Curiae* 24. It is, in any event, fair to say that even without Title VII's "substantial weight" requirement the Court would have found no administrative preclusion in that context. Title VII's § 706(c), 42 U. S. C. § 2000e–5(c), which also provides for federal court action in the aftermath of terminated state proceedings and is nearly identical to the Age Act's § 14(b), see *Oscar Mayer*, *supra*, at 755, would have provided yet further support for the Court's result there.

Thus § 14(b) suffices to outweigh the lenient presumption in favor of administrative estoppel, a holding that also comports with the broader scheme of the Age Act and the provisions for its enforcement. Administrative findings

with respect to the age-discrimination claims of federal employees enjoy no preclusive effect in subsequent judicial litigation, see *Rosenfeld* v. *Department of Army*, 769 F. 2d 237 (CA4 1985); *Nabors* v. *United States*, 568 F. 2d 657 (CA9 1978); cf. *Chandler* v. *Roudebush*, 425 U. S. 840 (1976) (same, with respect to Title VII claims), and since there is no reason to believe federal enforcement agencies are any less competent than their state counterparts, it would be anomalous to afford more deference to one than the other. It would, indeed, invite further capricious anomalies as well, for whether age-discrimination claims are investigated first by the EEOC or by state authorities is a matter over which the complainant has no control, see 29 CFR §§ 1626.9, 1626.10 (1990); whether or not he might receive his day in court (complete with jury, see 29 U. S. C. § 626(c)(2)), would then depend, under petitioner's theory, on bureaucratic chance. Petitioner's reading would also lead to disparities from State to State, depending on whether a given jurisdiction had an age-discrimination statute of its own. See § 633(b). Moreover, on the assumption that claimants fare better in federal court than before state agencies, and in light of § 14(a)'s provision that state proceedings are superseded upon commencement of federal action, see § 633(a), a recognition of administrative estoppel here would induce all claimants to initiate federal suit at the earliest opportunity after filing the state complaint, thereby defeating the purpose of deferral to resolve complaints outside the federal system. See *Oscar Mayer*, *supra*, at 755–756.

Finally, although the wisdom of Congress' decision against according preclusive effect to state agency rulings has no bearing upon the disposition of the case, that choice has plausible policy support. Although it is true that there will be some duplication of effort, the duplication need not be great. We speak, after all, only of agency determinations not otherwise subjected to judicial review; our reading of the statute will provide no more than a second chance to prove the claim,

and even then state administrative findings may be entered into evidence at trial. See *Chandler*, *supra*, at 863, n. 39. It also may well be that Congress thought state agency consideration generally inadequate to ensure full protection against age discrimination in employment. In this very case, the New York Division of Human Rights, which ruled against respondent on the merits, has itself appeared as *amicus* on his behalf, highlighting the shortfalls of its procedures and resources. See Brief for Attorney General of State of New York as *Amicus Curiae* 18–22. Alternatively, by denying preclusive effect to any such agency determination, Congress has eliminated litigation that would otherwise result, from State to State and case to case, over whether the agency has in fact "act[ed] in a judicial capacity" and afforded the parties "an adequate opportunity to litigate," *Utah Constr. Co.*, 384 U. S., at 422, so as to justify application of a normal rule in favor of estoppel.

For these reasons, the District Court's grant of petitioner's motion for summary judgment was erroneous on the grounds stated. The judgment of the Court of Appeals is affirmed, and the case is remanded to the District Court for proceedings consistent with this opinion.

It is so ordered.

GOLLUST ET AL. *v.* MENDELL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 90-659. Argued April 15, 1991—Decided June 10, 1991

Section 16(b) of the Securities Exchange Act of 1934 imposes strict liability on "beneficial owner[s]" of more than 10% of a corporation's listed stock, and on the corporation's officers and directors, for any profits realized from any purchase and sale, or sale and purchase, of such stock occurring within a 6-month period. Such "insiders" are subject to suit "instituted by the issuer, or by the owner of any security of the issuer" in the issuer's name and behalf. After respondent Mendell, an owner of common stock in Viacom International, Inc. (International), instituted a § 16(b) suit against petitioners, allegedly "beneficial owners" of International stock, International was acquired by a shell subsidiary of what is now called Viacom, Inc. (Viacom). International merged with the subsidiary and became Viacom's wholly owned subsidiary and sole asset. Mendell received cash and stock in Viacom in exchange for his International stock. The District Court granted petitioners' motion for summary judgment on the ground that Mendell had lost standing to maintain the action because he no longer owned any International stock. The Court of Appeals reversed, holding that Mendell's continued prosecution of the action was not barred by the statute's language or existing case law and was fully consistent with the statutory objectives.

Held: Mendell has satisfied the statute's standing requirements. Pp. 121–128.

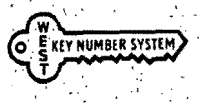
(a) Section 16(b) provides standing of signal breadth, expressly limited only by the conditions that the plaintiff be the "owner of [a] security" of the "issuer" at the time the suit is "instituted." Any "security"—including stock, notes, warrants, bonds, debentures, puts, and calls, 15 U. S. C. § 78c(a)(10)—will suffice to confer standing. There is no restriction in terms of the number or percentage of shares, or the value of any other security, that must be held. Nor is the security owner required to have had an interest in the issuer at the time of the short-swing trading. Although the security's "issuer" does not include parent or subsidiary corporations, 15 U. S. C. § 78c(a)(8), this requirement is determined at the time the § 16(b) action is "instituted." Congress intended to adopt the common understanding of the word "institute"—"inaugurate or commence; as to institute an action," Black's Law Dictionary 985–986 (3d ed. 1933)—which is confirmed by its use of the

tioned, to dispel the aura of coercion and intimidation that pervades such encounters. There is no reason to expect that such requirements would render the Nation's buses law-enforcement-free zones.

III

The majority attempts to gloss over the violence that today's decision does to the Fourth Amendment with empty admonitions. "If th[e] [war on drugs] is to be fought," the majority intones, "those who fight it must respect the rights of individuals, whether or not those individuals are suspected of having committed a crime." *Ante*, at 2389. The majority's actions, however, speak louder than its words.

I dissent.



Ellis GREGORY, Jr. and Anthony P. Nugent, Jr., Judges, Petitioners

v.

John D. ASHCROFT, Governor of Missouri.

No. 90-50.

Argued March 18, 1991.

Decided June 20, 1991.

Missouri state court judges challenged mandatory retirement provision of State Constitution. The United States District Court for the Eastern District of Missouri, William L. Hungate, J., granted Governor's motion to dismiss, and appeal was taken. The Court of Appeals, 898 F.2d 598, affirmed, and certiorari was sought. The Supreme Court, Justice O'Connor, held that: (1) appointed Missouri state judges constitute appointees "on a policymaking level," within meaning of exclusion to Federal Age Discrimination in Employment Act, and (2) Missouri Constitution's mandatory retirement provision does not violate equal protection.

Affirmed.

Justice White, concurred in part, dissented in part, concurred in judgment and filed opinion in which Justice Stevens joined.

Justice Blackmun, dissented and filed opinion in which Justice Marshall joined.

1. States ⇐4.16

Authority of state's people to determine qualifications of their most important government officials lies at heart of representative government, and is reserved under Tenth Amendment and guaranteed by guaranty clause of Article 4, § 4. U.S.C.A. Const. Art. 4, § 4; Amend. 10.

2. Judges ⇐5

States ⇐4.17

Congressional interference with state's decision to establish qualifications for judges upsets usual constitutional balance of federal and state powers, and thus Congress must make its intention to do so unmistakably clear in language of statute.

3. Commerce ⇐82.20

As against Congress' powers under commerce clause, authority of people of states to determine qualifications of their government officials may be inviolate. U.S.C.A. Const. Art. 1, § 8, cl. 3.

4. Civil Rights ⇐169, 171

Appointed Missouri state judges constitute appointees "on a policymaking level," within meaning of exclusion to federal Age Discrimination in Employment Act, absent clear congressional intent to include such judges within coverage of Act, regardless of whether Congress acted pursuant to its commerce clause powers or its powers under the enforcement section of the Fourteenth Amendment. U.S.C.A. Const. Art. 1, § 8, cl. 3; Amend. 14, § 5; Age Discrimination in Employment Act of

1967, § 11(f), as amended, 29 U.S.C.A. § 630(f).

5. Constitutional Law ⇐278.4(2)
States ⇐4.16

States' power to define qualifications of their officeholders has force even against proscriptions of Fourteenth Amendment. U.S.C.A. Const.Amend. 14.

6. Constitutional Law ⇐238.5

State's mandatory retirement provision for judges, challenged on equal protection grounds, was subject to rational basis scrutiny; age is not suspect classification and judges had no fundamental interest in serving as judges. U.S.C.A. Const.Amend. 14.

7. Constitutional Law ⇐213.1(2)

Under rational basis test, Supreme Court will not overturn law as violative of equal protection unless varying treatment of different groups or persons is so unrelated to achievement of any combination of legitimate purposes that court can only conclude that people's actions in approving it were irrational. U.S.C.A. Const.Amend. 14.

8. Constitutional Law ⇐238.5
Judges ⇐7

Missouri Constitution's mandatory retirement provision for judges reaching age of 70 does not violate equal protection; people could rationally determine that judges' physical and mental capacities would diminish with age and, unlike other state officials, election process might be inadequate to determine which judges' performance had become deficient. U.S.C.A. Const.Amend. 14; V.A.M.S. Const. Art. 5, § 26, subd. 1.

Syllabus *

Article V, § 26 of the Missouri Constitution provides a mandatory retirement age of 70 for most state judges. Petitioners, judges subject to § 26, were appointed by the Governor and subsequently were retained in office by means of retention elections in which they ran unopposed, subject only to a "yes or no" vote. Along with other state judges, they filed suit against respondent Governor, alleging that § 26 violated the federal Age Discrimination in Employment Act of 1967 (ADEA) and the Equal Protection Clause of the Fourteenth Amendment. The District Court granted the Governor's motion to dismiss, ruling that there was no ADEA violation because Missouri's appointed judges are not covered "employees" within the Act's terms, and that there was no equal protection violation because there is a rational basis for the distinction between judges and other state officials to whom no mandatory retirement age applies. The Court of Appeals affirmed.

Held:

1. Missouri's mandatory retirement requirement for judges does not violate the ADEA. Pp. 2398–2406.

(a) The authority of a State's people to determine the qualifications of their most important government officials lies "at the heart of representative government," and is reserved under the Tenth Amendment and guaranteed by the Guarantee Clause of Article IV, § 4. See, *e.g.*, *Sugarman v. Dougall*, 413 U.S. 634, 648, 93 S.Ct. 2842, 2850, 37 L.Ed.2d 853. Because congressional interference with the Missouri people's decision to establish a qualification for their judges would upset the usual constitutional balance of federal and state powers, Congress must make its intention to do so "unmistakably clear in the language of the statute." See, *e.g.*, *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65, 109 S.Ct. 2304, 2308, 105 L.Ed.2d 45. Moreover, where Congress acts pursuant to its Commerce Clause power—as it did in extending the ADEA to the States, see *EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18—the authority of a State's people to determine their govern-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

ment officials' qualifications may be inviolate. Application of the *Will* plain statement rule to determine whether Congress intended the ADEA to apply to state judges may help the Court to avoid a potential constitutional problem. Pp. 2399–2403.

(b) Appointed state judges are not covered by the ADEA. When it extended the Act's substantive provisions to include the States as employers, Congress redefined "employee" to exclude all elected and most high-ranking state officials, including "appointee[s] on the policymaking level." It is at least ambiguous whether a state judge is such an appointee. Regardless of whether the judge might be considered to make policy in the same sense as executive officials and legislators, the judge certainly is in a position requiring the exercise of discretion concerning issues of public importance, and therefore might be said to be "on the policymaking level." Thus, it cannot be concluded that the ADEA "makes unmistakably clear," *Will, supra,* 491 U.S. at 65, 109 S.Ct., at 2308, that appointed state judges are covered. Pp. 2403–2405.

(c) Even if Congress acted pursuant to its enforcement powers under § 5 of the Fourteenth Amendment, in addition to its Commerce Clause powers, when it extended the ADEA to state employment, the ambiguity in the Act's "employee" definition precludes this Court from attributing to Congress an intent to cover appointed state judges. Although, in *EEOC v. Wyoming, supra,* 460 U.S., at 243, and n. 18, 103 S.Ct., at 1064, and n. 18, the Court noted that the federalism principles constraining Congress' exercise of its Commerce Clause powers are attenuated when it acts pursuant to its § 5 powers, the Court's political-function cases demonstrate that the Fourteenth Amendment does not override all such principles, see, *e.g., Sugarman, supra,* 413 U.S., at 648, 93 S.Ct., at 2850. Of particular relevance here is *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 16, 101 S.Ct. 1531, 1539, 67 L.Ed.2d 694, in which the Court established that it will not attribute to Congress an unstated intent to intrude on traditional state authority in the exercise of its § 5 powers. That rule looks much like the plain statement rule applied *supra,* and pertains here in the face of the statutory ambiguity. Pp. 2404–2406.

2. Missouri's mandatory retirement provision does not violate the Equal Protection Clause. Pp. 2406–2408.

(a) Petitioners correctly assert their challenge at the rational basis level, since age is not a suspect classification under the Equal Protection Clause, and since they do not claim that they have a fundamental interest in serving as judges. See, *e.g., Vance v. Bradley,* 440 U.S. 93, 97, 99 S.Ct. 939, 942–943, 59 L.Ed.2d 171. In such circumstances, this Court will not overturn a state constitutional provision unless varying treatment of different groups is so unrelated to the achievement of any combination of legitimate purposes that it can only be concluded that the people's actions in approving it were irrational. *Ibid.* P. 2407.

(b) The Missouri people rationally could conclude that the threat of deterioration at age 70 is sufficiently great, and the alternatives for removal from office sufficiently inadequate, that they will require all judges to step aside at that age. Because it is an unfortunate fact of life that physical and mental capacity sometimes diminish with age, the people may wish to replace some older judges in order to satisfy the legitimate, indeed compelling, public interest in maintaining a judiciary fully capable of performing judges' demanding tasks. Although most judges probably do not suffer significant deterioration at age 70, the people could reasonably conceive the basis for the classification to be true. See *Bradley, supra,* 440 U.S., at 111, 99 S.Ct., at 949–950. Voluntary retirement will not always be sufficient to serve acceptably the goal of a fully functioning judiciary, nor may impeachment, with its public humiliation and elaborate procedural machinery. The election process may also

be inadequate, since most voters never observe judges in action nor read their opinions; since state judges serve longer terms than other officials, making them—deliberately—less dependent on the people's will; and since infrequent retention elections may not serve as an adequate check on judges whose performance is deficient. That other state officials are not subject to mandatory retirement is rationally explained by the facts that their performance is subject to greater public scrutiny, that they are subject to more standard elections, that deterioration in their performance is more readily discernible, and that they are more easily removed than judges. Pp. 2407–2408.

898 F.2d 598 (CA8 1990), affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and SCALIA, KENNEDY, and SOUTER, JJ., joined, and in Parts I and III of which WHITE and STEVENS, JJ., joined. WHITE, J., filed an opinion concurring in part, dissenting in part, and concurring in the judgment, in which STEVENS, J., joined. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL, J., joined.

Jim J. Shoemake, St. Louis, Mo., for petitioners; Bruce Dayton Livingston, St. Louis, Mo., on brief.

James B. Deutsch, Jefferson City, Mo., for respondent.

Justice O'CONNOR delivered the opinion of the Court.

Article V, § 26 of the Missouri Constitution provides that "[a]ll judges other than municipal judges shall retire at the age of seventy years." We consider whether this mandatory retirement provision violates the federal Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. §§ 621–634, and whether it comports with the federal constitutional prescription of equal protection of the laws.

I

Petitioners are Missouri state judges. Judge Ellis Gregory, Jr., is an associate circuit judge for the Twenty-First Judicial Circuit. Judge Anthony P. Nugent, Jr., is a judge of the Missouri Court of Appeals, Western District. Both are subject to the § 26 mandatory retirement provision. Petitioners were appointed to office by the Governor of Missouri, pursuant to the Missouri Non-Partisan Court Plan, Mo. Const., Art. V, §§ 25(a)–25(g). Each has, since his appointment, been retained in office by means of a retention election in which the judge ran unopposed, subject only to a "yes or no" vote. See Mo. Const., Art. V, § 25(c)(1).

Petitioners and two other state judges filed suit against John D. Ashcroft, the Governor of Missouri, in United States District Court for the Eastern District of Missouri, challenging the validity of the mandatory retirement provision. The judges alleged that the provision violated both the ADEA and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Governor filed a motion to dismiss.

The District Court granted the motion, holding that Missouri's appointed judges are not protected by the ADEA because they are "appointees ... 'on a policymaking level'" and therefore are excluded from the Act's definition of "employee." App. to Pet. for Cert. 22. The court held also that the mandatory retirement provision does not violate the Equal Protection Clause because there is a rational basis for the distinction between judges and other state officials to whom no mandatory retirement age applies. *Id.*, at 23.

The United States Court of Appeals for the Eighth Circuit affirmed the dismissal. 898 F.2d 598 (1990). That court also held that appointed judges are "'appointee[s] on the policymaking level,'" and are therefore not covered under the ADEA. *Id.*, at 604. The Court of Appeals held as well that Missouri had a rational basis for distin-

ıishing judges who had reached the age 70 from those who had not. *Id.*, at 606.

We granted certiorari on both the ADEA ıd equal protection questions, 498 U.S. —, 111 S.Ct. 507, 112 L.Ed.2d 519 (1990), ıd now affirm.

II

The ADEA makes it unlawful for an employer" "to discharge any individual" ho is at least 40 years old "because of uch individual's age." 29 U.S.C. § 623(a), 631(a). The term "employer" is efined to include "a State or political subivision of a State." 29 U.S.C. § 630(b)(2). etitioners work for the State of Missouri. hey contend that the Missouri mandatory etirement requirement for judges violates he ADEA.

A

As every schoolchild learns, our Constitıon establishes a system of dual sovereignıy between the States and the Federal Government. This Court also has recognized this fundamental principle. In *Taffin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990), "[w]e beg[a]n with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." Over a hundred years ago, the Court described the constitutional scheme of dual sovereigns:

> "'[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' . . . '[W]ithout the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869), quoting *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101 (1869).

The Constitution created a Federal Government of limited powers. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system. As James Madison put it:

> "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, pp. 292–293 (C. Rossiter ed. 1961) (J. Madison).

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. See generally McConnell, Federalism: Evaluating the Founders' Design, 54 U.Chi. L.Rev. 1484, 1491–1511 (1987); Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L.Rev. 1, 3–10 (1988).

Perhaps the principal benefit of the federalist system is a check on abuses of

government power. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985), quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572, 105 S.Ct. 1005, 1028, 83 L.Ed.2d 1016 (1985) (Powell, J., dissenting). Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. Alexander Hamilton explained to the people of New York, perhaps optimistically, that the new federalist system would suppress completely "the attempts of the government to establish a tyranny":

> "[I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress." The Federalist No. 28, pp. 180–181 (A. Hamilton).

James Madison made much the same point:

> "In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, p. 323 (J. Madison).

One fairly can dispute whether our federalist system has been quite as successful in checking government abuse as Hamilton promised, but there is no doubt about the design. If this "double security" is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.

The Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. U.S. Const., Art. VI. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.

The present case concerns a state constitutional provision through which the people of Missouri establish a qualification for those who sit as their judges. This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers ... should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." *Taylor v. Beckham*, 178 U.S. 548, 570–571, 20 S.Ct. 890, 898, 44 L.Ed. 1187 (1900). See also *Boyd v. Thayer*, 143 U.S. 135, 161, 12 S.Ct.

375, 381–382, 36 L.Ed. 103 (1892) ("Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen").

Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" this balance. *Atascadero, supra,* 473 U.S., at 243, 105 S.Ct., at 3147. We explained recently:

> "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242 [105 S.Ct. 3142, 3147, 87 L.Ed.2d 171] (1985); see also *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 99 [104 S.Ct. 900, 907, 79 L.Ed.2d 67] (1984). *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 [67 S.Ct. 1146, 1152, 91 L.Ed. 1447] (1947).... 'In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.' *United States v. Bass,* 404 U.S. 336, 349 [92 S.Ct. 515, 523, 30 L.Ed.2d 488] (1971)." *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 65, 109 S.Ct. 2304, 2308, 105 L.Ed.2d 45 (1989).

This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

In a recent line of authority, we have acknowledged the unique nature of state decisions that "go to the heart of representative government." *Sugarman v. Dougall,* 413 U.S. 634, 647, 93 S.Ct. 2842, 2850, 37 L.Ed.2d 853 (1973). *Sugarman* was the first in a series of cases to consider the restrictions imposed by the Equal Protection Clause of the Fourteenth Amendment on the ability of state and local governments to prohibit aliens from public employment. In that case, the Court struck down under the Equal Protection Clause a New York City law that provided a flat ban against the employment of aliens in a wide variety of city jobs. *Ibid.*

The Court did not hold, however, that alienage could never justify exclusion from public employment. We recognized explicitly the States' constitutional power to establish the qualifications for those who would govern:

> "Just as 'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections,' *Oregon v. Mitchell,* 400 U.S. 112, 124–125 [91 S.Ct. 260, 264–265, 27 L.Ed.2d 272] (1970) (footnote omitted) (opinion of Black, J.); see *id.,* at 201 [91 S.Ct., at 303] (opinion of Harlan, J.), and *id.,* at 293–294 [91 S.Ct., at 348–349] (opinion of Stewart, J.), "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Boyd v. Thayer,* 143 U.S. 135, 161 [12 S.Ct. 375, 381–382, 36 L.Ed. 103] (1892). See *Luther v. Borden,* 7 How. 1, 41 [12 L.Ed. 581] (1849); *Pope v. Williams,* 193 U.S. 621, 632–633 [24 S.Ct. 573, 575–576, 48 L.Ed. 817] (1904). Such power inheres in the State by virtue of its obligation, already noted above, 'to preserve the basic conception of a political community.' *Dunn v. Blumstein,* 405 U.S. [330, 344, 92 S.Ct. 995, 1004, 31 L.Ed.2d 274 (1972)]. And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective and

important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." *Ibid.*

We explained that, while the Equal Protection Clause provides a check on such state authority, "our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." *Id.*, at 648, 93 S.Ct., at 2850. This rule "is no more than ... a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders. U.S. Const. Art. IV, § 4; U.S. Const. Amdt. X; *Luther v. Borden, supra;* see *In re Duncan,* 139 U.S. 449, 461 [11 S.Ct. 573, 577, 35 L.Ed. 219] (1891)." *Ibid.*

In several subsequent cases we have applied the "political function" exception to laws through which States exclude aliens from positions "intimately related to the process of democratic self-government." See *Bernal v. Fainter,* 467 U.S. 216, 220, 104 S.Ct. 2312, 2316, 81 L.Ed.2d 175 (1984). See also *Nyquist v. Mauclet,* 432 U.S. 1, 11, 97 S.Ct. 2120, 2126, 53 L.Ed.2d 63 (1977); *Foley v. Connelie,* 435 U.S. 291, 295–296, 98 S.Ct. 1067, 1070–1071, 55 L.Ed.2d 287 (1978); *Ambach v. Norwick,* 441 U.S. 68, 73–74, 99 S.Ct. 1589, 1592–1593, 60 L.Ed.2d 49 (1979); *Cabell v. Chavez-Salido,* 454 U.S. 432, 439–441, 102 S.Ct. 735, 739–741, 70 L.Ed.2d 677 (1982). "[W]e have ... lowered our standard of review when evaluating the validity of exclusions that entrust only to citizens important elective and nonelective positions whose operations go to the heart of representative government.'" *Bernal,* 467 U.S., at 221, 104 S.Ct., at 2316 (citations omitted).

