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“No Country for Old Men:” *AARP v. EEOC* and Age Discrimination in Employer- Sponsored Retiree Health Benefits

Mary Kaczorek†

Introduction

On June 4, 2007, the United States Court of Appeals for the Third Circuit in *AARP v. EEOC (AARP III)*¹ ruled that the Equal Employment Opportunity Commission (“EEOC”) can implement an exemption to the Age Discrimination in Employment Act (“ADEA”)² allowing employers to alter, decrease, or drop health benefits for retirees who reach the age of Medicare eligibility.³ The EEOC proposed this exemption after many employers began dropping retiree health benefits in order to avoid liability for age discrimination under a previous construction of the ADEA.⁴ Although employers are not required to provide retiree health benefits, many older people⁵ rely on this coverage to meet their health care needs.⁶

By allowing the EEOC to effectively repeal a portion of the ADEA, the court undermined legislation that protects against age discrimination. The United States is truly becoming “no country for old men”⁷ and women by failing to provide adequate protections to ensure sufficient health insurance coverage

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1. 489 F.3d 558 (3d Cir. 2007).

2. 29 U.S.C. §§ 621–34 (2000). All references in this Article to sections of the ADEA refer to the relevant portions of the Act as they appear in Pub. L. No. 90-202, 81 Stat. 602 (1967).

3. *Id.* at 565–67.

4. *See infra* Part II.A–B.

5. For the purpose of this Article, “older people” refers to those over sixty-five.

6. *See infra* Part I.

7. NO COUNTRY FOR OLD MEN (Paramount Pictures 2007). The phrase “no country for old men,” as used in this Article, accurately summarizes the state of retiree health benefits in the United States, and it does not refer to the substance of the motion picture.

throughout retirement. Part I of this Article outlines the history and status of health care, Medicare, and retiree health benefits in the United States to contextualize this decision and its consequences. Part II highlights relevant statutes and cases leading up to *AARP III*. Part III discusses the court's reasoning and analysis in *AARP III*. This Article concludes: the EEOC's exemption goes beyond its limited authority in section 9 of the ADEA; the court should not have so readily rejected the "equal benefit/equal cost standard"⁸ or a variation thereof; the court erred in its application of the *Chevron* doctrine,⁹ failing to recognize the overall congressional intent behind the ADEA; AARP's¹⁰ additional arguments under the Administrative Procedure Act ("APA") should not have been so easily dismissed; and better alternatives exist for solving this problem without effectively repealing anti-discrimination legislation.

I. Health Care, Medicare, and Retiree Health Benefits in the United States

The United States employs a hybrid system of health insurance, relying on both private programs and public funding.¹¹ Medicare is the most expansive public health insurance program,¹² insuring about ninety-seven percent of Americans over sixty-five years old.¹³ Yet, most of this population also rely on supplemental insurance to meet their health care needs, often in the form of

8. See *infra* Part IV.B.

9. See *infra* Part IV.C.

10. AARP was formerly known as the American Association of Retired Persons. The organization shortened its name to simply "AARP" in 1999. See http://www.aarp.org/about_aarp/aarp_overview/a2003-01-13-aarphistory.html (noting that the word "Retired" in its former name was inaccurate, as "44 percent of AARP members work part time or full time").

11. See THE COMMONWEALTH FUND, PUBL'N NO. 654, AMERICAN HEALTH CARE: WHY SO COSTLY? 4 (2003), available at http://www.commonwealthfund.org/usr_doc/davis_senatecommitteetestimony_654.pdf?section=4039 (describing the United States' health care system as a "part-public, part-private system of insurance, managed care, and market competition").

12. See SUE A. BLEVINS, MEDICARE'S MIDLIFE CRISIS 3 (2001) ("Medicare is the largest single payer for health care in the United States, representing 12 percent of federal spending."). See generally BD. OF TRS., FED. HOSP. INS. & FED. SUPPLEMENTARY MED. INS. TRUST FUNDS, THE 2007 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL HOSPITAL INSURANCE AND FEDERAL SUPPLEMENTARY MEDICAL INSURANCE TRUST FUNDS (2007) [hereinafter TRS.' ANNUAL REPORT] (providing detailed current and projected spending on Medicare).

13. Marilyn Moon, *Meeting Health and Long-Term Care Needs in Retirement*, in THE OXFORD HANDBOOK OF PENSIONS AND RETIREMENT INCOME 336, 339 (Gordon L. Clark et al. eds., 2006).

employer-backed retiree health benefits.¹⁴

A. *The Rising Cost of Health Care in the United States*

Health care costs are unusually high in the United States as compared to the rest of the world,¹⁵ and Americans are paying more for their health care each year.¹⁶ This problem is especially salient with the older population, which generally has greater needs and increased costs associated with health care.¹⁷ As the "baby boomer" generation ages, this problem will become a national crisis.¹⁸

Americans pay more for health care than other industrialized nations, averaging 134% higher health care costs per capita.¹⁹ As a result, many cannot afford the health insurance they need.²⁰ Forty-seven million people, over fifteen percent of all Americans, were uninsured in the United States in 2006.²¹ A study completed

14. See THE HENRY J. KAISER FAMILY FOUND. & HEWITT, RETIREE HEALTH BENEFITS EXAMINED: FINDINGS FROM THE KAISER/HEWITT 2006 SURVEY ON RETIREE HEALTH BENEFITS 1 (2006), available at <http://www.kff.org/medicare/upload/7587.pdf> [hereinafter KAISER REPORT] ("Employer plans . . . provide highly-valued supplemental benefits to more than 12 million retirees now on Medicare.").

15. See generally THE COMMONWEALTH FUND, *supra* note 11, at 13–16 (summarizing health care spending and coverage disparities between the United States and other industrialized nations).

16. See generally THE HENRY J. KAISER FAMILY FOUND., PUBL'N NO. 7692, TRENDS IN HEALTH CARE COSTS AND SPENDING 1 (2007), available at <http://www.kff.org/insurance/upload/7692.pdf> (compiling and summarizing data on the annual increased costs of health care in the United States and noting "[h]ealth care spending has risen about 2.4 percentage points faster than GDP since 1970").

17. See generally CHRISTINE K. CASSEL, MEDICARE MATTERS: WHAT GERIATRIC MEDICINE CAN TEACH AMERICAN HEALTH CARE 25–41 (2005) (listing common health problems for aging people); NANCY R. HOOYMAN & H. ASUMAN KIYAK, SOCIAL GERONTOLOGY: A MULTIDISCIPLINARY PERSPECTIVE 101–45 (6th ed. 2002) (providing a background of health issues related to aging and the higher use of health care services by elders).

18. See generally ALLIANCE FOR AGING RESEARCH, AGEISM: HOW HEALTH CARE FAILS THE ELDERLY 3–4 (2003), available at <http://www.agingresearch.org/content/article/detail/694> (discussing how the projected total "sixty-five and older" population in 2030 will be more than 20% of the population and how physicians may stop providing services to older people if Medicare reimbursements continue to decrease); WAN HE ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS. & U.S. DEP'T. OF COMMERCE, PUBL'N NO. P23-209, 65+ IN THE UNITED STATES: 2005, at 1 (2005), available at <http://www.census.gov/prod/2006pubs/p23-209.pdf> (detailing how the aging of the baby boomers will change the population in the United States).

19. SUSAN STARR SERED & RUSHIKA FERNANDOPULLE, UNINSURED IN AMERICA: LIFE AND DEATH IN THE LAND OF OPPORTUNITY 195 (2005).

20. In 2002, medical debt caused between one-third and one-half of all personal bankruptcies, and in 2003, 46% of uninsured Americans owed money to a medical provider. *Id.* at 13.

21. CARMEN DENAVAS-WALT ET AL., U.S. DEP'T OF COMMERCE, PUBL'N NO. P60-

by The Commonwealth Fund attributes this rising cost to a number of factors, including "insurance underwriting cycles, the price of services, use of services, new technologies, [and] the administrative costs of a fragmented system."²² The administrative costs of the health care system are particularly burdensome, accounting for nearly one-third of all health care spending²³ and growing at a rapid rate.²⁴

Health care costs are especially high for older people, who have increased health care issues and needs.²⁵ First, a significant portion of the older population requires long-term care, such as a nursing-home care or home health care.²⁶ There are now about 1.5 million older people living in institutions; this number is expected to rise to 5 million by 2040.²⁷ Second, as people age, they take longer to recover from illnesses and surgeries, requiring more transitional and rehabilitative services.²⁸ Third, older people need more preventative health care for acute conditions (i.e., the common cold or influenza) because the consequences of contracting an acute condition are more severe for an older person.²⁹ Last, and most significantly, many older people depend on prescription drugs to treat chronic conditions.³⁰ This dependence creates a serious problem for older people, as prescription drugs cost two or three times more in the United States than in other industrialized

223, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2006, at 18 (2007), available at <http://www.census.gov/prod/2007pubs/p60-233.pdf>.

22. THE COMMONWEALTH FUND, *supra* note 11, at 5.

23. See SERED & FERNANDOPULLE, *supra* note 19, at 196.

24. "Administrative expenses are increasing 11.2 percent a year. Currently at \$111 billion, they are projected to rise to \$223 billion in 2012." THE COMMONWEALTH FUND, *supra* note 11, at 2.

25. See ALLIANCE FOR AGING RESEARCH, *supra* note 18, at 4–11.

26. See BLEVINS, *supra* note 12, at 72–75 (stating that in 1999, about 134 billion was spent on long-term care and in 1997, over 4% of the sixty-five and older population lived in nursing homes).

27. *Id.* at 74.

28. See HOOYMAN & KİYAK, *supra* note 17, at 108 (describing the decline in immunity associated with aging); Neil J. Nusbaum, *Issues in Home Rehabilitative Care*, 8 ANNALS LONG-TERM CARE 11, 43–48 (2000), available at <http://www.annalsoflongtermcare.com/article/870> (describing community and home health rehabilitative care for the elderly).