[1–3] These cases stand in recognition of the authority of the people of the States to determine the qualifications of their most important government officials.[1] It is an authority that lies at "'the heart of representative government.'" *Ibid.* It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government." U.S. Const., Art. IV, § 4. See *Sugarman, supra,* 413 U.S., at 648, 93 S.Ct., at 2850–2851 (citing the Guarantee Clause and the Tenth Amendment). See also Merritt, 88 Colum.L.Rev., at 50–55.

The authority of the people of the States to determine the qualifications of their government officials is, of course, not without limit. Other constitutional provisions, most notably the Fourteenth Amendment, proscribe certain qualifications; our review of citizenship requirements under the political-function exception is less exacting, but it is not absent. Here, we must decide what Congress did in extending the ADEA to the States, pursuant to its powers under the Commerce Clause. See *EEOC v. Wyoming,* 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983) (the extension of the ADEA to employment by state and local governments was a valid exercise of Congress' powers under the Commerce Clause). As against Congress' powers "[t]o regulate Commerce ... among the

1. Justice WHITE believes that the "political function" cases are inapposite because they involve limitations on "*judicially-created* scrutiny" rather than "*Congress'* legislative authority," which is at issue here. *Post,* at 2410. He apparently suggests that Congress has greater authority to interfere with state sovereignty when acting pursuant to its Commerce Clause powers than this Court does when applying the Fourteenth Amendment. Elsewhere in his opinion, Justice WHITE emphasizes that the Fourteenth Amendment was designed as an intrusion on state sovereignty. See *post,* at 2411–2412. That being the case, our diminished scrutiny of state laws in the "political function" cases, brought under the Fourteenth Amendment, argues strongly for special care when interpreting alleged congressional intrusions into state sovereignty under the Commerce Clause.

several States," U.S. Const., Art. I, § 8, cl. 3, the authority of the people of the States to determine the qualifications of their government officials may be inviolate.

We are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (declining to review limitations placed on Congress' Commerce Clause powers by our federal system). But there is no need to do so if we hold that the ADEA does not apply to state judges. Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." L. Tribe, American Constitutional Law § 6-25, p. 480 (2d ed. 1988).

B

In 1974, Congress extended the substantive provisions of the ADEA to include the States as employers. Pub.L. 93-259, § 28(a), 88 Stat. 74; 29 U.S.C. § 630(b)(2). At the same time, Congress amended the definition of "employee" to exclude all elected and most high-ranking government officials. Under the Act, as amended:

> "The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office." 29 U.S.C. § 630(f).

Governor Ashcroft contends that the § 630(f) exclusion of certain public officials also excludes judges, like petitioners, who are appointed to office by the Governor and are then subject to retention election. The Governor points to two passages in § 630(f). First, he argues, these judges are selected by an elected official and, because they make policy, are "appointee[s] on the policymaking level."

Petitioners counter that judges merely resolve factual disputes and decide questions of law; they do not make policy. Moreover, petitioners point out that the policymaking-level exception is part of a trilogy, tied closely to the elected-official exception. Thus, the Act excepts elected officials and: (1) "any person chosen by such officer to be on such officer's personal staff"; (2) "an appointee on the policymaking level"; and (3) "an immediate advisor with respect to the constitutional or legal powers of the office." Applying the maxim of statutory construction *noscitur a sociis*—that a word is known by the company it keeps—petitioners argue that since (1) and (3) refer only to those in close working relationships with elected officials, so too must (2). Even if it can be said that judges may make policy, petitioners contend, they do not do so at the behest of an elected official.

Governor Ashcroft relies on the plain language of the statute: it exempts persons appointed "at the policymaking level." The Governor argues that state judges, in fashioning and applying the common law, make policy. Missouri is a common law state. See Mo.Rev.Stat. § 1.010 (1986) (adopting "[t]he common law of England" consistent with federal and state law). The common law, unlike a constitution or statute, provides no definitive text; it is to be derived from the interstices of prior opinions and a well-considered judgment of what is best for the community. As Justice Holmes put it:

"The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis." O. Holmes, The Common Law 35–36 (1881).

Governor Ashcroft contends that Missouri judges make policy in other ways as well. The Missouri Supreme Court and Courts of Appeals have supervisory authority over inferior courts. Mo. Const., Art. V, § 4. The Missouri Supreme Court has the constitutional duty to establish rules of practice and procedure for the Missouri court system, and inferior courts exercise policy judgment in establishing local rules of practice. See Mo. Const., Art. V, § 5. The state courts have supervisory powers over the state bar, with the Missouri Supreme Court given the authority to develop disciplinary rules. See Mo.Rev.Stat. §§ 484.040, 484.200–484.270 (1986); Rules Governing the Missouri Bar and the Judiciary (1991).

[4] The Governor stresses judges' policymaking responsibilities, but it is far from plain that the statutory exception requires that judges actually make policy. The statute refers to appointees "on the policymaking level," not to appointees "who make policy." It may be sufficient that the appointee is in a position requiring the exercise of discretion concerning issues of public importance. This certainly describes the bench, regardless of whether judges might be considered policymakers in the same sense as the executive or legislature.

Nonetheless, "appointee at the policymaking level," particularly in the context of the other exceptions that surround it, is an odd way for Congress to exclude judges; a plain statement that judges are not "employees" would seem the most efficient phrasing. But in this case we are not looking for a plain statement that judges are excluded. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*. This does not mean that the Act must mention judges explicitly, though it does not. Cf. *Dellmuth v. Muth*, 491 U.S. 223, 233, 109 S.Ct. 2397, 2403, 105 L.Ed.2d 181 (SCALIA, J., concurring). Rather, it must be plain to anyone reading the Act that it covers judges. In the context of a statute that plainly excludes most important state public officials, "appointee on the policymaking level" is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not.

The ADEA plainly covers all state employees except those excluded by one of the exceptions. Where it is unambiguous that an employee does not fall within one of the exceptions, the Act states plainly and unequivocally that the employee is included. It is at least ambiguous whether a state judge is an "appointee on the policymaking level."

Governor Ashcroft points also to the "person elected to public office" exception. He contends that because petitioners—although appointed to office initially—are subject to retention election, they are "elected to public office" under the ADEA. Because we conclude that petitioners fall presumptively under the policymaking-level exception, we need not answer this question.

C

The extension of the ADEA to employment by state and local governments was a valid exercise of Congress' powers under the Commerce Clause. *EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983). In *Wyoming*, we re-

served the questions whether Congress might also have passed the ADEA extension pursuant to its powers under § 5 of the Fourteenth Amendment, and whether the extension would have been a valid exercise of that power. *Id.*, at 243, and n. 18, 103 S.Ct., at 1064, and n. 18. We noted, however, that the principles of federalism that constrain Congress' exercise of its Commerce Clause powers are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments. *Id.*, at 243, and n. 18, 103 S.Ct., at 1064, and n. 18, citing *City of Rome v. United States*, 446 U.S. 156, 179, 100 S.Ct. 1548, 1563, 64 L.Ed.2d 119 (1980). This is because those "Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome, supra*, at 179, 100 S.Ct., at 1563. One might argue, therefore, that if Congress passed the ADEA extension under its § 5 powers, the concerns about federal intrusion into state government that compel the result in this case might carry less weight.

[5] By its terms, the Fourteenth Amendment contemplates interference with state authority: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14. But this Court has never held that the Amendment may be applied in complete disregard for a State's constitutional powers. Rather, the Court has recognized that the States' power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment.

We return to the political-function cases. In *Sugarman*, the Court noted that "aliens as a class 'are a prime example of a "discrete and insular" minority (see *United States v. Carolene Products Co.*, 304 U.S. 144, 152–153, n. 4 [58 S.Ct. 778, 783–784, n. 4, 82 L.Ed. 1234 (1938)).' and that classifications based on alienage are 'subject to close judicial scrutiny.'" 413 U.S., at 642, 93 S.Ct., at 2847, quoting *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971). The *Sugarman* Court held that New York City had insufficient interest in preventing aliens from holding a broad category of public jobs to justify the blanket prohibition. 413 U.S., at 647, 93 S.Ct., at 2850. At the same time, the Court established the rule that scrutiny under the Equal Protection Clause "will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." *Id.*, at 648, 93 S.Ct., at 2850. Later cases have reaffirmed this practice. See *Foley v. Connelie*, 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978); *Ambach v. Norwick*, 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979); *Cabell v. Chavez-Salido*, 454 U.S. 432, 102 S.Ct. 735, 70 L.Ed.2d 677 (1982). These cases demonstrate that the Fourteenth Amendment does not override all principles of federalism.

Of particular relevance here is *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). The question in that case was whether Congress, in passing a section of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010 (1982 ed.), intended to place an obligation on the States to provide certain kinds of treatment to the disabled. Respondent Halderman argued that Congress passed § 6010 pursuant to § 5 of the Fourteenth Amendment, and therefore that it was mandatory on the States, regardless of whether they received federal funds. Petitioner and the United States, as respondent, argued that, in passing § 6010, Congress acted pursuant to its spending power alone. Consequently, § 6010 applied only to States accepting federal funds under the Act.

The Court was required to consider the "appropriate test for determining when Congress intends to enforce" the guarantees of the Fourteenth Amendment. 451 U.S., at 16, 101 S.Ct., at 1539. We adopted a rule fully cognizant of the traditional power of the States: "Because such legislation imposes congressional policy on a

State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Ibid.* Because Congress nowhere stated its intent to impose mandatory obligations on the States under its § 5 powers, we concluded that Congress did not do so. *Id.*, at 16, 101 S.Ct., at 1539.

The *Pennhurst* rule looks much like the plain statement rule we apply today. In *EEOC v. Wyoming*, the Court explained that *Pennhurst* established a rule of statutory construction to be applied where statutory intent is ambiguous. 460 U.S., at 244, n. 18, 103 S.Ct., at 1064, n. 18. In light of the ADEA's clear exclusion of most important public officials, it is at least ambiguous whether Congress intended that appointed judges nonetheless be included. In the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment.

III

Petitioners argue that, even if they are not covered by the ADEA, the Missouri Constitution's mandatory retirement provision for judges violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Petitioners contend that there is no rational basis for the decision of the people of Missouri to preclude those age 70 and over from serving as their judges. They claim that the mandatory retirement provision makes two irrational distinctions: between judges who have reached age 70 and younger judges, and between judges 70 and over and other state employees of the same age who are not subject to mandatory retirement.

[6, 7] Petitioners are correct to assert their challenge at the level of rational basis. This Court has said repeatedly that age is not a suspect classification under the Equal Protection Clause. See *Massachusetts Bd. of Retirement v. Murgia*, 4 U.S. 307, 313–314, 96 S.Ct. 2562, 2566–25 49 L.Ed.2d 520 (1976); *Vance v. Bradl* 440 U.S. 93, 97, 99 S.Ct. 939, 942–943, L.Ed.2d 171 (1979); *Cleburne v. Clebur Living Center, Inc.*, 473 U.S. 432, 441, S.Ct. 3249, 3255, 87 L.Ed.2d 313 (198 Nor do petitioners claim that they have fundamental interest in serving as judg The State need therefore assert only a tional basis for its age classification. *Murgia, supra*, 427 U.S., at 314, 96 S.C at 2567; *Bradley*, 440 U.S., at 97, 99 S.C at 942. In cases where a classificat burdens neither a suspect group nor a f damental interest, "courts are quite rel tant to overturn governmental action the ground that it denies equal protect of the laws." *Ibid.* In this case, we a dealing not merely with government acti but with a state constitutional provisi approved by the people of Missouri as whole. This constitutional provision flects both the considered judgment of t state legislature that proposed it and th of the citizens of Missouri who voted for See 1976 Mo.Laws 812 (proposing the m datory retirement provision of § 26); M Const., Art. XII, §§ 2(a), 2(b) (describ the amendment process). "[W]e will overturn such a [law] unless the vary treatment of different groups or person so unrelated to the achievement of a combination of legitimate purposes that can only conclude that the [people's] tions were irrational." *Bradley, supra*, 97, 99 S.Ct., at 943. See also *Pennell San Jose*, 485 U.S. 1, 14, 108 S.Ct. 849, 8 99 L.Ed.2d 1 (1988).

[8] Governor Ashcroft cites *O'Neil Baine*, 568 S.W.2d 761 (Mo.1978) (en ba as a fruitful source of rational bases. *O'Neil*, the Missouri Supreme Court whom Missouri Constitution Article § 26, applies—considered an equal prot tion challenge to a state statute that est lished a mandatory retirement age of for state magistrate and probate judg The court upheld the statute, declaring

merous legitimate state objectives it served: "[t]he statute draws a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal demand for the highest caliber of judges in the system"; "the statute ... draws a legitimate line to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not"; "mandatory retirement increases the opportunity for qualified persons ... to share in the judiciary and permits an orderly attrition through retirement"; "such a mandatory provision also assures predictability and ease in establishing and administering judges' pension plans." *Id.*, at 766–767. Any one of these explanations is sufficient to rebut the claim that "the varying treatment of different groups or persons [in § 26] is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people's] actions were irrational." *Bradley, supra*, 440 U.S., at 97, 99 S.Ct., at 943.

The people of Missouri have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform. It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age. See *Bradley, supra*, at 111–112, 99 S.Ct., at 949–950; *Murgia, supra*, 427 U.S., at 315, 96 S.Ct., at 2568. The people may therefore wish to replace some older judges. Voluntary retirement will not always be sufficient. Nor may impeachment—with its public humiliation and elaborate procedural machinery—serve acceptably the goal of a fully functioning judiciary. See Mo. Const., Art. VII, §§ 1–3.

The election process may also be inadequate. Whereas the electorate would be expected to discover if their governor or state legislator were not performing adequately and vote the official out of office, the same may not be true of judges. Most voters never observe state judges in action, nor read judicial opinions. State judges also serve longer terms of office than other public officials, making them—deliberately—less dependent on the will of the people. Compare Mo. Const., Art. V, § 19 (Supreme Court Justices and Court of Appeals judges serve 12-year terms; Circuit Court judges six years) with Mo. Const., Art. IV, § 17 (governor, lieutenant governor, secretary of state, state treasurer, and attorney general serve 4-year terms) and Mo. Const., Art. III, § 11 (state representatives serve 2-year terms; state senators four years). Most of these judges do not run in ordinary elections. See Mo. Const., Art. V, § 25(a). The people of Missouri rationally could conclude that retention elections—in which state judges run unopposed at relatively long intervals—do not serve as an adequate check on judges whose performance is deficient. Mandatory retirement is a reasonable response to this dilemma.

This is also a rational explanation for the fact that state judges are subject to a mandatory retirement provision, while other state officials—whose performance is subject to greater public scrutiny, and who are subject to more standard elections—are not. Judges' general lack of accountability explains also the distinction between judges and other state employees, in whom a deterioration in performance is more readily discernible and who are more easily removed.

The Missouri mandatory retirement provision, like all legal classifications, is founded on a generalization. It is far from true that all judges suffer significant deterioration in performance at age 70. It is probably not true that most do. It may not be true at all. But a State "'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'" *Murgia, supra*, at 316, 96 S.Ct., at 2568, quoting *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970). "In an equal protection case of this type ... those challenging the ... judgment [of the people]

must convince the court that the ... facts on which the classification is apparently based could not reasonably be conceived to be true by the ... decisionmaker." *Bradley*, 440 U.S., at 111, 99 S.Ct., at 949. The people of Missouri rationally could conclude that the threat of deterioration at age 70 is sufficiently great, and the alternatives for removal sufficiently inadequate, that they will require all judges to step aside at age 70. This classification does not violate the Equal Protection Clause.

IV

The people of Missouri have established a qualification for those who would be their judges. It is their prerogative as citizens of a sovereign State to do so. Neither the ADEA nor the Equal Protection Clause prohibits the choice they have made. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Justice WHITE, with whom Justice STEVENS joins, concurring in part, dissenting in part, and concurring in the judgment.

I agree with the majority that neither the ADEA nor the Equal Protection Clause prohibits Missouri's mandatory retirement provision as applied to petitioners, and I therefore concur in the judgment and in Parts I and III of the majority's opinion. I cannot agree, however, with the majority's reasoning in Part II of its opinion, which ignores several areas of well-established precedent and announces a rule that is likely to prove both unwise and infeasible. That the majority's analysis in Part II is completely unnecessary to the proper resolution of this case makes it all the more remarkable.

I

In addition to petitioners' equal protection claim, we granted certiorari to decide the following question:

"Whether appointed Missouri state court judges are 'appointee[s] on the policymaking level' within the meaning of the Age Discrimination in Employment Act ('ADEA'), 28 U.S.C. §§ 621–34 (1982 & Supp.V 1987), and therefore exempted from the ADEA's general prohibition of mandatory retirement and thus subject to the mandatory retirement provision of Article V, Section 26 of the Missouri Constitution." Pet. for Cert. i.

The majority, however, chooses not to resolve that issue of statutory construction. Instead, it holds that whether or not the ADEA can fairly be read to exclude state judges from its scope, "[w]e will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*." *Ante*, at 2404 (emphasis in original). I cannot agree with this "plain statement" rule because it is unsupported by the decisions upon which the majority relies, contrary to our Tenth Amendment jurisprudence, and fundamentally unsound.

Among other things, 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." 29 U.S.C. § 623(a). In 1974, Congress amended the definition of "employer" in the ADEA to include "a State or political subdivision of a State." 29 U.S.C. § 630(b)(2). With that amendment, "there is no doubt what the intent of Congress was: to extend the application of the ADEA to the States." *EEOC v. Wyoming*, 460 U.S. 226, 244, n. 18, 103 S.Ct. 1054, 1064, n. 18, 75 L.Ed.2d 18 (1983).

The dispute in this case therefore is not whether Congress has outlawed age discrimination by the States. It clearly has. The only question is whether petitioners fall within the definition of "employee" in the Act, § 630(f), which contains exceptions for elected officials and certain appointed officials. If petitioners *are* "employee[s]," Missouri's mandatory retirement provision

clearly conflicts with the antidiscrimination provisions of the ADEA. Indeed, we have noted that the "policies and substantive provisions of the [ADEA] apply with especial force in the case of mandatory retirement provisions." *Western Air Lines v. Criswell*, 472 U.S. 400, 410, 105 S.Ct. 2743, 2750, 86 L.Ed.2d 321 (1985). Pre-emption therefore is automatic, since "state law is pre-empted to the extent that it actually conflicts with federal law." *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983). The majority's federalism concerns are irrelevant to such "actual conflict" pre-emption. "'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982), quoting *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180 (1962).

While acknowledging this principle of federal legislative supremacy, see *ante*, at 2400, the majority nevertheless imposes upon Congress a "plain statement" requirement. The majority claims to derive this requirement from the plain statement approach developed in our Eleventh Amendment cases, see, *e.g.*, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985), and applied two Terms ago in *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65, 109 S.Ct. 2304, 2308, 105 L.Ed.2d 45 (1989). The issue in those cases, however, was whether Congress intended a particular statute to extend to the States *at all*. In *Atascadero*, for example, the issue was whether States could be sued under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Similarly, the issue in *Will* was whether States could be sued under 42 U.S.C. § 1983. In the present case, by contrast, Congress has expressly extended the coverage of the ADEA to the States and their employees. Its intention to regulate age discrimination by States is thus "unmistakably clear in the language of the statute." *Atascadero, supra*, 473 U.S., at 242, 105 S.Ct., at 3147. See *Davidson v. Board of Governors of State Colleges and Universities*, 920 F.2d 441, 443 (CA7 1990) (ADEA satisfies "clear statement" requirement). The only dispute is over the precise details of the statute's application. We have never extended the plain statement approach that far, and the majority offers no compelling reason for doing so.

The majority also relies heavily on our cases addressing the constitutionality of state exclusion of aliens from public employment. See *ante*, at 2401–2402, 2404–2406. In those cases, we held that although restrictions based on alienage ordinarily are subject to strict scrutiny under the Equal Protection Clause, see *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971), the scrutiny will be less demanding for exclusion of aliens "from positions intimately related to the process of democratic self-government." *Bernal v. Fainter*, 467 U.S. 216, 220, 104 S.Ct. 2312, 2316, 81 L.Ed.2d 175 (1984). This narrow "political function" exception to the strict scrutiny standard is based on the "State's historical power to exclude aliens from participation in its democratic political institutions." *Sugarman v. Dougall*, 413 U.S. 634, 648, 93 S.Ct. 2842, 2850–2851, 37 L.Ed.2d 853 (1973).

It is difficult to see how the "political function" exception supports the majority's plain statement rule. First, the exception merely reflects a determination of the scope of the rights of aliens under the Equal Protection Clause. Reduced scrutiny is appropriate for certain political functions because "the right to govern is reserved to citizens." *Foley v. Connelie*, 435 U.S. 291, 297, 98 S.Ct. 1067, 1071, 55 L.Ed.2d 287 (1978); see also *Sugarman, supra*, 413 U.S., at 648–649, 93 S.Ct., at 2850–2851. This conclusion in no way establishes a method for interpreting rights

that are statutorily created by Congress, such as the protection from age discrimination in the ADEA. Second, it is one thing to limit *judicially-created* scrutiny, and it is quite another to fashion a restraint on *Congress'* legislative authority, as does the majority; the latter is both counter-majoritarian and an intrusion on a co-equal branch of the federal government. Finally, the majority does not explicitly restrict its rule to "functions that go to the heart of representative government," *id.*, at 647, 93 S.Ct., at 2850, and may in fact be extending it much further to all "state governmental functions." See *ante*, at 2406.

The majority's plain statement rule is not only unprecedented, it directly contravenes our decisions in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), and *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988). In those cases we made it clear "that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." *Id.*, at 512, 108 S.Ct., at 1360. We also rejected as "unsound in principle and unworkable in practice" any test for state immunity that requires a judicial determination of which state activities are "traditional," "integral," or "necessary." *Garcia, supra*, 469 U.S., at 546, 105 S.Ct., at 1015. The majority disregards those decisions in its attempt to carve out areas of state activity that will receive special protection from federal legislation.

The majority's approach is also unsound because it will serve only to confuse the law. First, the majority fails to explain the scope of its rule. Is the rule limited to federal regulation of the qualifications of state officials? See *ante*, at 2403. Or does it apply more broadly to the regulation of any "state governmental functions"? See *ante*, at 2406. Second, the majority does not explain its requirement that Congress' intent to regulate a particular state activity be "plain to anyone reading [the federal statute]." See *ante*, at 2404. Does that mean that it is now improper to look to the purpose or history of a federal statute in determining the scope of the statute's limitations on state activities? If so, the majority's rule is completely inconsistent with our pre-emption jurisprudence. See, *e.g.*, *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715, 105 S.Ct. 2371, 2376, 85 L.Ed.2d 714 (1985) (pre-emption will be found where there is a "clear and manifest *purpose*" to displace state law; emphasis added). The vagueness of the majority's rule undoubtedly will lead States to assert that various federal statutes no longer apply to a wide variety of State activities if Congress has not expressly referred to those activities in the statute. Congress, in turn, will be forced to draft long and detailed lists of which particular state functions it meant to regulate.

The imposition of such a burden on Congress is particularly out of place in the context of the ADEA. Congress already has stated that all "individual[s] employed by any employer" are protected by the ADEA unless they are expressly excluded by one of the exceptions in the definition of "employee." See 29 U.S.C. § 630(f). The majority, however, turns the statute on its head, holding that state judges are not protected by the ADEA because "Congress has [not] made it clear that judges are *included*." *Ante*, at 2404 (emphasis in original). Cf. *EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), where we held that state game wardens are covered by the ADEA, even though such employees are not expressly included within the ADEA's scope.

The majority asserts that its plain statement rule is helpful in avoiding a "potential constitutional problem." *Ante*, at 2403. It is far from clear, however, why there would be a constitutional problem if the ADEA applied to state judges, in light of our decisions in *Garcia* and *Baker*, discussed above. As long as "the national political *process* did not operate in a defec-

tive manner, the Tenth Amendment is not implicated." *Baker, supra,* 485 U.S., at 512, 108 S.Ct., at 1360. There is no claim in this case that the political process by which the ADEA was extended to state employees was inadequate to protect the States from being "unduly burden[ed]" by the Federal Government. See *Garcia, supra,* 469 U.S., at 556, 105 S.Ct., at 1020. In any event, as discussed below, a straightforward analysis of the ADEA's definition of "employee" reveals that the ADEA does not apply here. Thus, even if there were potential constitutional problems in extending the ADEA to state judges, the majority's proposed plain statement rule would not be necessary to avoid them in this case. Indeed, because this case can be decided purely on the basis of statutory interpretation, the majority's announcement of its plain statement rule, which purportedly is derived from constitutional principles, *violates* our general practice of avoiding the unnecessary resolution of constitutional issues.

My disagreement with the majority does not end with its unwarranted announcement of the plain statement rule. Even more disturbing is its treatment of Congress' power under § 5 of the Fourteenth Amendment. See *ante,* at 2404–2406. Section 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Despite that sweeping constitutional delegation of authority to Congress, the majority holds that its plain statement rule will apply with full force to legislation enacted to enforce the Fourteenth Amendment. The majority states: "In the face of ... ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions *regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment.*" *Ante,* at 2406 (emphasis added).[1]

The majority's failure to recognize the special status of legislation enacted pursuant to § 5 ignores that, unlike Congress' Commerce Clause power, "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976). Indeed, we have held that "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.' Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome v. United States,* 446 U.S. 156, 179, 100 S.Ct. 1548, 1562–1563, 64 L.Ed.2d 119 (1980); see also *EEOC v. Wyoming,* 460 U.S., at 243, n. 18, 103 S.Ct., at 1064, n. 18.

The majority relies upon *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), see *ante,* at 2405–2406, but that case does not support its approach. There, the Court merely stated that "we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." 451 U.S., at 16, 101 S.Ct., at 1539. In other words, the *Pennhurst* presumption was designed only to answer the question whether

1. In *EEOC v. Wyoming,* 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), we held that the extension of the ADEA to the States was a valid exercise of congressional power under the Commerce Clause. We left open, however, the issue whether it was also a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. Cf. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 453, n. 9, 96 S.Ct. 2666, 2670, n. 9, 49 L.Ed.2d 614 (1976) (extension of Title VII to States was pursuant to Congress' § 5 power). Although we need not resolve the issue in this case, I note that at least two Courts of Appeals have held that the ADEA was enacted pursuant to Congress' § 5 power. See *Heiar v. Crawford County,* 746 F.2d 1190, 1193–1194 (CA7 1984); *Ramirez v. Puerto Rico Fire Service,* 715 F.2d 694, 700 (CA1 1983).

a particular piece of legislation was enacted pursuant to § 5. That is very different from the majority's apparent holding that even when Congress *is* acting pursuant to § 5, it nevertheless must specify the precise details of its enactment.

The majority's departures from established precedent are even more disturbing when it is realized, as discussed below, that this case can be affirmed based on simple statutory construction.

II

The statute at issue in this case is the ADEA's definition of "employee," which provides:

> "The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision." 29 U.S.C. § 630(f).

A parsing of that definition reveals that it excludes from the definition of "employee" (and thus the coverage of the ADEA) four types of (non-civil service) state and local employees: (1) persons elected to public office; (2) the personal staff of elected officials; (3) persons appointed by elected officials to be on the policymaking level; and (4) the immediate advisers of elected officials with respect to the constitutional or legal powers of the officials' offices.

The question before us is whether petitioners fall within the third exception. Like the Court of Appeals, see 898 F.2d 598, 600 (CA8 1990), I assume that petitioners, who were initially appointed to their positions by the Governor of Missouri, are "appointed" rather than "elected" within the meaning of the ADEA. For the reasons below, I also conclude that petitioners are "on the policymaking level." [2]

"Policy" is defined as "a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in the light of given conditions to guide and usu[ally] determine present and future decisions." Webster's Third New International Dictionary 1754 (1976). Applying that definition it is clear that the decisionmaking engaged in by common-law judges, such as petitioners, places them "on the policymaking level." In resolving disputes, although judges do not operate with unconstrained discretion, they do choose "from among alternatives" and elaborate their choices in order "to guide and ... determine present and future decisions." The quotation from Justice Holmes in the majority's opinion, see *ante*, at 2404, is an eloquent description of the policymaking nature of the judicial function. Justice Cardozo also stated well:

> "Each [common-law judge] indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law.... [W]ithin the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made." B. Cardozo, The Nature of the Judicial Process 113-11 (1921).

2. Most of the lower courts that have addressed the issue have concluded that appointed state judges fall within the "appointee[s] on the policymaking level" exception. See 898 F.2d 598 (CA8 1990) (case below); *EEOC v. Massachusetts*, 858 F.2d 52 (CA1 1988); *Sabo v. Casey*, 757 F.Supp. 587 (ED Pa.1991); *In re Stout*, 521 P 571, 559 A.2d 489 (1989); see also *EEOC Illinois*, 721 F.Supp. 156 (ND Ill.1989). But s *EEOC v. Vermont*, 904 F.2d 794 (CA2 1990 *Schlitz v. Virginia*, 681 F.Supp. 330 (ED Va rev'd on other grounds, 854 F.2d 43 (CA4 1988

Moreover, it should be remembered that the statutory exception refers to appointees "on the policymaking level," not "policymaking employees." Thus, whether or not judges actually *make* policy, they certainly are on the same *level* as policymaking officials in other branches of government and therefore are covered by the exception. The degree of responsibility vested in judges, for example, is comparable to that of other officials that have been found by the lower courts to be on the policymaking level. See, *e.g.*, *EEOC v. Reno*, 758 F. 2d 581 (CA11 1985) (assistant state attorney); *EEOC v. Board of Trustees of Wayne Cty. Comm. Coll.*, 723 F. 2d 509 (CA6 1983) (president of community college).

Petitioners argue that the "appointee[s] on the policymaking level" exception should be construed to apply "only to persons who advise or work closely with the elected official that chose the appointee." Brief for Petitioners 18. In support of that claim, petitioners point out that the exception is "sandwiched" between the "personal staff" and "immediate adviser" exceptions in § 630(f), and thus should be read as covering only similar employees.

Petitioners' premise, however, does not prove their conclusion. It is true that the placement of the "appointee" exception between the "personal staff" and "immediate adviser" exceptions suggests a similarity among the three. But the most obvious similarity is simply that each of the three sets of employees are connected in some way with elected officials: the first and third sets have a certain working relationship with elected officials, while the second is *appointed* by elected officials. There is no textual support for concluding that the second set must *also* have a close working relationship with elected officials. Indeed, such a reading would tend to make the "appointee" exception superfluous since the "personal staff" and "immediate adviser" exceptions would seem to cover most appointees who are in a close working relationship with elected officials.

Petitioners seek to rely on legislative history, but it does not help their position. There is little legislative history discussing the definition of "employee" in the ADEA, so petitioners point to the legislative history of the identical definition in Title VII, 42 U.S.C. § 2000e(f). If anything, that history tends to confirm that the "appointee[s] on the policymaking level" exception was designed to exclude from the coverage of the ADEA all high-level appointments throughout state government structures, including judicial appointments.

For example, during the debates concerning the proposed extension of Title VII to the States, Senator Ervin repeatedly expressed his concern that the (unamended) definition of "employee" would be construed to reach those "persons who exercise the legislative, executive, *and judicial* powers of the States and political subdivisions of the States." 118 Cong.Rec. 1838 (1972) (emphasis added). Indeed, he expressly complained that "[t]here is not even an exception in the [unamended] bill to the effect that the EEOC will not have jurisdiction over ... State judges, whether they are elected or appointed to office." *Id.*, at 1677. Also relevant is Senator Taft's comment that, in order to respond to Senator Ervin's concerns, he was willing to agree to an exception not only for elected officials, but also for "those at the top decisionmaking levels in the executive and judicial branch as well." *Id.*, at 1838.

The definition of "employee" subsequently was modified to exclude the four categories of employees discussed above. The Conference Committee that added the "appointee[s] on the policymaking level" exception made clear the separate nature of that exception:

> "It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisors *or* to policymaking positions at *the highest levels* of the departments or agencies of State or local governments, such as cabinet officers, and persons

with comparable responsibilities at the local level." H.R.Conf.Rep. No. 92-899, pp. 15-16 (1972) (emphasis added).

The italicized "or" in that statement indicates, contrary to petitioners' argument, that appointed officials need not be advisers to be covered by the exception. Rather, it appears that "Congress intended two categories: policymakers, who need not be advisers; and advisers, who need not be policymakers." *EEOC v. Massachusetts*, 858 F.2d 52, 56 (CA1 1988). This reading is confirmed by a statement by one of the House Managers, Representative Erlenborn, who explained that "[i]n the conference, an additional qualification was added, exempting those people appointed by officials at the State and local level in policymaking positions." 118 Cong.Rec., at 7567.

In addition, the phrase "the highest levels" in the Conference Report suggests that Congress' intent was to limit the exception "down the chain of command, and not so much across agencies or departments." *EEOC v. Massachusetts*, 858 F.2d, at 56. I also agree with the First Circuit's conclusion that even lower court judges fall within the exception because "each judge, as a separate and independent judicial officer, is at the very top of his particular 'policymaking' chain of command, responding ... only to a higher appellate court." *Ibid.*

For these reasons, I would hold that petitioners are excluded from the coverage of the ADEA because they are "appointee[s] on the policymaking level" under 29 U.S.C. § 630(f).[3]

I join Parts I and III of the Court's opinion and concur in its judgment.

Justice BLACKMUN, with whom Justice MARSHALL joins, dissenting.

I agree entirely with the cogent analysis contained in Part I of Justice WHITE's opinion, *ante*. For the reasons well stated by Justice WHITE, the question we must resolve is whether appointed Missouri state judges are excluded from the general *prohibition* of mandatory retirement that Congress established in the Federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. I part company with Justice WHITE, however, in his determination that appointed state judges fall within the narrow exclusion from ADEA coverage that Congress created for an "appointee on the policymaking level." 29 U.S.C. § 630(f).

I

For two reasons, I do not accept the notion that an appointed state judge is an "appointee on the policymaking level." First, even assuming that judges may be described as policymakers in certain circumstances, the structure and legislative history of the policymaker exclusion make clear that judges are not the kind of policymakers whom Congress intended to exclude from the ADEA's broad reach. Second, whether or not a plausible argument may be made for judges' being policymakers, I would defer to the EEOC's reason-

3. The dissent argues that we should defer to the EEOC's view regarding the scope of the "policymaking level" exception. See *post*, at 2418. I disagree. The EEOC's position is not embodied in any formal issuance from the agency, such as a regulation, guideline, policy statement, or administrative adjudication. Instead, it is merely the EEOC's *litigating* position in recent lawsuits. Accordingly, it is entitled to little if any deference. See, *e.g.*, *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-213, 109 S.Ct. 468, 473-474, 102 L.Ed.2d 493 (1988); *St. Agnes Hospital v. Sullivan*, 905 F.2d 1563, 1568 (CADC 1990). Although the dissent does cite to an EEOC decision involving the policymaking exception in Title VII, see *post*, at 2418, that decision did not state, even in *dicta*, that the exception is limited to those who work closely with elected officials. Rather, it merely stated that the exception applies to officials "on the highest levels of state or local government." CCH EEOC Decisions (1983) ¶ 6725. In any event, the EEOC's position is, for the reasons discussed above, inconsistent with the plain language of the statute at issue. "[N]o deference is due to agency interpretations at odds with the plain language of the statute itself." *Ohio Public Employees Retirement System v. Betts*, 492 U.S. 158, 171, 109 S.Ct. 2854, 2863, 106 L.Ed.2d 134 (1989).

ble construction of the ADEA as covering ppointed state judges.

A

Although it may be possible to define an ppointed judge as a "policymaker" with nly a dictionary as a guide,[1] we have an bligation to construe the exclusion of an 'appointee on the policymaking level" with sensitivity to the context in which Congress placed it. In construing an undefined statutory term, this Court has adhered steadfastly to the rule that "'words grouped in a list should be given related meaning,'" *Dole v. Steelworkers*, 494 U.S. 26, ——, 110 S.Ct. 929, 930, 108 L.Ed.2d 23 (1990), quoting *Massachusetts v. Morash*, 490 U.S. 107, 114–115, 109 S.Ct. 1668, 1672–1673, 104 L.Ed.2d 98 (1989), quoting *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 8, 105 S.Ct. 2458, 2462, 86 L.Ed.2d 1 (1985), quoting *Securities Industry Assn. v. Board of Governors, FRS*, 468 U.S. 207, 218, 104 S.Ct. 3003, 3009, 82 L.Ed.2d 158 (1984), and that "'in expounding a statute, we [are] not ... guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Morash*, 490 U.S., at 115, 109 S.Ct., at 1673, quoting *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 51, 107 S.Ct. 1549, 1554–1555, 95 L.Ed.2d 39 (1987). Applying these maxims of statutory construction, I conclude that an appointed state judge is not the kind of "policymaker" whom Congress intended to exclude from the protection of the ADEA.

The policymaker exclusion is placed between the exclusion of "any person chosen by such [elected] officer to be on such officer's personal staff" and the exclusion of "an immediate advisor with respect to the exercise of the constitutional or legal powers of the office." See 29 U.S.C. § 630(f). Reading the policymaker exclusion in light of the other categories of employees listed with it, I conclude that the class of "appointee[s] on the policymaking level" should be limited to those officials who share the characteristics of personal staff members and immediate advisers, *i.e.*, those who work closely with the appointing official and are directly accountable to that official. Additionally, I agree with the reasoning of the Second Circuit in *EEOC v. Vermont*, 904 F.2d 794 (1990):

> "Had Congress intended to except a wide-ranging category of policymaking individuals operating wholly independently of the elected official, it would probably have placed that expansive category at the end of the series, not in the middle." *Id.*, at 798.

Because appointed judges are not accountable to the official who appoints them and are precluded from working closely with that official once they have been appointed, they are not "appointee[s] on the policymaking level" for purposes of 29 U.S.C. § 630(f).[2]

1. Justice WHITE finds the dictionary definition of "policymaker" broad enough to include the Missouri judges involved in this case, because judges resolve disputes by choosing "'from among alternatives' and elaborate their choices in order 'to guide and ... determine present and future decisions.'" *Ante*, at 2413. See also *Gregory v. Ashcroft*, 898 F.2d 598, 601 (CA8 1990), quoting *EEOC v. Massachusetts*, 858 F.2d 52, 55 (CA1 1988). I hesitate to classify judges as policymakers, even at this level of abstraction. Although some part of a judge's task may be to fill in the interstices of legislative enactments, the *primary* task of a judicial officer is to apply rules reflecting the policy choices made by, or on behalf of, those elected to legislative and executive positions. A judge is first and foremost one who resolves disputes, and not one charged with the duty to fashion broad policies establishing the rights and duties of citizens. That task is reserved primarily for legislators. See *EEOC v. Vermont*, 904 F.2d 794, 800–801 (CA2 1990).

Nor am I persuaded that judges should be considered policymakers because they sometimes fashion court rules and are otherwise involved in the administration of the state judiciary. See *In re Stout*, 521 Pa. 571, 583–586, 559 A.2d 489, 495–497 (1989). These housekeeping tasks are at most ancillary to a judge's primary function described above.

2. I disagree with Justice WHITE's suggestion that this reading of the policymaking exclusion renders it superfluous. *Ante*, at 2413–2414.

B

The evidence of Congress' intent in enacting the policymaking exclusion supports this narrow reading. As noted by Justice WHITE, *ante*, at 2413, there is little in the legislative history of § 630(f) itself to aid our interpretive endeavor. Because Title VII of the Civil Rights Act of 1964, § 701(f), as amended, 42 U.S.C. § 2000e(f), contains language identical to that in the ADEA's policymaking exclusion, however, we accord substantial weight to the legislative history of the cognate Title VII provision in construing § 630(f). See *Lorillard v. Pons*, 434 U.S. 575, 584, 98 S.Ct. 866, 872, 55 L.Ed.2d 40 (1978) (noting that "the prohibitions of the ADEA were derived *in haec verba* from Title VII"). See also *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 621–622, 83 L.Ed.2d 523 (1985); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756, 99 S.Ct. 2066, 2071–2072, 60 L.Ed.2d 609 (1979); *EEOC v. Vermont*, 904 F.2d, at 798.

When Congress decided to amend Title VII to include States and local governments as employers, the original bill did not contain any employee exclusion. As Justice WHITE notes, *ante*, at 2413, the absence of a provision excluding certain state employees was a matter of concern for Senator Ervin, who commented that the bill, as reported, did not contain a provision "to the effect that the EEOC will not have jurisdiction over . . . State judges, whether they are elected or appointed to office. . . ." 118 Cong.Rec. 1677 (1972). Because this floor comment refers to appointed judges, Justice WHITE concludes that the later amendment containing the exclusion of "an appointee on the policymaking level" w drafted in "response to the concerns rais by Senator Ervin and others," *ante*, 2413, and therefore should be read to clude judges.

Even if the only legislative history av able was the above-quoted statement Senator Ervin and the final amendm containing the policymaking exclusion, would be reluctant to accept Just WHITE's analysis. It would be odd conclude that the general exclusion those "on the policymaking level" was a ed in response to Senator Ervin's very s cific concern about appointed judg Surely, if Congress had desired to excl judges—and was responding to a spec complaint that judges would be within jurisdiction of the EEOC—it would h chosen far clearer language to accompl this end.[3] In any case, a more detai look at the genesis of the policymaki exclusion seriously undermines the sug tion that it was intended to include appo ed judges.

After commenting on the absence of employee exclusion, Senator Ervin posed the following amendment:

"[T]he term 'employee' as set forth in original act of 1964 and as modifie the pending bill shall not include person elected to public office in State or political subdivision of any S by the qualified voters thereof, or person chosen by such person to ad him in respect to the exercise of constitutional or legal powers of his fice." 118 Cong.Rec. 4483 (1972).

There exist policymakers who work closely with an appointing official but who are appropriately classified as neither members of his "personal staff" nor "immediate adviser[s] with respect to the exercise of the constitutional or legal powers of the office." Among others, certain members of the Governor's Cabinet and high level state agency officials well might be covered by the policymaking exclusion, as I construe it.

3. The majority acknowledges this anomaly by noting that "'appointee [on] the policymaking level,' particularly in the context of the o exceptions that surround it, is an odd wa Congress to exclude judges; a plain state that judges are not 'employees' would seem most efficient phrasing." *Ante*, at 2404. majority dismisses this objection not by ref it, but by noting that "we are not looking plain statement that judges are excluded." For the reasons noted in Part I of Ju WHITE's opinion, this reasoning is faulty: pointed judges are covered unless they fall in the enumerated exclusions.

II

The Missouri constitutional provision mandating the retirement of a judge who reaches the age of 70 violates the ADEA and is, therefore, invalid.[5] Congress enacted the ADEA with the express purpose "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621. Congress provided for only limited exclusions from the coverage of the ADEA, and exhorted courts applying this law to construe such exclusions narrowly. The statute's structure and legislative history reveal that Congress did not intend an appointed state judge to be beyond the scope of the ADEA's protective reach. Further, the EEOC, which is charged with the enforcement of the ADEA, has determined that an appointed state judge is covered by the ADEA. This Court's precedent dictates that we defer to the EEOC's permissible interpretation of the ADEA.

I dissent.

the policymaking level whom Congress intended to exclude from ADEA coverage. See CCH EEOC Decisions (1983) ¶ 6725. Second, the Court in *Bowen* emphasized that the agency had failed to offer "a reasoned and consistent view of the scope of" the relevant statute and had proffered an interpretation of the statute that was "contrary to the narrow view of that provision advocated in past cases." See 488 U.S., at 212–213, 109 S.Ct., at 473–474. In contrast, however, the EEOC never has waivered from its view that the policymaking exclusion does not apply to appointed judges. Thus, this simply is *not* a case in which a court is asked to defer to "nothing more than an agency's convenient litigating position." *Id.*, at 213, 109 S.Ct., at 474. For all the reasons that deference was inappropriate in *Bowen*, it is appropriate here.

5. Because I conclude that the challenged Missouri constitutional provision violates the ADEA, I need not consider petitioners' alternative argument that the mandatory retirement provision violates the Fourteenth Amendment to the United States Constitution. See *Carnival Cruise Lines, Inc. v. Shute*, — U.S. —, —, 111 S.Ct. 1522, —, 113 L.Ed.2d 622 (1991).

Jeffrey M. MASSON, Petitioner

v.

NEW YORKER MAGAZINE, INC., Alfred A. Knopf, Inc. and Janet Malcolm.

No. 89-1799.

Argued Jan. 14, 1991.

Decided June 20, 1991.