29. Eighty-nine percent of deaths due to pneumonia and influenza occur in people aged over sixty-five, yet less than 30% of this population receive a pneumococcal vaccination and less than 50% receive yearly influenza vaccinations. HOOYMAN & KİYAK, *supra* note 17, at 105.

30. More than 80% of people aged seventy or older suffer from at least one chronic condition, which often causes distress, pain, and daily health monitoring. *Id.* at 105. Of people aged sixty-five or older, about 25% take three or more prescription medications daily, sometimes up to fifteen different prescriptions every day. *Id.* at 130.

countries.³¹

With the first baby boomers turning sixty-five in 2010, the high cost of health care for the older population will become a national crisis.³² The population of citizens aged sixty-five and older is projected to double from 2003 to 2030, growing from 36 million to 72 million.³³ The "oldest old" population, aged eighty-five and older, is projected to double from 2003 to 2030 and double again by 2050, growing from 4.7 million, to 9.6 million, to 20.9 million.³⁴ In a country that pays more for health care per capita than anywhere else in the world,³⁵ the costs associated with providing health care for this population surge will be astronomical.³⁶

B. *The History and Coverage of Medicare*

Medicare provides baseline health coverage to Americans over age sixty-five, but this coverage is not comprehensive because it does not fully meet the health care needs of this population.³⁷ Medicare has incited controversy throughout its existence,³⁸ and it has been reformed several times.³⁹ Currently, Medicare consists of Parts A through D, which provide only baseline coverage for beneficiaries.⁴⁰ Nearly all Medicare beneficiaries augment this

31. CASSEL, *supra* note 17, at 5 (arguing that the powerful lobbying of the pharmaceutical industry has blocked government negotiations of drug costs in the United States, even though other nations bargain with the same companies to lower costs for their citizens).

32. See cases cited *supra* note 18.

33. HE ET AL., *supra* note 18, at 6.

34. *Id.*

35. See *supra* text accompanying note 19.

36. See, e.g., OFFICE OF THE ACTUARY, CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEPT OF HEALTH & HUMAN SERVS., NATIONAL HEALTH EXPENDITURE PROJECTIONS 2006–2016: FORECAST SUMMARY tbl.2, available at <http://www.cms.hhs.gov/NationalHealthExpendData/downloads/proj2006.pdf> (projecting the cost of nursing home care to double between 2001 to 2016, growing from 101.5 billion to 210.9 billion dollars per year).

37. See generally Social Security Act, 42 U.S.C. §§ 1395–1395ggg (2000) (encompassing all of the Medicare legislation). In 1972, Medicare was expanded to cover people with disabilities and those suffering from end-stage renal disease. Social Security Amendments of 1972, Pub. L. No. 92-603, §§ 299I, 1600–16, 86 Stat. 1329, 1363–64, 1465–75.

38. Compare DAVID A. HYMAN, MEDICARE MEETS MEPHISTOPHELES (2006) (satirizing the expansiveness and inefficiency of Medicare and arguing it undermines the American values of thrift and truthfulness), with JOHN GEYMAN, SHREDDING THE SOCIAL CONTRACT: THE PRIVATIZATION OF MEDICARE (2006) (challenging attempts to "privatize" Medicare).

39. See GEYMAN, *supra* note 38, at 32–38, for a concise history of Medicare's issues, challenges, and changes throughout the twentieth century.

40. 42 U.S.C. §§ 1395–1395ggg; see Moon, *supra* note 13, at 336–37. See

minimal coverage with supplemental insurance through Medicaid, Medigap policies, or employer-backed retiree health benefits.⁴¹

Medicare was passed in 1965 after efforts to create a national health care system failed throughout the first half of the twentieth century.⁴² The initial Medicare legislation included Part A, hospital insurance, and Part B, supplementary medical insurance.⁴³ Part A now covers inpatient hospital services, up to 100 days of outpatient care after a related hospital stay of over three days, limited home health care, hospice care, and blood received during a covered stay.⁴⁴ Part B now covers “medically necessary” services and supplies and Medicare-covered preventive services, including: non-routine doctor services, outpatient services and supplies, diagnostic tests, ambulance costs, medical equipment, additional non-emergency surgeries, therapy (mental, physical, and speech), clinical laboratory services, limited home health care, outpatient hospital services, and blood received as an outpatient or during a period covered under Part B.⁴⁵

In 1988, the Medicare Catastrophic Coverage Act⁴⁶ expanded hospital and nursing benefits, added mammography and outpatient prescription drug coverage, and placed a cap on patient liability.⁴⁷ The Balanced Budget Act of 1997 further increased beneficiary protections and preventative health coverage and gave beneficiaries the option to coordinate private insurance plans with

generally CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEPT OF HEALTH AND HUMAN SERVS., PUBL’N NO. CMS-10050-10, MEDICARE & YOU (2007) [hereinafter MEDICARE & YOU] (providing a straightforward, detailed description of Medicare Parts A through D in plain language to be used by Medicare beneficiaries).

41. See Moon, *supra* note 13, at 336–42 (describing Medicare as a “minimal benefit package” that is usually “supplemented by private sources” or Medicaid); see also JILL QUADAGNO, ONE NATION UNINSURED: WHY THE U.S. HAS NO NATIONAL HEALTH INSURANCE 9 (2005) (stating that Medicare initially served to inflate health care costs: in 1965, daily hospital charges rose almost 17%, general practitioners’ fees rose 25%, and internists’ fees rose 40%).

42. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286; see also BLEVINS, *supra* note 12, at 39.

43. *Id.* §§ 1811–17, 1831–44, 79 Stat. at 291–313; see also BLEVINS, *supra* note 12, at 44–46.

44. See MEDICARE & YOU, *supra* note 40, at 9; see also Moon, *supra* note 13, at 339.

45. See MEDICARE & YOU, *supra* note 40, at 13–19; see also Moon, *supra* note 13, at 339.

46. Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 683.

47. CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEPT OF HEALTH AND HUMAN SERVS., KEY MILESTONES IN CMS PROGRAMS, available at <http://www.cms.hhs.gov/History/Downloads/CMSProgramKeyMilestones.pdf> [hereinafter CMS MILESTONES].

their Medicare benefits.⁴⁸ In 2003, the Medicare Prescription Drug, Improvement, and Modernization Act created new prescription drug benefits.⁴⁹

Although Medicare provides baseline coverage, it does not meet the health care needs of many older people.⁵⁰ Many necessary services, such as hearing aids, dental services, eye exams, and rehabilitation after a hospital stay of less than three days, are not covered by Medicare.⁵¹ Medicare co-pays and deductibles can also be unmanageable; a hospital stay between one and sixty days, for example, has a high deductible at \$992 and co-pays can range up to \$496 per day based on the length of stay.⁵² Due to both inadequate coverage and enormous costs, Medicare alone does not provide sufficient health insurance.⁵³

Indeed, at least ninety-three percent of elderly Medicare beneficiaries use supplemental insurance to meet their health care needs.⁵⁴ About nine percent of elderly Medicare beneficiaries rely on Medicaid, an insurance program for low-income individuals, for this additional coverage.⁵⁵ Another fifty percent of elderly Medicare beneficiaries use managed care, private Medigap policies, or other sources for their supplemental insurance.⁵⁶ The remaining thirty-four percent of elderly beneficiaries have employer-backed retiree health benefits to augment their Medicare coverage.⁵⁷ With the exception of employer-backed

48. Balanced Budget Act of 1997, Pub. L. No. 105-33, §§ 4001-06, 111 Stat. 251, 276-334; see also CMS MILESTONES, *supra* note 47.

49. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066; see also CMS MILESTONES, *supra* note 47.

50. See Moon, *supra* note 13, at 337 (contending Medicare is "usually supplemented by private sources"). Medicare itself is also in a financial crisis: a "Medicare Funding Warning" has been issued, and the Part A hospital insurance ("HI") trust fund is projected to be exhausted by 2019. TRS.' ANNUAL REPORT, *supra* note 12, at 13-14, 37.

51. See EMPLOYEE BENEFIT RESEARCH INST., FACTS FROM EBRI, THE BASICS OF MEDICARE: UPDATED WITH THE 2007 BOARD OF TRUSTEES REPORT 4-5 (2007), available at <http://www.ebri.org/pdf/publications/facts/0507fact-medicare.pdf> [hereinafter EBRI FACTS] (summarizing recent Medicare costs to the beneficiary and coverage).

52. *Id.* at 3.

53. MEDICARE PAYMENT ADVISORY COMM'N, A DATA BOOK: HEALTH CARE SPENDING AND THE MEDICARE PROGRAM 62 (2007), available at http://www.medpac.gov/documents/Jun07DataBook_Entire_report.pdf [hereinafter MEDPAC DATA] (listing different sources of supplemental insurance for Medicare beneficiaries); see also Moon, *supra* note 13, at 352.

54. See MEDPAC DATA, *supra* note 53, at 62.

55. See Moon, *supra* note 13, at 343 (noting that low-income Medicare beneficiaries may be eligible for Medicaid).

56. *Id.*

57. *Id.*

retiree health benefits, this supplemental insurance is often expensive and inadequate for many older people.⁵⁸

As the cost of health care continues to rise and the older population continues to grow in the United States,⁵⁹ it is increasingly important that older people have sufficient health insurance. Under the United States' current hybrid system, adequate and affordable supplemental insurance is integral to the health care of older Americans.⁶⁰ For many, employer-backed retiree benefits provide the solution to inadequate health insurance.⁶¹

C. Retiree Health Benefits in the United States

Employers are not required by law to provide retiree health benefits, but many choose to do so.⁶² The number of employers choosing to provide retiree health benefits, however, is declining.⁶³ Often this is due to the cost of domestic health care and competition with foreign firms in a global market.⁶⁴ As long as the United States relies on a hybrid system of Medicare and supplemental insurance for older people, the future of retiree health benefits will determine the extent of health care coverage available to many older Americans.⁶⁵

Over 12 million retirees (thirty-two percent of all Medicare beneficiaries) receive employer-backed health care benefits.⁶⁶ Employers are dropping retiree health benefits every year:⁶⁷ from 1988 to 2006, the number of large employers providing retiree health benefits dropped from sixty-six percent to thirty-five percent.⁶⁸ In a survey of large employers, the Kaiser Family Foundation found that nine percent of employers cut health

58. See Moon, *supra* note 13, at 342–43 (describing Medigap as “very expensive” and acknowledging that Medicaid may not adequately cover all low-income Medicare beneficiaries).