Noted psychoanalyst, who was subject of magazine article and book, brought libel action against publishers and author. The United States District Court for the Northern District of California, Eugene F. Lynch, J., 686 F.Supp. 1396, granted summary judgment in defendants' favor. Superseding its prior opinion, 881 F.2d 1452, the Court of Appeals for the Ninth Circuit, 895 F.2d 1535, affirmed. Certiorari was granted. The Supreme Court, Justice Kennedy, held that: (1) evidence presented jury question under California law as to whether author acted with requisite knowledge of falsity or reckless disregard as to truth or falsity of five of six cited passages, and (2) on remand, Court of Appeals was to consider in the first instance the argument that District Court erred in granting summary judgment to publishers on basis of their respective relations with author or lack of independent actual malice.

Reversed and remanded.

Justice White concurred in part and dissented in part and filed opinion in which Justice Scalia joined.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1990

STEVENS *v.* DEPARTMENT OF THE TREASURY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 89-1821. Argued March 19, 1991—Decided April 24, 1991

On April 27, 1987, petitioner Stevens, who was in his 60's, was subjected to an adverse personnel action by his employer, the Internal Revenue Service. Believing that he had been the victim of age discrimination, he attempted to invoke his agency's administrative procedure for resolving such claims in September 1987, long after the expiration of the applicable time period set forth in Equal Employment Opportunity Commission (EEOC) regulations. On October 19, he filed a formal administrative complaint of age discrimination with the Department of the Treasury, concluding with a notice of his intention to sue if the matter was not satisfactorily resolved. The complaint was rejected because of the untimeliness of his initial attempt to obtain relief, and the EEOC's Office of Review and Appeals affirmed. On May 3, 1988, Stevens filed a complaint against the Department and its Secretary in the District Court, which dismissed the case with prejudice, concluding that it was "without jurisdiction" to apply the Age Discrimination in Employment Act of 1967 (ADEA) in the circumstances. Noting that a federal employee has two alternative avenues of relief under the ADEA, the court reasoned (1) that Stevens had not satisfied the requirements for proceeding directly to federal court under 29 U. S. C. § 633a(d), which, the court declared, mandated that he "initiate an action no later than 180 days from the unlawful action and notify the EEOC within 30 days prior to commencing suit," and (2) that his attempted administrative procedure had not properly been invoked because of untimeliness, whereas, having chosen the

administrative route under § 633a(b), he was required to exhaust his administrative remedies before bringing suit. The Court of Appeals declared that, under § 633a(d), Stevens had to file a notice of intent to sue within 180 days of the allegedly discriminatory action but did not have to initiate his federal suit within that period. Nevertheless, the court affirmed the dismissal of his complaint on the ground that, since he had not initiated his suit until May 3, 1988, his October 19, 1987, notice to the EEOC was not effective.

Held:

1. Stevens' civil action was timely under § 633a. Pp. 5–8.

(a) Stevens clearly met the requirements of § 633a(d), which calls for a notice of "not less than" 30 days to the EEOC of an intent to sue (not notification within 30 days), and provides that the "notice shall be filed" within 180 days of the alleged unlawful practice (not filed within 180 days of the notice). Here, the EEOC—which accepts a notice given to the employing agency as sufficient compliance with the statutory notice requirement—was notified on October 19, 1987, the 176th day after the alleged discriminatory action of April 27, 1987. And suit was not filed until May 3, 1988, a date more than 30 days after the notice was given. Pp. 5–7.

(b) There is no discernible basis for concluding that the suit was not filed within the applicable limitations period. Since the statute does not expressly impose any additional limitations period for a complaint, it must be assumed that Congress intended to impose an appropriate period borrowed either from a state statute or from an analogous federal one. It need not be decided here which limitations period is applicable to § 633a(c) civil actions, since Stevens filed his suit only one year and six days after the allegedly discriminatory event. As respondents acknowledge, that is well within whatever statute of limitations might apply. Pp. 7–8.

(c) The timeliness issue is properly before this Court, since the District Court heard the case on the merits, and the Court of Appeals in its turn specifically referred to Stevens' notice of intention to file a civil suit and answered the timeliness question incorrectly. P. 8.

2. This Court will not address the question whether Stevens, having filed an administrative complaint, was required to exhaust his administrative remedies before filing a civil action, since the Government, in direct contradiction of its position before the Court of Appeals, now fully agrees with Stevens that exhaustion is not required. Pp. 8–11.

897 F. 2d 526, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined, and in all but Part IV of which STEVENS, J., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 11.

Alison Steiner argued the cause for petitioner. With her on the briefs were *Michael Adelman* and *Donald B. Verrilli, Jr.*

Amy L. Wax argued the cause *pro hac vice* for respondents. With her on the brief were *Solicitor General Starr, Assistant Attorney General Gerson, Deputy Solicitor General Roberts, Harriet S. Shapiro, Michael Jay Singer,* and *Donald R. Livingston.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns a claim of age discrimination said to be in violation of § 15 (the federal employees' component) of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as added by the Fair Labor Standards Amendments of 1974, 88 Stat. 74, and amended, 29 U. S. C. § 633a.

I

Petitioner Charles Z. Stevens III, is an employee of the United States Internal Revenue Service (Service). In August 1986, when he was 63 years of age, Stevens was accepted into the Service's Revenue Officer Training Program at Austin, Tex., and assumed probationary status as a civil service employee. On April 27, 1987, he was advised that his performance in the program was not satisfactory. He then requested a transfer out of the program and a demotion, rather than face separation from the Service. Believing that he had been the victim of age discrimination, Stevens on May 21 wrote his Congressman for assistance. See App. 8. That inquiry proved to be nonproductive.

In September 1987, petitioner attempted to invoke his agency's administrative procedure for resolving age discrimination complaints through an initial meeting with an Equal Employment Opportunity Counselor. This, however,

was long after the expiration of the 30-day period prescribed for such an application by 29 CFR §§ 1613.511, 1613.512, and 1613.214(a)(1)(i) (1990). On October 19, petitioner filed a formal administrative complaint of age discrimination with the Department of the Treasury. App. 11. At the end of that complaint was the following statement: "This is also my notice of intention to sue in U. S. Civil District Court if the matter is not satisfactorily resolved." *Id.*, at 15. The complaint was rejected, it was said, because of the delay in seeking a meeting with the counselor and because there was no showing of good cause for not complying with the 30-day requirement. *Id.*, at 16. This action was described by the Director of the Regional Complaints Center as "a final agency decision." *Id.*, at 19. On petitioner's appeal to the Equal Employment Opportunity Commission (EEOC) Office of Review and Appeals, the rejection for untimeliness was affirmed on March 30, 1988. *Id.*, at 20.

On May 3, 1988, petitioner filed *pro se* his complaint against the Department of the Treasury and its Secretary in the United States District Court for the Western District of Texas. *Id.*, at 2. At an ensuing hearing, petitioner was represented by counsel. The defense moved to dismiss the action on the ground that petitioner had failed to establish any basis for tolling the 30-day period. *Id.*, at 22. The District Court granted the motion and dismissed the case with prejudice. App. to Pet. for Cert. A–1. It noted: "[A]n employee who believes that he has been discriminated against because of age has two avenues of relief under the ADEA": he either "may proceed directly to federal court and initiate an action no later than 180 days from the unlawful action and notify the EEOC within 30 days prior to commencing suit," *id.*, at A–3, citing 29 U. S. C. § 633a(d), or he "may file an administrative complaint with the employing federal agency and appeal an adverse finding to the" EEOC, in which case he "may bring a federal civil action only after exhausting his administrative remedies," App. to Pet. for Cert. A–3,

citing 29 U. S. C. § 633a(b). The court reasoned that the alternative administrative procedure, which petitioner had attempted, had not properly been invoked because of the untimeliness of Stevens' complaint and the absence of a satisfactory explanation for the delay. The court therefore concluded that it was "without jurisdiction" to apply the ADEA "to the circumstances of Stevens' demotion in April, 1987." App. to Pet. for Cert. A–3 to A–4.

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. In an unpublished *per curiam* opinion, that court disagreed with the District Court's statement that the employee could go directly to federal court "no later than 180 days from the unlawful action." It said that Stevens had to file a notice of intent to sue within 180 days of the allegedly discriminatory action but that he did not have to initiate his federal suit within that period. *Id.*, at A–7. The court went on to say: "However, Stevens did not initiate the present action in federal court until May [3], 1988[;] therefore Stevens' notice to the EEOC, of October 19, 1987 was not effective." *Ibid.* The court concluded: "Although the district court did not state the applicable law correctly, ultimately the correct result was reached since Stevens failed to meet the requirements set forth in 29 U. S. C. 633a(d)." *Id.*, at A–8. The District Court's dismissal was affirmed. Judgt. order reported at 897 F. 2d 526 (1990).

We granted certiorari over respondents' opposition because of what appeared to us to be a clear misreading by the lower courts of the applicable and important federal statute. 498 U. S. 957 (1990).

II

As the District Court noted in its opinion, App. to Pet. for Cert. A–3, § 15 of the ADEA provides two alternative routes for pursuing a claim of age discrimination. An individual may invoke the EEOC's administrative process and then file a civil action in federal district court if he is not satisfied with his administrative remedies. See 29 U. S. C. §§ 633a(b) and

(c). A federal employee complaining of age discrimination, however, does not have to seek relief from his employing agency or the EEOC at all. He can decide to present the merits of his claim to a federal court in the first instance. See § 633a(d). Both routes to court are implicated in this case. We address the direct route first.

Section 15(d) of the Act, 29 U. S. C. § 633a(d), reads:

> "When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission *not less than* thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred." (Emphasis added.)

The District Court obviously misread this statute when it said that the federal employee "may proceed directly to federal court and initiate an action no later than 180 days from the unlawful action and notify the EEOC *within* 30 days prior to commencing suit." App. to Pet. for Cert. A–3 (emphasis added). The court thus imposed a requirement that the federal court action be instituted *within* the 180-day period and an additional requirement that the EEOC be notified *within* 30 days prior to the commencement of the suit. But the statute reads otherwise as to both requirements. It calls for a notice of not less than 30 days to the Commission of an intent to sue (not notification within 30 days), and it provides that the notice shall be filed with the Commission within 180 days of the alleged unlawful practice (not filed within 180 days of the notice). Clearly, petitioner Stevens met both requirements. The EEOC was notified on October 19, 1987, the 176th day after the alleged discriminatory action—petitioner's transfer and demotion of April 27, 1987—had occurred.[1]

[1] The EEOC accepts a notice given to the employing agency as sufficient compliance with the statutory notice requirement. See Management Directive EEO–MD 107, ch. 12, pp. 12–2 and 12–3 (1987).

And suit was not filed until May 3, 1988, a date more than 30 days after the notice was given.

The Court of Appeals corrected one of the District Court's two errors:

> "Contrary to what the district court stated, Stevens had to file a notice of intent to sue with the EEOC within 180 days of the alleged discriminatory action. Stevens did not have to initiate his federal action within 180 days of the alleged action, but merely give notice to the EEOC of his intention to initiate a civil action." *Id.*, at A–7.

But the Court of Appeals then added the sentence already noted: "However, Stevens did not initiate the present action in federal court until May 4, 1988[;] therefore Stevens' notice to the EEOC, of October 19, 1987 was not effective." This enigmatic sentence surely implies, even if it does not say so directly, that the court was not in disagreement with the District Court's second error—that the federal litigation had to be commenced *within* 30 days of the notice, instead of *after* 30 days from the notice. We note, at this point, that the District Court's and Court of Appeals' error in their reading of the statute has also been replicated by two other courts. See *Castro* v. *United States*, 775 F. 2d 399, 403 (CA1 1985); *McKinney* v. *Dole*, 246 U. S. App. D. C. 376, 387, 765 F. 2d 1129, 1140 (1985). The applicable regulations are positive as to the absence of such a "within 30 days" requirement under the ADEA, in marked contrast with the situation concerning the assertion of a Title VII claim. See 29 CFR § 1613.514 (1990). Respondents concede all this, for they say that "the statute is clear." Brief for Respondents 29.

There is no foundation that we can discern for any conclusion that the suit was not filed within the applicable period of limitations. The statute does not expressly impose any additional limitations period for a complaint of age discrimination. We therefore assume, as we have before, that Congress intended to impose an appropriate period borrowed either from a state statute or from an analogous federal one. *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S.

143, 146–148 (1987). In this case, we need not decide which limitations period is applicable to a civil action under 29 U. S. C. § 633a(c). Stevens filed his suit on May 3, 1988, only one year and six days after the allegedly discriminatory event of April 27, 1987. That, as respondents acknowledge, Brief for Respondents 30, "is well within whatever statute of limitations might apply to the action."[2]

III

The Solicitor General, however, submits that the petition for certiorari should be dismissed as having been improvidently granted. *Id.*, at 31. He rests this submission on the argument that petitioner did not properly present the merits of the timeliness issue to the Court of Appeals, and that this Court should not address that question for the first time. *Id.*, at 8–9, 11–15. He made the same argument in his opposition to the petition for certiorari. Brief in Opposition 5–7. We rejected that argument in granting certiorari, and we reject it again now because the Court of Appeals, like the District Court before it, decided the substantive issue presented.

The District Court heard the case on the merits. Tr. 83–176. The Court of Appeals in its turn specifically referred to Stevens' notice of intention to file a civil suit, App. to Pet. for Cert. A–7, and, as we have explained, answered the timeliness question incorrectly. We thus are satisfied that the issue is properly before us.

IV

Answering the timeliness question in petitioner's favor, as we have, brings us to an issue involving the administrative

[2] Indeed, when Stevens formally was advised of his right to sue, he was told: "[Y]ou *MAY* have up to six years after the right of action first accrued in which to file a civil action." This was a reference to the general statute of limitations, 28 U. S. C. § 2401(a), for a civil action against the Government. See Brief for Respondents 30, n. 22.

route to federal court. Once petitioner had filed an EEOC complaint, was he required to exhaust his administrative remedies in order to file a civil action in district court? The Court of Appeals expressly stated its circuit rule on exhaustion just *eight days* after it issued the opinion below. In *White* v. *Frank*, 895 F. 2d 243, 244 (CA5), cert. denied, 498 U. S. 890 (1990), the court said: "[A]n ADEA plaintiff who chooses to appeal the employer's determination to the Equal Employment Opportunity Commission . . . must await final action by that agency before filing an action in federal district court." The exhaustion issue has divided the Circuits. Compare, *e. g.*, *Langford* v. *U. S. Army Corps of Engineers*, 839 F. 2d 1192, 1194–1195 (CA6 1988), with *Purtill* v. *Harris*, 658 F. 2d 134, 138 (CA3 1981), cert. denied, 462 U. S. 1131 (1983).

Although the issue is an important one, it is here that we encounter procedural difficulty. Respondents in direct contradiction of their position before the Court of Appeals, now fully agree with petitioner on the merits of the exhaustion issue. According to the Solicitor General, a federal employee who elects agency review of an age discrimination claim need not exhaust his administrative remedies before bringing a civil action. Respondents have thus abandoned the position that they took before the Court of Appeals when, in their brief there, they said:

> "If an employee files an administrative claim with his agency, the employee must properly exhaust his administrative remedies like employees alleging other types of discrimination . . . .
>
> . . . . . .
>
> "It is well established that a federal employee must timely exhaust any administrative remedies available to him before he can bring suit . . . . Therefore, Judge Bunton properly dismissed Mr. Stevens' cause of action because Mr. Stevens did not meet the administrative re-

quirements." Brief for Appellees in No. 89-1432 (CA5), pp. 6-7.

Respondents, of course, acknowledge this, Tr. of Oral Arg. 17, and concede that they indeed "took a different position," *id.*, at 22. They candidly say that "we have reconsidered our position." *Id.*, at 33.

It is all well and good for respondents to rethink their position. Their choice, however, has meant that on the merits there is no one before us who stands in a position adverse to petitioner. Neither is there anyone before us who defends the results reached in those decided cases where Courts of Appeals have found an exhaustion requirement when administrative relief is sought before a court action is instituted. See, *e. g.*, *McGinty* v. *United States Department of the Army*, 900 F. 2d 1114 (CA7 1990); *Castro* v. *United States*, 775 F. 2d 399 (CA1 1985); *Purtill* v. *Harris*, *supra*. Those cases stand in conflict with the Sixth Circuit's decision in *Langford* v. *U. S. Army Corps of Engineers*, *supra*.

In each of these cited cases, the United States put forward the exhaustion requirement. We must assume, in view of the Solicitor General's concession here, that the Government no longer will defend its earlier litigation position.

Under these circumstances we are disinclined to rule on the merits of the exhaustion issue. We feel that our only proper course is to reverse the judgment of the Court of Appeals and to remand the case for further proceedings. On remand, the defense presumably (and it is a strong presumption) will submit to the Court of Appeals its altered positions—that there is no exhaustion issue at all in this case because petitioner did not institute his court action until after a final decision of the agency had been made—and, if that submission is not accepted by the court, that respondents now have withdrawn from the stance they took before the Court of Appeals on the merits. In either event, petitioner Stevens finally should gain his day in court and will not have all avenues to relief completely blocked.

Meanwhile, to be sure, the rulings in *McGinty*, *Castro*, and *Purtill*, and any other ruling to the same effect will remain outstanding and in conflict with *Langford*. There is little or nothing, by way of disagreement or agreement with those cases, that this Court should do in the present litigation. The cases may be respectively challenged or supported by some future litigant in a way that will lead to a definitive resolution of the existing conflict in authority. If this does not come about, then, because of the Government's change of mind and new position, any legal significance of the conflict may simply fade away with the passage of time.

Reversed and remanded.

JUSTICE STEVENS, concurring in part and dissenting in part.

While I join the remainder of the Court's opinion, I disagree with Part IV. In my view, the Government is quite right in its present position that the statute contains no requirement that a federal employee exhaust administrative remedies before instituting a court action. The case is not moot, because the Government's position as petitioner's former employer is adverse to petitioner. The adversary posture that the Court finds lacking as to the exhaustion issue is equally lacking as to the issue that the Court does decide. Compare *ante*, at 9-10, with *ante*, at 7-8. Moreover, because 29 U. S. C. § 633a, the statutory provision at issue, applies only to federal employees, the adversary posture the Court awaits will never arise unless the Government once again reverses its position.

The Court acknowledges that the exhaustion question is an important issue on which the lower courts are divided. See *ante*, at 9. The issue is also straightforward and capable of swift resolution. The Government in its argument before the Court of Appeals based its contention that exhaustion is required solely on an analogy to Title VII. See Brief for Appellees in No. 89-1432 (CA5), pp. 6-7. Unlike Title

VII, however, the Age Discrimination in Employment Act (ADEA) contains no express requirement that a federal employee complainant seek administrative relief. There is therefore no basis from which to infer that a complainant who has voluntarily sought administrative relief must exhaust all administrative remedies before proceeding to court. The Equal Employment Opportunity Commission, charged with interpretation of the ADEA, does not read the statute to require exhaustion by federal employees. See 29 CFR § 1613.513 (1990).

The only language of the ADEA relied on by those Courts of Appeals that have required exhaustion is the omission from § 633a of a provision like that in Title VII allowing an employee to abandon the administrative complaint route if there has been no administrative action within 180 days.* This provision, however, is unnecessary in § 633a because, as I have explained, the ADEA contains no requirement for federal employees equivalent to Title VII's command that a complainant first seek administrative relief.

I would therefore resolve the exhaustion issue as well as the timeliness question. To that extent, I respectfully dissent from the Court's disposition.

*See *Purtill* v. *Harris*, 658 F. 2d 134, 138 (CA3 1981), cert. denied, 462 U. S. 1131 (1983); *Castro* v. *United States*, 775 F. 2d 399, 404 (CA1 1985); *Rivera* v. *United States Postal Service*, 830 F. 2d 1037, 1039 (CA9 1987), cert. denied, 486 U. S. 1009 (1988); *Bornholdt* v. *Brady*, 869 F. 2d 57, 63 (CA2 1989); *White* v. *Frank*, 895 F. 2d 243, 244 (CA5), cert. denied, 498 U. S. 890 (1990); *McGinty* v. *United States Department of Army*, 900 F. 2d 1114, 1117 (CA7 1990).

IN RE AMENDMENT TO RULE 39

No. ——. Decided April 29, 1991

This Court's Rule 39 is amended to provide the Court with some control over frivolous or malicious *in forma pauperis* filings. Damages and costs are ineffective to deter such filings, as *in forma pauperis* status is conditioned on an affidavit or declaration that the petitioner is financially unable to pay fees or post security. The Rule applies only to those filings that the Court determines would have been denied in any event and permits a disposition of the matter without the Court issuing an order granting leave to proceed *in forma pauperis*.

Rule amended.

PER CURIAM.

We are ordering an amendment to this Court's Rule 39 respecting proceedings *in forma pauperis*.

Filings under our paid docket require a not-insubstantial filing fee, currently $300, and compliance with our printing requirements. See Rules 33 and 38. These Rules serve as some disincentive to frivolous paid filings. Furthermore, we have the ability to exercise control over the paid docket under Rule 42.2, which provides for award of "just damages and single or double costs" in the case of a frivolous filing. See *Hatch* v. *Reliance Ins. Co.*, 474 U. S. 1048 (1986); *Hyde* v. *Van Wormer*, 474 U. S. 992 (1985). These controls are not effective with reference to proceedings *in forma pauperis*.

It is vital that the right to file *in forma pauperis* not be encumbered by those who would abuse the integrity of our process by frivolous filings, particularly those few persons whose filings are repetitive with the obvious effect of burdening the office of the Clerk and other members of the Court staff. In order to preserve meaningful access to this Court's resources, and to ensure the integrity of our processes, we find it necessary and advisable to promulgate this amendment to Rule 39, to provide us some control over frivolous or malicious *in forma pauperis* filings. Sanctions of damages and costs are ineffective to deter such filings as *in forma pau-*

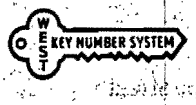
canals serve were calculated in the prior proceedings. But the requirements were calculated for the purpose of determining the appropriate apportionment of the pivotal reach, not to impose a cap on the canals' total diversions, either individually or cumulatively. See Doherty Report 161 ("[T]he findings herein as to *requirements* cannot, I think, be deemed a limitation upon individual canals or groups, in actual administration, either as to natural flow or storage water, nor do I think any such limitations can properly be imposed by the decree" (emphasis in original)). Paragraph V of the decree, which sets forth the apportionment, makes no mention of diversion ceilings and expressly states that Nebraska is free to allocate its share among its canals as it sees fit. See 325 U.S., at 667, 66 S.Ct., at 2.

In Wyoming's view, Paragraph IV of the decree requires a different result. The Master properly rejected this argument. Paragraph IV establishes the priority of Nebraska canals diverting in the pivotal reach relative to federal projects in Wyoming. See *id.*, at 666–667, 66 S.Ct., at 2. We agree with the United States that, although Paragraph IV "limits the extent to which the Nebraska canals may stop federal reservoirs from storing water, [it] does not place any 'absolute ceilings' or other restrictions on the quantities of water those canals may actually divert." U.S. Brief 40, n. 21. Wyoming asks us to clarify that the federal reservoirs have no obligation to bypass natural flow to a senior Nebraska canal when the canal is making excessive calls for federal storage water. Because there is as yet inadequate factual development on the question whether Nebraska canals have in fact made excessive calls, we decline to do so.

IV

For the foregoing reasons, all of the exceptions filed to the Special Master's reports are overruled. The summary judgment motions of Nebraska and the United States regarding the Inland Lakes' priority date are granted, as is Nebraska's partial summary judgment motion with respect to the issue of canal diversion limitations. All other summary judgment motions are denied.

It is so ordered.



HAZEN PAPER COMPANY, et al., Petitioners,

v.

Walter F. BIGGINS.

No. 91-1600.

Argued Jan. 13, 1993.

Decided April 20, 1993.

Discharged employee brought action under ADEA and ERISA. The United States District for the District of Massachusetts entered judgment finding ADEA and ERISA violations, but finding that violation was not willful, and appeal ensued. The Court of Appeals for the First Circuit, 953 F.2d 1405, affirmed in part and reversed in part. The Supreme Court, Justice O'Connor, held that: (1) without more, discharging employee to prevent his pension benefits from vesting did not violate ADEA, and (2) violation of ADEA is willful if the employee either knew or showed reckless disregard for whether its conduct was prohibited by the statute.

Vacated and remanded.

Justice Kennedy filed a concurring opinion in which Justice Thomas and the Chief Justice concurred.

1. Civil Rights ⇐168.1

There is no disparate treatment under ADEA when factor motivating employer is

some feature other than employee's age. Age Discrimination in Employment Act of 1967, § 4(a)(1), as amended, 29 U.S.C.A. § 623(a)(1).

2. Civil Rights ⇐168.1

Disparate treatment theory is available under ADEA. Age Discrimination in Employment Act of 1967, § 4(a)(1), as amended, 29 U.S.C.A. § 623(a)(1).

3. Civil Rights ⇐153

In disparate treatment case, liability depends upon whether the protected trait actually motivated employer's decision; employer may have relied upon formal, facially discriminatory policy requiring adverse treatment of employees with that trait or employer may have been motivated by protected trait on ad hoc, informal basis but, whatever the decision-making process, disparate treatment claim cannot succeed unless employee's protected trait action played a role in that process and had determinative influence on the outcome. Age Discrimination in Employment Act of 1967, § 4(a)(1), as amended, 29 U.S.C.A. § 623(a)(1).

4. Civil Rights ⇐170

It is the very essence of age discrimination for older employee to be fired because employer believes that productivity and competence decline with old age. Age Discrimination in Employment Act of 1967, § 4(a)(1), as amended, 29 U.S.C.A. § 623(a)(1).

5. Civil Rights ⇐168.1

Employee cannot rely on age as a proxy for employee's remaining characteristics, such as productivity, but must instead focus on those factors directly. Age Discrimination in Employment Act of 1967, § 4(a)(1), as amended, 29 U.S.C.A. § 623(a)(1).

6. Civil Rights ⇐170

Age and years of service are analytically distinct, so that employer could take account of one while ignoring the other, and decision based on years of service is thus not necessarily age-based; firing employee in order to prevent pension bene from vesting does not, without more, late ADEA. Age Discrimination in ployment Act of 1967, § 4(a)(1), as am ed, 29 U.S.C.A. § 623(a)(1).

7. Master and Servant ⇐34.1

Firing employee in order to prevent pension benefits from vesting is action under ERISA. Employee Retirement come Security Act of 1974, § 510, U.S.C.A. § 1140.

8. Civil Rights ⇐407

ADEA does not provide for liquid damages where consistent with principl two-tiered liability scheme but, rather, vides for liquidated damages where v tion was willful. Age Discriminatio Employment Act of 1967, § 7(b), as am ed, 29 U.S.C.A. § 626(b).

9. Civil Rights ⇐407

Employer who knowingly relies on in reaching decision to discharge emplo does not invariably commit knowing reckless violation of ADEA in view of bona fide occupational qualification def and exemptions of certain subject ma and persons. Age Discrimination in ployment Act of 1967, §§ 4(f)(1, 2), 12(c), as amended, 29 U.S.C.A. §§ 623 2), 626(b), 631(c).

10. Civil Rights ⇐407

If employer incorrectly but in faith and nonrecklessly believes ADEA permits particular age-based sion, liquidated damages should not b posed. Age Discrimination in Employ Act of 1967, §§ 4(f)(1, 2), 7(b), 12(c) amended, 29 U.S.C.A. §§ 623(f)(1, 626(b), 631(c).

11. Civil Rights ⇐407

Violation of ADEA is "willful" if ployer either knew or showed reckless regard for the matter of whether its duct was prohibited by statute. Age

crimination in Employment Act of 1967, § 7(b), as amended, 29 U.S.C.A. § 626(b).

See publication Words and Phrases for other judicial constructions and definitions.

Syllabus *

Petitioners fired respondent Biggins when he was 62 years old and apparently a few weeks short of the years of service he needed for his pension to vest. In his ensuing lawsuit, a jury found, *inter alia*, a willful violation of the Age Discrimination in Employment Act of 1967 (ADEA), which gave rise to liquidated damages. The District Court granted petitioners' motion for judgment notwithstanding the verdict on the "willfulness" finding, but the Court of Appeals reversed, giving considerable emphasis to evidence of pension interference in upholding ADEA liability and finding that petitioners' conduct was willful because, under the standard of *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128, 105 S.Ct. 613, 625, 83 L.Ed.2d 523, they knew or showed reckless disregard for the matter of whether their conduct contravened the ADEA.

Held:

1. An employer does not violate the ADEA by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service. In a disparate treatment case, liability depends on whether the protected trait—under the ADEA, age—actually motivated the employer's decision. When that decision is wholly motivated by factors other than age, the problem that prompted the ADEA's passage—inaccurate and stigmatizing stereotypes about older workers' productivity and competence—disappears. Thus, it would be incorrect to say that a decision based on years of service—which is analytically distinct from age—is necessarily age-based. None of this Court's prior decisions should be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper in any respect. The foregoing holding does not preclude the possibility of liability where an employer uses pension status as a proxy for age, of dual liability under the Employee Retirement Income Security Act of 1974 and the ADEA, or of liability where vesting is based on age rather than years of service. Because the Court of Appeals cited additional evidentiary support for ADEA liability, this case is remanded for that court to reconsider whether the jury had sufficient evidence to find such liability. Pp. 1705–1708.

2. The *Thurston* "knowledge or reckless disregard" standard for liquidated damages applies not only where the predicate ADEA violation is a formal, facially discriminatory policy, as in *Thurston*, but also where it is an informal decision by the employer that was motivated by the employee's age. Petitioners have not persuaded this Court that *Thurston* was wrongly decided or that the Court should part from the rule of *stare decisis*. Applying the *Thurston* standard to cases of individual discrimination will not defeat the two-tiered system of liability intended by Congress. Since the ADEA affords an employer a "bona fide occupational qualification" defense, and exempts certain subject matters and persons, an employer could incorrectly but in good faith and nonrecklessly believe that the statute permits a particular age-based decision. Nor is there some inherent difference between this case and *Thurston* to cause a shift in the meaning of the word "willful." The distinction between the formal, publicized policy in *Thurston* and the undisclosed factor here is not such a difference, since an employer's reluctance to acknowledge its reliance on the forbidden factor should not cut *against* imposing a penalty. Once a "will-

* NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

ful" violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, provide direct evidence of the employer's motivation, or prove that age was the predominant rather than a determinative factor in the employment decision. Pp. 1708–1710.

953 F.2d 1405 (CA1 1992), vacated and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, in which REHNQUIST, C.J., and THOMAS, J., joined.

Robert B. Gordon, Boston, MA, for petitioners.

Maurice M. Cahillane, Jr., Springfield, MA, for respondent.

John R. Dunne, for the U.S. as amicus curiae by special leave of the Court.

Justice O'CONNOR delivered the opinion of the Court.

In this case we clarify the standards for liability and liquidated damages under the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.*

I

Petitioner Hazen Paper Company manufactures coated, laminated, and printed paper and paperboard. The company is owned and operated by two cousins, petitioners Robert Hazen and Thomas N. Hazen. The Hazens hired respondent Walter F. Biggins as their technical director in 1977. They fired him in 1986, when he was 62 years old.

Respondent brought suit against petitioners in the United States District Court for the District of Massachusetts, alleging a violation of the ADEA. He claimed that age had been a determinative factor in petitioners' decision to fire him. Petitioners contested his claim, asserting instead that respondent had been fired for doing business with competitors of Hazen Paper. The case was tried before a jury, which rendered a verdict for respondent on his ADEA claim and also found violations of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 895, § 510, 29 U.S.C. § 1140, and state law. On the ADEA count, the jury specifically found that petitioners "willfully" violated the statute. Under § 7(b) of the ADEA, 29 U.S.C. § 626(b), a "willful" violation gives rise to liquidated damages.

Petitioners moved for judgment notwithstanding the verdict. The District Court granted the motion with respect to a state law claim and the finding of "willfulness" but otherwise denied it. An appeal ensued. 953 F.2d 1405 (CA1 1992). The United States Court of Appeals for the First Circuit affirmed judgment for respondent on both the ADEA and ERISA counts, and reversed judgment notwithstanding the verdict for petitioners as to "willfulness."

In affirming the judgments of liability the Court of Appeals relied heavily on the evidence that petitioners had fired respondent in order to prevent his pension benefits from vesting. That evidence, as construed most favorably to respondent by the court, showed that the Hazen Paper pension plan had a 10-year vesting period and that respondent would have reached the 10-year mark had he worked "a few more weeks" after being fired. *Id.*, at 1411. There was also testimony that petitioners had offered to retain respondent as a consultant to Hazen Paper, in which capacity he would not have been entitled to receive pension benefits. *Id.*, at 1412. The Court of Appeals found this evidence of pension interference to be sufficient for ERISA liability, *id.*, at 1416, and also gave it considerable emphasis in upholding ADEA liability. After summarizing all the testimony tending to show age discrimination, the court stated:

"Based on the foregoing evidence, the jury could reasonably have found that Thomas Hazen decided to fire [respondent]

dent] before his pension rights vested and used the confidentiality agreement [that petitioners had asked respondent to sign] as a means to that end. The jury could also have reasonably found that age was inextricably intertwined with the decision to fire [respondent]. If it were not for [respondent's] age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. [Respondent] was fifty-two years old when he was hired; his pension rights vested in ten years." *Id.*, at 1412.

As to the issue of "willfulness" under § 7(b) of the ADEA, the Court of Appeals adopted and applied the definition set out in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). In *Thurston*, we held that the airline's facially discriminatory job-transfer policy was not a "willful" ADEA violation because the airline neither "knew [nor] showed reckless disregard for the matter of whether" the policy contravened the statute. *Id.*, at 128, 105 S.Ct., at 625 (internal quotation marks omitted). The Court of Appeals found sufficient evidence to satisfy the *Thurston* standard, and ordered that respondent be awarded liquidated damages equal to and in addition to the underlying damages of $419,454.38. 953 F.2d, at 1415–1416.

We granted certiorari to decide two questions. 505 U.S. ——, 112 S.Ct. 2990, 120 L.Ed.2d 868 (1992). First, does an employer's interference with the vesting of pension benefits violate the ADEA? Second, does the *Thurston* standard for liquidated damages apply to the case where the predicate ADEA violation is not a formal, facially discriminatory policy, as in *Thurston*, but rather an informal decision by the employer that was motivated by the employee's age?

II

A

[1] The courts of appeals repeatedly have faced the question whether an employer violates the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age. Compare *White v. Westinghouse Electric Co.*, 862 F.2d 56, 62 (CA3 1988) (firing of older employee to prevent vesting of pension benefits violates ADEA); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (CA7 1987) (firing of older employee to save salary costs resulting from seniority violates ADEA) with *Williams v. General Motors Corp.*, 656 F.2d 120, 130, n. 17 (CA5 1981) ("[S]eniority and age discrimination are unrelated. . . . We state without equivocation that the seniority a given plaintiff has accumulated entitles him to no better or worse treatment in an age discrimination suit."), cert. denied, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982); *EEOC v. Clay Printing Co.*, 955 F.2d 936, 942 (CA4 1992) (emphasizing distinction between employee's age and years of service). We now clarify that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age.

[2] We long have distinguished between "disparate treatment" and "disparate impact" theories of employment discrimination.

> " 'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . .
>
> "[C]laims that stress 'disparate impact' [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory." *Teamsters v. United States*, 431 U.S. 324, 335, n. 15, 97

S.Ct. 1843, 1855, n. 15, 52 L.Ed.2d 396 (1977) (citation omitted) (construing Title VII of Civil Rights Act of 1964).

The disparate treatment theory is of course available under the ADEA, as the language of that statute makes clear. "It shall be 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.*" 29 U.S.C. § 623(a)(1) (emphasis added). See *Thurston, supra,* 469 U.S., at 120–125, 105 S.Ct., at 621–624 (affirming ADEA liability under disparate treatment theory). By contrast, we have never decided whether a disparate impact theory of liability is available under the ADEA, see *Markham v. Geller,* 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981) (REHNQUIST, J., dissenting from denial of certiorari), and we need not do so here. Respondent claims only that he received disparate treatment.

[3] In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. See, *e.g., United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 252–256, 101 S.Ct. 1089, 1093–1095, 67 L.Ed.2d 207 (1981); *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 576–578, 98 S.Ct. 2943, 2949–2950, 57 L.Ed.2d 957 (1978). The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait. See, *e.g., Thurston, supra; Los Angeles Dept. of Water & Power v. Manhart,* 435 U.S. 702, 704–718, 98 S.Ct. 1370, 1373–1380, 55 L.Ed.2d 657 (1978). Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. See, *e.g., Anderson v. Bessemer City,* 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *Teamsters, supra,* 431 U.S., at 334–343, 97 S.Ct., at 1854–1859. Whatever the employer's decisionmaking process, a disparate treatm claim cannot succeed unless the employ protected trait actually played a role in t process and had a determinative influe on the outcome.

[4, 5] Disparate treatment, thus fined, captures the essence of what C gress sought to prohibit in the ADEA. is the very essence of age discrimina for an older employee to be fired beca the employer believes that productivity competence decline with old age. As explained in *EEOC v. Wyoming,* 460 U 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (19 Congress' promulgation of the ADEA prompted by its concern that older worl were being deprived of employment on basis of inaccurate and stigmatizing ste types.

"Although age discrimination rarely based on the sort of animus motiva some other forms of discrimination was based in large part on stereoty unsupported by objective fact. ... M over, the available empirical evide demonstrated that arbitrary age li were in fact generally unfounded that, as an overall matter, the per mance of older workers was at leas good as that of younger workers." at 231, 103 S.Ct., at 1057–1058.

Thus the ADEA commands that "emp ers are to evaluate [older] employees on their merits and not their age." *W ern Air Lines, Inc. v. Criswell,* 472 400, 422, 105 S.Ct. 2743, 2756, 86 L.E 321 (1985). The employer cannot rely age as a proxy for an employee's remai characteristics, such as productivity, must instead focus on those factors di ly.

[6] When the employer's decision wholly motivated by factors other age, the problem of inaccurate and stig tizing stereotypes disappears. This is even if the motivating factor is correl with age, as pension status typically Pension plans typically provide that an ployee's accrued benefits will become forfeita , or "vested," once the empl

completes a certain number of years of service with the employer. See 1 J. Mamorsky, Employee Benefits Law § 5.03 (1992). On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with a particular employer. Yet an employee's age is analytically distinct from his years of service. An employee who is younger than 40, and therefore outside the class of older workers as defined by the ADEA, see 29 U.S.C. § 631(a), may have worked for a particular employer his entire career, while an older worker may have been newly hired. Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age-based."

The instant case is illustrative. Under the Hazen Paper pension plan, as construed by the Court of Appeals, an employee's pension benefits vest after the employee completes 10 years of service with the company. Perhaps it is true that older employees of Hazen Paper are more likely to be "close to vesting" than younger employees. Yet a decision by the company to fire an older employee solely because he has nine-plus years of service and therefore is "close to vesting" would not constitute discriminatory treatment on the basis of age. The prohibited stereotype ("Older employees are likely to be ___") would not have figured in this decision, and the attendant stigma would not ensue. The decision would not be the result of an inaccurate and denigrating generalization about age, but would rather represent an *accurate* judgment about the employee—that he indeed is "close to vesting."

[7] We do not mean to suggest that an employer *lawfully* could fire an employee in order to prevent his pension benefits from vesting. Such conduct is actionable under § 510 of ERISA, as the Court of Appeals rightly found in affirming judgment for respondent under that statute. See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142–143, 111 S.Ct. 478, 484–485, 112 L.Ed.2d 474 (1990). But it would not, without more, violate the ADEA. That law requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify *further* characteristics that an employer must also ignore. Although some language in our prior decisions might be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper *in any respect*, see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) (creating proof framework applicable to ADEA) (employer must have "legitimate, nondiscriminatory reason" for action against employee), this reading is obviously incorrect. For example, it cannot be true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA.

We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, cf. *Metz*, 828 F.2d, at 1208 (using "proxy" to mean statutory equivalence), but in the sense that the employer may suppose a correlation between the two factors and act accordingly. Nor do we rule out the possibility of dual liability under ERISA and the ADEA where the decision to fire the employee was motivated both by the employee's age and by his pension status. Finally, we do not consider the special case where an employee is about to vest in pension benefits as a result of his *age*, rather than years of service, see 1 Mamorsky, *supra*, at § 5.02[2], and the employer fires the employee in order to prevent vesting. That case is not presented here. Our holding is simply that an employer does not violate the ADEA just

by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service.

Besides the evidence of pension interference, the Court of Appeals cited some additional evidentiary support for ADEA liability. Although there was no direct evidence of petitioners' motivation, except for two isolated comments by the Hazens, the Court of Appeals did note the following indirect evidence: Respondent was asked to sign a confidentiality agreement, even though no other employee had been required to do so, and his replacement was a younger man who was given a less onerous agreement. 953 F.2d, at 1411. In the ordinary ADEA case, indirect evidence of this kind may well suffice to support liability if the plaintiff also shows that the employer's explanation for its decision—here, that respondent had been disloyal to Hazen Paper by doing business with its competitors—is "'unworthy of credence.'" *Aikens*, 460 U.S., at 716, 103 S.Ct., at 1482 (quoting *Burdine*, 450 U.S., at 256, 101 S.Ct., at 1095). But inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present. This issue is now before us in the Title VII context, see *Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (CA8 1992), cert. granted, 506 U.S. ——, 113 S.Ct. 954, 122 L.Ed.2d 111 (1993), and we will not address it prematurely. We therefore remand the case for the Court of Appeals to reconsider whether the jury had sufficient evidence to find an ADEA violation.

B

Because we remand for further proceedings, we also address the second question upon which certiorari was granted: the meaning of "willful" in § 7(b) of the ADEA, which provides for liquidated damages in the case of a "willful" violation.

In *Thurston*, we thoroughly analyzed § 7(b) and concluded that "a violation of the Act [would be] 'willful' if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 469 U.S., at 126, 105 S.Ct., at 624 (internal quotation marks and ellipsis omitted). We sifted through the legislative history of § 7(b), which had derived from § 16(a) of the Fair Labor Standards Act (FLSA), 52 Stat. 1069, as amended, 29 U.S.C. § 216(a), and determined that the accepted judicial interpretation of § 16(a) at the time of the passage of the ADEA supported the "knowledge or reckless disregard" standard. See 469 U.S., at 126, 105 S.Ct., at 624. We found that this standard was consistent with the meaning of "willful" in other criminal and civil statutes. See *id.*, at 126–127, 105 S.Ct., at 624–625. Finally, we observed that Congress aimed to create a "two-tiered liability scheme," under which some but not all ADEA violations would give rise to liquidated damages. We therefore rejected a broader definition of "willful" providing for liquidated damages whenever the employer knew that the ADEA was "in the picture." See *id.*, at 127–128, 105 S.Ct., at 624–625.

In *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988), a FLSA case, we reaffirmed the *Thurston* standard. The question in *Richland Shoe* was whether the limitations provision of the FLSA, creating a 3-year period for "willful" violations, should be interpreted consistently with *Thurston*. We answered that question in the affirmative:

> "The word 'willful' is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. The standard of willfulness that was adopted in *Thurston*—that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute—is surely a fair reading of the plain language of the Act." 486 U.S., at 133, 108 S.Ct., at 1681.

Once again we rejected the "in the picture standard" because it would "virtually obliterat[e] any distinction between willful and nonwillful violations." *Id.*, at 132–133, 108 S.Ct., at 1680–1681.

[8] Surprisingly, the courts of appeals continue to be confused about the meaning of the term "willful" in § 7(b) of the ADEA. A number of circuits have declined to apply *Thurston* to what might be called an informal disparate treatment case—where age has entered into the employment decision on an ad hoc, informal basis rather than through a formal policy. At least one circuit refuses to impose liquidated damages in such a case unless the employer's conduct was "outrageous." See, *e.g.*, *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 57–58 (CA3 1989). Another requires that the underlying evidence of liability be direct rather than circumstantial. See, *e.g.*, *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (CA8 1989). Still others have insisted that age be the "predominant" rather than simply a determinative factor. See, *e.g.*, *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1159 (CA10 1990); *Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 158 (CA6 1988). The chief concern of these circuits has been that the application of *Thurston* would defeat the two-tiered system of liability intended by Congress, because every employer that engages in informal age discrimination knows or recklessly disregards the illegality of its conduct.

We believe that this concern is misplaced. The ADEA does not provide for liquidated damages "where consistent with the principle of a two-tiered liability scheme." It provides for liquidated damages where the violation was "willful." That definition must be applied here unless we overrule *Thurston*, or unless there is some inherent difference between this case and *Thurston* to cause a shift in the meaning of the word "willful."

[9, 10] As for the first possibility, petitioners have not persuaded us that *Thurston* was wrongly decided, let alone that we should depart from the rule of *stare decisis*. The two-tiered liability principle was simply one interpretive tool among several that we used in *Thurston* to decide what Congress meant by the word "willful," and in any event we continue to believe that the "knowledge or reckless disregard" standard will create two tiers of liability across the range of ADEA cases. It is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA. The ADEA is not an unqualified prohibition on the use of age in employment decisions, but affords the employer a "bona fide occupational qualification" defense, see 29 U.S.C. § 623(f)(1), and exempts certain subject matters and persons, see, *e.g.*, § 623(f)(2) (exemption for bona fide seniority systems and employee benefit plans); § 631(c) (exemption for bona fide executives and high policymakers). If an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed. See *Richland Shoe*, *supra*, 486 U.S., at 135, n. 13, 108 S.Ct., at 1682, n. 13. Indeed, in *Thurston* itself we upheld liability but *reversed* an award of liquidated damages because the employer "acted [nonrecklessly] and in good faith in attempting to determine whether [its] plan would violate the ADEA." 469 U.S., at 129, 105 S.Ct., at 625.