59. See *supra* Part I.A.

60. See Moon, *supra* note 13, at 341–43.

61. Thirty-two percent of all Medicare beneficiaries in 2004 relied on employer-backed retiree health benefits for supplemental health insurance. MEDPAC DATA, *supra* note 53, at 62.

62. See *id.*; KAISER REPORT, *supra* note 14, at 1. See generally Rick Rewerts & Elaine Davis, *The Future of Retiree Health Care Benefits*, 20 J. COMP. BENEFITS 6 (2004) (summarizing the history of employer-backed retiree health benefits in the United States since the 1960s).

63. See KAISER REPORT, *supra* note 14, at 1.

64. See, e.g., George F. Will, *What Ails GM*, WASH. POST, May 1, 2005, at B7.

65. See *supra* Part I.B.

66. KAISER REPORT, *supra* note 14, at 1; MEDPAC DATA, *supra* note 53, at 62.

67. See KAISER REPORT, *supra* note 14, at 1.

68. *Id.*

benefits for future Medicare-eligible retirees from 2005 to 2006, and ten percent were very likely to eliminate health benefits for future retirees.⁶⁹ Employers are also shifting the costs of health insurance onto retirees through increases in co-pays, co-insurance, and deductibles.⁷⁰

Employers have been cutting benefits for a variety of reasons.⁷¹ Two obvious culprits are the increasing cost of domestic health care and global business competition.⁷² The average cost of health care for retirees rose 6.8 percent from 2005 to 2006,⁷³ and it will continue to rise as more baby boomers retire.⁷⁴ This increased cost becomes especially burdensome when coupled with competition from foreign firms enjoying national health care.⁷⁵ The American automotive industry illustrates this problem: in 2005, General Motors had 4 billion dollars more in health care costs than Toyota.⁷⁶ It is commonly reported that "legacy" retiree benefits account for \$1,525 of the price of every car sold by General Motors.⁷⁷ This disparity in health care and other costs leaves many domestic employers no choice but to reduce retiree health benefits.⁷⁸

As employers reduce and eliminate retiree health benefits, the state of health care for older people in the United States

69. *Id.* at 2, 19, 22. Specifically, 10% of surveyed employers said they were "very or somewhat likely to terminate coverage for future retirees." *Id.* at 22.

70. *Id.* at 1, 19.

71. See generally Larry Grudzien, *The Great Vanishing Benefit, Employer Provided Retiree Medical Benefits: The Problem and Possible Solutions*, 39 J. MARSHALL L. REV. 785, 786 (2006) (attributing the decrease in employer-backed retiree health benefits to "accounting issues, increased costs, international competition, age discrimination issues, and lack of viable and flexible funding vehicles for individuals, employees, and employers").

72. *Id.* at 790-91, 793-95.

73. KAISER REPORT, *supra* note 14, at 2, 11.

74. See *supra* Part I.A.

75. See Grudzien, *supra* note 71, at 793-95.

76. See Tom Walsh, *GM's CEO Must Cope with Retiree Benefit Cost*, DETROIT FREE PRESS, Apr. 20, 2005, at C1 (also noting that the UAW has been unable to unionize the plants of Asian or European "implant" automakers in the United States). This fact is significant as 86% of employers with a unionized workforce provide retiree health benefits. KAISER REPORT, *supra* note 14, at 3.

77. See Will, *supra* note 64, at B7.

78. See Sholnn Freeman & Frank Ahrens, *GM, Union Agree on Contract to End Strike*, WASH. POST, Sept. 27, 2007, at A1 (discussing the current state of retiree benefits in the American automotive industry); Will, *supra* note 64, at B7 (finding that, although Toyota and many other foreign firms have manufacturing plants in the United States, most of these are non-unionized); see also Steve Riczo, *A System in Crisis*, USA TODAY, Sept. 1, 2006 (Magazine), at 70 (noting that Japan has a national health insurance program, and that per capita health care costs in the United States are more than double the per capita health care costs in Japan).

becomes increasingly dismal.⁷⁹ Medicare does not provide adequate coverage on its own, so over ninety percent of Medicare beneficiaries must use supplemental insurance.⁸⁰ For the twelve million older people in the United States who rely on employer-backed retiree health benefits for this supplemental insurance,⁸¹ any decrease in benefits will trigger an outcry.⁸²

II. The Procedural History Surrounding *AARP III*

The issue in *AARP v. EEOC*⁸³ is whether an employer can incorporate Medicare eligibility in determining retiree health benefits without meeting the requirements in the ADEA.⁸⁴ This case is best understood in the context of the amended language of the ADEA,⁸⁵ legal precedent,⁸⁶ and the administrative reactions to both.⁸⁷

A. Erie County and the Plain Language of the ADEA

The ADEA mandates that an employer providing benefits to retirees must provide equal health benefits to all retirees, regardless of age.⁸⁸ The plain language of section 4 of the ADEA prohibits discrimination in employment on the basis of age.⁸⁹ Specifically, the statute reads: "It shall be unlawful for an employer . . . to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age"⁹⁰

79. See *supra* text accompanying notes 67–70.

80. See *supra* Part I.B.

81. See KAISER REPORT, *supra* note 14, at 1.

82. See generally Freeman & Ahrens, *supra* note 78, at A1; Walsh, *supra* note 76, at C1; Will, *supra* note 64, at B7.

83. *AARP v. EEOC (AARP II)*, 390 F. Supp. 2d 437 (E.D. Pa. 2005) (granting relief from judgment), *aff'd*, *AARP v. EEOC (AARP III)*, 489 F.3d 558 (3d Cir. 2007); *AARP v. EEOC (AARP I)*, 383 F. Supp. 2d 705 (E.D. Pa. 2005).

84. *AARP III*, 489 F.3d 558, 562 (3d Cir. 2007).

85. Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 623(a), 623(f)(2), 628 (2000).

86. *Erie County Retirees Ass'n v. County of Erie (Erie County Retirees II)*, 220 F.3d 193 (3d Cir. 2000); *Erie County Retirees Ass'n v. County of Erie (Erie County Retirees III)*, 140 F. Supp. 2d 466 (W.D. Pa. 2001); *Erie County Retirees Ass'n v. County of Erie (Erie County Retirees I)*, 91 F. Supp. 2d 860 (W.D. Pa. 1999).

87. 72 Fed. Reg. 72944 (Dec. 26, 2007) (to be codified at 29 C.F.R. 1625.32); 68 Fed. Reg. 41542 (July 14, 2003).

88. See § 623(a).

89. See § 623(a); § 621(b) (describing the purpose of the ADEA: "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").

90. § 623(a)(1).

In the early stages of ADEA enforcement,⁹¹ the EEOC interpreted "compensation, terms, conditions, or privileges" to include fringe benefits.⁹² The regulations provided an "equal benefit/equal cost" check, requiring an employer to either a) spend the same amount on all retirees or b) provide the same benefit for all retirees.⁹³

In 1990, Congress codified this EEOC regulation when it amended the ADEA by passing the Older Workers Benefit Protection Act ("OWBPA").⁹⁴

It shall not be unlawful for an employer, employment agency, or labor organization . . . to take any action otherwise prohibited . . . to observe the terms of a bona fide employee benefit plan . . . where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker.⁹⁵

"Employee benefits" under the OWBPA includes retiree health benefits within the "compensation, terms, conditions, or privileges of employment."⁹⁶ Hence, the plain language of the ADEA now considers a failure to meet the "equal benefit/equal cost" requirement to constitute discrimination on the basis of age in the context of retiree health benefits.⁹⁷

An issue arises, however, in enforcing the "equal benefit/equal cost" requirement when a retiree becomes eligible for Medicare at age sixty-five.⁹⁸ Before 2000, employers assumed that coordinating an alteration in benefits with Medicare eligibility did not violate the ADEA, relying on the OWBPA's legislative history.⁹⁹ This assumption was challenged in 2000 with *Erie County Retirees Association v. Erie County*,¹⁰⁰ where retirees

91. The 2000 version of the Employee Benefits chapter of the EEOC Compliance Manual, which references this policy, is available at <http://www.eeoc.gov/policy/docs/benefits.html#B.%20Health%20Insurance>. See EEOC, COMPLIANCE MANUAL, § 4(b) (2000) (rescinded August 20, 2001) (ADEA Issues).

92. *Id.*

93. See § 623(f)(2)(B)(i).

94. Older Workers Benefit Protection Act ("OWBPA"), Pub. L. No. 101-433, § 102, 104 Stat. 978, 978 (1990) (codified as amended in 29 U.S.C. § 630).

95. § 623(f).

96. § 630(l).

97. § 623(a), (f)(2)(B)(i).

98. 42 U.S.C. § 1395c (2000).

99. See Statement of Managers, 135 Cong. Rec. S25353 (Sept. 24, 1990). See generally *Erie County Retirees II*, 220 F.3d 193, 205-08 (3d Cir. 2000) (discussing OWBPA's legislative history surrounding this issue).

100. *Erie County Retirees II*, 220 F.3d 193; *Erie County Retirees III*, 140 F. Supp. 2d 466 (W.D. Pa. 2001); *Erie County Retirees I*, 91 F. Supp. 2d 860 (W.D. Pa. 1999).

eligible for Medicare brought a class action against their employer for offering retirees over age sixty-five a lesser benefit package than retirees under age sixty-five without meeting the "equal benefit/equal cost" requirement.¹⁰¹

The Third Circuit Court of Appeals held that the county could only escape age-discrimination liability under the ADEA if it could meet the "equal benefit/equal cost" standard, and it remanded the case to determine whether the standard had been met.¹⁰² On remand, the lower court determined that the standard had not been met.¹⁰³

The Third Circuit based its holding on textual interpretation, relying primarily on the plain language of the ADEA.¹⁰⁴ *Erie County* makes clear that an employer violates the plain language of the ADEA when it reduces benefits for retirees who are eligible for Medicare without meeting the "equal benefit/equal cost" requirement.¹⁰⁵

B. The Effect of Erie County and the EEOC's Proposed Exemption

The EEOC filed an amicus brief in support of the Erie County retirees.¹⁰⁶ In its brief, the EEOC contended that the county violated the ADEA and should be subject to the "equal benefit/equal cost" requirement because Medicare eligibility was an "age-defined factor" that directly contributed to discrimination in benefit options.¹⁰⁷ After supporting the retirees in *Erie County*, the EEOC adopted the *Erie County* court's position as its "national enforcement policy."¹⁰⁸

Following the EEOC's adoption of the *Erie County* position, many commentators anticipated that employers would respond by terminating or reducing all benefits for retirees.¹⁰⁹ Because there

101. *Erie County Retirees II*, 220 F.3d 193.

102. *Id.* at 216-17.

103. *See Erie County Retirees III*, 140 F. Supp. 2d at 477.

104. *See Erie County Retirees II*, 220 F.3d at 208-17.

105. *See id.* at 216-17.

106. Brief for the Equal Employment Opportunity Commission as Amici Curiae Supporting Appellants, *Erie County Retirees Ass'n v. Erie County*, 220 F.3d 193 (3d. Cir. 2000) (No. 99-3877), 2000 WL 33983611.

107. "Medicare eligibility is, in part, an age-defined factor But for the fact that they were Medicare eligible, the plaintiffs would not have been placed in the allegedly inferior health plan." *Id.* at 5-6.

108. 68 Fed. Reg. 41542, 41545 n.25 (July 14, 2003).

109. *See id.* at 41546 n.27; Christopher Condeluci, *Winning the Battle, but Losing the War: Purported Age Discrimination May Discourage Employers from Providing Retiree Medical Benefits*, 35 J. MARSHALL L. REV. 709, 715-16 (2002);

is no legal duty to provide health benefits to retirees,¹¹⁰ employers may prefer to drop or reduce all benefits rather than risk liability under the ADEA for providing unequal benefits to retirees over and under sixty-five.¹¹¹ Labor unions and employer groups also feared this response.¹¹² This concern materialized in the aftermath of *Erie County*; instead of increasing benefits for retirees over sixty-five, the county instead reduced benefits for retirees under sixty-five to match the benefits of the older retirees with Medicare.¹¹³

In response, the EEOC rescinded its *Erie County* policy and began to study this problem in more detail.¹¹⁴ The EEOC determined that the "equal benefit/equal cost" regulation was impractical because it was too cumbersome for employers to calculate equal costs or benefits for the different groups of retirees.¹¹⁵ Determining that this requirement was irreconcilable with the goal of maximizing benefits for all ages of retirees, the EEOC reversed its position.¹¹⁶ Exercising its authority under section 9 of the ADEA to "establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest,"¹¹⁷ the EEOC published the following ADEA exemption for notice and comment in 2003

§ 1625.32 Coordination of Retiree Health Benefits with Medicare and State Health Benefits

(b) Some employee benefit plans provide health benefits for retired participants that are altered, reduced or eliminated when the participant is eligible for Medicare health benefits or

Grudzien, *supra* note 71, at 791–93.

110. The Supreme Court has explicitly said that the Employee Retirement Income Security Act ("ERISA") does not require an employer to provide retiree health benefits. *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) ("Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan.").

111. See sources cited *supra* note 109.

112. See Condeluci, *supra* note 109, at 754–58.

113. See, e.g., Grudzien, *supra* note 71, at 791–93 (describing age discrimination issues as a cause for employers to reduce or eliminate retiree health benefits).

114. See 68 Fed. Reg. 41542 (July 14, 2003) (discussing the *Erie County* policy and possible alternatives).

115. See *id.* at 41546–47.

116. See *id.* at 41546–47; see also Mary Crossley, *Discrimination Against the Unhealthy in Health Insurance*, 54 U. KAN. L. REV. 73, 97–98 (2005) (discussing different ideas of fairness and describing "the goal of nondiscrimination or fairness for older persons in employer-sponsored health coverage" as just "one goal to be balanced against others").

117. ADEA, 29 U.S.C. § 628 (2000).

for health benefits under a comparable State health benefit plan. . . . [I]t is hereby found necessary and proper in the public interest to exempt from all prohibitions of the Act such coordination of retiree health benefits with Medicare or a comparable State health benefit plan.¹¹⁸

The exemption allows employers to incorporate Medicare eligibility into a benefits determination without meeting the "equal benefit/equal cost" or other provision in the ADEA—a complete reversal from the EEOC's former position on this issue.¹¹⁹

C. The AARP Challenge and the Effect of Brand X on Judicial Review of Administrative Statutory Interpretation

AARP sued the EEOC and was granted an injunction in *AARP I*.¹²⁰ After *AARP I*, the Supreme Court altered the rule for judicial review of an administrative statutory interpretation in *National Cable Telecommunications Ass'n v. Brand X Internet Services (Brand X)*,¹²¹ granting more deference to the agency's interpretation when it conflicts with a prior judicial ruling.¹²² The district court then applied the new standard and vacated its earlier judgment for AARP (*AARP II*), but stayed the injunction pending an appeal by AARP.¹²³ AARP promptly appealed (*AARP III*).¹²⁴

1. *AARP I* and the *Chevron* Test of Administrative Interpretation of a Statute: A Victory for AARP

Before the EEOC's exemption was codified, AARP sued the EEOC.¹²⁵ AARP challenged the EEOC's authority to make its exemption to the ADEA, given the outcome of *Erie County* to the contrary.¹²⁶ The district court granted an injunction prohibiting the EEOC's exemption, relying on *Erie County* precedent¹²⁷ and the test for judicial review of an administrative interpretation of a statute articulated by the Supreme Court in *Chevron, U.S.A., Inc.*

118. 68 Fed. Reg. at 45148–49.

119. *Id.* at 45148.

120. *AARP I*, 383 F. Supp. 2d 705 (E.D. Pa. 2005).

121. 545 U.S. 967 (2005).

122. *Id.* at 983.

123. *AARP II*, 390 F. Supp. 2d 437, 448–62 (E.D. Pa. 2005), *aff'd*, *AARP III*, 489 F.3d 558 (3d Cir. 2007).

124. *AARP III*, 489 F.3d 558 (3d Cir. 2007).

125. *AARP I*, 383 F. Supp. 2d 705.

126. *Id.* at 706.

127. *Id.* (citing *Erie County Retirees II*, 220 F.3d 193 (3d Cir. 2000)).

v. Natural Resources Defense Council.¹²⁸

In *Chevron*, the Court considered an interpretation of statutory language by the Environmental Protection Agency ("EPA").¹²⁹ The Court articulated the two-step test now commonly used to review an agency's interpretation of a statute.¹³⁰ Step one asks "whether Congress has directly spoken to the precise question at issue."¹³¹ If so, the inquiry ends and the agency must give effect to congressional intent.¹³² If there is no expressed intent or if the intent is ambiguous, then the test proceeds to step two, in which the court asks if the agency's interpretation is "based on a permissible construction of the statute."¹³³ If it is, then the administrative construction of the statute stands.¹³⁴

The court in *AARP I* held that the EEOC's proposed exemption violated the plain language of the ADEA as interpreted by the Third Circuit in *Erie County*.¹³⁵ The court rejected the EEOC's contention that its grant of authority under section 9 of the ADEA to "establish such reasonable exemptions . . . as it may find necessary and proper in the public interest" allowed the exemption for three reasons.¹³⁶ First, the court noted that an administrative agency cannot contradict congressional intent and that the *Erie County* court had already determined that Congress did not intend this practice under the ADEA.¹³⁷ Second, the court found that the EEOC's interpretation would "render meaningless the first step of *Chevron*" if the substantive provisions of a statute were ignored and only the grant of authority to an agency was considered.¹³⁸ Last, the court determined that the grant of authority may only be applicable in situations regarding "explicit, or implicit, gaps that Congress left in the ADEA."¹³⁹ The court, citing *Erie County*'s finding of congressional intent, found no gaps

128. 467 U.S. 837 (1984).

129. *Id.* at 840.

130. *Id.* at 842-43.

131. *Id.* at 842.

132. *Id.* at 843.

133. *Id.*

134. *Id.* See generally Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921 (2006) (arguing that criticism of the *Chevron* doctrine is misplaced, and the courts should accept an agency's power to interpret ambiguous statutes).

135. *AARP I*, 383 F. Supp. 2d 705, 711 (E.D. Pa. 2005).

136. See *id.* at 710; see also ADEA, 29 U.S.C. § 628 (2000).

137. *AARP I*, 383 F. Supp. 2d at 710.

138. *Id.* at 711.