[11] Nor do we see how the instant case can be distinguished from *Thurston*, assuming that petitioners did indeed fire respondent because of his age. The only distinction between *Thurston* and the case before us is the existence of formal discrimination. Age entered into the employment decision there through a formal and publicized policy, and not as an undisclosed factor motivating the employer on an ad hoc basis, which is what respondent alleges occurred here. But surely an employer's reluctance to acknowledge its reliance on the forbidden factor should not cut *against*

imposing a penalty. It would be a wholly circular and self-defeating interpretation of the ADEA to hold that, in cases where an employer more likely knows its conduct to be illegal, knowledge alone does not suffice for liquidated damages. We therefore reaffirm that the *Thurston* definition of "willful"—that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute—applies to all disparate treatment cases under the ADEA. Once a "willful" violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant rather than a determinative factor in the employment decision.

The judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Justice KENNEDY, with whom THE CHIEF JUSTICE and Justice THOMAS join, concurring.

I agree with the Court that the Court of Appeals placed improper reliance on respondent's evidence of pension interference and that the standard for determining willfulness announced in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985), applies to individual acts of age discrimination as well as age discrimination manifested in formal, company-wide policy. I write to underscore that the only claim based upon the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, asserted by respondent in this litigation is that petitioners discriminated against him because of his age. He has advanced no claim that petitioners' use of an employment practice that has a disproportionate effect on older workers violates the ADEA. See App. 29–30 (amended complaint); 5 Record 71–76 (jury instructions). As a result, nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called "disparate impact" theory of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e–17. As the Court acknowledges, *ante*, at 5, we have not yet addressed the question whether such a claim is cognizable under the ADEA, and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA. See *Markham v. Geller*, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981) (REHNQUIST, J., dissenting from denial of certiorari); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1216–1220 (CA7 1987) (Easterbrook, J., dissenting); Note, Age Discrimination and the Disparate Impact Doctrine, 34 Stan.L.Rev. 837 (1982). It is on the understanding that the Court does not reach this issue that I join in its opinion.

Todd A. BRECHT, Petitioner

v.

Gordon A. ABRAHAMSON, Superintendent, Dodge Correctional Institution.

No. 91–7358.

Argued Dec. 1, 1992.

Decided April 21, 1993.

Following setting aside by Wisconsin Court of Appeals, 138 Wis.2d 158, 405 N.W.2d 718, of murder conviction, and reinstatement of conviction by the Wisconsin Supreme Court, 143 Wis.2d 297, 421 N.W.2d 96, petitioner sought habeas corpus relief. The United States District Court for the Western District of Wisconsin, 759 F.Supp. 500, set aside conviction. On appeal, the Court of Appeals for the Seventh Circuit, 944 F.2d 1363, reversed, and certio-

rari was granted. The Supreme Court, Chief Justice Rehnquist, held that: (1) in determining whether habeas relief must be granted for prosecution's use for impeachment purposes of petitioner's post-*Miranda* silence, standard is whether error had substantial and injurious effect or influence in determining jury's verdict, rather than whether error was harmless beyond reasonable doubt, and (2) state's improper use of defendant's post-*Miranda* silence to impeach defendant's claim that shooting was accidental did not have substantial and injurious effect or influence in determining jury's verdict.

Affirmed.

Justice Stevens filed concurring opinion.

Justice White filed dissenting opinion in which Justice Blackmun joined and in which Justice Souter joined in part.

Justices Blackmun, O'Connor and Souter filed dissenting opinions.

1. Witnesses ⇐347

Constitution does not prohibit use for impeachment purposes of defendant's silence prior to arrest, or after arrest if no *Miranda* warnings are given.

2. Criminal Law ⇐720(1), 721(4)
Witnesses ⇐347

Where defendant claimed that shooting was an accident for the first time when he took stand for trial, it was proper, and probative, for state to impeach his testimony by pointing out that defendant had failed to tell anyone before time he received his *Miranda* warnings at his arraignment about the shooting being an accident; on the other hand, state's references to defendant's silence after that point in time, or more generally to his failure to come forward with his version of events at any time before trial, was improper. U.S.C.A. Const.Amend. 14.

3. Habeas Corpus ⇐495

In determining whether habeas relief must be granted for prosecution's use for impeachment purposes of petitioner's post-*Miranda* silence, standard is whether error had substantial and injurious effect or influence in determining jury's verdict, rather than whether error was harmless beyond reasonable doubt. U.S.C.A. Const. Amend. 14; 28 U.S.C.A. §§ 2111, 2254.

4. Statutes ⇐220

Generally, Supreme Court is reluctant to draw inferences from Congress' failure to act.

5. Courts ⇐100(1)

New rules always have retroactive application to criminal cases on direct review.

6. Habeas Corpus ⇐495

State's improper use of defendant's post-*Miranda* silence to impeach defendant's claim that shooting was accidental did not have substantial and injurious effect or influence in determining jury's verdict, and thus habeas relief was not warranted, where state's references to defendant's post-*Miranda* silence were infrequent, state made extensive and permissible references to defendant's pre-*Miranda* silence, and evidence of guilt was weighty. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. §§ 2111, 2254.

*Syllabus**

At his first-degree murder trial in Wisconsin state court, petitioner Brecht admitted shooting the victim, but claimed it was an accident. In order to impeach this testimony, the State, *inter alia*, made several references to the fact that, before he was given his *Miranda* warnings at an arraignment, Brecht failed to tell anyone with whom he came in contact that the shooting was accidental. The State also made several references to his post-*Miranda*-warning silence in this regard. The jury returned a

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Steve:

Copies of Major Supreme Court cases in employment discrimination 1980 - present.

Willie

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS *v.* BURDINE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-1764. Argued December 9, 1980—Decided March 4, 1981

Respondent filed suit in Federal District Court, alleging, *inter alia,* that her termination of employment with petitioner was predicated on gender discrimination in violation of Title VII of the Civil Rights Act of 1964. The District Court found that the testimony for petitioner sufficiently had rebutted respondent's allegation of gender discrimination in the decision to terminate her employment. The Court of Appeals reversed this finding, holding that the defendant in a Title VII case bears the burden of proving by a preponderance of the evidence the existence of legitimate, nondiscriminatory reasons for the employment action and also must prove by objective evidence that those hired were better qualified than the plaintiff, and that the testimony for petitioner did not carry either of these burdens.

Held: When the plaintiff in a Title VII case has proved a prima facie case of employment discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions. Pp. 252–260.

(a) As set forth in *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, the basic allocation of burdens and order of presentation of proof in a Title VII case, is as follows. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.,* at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. The defendant need not persuade the court that it was actually motivated by the proffered reasons, but it is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. Pp. 252–256.

(b) The Court of Appeals erred by requiring petitioner to prove by a preponderance of the evidence the existence of nondiscriminatory reasons for terminating respondent. By doing this, the court required much more than is required by *McDonnell Douglas, supra,* and its progency: it placed on petitioner the burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the respondent. Limiting the defendant's evidentiary obligation to a burden of production will not unduly hinder the plaintiff. Pp. 256–258.

(c) The Court of Appeals also erred in requiring petitioner to prove by objective evidence that the person hired was more qualified than respondent. It is the plaintiff's task to demonstrate that similarly situated employees were not treated equally, but the Court of Appeals' rule would require the employer to show that the plaintiff's objective qualifications were inferior to those of the person selected, and if it cannot, a court would, in effect, conclude that it has discriminated. The Court of Appeals' views can also be read as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. But Title VII does not obligate an employer to accord this preference. Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. Pp. 258–259.

608 F. 2d 563, vacated and remanded.

POWELL, J., delivered the opinion for a unanimous Court.

Gregory Wilson, Assistant Attorney General of Texas, argued the cause *pro hac vice* for petitioner. With him on the brief were *Mark White,* Attorney General, *John W. Fainter, Jr.,* First Assistant Attorney General, *Lonny F. Zwiener,* Assistant Attorney General, and *Paul R. Gavia.*

Hubert L. Gill argued the cause and filed a brief for respondent.*

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to address again the nature of the evidentiary burden placed upon the defendant in an em-

**Robert E. Williams* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

ployment discrimination suit brought under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* The narrow question presented is whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed.

I

Petitioner, the Texas Department of Community Affairs (TDCA), hired respondent, a female, in January 1972, for the position of accounting clerk in the Public Service Careers Division (PSC). PSC provided training and employment opportunities in the public sector for unskilled workers. When hired, respondent possessed several years' experience in employment training. She was promoted to Field Services Coordinator in July 1972. Her supervisor resigned in November of that year, and respondent was assigned additional duties. Although she applied for the supervisor's position of Project Director, the position remained vacant for six months.

PSC was funded completely by the United States Department of Labor. The Department was seriously concerned about inefficiencies at PSC.[1] In February 1973, the Department notified the Executive Director of TDCA, B. R. Fuller, that it would terminate PSC the following month. TDCA officials, assisted by respondent, persuaded the Department to continue funding the program, conditioned upon PSC's reforming its operations. Among the agreed conditions were the appointment of a permanent Project Director and a complete reorganization of the PSC staff.[2]

After consulting with personnel within TDCA, Fuller hired

[1] Among the problems identified were overstaffing, lack of fiscal control, poor bookkeeping, lack of communication among PSC staff, and the lack of a full-time Project Director. Letter of March 20, 1973, from Charles Johnson to B. R. Fuller, reprinted in App. 38–40.

[2] See *id.*, at 39.

a male from another division of the agency as Project Director. In reducing the PSC staff, he fired respondent along with two other employees, and retained another male, Walz, as the only professional employee in the division. It is undisputed that respondent had maintained her application for the position of Project Director and had requested to remain with TDCA. Respondent soon was rehired by TDCA and assigned to another division of the agency. She received the exact salary paid to the Project Director at PSC, and the subsequent promotions she has received have kept her salary and responsibility commensurate with what she would have received had she been appointed Project Director.

Respondent filed this suit in the United States District Court for the Western District of Texas. She alleged that the failure to promote and the subsequent decision to terminate her had been predicated on gender discrimination in violation of Title VII. After a bench trial, the District Court held that neither decision was based on gender discrimination. The court relied on the testimony of Fuller that the employment decisions necessitated by the commands of the Department of Labor were based on consultation among trusted advisers and a nondiscriminatory evaluation of the relative qualifications of the individuals involved. He testified that the three individuals terminated did not work well together, and that TDCA thought that eliminating this problem would improve PSC's efficiency. The court accepted this explanation as rational and, in effect, found no evidence that the decisions not to promote and to terminate respondent were prompted by gender discrimination.

The Court of Appeals for the Fifth Circuit reversed in part. 608 F. 2d 563 (1979). The court held that the District Court's "implicit evidentiary finding" that the male hired as Project Director was better qualified for that position than respondent was not clearly erroneous. Accordingly, the court affirmed the District Court's finding that respondent was not discriminated against when she was not promoted. The

Court of Appeals, however, reversed the District Court's finding that Fuller's testimony sufficiently had rebutted respondent's prima facie case of gender discrimination in the decision to terminate her employment at PSC. The court reaffirmed its previously announced views that the defendant in a Title VII case bears the burden of proving by a preponderance of the evidence the existence of legitimate nondiscriminatory reasons for the employment action and that the defendant also must prove by objective evidence that those hired or promoted were better qualified than the plaintiff. The court found that Fuller's testimony did not carry either of these evidentiary burdens. It, therefore, reversed the judgment of the District Court and remanded the case for computation of backpay.[3] Because the decision of the Court of Appeals as to the burden of proof borne by the defendant conflicts with interpretations of our precedents adopted by other Courts of Appeals,[4] we granted certiorari. 447 U. S. 920 (1980). We now vacate the Fifth Circuit's decision and remand for application of the correct standard.

II

In *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment.[5] First, the plaintiff has the burden of proving by

[3] The Court of Appeals also vacated the District Court's judgment that petitioner did not violate Title VII's equal pay provision, 42 U. S. C. § 2000e–2 (h), but that decision is not challenged here.

[4] See, *e. g.*, *Lieberman* v. *Gant*, 630 F. 2d 60 (CA2 1980); *Jackson* v. *U. S. Steel Corp.*, 624 F. 2d 436 (CA3 1980); *Ambush* v. *Montgomery County Government*, 22 FEP Cases 1101 (CA4 1980); *Loeb* v. *Textron, Inc.*, 600 F. 2d 1003 (CA1 1979). But see *Vaughn* v. *Westinghouse Elec. Corp.*, 620 F. 2d 655 (CA8 1980), cert. pending, No. 80–276.

[5] We have recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes. See *McDonnell Douglas*, 411 U. S., at 802, n. 14; *Teamsters* v. *United States*, 431 U. S. 324, 335–336, and n. 15 (1977).

the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.*, at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.*, at 804.

The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. See *Board of Trustees of Keene State College* v. *Sweeney*, 439 U. S. 24, 25, n. 2 (1978); *id.*, at 29 (STEVENS, J., dissenting). See generally 9 J. Wigmore, Evidence § 2489 (3d ed. 1940) (the burden of persuasion "never shifts"). The *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question.

The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a proponderence of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.[6] The prima facie case serves an important

[6] In *McDonnell Douglas*, *supra*, we described an appropriate model for a prima facie case of racial discrimination. The plaintiff must show:

"(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U. S., at 802.

We added, however, that this standard is not inflexible, as "[t]he facts necessarily will vary in Title VII cases, and the specification above

function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection. See *Teamsters* v. *United States*, 431 U. S. 324, 358, and n. 44 (1977). As the Court explained in *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 577 (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.[7]

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. See *Sweeney, supra*, at 25. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plain-

of the prima facie proof required from respondent is not necessarily applicable in every respect in differing factual situations." *Id.*, at 802, n. 13.

In the instant case, it is not seriously contested that respondent has proved a prima facie case. She showed that she was a qualified woman who sought an available position, but the position was left open for several months before she finally was rejected in favor of a male, Walz, who had been under her supervision.

[7] The phrase "prima facie case" not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 J. Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.

tiff.[8] To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.[9] The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted,[10] and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the

[8] This evidentiary relationship between the presumption created by a prima facie case and the consequential burden of production placed on the defendant is a traditional feature of the common law. "The word 'presumption' properly used refers only to a device for allocating the production burden." F. James & G. Hazard, Civil Procedure § 7.9, p. 255 (2d ed. 1977) (footnote omitted). See Fed. Rule Evid. 301. See generally 9 J. Wigmore, Evidence § 2491 (3d ed. 1940). Cf. J. Maguire, Evidence, Common Sense and Common Law 185–186 (1947). Usually, assessing the burden of production helps the judge determine whether the litigants have created an issue of fact to be decided by the jury. In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.

[9] An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel.

[10] See generally J. Thayer, Preliminary Treatise on Evidence 346 (1898). In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See *McDonnell Douglas*, 411 U. S., at 804–805.

III

In reversing the judgment of the District Court that the discharge of respondent from PSC was unrelated to her sex, the Court of Appeals adhered to two rules it had developed to elaborate the defendant's burden of proof. First, the defendant must prove by a preponderence of the evidence that legitimate, nondiscriminatory reasons for the discharge existed. 608 F. 2d, at 567. See *Turner* v. *Texas Instruments, Inc.*, 555 F. 2d 1251, 1255 (CA5 1977). Second, to satisfy this burden, the defendant "must prove that those he hired . . . were somehow *better* qualified than was plaintiff; in other words, comparative evidence is needed." 608 F. 2d, at 567 (emphasis in original). See *East* v. *Romine, Inc.*, 518 F. 2d 332, 339–340 (CA5 1975).

A

The Court of Appeals has misconstrued the nature of the burden that *McDonnell Douglas* and its progeny place on the defendant. See Part II, *supra*. We stated in *Sweeney* that "the employer's burden is satisfied if he simply 'explains what he has done' or 'produc[es] evidence of legitimate nondiscriminatory reasons.'" 439 U. S., at 25, n. 2, quoting *id.*, at 28, 29 (STEVENS, J., dissenting). It is plain that the Court

of Appeals required much more: it placed on the defendant the burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the plaintiff.[11]

The Court of Appeals distinguished *Sweeney* on the ground that the case held only that the defendant did not have the burden of proving the absence of discriminatory intent. But this distinction slights the rationale of *Sweeney* and of our other cases. We have stated consistently that the employee's prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for the action; that is, to satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus. The Court of Appeals would require the defendant to introduce evidence which, in the absence of any evidence of pretext, would *persuade* the trier of fact that the employment action was lawful. This exceeds what properly can be demanded to satisfy a burden of production.

The court placed the burden of persuasion on the defendant apparently because it feared that "[i]f an employer need

[11] The court reviewed the defendant's evidence and explained its deficiency:

"Defendant failed to introduce comparative factual data concerning Burdine and Walz. Fuller merely testified that he discharged and retained personnel in the spring shakeup at TDCA primarily on the recommendations of subordinates and that he considered Walz qualified for the position he was retained to do. Fuller failed to specify any objective criteria on which he based the decision to discharge Burdine and retain Walz. He stated only that the action was in the best interest of the program and that there had been some friction within the department that might be alleviated by Burdine's discharge. Nothing in the record indicates whether he examined Walz' ability to work well with others. This court in *East* found such unsubstantiated assertions of 'qualification' and 'prior work record' insufficient absent data that will allow a true *comparison* of the individuals hired and rejected." 608 F. 2d, at 568.

only *articulate*—not prove—a legitimate, nondiscriminatory reason for his action, he may compose fictitious, but legitimate, reasons for his actions." *Turner* v. *Texas Instruments, Inc., supra,* at 1255 (emphasis in original). We do not believe, however, that limiting the defendant's evidentiary obligation to a burden of production will unduly hinder the plaintiff. First, as noted above, the defendant's explanation of its legitimate reasons must be clear and reasonably specific. *Supra,* at 255. See *Loeb* v. *Textron, Inc.,* 600 F. 2d 1003, 1011–1012, n. 5 (CA1 1979). This obligation arises both from the necessity of rebutting the inference of discrimination arising from the prima facie case and from the requirement that the plaintiff be afforded "a full and fair opportunity" to demonstrate pretext. Second, although the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation. Third, the liberal discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files concerning her complaint. See *EEOC* v. *Associated Dry Goods Corp.,* 449 U. S. 590 (1981). Given these factors, we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext. We remain confident that the *McDonnell Douglas* framework permits the plaintiff meriting relief to demonstrate intentional discrimination.

B

The Court of Appeals also erred in requiring the defendant to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff. *McDonnell Douglas* teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally. 411 U. S., at 804. The Court of Appeals' rule would require

the employer to show that the plaintiff's objective qualifications were inferior to those of the person selected. If it cannot, a court would, in effect, conclude that it has discriminated.

The court's procedural rule harbors a substantive error. Title VII prohibits all discrimination in employment based upon race, sex, and national origin. "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions." *McDonnell Douglas, supra,* at 801. Title VII, however, does not demand that an employer give preferential treatment to minorities or women. 42 U. S. C. § 2000e–2 (j). See *Steelworkers* v. *Weber,* 443 U. S. 193, 205–206 (1979). The statute was not intended to "diminish traditional management prerogatives." *Id.,* at 207. It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired. *Furnco Construction Corp.* v. *Waters,* 438 U. S. 567, 577–578 (1978).

The views of the Court of Appeals can be read, we think, as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. But Title VII does not obligate an employer to accord this preference. Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination. *Loeb* v. *Textron, Inc., supra,* at 1012, n. 6; see *Lieberman* v. *Gant,* 630 F. 2d 60, 65 (CA2 1980).

IV

In summary, the Court of Appeals erred by requiring the defendant to prove by a preponderance of the evidence the

existence of nondiscriminatory reasons for terminating the respondent and that the person retained in her stead had superior objective qualifications for the position.[12] When the plaintiff has proved a prima facie case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[12] Because the Court of Appeals applied the wrong legal standard to the evidence, we have no occasion to decide whether it erred in not reviewing the District Court's finding of no intentional discrimination under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52 (a). Addressing this issue in this case would be inappropriate because the District Court made no findings on the intermediate questions posed by *McDonnell Douglas*.

WOOD ET AL. v. GEORGIA

CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

No. 79-6027. Argued November 4, 1980—Decided March 4, 1981

Petitioners, former employees of an "adult" movie theater and bookstore, were convicted of distributing obscene materials in violation of a Georgia statute and received fines and jail sentences but were placed on probation on the condition that they make monthly installment payments toward the satisfaction of the fines. When petitioners failed to make the payments, a probation revocation hearing was held. Petitioners, who had by that time left their jobs in the "adult" establishments, offered evidence of their inability to make the payments and stated that they had expected their former employer to pay the fines for them. When petitioners were unable to make up their arrearages, the Georgia trial court denied their motion to modify the probation conditions and ordered petitioners to serve the remaining portions of their jail sentences. After the Georgia Court of Appeals affirmed, this Court granted a writ of certiorari to decide whether it is constitutional under the Equal Protection Clause to imprison a probationer solely because of his inability to make installment payments on fines.

Held: This is an inappropriate case in which to decide the equal protection question. Since the record suggests that petitioners may be in their present predicament because of their counsel's divided loyalties, a possible due process violation is apparent, and the case is remanded for further findings concerning such possible violation. Pp. 264–274.

(a) The transcript of the revocation hearing shows that petitioners understood that their former employer would provide legal assistance if they should face legal trouble as a result of their employment, would pay any fines, and would post any necessary bonds. Petitioners have been represented since the time of their arrest by a single lawyer, who was paid by the employer and who posted bonds in this case and paid other fines when each of the petitioners was arrested a second time. If petitioners' counsel was serving the employer's interest in obtaining an equal protection ruling that offenders cannot be jailed for failure to pay fines that are beyond their means, which could only occur if petitioners received fines beyond their own means and then risked jail by failing to pay, this conflict in goals may have influenced the trial court's decisions to impose large fines and to revoke the probations rather than modify the conditions thereof. Pp. 264–268.

10-18

EEOC

NOTICE

NUMBER N-915-062

DATE 11/20/90

1. SUBJECT: Policy Guidance: Whether "testers" have standing to file charges of employment discrimination against employers, employment agencies and/or labor organizations which have discriminated against them because of their race, color, religion, sex or national origin.

2. PURPOSE: This policy guidance sets forth the Commission's position on the issue of whether "testers" (persons who apply for employment for the purpose of testing for discriminatory hiring practices, but do not intend to accept such employment), have standing to file charges under Title VII.

3. EFFECTIVE DATE: Upon receipt.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: Title VII/EPA Division, Office of Legal Counsel.

6. INSTRUCTIONS: File after § 605 of Volume II of the Compliance Manual.

7. SUBJECT MATTER:

I. Introduction

The issue addressed here is whether "testers" have standing to bring actions under Title VII. "Testers" are defined as individuals who apply for employment which they do not intend to accept, for the sole purpose of uncovering unlawful discriminatory hiring practices. Section 706(b) of Title VII, 42 U.S.C 2000e-5(b), authorizes the Commission to accept charges of employment discrimination "filed by or on behalf of a person claiming to be aggrieved." Since testers do not actually want the positions for which they apply, the question is whether testers can be "persons claiming to be aggrieved" within the meaning of § 706(b).[1] The Commission concludes that testers are aggrieved parties under Title VII where they have been unlawfully discriminated against when applying for employment. Whether or not a person intends to accept a position for which he/she applied, he/she has a statutory right, pursuant to Title VII, § 703(a)(1), not to have been rejected on the basis of race, color, religion, sex or national origin. The discriminatory rejection itself constitutes an injury, even though

[1] The analysis set forth in this policy guidance could also be applied to the ADEA, since the language in § 7(c)(1) and (d) is almost identical to that in § 706(b) of Title VII.

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the tester may not have suffered the loss of a real employment opportunity or any monetary loss.

II. Definition of Testers

"Testers" in the employment context perform the same function as do testers in the housing context.[2] Testers in housing cases have been defined as "individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982). Typically, a fair housing or other civil rights organization sends testers of different races[3] to apply for housing with a particular realtor or landlord. Usually, the realtor/landlord is chosen because someone has complained to the fair housing organization about this particular housing provider.

The housing/civil rights organization ensures that where testers are "paired" (sent to the same landlord/realtor for comparative treatment), both the Black and White testers provide information on their applications which will make them equally qualified with respect to their incomes, employment, credit and residence histories, present rents, etc. Housing/civil rights groups that routinely use testers create a "profile" for each tester for each assignment and provide him/her with a "script."

In the classic case of a discriminatory landlord/realtor, the Black tester applies for an apartment and is told that no apartments are available or is informed only about housing which is located in predominantly Black neighborhoods. Shortly thereafter, the White tester applies to the same housing provider for the same type of apartment requested by the Black tester. The White tester is told of one or more apartments which were not made available to the Black tester.

Several sets of testers may be sent to the same housing provider to establish a pattern of discriminatory treatment and thus avoid the defense of an individual "fluke," oversight or personality conflict. Follow-up calls may be made by the testers to receive updated information so that a provider cannot claim that

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[2] Testers have been used much more intensively in the housing area than in the employment area, and there is well established case law on the validity of tester standing in fair housing cases (see Section V).

[3] The discussion here and all cases cited in this document refer only to Black and White testers challenging discrimination on the basis of race. Apparently, this is the only context in which courts have addressed the issue of tester standing. However, all theories discussed in this document are equally applicable for testers challenging discrimination on the basis of color, religion, sex, national origin or age.

a residence listing "came in" after the Black applicant left, but before the White applicant arrived.

Testers in the employment context perform the same role vis a vis equal employment opportunity. They are generally used by civil rights organizations or government agencies.[4] Black and White testers are sent to apply for employment with a particular employer or employment agency. The organization/agency ensures that where testers are paired, both provide information on their applications which makes them equally qualified as employees with respect to their employment histories, educational backgrounds, references, etc.

As in the housing context, Black and White testers are sent to apply for the same position and the treatment of the two applicants is compared. Conceptually, there is no difference between a tester in the fair housing context and a tester in the equal employment context. Although the employment tester might, in some instances, have a more difficult and elaborate role to play,[5] he/she performs precisely the same role in the furtherance of Title VII as does the tester for housing discrimination.

III. Standing Interpreted Broadly Under Title VII

Standing is generally interpreted broadly under Title VII in order to achieve the statute's goal of equal employment opportunity, particularly since Title VII is generally enforced through civil actions brought by or on behalf of private parties.

> The private right of action remains an essential means of obtaining judicial enforcement of Title VII ... the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.

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[4] Testers may be sent out by agencies or organizations which intend to file charges against the targeted employer. The tester may be an employee or volunteer of the organization who has no personal interest in filing a charge. However, the organization may file a charge on behalf of "a person claiming to be aggrieved" under Title VII. 29 C.F.R. § 1601.7(a). Under the ADEA, the "Commission shall receive information concerning alleged violations of the Act, including charges and complaints, from any source." 29 C.F.R. § 1626.4. Therefore, such an organization may file a charge on behalf of a tester.

[5] Unlike testers in the housing area, testers for employment discrimination have the additional burden of appearing qualified for the job in question if interviewed. This might limit the types of jobs for which an organization can reasonably test.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974). Congress has cast the Title VII plaintiff in the role of a "private attorney general" in enforcing the Act. Stewart v. Hannon, 675 F.2d 846, 850, 28 EPD ¶ 32,582 (7th Cir. 1982). Congress intended that the language in § 706(b), referring to an "aggrieved" person, be construed to define standing as broadly as possible under Article III of the United States Constitution.[6] Id. at 849; EEOC v. Mississippi College, 626 F.2d 477, 482, 24 EPD ¶ 31,268 (5th Cir. 1980), cert. denied, 453 U.S. 912, 26 EPD ¶ 31,901 (1981); EEOC v. Bailey Co., 563 F.2d 439, 452-453, 15 EPD ¶ 7,840 (6th Cir. 1977), cert. denied, 435 U.S. 915, 16 EPD ¶ 8,148 (1978); Waters v. Heublein Inc., 547 F.2d 466, 469-470, 12 EPD ¶ 11,238 (9th Cir. 1976), cert. denied, 433 U.S. 915, 14 EPD ¶ 7,635 (1977); Hackett v. McGuire Bros., 445 F.2d 442, 446, 3 EPD ¶ 8,276 (3d Cir. 1971).

IV. Standing of "Testers" in Early Civil Rights Litigation

The broad construction of standing under Title VII is consistent with cases involving standing in the context of other civil rights statutes. "[C]omplainants act not only on their own behalf, but also 'as private attorneys general' in vindicating a policy that Congress considered to be of the highest priority." Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 211 (1972) (referring to Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3604 et seq., commonly known as the Fair Housing Act). Accord Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990).

Historically, in civil rights litigation, standing has been construed liberally in order to further "an overriding, constitutionally rooted national policy against racial discrimination." Wright v. Regan, 656 F.2d 820, 829 (D.C. Cir. 1981). In Wright, the court held that Black parents and students attending public schools in segregated areas had standing to challenge the tax-exempt status of "White-only" educational institutions in their communities. Although the plaintiffs did not seek admission to the schools, the court held that the injury which they suffered, viz, denigration caused when their government "graces with tax-exempt status educational institutions in their communities which treat members of their races as persons of lesser

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[6] Article III, § 2, of the U.S. Constitution states, in pertinent part, that "[t]he judicial Power shall extend to all Cases ... (and) Controversies ...." A "controversy" is a matter in which the plaintiff has alleged "a personal stake in the outcome of the controversy." Warth v. Seldin, 422 U.S. 490, 498-499 (1975). See also Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 44-45 (1976) (plaintiff's injury is likely to be redressed if the requested relief is granted); Association of Data Processing Orgs. v. Camp, 397 U.S. 150, 151-152 (1970) ("the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action").

worth," was sufficient to sustain a challenge of the tax exempt status of the institution. 656 F.2d at 827. The court held that this case was indistinguishable from previous civil rights cases which granted standing to persons acting as social protesters rather than as persons who were actually deprived of a tangible benefit which they intended to accept, citing Coit v. Green, 404 U.S. 997 (1971) (Black parents and public schoolchildren had standing to challenge tax-exempt status of racially exclusive private schools); Norwood v. Harrison, 413 U.S. 554 (1974) (parents of Black schoolchildren had standing to challenge state's provision of textbooks to private schools which excluded Blacks); Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (Black citizens had standing to challenge city's practice of permitting racially segregated private groups and clubs to reserve temporary exclusive use of certain park facilities). The civil rights activists in these cases challenged racially discriminatory practices as a form of social protest to eradicate racial discrimination in this country, rather than to gain a specific, tangible, personal benefit. Arguably, these activists acted as "testers," challenging discriminatory practices where they had no intention of personally accepting any tangible benefit. The injury which they suffered was denigration, as Black citizens, resulting from the state's sanction or support of racial discrimination.

Courts have recognized the need for broad standing in virtually all civil rights contexts. The court in Watts v. Boyd Properties, Inc., 758 F.2d 1482, 1485 (11th Cir. 1985), holding that a Black tester had standing to challenge discriminatory housing practices, both under Title VIII and § 1982, analogized several cases in support of this conclusion. In addition to adopting the Third Circuit's reasoning in Meyers v. Pennypack Woods Home Ownership Association, 559 F.2d 894 (3d Cir. 1977), (conferring standing on a Black tester in a § 1982 housing discrimination case), it relied on the Supreme Court's decisions in Pierson v. Ray, 368 U.S. 547 (1967), and Evers v. Dwyer, 358 U.S. 202 (1958).[7] In Pierson, a group of Black clergymen went to a segregated bus terminal in Jackson, Mississippi, for the sole purpose of testing the legality of segregated public accommodations. The Supreme Court held that although the plaintiffs' purpose was to test the law rather than to actually use the terminal, they had standing to seek redress under § 1982 because they had been discriminated against by being removed from the terminal. Similarly, in Evers, the Supreme Court recognized the standing of a Black plaintiff who sat in the White section of a Memphis bus and was removed from the bus by authorities. The plaintiff had never before ridden a bus in Memphis and had done so solely for the purpose of testing the legality of the state's

[7] Pierson and Evers were also cited in Meyers. 559 F.2d at 898.

segregation laws.[8] See also Havens Realty Corp. v. Coleman, 455 U.S. at 374 (Pierson and Evers cited for proposition that a person need not have intended to buy or rent in order to have been injured within the meaning of Title VIII). As demonstrated by the cases cited above and in Section V regarding tester standing in the housing context, the civil rights movement and its accompanying litigation have a rich history of testers in one form or another.

V. Testers' Standing to Challenge Discriminatory Housing Practices

It is well established that testers have standing under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3604 et seq., where they have been racially discriminated against in the provision of or referral to housing. Havens Realty Corp. v. Coleman, 455 U.S. 363; Village of Bellwood v. Dwivedi, 895 F.2d 1521; Watts v. Boyd Properties, Inc., 758 F.2d 1482; Village of Bellwood v. Gorey & Associates, 664 F. Supp. 320 (N.D. Ill. 1987). In these cases, the injury was not the deprivation of housing on the basis of race, but rather the failure to provide accurate or complete information with respect to available housing on the basis of race, i.e., disparate treatment.

Title VIII makes it unlawful for an individual or firm covered by the Act:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of a dwelling to any person because of race, color, religion, sex, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith because of race, color, religion, sex, or national origin.
>
> ...
>
> (d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

42 U.S.C. § 3604(a), (b) and (d).

Section 810(a) of Title VIII, 42 U.S.C. § 3610(a), authorizes any "person aggrieved" under Title VIII to file a complaint with the Secretary of Housing and Urban Development and defines "a

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[8] However, Watts recognized that the injury to plaintiffs in Pierson was greater than in Evers because the clergymen were arrested and later convicted of violating state law. 758 F.2d at 1485.

person aggrieved" as "[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur...."

In Havens, the Supreme Court held that where a tester was given inaccurate or incomplete information with respect to available housing, the tester was an "aggrieved person" within the meaning of § 810(a) of Title VIII.[9] The Court began its analysis with the specific language of § 804(d)[10] and concluded that "Congress conferred on all 'persons' a legal right to truthful information about available housing." 455 U.S. at 373. Section 804(d) thus created "an enforceable right to truthful information concerning the availability of housing" rather than limiting the Fair Housing Act to the right to acquire housing, irrespective of race, color, religion, sex, or national origin. "'Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.'" Village of Bellwood v. Dwivedi, 895 F.2d at 1526, quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973). Where a tester is given truthful information about available housing and is not denied any opportunity to obtain housing, the tester does not have standing as a person aggrieved under Title VIII. Havens Realty Corp. v. Coleman, 455 U.S. at 374-375 (White tester had no Title VIII standing because she was given accurate information about available housing and was not denied any opportunity to rent).

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[9] Havens cited Trafficante as authority for a broad interpretation of standing under Title VIII. 455 U.S. at 376 n. 17. In Trafficante, the Court unanimously concluded that under Title VIII, the term "person aggrieved" should be interpreted broadly where: 1) actions brought by private persons are the primary method of obtaining compliance with the statute; 2) the statutory language indicates a congressional intent to construe standing as broadly and inclusively as allowed by Article III of the Constitution; 3) the legislative history of the statute indicates a congressional intent to broadly construe standing; and/or 4) the governmental agency charged with enforcing the statute broadly construes standing.

[10] The Court noted the distinction between § 3604(a) and § 3604(d) and proceeded to find tester standing under § 3604(d) with no further discussion of § 3604(a). 455 U.S. at 374. There is an argument, then, that the Court regarded the bona fide offer requirement as precluding tester standing under § 3604(a). Accord U.S. v. Youritan Construction Co., 370 F. Supp. 643, 650 (N.D. Cal. 1973) (holding that a landlord had violated Title VIII by giving false information about available housing to testers, the court distinguished § 3604(a) from § 3604(d), explaining that under § 3604(a), the term "bona fide offer" might disqualify a tester from having standing while § 3604(d) prohibits the misrepresentation of the availability of housing without the "bona fide offer" requirement).

Accord Nur v. Blake Development Corp., 655 F. Supp. 158 (N.D. Ind. 1987).

The Seventh Circuit in Dwivedi recognized that "Congress may not circumvent Article III of the Constitution by authorizing someone whose substantive rights have not been invaded to sue to redress an invasion of someone else's substantive rights." 895 F.2d at 1526. "But Congress can create new substantive rights, such as the right to be free from misrepresentations, and if that right is violated, the holder of the right can sue without running afoul of Article III, even if he incurs no other injury (for example, the loss of a home-buying opportunity)." Id. at 1526-1527.[11] Accord Havens Realty Corp. v. Coleman, 455 U.S. at 373. The Dwivedi court further explained that the misrepresentation was a violation of Title VIII because it was intended to prevent a Black person from buying a house in a White neighborhood. 895 F.2d at 1529. "He is treating a black customer differently from a white one because the customer is black. He knows they are of different races and treats them differently because of that knowledge." Id. Title VIII violations are not limited to instances where a landlord/realtor misrepresents information regarding the availability of housing. "If a broker simply refuses a customer's point-blank request to show him a house in a neighborhood that the broker wants to reserve for persons of a different race, this is steering even though there is no misrepresentation." Id. "Steering" is defined as "directing prospective home buyers interested in equivalent properties to different areas according to their race." Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 94 (1979).

The Dwivedi court compared the standard and intent requirement to be applied in Title VIII cases with that of Title VII cases:

> The mental element required in a steering case is the same as that required in employment discrimination cases challenged either under Title VII of the Civil Rights Act of 1964 (and section 3604 is part of the same Act) or under 42 U.S.C. § 1981 (the standard of liability in which is similar to that in Title VII ....) on a theory of disparate treatment.... The unlawful conduct is treating a person differently because of the person's race ....

895 F.2d at 1529-1530. The similarities between the purposes and language of Title VIII and Title VII are clearly apparent. Courts typically "borrow" language and reasoning from one statute to apply to the other.

In addition to their standing in the context of Title VIII, testers have standing to challenge discriminatory housing

[11] Note, however, that the jury did not award monetary damages to the testers in this case. 895 F.2d at 1532.

practices under the Civil Rights Act of 1866, 42 U.S.C. § 1982. Watts v. Boyd Properties, Inc., 758 F.2d at 1484-1485, and Meyers v. Pennypack Woods Home Ownership Association, 559 F.2d at 898 (discussed in Section IV.) Section 1982 provides as follows:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

In the § 1982 housing cases, the Black testers were deprived of the same right to rent property as was granted to White citizens. The fact that they did not actually intend to rent the apartments in question was irrelevant in determining whether their statutory rights had been violated. Unlike § 3604(a) of Title VIII, § 1982 does not require that an applicant for housing, who was rejected on the basis of race, make a bona fide offer to rent in order to challenge the practice. (See Section VI). In this respect, Title VII is analogous to § 1982.

VI. Testers in Employment Cases Analogous to Testers in Housing Cases

Although the courts have not specifically decided the issue of whether testers have standing in the employment context, the analysis of tester standing in Title VII cases should be construed in a manner consistent with the principles set forth in the context § 3604(d) of Title VIII. The purpose and structure of these civil rights statutes are "functionally identical." Waters v. Heublein, Inc., 547 F.2d at 469 (White employee had standing to sue for discriminatory hiring practices which excluded Blacks and Hispanics, thus depriving her of interpersonal contacts with persons of other races in her work environment).[12]

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[12] Section 706(b) of Title VII, 42 U.S.C 2000e-5(b), authorizes the Commission to accept charges of employment discrimination "filed by or on behalf of a person claiming to be aggrieved" under the statute.

Section 703(a)(1) of Title VII makes it unlawful for an employer 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 ....

Similarly, § 703(b) makes it unlawful for an employment agency to:

> fail or refuse to refer for employment, or otherwise discriminate against any individual because of his race, color, religion, sex or national origin, or to classify

The Waters court held that "[t]he distinction between laws aimed at desegregation and laws aimed at equal opportunity is illusory. These goals are opposite ends of the same coin." 547 F.2d at 469. The court explained that deprivation of interracial interaction in the workplace is at least as great as it might be in one's home environment and therefore held that a White employee had standing to bring a Title VII action against her employer for discriminatory hiring practices aimed at Blacks and Hispanics. Id. See also EEOC v. Mississippi College, 626 F.2d 477 (White faculty member granted standing to challenge discriminatory hiring practices against Blacks); Rogers v. EEOC, 454 F.2d 234, 4 EPD ¶ 7597 (5th Cir.), cert. denied, 406 U.S. 957, 5 EPD ¶ 7838 (1972) (Hispanic employee of optometrist had Title VII standing to challenge segregation of patients since it created a demeaning and discriminatory work environment).

Waters stressed that the extension of the Title VIII definition of "person aggrieved" to Title VII made "no new law." The court noted that in Trafficante, the Supreme Court specifically turned to Hackett v. McGuire Bros., 445 F.2d 442, a Title VII case, for guidance in formulating its definition of a "person claiming to be aggrieved," holding that both statutes require similar, broad interpretations of standing.[13] "The fact that Trafficante thus approved the reasoning of this Title VII case further demonstrates that on this issue of standing the Supreme Court does not conceive Title VII and VIII to be different...." EEOC v. Bailey Co., 563

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or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Under § 703(c), it is unlawful for a labor organization:

(1) to exclude or expel from its membership, or otherwise to discriminate against any individual because of race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

[13] Hackett held that a pensioner could be an aggrieved party under Title VII where he had been discriminated against as an employee on the basis of race.

F.2d at 453. Accord Stewart v. Hannon, 675 F.2d at 849; EEOC v. Mississippi College, 626 F.2d at 482.

Where an employer fails or refuses to hire a person on the basis of race, color, religion, sex, or national origin, the employer has violated Title VII. By clear analogy to § 3604(d) of Title VIII, the applicant has a statutory right not to be rejected on one of these bases, even if that applicant does not intend to accept the position. Title VII contains no requirement, analogous to the provision in § 3604(a) of Title VIII, that the request for employment be bona fide. The injury is the disparate treatment based on race, color, religion, sex, or national origin, rather than the loss of a real employment opportunity -- just as the cases based on 42 U.S.C. § 1982[14] and § 3604(d) of Title VIII hold that an applicant for housing is injured as a result of disparate treatment in the provision of or referral to housing on the basis or race, color, religion, sex, or national origin.

The language of Title VII with respect to employment agencies (see § 703(b)) is almost completely parallel to that of § 3604(d) of Title VIII. Title VII prohibits an employment agency from failing or refusing to refer persons in protected groups for employment. Any person who is not referred for employment based on prohibited discrimination is "a person claiming to be aggrieved" within the meaning of Title VII, just as a person who is not given accurate information regarding housing based on prohibited discrimination is "a person aggrieved" within the meaning of Title VIII. Section 703(b) similarly prohibits the classification of individuals by race, color, religion, sex, or national origin. Therefore, a person who was so classified by an employment agency would be a "person aggrieved," whether or not he/she intended to accept an employment offer obtained through that agency, since his/her statutory right not to be so classified would have been violated. The language in § 703(c)(2), with respect to labor organizations, is nearly identical to that in § 703(b).

Title VII prohibits employers, employment agencies and labor organizations from "otherwise" discriminating against individuals on the basis of race, color, religion, sex, or national origin with respect to employment related matters (see §§ 703(a)(1), (b) and (c)(1)). Congress clearly intended to extend Title VII coverage to include disparate treatment against protected groups by employers, employment agencies and labor organizations which were not contemplated by the specific violations identified in the statute. This inclusive language reflects a legislative intent to prevent all forms of discrimination against protected groups which employers/agencies/labor organizations might create in order to limit employment opportunities on the bases of race, color, religion, sex, or national origin.

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[14] See Section IV for a discussion of Watts and Meyers, decided under § 1982.

VII. Charge Processing

Field offices should accept charges from "testers" and/or civil rights/community organizations filing charges on behalf of testers. Title VII, as a provision of national civil rights legislation enacted to eradicate racial discrimination, requires a broad interpretation of standing. Title VII and Title VIII are "functionally identical" in purpose and structure. Testers in both the housing and employment areas serve essentially the same function. It is well established that testers in the housing area have standing to challenge prohibited discriminatory practices by landlords/realtors. There is no reason to distinguish between the standing of testers in the housing area and testers in the employment context. Therefore, testers who pose as job applicants for the sole purpose of uncovering illegal discrimination have standing to challenge these practices under Title VII.

Nov. 20, 1990
Date

Approved: Evan J. Kemp, Jr.
Chairman

87-2

DECISION

Issue

Charging Party, an Hispanic, alleges that the Respondent, a state electrical licensing board, engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000(e) et seq. (1982) (Title VII), when it refused to allow him to sit for the licensing examination for journeyman electricians because of his national origin. In addition to the allegation of discrimination, this charge raises the issue of whether the Respondent is covered by Title VII.

HOLDING

The Respondent is not an employer or other covered entity under Section 706 of Title VII. The Respondent is, however, covered by Section 707 of Title VII. The charge is remanded to the District Office for further processing.

DISCUSSION

The Charging Party applied for but was denied an opportunity to take an examination for a journeyman electrician's license. At the time of his application, Charging Party had 15 years of experience in the electrical trades and had just completed a course in National Electrical Codes. In addition to serving three years as an electrician's mate in the U.S. Navy, Charging Party worked twelve years at a steel plant. While at the steel plant, he completed an electrician's apprenticeship of five years and served seven and one-half years as a journeyman wireman (electrician). 1/ He was laid-off in a reduction in force at the steel plant and, shortly thereafter, applied for the journeyman electrician's license.

Charging Party alleges that his credentials should have been sufficient to qualify him for taking the licensing examination. He alleges further that non-Hispanic applicants with lesser qualifications, who had not completed an apprenticeship, had been allowed to take the journeyman examination.

The threshold issue to be decided is whether Title VII covers a licensing agency where the allegations of discrimination are by an applicant for an occupational license and where an employment relationship between the parties neither existed nor was contemplated.