139. *Id.*

in this portion of the ADEA, and thus the EEOC exemption exceeded its grant of authority.¹⁴⁰

Central to the *AARP I* court's reasoning is the doctrine of *stare decisis*, the binding nature of judicial precedent.¹⁴¹ Based primarily on the *Erie County* court's determination that Congress did not intend for employers to reduce benefits with Medicare eligibility without meeting the "equal benefit/equal cost" requirement, the *AARP I* court granted summary judgment for AARP and permanently enjoined the implementation of the EEOC's exemption.¹⁴²

2. The Change in Deference with *Brand X* and *AARP II*: A Victory for the EEOC

After the court's decision in *AARP I*, the Supreme Court changed the judicial standard of review of an administrative statutory interpretation.¹⁴³ It altered the *Chevron* test in *Brand X*, granting more deference to a subsequent agency's interpretation that follows a prior judicial ruling.¹⁴⁴ In *Brand X*, the Supreme Court considered the Federal Communications Commission's ("FCC's") interpretation of a statute.¹⁴⁵ In applying *Chevron*, the Court determined that "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."¹⁴⁶ The Court reasoned it was "for agencies, not courts, to fill statutory gaps."¹⁴⁷ Justice Scalia dissented, claiming this new interpretation undermined *stare decisis*.¹⁴⁸ "Article III courts do not sit to render decisions that can be reversed or ignored by Executive officers."¹⁴⁹

140. *Id.*

141. "Once a court has determined a statute's meaning, the court must adhere to that prior ruling under the doctrine of *stare decisis* and assess an agency's later interpretation of the statute against that settled law." *Id.* at 709.

142. *Id.* at 711–12 (citing *Erie County Retirees I*, 220 F.3d 193 (3d Cir. 2000)).

143. *Nat'l Cable Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005).

144. *Id.*

145. *Id.*

146. *Id.* at 982–83.

147. *Id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843–44 & n.11 (1984)).

148. *Id.* at 1017 (Scalia J., dissenting).

149. *Id.*; see Thomas E. Zahn, *Settled No More: An Administrative Agency May Overturn Prior Judicial Interpretation of a Statute Within Its Jurisdiction So Long as the Statutory Language Is Ambiguous*, 8 DUQ. BUS. L.J. 143 (2006) (arguing that the majority's position is incorrect). But see Doug Geyser, *Courts Still "Say What the Law Is": Explaining the Functions of the Judiciary and Agencies After Brand X*,

The court in *AARP II* promptly recognized the increased deference *Brand X* gave to an administrative interpretation of statutory language.¹⁵⁰ The *AARP II* court construed *Brand X* to mean that a prior judicial ruling forecloses a subsequent administrative interpretation "unless the court holds that its interpretation is the *only permissible*, not merely *the best*, construction of the statute."¹⁵¹ After altering its application of the *Chevron* test, the court determined that the Medicare issue in *Erie County* was a gap in the ADEA that Congress intended the EEOC to fill.¹⁵² The court concluded that the *Erie County* construction of the ADEA was not the statute's "only permissible meaning" and that the EEOC's exemption satisfied both parts of the *Chevron* test as altered by *Brand X*.¹⁵³

The procedural history leading up to *AARP III* reflects significant changes in the interpretation of the ADEA, the role of the EEOC in enforcing and regulating under the ADEA, and the *Chevron* analysis of administrative statutory interpretation. The *AARP III* court would reach the same result as in *AARP II*, but through a different analysis and construction of the *Chevron* test.¹⁵⁴

III. *AARP v. EEOC (AARP III)*

A. *The Exemption Is Within the EEOC's Authority Under the ADEA*

In *AARP III*, AARP appealed the *AARP II* court's decision.¹⁵⁵ The court defined the "precise question" in *AARP III* as "whether the EEOC ha[d] the power to issue a regulation exempting from the prohibitions of the ADEA" the practice of incorporating Medicare eligibility into determinations of employer-sponsored retiree health benefits.¹⁵⁶ In determining that the EEOC had the requisite authority to make the exemption, the court looked to the plain language in section 9 of the ADEA, which grants rulemaking authority to the EEOC.¹⁵⁷ "By stating that 'any or all provisions'

106 COLUM. L. REV. 2129, 2151–52 (2006) (arguing Justice Scalia's concerns are misplaced).

150. *AARP II*, 390 F. Supp. 2d 437, 441 (E.D. Pa. 2005).

151. *Id.* at 447.

152. *Id.* at 454.

153. *See id.* at 448–62.

154. *AARP III*, 489 F.3d 558, 562–65 (2007).

155. *Id.* at 558–59.

156. *Id.* at 563.

157. *Id.* at 563; *see also* ADEA, 29 U.S.C. § 628 (2000).

may be subject to exemptions, Congress made plain its intent to allow limited practices not otherwise permitted under the statute."¹⁵⁸ Responding to AARP's contention that the exemptions exceeded the EEOC's authority, the court again invoked the plain language of section 9 of the ADEA and described the EEOC's exemption as appropriately "limited."¹⁵⁹ In a footnote, the court maintained that the exemption did not effectively repeal a portion of the ADEA because "the proposed regulation at issue is narrowly focused and not contrary to the terms and purpose of the ADEA."¹⁶⁰

The court went on to discuss the *Chevron* two-step analysis, determining that, "[u]nder *Chevron* step one, Congress' express intent to permit such exemptions under section 9 of the ADEA must be given effect; it is unnecessary to proceed to step two."¹⁶¹ By holding that no statutory gaps or ambiguity needed to exist in the statute for the EEOC to exercise its authority to make an exemption, the court did not reach the issue of *Brand X*.¹⁶² Unlike *AARP II*, the court in *AARP III* discussed congressional intent exclusively in terms of the EEOC's power under section 9 of the ADEA.¹⁶³

B. The Exemption Meets the Requirements of the APA

The court then addressed a number of issues raised by AARP under the APA, an act that invalidates any administrative action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁶⁴ The first challenge by AARP was substantive. AARP asserted that the EEOC disregarded a regulation stating that an exemption must be "exercised with caution and due regard for the remedial purpose of the statute."¹⁶⁵ The court rejected this challenge, finding the EEOC's exemption to be "narrowly drawn" and "reasonable."¹⁶⁶ Similarly, the court dismissed AARP's contention that the exemption should be invalidated for representing a change in agency policy unsupported by existing law because, the court found, the exemption was drawn on a "reasoned analysis for change."¹⁶⁷

158. *AARP III*, 489 F.3d at 564.

159. *Id.* at 563–64.

160. *Id.* at 563 n.5.

161. *Id.* at 565.

162. *Id.*

163. *See id.* at 563–65; *AARP II*, 390 F. Supp. 2d 437 (E.D. Pa. 2005).

164. *AARP III*, 489 F.3d at 565–67 (quoting APA, 5 U.S.C. § 706(2)(A) (2000)).

165. *Id.* at 566 (quoting 29 C.F.R. § 1627.15(b) (2007)).

166. *Id.* at 566.

167. *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut.*

The court then turned to procedural concerns raised by AARP.¹⁶⁸ Citing the EEOC's notice of proposed regulation, the court first rejected AARP's claim that the EEOC failed to "consider all relevant factors and possible alternatives in proposing the exemption."¹⁶⁹ Next, the court dismissed the assertion that the EEOC failed to consider the "effect on all workers" because the EEOC explicitly recognized the potential detriment to certain classes.¹⁷⁰ The court also rejected AARP's third procedural objection that the EEOC did not consider all alternatives. Here, the court cited a lengthy discussion of the "equal benefit/equal cost" provision in the EEOC's proposed exemption.¹⁷¹ Last, AARP asserted that the EEOC provided inadequate information during the notice and comment period under the APA, which the court rejected based on the plain language of the APA, which requires only "general notice."¹⁷²

After the court rejected AARP's challenges based on *Chevron* and the APA, it affirmed *AARP II* and lifted the injunction against implementation of the EEOC's exemption.¹⁷³ The EEOC published the final rule on December 26, 2007, reinforcing its position in the 2003 rule proposal and including commentary on the AARP litigation, but without substantially changing the language of the rule.¹⁷⁴ The Supreme Court denied AARP's petition for a writ of certiorari on March 24, 2008.¹⁷⁵

IV. *AARP III* and the Effective Repeal of ADEA Protections: Problems and Potential Solutions

The judicial reasoning in *AARP III* leaves much to be desired. First, section 9 of the ADEA only grants the EEOC limited administrative power to make exemptions; the EEOC does not have the power to effectively repeal the central purpose of the statute.¹⁷⁶ Second, the court prematurely dismissed the "equal

Auto. Ins. Co., 463 U.S. 29, 40-42 (1983)).

168. *Id.* at 566.

169. *Id.* at 566-67.

170. *Id.* at 567.

171. *Id.*

172. *Id.* (citing APA, 5 U.S.C. § 553(b)-(c) (2000)).

173. *Id.* at 567-68.

174. 72 Fed. Reg. 72938-01 (Dec. 26, 2007) (to be codified at 29 C.F.R. §§ 1625, 1627). See generally Robert Pear, *Many Retirees May Lose Benefit from Employers*, N.Y. TIMES, Dec. 27, 2007, at A1 (discussing the EEOC's ruling and its impact on retirees).

175. *AARP v. EEOC*, No. 07-662, 2008 WL 754343 (U.S. Mar. 24, 2008) (denying certiorari).

176. See *AARP III*, 489 F.3d. at 563 n.5 (citing *United States v. Shumway*, 199

benefit/equal cost," anti-discrimination check, or variations serving the same purpose, while decreasing the burden to employers.¹⁷⁷ Third, the court misapplied the *Chevron*¹⁷⁸ test by ignoring congressional intent behind the ADEA.¹⁷⁹ Fourth, the court did not adequately address at least two of AARP's additional concerns under the APA: restrictions on the EEOC's authority to make exemptions to the ADEA and the EEOC's failure to consider other alternatives.¹⁸⁰ Despite the court's limited capacity to solve the immediate problem, there are possible solutions to this issue beyond the scope of a single judicial decision.¹⁸¹

A. Section 9 of the ADEA: A Limited Rulemaking Power

The plain language of section 9 of the ADEA grants the EEOC the power to make "reasonable" exemptions to the ADEA that are "necessary and proper in the public interest."¹⁸² While noting that "no administrative agency is permitted to effectively repeal any portion of a statute by regulation,"¹⁸³ the *AARP III* court upheld the EEOC's proposed exemption, citing section 9 of the ADEA.¹⁸⁴ The exemption does not, however, satisfy the reasonableness limitation in section 9 of the ADEA because it effectively repeals the central purpose of the ADEA, allowing employers to discriminate against older retirees.¹⁸⁵

In *AARP III*, the court said, "by stating that 'any or all provisions' may be subject to exemptions, Congress made plain its

F.3d 1093, 1107 (9th Cir. 1999)).