Section 706(b) of Title VII empowers the Commission to enforce Title VII " whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice." (emphasis added)

1/ The Charging Party has a certificate of completion of apprenticeship issued by the state apprenticeship council dated January 1975. He was employed as a journeyman electrician under an exception to the licensing requirement which provides "any regular employee of any firm or corporation is not required to have a license to do electrical work on the property of such firm or corporation."

Many courts have interpreted Section 706 of Title VII to cover third parties who are not employers of Charging Parties in the common law sense of the word, 2/ but courts which have specifically addressed the issue of Title VII coverage of the licensing function of agencies have found no coverage under Section 706. 3/ Some of these courts have distinguished a state's police power, the

2/ See, e.g., Spirt v. TIAA, 691 F.2d 1054, 30 EPD ¶ 33, 072 (2d Cir. 1984)(an insurance company which provides retirement benefits solely for employees of universities is so intertwined with the universities that it must be deemed an employer within the meaning of Title VII); Gomez v. Alexian Bros. Hospital, 698 F.2d 1019, 31 EPD ¶33, 328 (9th Cir. 1983)(an independent contractor which was to provide emergency services to a hospital was covered by Title VII where the hospital wrongfully interfered with an employment opportunity); Lutcher v. Musicians Union Local 47, 633 F.2d 880, 24 EPD ¶ 31, 402 (9th Cir. 1980)(a labor union has a duty to accommodate an employee's religious beliefs despite the statute's literal reference only to employers); Sibley Memorial Hospital v. Wilson, 488 F.2d 1338, 6 EPD ¶ 8964 (D.C. Cir.1974)(discriminatory interference with individual's opportunities for work with another employer subjects interferor to Title VII coverage); Pao v. Holy Redeemer Hospital, 547 F. Supp. 484 (E.D. Pa. 1982)(a doctor seeking staff privileges need not establish a "formal" employment relationship for Title VII coverage); Vanguard Justice Society v. Hughes, 471 F. Supp. 670, 20 EPD ¶ 30,077 (D.Md. 1979)(the Baltimore City Civil Service Commission, despite its limited role in hiring policemen, is an employer because it exercised substantial authority in the area of testing and significantly affected access to employment opportunities); Gill v. Monroe County Dept. of Social Services, 79 FRD 319 (W.D.N.Y. 1978)(state department of social service did not directly employ plaintiff but controlled access to job market); Curran v. Portland Superintending School Committee, 435 F. Supp. 1063, 15 EPD ¶ 7871 (D.N.H. 1977)(city is an employer of school teachers within the meaning of Title VII where it appropriated funds, including salaries even though city charter prohibits involvement of city in school affairs); Puntolillo v. N.H. Racing Comm'n, 375 F. Supp. 1089, 8 EPD ¶ 9671 (D.N.H. 1974)(regulatory agency did not have traditional employer/employee relationship with driver/trainers, but controlled access to racing opportunities, an activity within the scope of Title VII).

3/ Haddock v. Bd. of Dental Examiners of California, 777 F.2d. 462, 38 EPD ¶ 35,777 (9th Cir. 1985)(board of dental examiners is not an employer, employment agency or labor organization within the meaning of Title VII); Darks v. City of Cincinnati, 745 F.2d 1040, 35 EPD ¶ 34,708 (6th Cir.1984) (denial of dance hall license to felon not covered by Title VII where he has no employment relationship with licensing agency or a third party); Woodard v. Virginia Bd. of Bar Examiners, 598 F. 2d 1345, 19 EPD ¶ 9260 (4th Cir. 1979) (Virginia Board of Bar Examiners is neither an employer, an employment agency, nor a labor organization within the meaning of Title VII); Tyler v. Vickery, 517 F.2d 1089, 10 EPD ¶ 10,388 (5th Cir. 1975)(Title VII does not apply by its terms because the Georgia Board of Bar Examiners is neither an employer, an employment agency, nor a labor organization), cert. denied 426 U.S. 940, 12 EPD

[footnote 3 continues]

source of its licensing authority, from its proprietary powers, the source of its authority to hire its own employees and otherwise manage its function. 4/

These courts note that while the 1972 amendments to Title VII removed the exclusion of states and political subdivisions of states from the definition of "employer," the amendments apply only to the agencies' proprietary powers and thus only to employees of licensing agencies. This result is based on the absence of express language in Title VII and on the absence of legislative history on the point. The courts declined to construct from either source a congressional intent to subject the states' exercise of police power to coverage by Section 706 of Title VII. They conclude that a licensing agency is not an "employer" of a license applicant within the meaning of Section 706 of Title VII.

We agree with this reading of Title VII. We are of the view that Section 706 of Title VII does not cover a state agency's licensing function pursuant to its police power. We recognize that there may be instances, however, where an agency's proprietary powers may comingle with its police power and result in Title VII coverage, under Section 706. In such an instance, the licensing agency has a function which goes beyond the mere licensing function, but involves some kind of continuing control or influence on employment or employment opportunities. 5/

3/ cont'd)

¶10,977 (1976); Nat'l Org. for Women v. Waterfront Comm'n of N.Y. Harbor 468 F. Supp 317, 19 EPD ¶ 9253 (S.D.N.Y. 1979)(waterfront commission, in its licensing role, neither pays wages nor engages services or obtains workers: it is not therefore an employer or employment agency); Lavender-Cabellero v. Depart. of Consumer Affairs, 458 F. Supp. 213, 18 EPD ¶ 8840 (S.D.N.Y. 1978) (denial of process server's license is not subject to Title VII: federal oversight of state regulation requires more explicit Congressional mandate); Delgado v. McTighe, 442 F.Supp. 725, 19 FEP Case 557 (E.D. Pa. 1977)(neither the language of Title VII nor its legislative history indicates an intent to cover applicants for admission to the Pennsylvania bar).

4/ Nat'l Org. for Women v. Waterfront Comm'n of N. Y. Harbor, 468 F. Supp. at 321, Title VII does not authorize the regulation of licensing activities undertaken by states in the exercise of their police powers. Such regulation would be " inconsistent with the clear intent of Congress . . . we must assume that Congress was cognizant of the Supreme Court's repeated reminder that it disfavors 'inroads by implication on state authority . . .' (citation omitted). Lavender-Cabellaro v. Dept. of Consumer Affairs, 458 F. Supp. at 215, "The distinction between the proprietary and essentially private functions described in Sibley and Puntolillo and the regulatory function delineated by the line of cases holding governmental bodies are not employers within the meaning of Title VII when exercising their licensing function with respect to bar examinations . . . is persuasive . . . . To impose federal oversight, Congressional mandate must be more specific.

5/ See, e.g., Puntolillo v. N. H. Racing Commission, 375 F. Supp. 1089 (D.N.H. 1974) (where the Commission issued licenses but also assigned stall spaces at the race track).

It is our view, however, that even if the licensing agency is not an employer under Section 706 of Title VII, it may be covered, nevertheless, by Section 707. The language of Section 707 is clearly broader in scope than the language of 706 and does not depend on the existence of an employment relationship or control or interference with an employment opportunity. Section 707(a) allows the Commission to take enforcement action whenever it

> has reasonable cause to believe that any person 6/ or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described.... (emphasis added) 7/

Further, Section 707(e) of the Act authorizes the Commission "to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission." (emphasis added)

As the Supreme Court stated in Brotherhood of Teamsters v. United States, 8/ "A pattern or practice of discrimination means that discrimination is standard operating procedure - the regular rather than the unusual practice." The court noted that through the legislative history it is clear that Congress intended that "pattern or practice" as used in Section 707 not be treated as a term of art, but that the words be given their usual meaning. Quoting Senator Humphrey the court states that a pattern or practice is "'more than an isolated, sporadic incident, but is repeated routine or [discrimination] of a generalized nature. . . .' 110 Cong. Rec. 14270 (1964)" 9/

The language of the Charging Party's complaint may be fairly read to include allegations of a pattern or practice of discrimination against Hispanic applicants for electrical licenses. Charging Party states "Anglos without an apprenticeship have been allowed to take the examination and have been granted a license."

His charge amounts to an allegation of selective enforcement of the state licensing law against Hispanics and constitutes an allegation of a pattern or practice of discrimination. 10/

6/ Pursuant to Section 701(a) a "person" is " one or more individuals, governments, governmental agencies, political subdivisions,...."

7/ This enforcement authority originally vested in the Attorney General, but as a result of the 1972 amendments to Title VII, the function was transferred to the EEOC in consonance with Section 707(c).

8/ 431 U.S. 324, 336 (1977)

9/ Id. at n.16

10/ State licensing regulation requires in part that an applicant for journeyman electrician after July 1, 1977 have on file a record of employment as an apprentice or trainee performing commercial and industrial work.

The Commission concludes that it is empowered by Sections 707(e) and 707(a) to investigate the patterns or practices of discrimination alleged in this charge and to take enforcement action as necessary.

The investigative file in this case lacks sufficient data concerning the rejection rate for Hispanic applicants for the journeyman electrician's examination as compared to the rejection rate for non-Hispanic applicants for the same examination. In addition, there is no evidence that the allegation of selective enforcement of the licensing law was investigated. Accordingly, the Commission remands this charge to the District Office for further processing consistent with this decision.

This decision overrules any prior licensing agency decisions which were issued by this Commission and which are inconsistent with the result reached herein.

FOR THE COMMISSION:

August 31, 1987
Date

Executive Officer (Acting)
Executive Secretariat

Major Policy Pronouncements

1. Comparable Worth Decision

2. Coverage of State Licensing Agencies

3. Title VII Coverage

4. Application of the Age Discrimination in Employment Act and the Equal Pay Act overseas

5. Current Issues of Sexual Harassment

6. Job Advertising and Pre-Employment Inquiries

7. Summary of the Americans with Disabilities Act

8. Whether "Testers" have standing to file charges of discrimination against employers, employment agencies and/or labor organizations

9. Supreme Court decision in International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.

10. Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991

11. Recent Development in the Disparate Treatment Theory

12. Application of the Americans with Disabilities Act of 1990 to disability-based distinctions in employer provided health insurance

13. Application of Title VII and the Americans with Disabilities Act to conduct overseas and to Foreign Employers Discriminating in the United States

14. Harris v. Forklift Systems, Inc.

15. Pre-employment Disability-related Inquiries and Medical Examinations

16. Two documents not considered by the Commission, explaining Title I and II of the Older Workers Benefit Protection Act

STATEMENT OF CHARGE

Charging Parties, a female employee of Respondent and the bargaining representative for Respondent's administrative employees, allege that the Respondent discriminates against its female employees in compensation in violation of Title VII of the Civil Rights Act of 1964, as amended.

Specifically, Charging Parties allege that Respondent:

(1) Pays employees in classifications traditionally and predominately occupied by female employees less than employees in classifications traditionally and predominately occupied by male employees even though the duties performed by the female employees in such classifications require equal or more skill, effort and responsibility than the duties performed by employees in classifications traditionally and predominately occupied by male employees.

(2) Intentionally sets the wage rates of employees in classifications traditionally and predominately occupied by female employees lower than the wage rates of employees in classifications traditionally and predominately occupied by male employees. This discriminatory result has been established and maintained by a practice of basing wage increases for predominantly female classifications upon wage comparisons consisting of wage rates below the prevailing rate while basing wage increases for predominantly male classifications on wage comparisons consisting of wage rates equal to the prevailing rates.

JURISDICTION

Respondent, a local government agency, is an employer within the meaning of Title VII, and all other jurisdictional requirements have been met.

RESPONDENT'S POSITION

The Respondent denies Charging Parties' allegation that it intentionally discriminates against its female employees by basing wage increases for its predominantly female classifications on wage rates which are below the prevailing rate. Further, Respondent maintains that Charging Parties' first allegation does not state a claim for relief under Title VII.

SUMMARY OF INVESTIGATION

Respondent is a municipal housing authority whose staff is divided principally into two groups--administrative staff 1/ and maintenance staff. 2/ The administrative staff is predominately female; eighty-five percent of the employees in the administrative staff are females. The maintenance staff is predominately male; eighty-eight percent of the maintenance staff is male. The Charging Parties do not allege nor is there evidence which shows that Respondent assigns employees to jobs on the basis of sex or that any barriers exist which would prevent the movement of males and females between job categories.

As a local housing authority, Respondent receives annual operational funds from the United States Department of Housing and Urban Development (HUD). Pursuant to statute, HUD requires Respondent to pay maintenance employees a salary not less than the wages prevailing in the locality. 42 U.S.C. Sec. 1437(j). The statute is silent on pay for administrative employees. However, the contract under which HUD grants funds requires Respondent to pay administrative staff a salary which is comparable to "pertinent local public practice." To assist Respondent in meeting its responsibility in determining community wage rates, HUD provides Respondent with literature on the comparability survey process and with survey forms.

The record shows that annual wage increases paid to administrative and maintenance staff were based, generally, upon wage surveys of local municipal agencies. Where comparability data were not available from local municipal agencies, Respondent sought wage data from housing authorities in surrounding jurisdictions. The prevailing wage rate served as the basis for negotiations with the bargaining representative of both the maintenance and administrative staffs. The actual wage increases paid were arrived at through the collective bargaining process. Respondent's payroll records show that the pay for both administrative and maintenance staff exceeded the prevailing community rate.

1/ The job positions within the administrative grouping include clerk-typist, receptionist, departmental secretary, purchasing technician, receiving/inventory clerk, data processing coordinator, bookkeeper, accounting supervisor, recreation aide, maintenance clerk/dispatcher, management aide, tenant selection assistant.

2/ The job positions within the maintenance grouping include janitor, resident custodian, operating engineer, project maintenance serviceman, grounds serviceman, carpenter, painter, vehicle mechanic.

ANALYSIS:

The Commission enforces two statutes which ban wage discrimination based on sex. The Equal Pay Act, 29 U.S.C. §206(d), provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishments at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .

Section 703(a)(1) of Title VII, 42 U.S.C. §2000e-2(a)(1), makes it unlawful "to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." Another provision of Title VII, commonly referred to as the Bennett Amendment, provides that:

> [I]t shall not be an unlawful employment practice under this subchapter for an employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 [The Equal Pay Act].

42 U.S.C. §2000e-2(h).

For many years, it was uncertain whether the Bennett Amendment incorporated into Title VII the "equal pay for equal work" standard of the Equal Pay Act or only the Equal Pay Act's four affirmative defenses. This issue was resolved by County of Washington v. Gunther, 452 U.S. 161 (1981). The Supreme Court held that only the affirmative defenses were incorporated, and that "claims of discriminatory undercompensation are not barred by §703(h) of Title VII merely because [females] do not perform work equal to that of [males]." 452 U.S. at 181.

Relevant case law indicates that traditional Title VII principles can be applied to claims of sex-based wage discrimination. Thus, such claims may be proved by evidence of (1) the discriminatory application of a wage policy or system or the discriminatory use of wage-setting techniques such as job evaluations or market surveys, (2) barriers to equal access to jobs, or (3) the preponderance of direct or circumstantial evidence that wages are intentionally depressed because of the sex of the occupants of the job.

1. The Charging Parties first allege that Respondent is violating Title VII because it pays its traditionally and predominantly female classifications less than it pays its traditionally and predominantly male classifications even though the female classifications require equal or more skill, effort, and responsibility to perform than the male classifications. However, since neither the Charging Parties nor the Commission's investigation has produced any direct or circumstantial evidence that the difference in pay is due to the Charging Parties' sex, the Commission cannot infer that sex is a factor in wage setting.

The mere predominance of individuals of one sex in a job classification is not sufficient to create an inference of sex discrimination in wage setting. However, one court has inferred sex discrimination where an employer pays lower wages to a female-dominated job category while steering women away from other higher paying job categories or otherwise limiting their access to those jobs because of their sex. Taylor v. Charley Bros. Co., 25 FEP Cases 602 (W.D. Pa. 1981). Another court has held that sex discrimination may be inferred where it is shown that "(1)[Charging Parties] are members of a protected class (2) occupying a sex-segregated job classification (3) that is paid less than a (4) sex-segregated job classification occupied by men and (5) that the two job classifications at issue are so similar in their requirements of skill, effort, and responsibility, and working conditions that it can reasonably be inferred that they are of comparable value to an employer." 3/ Briggs v. City of Madison, 536 F.Supp. 435, 445 (W.D. Wisc. 1982). Charging Parties here cannot avail themselves of these cases because there is no evidence that the Respondent steered women away from maintenance positions or otherwise limited women's access to those jobs, or that its administrative and maintenance positions involve work that is similar in skill, effort, responsibility and working conditions.

3/ Although the Court in Briggs uses the word "segregated" in its holding, the Court made clear that plaintiffs in that case had not alleged that they had been denied access to, or denied the opportunity to compete for, the "sex-segregated job classification occupied by men." 536 F. Supp. at 442. The Court also made clear that the element of similarity of work requirements and conditions involves an analysis of observable and functional similarities rather than an evaluation of "the abstract 'worth . . . to society or to an employer' of one job as against another . . ." 536 F.Supp. at 446.

Rather than being based on evidence of intentional discrimination, the Charging Parties' claim appears to be based on what the Supreme Court referred to as "the controversial concept of 'comparable worth'". Gunther, 452 U.S. at 166. Under this theory, individuals claim entitlement to "increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community." Id. The Commission finds no statutory basis or case law support for the conclusion that evidence consisting solely of such a comparison is sufficient to establish a violation of Title VII.

Circuit and district court decisions, both before and after Gunther, have rejected such claims. In Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977), the University of Northern Iowa commissioned a job evaluation study whose results placed clerical workers, predominately female, and physical plant workers, predominately male, in the same pay grade. Because the market rate for physical plant jobs was greater than the rate determined under the evaluation system, the university modified the evaluation system by providing advance pay steps in the starting pay for many physical plant employees, but not for clerical workers. The plaintiffs argued that the clerical and physical plant jobs were of equal worth to the university and that by basing wage rates on the market rate, the university was perpetuating sex-based discrimination that existed in the market. In finding for the defendant, the court reasoned that the value of the job to the employer was only one of the factors used to establish wages. Other factors may include the supply of workers and collective bargaining. The court reasoned further that nothing in Title VII required employers to ignore the market in setting wages. In the absence of proof of the defendant's disparate application of its wage policy or of discriminatory assignment, the court held that the plaintiffs failed to establish a prima facie violation of Title VII. The court stated that the plaintiffs may have established a prima facie case of intentional discrimination if they had shown that the market rate for both groups was higher but that only the pay of males was raised.

In Lemons v. City of Denver, 620 F.2d 228 (10th Cir. 1980), cert. denied, 449 U.S. 888 (1980), nurses challenged the city's classification and pay plan. Through its plan, the city sought to equalize the pay for its employees with the pay for like jobs in the community. The plaintiffs did not want their classification compared with nurses in the community because they alleged that, historically, nurses have been underpaid for two reasons: 1) their work has not been properly valued, and 2) almost universally, nurses have been women. They argued that using the community standard incorporated that discrimination into the city's pay plan. The court stated that, even if the nurses pay may have been, in part, a product of past attitudes and practices, Title

VII was not intended to adjust this type of disparity. The court stated that existing authority did not require the city to reassess the worth of services in each position relative to all others and to strike a new balance and relationship.

In the most recent circuit court opinion on the issue, the Ninth Circuit reiterated its view that evidence of "comparable worth," as defined by Gunther, does not establish a violation of Title VII. In Spaulding v. University of Washington, 740 F.2d 686 (9th Cir. 1984), cert. denied, 105 S.Ct. 511 (1984), members of the university's predominantly female nursing faculty alleged that they were being underpaid in comparison with male faculty members in related departments, such as health services and social work. The district court, adopting the findings of a special master, rejected the plaintiffs' claims under the Equal Pay Act and Title VII.

The Ninth Circuit affirmed the district court's ruling under the Equal Pay Act, determining that the jobs in question were not substantially equal. Then, the court found that the nursing faculty had not established Title VII liability under either the intentional discrimination or disparate impact doctrines.

Plaintiffs' disparate impact claim challenged the university's use of market rates in establishing wages. The court rejected the plaintiffs' contention that the university's reliance on the market qualified as a facially neutral policy which had an adverse impact on women. The court explained that "[e]very employer constrained by market forces must consider market values in setting his labor costs." 740 F.2d at 708. The court held:

> We agree with Lemons and Christensen and join those courts in refusing to accept a construction of Title VII allowing the nursing faculty to establish a prima facie violation of that Act whenever employees of different sexes receive disparate compensation for work of differing skills that may, subjectively, be of equal value to the employer, but does not command an equal price in the labor market.

740 F.2d at 707.

Most federal district courts also have been unwilling to extend Title VII to cover "comparable worth" claims. See, e.g., Gerlach v. Michigan Bell Telephone Company, 501 F.Supp. 1300 (E.D. Mich. 1980); Power v. Barry County, Michigan, 539 F.Supp. 721 (W.D. Mich. 1982); American Nurses Association v. State of Illinois, 606 F.Supp. 1313 (N.D. Ill. 1985), appeal docketed, No. 85-1766 (7th Cir. May 7, 1985); AFSCME v. County of Nassau, ____ F.Supp. _____, 37 FEP Cases 1424, No. 84 Civ. 1730 (E.D. N.Y. May 16, 1985).

Thus, the overwhelming weight of precedent fails to support Charging Parties' attempt to prove a violation of Title VII by relying solely on a comparison of the value of the services they perform to the value of dissimilar jobs which command a different wage in the market. The Commission is convinced that Congress never consented to wholesale governmental restructuring of the valuations of jobs established by the non-sex based decisions of employers, the collective bargaining process, or by the mechanisms of the market place. Accordingly, the Commission finds there is no evidence that Respondent discriminated on the basis of sex, in violation of Title VII, by maintaining the wage practices described in the first allegation.

2. Charging Parties also allege that Respondent surveys higher paying unionized establishments in determining prevailing wage rates for maintenance staff but lower paying local municipal agencies in determining the prevailing wage rate for administrative staff and contend that this proves that Respondent engaged in intentional sex-based wage discrimination in violation of Title VII. The evidence presented does not support the allegation. Respondent has submitted its wage surveys from 1979 through 1982. In each of these years, the same establishments were utilized to determine the prevailing community wage rates for both the administrative and maintenance staff. The Commission's investigation revealed no evidence that the Respondent used one survey methodology to determine wage rates for the predominately male maintenance classifications and another for predominately female classifications. Charging Parties stated that they possessed wage survey data which supported their claim. However, in spite of repeated requests from the Commission, Charging Parties did not provide this data. 4/ The Commission must, therefore, conclude that such evidence does not exist. Accordingly, based on the evidence of record, the Commission does not find reasonable cause to believe that Respondent has intentionally discriminated against its female employees in compensation as alleged.

CONCLUSION

The Commission finds no reasonable cause to believe that Respondent violated Title VII as alleged in the charge.

FOR THE COMMISSION:

* July 12, 1985
Date

Clyde Clark Mathews
Executive Officer
to the Commission

4/ The Commission notes that under 29 C.F.R. 1601.19(c) it may dismiss a charge when, in its view, the charging party has failed to cooperate in the investigation of the charge.

* This decision, originally issued on June 17, 1985, is being reissued to reflect the correction of case citations.