177. See *id.* at 567.

178. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

179. See *AARP III*, 489 F.3d at 563; see also *AARP II*, 390 F. Supp. 2d 437, 452 n.11 (E.D. Pa. 2005) ("The Supreme Court has never decided whether an agency's interpretation of the scope of its own statutory authority is entitled to *Chevron* deference."); *AARP I*, 383 F. Supp. 2d 705, 711 (E.D. Pa. 2005) (maintaining that to narrow the scope of *Chevron*'s first prong to an analysis of whether the EEOC has the power to make the exemption would "render meaningless the first step of *Chevron*").

180. See *AARP III*, 489 F.3d at 566-67.

181. See, e.g., Grudzien, *supra* note 71, at 803-25 (offering possible solutions to the "great vanishing benefit" of employer-backed retiree health benefits); SERED & FERNANDOPULLE, *supra* note 19, at 184-94 (proposing several options to increase health care coverage in the United States).

182. ADEA, 29 U.S.C. § 628 (2000).

183. *AARP III*, 489 F.3d at 563 n.5.

184. See *id.* at 563-64.

185. See § 621(b); 68 Fed. Reg. 41542, 41548 (July 14, 2003). The exemption provides no way to regulate fairness in the distribution of employer-sponsored retiree health benefits for retirees of different ages, leaving the door open for age discrimination expressly prohibited by the ADEA.

intent to allow limited practices not otherwise permitted under the statute."¹⁸⁶ The court characterized the EEOC's proposed rule as a "narrow exemption" focused solely on the employer practice of coordinating retiree benefits with Medicare eligibility.¹⁸⁷ Employer "coordination of retiree health benefits with Medicare,"¹⁸⁸ however, affects all retirees because every American is automatically enrolled in Medicare Part A upon turning sixty-five.¹⁸⁹ The EEOC's proposal, therefore, is not a "narrow exemption" to a provision of the ADEA, but it is effectively a repeal of a key piece of anti-discrimination legislation.

Through its proposed exemption to the ADEA, the EEOC effectively repeals the portion of the ADEA barring age discrimination in employer-sponsored health benefits. The EEOC's exemption not only removes the "equal benefit/equal cost" check against age discrimination, but it removes any regulation of employer-sponsored, retiree health benefits whatsoever. An agency may not effectively repeal a portion of a statute through regulation.¹⁹⁰ This tenet is central to the doctrine of separation of powers;¹⁹¹ it is for the legislature, not an executive agency, to draft and repeal laws.¹⁹²

In a country with high health care costs and a rapidly growing older population, it is not "reasonable" to effectively repeal a statute that protects against age discrimination in the area of health benefits.¹⁹³ Thirty-four percent of elderly Medicare beneficiaries rely on employer-sponsored retiree health insurance

186. *AARP III*, 489 F.3d at 563.

187. *Id.* at 565. Likewise, the court found that the exemption did not run afoul of the "delegation doctrine," in which Congress may permit the controlling agency a degree of legislative authority limited to the "intelligible principle" of a statute, because the EEOC's exemption was "narrowly focused to permit a discrete practice pursuant to the purposes of the ADEA." *See id.* at 565 n.6.

188. 68 Fed. Reg. at 41548.

189. *See* 42 U.S.C. § 426 (2000).

190. *See* *United States v. Shumway*, 199 F.3d 1093, 1107 (9th Cir. 1999) ("Administrative agencies lack authority effectively to repeal the statute by regulations.").

191. *See* U.S. CONST. art. I, §§ 1, 8 (granting "[a]ll legislative Powers" to Congress, including the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"). *See generally* *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952) (outlining the separation of powers doctrine, specifically as it applies to limits on the lawmaking powers of the executive branch).

192. *See* U.S. CONST. art. I, §§ 1, 8; *INS v. Chadha*, 462 U.S. 919, 954 (1983). *But see* *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (discussing the deference agencies have in interpreting a statute).

193. *See supra* Part I.A. (discussing the high cost of health care).

to supplement Medicare and meet their health care needs.¹⁹⁴ A competitive, global market compels employers to cut costs;¹⁹⁵ removing any regulation of employer-sponsored retiree health benefits conflicts with the congressional intent of the ADEA to encourage the employment of older workers.¹⁹⁶ Although it may be prudent to reward employers who provide health benefits to retirees, it is not "reasonable" to abandon all safeguards against age discrimination in this area.¹⁹⁷

The proposed exemption goes beyond the EEOC's rulemaking authority under the ADEA.¹⁹⁸ By effectively repealing the anti-discriminatory purpose of the ADEA, the EEOC violates the plain language of the statute¹⁹⁹ and the separation of powers doctrine.²⁰⁰

B. The Equal Benefit/Equal Cost Concept: A Necessary Check

The "equal benefit/equal cost" concept in the ADEA provides a necessary check against age discrimination in employment compensation, which includes retiree health benefits.²⁰¹ Neither the EEOC nor the *AARP III* court provides sufficient justification to warrant dismissal of this check against age discrimination. It is not unreasonable to require employers to accommodate a variation of the "equal benefit/equal cost" requirement when creating health benefit packages for retired employees.

The EEOC's primary concern regarding the "equal benefit/equal cost" requirement is that it is impracticable for employers to calculate the "cost" or "benefit" of Medicare.²⁰² The EEOC cited a "multitude of variables, including types of plans, levels and types of coverage, deductibles, and geographical areas covered,"²⁰³ and the "subjective nature of some health benefits"²⁰⁴ in concluding that the "cost" of health insurance cannot easily be

194. KAISER REPORT, *supra* note 14, at 1.

195. See *supra* text accompanying notes 67–78 (discussing the fact that employers are saving money by reducing health benefits).

196. See H.R. REP. No. 90–805, at 1 (1967); see also ADEA, 29 U.S.C. § 623(a) (2000).

197. See § 623(a) (prohibiting employment discrimination based on age).

198. See *id.* § 628 (giving the Secretary of Labor the right to issue necessary or appropriate rules and regulations and to establish reasonable exemptions).

199. See *supra* text accompanying notes 89–97.

200. See *supra* notes 191–92 and accompanying text.

201. See § 623(f)(2)(B)(i).

202. See 68 Fed. Reg. 41542, 41546 (July 14, 2003).

203. *Id.*

204. *Id.*

calculated.²⁰⁵ Similarly, the EEOC determined that it is impracticable for an employer to calculate its "cost" of providing health insurance because "the government's cost [of providing] Medicare services does not reflect what similar benefits would cost an employer in the marketplace."²⁰⁶ Additionally, it is difficult because an employer's tax obligation pursuant to the Federal Insurance Contributions Act²⁰⁷ is not representative because most employees change jobs throughout their careers and also because employees pay for a part of Medicare themselves.²⁰⁸ The *AARP III* court deferred to the EEOC's judgment and did not question the EEOC's conclusion that the "equal benefit/equal cost" requirement is too burdensome for employers.²⁰⁹

Although the EEOC raised significant issues warranting close consideration, there are some variations of the statutory "equal benefit/equal cost" rule that can serve the same purpose while imposing a lighter burden on employers. For example, removing the individualized, case-by-case nature of the requirement would significantly reduce the impracticability of this check.²¹⁰ Instead of individually accommodating each retiree, an employer could collectively incorporate an average "cost" of Medicare for retirees within a certain age cohort.²¹¹ Moreover, the EEOC could calculate and distribute the quantitative value of Medicare "cost" to employers each year, nearly removing the burden on employers all together.²¹² In determining this "cost" of Medicare, the EEOC could incorporate the entirety of Part A and an average of the Parts B and D services utilized by retirees with employer-sponsored benefits.²¹³ The EEOC could then translate the federal government's cost of services provided by Medicare to a

205. *See id.*

206. *Id.*

207. Federal Insurance Contributions Act (FICA), 26 U.S.C. §§ 3101–28 (2000). FICA mandates that an employer withhold tax for Medicare from the wages of every employee. *Id.*

208. *See* 68 Fed. Reg. at 41546.

209. *See AARP III*, 489 F.3d 558, 567 (3d Cir. 2007). While considering AARP's challenges under the APA, the court deferred to the EEOC's judgment regarding the "equal benefit/equal cost" rule. *See id.*; *see also infra* Part IV.D.

210. *AARP III*, 489 F.3d at 567 (discussing the difficulty of calculating retiree health costs and benefits for individuals).

211. For example, the "cost" of Medicare could be calculated for separate cohorts of retirees aged sixty-five to seventy, seventy-one to seventy-five, and so on.

212. For instance, the EEOC could adjust its calculations based on the increased cost of health care annually. The existing retirees' plans could be adjusted less frequently, such as every three or five years, to decrease the burden on employers.

213. *See supra* Part I.B. for a discussion of the benefits, costs, and coverage of Medicare Parts A through D.

comparable value for an employer in the marketplace. The EEOC could then limit the number of variables accordingly, focusing on more quantifiable values, such as deductibles or co-pays.²¹⁴ Once employers are given the average dollar value for retirees within a certain age group, adjusting a health plan accordingly to avoid age discrimination becomes significantly less burdensome.²¹⁵

This proposal is one possible variation of the "equal benefit/equal cost" rule that could balance employer convenience with fairness to all retirees.²¹⁶ Incorporating some flexibility into a variation of the "equal benefit/equal cost" rule maintains the integrity of the requirement as a safeguard against age discrimination consistent with congressional intent, while at the same time decreasing the burden on employers. Both the *AARP III* court and the EEOC were too hasty in dismissing this requirement and potential variations.²¹⁷

C. The Court's Misapplication of the Chevron Test

In addition to failing to recognize the EEOC's proposed exemption as an effective repeal of the ADEA²¹⁸ and failing to consider reasonable variations to the "equal benefit/equal cost" requirement,²¹⁹ the *AARP III* court misapplied the *Chevron* test.²²⁰ Congress has "directly spoken"²²¹ to this issue by passing the substantive anti-discriminatory provisions of the ADEA.²²² By selectively applying step one of the *Chevron* analysis to only portions of the ADEA, the court sidestepped the remainder of the *Chevron* test. Because, as argued above, the EEOC's proposal fails

214. If the EEOC limits the variables used and simplifies this process to achieve only an average or estimated cost for a general group of retirees, it can no longer maintain that "retiree health costs or benefits [cannot] be reasonably quantified in a regulation." 68 Fed. Reg. 41542, 41546 (July 14, 2003).

215. See *id.* (describing the burden on employers as primarily due to the complex nature of calculating the "cost" or "benefit").

216. Additional cost-saving alternatives may include: resources or guidelines from the EEOC to help employers accommodate the "equal benefit/equal cost" requirement, decreased recordkeeping requirements for employers, an incentive program for employees to exercise optional waiver of the "equal benefit/equal cost" requirement, and restrictions on potential causes of action by employees, unions, or employee groups for a violation of this requirement.

217. The EEOC did not publicly consider any variations of the rule before dismissing it. See 68 Fed. Reg. at 41546-47. Likewise, the *AARP III* court did not enter into a discussion of variations on the rule which could accommodate both interests. See *AARP III*, 489 F.3d 558, 566-67 (3d Cir. 2007).

218. See *supra* Part IV.A.

219. See *supra* Part IV.B.

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

221. *Id.* at 842.

222. See ADEA, 29 U.S.C. § 623 (2000).

the first step of the *Chevron* test,²²³ the court should have considered *Chevron* step two as well.²²⁴

The first part of the *Chevron* test asks "whether Congress has directly spoken to the precise question at issue,"²²⁵ and it rejects any administrative statutory interpretation contrary to clearly expressed congressional intent.²²⁶ In the present case, Congress has "directly spoken to the precise question at issue"²²⁷ not only by granting the EEOC the ability to make reasonable exemptions,²²⁸ but also by explicitly prohibiting age discrimination in an employer's distribution of retiree health benefits.²²⁹

In *AARP III*, the court considered only portions of the congressional intent behind the ADEA, ignoring the overarching purpose.²³⁰ The *AARP III* court determined that the "precise question" at issue was "whether the EEOC has the power to issue a regulation exempting from the prohibitions of the ADEA employer-sponsored benefits plans that coordinate retiree health benefits with eligibility for Medicare or state-sponsored health benefits programs."²³¹ As the court in *AARP I* and *II* asserted, a reading this narrow will always satisfy the first step of *Chevron*.²³² A *Chevron* inquiry, by definition, regards the scope of administrative authority to interpret a particular statute.²³³ If *Chevron*'s "precise question" is focused solely on the congressional grant of authority to an agency, the agency will always be entitled to deference via the provision of the statute authorizing the agency to create the regulation in the first place.²³⁴ The court should not have adopted reasoning that "render[s] meaningless the first step of *Chevron*."²³⁵

223. *AARP III*, 489 F.3d 558, 565 (3d Cir. 2007).

224. See *Chevron*, 467 U.S. at 843–44 (articulating the second prong of the test).

225. *Id.* at 842.

226. *Id.* at 842–43.

227. *Id.* at 842.

228. ADEA, 29 U.S.C. § 628 (2000).

229. § 623(f)(2)(B).

230. See *AARP III*, 489 F.3d 558, 563 (3d Cir. 2007).

231. *Id.*

232. See *AARP II*, 390 F. Supp. 2d 437, 452 n.11 (E.D. Pa. 2005); *AARP I*, 383 F. Supp. 2d 705, 711 (E.D. Pa. 2005) (maintaining that to reduce step one of *Chevron* to an analysis of whether the EEOC has the power to make the exemption would render the first step meaningless).

233. See *Chevron*, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984).

234. See *AARP II*, 390 F. Supp. 2d at 452 n.11. The court also noted: "The Supreme Court has never decided whether an agency's interpretation of the scope of its own statutory authority is entitled to *Chevron* deference." *Id.*

235. *AARP I*, 383 F. Supp. 2d at 711.

The *AARP III* court construed the “precise question” as it did because the EEOC’s exemption would likely fail the first step of *Chevron* test under the appropriate formulation of the “precise question.” Congress did not delegate authority to the EEOC to decide whether an employer can circumvent the anti-discrimination protections of the ADEA when incorporating Medicare eligibility into a health benefits package.²³⁶ *Chevron* step two, whether the EEOC’s rule is “based on a permissible construction of the statute,” warrants consideration.²³⁷ This, in turn, leads to a *Chevron* analysis under the new *Brand X* standard.²³⁸ Although the same conclusion as that in *AARP II*²³⁹ could have been reached under such an analysis, the *AARP III* court failed to address this question because it did not adequately formulate or execute the *Chevron* doctrine.²⁴⁰

D. The Court’s Premature Rejection of AARP’s Challenges Under the APA

In *AARP III*, the court also considered several objections raised by AARP under the APA.²⁴¹ The APA calls for invalidation of any administrative regulation that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”²⁴² Although the court’s dismissal of several of these points may be warranted, two points merit further consideration.²⁴³

AARP first contended that the EEOC acted arbitrarily by disregarding another EEOC regulation calling for “caution and due regard for the remedial purpose of the [ADEA]” throughout

236. *See id.* at 709–10.

237. *Chevron*, 467 U.S. at 843.

238. *Nat’l Cable Telecomms. Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005). In *AARP II*, the court read *Brand X* to hold that a prior judicial ruling forecloses a subsequent administrative interpretation only “if the court has determined the *only permissible* meaning of the statute.” *AARP II*, 390 F. Supp. 2d at 442.

239. The *AARP II* court found the EEOC’s proposed exemption was not foreclosed by *Erie County Retirees II*, and thus was not in direct conflict with expressed congressional intent, nor in violation of *Chevron*’s step one. *Id.* at 454–55.

240. *See AARP III*, 489 F.3d 558, 562–65 (3d Cir. 2007). More specifically, the court asked the wrong “precise question” and applied congressional intent selectively, ignoring the intent surrounding the anti-discriminatory provisions of the ADEA.

241. *Id.* at 565–67 (citing 5 U.S.C. § 706(2)(A) (2000)).

242. § 706(2)(A).

243. *See AARP III*, 489 F.3d at 565–67; *supra* Part III.B (discussing the court’s response to AARP’s challenges under the APA).

the rulemaking process.²⁴⁴ The court quickly dismissed AARP's claim, citing again the "narrowly drawn" nature of the EEOC's proposed exemption.²⁴⁵ As discussed previously, the EEOC's exemption is not "narrowly drawn" because it affects every retiree who turns sixty-five and every employer providing benefits for retirees over the age of sixty-five.²⁴⁶ The "remedial purpose" of the ADEA is to guard against age discrimination in employment.²⁴⁷ Although encouraging employers to provide retiree health benefits runs congruent with the principles of the ADEA, it is not the primary "remedial purpose" of the statute.²⁴⁸ The court did not adequately address AARP's claim regarding the loss of protection against age discrimination suffered under the EEOC's exemption.²⁴⁹

AARP's next contention, that "the EEOC acted arbitrarily by failing to consider . . . possible alternatives in proposing the exemption," was also dismissed too readily by the court.²⁵⁰ The court specifically discussed the "equal benefit/equal cost" provision and maintained that the EEOC sufficiently considered this alternative to the exemption.²⁵¹ As discussed previously,²⁵² the EEOC did not substantially address in a public manner the potential variations to this provision before concluding that "relying solely on this approach would be impractical or impossible."²⁵³ The court again deferred to the EEOC and did not question the EEOC's choice to abandon a necessary check against age discrimination.²⁵⁴

244. *AARP III*, 489 F.3d at 565–67 (quoting 29 C.F.R. § 1627.15(b) (2007)).

245. *Id.* at 566.

246. *See supra* text accompanying note 189.

247. This is evidenced by the title of the legislation, the "Age Discrimination in Employment Act." ADEA, Pub. L. No. 90-202 § 1, 81 Stat. 602, 602 (1967).

248. *See* ADEA, 29 U.S.C. § 623(a) (2000); *see also* H.R. REP. No. 90-805, at 8 (1967) (the purpose of the ADEA is "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").

249. The court addressed this concern earlier in the opinion, stating "[w]e recognize with some dismay that the proposed exemption may allow employers to reduce health benefits to retirees over the age of sixty-five while maintaining greater benefits for younger retirees," but "the EEOC has shown that this narrow exemption . . . will likely benefit all retirees." *AARP III*, 489 F.3d at 565. The court did not directly address this concern again but continued to refer to the "narrowly drawn" nature of the EEOC's exemption to justify dismissal of AARP's concerns about age discrimination. *Id.* at 565–67.

250. *Id.* at 566.

251. *Id.*

252. *See supra* Part III.B.

253. *AARP III*, 489 F.3d at 567.

254. *Id.*

Throughout its discussion of AARP's concerns under the APA, the court engaged in a sort of unannounced balancing test, weighing the value of age discrimination safeguards against the value of encouraging employers to provide health benefits to retirees.²⁵⁵ This is evidenced by the court's consistent characterization of the EEOC's exemption as "narrowly drawn" and the subsequent inevitable dismissal of concerns regarding the true purpose of the ADEA and possible alternatives to the exemption.²⁵⁶ Although such an approach may be prudent,²⁵⁷ it results in a failure to fully address AARP's concerns regarding age discrimination within established standards of judicial review.²⁵⁸

E. Solutions and Alternatives to the EEOC's Effective Repeal of Protections Under the ADEA

Although the EEOC's stated intent to maximize the total amount of health benefits for all retirees is commendable, the EEOC cannot effectively repeal anti-discrimination legislation.²⁵⁹ By supporting the EEOC's action, the *AARP III* court undermined the ADEA and gave employers the option of discriminating against older retirees, who can be more costly to insure.²⁶⁰ Instead of repeatedly deferring to the EEOC's judgment, the court should have objectively reviewed the EEOC's and AARP's points within an established judicial framework.²⁶¹ A better solution resides with Congress and reformation of the current system of health care for older people in the United States.²⁶²

1. Solutions and Alternatives Available to the Court

There were limited alternatives available to the court in *AARP III* because the ideal solution to this problem is legislative.

255. *Id.* at 565-67.

256. *Id.*

257. See Crossley, *supra* note 116, at 106-07 (discussing the "balancing test" inherent in dialogue concerning health insurance).

258. The APA does not call for a balancing test weighing the benefits of a regulation with the purpose of a statute, but for a determination of whether an agency acted appropriately in constructing the regulation. 5 U.S.C. § 706(2) (2000).

259. See *supra* Part IV.A (arguing the EEOC's exemption effectively repeals parts of the ADEA).

260. Although an employer may need to provide full benefits for a retiree under sixty-five not yet eligible for Medicare, older retirees generally have greater health care needs than younger retirees. See *supra* notes 25-31 and accompanying text.

261. See *supra* Part IV.A-D (discussing problems with the court's reasoning in *AARP III*, specifically the characterization of the EEOC's proposal as "narrowly drawn").

262. See *supra* notes 191-92 (discussing the separation of powers doctrine and congressional legislative authority).

Notwithstanding a compromise, either option available to the court had a negative consequence, be it a potential reduction in retiree health benefits resulting from an employer's fear of liability under the ADEA²⁶³ or the sacrifice of a powerful and necessary check against age discrimination in retiree health benefits. The court should not, however, have focused on the outcome of its decision, but rather on applying the appropriate tests of judicial review to the objections raised by AARP, particularly regarding the *Chevron* doctrine.

The court should have reached its solution by respecting limitations on the EEOC's rulemaking authority, exploring variations on the "equal benefit/equal cost" requirement, applying the appropriate formulation of the *Chevron* test, and adequately considering AARP's objections under the APA. These areas for improvement in the court's reasoning center around the *Chevron* test. Had the court articulated the *Chevron* test appropriately, AARP's concerns regarding the EEOC's rulemaking authority, the "equal benefit/equal cost" requirement, and the APA would have also been adequately considered.²⁶⁴

The court should have framed *Chevron* step one, "whether Congress has directly spoken to the precise question at issue,"²⁶⁵ by considering the entirety of the ADEA and not exclusively the EEOC's regulatory authority under section 9 of the ADEA. In *Chevron* itself, for example, the Court considered the statutory language and the legislative history of the Clean Air Act to evaluate the validity of the EPA's regulation.²⁶⁶ Likewise, the Court in *Brand X* inquired into the language of the Communications Act beyond the grant of authority to the FCC to determine whether the FCC's regulation was valid.²⁶⁷ Such a broad inquiry should have been similarly applied in this case; the *AARP III* court should have asked if Congress "explicitly left a gap for the agency to fill" in the ADEA regarding the coordination of

263. This was the outcome after the court in *Erie County Retirees II*, 220 F.3d 193 (3d Cir. 2000), upheld the "equal benefit/equal cost" regulation. See *supra* Part II.B.

264. The court's formulation of *Chevron* step one, inquiring no further than section 9 of the ADEA, gives the court the means to readily dismiss AARP's other contentions simply by citing section 9. See *AARP III*, 489 F.3d 558, 563–67 (3d Cir. 2007).

265. *Chevron*, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984).

266. *Id.* at 859–66 (using statutory language, legislative history, and policy concerns to consider the EPA's regulation).

267. *Nat'l Cable Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986–88 (2005) (looking to statutory sources to determine the meaning of "telecommunications service").

retiree health benefits with Medicare, not whether the EEOC had the authority to make the regulation under section 9. To determine this, the court should have considered the totality of the ADEA, balancing the language in section 9 with the other substantive provisions of the ADEA.

Under this more contextualized application of the *Chevron* doctrine, the court would have been forced to apply a higher level of scrutiny to the other aspects of its inquiry into the EEOC's regulation. AARP's separation of powers challenge, dismissed in a footnote²⁶⁸ in the *AARP III* opinion, would have required an in-depth discussion. Additionally, the court would have inquired more thoroughly into the "equal benefit/equal cost" requirement and potential variations and AARP's other contentions under the APA.

The *AARP III* court's decision allowing the EEOC's exemption enables an employer to freely reduce or drop benefits for older retirees who may not be able to afford supplemental insurance necessary to meet their health care needs.²⁶⁹ Because the level of deference awarded to an agency in the *Chevron* analysis is a high threshold for any challenger to overcome,²⁷⁰ it is unlikely that the court could have reached a solution satisfying AARP even through balanced judicial review and reasoning.²⁷¹ Future courts addressing this problem should not, however, follow the Third Circuit's spotty judicial analysis in *AARP III* that undermines the plain language of the ADEA, the separation of powers doctrine, the *Chevron* doctrine, and the APA.

2. Solutions and Alternatives Available to Congress

The *AARP III* court was presented with a problem it did not have the means, expertise, or authority to fix. Congress can, however, address the crisis of inadequate health care for older people in the United States by lowering the costs of health care through price controls on prescription drugs and regulation of other health care services, increasing the coverage of Medicare to

268. See 489 F.3d at 563 n.5.

269. The situation becomes particularly dire when an older retiree who loses his or her employer-sponsored health benefits cannot afford private or Medicaid supplementary insurance, but does not qualify for Medicaid assistance either. See *supra* Part I.B through I.C.

270. *Chevron*, 467 U.S. at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . .").

271. If a ready solution existed, it presumably would have been found during the seven years of litigation regarding this issue.

decrease older people's reliance on supplemental insurance, lowering the age of Medicare eligibility so employers are less burdened by retirees who have not qualified for Medicare, or abandoning the current hybrid system in favor of a national health care coverage system.

The most obvious solution to this problem is to lower the cost of health care for retirees and thus reduce retiree dependency on employer-sponsored health benefits. There is no good reason that health care costs more in the United States than in other nations.²⁷² Other nations bargain with pharmaceutical companies to reduce the cost of prescription drugs for their citizenries.²⁷³ Congress should bargain with these same companies so that older Americans can stop paying two to three times as much for prescription drugs as similar cohorts in other countries.²⁷⁴ Additional methods for lowering the cost of health care to the consumer may include reducing administrative costs and regulating the costs of particular health care services.

Another, more cumbersome solution lies in reforming Medicare services provided under Parts A and B and age requirements. If Medicare covered more health care services, particularly dental, hearing, vision, and increased hospital and medical services, then older retirees would rely less on employer-sponsored supplemental health insurance. Similarly, if the age for Medicare eligibility were lowered, employers would have to worry less about providing full health benefits to retirees under the age of Medicare eligibility.²⁷⁵ Neither of these options is feasible, however, without corresponding revenue reform as Medicare has limited resources and will soon become insolvent.²⁷⁶

The final, and most radical, solution to this issue involves the implementation of a national, universal health coverage system that fully meets the health care needs of older people in the United States, as well as the forty-seven million uninsured Americans

272. See generally *supra* text accompanying notes 19–24 (describing the higher cost of health care in the United States compared with other nations).

273. CASSEL, *supra* note 17, at 5.

274. *Id.* at 5.

275. See *id.* at 108 (proposing that the age of Medicare eligibility be lowered). "Presently, many people neglect their health needs in their early sixties in order to postpone treatment until age sixty-five, when they become eligible for Medicare. Assuring health-care access to this group might reduce overall costs and improve the health for those at higher risk." *Id.*

276. See MEDPAC DATA, *supra* note 53, at 11. Medicare is in a financial crisis: the Part A hospital insurance ("HI") trust fund is projected to be exhausted by 2019, and the Board of Trustees have issued a "Medicare Funding Warning" to Congress. TRS.' ANNUAL REPORT, *supra* note 12, at 14, 29–39.

under age sixty-five.²⁷⁷ This idea has been popular among politicians for the past century, but has never gained enough momentum to materialize.²⁷⁸ Possible ways to begin this process include: expanding the existing Medicaid program, implementing a federal voucher program, creating a reinsurance plan/premium rebate pool, and providing tax credits against the purchase of private insurance.²⁷⁹ Although costs associated with implementing a universal system would no doubt be high, abandoning the employer-based, hybrid system of health insurance would greatly reduce "the administrative costs of a fragmented system."²⁸⁰

Conclusion

The court in *AARP III* determined that an employer may alter, reduce, or drop health benefits once a retiree becomes eligible for Medicare without meeting the "equal benefit/equal cost" anti-discrimination requirement in the ADEA.²⁸¹ Whatever the permanent solution to this problem may be, it clearly resides with Congress and not the judiciary or a regulatory agency. Congress should generate a permanent solution, whether by lowering the cost of health care, reforming Medicare, or implementing a universal health care system. Although the most effective solution to this problem lies in congressional action, the *AARP III* court erred by inadequately reviewing the claims presented by AARP against the EEOC and upholding a regulation that effectively repeals legislation guarding against age discrimination.

This case is representative of much larger problems surrounding health care, Medicare, and retiree health benefits in the United States for older people.²⁸² If this failure to protect the rights and interests of older people continues, the United States will truly become "no country for old men" and women.

277. See DENAVAS-WALT, *supra* note 21, at 19.

278. See QUADAGNO, *supra* note 41, at 201 (summarizing the various attempts to implement a universal health care system since the 1910s).

279. See *id.* at 201–12 (detailing the strengths and weaknesses of each of these proposals, all of which have "been under consideration for more than half a century").

280. COMMONWEALTH FUND, *supra* note 11, at 5.

281. *AARP III*, 489 F.3d 558 (3d Cir. 2007).

282. See *supra* Part I.